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

Judgment reserved on: 21.02.2025
Judgment pronounced on: 26.05.2025

\+ **O.M.P. (COMM) 378/2019, I.A. 12705/2019, I.A. 845/2023**

BHARAT FORGE LIMITED .....Petitioner

Through: Mr. Nakul Dewan, Sr. Adv. with Mr. Parag Khandhar, Mr. Krishan Kumar, Mr. Satender Saharan, Advs.

versus

TARSEM JAIN & ANR. .....Respondents

Through: Mr. Ramesh Singh, Sr. Adv. with Mr. Rahul Gupta, Ms. Nanya, Advs.

\+ **O.M.P. (COMM) 382/2019, I.A. 12939/2019, I.A. 769/2023**

BF INFRASTRUCTURE LIMITED .....Petitioner

Through: Mr. Nakul Dewan, Sr. Adv. with Mr. Parag Khandhar, Mr. Krishan Kumar, Mr. Satender Saharan, Advs.

versus

TARSEM JAIN & ANR. .....Respondents

Through: Mr. Ramesh Singh, Sr. Adv. with Mr. Rahul Gupta, Ms. Nanya, Advs.

\+ **OMP (ENF.) (COMM.) 47/2024, EX.APPL.(OS) 299/2024**

TARSEM JAIN .....Decree Holder

Through: Mr. Ramesh Singh, Sr. Adv. with Mr. Rahul Gupta, Ms. Nanya, Advs.

versus

BF INFRASTRUCTURE LIMITED & ANR. .....Judgement Debtors

Through: Mr. Nakul Dewan, Sr. Adv. with Mr. Parag Khandhar, Mr. Krishan Kumar, Mr. Satender Saharan, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: JASMEET SINGH, J

1. The present petitions are filed under Section 34 of the Arbitration & Conciliation Act, 1996 hereinafter referred to as (hereinafter referred to as *"the 1996 Act"*) by the petitioners - Bharat Forge Limited in O.M.P (COMM.) 378/2019 as well as by BF Infrastructure Limited in O.M.P (COMM.) 382/2019 challenging the arbitral award dated 10.05.2019 (hereinafter referred to as *"Impugned Award"*) and for setting aside order dated 16.12.2015.
2. The third petition is the enforcement petition filed by the award holder i.e. Mr. Tarsem Jain against BF infrastructure and Bharat Forge seeking payment of the decretal amount of 77 crores along with up-to-date accrued interest.
3. Since all the petitions are arising from a common arbitral Award dated 10.05.2019 and have been heard together, the same are decided by this common judgment.

FACTS

4. The factual matrix as per the BF Infrastructure Limited is that respondent no.1 (*hereinafter referred to as "R1"*) – Mr. Tarsem Jain (R1 in both petitions) represented to BF Infrastructure Limited that he is owner of entire share capital of many companies incorporated in India and abroad which were engaged in mining activities and were holding valid permits in US and Africa. R1 further represented he is a

beneficial owner of Coal Columbia SAS, Mines and Minerals Company Colombia SAS and Multitex Africa SA and 99% of the paid-up equity share capital of Aggressive Projects Pvt. Ltd. a company incorporated in India.

5. BF Infrastructure Limited, a subsidiary company of Bharat Forge Limited (flagship company of Kalyani Group of Companies), entered into a Share Purchase Agreement (*hereinafter referred to as "SPA"*) dated 18.12.2010 in which R1 agreed to transfer 100% of total equity share capital of the 3 above mentioned companies to Aggressive Projects Pvt. Limited (hereinafter referred to as *"APPL"*). Subsequently, 90 % nominal value of equity shares of APPL were to be transferred to BF Infrastructure Limited.

6. It is stated by BF Infrastructure Limited that as per clause 2, the 1st closing was to be fulfilled subject to performance of all conditions given under Schedule II of the SPA unless the same were expressly waived. These were conditions precedent. The same had not been performed by R1 which has thereby resulted in the entire agreement coming to an end.

7. It is further stated by BF Infrastructure Limited if any conditions were not performed or satisfied and otherwise not expressly waived in writing the SPA would automatically cease to operate thus relegating the parties to their respective original positions. The petitioner had even paid 50 lakhs to R1. These 50 lakhs were to be paid on the date of execution, and 1 crore was to be paid when 100% ownership of the 3

companies was transferred to APPL and 90% shareholding of the same was to be transferred to the petitioner.

