

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

The Hon'ble Justice Sabyasachi Bhattacharyya

Execution Case No. 193 2019

KOTAK MAHINDRA BANK LIMITED
VS
SHALIBHADRA COTRADE PVT. LTD. AND ORS.

For the award-holder : Mr. Ritoban Sarkar, Adv.
Ms. Shrayashee Das, Adv.
Mr. Rohan Kumar Thakur, Adv.
Mr. Paritosh Sinha, Adv.

For the
respondent nos.2 and 3 : Mr. Reetobroto Kumar Mitra, Adv.
Mr. Aditya Kanodia, Adv.
Ms. Shreya Trivedi, Adv.

Hearing concluded on : 25.06.2024

Judgment on : 02.07.2024

Sabyasachi Bhattacharyya, J:-

1. The petitioner has preferred an application under Section 36 of the Arbitration and Conciliation Act, 1996 (for short, "the 1996 Act") for enforcement of an *ex parte* award. The award-debtor challenges the maintainability of the same on the ground that the appointment of the Arbitrator was unilateral on the part of the award-debtor, which vitiates the inherent jurisdiction of the Arbitrator, who was *de jure* ineligible in terms of Section 12(5), read with the Seventh Schedule, of the 1996 Act, to pass the award. Accordingly, it is contended that the award itself, being a nullity, was *void ab initio*. Hence, even without any challenge under Section 34 of the 1996 Act having been filed, the

inexecutability of the award can be set up as a defence in a proceeding for enforcement of the same.

2. Learned counsel for the award-debtor relies on the language of the Section 36 of the 1996 Act, in particular sub-section (1) thereof, in support of his contentions.
3. Learned counsel for the award-debtor places reliance on the Judgment of *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*, reported at (2019) 5 SCC 755, where the Supreme Court observed that in cases which fall under Section 12(5), Section 14(1)(a) of the 1996 Act gets attracted inasmuch as the Arbitrator becomes, as a matter of law (i.e. *de jure*), unable to perform his functions under Section 12(5), being ineligible to be appointed as an Arbitrator. This being so, his mandate automatically terminates and he shall then be substituted by another Arbitrator, under Section 14(1) itself.
4. Learned counsel for the judgment-debtor next cites a Division Bench judgment of the Delhi High Court in *Kotak Mahindra Bank Ltd. Vs. Narendra Kumar Prajapat*, reported at 2023 SCC OnLine Del 3148, where the Division Bench found no infirmity with the view of the Commercial Court which held that an award rendered by a person who is ineligible to act as an Arbitrator by virtue of Section 12(5) is a nullity and, therefore, cannot be enforced. It was observed that a person who is ineligible to act as an Arbitrator lacks the inherent jurisdiction to render an arbitral award under the 1996 Act. It is trite law that a decision by any authority which lacks inherent jurisdiction

to make the same cannot be considered as valid and thus, clearly, such an impugned award cannot be enforced.

5. Learned counsel cites an order passed by the Supreme Court in a Special Leave Petition filed against such order, which was dismissed, thereby affirming the same.
6. Learned counsel appearing for the award-debtor next cites *Cholamandalam Investment and Finance Company Ltd. vs. Amrapali Enterprises and Another*, reported at 2023 SCC OnLine Cal 605, where a co-ordinate Bench of this Court had held that the impugned award which was passed by a *de jure* ineligible Arbitrator suffers from a permanent and indelible mark of bias and prejudice which cannot be washed away at any stage including the execution proceedings. While Section 47 of the CPC was held to be not directly applicable, similar principles have to be applied in cases of awards passed by Arbitral Tribunals lacking inherent jurisdiction, the learned Single Judge observed.
7. Learned counsel for the award-debtor then places reliance on an unreported judgment of this Court in *CO Nos. 39 to 42 of 2019 [SRS Investments Bengal Tiger Ltd. Vs. Rahul Todi and others]* where it was held that as far as the commonality of grounds in the proceedings under Section 47, CPC and Section 34 of the 1996 Act are concerned, the same *ipso facto* does not render the former non-maintainable. There can very well be grounds as contemplated in Section 34 of the 1996 Act which affords grounds to render the award a nullity, bringing those within the domain of Section 47 of the CPC as well.

