**"C.R"**

**C.S DIAS,J.**

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**O.P (C)No.1263 of 2022**

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**Dated this the 2nd day of August,022.**

**JUDGMENT**

Aggrieved by the order in CMA (Arb) No.530/2022 of the Court of Additional District Judge – VII, Ernakulam, the petitioner before the court below has filed this original petition.

2. The skeletal facts relevant for the determination of the original petition are: the petitioner is a public limited company registered with the Reserve Bank of India as a non-banking finance company engaged in providing loans on a hypothecation and guarantee basis. The respondent and his guarantor had entered into Ext.P1 hypothecation agreement with the petitioner to purchase a motor car on hypothecation. It was, *inter-alia*, agreed by the parties that in the case of any dispute between them, the same would be settled in arbitration at Ernakulam. The respondent committed a breach of the agreement. The petitioner invoked Clause 20 of Ext.P1 agreement and issued a notice under Section 21 of the

Arbitration and Conciliation Act, 1996 (in short 'Act') by suggesting the name of an Arbitrator. Even though the respondent received the notice, he did not send any reply. Inferring that the respondent had accepted the name of the arbitrator suggested by the petitioner, the petitioner appointed a sole Arbitrator. The petitioner filed its claim petition before the nominated Arbitrator along with an application filed under Section 17 (1) of the Act for interim relief. The Arbitrator passed Ext.P2 ad-interim award permitting the petitioner to repossess the vehicle. The petitioner then filed CMA (Arb)No.530/2022 (Ext.P3), under Section 17(2) of the Act, to enforce the Ext.P2 interim award. Along with Ext.P3, the petitioner filed Ext.P4 application to appoint an Advocate Commissioner to repossess the vehicle. Nevertheless, the court below, on a finding that the respondent is residing in Kottayam, by the impugned Ext.P5 order, held it has no jurisdiction and ordered the return of the original petition for representation to the proper Court. Ext.P5 order is irregular and unsustainable in law. Hence, the original petition.

3. Heard; Sri.Shiju Varghese, the learned counsel for the petitioner.

4. Sri. Shiju Varghese argued that Ext.P5 order is patently wrong and erroneous because the court below has failed to consider the provisions of the Act and the law laid down by this Court on the point, in its proper perspective. The Arbitration and Conciliation Act is a self-contained enactment emphasising party autonomy. An interim award can be enforced by the Court situated at the seat as agreed by the parties to the agreement. There is no necessity to file the original petition where the respondent is residing as contemplated under the Code of Civil Procedure, which has no application. He placed reliance on the decision of the Honourable Supreme Court in **Sundaram Finance Limited v. Abdul Samad and another** [(2018) 3 SCC 622] and the decision of this Court in **Muthoot Vehicle and Asset Finance Ltd. v. Gopalan Kuttappan** [2009 KHC 5086] to canvass the position that an award can be enforced anywhere in India and the property can be attached before judgment by a court even if the subject matter is outside

its jurisdiction. Hence, he submitted that the original petition may be allowed.

5. When this Court was proposing to admit the original petition and order notice to the respondent, the learned counsel drew the attention of this Court to the decision in **HDFC Bank Ltd v. Manaf Arakkaveettil** [2018 (4) KHC 84] and argued that this Court has dispensed with the issuance of prior notice to the respondent in cases of such nature, as it may entail in the vanishing of the security sought to be attached. He also relied on the decisions of this Court in **Sakthi Finance Ltd. v. Shanavas and others** [2018 (5) KHC 739] and **Pradeep K.N v. Station House Officer, Perumbavoor and another** [2016 (2) KHC 714] to drive home the contentions that the enforcement court constituted under Section 17 (2) of the Act is not expected to conduct an enquiry on the interim award passed by the Arbitrator like an appellate court and that an order of repossession can only be enforced through a civil court.

6. In the above factual and legal background, this Court decided to consider and dispose of the original petition without ordering notice to the respondent.

