2024:DHC:5967

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

\+ O.M.P. (COMM) 297/2023

M/S S. K. BUILDERS .....Petitioner

Through: Mr. Rajshekhar Rao, Sr. Adv. with Mr. Mayank Sharma, Mr. Anshul Kulshrestha and Mr. Zahid L. Ahmed, Advs.

versus

M/S CLS CONSTRUCTION PVT LTD .....Respondent

Through: Mr. Kirti Uppal, Sr. Advocate with Mr. Sidharth Chopra, Mr. Harshita Gulati, Ms. Diksha Mathur, Mr. Aditya Raj and Mr. Navneet Thakran, Advocates

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

% 08.08.2024

1. Arbitral proceedings between the petitioner and the respondent, before a Sole Arbitrator, culminated in an award dated 18 May 2023. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996[1] assails the said award.

2. Mr. Rajshekhar Rao, learned Senior Counsel for the petitioner, submits that the impugned award is a nullity as the arbitrator had been unilaterally appointed by the respondent without the consent of the petitioner. The impugned award, resultantly, stands vitiated *ab initio*.

[1] "the 1996 Act" hereinafter

3. The disputes between the parties arose in the context of a Memorandum of Understanding[2] dated 20 December 2019 between the petitioner and the respondent. The MoU was in the nature of a sub-contract by the petitioner on the respondent for construction of a railway platform and certain other structures. Clause 16 of the MoU envisaged resolution of disputes by arbitration and read thus:

> "16. That the parties undertake to fully abide by the terms and conditions set out in this MOU and not to dispute / agitate upon the same hereinafter in future in any manner whatsoever, or in case any misunderstanding or dispute arises pertaining to the terms and conditions of this deed the same shall beresolved by the parties themselves and if the dispute still persist the same shall be resolved and *decided by the sole arbitrator as per mutually decided both of parties*, Advocate in accordance to the rules, regulations and procedures of the of Arbitration and Conciliation Act, whose decision shall be final and binding upon both parties to this deed."
>
> (Emphasis supplied)

4. Thus, it would be seen that Clause 16 of the MOU itself envisaged arbitration by an Arbitrator to be mutually appointed by both parties. That said, even if the agreement were, as in certain other cases, to have provided for unilateral appointment of an arbitrator, such a covenant could not have been enforced in view of the decision of the Supreme Court in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd***[3]***, Bharat Broadband Network Ltd v. United Telecoms Ltd***[4]***, TRF Ltd v. Energo Engineering Projects Ltd***[5] and ***Haryana Space Application Centre (HARSAC) v. Pan India Consultants Pvt Ltd***[6]**.** Nonetheless, in the present case, the arbitration agreement

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[2] "MoU" hereinafter
[3] **(2020) 20 SCC 760**
[4] **(2019) 5 SCC 755**
[5] **(2017) 8 SCC 377**
[6] **(2021) 3 SCC 103**

categorically envisaged bilateral appointment of the arbitrator by consent of parties.

5. The respondent raised certain claims against the petitioner and, on the dispute remaining unresolved, sought reference of the disputes to arbitration. On 21 June 2021, the respondent addressed a notice to the petitioner styled as "NOTICE OF INVOCATION OF ARBITRATION AGREMENET AS CONTAINED IN MEMORANDUM OF UNDERSTANDING DATED 20.12.2019 AND APPOINTMENT OF ARBITRATOR". Having set out the controversy in dispute, the notice concluded thus :

> "…Therefore in view of the above stated facts and circumstances, it is clear that the dispute and differences have arisen out of Memorandum of Understanding dated 20.12.2019 between you and our client, we hereby on behalf of our above named Client request your good self to refer the disputes and differences to the Arbitration of Sole Arbitrator to be appointed by mutual consent.
>
> Accordingly, our above named client hereby appoints Sh. M.P.S. Kasana Advocate Enrolment no.D 186/1993 having office at Kasana Place 46, Street No.16, Wazirabad, Delhi – 110 084, as the Arbitrator who shall commence the Arbitral Proceedings in accordance to the rules and procedures of the Arbitration and Conciliation Act, 1996.
>
> *Further you are called upon to send your consent for reference of disputes to the Arbitration which will be conducted by the sole Arbitrator named above, within the Statutory period from the date of the receipt of this Present Notice. Take notice that your non-response or silence shall be treated as a consent.* This is without prejudice to our Client's rights to seek any other Legal remedy available as per law."
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> (Emphasis supplied)

6. The petitioner replied to the aforesaid notice of the respondent on 1 July 2021. The reply disputes any liability of the petitioner

towards the respondent, but is completely silent on the request for reference of the disputes to arbitration.