- 8.** Lastly, learned counsel cites *TRF Limited Vs. Energo Engineering Projects Limited*, reported at (2017) 8 SCC 377, where the Supreme Court held, in connection with an application under Section 11(6) of the 1996 Act, that the Managing Director of the respondent himself, by virtue of the amended provision introducing Section 12(5), enumerating disqualification in the Seventh Schedule, could not appoint an Arbitrator.
- 9.** Learned counsel for the award-holder, on the other hand, argues that Section 36 of the 1996 Act creates a legal fiction regarding enforcement of an award being in terms of the Code of Civil Procedure. However, Section 47 of the Code of Civil Procedure is not applicable, as Section 34 itself prescribes the grounds of a challenge to an arbitral award. In support of such contention, learned counsel cites *Krishna Kumar Mundhra v. Narendra Kumar Anchalia*, reported at 2003 SCC OnLine Cal 381. Learned counsel next cites an unreported judgment of a Co-ordinate Bench of this Court in *Eastern Gases Limited Vs. Usha Martin Limited* where the learned Single Judge followed the proposition laid down in *Krishna Kumar Mundhra (supra)*.
- 10.** Learned counsel next cites a judgment of a learned Single Judge of the Delhi High Court where it was held that a challenge to an award on the ground of nullity may be initiated in accordance with Section 34 of the 1996 Act. However, such objection cannot be countenanced in enforcement proceedings.
- 11.** Learned counsel next relies on *Birat Chandra Dagara v. Orissa Manganese & Minerals Ltd.*, reported at 2020 SCC OnLine Ori 5, which

was also upheld by dismissal of an SLP by the Supreme Court. In the said judgment, the learned Single Judge of the Orissa High Court held that there is no scope for entertaining an objection regarding inexecutability within the trappings of Section 47 of the Code of Civil Procedure in an execution proceeding under the 1996 Act, particularly in absence of challenge to the award under Section 34 of the Act.

- 12.** Learned counsel also relies on an unreported Division Bench judgment of the Delhi High Court in the matter of *Arjun Mall Retail Holdings Pvt Ltd & Ors. vs. Gunocen INC. [FAO (COMM) 31/2021 & CM APPL. 5051/2021]* where it was observed that the scope of interference is very limited under Section 34, confined to patent illegality in the Arbitral Award. If instead of contesting the respondent's claim before the learned Arbitrator, the appellants remained mute spectators and only after losing the battle in arbitral proceedings preferred an appeal under Section 34, the same was not to be entertained.
- 13.** Learned counsel for the award-holder also relies on *Perkins Eastman Architects DPC and another Vs. HSCC (India) Limited*, reported at *(2020) 20 SCC 760*, for the proposition that even if a Managing Director of a party to the Arbitration Agreement himself acts as an Arbitrator or appoints an arbitrator, the same is violative of Section 12(5) of the 1996 Act. However, in the present case, it is argued that a third-party, being a learned advocate, was appointed as an Arbitrator, that too, under the relevant arbitration clause between the parties, which envisages the appointments of an Arbitrator unilaterally by the award-holder.

14. Lastly, learned counsel cites an unreported judgment in *Kotak Mahindra Bank Limited Vs. Baahubali Ferro Tech and Power Pvt. Ltd. and Another*, where a co-ordinate Bench held that no challenge could be raised to an Arbitral Award under the garb of an application under Section 47 of the Code of Civil Procedure.
15. Thus, the questions which arise for consideration in the present case are as follows:
- i) Whether a unilateral appointment of Arbitrator, without any further allegation of bias under Section 12(5), read with the Seventh Schedule of the Arbitration and Conciliation Act, 1996 renders the Arbitrator ineligible;
 - ii) Whether ineligibility under Section 12(5) of the 1996 Act or otherwise renders an arbitral proceeding and the consequential award *void ab initio*;
 - iii)
 - a) The scope of applicability of the Code of Civil Procedure, in particular Section 47, in an enforcement proceeding under Section 36 of the 1996 Act;
 - b) Whether ineligibility of the Arbitrator can be set up as a ground of inexecutability of an award in a proceeding under Section 36 of the 1996 Act.