7. Ext.P1 agreement was entered between the petitioner – Hedge Finance Ltd (referred to in Ext.P1 as 'HFL') and the respondent and his guarantor on 11.08.2020. Clause 20 (a) of the Ext. P1 agreement reads as follows:

"20. Arbitration (a) All disputes, differences and/or claim arising out of this agreement for loan shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory amendment thereof and shall be referred to the sole arbitrator to be appointed by 'HFL'. In the event of death, refusal, neglect, inability or incapacity of a person so appointed to act as the arbitrator, the 'HFL' may appoint a new arbitrator. This reference to the arbitrator shall be within the clauses, terms and conditions of this agreement. The arbitrator shall not be required to give any reasons for the award and the award given by the arbitrator shall be final and binding on parties concerned".

8. The petitioner has alleged in the original petition filed before the court below that the respondent had committed a breach of Ext. P1 agreement by not repaying the loan amount within the agreed time period, compelling the petitioner to invoke clause 20 of the Ext.P1 and issue notice as prescribed

under Section 21 of the Act. As the respondent did not reply to the notice, the petitioner has assumed that the respondent has accepted the authority of the person suggested by the petitioner to act as the Arbitrator. Accordingly, the petitioner has appointed the Arbitrator and filed the claim petition and the application for interim relief before him. The Arbitrator has passed the interim award under Section 17 (1) of the Act, which was sought to be enforced under Section 17 (2) of the Act. But, by the impugned order, the court below has returned the original petition for representation to the court where the respondent resides.

9. The Arbitration and Conciliation Act, 1996 was extensively amended by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016).

10. After evaluating the pleadings and materials on record and clause 20 of Ext P1 agreement, and the law laid down by the Hon’ble Supreme Court in **Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd** [(2017) 4 SCC 665], **TRF Ltd v. Energo Engineering Projects Ltd** [(2017) 8 SCC 377], **Bharat Broadband Network Ltd v. United**

**Telecoms Ltd** [(2019) 5 SCC 755] **and Perkins Eastman Architects DPC and another v. HSCC (India) Ltd** [(2020) 20 SCC 760], wherein it is held in explicit terms that, post-2015 amendment of the Act, a unilateral appointment of an Arbitrator by an Authority which is interested in the outcome of the decision of the dispute is impermissible in law. Such an Arbitrator becomes de jure incapacitated to perform his functions as an Arbitrator.

11. In the above context, the learned counsel appearing for the petitioner was asked to address this Court on the above point.

12. Sri. Shiju Varghese then argued that if the respondent has any dispute regarding the appointment, competence or eligibility of the Arbitrator, then he has the right to invoke Section 13 of the Act and raise the dispute before the Arbitrator, who is bound to decide on his jurisdiction following the doctrine of kompetenz-kompetenz. After that, if the Arbitrator upholds his jurisdiction, the respondent can challenge the award taking recourse to Section 34 of the Act or challenge the interim award as provided under Section 37 (1)

(b) of the Act. Therefore, the questions regarding the Arbitrator's appointment, competence, impartiality or eligibility need not be gone into by the court below or this Court at the stage of enforcement of the interim award.

13. Taking into account the complexity of the issue, i.e., the petitioner wants to enforce an interim award passed by a person who is prima facie found ineligible to act as an Arbitrator, in the light of Section 12 and Schedules five and seven of the Act and the law laid down in the afore-cited decisions, this Court appointed Sri.Liji Vadakedom and Sri.Ranjith Varghese as Amici Curiae, to assist the court on the above point.

14. The learned Amici Curiae, in unison, also placed reliance on the afore-cited precedents of the Honourable Supreme Court in **Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd, TRF Ltd v. Energo Engineering Projects Ltd, Bharat Broadband Network Ltd v. United Telecoms Ltd and Perkins Eastman Architects DPC and another v. HSCC (India) Ltd,** and submitted that in the post 2015 amendment era of the Arbitration and

Conciliation Act ( Act 3 of 2016) w.e.f. 23.10.2015, a person falling within foul of the Schedules five and seven of the Act is ineligible to be appointed or act as an Arbitrator unless, after the dispute, the parties enter into an express agreement in writing, as stipulated under the proviso to Section 12(5) of the Act, or the Arbitrator is appointed by this Court under Section 11 of the Act. Therefore, a person appointed in violation to the procedure mentioned above, the Arbitrator is de jure incapacitated and his mandate stands terminated.