7. Mr. M.P.S. Kasana, who was the person named in the notice dated 21 June 2021 as the proposed Arbitrator, proceeded to enter on reference. There is no dispute about the fact that the petitioner and the respondent participated in the arbitral proceedings. However, during the course of arbitration, the petitioner filed a specific application before the Arbitrator under Section 21[7] read with Section 32[8] of the 1996 Act, praying that the arbitral proceedings be terminated, *inter alia*, on the ground that the appointment of the Arbitrator was unilateral. Specific objections to assumption of jurisdiction by the Arbitrator, despite the appointment having been unilateral, find place in para 1, 5 and 6 of the application, which may, to the extent relevant, be reproduced thus:

> "1 …Even otherwise the unilateral appointment of the arbitrator with a caveat of the consent of the other party is held to be an illegal way of appointment of the arbitrator in catena of judgment.
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> *****
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> 5. That it is here to submit that the respondent has never given any consent to even the appointment of the arbitrator and / or the

[7] **21. Commencement of arbitral proceedings**. – Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

[8] **32. Termination of proceedings**. –

(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where—

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings; or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to Section 33 and sub-section (4) of Section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.

claim amount, when the same is not detailed in the notice dated 21.06.2021, thus there is no reason to reply and / or accept the same, as law of limitation has never started to run, when the legal notice is defective as per section 21 of the Act.

6. That in the light of the aforesaid facts and circumstances, the present arbitration proceeding is impossible and unsustainable in the eyes of law, more particularly the pecuniary jurisdiction, whereas on the contrary this hon'ble tribunal has calculated the arbitration fee of ₹ 9,03,201/- (Rupees Nine Lakh Three Thousand Two hundred and ten only), vide its order dated 03.01.2022 on the basis of the claim petition without looking into the merit and contrary to the settled law, which is illegal ab-initio, when this Hon'ble tribunal is not properly constituted, its jurisdiction was never been decided, even by the claimant.

8. The learned Arbitrator decided the aforesaid application by order dated 17 February 2022, paras 8 to 10, 12, 13, 15 and 18 read as under:

"8. I have heard arguments from Sh. KK Jha Ld. counsel for the claimant, Sh. Rajesh Kumar Ld. Counsel for the respondent and also gone through the complete record and documents filed by both the parties before Arbitration tribunal as well as considered the submissions and case laws submitted by both the parties with at most care and regards.

9. That the Ld. Counsel for the claimant has argued that their notice dated 21.06.2021 completed the requirements of invocation of arbitration under section 21 of the Arbitration and Conciliation Act, 1996, as in the said notice it is specifically mentioned that we have already appointed the sole arbitrator and non-response or silence shall be treated as a consent for appointment of sole arbitrator. It is also argued by the Ld. Counsel for the claimant that if the respondent was having any objection for the appointment of sole arbitrator or for invocation of arbitration, the respondent could have raised the objection in his reply dated 01.07.2021 to the effect that he has objection for the appointment of sole arbitrator or for invocation of arbitration. It is also argued that the respondent could have also raised objection at any other subsequent stage, when they have appeared before the arbitration tribunal or could have mentioned in his reply to the statement of claim. It is argued that the respondent has not raised any objection for invocation of arbitrator at any point of time and now when pleadings of both the parties are completed and evidence yet to be started, the instant

application under section 21 R/w section 32 of the Arbitration and Conciliation Act, 1996 has been filed for raising the objection for invocation of arbitration, which is completely without any justification and cause and reason.