Issue:

- i) ***Whether a unilateral appointment of Arbitrator, without any further allegation of bias under Section 12(5), read***

with the Seventh Schedule of the Arbitration and Conciliation Act, 1996 renders the Arbitrator ineligible.

- 16.** In *Bharat Broadband Network Ltd. (supra)*, the Supreme Court observed that the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of the same by an express agreement in writing. Thus, the Supreme Court laid stress on there being an express agreement in writing to waive such objection. There is no doubt regarding such legal proposition.
- 17.** However, in the said case, it was observed by the Supreme Court that in a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the Arbitrator becomes, as a matter of law (i.e. *de jure*) unable to perform his functions under Section 12(5), being ineligible to be appointed as an Arbitrator. This being so, his mandate automatically terminates and he shall be substituted by another Arbitrator under Section 14(1) itself. Importantly, the Supreme Court also observed that it is only if a controversy occurs concerning whether he has become *de jure* unable to perform his functions as such that a party has to apply to the court to decide on the termination on the mandate, unless otherwise agreed by the parties. In paragraph 20 of the said judgment, it was recorded that the moment the appellant came to know that the appointment itself would be invalid, it filed an application before the sole Arbitrator for termination of his mandate.

18. Thus, it was not a case, like the present one, where the objecting party waited till the arbitral proceeding was over and did not apply at any point of time objecting to the jurisdiction or capacity of the Arbitrator.
19. Thus, the broad proposition laid down therein cannot have any direct relevance on the issue at hand.
20. In the unreported case of *Cholamandalam Investment and Finance Company Ltd. (supra)*, a learned Single Judge of this Court, while relying on *Bharat Broadband Network Ltd. (supra)*, observed that awards passed by a unilaterally appointed Arbitrator are non-est in the eye of law. While Section 47 of the Code of Civil Procedure is not directly applicable, guidance has to be sought from the jurisprudence of the Apex Court vis-à-vis decrees passed while lacking inherent jurisdiction. The court, while doing so, relied *inter alia* on the judgment of *Perkins Eastman Architects DPC (supra)*.
21. In order to decide the first issue in the present case, we have to consider whether a mere unilateral appointment of Arbitrator, without any further allegation of bias under Section 12(5), read with the Seventh Schedule of the 1996 Act, renders the Arbitrator ineligible. In *Perkins Eastman Architects DPC (supra)* two categories of cases were considered – first, where the Managing Director of one of the parties himself is named as an Arbitrator with an additional power to appoint any other person as an Arbitrator and the second, where the Managing Director is not to act as an Arbitrator himself but is empowered or otherwise to appoint any other person of his choice or discretion as an Arbitrator. The Supreme Court brought both cases

within the purview of ineligibility. Hence, over and above the criteria of ineligibility as stipulated in Section 12(5), read with the Seventh Schedule, the Supreme Court added a further ground of unilateral appointment as a criterion of ineligibility.

22. In *TRF Limited (supra)* as well, the Supreme Court held that once the named Arbitrator becomes ineligible by operation of law (there, the Managing Director of the respondent), he cannot nominate another person as an Arbitrator. It was observed that once the identity of the Managing Director as the sole Arbitrator was lost, the power to nominate someone else as Arbitrator was obliterated as well.
23. Although it was a case under Section 11 and not under Section 36 of the 1996 Act, nonetheless, the proposition laid down in the above judgments unerringly indicates that, in addition to the grounds specifically mentioned in Section 12(5) read with the Seventh Schedule, including the ground of bias, unilateral appointment of Arbitrator by one of the parties itself has also been brought under the purview of disqualification by ineligibility. Thus, the first issue is decided in the affirmative, holding that even a unilateral appointment of Arbitrator, without any further allegation of bias, renders the Arbitrator ineligible.

