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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Decided on: 16.08.2024

+ O.M.P. (COMM) 457/2022

RAM CHANDER AGGARWAL..... Petitioner

Through: Mr. Sidharth Joshi, Ms. Nidhi, Mr.
Mohd. Zaki & Ms. Akshita
Sharma, Advocates.

versus

RAM KISHAN AGGARWAL & ANR..... Respondents

Through: Mr. Rajiv Thukral, Ms. Shivani
Meena, Ms. Seema Seth, Mr.
Sanjiv Saluja & Ms. Poorvi Jain,
Advocates.

**CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN**

PRATEEK JALAN, J. (ORAL)

1. The petition is directed against an arbitral award dated 16.04.2022, by which the disputes between the parties, under a partnership deed dated 01.04.2014, have been adjudicated.

2. The petitioner was the claimant in the arbitration proceedings. Disputes having arisen between the parties, the petitioner appointed an arbitrator by a letter dated 02.07.2018. The learned arbitrator issued notice to the respondents on 09.07.2018, in response to which they objected to his unilateral appointment on 18.07.2018. The respondents also filed an application before the learned arbitrator in this regard, in respect of which, the learned arbitrator directed that it would be heard at

the time of final hearing. The respondent approached the District Court, Patiala House, under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 [“the Act”], for termination of the mandate of the learned arbitrator [O.M.P.(T)(COMM) 4/2019]. The petition was dismissed by the District Court, by judgment dated 05.04.2019, holding that it did not raise a ground under Section 14 of the Act.

3. The learned arbitrator thereafter framed the following issues:

“1. Whether this Arbitral Tribunal has not been constituted in conformity with the arbitration clause 18 of Partnership deed dated 01-04-2014 as stated in Preliminary Objection No. 1 of reply? OPR

2. Whether there is no cause of action for the claimant to file the present claim petition? OPR

3. Whether the claimant is entitled to recover Rs.2,00,00,000/- as lawful share on the basis of material on record from the respondents? OPC

4. Whether the claimant is entitled to recover the rightful and lawful share to the extent of 50% in the profit, stocks, capital Goodwill, remuneration and properties of partnership firm after rendition of accounts from the respondents? OPC

5. Whether the firm M/s. Shree Om Steel Corporation is liable to be dissolved? OPC

6. Whether the Claimant is entitled for costs? OPC

7.Relief.”¹

4. As far as issue No. 1 is concerned, the learned arbitrator noted the provision of clause 18 of the partnership deed, which reads as follows:

“18 That any dispute or difference arising between the partners with regard to the consideration, meaning, interpretation, effect and validity of any, some or all the terms of these present respecting the accounts, Profits and losses of the business, or the rights and liabilities of the partners or any of them or as to the conduct of the

¹ Emphasis supplied.

*business or dissolution or any other matter relating to the firm shall be referred to arbitrator appointed by all the parties.*²

5. After an analysis of the evidence led on this point, the learned arbitrator has recorded the following findings:

“100. In view of above discussion, I find that as per the arbitration Clause us set out above and admissions made by CW-1 and CW-3, an arbitrator is required to be appointed by both/all the partners. Thus, the unilateral appointment of this arbitral tribunal as a Sole Arbitrator by the Claimant for adjudication of disputes under the Partnership agreement between the parties is contrary to the said arbitration Clause and without authority. Thus, I hold that the appointment and constitution of this Arbitral Tribunal is not in conformity with the Arbitration Agreement i.e. Clause 18 of the Partnership Deed dated 01-04-2014.

*101. Issue No. 1 is decided in favour of the Respondents and against the Claimant.”*³

6. The learned arbitrator has thereafter discussed the various claims asserted by the petitioner herein, and rejected the same on merits. However, he has awarded costs in favour of the petitioner. The operative portion of the award reads as follows:

“205. After giving a careful thought to the disputes between the parties, in the net result, I make the following Award:-

(i) That the Claim Petition of the Claimant is partly allowed against the Respondents only to the extent of costs of Rs. 3,44,450/- (Rupees Three Lakh Forty Four Thousand Four Hundred Fifty Only) which is to be paid jointly and severally by both the Respondents within 15 days from this award failing which the Claimant shall be entitled for interest @ 18% per annum on this amount from the date of each payment paid by the Claimant on behalf of Respondents till its realisation and shall also pay all such costs and expenses that may be borne and incurred by the Claimant for recovering the awarded amount.

(ii) That the Claimant is directed to file the requisite stamp paper

² Emphasis supplied.

³ Emphasis supplied.

within 30 days from today.

(iii) In view of this award, if any application of any party is pending on record, the same shall stand disposed of.”