10. The Ld. Counsel for the respondent has argued that whatever reasons are there but the claimant is failed to comply the mandatory requirement of provisions of sending a valid legal notice under section 21 of the Arbitration and Conciliation Act, 1996 for invocation of arbitration. The Ld. Counsel for the respondent also argued that there cannot be an unilateral appointment of the arbitrator and the present arbitration tribunal has no jurisdiction to try and adjudicate the claim amount. The Ld. counsel for respondent also relied upon the case laws Lt. Col. H. S. Bedi (Retd.) & Anr. Vs. STCI Finance Limited, OMP (Comm.) 427/2018 and Alupro Building System Pvt. Ltd. Vs. Ozone Overseas Pvt. Ltd., OMP 3/2015.

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12. That it is correct, the claimant herein has issued a notice dated 21.06.2021 to the respondent for invocation of arbitration, the said notice was duly served upon the respondent herein. The respondent has also replied the said notice vide his reply dated 01.07.2021. *It is further admitted fact between the parties that in the said notice dated 21.06.2021, the claimant herein requested the respondent to refer the dispute and differences to the present arbitration tribunal and called upon the respondent to send his consent for reference of dispute to the arbitration. It is also found mentioned in the last para of the said notice dated 21.06.2021 that non response or silence shall be treated as a consent for the appointment of sole arbitrator. In his reply dated 01.07.2021 the respondent admittedly has not disputed the appointment of sole arbitrator and as such has not raised any objection to referring the matter to the sole arbitrator.* However the respondent denied the claims made by the claimant in notice dated 21.06.2021, stating therein

> "III. as per available records our client had made timely payment for the work done same, we have done after completing company formalities now have seen the work which you have done have liability of market around 1.98Cr. we have approaches to you several times to clear the dues of liability of market but you have not provided affirmative responses and even though you are not attending there (labours, materials suppliers, other sub contractor and staffs) calls as in leads they daily approaching our clients office complaint about non-payment of there."

and in the last para in this reply it is stated that:

> "so we would like to request you kindly clears all the dues related to liabilities of parties for which work done instated to taking any action on same."

13. That this arbitration tribunal have issued the notices dated 28.07.2021 to both the parties and they were requested to join the arbitration proceedings commencing on 21.08.2021. *Accordingly both the parties have responded the notice dated 28.07.2021 and have appeared before the Arbitration tribunal through their respective counsels on 21.08.2021. Then claimant herein has filed his statement of claim alongwith documents. The respondent herein has filed his reply to the statement of claim on 17.12.2021 and thereafter rejoinder was also filed by the claimant, as such pleadings of the parties are completed before this arbitration tribunal on 08.01.2022.*

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15. *That the respondent neither in his reply dated 01.07.2021 to the notice dated 21.06.2021 of the claimant, nor in his reply filed before this arbitration tribunal to the statement of claim has ever objected the appointment of this arbitration tribunal. Only the present application U/s21 R/w Section 32 of the Arbitration and Conciliation Act, 1996 has been filed on 15.01.2022, when the matter was listed for filing of affidavit of admission denial of document, framing of issues and for payment of arbitration fee.* From the perusal of the application it appears that the respondent is aggrieved from the claim raised by the claimant in his statement of claim and further on the basis of which fees of the arbitration proceedings has been calculated. It is also the grievance of the respondent that initially in the legal notice dated 25.03.2021 the claimant raised a demand of ₹ 15,89,403.769/- from the respondent and thereafter in a notice dated 21.06.2021 for invocation of arbitration, the claimant raised a demand of ₹ 2.45 Crores till date, but subsequently the claimant has filed a statement of claim for an amount of ₹ 6,65,71,049.96/-.However on perusal of Notice dated 25.03.2021 in its concluding para, it is specifically mentioned that if the Amount so raised including other compliance are not met/complied "then the Claimant having no other option, shall certainly knock the doors of the Hon'ble Arbitral Tribunal Court of law for redressal of his grievances for the loss of Huge investment in crores of Rupees, mental agony, harassment etc. being faced by him due to your (Respondent herein) non-cooperation. sluggish, deliberate and conscious act of delayed payment, which you (Respondent) please note" But even otherwise if there is variation of the demands by the claimant in the abovesaid notices and in statement of claim that has to be seen by adducing proper evidence, to the effect that for how much claim the claimant is legally