Issue:

- ii) ***Whether ineligibility under Section 12(5) of the 1996 Act or otherwise renders an arbitral proceeding and the consequential award void ab initio.***

24. The next question which is required to be considered is whether the ineligibility of an Arbitrator under Section 12(5) of the 1996 Act renders an Arbitral Proceeding and the consequential award *void ab initio*. As held above, unilateral appointment by one of the parties has itself been brought within the purview of ineligibility as an extension to the grounds enumerated in Section 12(5), read with the Seventh Schedule. However, it is required to be ascertained whether such ineligibility, *per se*, renders the Arbitral Proceeding and the consequential award *void ab initio*. Although the issue came up for consideration in *TRF Limited (supra)*, the court therein was considering the scope of an application under Section 11(6) of the 1996 Act. It was held that the courts, in a proceeding under Section 11 of the Act, can exercise the jurisdiction to nullify the appointments made by the authorities when there has been failure of procedure or *ex facie* contravention of the inherent facets of the Arbitration Clause; in the said case, plea pertaining to statutory disqualification of the nominated Arbitrator was permitted to be raised.
25. In *Perkins Eastman Architects DPC (supra)* as well, the court was considering an appointment under Section 11 of the 1996 Act and it was observed that unilateral appointment would render ineligible an Arbitrator. However, in none of the cases, the issue as to whether such ineligibility goes to the very root of the matter and renders the Arbitral Proceedings and consequential award *void ab initio*, if not taken at any stage before or throughout the Arbitral Proceeding, was never considered.

26. An important consideration here would be that the proviso to Section 12(5) of the 1996 Act provides an option to the parties, subsequent to disputes having arisen between them, to waive the applicability of the sub-section by an express agreement in writing. The said sub-section itself provides that 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. Thus, the ineligibility of an arbitrator has been made *post facto* waivable by the parties.
27. True, if no such express agreement in writing is entered into, the said ineligibility clause applies. However, the fact remains that the very existence of such provision for waiver makes the right a waivable right in principle. On a fundamental premise, as the objection as to ineligibility has been made waivable under the said proviso, it cannot be said that such ineligibility is an absolute bar, since an absolute bar or an inherent lack of jurisdiction would vitiate the entire proceeding and the consequential award, going to the root of the matter and rendering the arbitral proceeding *void ab initio*. Such an inherent lack of jurisdiction or absolute bar could not be made *post facto* rectifiable by waiver in any manner, be it in writing or otherwise.
28. If the bar is absolute, it would vitiate the very premise of assumption of jurisdiction by the arbitrator and render the proceeding itself and, hence, the consequential award *void ab initio*. At the same time, if

such proceeding is *void ab initio*, that is at the inception, there could not be any scope of subsequent waiver, by writing or otherwise.

- 29.** Thus, the very fact that the proviso contemplates subsequent waiver of the objection as to ineligibility also unerringly indicates that the ineligibility does not render the entire proceeding *void ab initio* or a nullity at the inception. If it were to be so, it would be *non est* and could not exist in the eye of law. Such a fundamental defect cannot be cured subsequently even by express waiver in writing.
- 30.** Hence, in view of the provision of waivability under the proviso to Section 12(5), the bar of ineligibility partakes of a character of not being an absolute bar which would hit at the root of the very assumption of jurisdiction at the inception, rendering the award a nullity.
- 31.** If a contrary interpretation is to be drawn, it would give rise to the absurdity that in cases where there is a written agreement between the parties, the proceeding and the consequential award would be valid whereas in cases where there is no such consent, the invalidity would revert back to the date of assumption of jurisdiction for appointment of the Arbitrator, rendering the entire proceeding *void ab initio*. Such a contradictory position, leaving it entirely to the whims of one of the parties to convert a fundamental legal bar applicable at the inception of a proceeding and an inherent lack of jurisdiction to a valid proceeding, cannot be read into the statute. It is well-settled that a provision of a statute cannot be interpreted by attributing absurdity to the intention of the Legislature.