8. Since disputes arose between the parties, BF Infrastructure Limited terminated the agreement on 16.08.2012.

9. R1 then invoked arbitration against BF Infrastructure Limited on 03.06.2013and called upon BF Infrastructure Limited to appoint an arbitrator with R1's consent. The arbitration clause being clause 20.4 in the SPA, reads as under: -

> *"20. GOVERNING LAW AND JURISDICTION*
>
> *20.1 This Agreement shall be governed by the laws of India.*
>
> *20.2 If any dispute, controversy or claim arises out of or in connection with this Agreement, including the breach, termination or invalidity thereof ('Dispute"), any party may serve formal written notice on the other parties that a Dispute has arisen ('Notice of Dispute").*
>
> *20.3 The parties shall use all reasonable efforts for a period of 15 days from the date on which the Notice of Dispute is served (or such longer period as may be agreed writing between the parties) to resolve the Dispute on amicable basis.*
>
> *20.4 If the parties are unable to resolve the Dispute by amicable negotiation within the time period referred to in clause 20.3, the Dispute shall be submitted to Arbitration before a single arbitrator appointed in accordance with the Arbitration and Conciliation Act, 1996,* ***upon the request of***

either party *Seat of arbitration shall be New Delhi, India. The language to be used in the arbitral proceedings shall be English. The award delivered in such Arbitration shall be final and binding upon the parties.*

20.5 For all purposes in relation to this Agreement, the Courts at New Delhi alone shall have exclusive jurisdiction. No other Courts shall have jurisdiction to deal with any dispute or any other matter between the Parties arising out of this Agreement."

10. The respondent wrote another letter dated 24.07.2014 to BF Infrastructure Limited to nominate an arbitrator with consent.
11. On 15.12.2014, Shri Hukum Chand Sukhija was appointed as an arbitrator to adjudicate the disputes between the parties. Vide reply dated 23.12.2014 BF Infrastructure Limited duly replied to the letter denying the averments and raised a counterclaim of Rs. 51, 28,423/-.R1 was the original claimant, and BF Infrastructure Limited and Bharat Forge were the original respondents in the claim before the learned arbitrator.
12. On 24.09.2015the BF Infrastructure challenged the appointment of the tribunal being unilateral appointment by an affidavit and Bharat Forge by an application under Section 16 of the 1996 Act.
13. The Arbitral Tribunal by its order dated 16.12.2015 held its appointment to be valid and further that it has been validly constituted in accordance with the procedure agreed upon in the SPA.

14. BF Infrastructure Limited filed a memo before the Arbitral Tribunal stating that it was compelled to participate in the proceedings under protest and without prejudice to its rights and contentions. BF Infrastructure Limited further reserved its rights to challenge the Order dated 16.12.2015 before the Arbitral Tribunal of upholding its own jurisdiction.

15. On 02.07.2016 and 16.09.2016 the Arbitral Tribunal framed issues and revised issues respectively, the revised issues read as under: -

(1) The addendum to SPA dated 18.12.2010 being undated, the parties are to prove the date of its execution and to disclose reasons for its execution in order to arrive at just decision in the matter on this point? O.P. Parties.

(2) Whether the Claimant committed breach of the terms and conditions of Share Purchase Agreement (SPA)? If so what was the nature and effect of such breach on the liabilities, if any, arising from SPA? O.P-R.1

(3) Whether the relief claimed by the Claimant is barred by any provisions of law as claimed by R-1? O.P- R.1.

(4) Whether there is misjoinder of R-2 in the present proceedings or there is non-joinder of any party whose presence may be essential in these proceedings? If so its effect. O.P. Respondents.

(5) Whether Share Purchase Agreement (SPA) could be unilaterally terminated by any of the parties to the contract? If

so whether R-1 had validly terminated the said contract? O.P. - R. 1.

(6) Whether any meetings of any body on behalf of Respondents were arranged by the Claimant in Qatar? O.P.P . C.

(7) Whether Claimant lost any opportunity to offer the project to other willing Indian Company Punj Lloyd, because of any reason attributable to the Claimant's? O.P.P . C.