15. Sri. Liji Vadakedom placed emphasis on the decision of the Honourable Supreme Court in **Chiranjilal Shrilal Goenka v. Jasjit Singh and others [(1993) 2 SCC 507],** which reads as follows:

"**18. It is settled law that a decree passed by a court without jurisdiction on the subject-matter or on the grounds on which the decree made which goes to the root of its jurisdiction or lacks inherent jurisdiction is a coram non judice. A decree passed by such a court is a nullity and is non est. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the very authority of the court to pass decree which cannot be cured by consent or**

**waiver of the party.** In Bahadur Singh v. Muni Subrat Dass [(1969) 2 SCR 432] an eviction petition was filed under the Rent Control Act on the ground of nuisance. The dispute was referred to arbitration. An award was made directing the tenant to run the workshop up to a specified time and thereafter to remove the machinery and to deliver vacant possession to the landlord. The award was signed by the arbitrators, the tenant and the landlord. It was filed in the court. A judgment and decree were passed in terms of the award. On expiry of the time and when the tenant did not remove the machinery nor delivered vacant possession, execution was levied under Delhi and Ajmer Rent Control Act. It was held that a decree passed in contravention of Delhi and Ajmer Rent Control Act was void and the landlord could not execute the decree. The same view was reiterated in Kaushalya Devi (Smt) v. K.L. Bansal [(1969) 1 SCC 59 : AIR 1970 SC 838] . In Ferozi Lal Jain v. Man Mal [(1970) 3 SCC 181 : AIR 1970 SC 794] a compromise dehors grounds for eviction was arrived at between the parties under Section 13 of the Delhi and Ajmer Rent Control Act. A decree in terms thereof was passed. The possession was not delivered and execution was laid. It was held that the decree was nullity and, therefore, the tenant could not be evicted. In Sushil Kumar Mehta v. Gobind Ram Bohra (dead) through his Lrs. [(1990) 1 SCC 193 : JT 1989 (Suppl) SC 329] the civil court decreed eviction but the building was governed by Haryana Urban (Control of Rent and Eviction) Act (11 of 1973). It was held that the decree was without jurisdiction and its nullity can be raised in execution. In Union of India v. Ajit Mehta and Associates, Pune [AIR 1990 Bom 45 : (1989) 3 Bom CR 535] a Division Bench to which Sawant, J. as he then was, a member was to consider whether

the validity of the award could be questioned on jurisdictional issue under Section 30 of the Arbitration Act. The Division Bench held that Clause 70 of the contract provided that the Chief Engineer shall appoint an engineer officer to be sole arbitrator and unless both parties agree in writing such a reference shall not take place until after completion of the works or termination or determination of the contract. Pursuant to this contract under Section 8 of the Act, an arbitrator was appointed and award was made. Its validity was questioned under Section 30 thereof. The Division Bench considering the scope of Sections 8 and 20(4) of the Act and on review of the case-law held that Section 8 cannot be invoked for appointment of an arbitrator unilaterally but Section 20(4) of the Act can be availed of in such circumstances. Therefore, the very appointment of the arbitrator without consent of both parties was held void being without jurisdiction. The arbitrator so appointed inherently lacked jurisdiction and hence the award made by such arbitrator is non est. In Ghellabhai case [ILR 21 Bom 336] Sir C.Farran, Kt., C.J. of Bombay High Court held that the probate court alone is to determine whether probate of an alleged will shall issue to the executor named in it and that the executor has no power to refer the question of execution of will to arbitration. It was also held that the executor having propounded a will and applied for probate, a caveat was filed denying the execution of the alleged will, and the matter was duly registered as a suit, the executor and the caveatrix subsequently cannot refer the dispute to arbitration, signing a submission paper, but such an award made pursuant thereto was held to be without jurisdiction.”