32. Hence, although unilateral appointment creates an ineligibility, the same is not of such a high stature as to tantamount to an implicit and inherent lack of jurisdiction rendering the entire proceedings and the consequential award a nullity altogether.
33. Thus, this issue is decided in the negative, holding that an ineligibility of unilateral appointment by one of the parties, which comes within the broader connotation of Section 12(5) of the 1996 Act, does not render an arbitral proceeding and the consequential award *void ab initio*.

Issue:

- iii) **a) The scope of applicability of the Code of Civil Procedure, in particular Section 47, in an enforcement proceeding under Section 36 of the 1996 Act;**
- b) Whether ineligibility of the Arbitrator can be set up as a ground of inexecutability of an award in a proceeding under Section 36 of the 1996 Act.**

34. The above two sub-issues, being interconnected, are taken up together for adjudication.
35. In order to assess the scope of applicability of the Code of Civil Procedure, in particular Section 47 thereof, to an enforcement proceeding under Section 36 of the 1996 Act, the language of Section 36 is to be looked into. The said Section is as follows:

“36. Enforcement.—(1) *Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.*

(2) *Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.*

(3) *Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:*

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908)."

- 36.** Sub-section (1) of Section 36, importantly, provides that subject to the provisions of sub-section (2), an award shall be enforced *in accordance with the provisions of the Code of Civil Procedure, in the same manner as if it were a decree of the court.*
- 37.** Hence, the two expressions used are "shall be enforced in accordance with the provisions of the Code of Civil Procedure" and "in the same manner as if it were a decree of the court".
- 38.** The question which arises is whether such language accommodates the applicability of the entire plethora of provisions attending the execution of a decree of a civil court, particularly as enumerated in Section 47 and Order XXI of the Code of Civil Procedure.
- 39.** A cue can be derived from the fact that sub-section (1) and sub-section (2) of Section 36 connects the enforcement of an arbitral award with Section 34. While sub-section (1) provides that enforcement can be effected only after the expiry of the time for preferring a challenge under Section 34 for setting aside of the award, sub-section (2) deals entirely with Section 34, providing that mere filing of such an

application shall not by itself render the award unenforceable unless the court grants an order of stay in accordance with sub-section (3) of Section 36. It is sub-section (3) of Section 36 which confers the power on the court to grant stay of operation of the arbitral award. Hence, sub-sections (2) and (3) of Section 36, read together, confirms the view that the enforcement of an award is entirely dependent on an application under Section 34. Even the power of grant of stay in connection with an application under Section 34 is conferred on the executing court by sub-section (3) of Section 36 and not under Section 34 itself. Hence, the inevitable conclusion is that Sections 34 and 36 are linked inextricably within the scheme of the 1996 Act.

- 40.** Seen from such perspective, it is to be considered whether the expression “shall be enforced”, which is to be in terms of the provisions of the Code of Civil Procedure and in the same manner as if it were a decree of the court, should be read as restricted only to the modality of enforcement or whether all the trappings of the relevant provisions of the Code of Civil Procedure, including Order XXI Rules 97 to 101 and Section 47 of the Code are also made applicable by virtue of the said expression in Section 36(1) of the 1996 Act. The former restrictive view is to be favoured due to several reasons.
- 41.** First, Section 5 of the 1996 Act, in no uncertain terms, provides that notwithstanding anything contained in any other law for the time being in force, no judicial authority shall intervene except where so provided in the said Part, that is, Part-I which also includes Sections 34 and 36. The said provision is to be read in conjunction with

Section 19(1), also coming under Part-I, which stipulates that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure. Hence, the limited scope of applicability of the Code of Civil Procedure either to the Tribunal or in respect of court proceedings under the 1996 Act would be insofar as it is provided in the 1996 Act and not otherwise.