entitled. Moreover, as per settled principle of law, as laid down by Hon'ble Apex Court in a case ***PSA Sical Terminals Pvt. Ltd. v The Board of Trustees VO***[9] (decided on 28.07.2021). an arbitrator cannot go beyond the contract and beyond the term & conditions of the agreement of the parties and it has been held that the jurisdiction of the arbitrator being confined to the four corner of the agreement, he can only pass such an award which may be the subject matter of reference. So mere filing of statement of claim is not sufficient to pass an award for the amount claimed in the Statement of claim. In fact an award and other claims so demanded in the Statement of claim cannot be awarded beyond the contract of parties and without any documentary proof. However before completion of evidence in any of the matter it is not possible to give any accurate finding as how much sum or amount is liable to be awarded, that can only be decided after completion of evidence between the parties. Similarly this settled principle of law would also be applicable in the present case.

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18. That the present case has also been considered in view of Section 32 of the Arbitration and Conciliation Act, 1996 but from the perusal of the records pleadings of the parties or otherwise, there is no any condition as referred in section 32 is made out for termination of the present arbitration proceedings from either of the parties, as such the Section 32 of the Arbitration and Conciliation Act cannot be invoked in the present matter without any justification and ground. Therefore in the fact and circumstances proceedings of the arbitration cannot be terminated, as such the application filed by the respondent to this effect is not maintainable and devoid of merits, more specifically when the pleadings of the parties are already completed and evidence is yet to be started.

18. *I have also gone through the case cited by the Ld. counsel for the respondent with at most regards, however the said case laws cited are not applicable in the facts and circumstances of the present case, since here is a case where both the parties have joined the proceeding before the present Arbitration proceeding and have completed their pleadings too. Therefore I do not find any justification or ground in the present application filed by the respondent* and in view of the submissions, discussions made by the Ld. Counsels of the parties and on perusal of records, the application under section U/s 21 read with Section 32 of the Arbitration and Conciliation Act, 1996 filed by the respondent is devoid of merits, hence the application is dismissed."

(Emphasis supplied)

[9] **2021 SCC OnLine SC 508**

9. The Arbitrator having thus rejected the petitioner's application for termination of the arbitral proceedings, the proceedings continued.

10. During the course of proceedings, as the mandate of the Arbitrator was to expire on 20 February 2023, a joint statement of learned counsel for the parties was recorded by the Arbitrator on 11 February 2023, extending the time for conclusion of the arbitral proceedings by a further period of three months. This fact stands noted in the following paragraph of the impugned award :

> "VI. EXTENSION OF TIME FOR THE ARBITRATION PROCEEDINGS WITH THE CONSENT OF BOTH THE PARTIES
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> That on 11.02.2023 case was listed for arguments on the application under section 137 R/w section 138 of the Indian Evidence Act. Both parties have addressed their arguments and it was decided further between both the parties that the period of 12 months after completion the pleadings of the parties is to expire by 20.02.2023 therefore a joint statement of the Ld. Counsels for both the parties for extension of time for Arbitration Proceeding for a further period of 3 months was recorded, as such it was decided between the parties that the Arbitration proceedings in the present matter be completed on or before 20.05.2023. The Ld. Counsels of both the parties have signed the joint statements recorded on 11.02.2023."

11. The award came to be rendered by the Arbitrator on 18 May 2023. The award being in favour of the respondent, the petitioner has challenged the award by means of the present proceedings under Section 34 of the 1996 Act.

12. Mr. Rao, learned Senior Counsel for the petitioner advanced a preliminary submission that the impugned award is a nullity, as the learned Arbitrator had no jurisdiction to enter on the reference, his

appointment having been unilaterally made by the respondent without the consent of the petitioner.

13. Mr. Kirti Uppal, learned Senior Counsel for the respondent emphatically refutes this contention. He submits that, in the notice dated 21 June 2021, issued by the respondent to the petitioner under Section 21 of the 1996 Act, invoking arbitration, it was clearly stated that if the petitioner did not object to the appointment of Mr. Kasana as the Arbitrator, the consent of the petitioner would be presumed. The proverbial ball was, thereafter in the petitioner's court, and it was for the petitioner to object to Mr. Kasana's appointment, if the petitioner so deemed appropriate. In the reply dated 1 July 2021 filed by way of response to Section 21 notice, however, the petitioner never raised any objection to reference of the disputes to arbitration or to Mr. Kasana being the Arbitrator. The Arbitrator, therefore, he submits, committed no illegality in entering on the reference or proceeding to arbitrate on the disputes.