7. The petitioner’s challenge is to the rejection of the substantive claims made by him. The respondents have also challenged the award in O.M.P.(COMM) 98/2022, pending before the District Court, Patiala House. The challenge of the respondents is to the extent of the award of costs against them.

8. I have heard learned counsel on both sides.

9. Learned counsel for both sides rightly submit that the learned arbitrator had no jurisdiction to decide any claims, having come to the conclusion that his appointment was unilateral and contrary to the terms of the arbitration clause.

10. The impermissibility of arbitral proceedings at the hands of unilaterally appointed arbitrators, derived from the provisions of Section 12 of the Act, stands established as a result of the decisions of the Supreme Court in *TRF Limited v. Energo Engineering Projects Limited*⁴ and *Perkins Eastman Architects DPC v. HSCC (India) Limited*⁵. The Court has held that, just as arbitral proceedings cannot be conducted by a person who is ineligible under Section 12 of the Act, so also, they cannot be conducted by a person nominated by an ineligible person or entity. This principle has been explained in several Division Bench decisions of this Court, including *Ram Kumar v. Shriram Transport Finance Co. Ltd.*⁶, *Govind Singh v. Satya Group Pvt. Ltd.*⁷, *Kotak Mahindra Bank Ltd.*

⁴ (2017) 8 SCC 377.

⁵ (2020) 20 SCC 760.

⁶ 2022 SCC OnLine Del 4268.

*v. Narendra Kumar Prajapat*⁸, and *Babu Lal & Anr. v. Cholamandalam Investment & Finance Co. Ltd. & Anr.*⁹, to hold that such proceedings are a nullity and *void ab initio*. In fact, even absent a challenge under Section 34 of the Act, an award rendered by a unilaterally appointed arbitrator has been held to be unenforceable. Further, as in the present case, the challenge can be taken even by the party which has unilaterally appointed the arbitrator.¹⁰

11. In the present case, it is not even necessary to go so far as to examine the issue in light of the legal provision in Section 12 of the Act. The arbitration clause itself required the arbitrator to be “*appointed by all the parties*”. The learned arbitrator himself has found that he was not so appointed. This by itself gives rise to an independent ground of challenge under Section 34(2)(a)(v) of the Act. In these circumstances, the conclusion of the learned arbitrator that he was not appointed in accordance with the arbitration clause, was correct, and the matter ought to have rested there. All discussion on merits of the claims and award of costs against the respondents, were in excess of jurisdiction.

12. This case in fact provides a fitting example to show that a jurisdictional objection of this nature, in the ordinary course, ought to be decided as a preliminary issue. While I do not intend to lay down a hard and fast rule, it is clear that the parties have expended time and money in pursuing the proceedings before the learned arbitrator. The contractual clause and the fact of the unilateral appointment of the learned arbitrator

⁷ 2023 SCC OnLine Del 37.

⁸ 2023 SCC OnLine Del 3148.

⁹ 2023 SCC OnLine Del 7239.

¹⁰ *Telecommunication Consultants India Ltd. v. Shivaa Trading* [2024 SCC OnLine Del 2937].

by the petitioner, do not appear to have been disputed. In fact, the finding on this aspect is on the basis of admission. The overarching objective of expeditious resolution of disputes by arbitration, would be better served by a pro-active consideration of such preliminary issues at the earliest opportunity. The respondents had taken this objection as soon as the learned arbitrator's notice was received by them and had also filed an application raising this issue before the learned arbitrator. A more robust approach would have led to a decision on this issue at the preliminary stage, and served them well.

13. In view of the aforesaid circumstances and with the consent of learned counsel for the parties, the impugned award dated 16.04.2022 is set aside in its entirety.

14. Learned counsel for the parties state that pleadings and evidence have already been led before the learned arbitrator. They request that the Court may appoint a new arbitrator in these proceedings itself, only at the stage of final hearing, so that the disputes can now be resolved by a Court appointed arbitrator.

15. Having regard to this submission, and at the request of learned counsel for the parties, Mr. Vinay K. Gupta, former Principal District and Sessions Judge [Tel: 9910384701], is appointed as the arbitrator to adjudicate the disputes between the parties. The learned arbitrator is requested to furnish a declaration under Section 12 of the Act, prior to entering upon the reference.

16. The arbitral proceedings will be taken up at the stage of final hearing. The arbitral record will be placed before the learned arbitrator by learned counsel for the parties.

17. The arbitration will be held under the aegis of Delhi International Arbitration Centre, Delhi High Court, Shershah Road, New Delhi-110503 [“DIAC”], and will be governed by the Rules of DIAC, including as to the remuneration of the learned arbitrator.

18. It is made clear that all rights and contentions of the parties are left open for adjudication by the learned arbitrator.

19. The petition stands disposed of.

PRATEEK JALAN, J

AUGUST 16, 2024

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