16. Sri. Liji Vadakedom further submitted that schedules five and seven of the Act enumerate the persons who stand disqualified to act as an Arbitrator. In the case at hand, undisputedly, the petitioner has unilaterally appointed the Arbitrator invoking clause 20 of Ext. P1, without an express agreement in writing, post the dispute, as prescribed under the proviso to sub-section (5) of Section 12 of the Act or with the intervention of this Court. If that be the case, the enforcing Court is within its bounds to decline enforcement of the interim award going by the law laid down in Chiranjilal Shrilal Goenka (supra).

17. Sri. Ranjith Varghese added that there is no meaning in not issuing notice to the respondent in an application filed under Section 17 (2) of the Act because such an application can be filed before the Arbitral Tribunal after the commencement of the arbitral proceedings, unlike an application filed under Section 9 of the Act, which can be filed before the commencement of the arbitral proceedings. The commencement of the arbitral proceedings is stated in Section 21 of the Act, to mean the date on which a request for a

dispute to be referred to arbitration is received by the respondent. Therefore, the respondent who is already aware of the proceedings should not be denied an opportunity to contest the application filed under Section 17 (2) of the Act, which would violate the principles of natural justice — the Audi alteram partem rule — which is one of the cardinal requisites of the Arbitration and Conciliation Act. He further submitted that in cases like the one at hand, many a time, after the vehicle/goods are taken possession of, on the strength of an interim award, there is no provision in the statute, especially when the respondent does not contest the proceedings, to ensure that the arbitral proceedings attain finality. Therefore, if notice to the respondent is dispensed with, the chances of the provisions being misused are higher. He also endorsed the submissions of the Sri. Liji Vadakedom that an interim award passed by an ineligible Arbitrator goes to the root of the matter and is null and void, and unenforceable. Such a non-est interim award may not be given the imprimatur of the Court. Hence, he submitted that the time is ripe to issue directions, invoking the supervisory powers of this Court under Article 227

of the Constitution of India, that arbitrators are appointed, and awards are passed within the framework of the Arbitration and Conciliation Act, 1996.

18. Section 12 of the Act has been interpreted by the Hon'ble Supreme Court in **Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd** in the following paragraphs:

"18. Keeping in mind the aforequoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. **In order to achieve this, sub-section (5) of Section 12 lays down 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, he shall be ineligible to be appointed as an arbitrator. In such an eventuality i.e. when the arbitration clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of the arbitration agreement.**

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**“20. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration.** The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in Hashwani v. Jivraj [Hashwani v. Jivraj, (2011) 1 WLR 1872 : 2011 UKSC 40] in the following words : (WLR p. 1889, para 45)

> *‘45. … the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.’*

21. Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in Consorts Ury [Fouchard, Gaillard, Goldman on International Commercial Arbitration, 562 [Emmanuel Gaillard & John Savage (Eds.) 1999] {quoting Cour de cassation [Cass.] [Supreme Court for judicial matters] Consorts Ury v. S.A. des Galeries Lafayette, Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France)}.] , underlined that:

> *'an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator'.*

22. Independence and impartiality are two different concepts. **An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence.** Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings.

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30. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector

undertaking itself and the authority to appoint the arbitrator rests with it. xxx xxx xxxx".

19. Subsequently, a three Judge Bench of the Hon'ble Supreme Court in **TRF Ltd v.Energo Engineering Projects Ltd** has declared thus:

"50. First, we shall deal with Clause (d). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned senior counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned senior counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. **We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another.** That is altogether a different situation. If there is a

clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the “named sole arbitrator” and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction. xxx xxxx (omitted).

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53. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. According to learned counsel for the appellant, ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee.