- 42.** Interpreted against the said backdrop, if it is to be construed that Section 36(1), merely by use of the expression that the enforcement shall be in accordance with the provisions of the Code of Civil Procedure and in the same manner as if it were a decree of the court, also brings in the additional provisions of Order XXI and Section 47 within the purview of such an enforcement, the very purpose of the 1996 Act, that is, expeditious alternative dispute resolution without the procedural wrangles and red-tapism of a regular court adjudication, would be frustrated.
- 43.** The underlying theme of the Arbitration and Conciliation Act, 1996 as in all other modes of Alternative Disputes Resolution (ADR) is expeditious disposal of disputes outside the judicial hierarchy of the system, thus relieving the courts of the burden of excessive litigation, while at the same time, granting an opportunity to the parties to settle matters as per their chosen mode of resolution with utmost expedition.
- 44.** If the provisions of Order XXI are applied through the small window provided by the language of sub-section (1) of Section 36 of the 1996 Act, the provisions of Order XXI Rules 97 to 101 would also enter the

fray, which would provide an entire hierarchy of adjudication of disputes akin to a civil court in respect of even third-parties to the arbitration agreement, which would be patently contrary to the definition of “party” in Section 2(1)(h) of the 1996 Act, which means a party to an Arbitration Agreement. It is well-settled that third-parties cannot invoke the jurisdiction of the Tribunal and/or the court within the contemplation of the 1996 Act, if they were not parties to the Arbitration Agreement in the first place. A broad reading of Section 36(1) would introduce the scope of adjudication of third-party disputes which in turn, within the contemplation of Rule 103 of Order XXI of the Code of Civil Procedure, would be deemed to be a decree, amenable to provisions of first and second appeals as a regular decree of a civil court. Such a hierarchical super-structure of appeals is alien to the Arbitration Act and cannot be read into the provisions of enforcement of an arbitral award.

- 45.** In similar tune, Section 47 of the Code of Civil Procedure also cannot be read into Section 36 of the 1996 Act, for the simple reason that it would open up a channel of resisting the enforcement on grounds which are already provided for under Section 34(2)(b)(i) of the 1996 Act.
- 46.** Thus, the scope of applicability of the Code of Civil Procedure, in particular Section 47 and in general the other extraneous provisions in an enforcement proceeding under Section 36 of the 1996 Act cannot be held to be permitted. Hence, the first component of the present issue, that is, Issue: (iii)(a) is answered as follows:

The provisions of Order XXI of the Code of Civil Procedure and allied provisions of the Code are applicable to an enforcement proceeding under Section 36 of the 1996 Act only to the limited extent insofar as the modes and modalities of enforcement are concerned. Thus, for example, the modes of execution has enumerated in Rules 30 to 96 of Order XXI shall be applicable *mutatis mutandis*, insofar as the said provisions facilitate and aid the enforcement of the award, at the same time not creating any obstruction or hindrance thereto, such as the provisions under Rules 97 to 103 of Order XXI would do.

47. While taking up the second component of the present issue as to whether the ineligibility of the Arbitrator can be set up as a ground of inexecutability of an award in a proceeding under Section 36, it is noteworthy that Section 34(2)(a)(i) provides precisely the ground of incapacity of a party, whereas sub-clause (v) provides, as a ground of challenge, that the composition of the Arbitral Tribunal or the Arbitral Procedure was not in accordance with the agreement of parties unless such agreement was in conflict with the provision of Part-I from which the parties cannot derogate or, failing such agreement, not in accordance with the said Part.
48. Also, under Section 34(2)(b)(ii), if the arbitral award is in conflict with the public policy of India, the same also furnishes a ground of challenge under Section 34. Public policy has been explained in Clause (iii) under *Explanation* 1 of the said Clause to include when the award is in conflict with the basic notions of morality or jurisdiction.