14. Mr. Uppal also places reliance on the observations contained in the passage from the impugned award extracted in para 10 *supra*, wherein the Arbitrator has noted the joint statement made by the learned counsel for both sides on 11 February 2023, consenting to extension of the mandate of the Arbitrator by three months. This, submits Mr. Uppal, amounts to consent by the petitioner to the arbitration of the disputes by the Arbitrator. It is not open, therefore, to the petitioner having failed in the arbitration, to now seek to contend that the Arbitrator was incompetent to arbitrate.

15. Had the petitioner succeeded in the arbitration, submits Mr. Uppal, tongue firmly in cheek, that such a contention would hardly have been raised.

16. Mr. Uppal places reliance on a judgment of a Division Bench of this Court in ***Arjun Mall Retail Holdings Pvt Ltd v. Gunocen Inc***[10], specifically on paras 32 to 35 of the report which read:

> "32. It is observed that the respondent had sent several notices invoking the Arbitration clause, the first of which was a Notice dated 11.11.2017. Thereafter, vide legal notice dated 02.08.2018, the respondent had informed the appellants in respect of invocation of the arbitration clause and appointment of the learned Sole Arbitrator. Therefore, the Tribunal entered into reference on 02.08.2018. When the matter came up for hearing before the learned Arbitrator on 31.10.2018 as well as on 24.11.2018, none appeared on behalf of the appellants. Relevantly, there is a time gap of almost eight months from the date of issuance of first legal Notice of invocation of arbitration proceedings and its actual commencement. Yet, the appellants did not take any recourse to law for revocation of appointment of learned Arbitrator or in challenge of the arbitration clause.
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> 33. We find that under Section 34 of the Act, 1996 scope of interference by the Court is limited to the extent that the Arbitral Award is not vitiated on basis of pleadings raised by the parties. The learned District Judge has rightly observed that if a party fails to raise a plea in arbitral proceedings, it cannot take a fresh ground to seek relief before the Appellate Authority and any such plea, deserves to be rejected.
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> 34. The Hon'ble Supreme Court in ***Delhi Airport Metro Express v. DMRC***[11], has observed that in several judgments scope of Section 34 of the Act has been interpreted to stress on the restrain upon the Court to examine the validity of the Arbitral Awards, after dissecting or reassessing the factual aspects of the cases. It has been observed as under :-
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> > "29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law

[10] **2024 SCC Onine Del 428**
[11] **(2022) 1 SCC 131**

committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the Arbitral Award. *The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the Arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the Arbitrator commits an error of jurisdiction by wandering outside the contract* and dealing with matters not allotted to them. An Arbitral Award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the Arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality"."

35. The aforesaid dictum in ***Delhi Airport Metro Express*** (Supra) makes it clear that under Section 34 of the Act, scope of interference by the courts is very limited and only if there is any patent illegality in the Arbitral Award, then only it is required to be touched upon. In the present case, even if it is accepted that the appellants had raised objection to the appointment of learned Arbitrator by sending a letter to him but the fact remains that the appointment was never challenged under the provisions of Section 11(6) of the Act, 1996 nor did the appellants participate in arbitral proceedings, despite having knowledge of the same. Instead of contesting the respondent's claim before the learned Arbitrator, the appellants remained mute spectator and only after losing the battle in arbitral proceedings, the appellants preferred appeal under Section 34 of the Act, challenging the appointment of Arbitrator as well as the Arbitral Award."

17. However, Mr. Uppal, with characteristic candour, concedes that, in the Special Leave petition preferred against the aforesaid decision, the Supreme Court, even while dismissing the SLP by order

dated 14 June 2024, left the question of law open. Nonetheless, he submits that the judgment of the Division Bench in ***Arjun Mall Retail Holdings*** is final and binds this Court.