54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. **By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an**

**arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated.** Therefore, the view expressed by the High Court is not sustainable and we say so".

20. Again, in **Bharat Broadband Network Ltd vs. United Telecoms Ltd** the Hon'ble Supreme Court has held as follows:

"14. From a conspectus of the above decisions, it is clear that Section 12(1), as substituted by the Arbitration and Conciliation (Amendment) Act, 2015 ["Amendment Act, 2015"], makes it clear that when a person is approached in connection with his possible appointment as an arbitrator, it is his duty to disclose in writing any circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality. The disclosure is to be made in the form specified in the Sixth Schedule, and the grounds stated in the Fifth Schedule are to serve as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Once this is done, the appointment of the arbitrator may be challenged on the ground that justifiable doubts have arisen under sub-section (3) of Section

12 subject to the caveat entered by sub- section (4) of Section 12. The challenge procedure is then set out in Section 13, together with the time limit laid down in Section 13(2). What is important to note is that the arbitral tribunal must first decide on the said challenge, and if it is not successful, the tribunal shall continue the proceedings and make an award. It is only post award that the party challenging the appointment of an arbitrator may make an application for setting aside such an award in accordance with Section 34 of the Act.

**15. Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non- obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes**

**have arisen between them, waive the applicability of this sub-section by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.**

16. The Law Commission Report, which has been extensively referred to in some of our judgments, makes it clear that there are certain minimum levels of independence and impartiality that should be required of the arbitral process, regardless of the parties' agreement. This being the case, the Law Commission then found:

> *"59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed section 12 (5) of the Act and the Fifth Schedule which incorporates the categories from the Red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his*

*functions, in terms of the proposed explanation to section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the Red and Orange lists of the IBA Guidelines), the ineligibility to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the Red list of the IBA Guidelines).*

*60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to section 12 (5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed section 12 (5) by an express agreement in writing. In all other cases, the general rule in the proposed section 12 (5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of section 12 (1), and in which context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator." (emphasis in original) Thus, it will be seen that party autonomy is to be respected only in certain exceptional situations which could be situations which arise in family arbitrations or other arbitrations where a person subjectively commands blind faith and trust of the parties to the dispute, despite*

*the existence of objective justifiable doubts regarding his independence and impartiality".*

21. Recently, in **Perkins Eastman Architects DPC and another vs. HSCC (India) Ltd**, the Hon'ble Supreme Court has in paragraphs 20 and 21 held as follows:

"20. We thus have two categories of cases. The first, similar to the one dealt with in *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. **We are conscious that if such deduction is drawn from the decision of this Court in *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , all cases having clauses similar to that with which we are**

**presently concerned, a party to the agreement would be disentitled to make any appointment of an arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an arbitrator.**

21. But, in our view that has to be the logical deduction from *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Para 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator". The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. **But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That**

**has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and recognised by the decision of this Court in *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377: (2017) 4 SCC (Civ) 72]".**

22. On an analysis of the amended provisions of the Arbitration and Conciliation Act, 1996 and the exposition of the law laid down by the Hon'ble Supreme Court in the afore-cited decisions, it is abundantly clear that the law mandates that there should be neutrality not only for the Arbitrator but also in the arbitrator selection process as well. Thus, in the post-2015 amendment era, there are only two modes of appointment of a sole Arbitrator (i) by express agreement in writing between the parties, post the dispute, agreeing to waive the applicability of Section 12 of the Act or (ii) by order of appointment by the High Court under Section 11 of the Act. If the appointment of a sole arbitrator is made other than by the above two methods, the appointment is ex facie bad and is in contravention of the provisions of the Act, which goes to the roots of the matter, and the Arbitrator becomes de jure ineligible to act as an arbitrator by the operation of law.