A broad framework has been provided in Section 34 itself to challenge an arbitral award also on the ground of ineligibility.

- 49.** Thus, importing the provisions of Section 47 of the Code of Civil Procedure to an enforcement proceeding under Section 36 of the 1996 Act would be entirely extraneous and superfluous and would overlap with Section 34. Hence, it cannot be said that the provisions of Section 47 are, in any manner, applicable to Section 36 of the 1996 Act.
- 50.** In *Kotak Mahindra (supra)*, the Division Bench of the Delhi High Court observed that an award rendered by a person who is ineligible to act as an Arbitrator by virtue of the provisions of Section 12(5) of the 1996 Act is a nullity and therefore, cannot be enforced as the authority lacks inherent jurisdiction to make such a decision. However, with utmost respect, the said view does not take into consideration the discussions discussed hereinabove, particularly as to a similar ground for challenge being provided in Section 34 and the enforcement under Section 36 of the 1996 Act being made subject to the expiry of the time for preferring a challenge under Section 34.
- 51.** Also, the ratio laid down in the said judgment is in conflict with *Krishna Kumar Mundhra (supra)* where a Division Bench of this Court had categorically observed that Section 34 of the 1996 Act also prescribes the grounds when an award can be challenged and after the question is decided the award becomes final in terms of Section 35. If no application under Section 34 is made, it was held, then after the expiration of the period of limitation the award becomes

enforceable in terms of Section 36 which also does not provide that the provisions of the Code as such would become applicable. It was rightly observed by the Division Bench that Section 36 creates a fiction that it would be enforceable as if it were a decree of the Court within the scope of Order XXI, CPC. This enforcement of the award under Order XXI would not attract the application of Section 47 simply by reason of the expressions used in Section 36. It was held that Section 36 cannot be read independent of the other provisions contained in the Act itself. It was also held by the Division Bench that the legislature, in its wisdom, thought it fit to incorporate a scope similar to Section 47 of the CPC in Section 34 of the Act in order to bring finality before the decree become executable. The same procedure cannot be expected to be incorporated in a statute twice over. The Legislature never intends repetition and at the same time, the object of the 1996 Act is directed towards speedy and hazard-free finality with a view to avoid long-drawn procedure based on technicalities. Therefore, it was held, having regard to the provisions of Sections 4, 5, 12, 13, 16, 34 and 35, Section 36 cannot be interpreted in a manner inconsistent with any of those provisions to attract the provisions contained in the Civil Procedure Code in its entirety.

52. The judgments in *Eastern Gases Ltd. (supra)* and *Birat Chandra Dagra (supra)*, respectively of this Court and the Orissa High Court, are also in similar tune. In *Hindustan Zinc Ltd. Vs. National Research Development Corporation*, reported at 2023 SCC OnLine Del 330, the

Delhi High Court also observed that an award can be held to be a nullity only under Section 34 and not in a proceeding under Section 36 of the 1996 Act.

53. Thus, on a comprehensive consideration of the above judgments, it is crystal-clear that the ineligibility of the Arbitrator cannot be set up as a ground of inexecutability of an award in a proceeding under Section 36 of the 1996 Act for the first time.
54. In the present case, the petitioner chose not to challenge the ineligibility of the Arbitrator before the Arbitrator and/or prefer a challenge under Section 34 of the 1996 Act against the final award of the Arbitrator. Having thus kept silent all along, the award-debtor cannot, for the first time, in the proceeding for enforcement of award under Section 36 of the 1996 Act, raise the issue of ineligibility. Hence, the last issue is also decided against the award-debtor.
55. In such view of the matter, the objections raised as to maintainability of the enforcement application under Section 36 of the 1996 Act are turned down. It is, thus, held that the present proceeding under Section 36 is very much maintainable.
56. In view of the above conclusion, the award-debtors are directed to file their affidavit of assets within three weeks from date.
57. The matter shall next be listed in the monthly list of August, 2024 for passing further orders.

(Sabyasachi Bhattacharyya, J.)