(8) Whether team of the Respondents visited Columbia in November 2009 and evaluated mine previously owned by RIO TINTO? O.P.P . C

(9) Whether Claimant's mining company Multitex Africa SA in Republic of Guinea had been granted license by the Government in Guinea for which property included seven mining projects for key minerals andfor what validity period? O.P.P . C.

(10) Whether the Respondents in this case have any connection in the matter of MOU dated May 12, 2010? If so to what effect? O.P.P . C.

(11) Whether after execution of MOU dated May 12, 2010 and execution of Share Purchase Agreement (SPA) dated 18.12.2010, Mr. Amit Kalyani appointed his close friend to become Resident Representative of the Respondents to seek mineral resources directly from the Government for Kalyani Group and to follow up for about 20(twenty) applications

pending before Government of Columbia? If so its effect on present case? O.P.P . C.

(12) Whether any lead geologist in UK had submitted any report for Bauxite project, who stated to the effect that 22(twenty two) square metres area that was evaluated may hold 200(two hundred) 9 million tonnes of deposit. of metallurgical drill of Bauxite? If so its effect? O.P.P. C.

Note: It is clarified that in Issue No. 12 while referring to 22 sq km, due to typographical error instead of 22 sq kms the version has been recorded as 22 sqmts instead of 22 sq kms. It is the admitted case of theparties that the area regarding which the report was submitted was not for 22 sqmts but it was for 22 sq kms. I these circumstances issue No. 12 is recast has follows and would be dealt with in the judgment 0 accordingly: -

"Whether any lead geologist in UK had 0 submitted any report for Bauxite project, who stated to the effect that 22(twenty two)square kilo meters area that was evaluated may hold 200(two hundred) million tonnes of deposit of metallurgical drill of Bauxite? If so its effect? O.P.P. C."

(13) Whether companies of China Chinaco were interested in the Bauxite project in Guinea but license of the Claimant's Company had since expired because of any reason attributable to the Respondents? If so its effect? O.P C.

(14) Whether R-2 has liability if any to meet the claim of the Claimant raised against R-1? If so its effect? O.P.P . C.

(15) To what relief if any is the Claimant entitled and against both the Respondents or against, which of the Respondents? Onus perpendie on parties."

16. BF Infrastructure Limited participated in the proceedings without prejudice, led evidence, cross-examined the witnesses. Subsequently, the sole arbitrator passed the impugned award holding R1 being entitled to compensation/damages to the tune of Rs. 77 crores.

17. It was further held by the Ld. Arbitrator, the decision as to whether the Corporate Veil of Bharat Forge needs to be lifted given the circumstances of the case would be upon the Court deciding the enforcement petition.

SUBMISSIONS ON BEHALF OF THE M/S BF INFRASTRUCE LIMITED AND M/S BHARAT FORGE LIMITED

18. Mr. Nakul Dewan, learned Senior Counsel appearing for BF Infrastructure Limited and Bharat Forge submits that unilateral appointment of the Tribunal by the original claimant/R1 contravenes the basic provisions of the Act. Reliance for the same has been placed on ***Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Co., 2024 SCC OnLine SC 3219***(hereinafter referred to as *CORE)* and the judgments of this Court in ***S.K. Builders v. M/S CLS Construction Pvt. Ltd. 2024 SCC OnLine Del 5498*** (though the operation of the judgment has been stayed in FAO (OS) (COMM) 178/2024, the judgment will still be good law and have a binding effect in light of the law laid down by the Hon'ble Supreme Court in Shree Chamundi Mopeds Ltd. v. Assocn. of S.I.T.,

AIR 1992 SC1439) and ***Lt Col H.S. Bedi v. STCI Finance Ltd., 2018 SCC OnLine Del 12577.*** It has also been stated that the constitution of the Tribunal is doubtful since it has not been constituted in terms with Clause 20.4 of the SPA.

19. It is stated that the proceedings against Bharat Forge are unsustainable in law as notice under Section 21 of the Act has not been served upon them. In the absence of a notice invoking arbitration, there could not be any deemed consent of Bharat Forge for the purposes of constitution of the Arbitral tribunal and hence the order of 16.12.2015 passed on the application under Section 16 of Bharat Forge is wrong in law. Additionally, the arbitrator on one hand held that it lacks the authority to lift the corporate veil but thereafter he exceeded the scope by passing adverse findings against Bharat Forge and an issue for the executing court to see if the corporate veil of BF infrastructure and Bharat Forge needs to be lifted.