23. Then the question would arise, can an interim award passed by an ineligible Arbitrator be enforced through a Court under Section 17 (2) of the Act. The law laid down in Chiranjilal Shrilal Goenka, TRF Ltd. (supra) and Mantoo Sarkar v. Oriental Insurance Co.Ltd and others [(2009) 2 SCC 244] and Sneh Lata Goel v.Pushplata and others [ (2019) 3 SCC 594] is sufficient to fortify the elementary principle that a decree passed by the Court without jurisdiction goes to the very roots of the matter and the decree is a nullity. Thus, I have no doubt in my mind that an interim award passed by an arbitrator who was appointed in contravention of the provisions of the Act and the law laid down by the Honourable Supreme Court extracted above, is bad in law and as a corollary to the same, the award is unenforceable. It should be borne in mind that the enforcement of an award is a serious matter and the court is cast with the responsibility to ascertain whether the interim award is passed by an arbitrator who is competent to be appointed in accordance with law. As observed in TRF Ltd, once the infrastructure collapses, the superstructure is bound to

collapse. One cannot have a building without the plinth. Therefore, the interim award becomes worthless.

24. On an appreciation of the pleadings in CMA (Arb)No.530/2022 filed by the petitioner before the court below, this Court finds that the original petition is totally silent on all the above aspects and there is no material placed before the court below as to whether the notice under Section 21 of the Act was served on the respondent and whether the petitioner and the respondent had entered into an express agreement in writing after the dispute, as contemplated under Section 12 (5) of the Act. Furthermore, the court below has not considered the decisions in Sundaram Finance Limited v. Abdul Samad and another [(2018) 3 SCC 622] and Muthoot Vehicle and Asset Finance Ltd. v. Gopalan Kuttappan [2009 KHC 5086] in its proper perspective. Hence, I am of the view that the matter needs to be reconsidered afresh by the court below, in the light of the observations made above.

25. Nonetheless, this Court is in complete agreement with the submission of Sri. Ranjith Varghese, that when an interim award passed under Section 17(1) of the Act is sought

to be enforced through the court by invoking Section 17(2) of the Act, there is no necessity to dispense with notice to the respondent. I accept the above proposition as an interim award can be passed after the commencement of the arbitral proceedings i.e., after notice is served on the respondent as provided under Section 21 of the Act, the respondent is entitled to notice in an application filed under Section 17 (2) of the Act for enforcement. On the contrary, the dispensation of notice may be relevant in an original petition filed under Section 9 of the Act, before the competent court, for interim measures because the petition can be filed before the commencement of the arbitral proceedings. Furthermore, the view of the respondent may have to be ascertained to find out whether a post-dispute agreement was executed between the parties as postulated under Section 12 (5) of the Act.

26. This Court places on record its appreciation for Sri.Liji Vadakedom and Sri.Ranjith Varghese, the Amici Curiae, for their threadbare submissions and valuable assistance rendered to this Court.

On a comprehensive consideration of the pleadings and materials on record, the law on the point and after hearing the learned counsel, in exercise of the supervisory jurisdiction of this Court under Article 227 of the Constitution of India, I dispose of the original petition with the following directions:

(i) Ext P5 order is set aside.

(ii) The court below is directed to reconsider CMA (Arb) No.530/2022 in the light of the decisions of the Hon'ble Supreme Court in Sundaram Finance Ltd v. Abdul Samad and another and Muthoot Vehicle and Asset Finance Ltd v. Gopalan Kuttappan.

(iii) The court below shall issue notice to the respondent and afford him an opportunity to file his written objection.

(iv) The petitioner shall be given an opportunity to amend the pleadings, if so requested.

(v) The court below is directed to consider whether Ext P2 interim award is enforceable as observed in this judgment.

(vi) The court below shall consider and dispose of Ext P1 original petition in accordance with law, as expeditiously as possible, at any rate within a period of one month after the respondent files his counter affidavit in Ext P1.

(vii) The Registrar (District Judiciary) shall forward a copy of the judgment to all the competent courts in the State dealing with the applications filed under the Arbitration and Conciliation Act, 1996.

**C.S.DIAS, JUDGE**

sks/30.7.2022