18. Mr. Uppal also places reliance on the decision of a learned Single Judge of this Court in ***R.S. Seven Lifestyle Pvt Ltd v Seven Hills***[12]. He submits that the situation that obtained before the learned Single Judge in ***R.S. Seven Lifestyle*** is starkly similar to the situation which obtains in the present case. In that case, too, the Arbitrator was unilaterally appointed by one party, as the opposite party did not object to the appointment before it was made. He points out that, in para 18 of the decision, this Court has treated the consent granted for extension of the mandate of the Arbitrator as an implied consent to the Arbitrator being competent to arbitrate on the dispute. In that view of the matter, Mr. Uppal submits that the petitioner cannot, at this juncture, be heard to contend that the impugned award is a nullity as the Arbitrator was unilaterally appointed.

19. Responding to the submissions of Mr. Uppal, Mr. Rao, learned Senior Counsel for the petitioner, points out that the petitioner had raised a specific challenge to the authority of Mr. Kasana to arbitrate on the dispute by moving an application before him under Section 21 read with Section 32 of the 1996 Act, seeking termination of his mandate. He has drawn my attention to the various paragraphs of the said application reproduced in para 7 *supra* in which it was specifically submitted that Mr. Kasana could not arbitrate on the

[12] Judgment dated 16 March 2021 passed in **OMP (T)(COMM) 7/2021**

dispute, as his appointment was unilateral. He has also drawn my attention to the order dated 17 February 2022 passed by the learned Arbitrator on the said application, in which the learned Arbitrator has relied on the fact that, in the reply dated 1 July 2021, submitted by the petitioner by way of response to the Section 21 notice dated 21 June 2021 addressed by the respondent, no objection to Mr. Kasana arbitrating on the dispute was ever raised. Apart from this, the learned Arbitrator has relied on the fact that the petitioner had participated in the proceedings. Mr. Rao's submission is that these considerations do not efface the illegality of the appointment of Mr. Kasana as the Arbitrator, as the appointment was clearly unilateral and without the consent of the petitioner. Mr. Rao places reliance on the judgment of a Coordinate Bench of this Court in ***Lt Col H.S. Bedi v STCI Finance Ltd***[13], which, he submits was almost identical on facts. In that case, following the judgment of the Supreme Court in ***Dharma Prathishthanam v. Madhok Construction (P) Ltd***[14], a Coordinate Bench of this Court held that the appointment of the Arbitrator was a nullity *ab initio* as it was unilateral and without the consent of one of the parties. This judgment, according to Mr. Rao, squarely covers the present case. Mr. Rao has also relied on the judgment of the Supreme Court in ***Lion Engineering Consultants v State of Madhya Pradesh***[15], particularly drawing attention to paras 3 and 4 of the report:

> "3. The learned Advocate General for the State of M.P. submitted that the amendment sought is formal. Legal plea arising on undisputed facts is not precluded by Section 34(2)(*b*) of the Act. *Even if an objection to jurisdiction is not raised under Section 16*

[13] **2018 SCC Online Del 12577**
[14] **(2005) 9 SCC 686**
[15] **(2018) 16 SCC 758**

of the Act, the same can be raised under Section 34 of the Act. It is not even necessary to consider the application for amendment as it is a legal plea, on admitted facts, which can be raised in any case. He thus submits the amendment being unnecessary is not pressed. The learned Advocate General also submitted that observations in ***MSP Infrastructure Ltd. v. M.P. Road Development Corpn. Ltd.***[16], particularly in paras 16 and 17 do not lay down correct law.

4. We find merit in the contentions raised on behalf of the State. We proceed on the footing that the amendment being beyond limitation is not to be allowed as the amendment is not pressed. We do not see any bar to plea of jurisdiction being raised by way of an objection under Section 34 of the Act even if no such objection was raised under Section 16."

Thus, submits Mr. Rao, the objection to the jurisdiction of the Arbitrator to arbitrate on the dispute can be taken at any stage.

