



IN THE COURT OF SH. SANJAY SHARMA-II : DJ (COMMERCIAL COURT)-11
(CENTRAL): TIS HAZARI COURTS, DELHI

Arbitration No. 22/2021

CNR No.: DLCT01-003012-2021

Sumit Gera

S/o Late Krishan Baldev

R/o 4/162, Street No. 9

Purani Tezab Mill, Bhola Nath Nagar

Shahdara, Delhi-110032

..... Petitioner

VERSUS

M/s. HDFC Bank Ltd.

7th Floor, Ansal Classique Tower

J-Block, Plot No. 1, Community Centre

Rajouri Garden, New Delhi-110027

..... Respondent

Date of Institution : 26.02.2021

Date of Arguments : 09.10.2024

Date of Judgment : 09.10.2024

J U D G M E N T

THE CHALLENGE:

1. The petitioner filed an application under Section 34 of 'The Arbitration and Conciliation Act, 1996' (Hereinafter referred to as '**the Act**') for setting aside *arbitral* award dated 31.08.2017 (Hereinafter '**the impugned award**') in Arbitration No. 1701/2017 titled as '*HDFC Bank Limited vs. Sumit Gera*' whereby sole arbitrator passed an *ex-parte* award in the sum of Rs. 3,05,983/- alongwith interest @ 15.51% per annum w.e.f. 22.05.2017 till realization and cost. The respondent was directed to adjust an amount of Rs. 1,03,010/- realized by way of sale of the vehicle.

THE FACTS:

2. The petitioner availed loan from the respondent in order to purchase Maruti Alto LXi CNG Car No. **DL 2CAP 0448**, *vide* principal loan agreement. Thereafter, the petitioner applied for top-up loan on the said vehicle, *vide* supplementary loan agreement dated 19.05.2016. The respondent sanctioned / disbursed a top-loan in the sum of Rs. 3,04,462/- to the petitioner. The said loan amount alongwith interest @ 15.51% per annum was repayable in 36 Equal Monthly Installments (*EMIs*) of Rs. 10,630/- each. However, the petitioner committed default in payment of monthly installments. The respondent recalled the loan and demanded outstanding amount of Rs. 3,05,983/-, *vide* notice dated 07.03.2017. The respondent taken possession of the said vehicle on 17.04.2017.

3. The respondent, *vide* letter dated 03.05.2017, appointed sole arbitrator for adjudication of the dispute. Sole arbitrator entered into reference and issued notice to the petitioner. However, the petitioner did not appear before sole arbitrator. Pursuant to order dated 05.06.2017 passed by sole arbitrator, the respondent sold the said vehicle at Rs. 1,19,000/- on 29.06.2017. Sole arbitrator proceeded *ex-parte* against the petitioner and thereafter, the respondent led evidence. On 31.08.2017, sole arbitrator passed the impugned award.

THE CONTENTIONS:

4. Ld. Counsel for the petitioner contended that the respondent did not serve any notice under Section 21 of the Act upon the petitioner for invocation of arbitration clause. He contended that an award passed by unilaterally appointed sole arbitrator is not enforceable. He contended that the impugned award should be set-aside.

5. Ld. Counsel for the petitioner relied upon judgments in *Perkins Eastman Architects DPC and Ors. vs. HSCC (India) Ltd.* decided on 26.11.2019, *Proddatur Cable TC DIGI Services vs. SITI Cable Network Limited* decided on 20.01.2020 and *BSCPL Infrastructure Limited vs. Union of India and Ors.* decided on 23.07.2021.

6. Ld. Counsel for the respondent stated that he has no objection to the setting aside of the impugned award as the impugned award was passed by an unilaterally appointed arbitrator.

ANALYSIS AND DISCUSSION:

7. The petitioner challenged legality of an award passed by an unilaterally appointed sole arbitrator without his consent.

8. The arbitration agreement contained in Clause No. 25 of ‘*Loan Agreement*’ is, as under:

“If any dispute arising under the agreement is below the pecuniary jurisdiction limit of the Debt Recovery Tribunals established under Recovery of Debts Due to banks and Financial Institutions Act, 1993 (51 of 1993), then such dispute shall be referred to arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 as may be amended, or its re-enactment, by a sole arbitrator, appointed by the Bank.....”

(emphasis supplied)

9. From perusal of the arbitration clause, it is evident that it is at the absolute discretion of the respondent to nominate a sole arbitrator for resolution of the dispute. The petitioner had no choice in appointment of sole arbitrator. The ethos and first principle on which the arbitration mechanism function is party-autonomy i.e. freedom to choose an arbitrator acceptable to both the parties to the agreement, embedded in the principle of natural justice “*no man can be a judge of his own cause i.e. Nemo iudex in causa sua*’.

10. In ***Kotak Mahindra Bank Ltd. vs. Narendra Kumar Prajapat***, 2023 SCC Online Del 3148 (DB), Hon'ble High Court of Delhi held, as under:

“10. The award rendered by an arbitrator who is ineligible to be appointed as such cannot be enforced.

