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CALCUTTA HC ON THE FATE OF AWARD PASSED BY UNILATERALLY APPOINTED ARBITRATOR

A. Introduction

Calcutta High Court (“**HC**”) in *SREI Equipment Finance Limited*,¹ on April 11, 2023, held that an award passed by a unilaterally appointed arbitrator is null and void and cannot be enforced under Section 36² of the Arbitration and Conciliation Act, 1996 (“**A&C Act**”).

B. Facts

1. SREI Equipment Finance Limited (“**SEFL**”) entered into Master Lease Agreement (“**MLA**”) with one Sadhan Mandal (“**Mandal**”) in 2018.
2. Under the MLA, over Rs. 87 lakhs was advanced to Mandal to hire two vehicles on lease.
3. When Mandal failed to repay the amount, SEFL invoked arbitration in 2020 and appointed Samrat Mukherjee as the Sole Arbitrator in accordance with following arbitration clause in the MLA.
“18(n) Any disputes or differences arising out of or in connection with the agreement during its subsistence or thereafter between the parties including any disputes and differences relating to the interpretation of the agreement or any clause thereof shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and rules framed thereunder and any amendment, modification, statutory enactment thereto from time to time and shall be referred to the sole Arbitration of an independent Arbitrator appointed by Lessor on its own or upon request of the Lessee and/or guarantors in writing upon intimation to all parties to this agreement.”
4. Based on the arbitration clause and submissions by the parties, SEFL unilaterally appointed the Sole Arbitrator.
5. In August 2021, the Sole Arbitrator passed an *ex parte* award in favour of SEFL directing Mandal to pay over Rs. 65 lakhs to SEFL.
6. SEFL filed an execution application under Section 36 of the A & C Act for the enforcement of the arbitral award before the HC.

C. HC Judgment & Reasoning:

1. The HC, relying on the Supreme Court (**SC**) judgment in *Perkins Eastman Architects* case,³ ruled that the selection method as contemplated by Clause 18 is illegal and that the arbitrator who was unilaterally chosen would lack jurisdiction to decide the dispute between the parties. Therefore, the resulting award would also be void and parties are free to reargue the dispute.

¹*SREI Equipment Finance Limited v. Sadhan Mandal* (11.04.2023 -CHC): MANU/WB/0794/2023.

² Enforcement of award.

³*Perkins Eastman Architects DPC and anr v. HSCC (India) Ltd* (26.11.2019-SC): MANU/SC/1628/2019.

2. The HC earlier dealt with in detail the fate of arbitral awards made by unilateral arbitrators in the *Cholamandalam Investment* case⁴ and after examining the Supreme Court’s rulings in *HRD Corporation*,⁵ *TRF Limited*,⁶ and *Bharat Broadband Network*⁷ cases, and had ruled as below:⁸
“It is a settled principle of law that compliance with Section 12(5) read with Schedule VII is sine qua non for any arbitral reference to gain recognition and validity before the Courts. An arbitral reference which begins with an illegal act vitiates the entire arbitral proceedings from its inception and the same cannot be validated at any later stage. Thus, it would be a logical inference to consider such arbitral proceedings as void ab initio.”
3. SEFL, however, relied on *McLeod Russel* case⁹ to argue that not all unilateral appointments are invalid unless the arbitrator falls under Seventh Schedule¹⁰ of A&C Act.
4. The HC held that:
 - *McLeod Russel* case does not apply, as the petitioner there had waived their rights in accordance with the proviso to Section 12(5) of A& C Act, participated in the arbitral proceedings, and expressly acknowledged the arbitrator’s jurisdiction.
 - Mandal, in this case, refused to participate and was placed *ex-parte* rather than submitting to the arbitrator’s jurisdiction by taking part in the arbitration proceedings.
5. The HC dismissed the Section 36 petition and directed the parties to re-file their claims before a properly constituted arbitral tribunal.

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⁴*Cholamandalam Investment and Finance Company Ltd. v. Amrapali Enterprises* (14.03.2023-CHC): MANU/WB/0527/2023.

⁵*HRD Corporation v. GAIL* (31.08.2017-SC): MANU/SC/1066/2017.

⁶*TRF Limited v. Energo Engineering Projects Limited* (03.07.2017- SC): MANU/ SC/0755/2017.

⁷*Bharat Broadband Network Ltd v. United Telecoms Ltd* (16.04.2019-SC): MANU/SC/0543/2019.

⁸ Paragraph 22(c) in the *Cholamandalam* judgment.

⁹*McLeod Russel India Limited and Another v. Aditya Birla Finance Limited and others* (14.02.2023-- CHC): MANU/WB/0262/2023.

¹⁰ Arbitrator’s relationship with parties or counsel.