20. The Tribunal has granted damages/compensation to R1 without there being any prayer regarding the same in the Statement of Claim. It is stated that the Tribunal could not have granted any relief as per Prayer CC of the Statement of Claim based on speculations as it is contrary to the express terms as provided under paragraph 7 of Schedule 2 of the SPA, under which the royalties are payable on the minerals actually mined. Since no minerals were mined no amount is payable andR1 did not lead evidence of the actual loss suffered.

21. It has been stated that the Arbitrator has calculated the quantum of damages/compensation based on surmises and conjectures. It is further

submitted that the decision on claim of damages is contrary to the terms of SPA and the Tribunal has re-written the terms of the contract. The formula which has been applied to arrive at the damages is beyond the scope of SPA and was not agreed between the parties. Therefore, the award is liable to be set aside under Sections 34(2)(a)(iii), 34(2)(a)(v) and 34(2)(b)(ii) of the Arbitration Act.

SUBMISSIONS ON BEHALF ON THE RESPONDENT/ ORIGINAL CLAIMANT – MR. TARSEM JAIN

22. On the other hand, Mr. Ramesh Singh, learned Senior Counsel appearing for the respondent submits that BF Infrastructure Limited on 09.09.2015 raised their objections against unilateral appointment of the Arbitrator before the Tribunal itself, which is bad in law as it is settled position that if an appointment of an Arbitrator is contrary to an agreement between the parties, then the aggrieved party is required to file an application under Section 11(6) of the Act against such appointment. Reliance is placed on ***Walter Bau AG, Legal Successor of the original Contractor, Dyckerhoff and Widmann A.G. v. Municipal Corporation of Greater Mumbai and Another, (2015) 3 SCC 800 (para 6, 9 & 10) and on Perkins Eastman 5 Architects DPC and Anr. v. HSCC (India) Ltd., (2020) 20 SCC 760 (pr. 26-28).***

23. It is stated that since BF Infrastructure Limited did not resort to the remedy available under S.11 (6), the petitioner cannot raise the challenge on appointment under Section 34 of the Act. Further, it is contended that BF Infrastructure Limited did not prefer an application even at a later stage under Section 11 (6) of the Act, but an affidavit

dated 25.09.2015 was preferred by BF Infrastructure Limited praying for termination of proceedings on the ground that the appointment was contrary to SPA and the provisions of the Act.

24. It is submitted that even after the request for termination of the arbitration was rejected by the Arbitrator vide order dated 16.12.2015, the petitioner did not take any other steps either under S.11 (6) or under S.14 of the Act, but rather BF Infrastructure took their chances and thereafter participated in the arbitration proceedings by filing statement of defense, pleadings, framing of issues, cross-examination, oral and written arguments between 12.09.2015 to 13.02.2019. Hence, the present challenge under S.34 of the Act is not maintainable.

25. It is further contended by the learned Senior Counsel, that the challenge against the appointment on the grounds of want of proper notice is not maintainable. It is stated that evidence in this regard is clear that Bharat Forge Limited was given proper notice of the appointment of the Arbitrator.

26. It is stated that the case of the Bharat Forge Limited is not that there is a lack of proper notice but that there is unilateral appointment of arbitrator made without express consent.

27. As regards the merits of the case are concerned, it is stated that the BF Infrastructure Limited and Bharat Forge are seeking the court to re-appreciate evidence and look into the finding of facts arrived at by the learned arbitrator the same is beyond the scope of the court in S.34 of the Arbitration Act.

28. It has been argued that the present proceedings fall under International Commercial Arbitration as given under 2(1)(f) of the 1996 Act and interference with the same is only confined to 2 grounds namely (i) conflict with basic notions of morality (ii) contravention of basic principles of justice. No such case is made out. ***Reliance is placed on Ssangyong Engineering & Construction Co. Ltd. v. National Highways. 2019 (15) SCC 131.***

29. It has further been argued that BF Infrastructure vide letter dated 23.12.2014 replied to communication dated 15.12.2014, wherein Arbitrator was appointed by R1 and further raised counterclaims of Rs. 51,28,423/-. Thus, it is stated there is/was no disagreement to the name suggested by R1 as an arbitrator.