20. Mr. Rao also places reliance on paras 14 to 16 of the judgment of the Supreme Court in ***Dharma Prathishthanam***, which read:

"14. In ***Thawardas Pherumal v. Union of India***[17] a question arose in the context that no specific question of law was referred to, either by agreement or by compulsion, for decision of the arbitrator and yet the same was decided howsoever assuming it to be within his jurisdiction and essentially for him to decide the same incidentally. It was held that : (SCR p. 58)

> "A reference requires the assent of *both* sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement between them that it should be referred, then recourse must be had to the court under Section 20 of the Act and the recalcitrant party can then be compelled to submit the matter under sub-section (4). In the absence of either, agreement by *both* sides about the terms of reference, or an order of the court under Section 20(4) compelling a reference, the arbitrator is not vested with the necessary exclusive jurisdiction."
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> (emphasis in original)

15. A Constitution Bench held in ***Waverly Jute Mills Co.***

[16] **(2015) 13 SCC 713**
[17] **(1955) 2 SCR 48 : AIR 1955 SC 468**

Ltd. v. Raymon and Co. (India) (P) Ltd[18] that :

> "An agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, at the ***time*** when they enter on their duties, the proceedings must be held to be wholly without jurisdiction. And this defect is not cured by the appearance of the parties in those proceedings, even if that is without protest, because it is well settled that consent cannot confer jurisdiction."

16. Again a three-Judge Bench held in ***Union of India v. A.L. Rallia Ram***[19] that it is from the terms of the arbitration agreement that the arbitrator derives his authority to arbitrate and in absence thereof the proceedings of the arbitrator would be unauthorised."

(Italics in original; underscoring supplied)

21. Having heard learned counsel for both sides, in my considered opinion, Mr. Rao's contention has to succeed.

22. Unilateral arbitration is an oxymoron. Consent, to the arbitration as well as the arbitrator, is the very *raison d'etre* of the arbitral process. Unilateral appointment of an arbitrator is, therefore, completely proscribed. Section 11 of the 1996 Act specifically envisages consensus *ad idem* on the Arbitrator who has to arbitrate on the disputes. In the present case, besides, Clause 16 of the MoU clearly envisaged appointment of the Arbitrator by consent of the parties.

23. There is clearly no consent by the petitioner to the appointment of Mr. Kasana as the Arbitrator. The respondent could not, by merely including, in its notice dated 21 June 2021, a cautionary caveat that non-response/silence by the petitioner to the respondent's request for

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[18] **(1963) 3 SCR 209 : AIR 1963 SC 90**
[19] **(1964) 3 SCR 164 : AIR 1963 SC 1685**

arbitration of the dispute by Mr. Kasana, would be taken as consent, seek to urge that, as the petitioner's response dated 1 July 2021 did not pointedly object to the arbitration of the dispute by Mr. Kasana, consent to Mr. Kasana arbitrating on the dispute must be presumed. Clause 16 of the MoU required *mutual decision*. "Decision" envisages a positive act. In the given context, it clearly analogizes to consent. Consent has to be express or, even if implied, to be unequivocal. The statement, in the notice dated 21 June 2021, that, were the petitioner not to object to the arbitration of the dispute by Mr. Kasana, consent in that regard would be presumed, can only apply to the respondent, not to the law. The respondent may, in other words, have presumed consent resulting from the silence, on the petitioner's part, regarding the proposal to arbitration by Mr. Kasana in its reply dated 1 July 2021. The law does not.

24. It is well settled that consent requires consensus *ad idem*. There must be positive consent on the part of the petitioner to the appointment of an Arbitrator. Absent such consent, the appointment becomes unilateral and *ex facie* illegal.

25. I am also in agreement with the decision of the Coordinate Bench in ***Lt. Col. H.S. Bedi*** in which this Court held that the mere insertion, in the Section 21 notice, of a caveat that failure to object to the arbitration of the disputes by the named Arbitrator would imply consent, would not necessarily mean that the opposite party had consented to the arbitration as it did not expressly object.

26. The appointment of the Arbitrator in the present case was,

therefore, unilateral. The arbitral proceedings would, even on that score, stand vitiated *ab initio*.

27. Mr. Rao is also correct in pointing out that the petitioner had, in the present case, specifically objected to the continuance of the arbitral proceedings by Mr. Kasana by moving an application, in that regard, before him, seeking termination of his mandate. One of the specific grounds on which the petitioner objected to Mr. Kasana continuing as the Arbitrator was the fact that the appointment of Mr. Kasana as the Arbitrator was unilateral and without the consent of the petitioner. Significantly, the application, in this context, placed reliance on the decision of this Court in ***Lt. Col. H.S. Bedi***.