12. In *Govind Singh v. Satya Group Pvt. Ltd.* : 2023/DHC/000081 this court held as under:

“In view of the above, the remaining question to be addressed is whether an arbitral award rendered by a person who is ineligible to act as an arbitrator is valid or binding on the parties. Clearly, the answer must be in the negative. The arbitral award rendered by a person who is ineligible to act as an arbitrator cannot be considered as an arbitral award. The ineligibility of the arbitrator goes to the root of his jurisdiction. Plainly an arbitral award rendered by the arbitral tribunal which lacks the inherent jurisdiction cannot be considered as valid. In the aforesaid view, the impugned award is liable to be set aside as being wholly without jurisdiction.

14. This Court finds no infirmity with the aforesaid view. A person who is ineligible to act an Arbitrator, lacks the inherent jurisdiction to render an Arbitral Award under the A&C Act. It is trite law that a decision, by any authority, which lacks inherent jurisdiction to make such a decision, cannot be considered as valid. Thus, clearly, such an impugned award cannot be enforced.”

11. Special Leave Petition (Civil) Diary No(s). 47322/2023 against the judgment in ***Kotak Mahindra Bank Ltd. vs. Narendra Kumar Prajapat*** was dismissed on 17.05.2023. The relevant part of the judgment of Hon'ble Supreme Court of India is, as under:

“From paragraph 6 of the impugned order, it appears to be an admitted position that the Arbitrator unilaterally appointed by the petitioner was ineligible to be appointed as an arbitrator by virtue of Section 12(5) of the Arbitration and Conciliation Act, 1996.”

12. In ***Smaaash Leisure Ltd. vs. Ambience Commercial Developers Pvt. Ltd.***, 2023 SCC OnLine Del 8322, Hon'ble High Court of Delhi held, as under:

“38.....It is no longer *res integra* that an arbitral award rendered by an Arbitrator, who is ineligible to act as an Arbitrator cannot be termed as an arbitral award and thus not binding on the parties.....

39. From the aforesaid judgment, it is clear that the ineligibility of the Arbitrator goes to the root of the jurisdiction and vitiates the award.....”

13. In ***Babu Lal and Another vs. Cholamandalam Investment and Finance Company Ltd. and Another***, 2023 SCC OnLine Del 7239, Hon'ble High Court of Delhi held, as under:

“8. It is an admitted position that the respondent Company nominated a Sole Arbitrator on its own without recourse to Court. Supreme Court in *Perkins Eastman Architects DPC.* (supra) has held that there cannot be a unilateral appointment or nomination of an Arbitrator by a party interested in the dispute. Reference has to be to an independent person.

9. In the instant case, admittedly, nomination of the Sole Arbitrator was done by the respondents on their own without any concurrence from the appellant. Letter dated 18.10.2021 is merely an intimation to the appellant of nomination of the Sole Arbitrator. Said nomination was without reference to the Court in terms of Section 11 of the Arbitration & Conciliation Act, 1996.

10. Clearly, an award rendered by an ineligible Arbitrator would be a nullity as has been held by a Coordinate Bench of this Court in *Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat*, 2023 SCC OnLine Del 3148.

11. In the instant case since the appointment of an Arbitral Tribunal was unilateral and without recourse to Court, the Award rendered by the Arbitral Tribunal would also be a nullity. The Trial Court has clearly erred in not appreciating that the appointment was unilateral and consequently, the Award was a nullity.”

14. Therefore, an arbitration award passed by a sole arbitrator appointed unilaterally by the respondent is without jurisdiction and *non-est*.

15. This Court has not considered the merits of the case of the parties in view of the fact that unilateral appointment of sole arbitrator is null and void, *non-est* and *void ab initio* and the impugned award passed by him is without jurisdiction, unenforceable and nullity.

CONCLUSION:

16. Therefore, the application under Section 34 of '*The Arbitration and Conciliation Act, 1996*' is allowed. Consequently, the impugned award dated 31.08.2017 in Arbitration No. 1701/2017 titled as '*HDFC Bank Limited vs. Sumit Gera*' is set-aside.

17. However, the respondent may initiate proceedings for appointment of an arbitrator for adjudication of the dispute in accordance with the provision of '*The Arbitration and Conciliation Act, 1996*'.

18. File be consigned to record room.

**SANJAY
SHARMA**

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by SANJAY
SHARMA
Date: 2024.10.09
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Announced in the open Court
on this 09th October, 2024

SANJAY SHARMA-II
DJ (Commercial Court)-11 (Central)
Tis Hazari Courts, Delhi

Sumit Gera vs. M/s. HDFC Bank Ltd.

CNR No.: DLCT01-003012-2021

Arbitration No. 22/2021

09.10.2024

Present : Mr. Sumit Goswani, Ld. Counsel for the petitioner
(*through Video Conferencing*).
Mr. Kartik Kumar, Ld. Counsel for the respondent.

Sole arbitrator has not made available the arbitral record to the Court despite repeated notices. However, Ld. Counsel for the respondent submitted that the impugned award was passed by an unilaterally appointed sole arbitrator and in view of the law governing legality of such award, he has no objection to setting aside of the impugned award. The Court has heard arguments of Ld. Counsel for the parties. *Vide* separate judgment, the application under Section 34 of '*The Arbitration and Conciliation Act, 1996*' is allowed. Consequently, the impugned award dated 31.08.2017 in Arbitration No. 1701/2017 titled as '*HDFC Bank Limited vs. Sumit Gera*' is set-aside. File be consigned to record room.

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SHARMA
Date:
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Sanjay Sharma-II
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Central, THC, Delhi
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