30. Lastly, it has been contended that the award is well reasoned and based on the evidence of the parties. The arbitral tribunal after analysis of evidence reduced the amount of claimed compensation from INR 192 crores in the statement of claim to INR 77 crores as awarded compensation/damages.

ANALYSIS AND FINDINGS

31. I have heard learned counsel for the parties and perused the material and documents placed on record.

Powers of the Court under Section 34 of the Act

32. The scope of the Court's jurisdiction under Section 34 of the 1996 Act, has been defined through a series of judgments of this Court as well as the Hon'ble Supreme Court. It has time and again been reiterated that the challenge of an arbitral award is only to be seen through the prism

of limited and specific grounds provided under Section 34 of the Act. Recently, the Hon'ble Supreme Court in ***Gayatri Balasamy v. ISG Novasoft Technologies Ltd., 2025 SCC OnLine SC 986*** observed as under: -

> *"I. Contours of Section 34, 1996 Act*
>
> *27. Section 5 of the 1996 Act limits judicial intervention in an arbitral award to what is authorized by Part I of the Act. Section 34(1) stipulates that 'recourse' to a court against an arbitral award may be made only by an application for setting aside the award in accordance with Section 34(2) and 34(3).*
>
> *28. Section 34(2)(a) enumerates specific grounds on which an award can be set aside. These include - the incapacity of a party, invalidity of an arbitration agreement in law, improper notice for appointment of an arbitrator or arbitral proceedings, denying the opportunity to a party to present their case, the award being beyond the scope of submission to arbitration, and* ***the composition of the arbitral tribunal or the arbitral procedure not being by the agreement of the parties in certain circumstances.*** *The proviso to Section 34(2)(a)(iv) outlines the concept of "severability of awards". This has been addressed separately in Part II of our Analysis."*

33. Further, Courts under S.34 cannot re-appreciate evidence or express its own views for that of the tribunal's. It is the arbitral tribunal which must

decide on the quantity and quality of evidence and appreciate the same. Thus, the court under Section 34 does not have the power to re-appreciate evidence. The Hon'ble Supreme Court in ***Associate Builders v. Delhi Development Authority (2015) 3 SCC 49*** held as under: -

> *"33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected.* ***A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award****. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares &Stock Brokers (P) Ltd. v. B.H.H. SecuritiesP) Ltd. 8, this Court held: (SCC pp. 601-02, para 21)"*
>
> > *"21.* ***A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act****. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable.*

The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

34. In the present case, the primary objection which has been raised by BF Infrastructure Limited in O.M.P (COMM.) 382/2019 as well as Bharat Forge Limited in O.M.P (COMM.) 378/2019 is the "Appointment of the Arbitrator being Unilateral".

35. To better understand and deal with the controversy in hand, it is pertinent to refer to the letters sent by R1 regarding the appointment of the Arbitral Tribunal:

    (i) 03.06.2013 – R1 sent a notice to BF Infrastructure Limited for wrongful termination of the SPA after a lapse of 7 months after the termination and for the payment of monthly fees as given under the Engagement Letter dated 12.01.2011. In the letter the

counsel for R1 requested BF Infrastructure *"…..to appoint an arbitrator with the consent of my aforesaid client……"*

(ii) 24.07.2014 – R1 sent another notice of arbitration to BF Infrastructure Limited for invoking arbitration. In this notice too it was requested by the counsel for R1*"……..to appoint arbitrator with the consent of my client……."*

(iii) 15.12.2014 – R1 sent a third notice to BF Infrastructure appointing Mr. Hukum Chand Sukhija as an arbitrator with the condition that "……*in case no communication is received within seven days from the receipt of this letter then it would be deemed that appointment of the aforesaid sole Arbitrator would be with mutual consent*."

36. For reference, the third and final notice is reproduced as under:-

Tarun Ahuja
Advocate

AHUJA ASSOCIATES
Advocates & Legal Consultants

~~Speed Post/Courier~~

Legal Notice

To

Dated: 15-12-2014

M/s B F Infrastructure Ltd.,
CS 8-10, 6th Floor, Tower-A,
The Corenthum,
A-41, Sector, 62,
Noida (UP) - 201301
Through its Managing Director/Directors

Dear Sir,

Under instructions from and on behalf of my client Sh Tarsem Jain at 454, Veer Apartment, Plot 28, Sector-13, Rohini, Delhi 110085, I serve you with the following communication:-

1. That earlier I have sent a legal Notice dated 24.7.2014 for and on behalf of my client giving the time of 15 days for appointment of the Arbitrator with mutual consent but till date no reply has been received by my client.