28. The manner in which the petitioner's objection has been rejected by the Arbitrator in his order dated 17 February 2022 clearly cannot sustain legal scrutiny. The Arbitrator has placed reliance on the observation, in the Section 21 notice dated 21 June 2022 issued by the respondent, that silence or absence of any objection by the petitioner to the appointment of Mr. Kasana as the Arbitrator to arbitrate on the disputes, would amount to deemed consent. In so doing, the learned Arbitrator has failed to notice that a precisely identical contention was specifically negatived by this Court in ***Lt. Col. H.S. Bedi.***

29. Further, while dealing with the application, the learned Arbitrator has not returned any finding on the petitioner's specific contention that his appointment as Arbitrator was unilateral and was, therefore a nullity *ab initio*. Rather, the Arbitrator has proceeded on the premise that, as the parties had completed their pleadings and the

proceedings had gone on for some time, the petitioner could not raise any objection to the jurisdiction of the Arbitrator to arbitrate on the dispute. This view, as taken by the learned Arbitrator in the order dated 17 February 2022, is clearly erroneous and cannot sustain in law. An objection to jurisdiction could be raised at any point. ***Lion Engineering Consultants*** is clear on the point.

30. In the impugned award, the learned Arbitrator has noted the fact that the parties had jointly agreed to extension of his mandate by three months with effect from 20 February 2023. This fact cannot, in my view, be regarded as consent on the part of the petitioner to the jurisdiction of the Arbitrator, especially in view of the specific objection in that regard having been raised by the petitioner by way of an independent application filed before the learned Arbitrator.

31. It is also significant that even while dismissing the SLP preferred against the judgment of the Division Bench in ***Arjun Mall Retail Holdings***, the Supreme Court left the question of law open. This clearly indicates that, even in the opinion of the Supreme Court, the question of whether an arbitration which proceeds following the unilateral appointment of the Arbitrator, can at all sustain, deserved consideration.

32. ***R.S. Seven Lifestyle*** was a case in which, prior to agreeing to extension of the mandate of the Arbitrator, no objection was raised by the petitioner to his jurisdiction. The first objection that was raised was on 25 January 2020, after the mandate of the Arbitrator already stood extended. Even so, the decision concludes by regularizing the

appointment of the Arbitrator by construing the appointment as having been made by the Court. As such, it is clear that the decision in ***R.S. Seven Lifestyle*** cannot be regarded as a binding precedent on the principle that, even where a specific application objecting to the Arbitrator's continuing with the jurisdiction were filed before the learned Arbitrator, the party would nonetheless stand estopped from raising the contention after the award was passed. In any event, ***R.S. Seven Lifestyle*** does not consider the judgment of the Supreme Court in ***Dharma Prathishthanam***. Though the decision in ***Dharma Prathishthanam*** was rendered in the context of erstwhile Arbitration Act, 1940, the principle that consensus *ad idem* is necessary between the parties is necessary for an Arbitrator to assume jurisdiction over the arbitration pervades both the 1940 as well as 1996 Act. The Coordinate Bench in ***Lt. Col. H.S. Bedi*** correctly therefore relied on the law laid down in ***Dharma Prathishthanam*** which has not been noticed by this Court while passing judgment in ***R.S. Seven Lifestyle***.

33. For all the aforesaid reasons, I am of the opinion that the learned Arbitrator had no jurisdiction to arbitrate on the disputes at hand, as his appointment was unilateral. The appointment of the Arbitrator, therefore, stands vitiated *ab initio*. The arbitral proceedings also, therefore, stand rendered a nullity. The impugned award, therefore, is liable to be set aside even on this sole ground.

34. Without therefore, entering into any other aspect of the dispute, the impugned award stands set aside solely on the ground that the appointment of the Arbitrator was unilateral.

35. The petition stands allowed accordingly with no orders as to costs.

C.HARI SHANKAR, J

AUGUST 8, 2024/yg

Click here to check corrigendum, if any