2. That accordingly my client has nominated the name of Shri Hukam Chand Sukhija, Advocate , D-100, Vivek Vihar, Phase-I, Delhi as the sole arbitrator for adjudicating the disputes which has arisen in view of the agreement dated 18th December 2010 with my above-stated client and you. He would file his statement of claim within a period of 30 days from the date of receipt of this communication. In case no communication is received within seven days from the receipt of this letter then it would be deemed that appointment of the aforesaid sole Arbitrator would

Office : Chamber No. 246-247, (Basement), Western Wing,
(Near State Bank of India) Tis Hazari Courts, Delhi-110054
Tel. : 9212138454, Enrl No. : D/2123/1999
Email : advocatetarun@ymail.com

TarunAhuja
Advocate

AHUJA ASSOCIATES
Advocates & Legal Consultants

be with mutual consent of both the parties and the Sole Arbitrator would start his proceedings. The Arbitration fee and the venue of the Arbitration shall be fixed by the Arbitrator and the copy of this communication is being sent to the aforesaid Sole Arbitrator for assuming the office and continuance of the proceedings in respect of the claims to be filed by my client before the said Arbitrator.

Copy retained for record

Yours Faithfully

15/7/14

(Tarun Ahuja)
Advocate

TARUN AHUJA
Advocate
Ch. No. 246-247 (Basement)
Western Wing, Tis Hazari Courts,

Copy to:

Sh Hukam Chand Sukhija,
Advocate,
D-100 Vivek Vihar, Phase-I,
Delhi-110095

Office : Chamber No. 246-247, (Basement), Western Wing,
(Near State Bank of India) Tis Hazari Courts, Delhi-110054
Tel. : 9212138454, Enrl No. : D/2123/1999

37. It is the case of BF Infrastructure Limited and Bharat Forge that in the absence of express consent, the appointment of the arbitrator could not have been presumed to be a deemed consent and hence the appointment is unilateral.

38. To my mind, this argument made by the learned senior counsel for BF Infrastructure Limited and Bharat Forge holds merit. It is settled law that unilateral appointment of an arbitrator is violative of principles given under Section 18 of the 1996 Act. Inherent impartiality and independence of an arbitrator is an essential requirement to instill faith and inspire confidence of the parties to the disputes in the adjudicatory process.

39. While reference of disputes to arbitration has many benefits including quick disposal of disputes, lower adjudication costs, party autonomy *inter alia*, however, in case of sole arbitrators if the appointment is not with the consent of both the parties privy to the contract from which the dispute arises the decision of the sole arbitrator may be prejudiced, thus causing a bias against the weaker party.

40. The same has been observed by the Hon'ble Supreme Court in the case of ***CORE (supra)***, wherein it was observed as under: -

> *"127. Reference of disputes to a sole arbitrator has various advantages, including easy arrangements of meetings or hearings, reduced expenses since the parties will only have to bear the expense of one arbitrator, and speedy decision-making.* ***In the case of the appointment of a sole***

arbitrator, the decision-making vests in the hands of one person. This poses a greater risk of bias against the weaker party, especially if the arbitrator is unilaterally appointed by the other party.

128. If a person having a financial interest in the outcome of the arbitral proceedings unilaterally nominates a sole arbitrator, it is bound to give rise to justifiable doubts on the independence and impartiality of the arbitrator. The possibility of bias by the arbitrator is real because the person who has an interest in the subject matter of the dispute can chart out the course of the entire arbitration proceeding by unilaterally appointing a sole arbitrator. A party may select a particular person to be appointed as a sole arbitrator because of a quid pro quo arrangement between them. ***Moreover, the fact that the sole arbitrator owes the appointment to one party may make it difficult to decide against that party for fear of displeasure. It is not possible to determine whether the sole arbitrator will be prejudiced, but the circumstances of the appointment give rise to the real possibility of bias****.*

129. Equal treatment of parties at the stage of appointment of an arbitrator ensures impartiality during the arbitral proceedings. ***A clause that allows one party to unilaterally appoint a sole arbitrator is exclusive and hinders equal participation of the other party in the appointment process***

of arbitrators. *Further, arbitration is a quasi-judicial and adjudicative process where both parties ought to be treated equally and given an equal opportunity to persuade the decision-maker of the merits of the case.* ***An arbitral process where one party or its proxy has the power to unilaterally decide who will adjudicate on a dispute is fundamentally contrary to the adjudicatory function of arbitral tribunals****.''*

41. A bare perusal of the documents on record shows that BF Infrastructure Limited had objected to the appointment of the arbitrator at the very outset – in the reply to notice of appearance on 09.09.2015. The grounds clearly stated therein are that the appointment is unilateral and the same is not acceptable to BF Infrastructure. For the sake of reference, the same is reproduced as under:-

B F INFRASTRUCTURE

CIN-U45203PN2010PLC136755

September 09, 2015

Courier

Mr. Hukum Chand Sukhija,
Advocate,
D-100, Second Floor,
Vivek Vihar Phase- I,
Delhi 110095

Subject: Notice for Appearance in the matter of Claim Case No. 0101 of 2015 in the matter of Tarsem Jain versus BF Infrastructure Limited and Another ("Case").

Dear Sir,

With reference to the Notice for Appearance in the above mentioned Arbitration Claim Case, we would like to state that:

1. We do not accept and challenge the appointment of Mr. Hukum Chand Sukhija as the Sole Arbitrator in the abovementioned Case. Since Mr. Hukum Chand Sukhija has been unilaterally appointed by Mr. T. K. Jain without any consent from BFIL, is contemplated as violation of Section 11(4) of the Indian Arbitration & Conciliation Act, 1996 ("Act"). , , Mr. Tarsem Jain has only right to request but does not have a right to appoint Sole Arbitrator and such unilateral appointment is contemplated as breach of the Act.

2. We vide our communication dated December 23, 2014, had requested Mr. Tarsem Jain to come to our office, in person, to settle the issue amicably. Copy of the BFIL communication is attached as Annexure – "A" for your ready reference. However, Mr. Jain has elected to ignore the communication and unilaterally appointed the Sole Arbitrator.

We would request you to kindly refer the provisions of Section 11 of the Arbitration and Conciliation Act, 1996 and further do not proceed in this matter. We would also request you to advice Mr. T. K. Jain to correspondence with BFIL and settle the matter amicably and pay all the dues which he has owed from BFIL.

Thanking you,

Sincerely,

For BF Infrastructure Limited

Shubham

Shubham Kandhway
Company Secretary

Copy to:
Mr. Tarsem Jain
454, Veer Apartment, Sector-13, Rohini, New Delhi- 110 085

42. BF Infrastructure Limited again on 24.09.2015 filed an affidavit and an application by Bharat Forge under Section 16 of the 1996 Act, to register

their objections against the unilateral appointment of the arbitrator. The same has been rejected by the arbitrator vide its order dated 16.12.2015.

43. While rejecting the application, the arbitrator observed as under; -

> *"33. On merits it is clear from the record that it is not a case of mere silence on the part of Respondent No. l in the matter of appointment of the Arbitral Tribunal as was notified by the claimant to Respondent No.1 through his Advocate's notice dated 15.12.2014. On the contrary through their reply letter dated 23.12.2014 Respondent No. l replied to the said notice in detail by putting forward their own counterclaim against the claimant inter alia by urging to the effect that Share Purchase Agreement dated 18.12.2012 contained several clauses related to rights to and obligations of both the parties, that the evaluation process was not found as per the representations of the claimant, that the claimant had served the Respondent Company for more than one year eight months as Adviser Global Mining and was in charge of the process for acquisition of the mines ;- that due diligence was carried out and that due diligence report was negative and mining prospects of the project site were very poor and that it was suggested by the due diligence report to the Respondents to surrender major part of mining areas; it was further claimed by Respondent No. I that Share Purchase Agreement dated 18.12.2012 was mutually agreed to be terminated and the said Respondent further claimed to the effect that the*

claimant had agreed to refund a sum of Rs.60,00,000/- (Rupees Sixty Thousand only) after full and final due in relation to termination of his engagement as an Adviser Global Mining with the company. It was further claimed by Respondent No.1 in the reply 23.12.2014 to the effect that after adjusting full and final due in relation to the termination of his engagement as an Adviser Global Mining with the company, the claimant was required to pay amount of Rs.51, 28, 423/- (Rupees Fifty One Thousand Twenty Eight Thousand Four Hundred Twenty Three only) to the Respondents. In these circumstances the Respondents claimed that on serious note Respondent No.1 asked the claimant to stop from sending notices with such claims, stated by Respondent No. l to be frivolous claim and it was further claimed by Respondent No. l that they were instigated to work out for initiating the Legal course of options available to them against the claimant for recovery of their dues including interest and damages.

34. That on the analysis of reply dated 23.12.2014 the Tribunal is constrained to observe that as permitted by the Hon'ble Apex Court in its decisions in the matter of appointment of Arbitrators, the opposite party could acquiesce in the appointment of the Arbitrator so appointed by the one party. Accordingly, it cannot be said to be a case

of mere inaction or silence on the part of the Respondents in replying to the notices issued by the claimant. It can be understood that so far as the earlier notices dated 03.06.2013 and 24.07.2014 are concerned, the Respondent No.1 had not replied to the said notices and therefore that could be treated as a case of mere silence or inaction on the part of the Respondents and consequently non-replying to the said notices dated 03.06.2013 and 24.07.2014 by Respondent No.1 or inaction on the said two notices may not amount to acquiescence on the part of Respondent No.1.

However, this is not so with respect to the notice dated 15.12.2014 in which it was stated by the claimant to the effect

> *("……. In case No communication is received within seven days from the receipt of this letter then it would be deemed that the appointment of the Sole Arbitrator would be by mutual consent of both person….")*

In spite of the fact that substance of each and every contention was dealt with by Respondent No.1 through reply dated 23.12.2014 as analyzed hereinabove so it cannot be said that the Arbitral Tribunal as Sole Arbitrator was not appointed in terms of Agreement dated 18.12.2010 between the parties.

As mentioned above the procedure agreed upon between

parties in the Share Purchase Agreement dated 18.12.2012 clearly provided to the effect

> *" ..... the dispute shall be submitted before the single Arbitrator in accordance to the Arbitration and Conciliation Act 1996* ***upon request of either party****".*

Furthermore when we refer to Section7 of the new Act it is revealed that Arbitration agreement means an agreement by the parties to submit to the Arbitration all or certain disputes which have arisen or which may arise between them in respect of defined Legal relationship, whether contractual or not and under Section 7 Subsection 4(c) it has been provided to the effect that

> *" .... an exchange of statements of claim and defense in which the existence of the agreement is alleged by one party and not denied by the other"*

it would amount to an Arbitration agreement in writing.

In these circumstances when the Share Purchase Agreement provides to the effect that the dispute shall be submitted to the Sole Arbitrator ***upon request of any party****, it is abundantly clear that in terms of Section 7 of the new Act read with the aforesaid agreement between the parties indicating that the dispute shall be submitted upon request of any party it is abundantly clear that in the instant case the Respondents*

have tacitly acquiesced into the mutual consent of the parties for appointment of this Arbitral Tribunal. Accordingly it cannot be said that the appointment of this of this Tribunal is not valid for any such reason for want of consent of the Respondents.

35. That when we refer to the provisions of Section 13 of the new Act, we find that the challenge to the appointment of the Arbitrator by a party who intends to challenge an Arbitrator ***shall, within fifteen days after becoming aware of the constitution of the Arbitral Tribunal*** *or after becoming aware of any circumstances referred to in Sub Section (3) of Section 12 has to send a written statement of the reasons for the challenge to the Arbitral Tribunal. In the instant case the challenge by the Respondents is not based on the second alternate regarding the circumstances referred to in Sub Section (2) or Section (3) of Section 12 of the new Act.*

Even otherwise when along with their communication dated 09.09.2015 addressed to the Arbitral and Tribunal, the Respondents have submitted Annexure-A being the reply dated ***23.12.2014*** *addressed to the counsel for the claimant in reply to communication dated 15.12.2014, which has been fully analyzed in the foregoing paragraphs, it is observed that this amounts to submission of the counter claim by the*

Respondents as is referred to under section 7 read with second part ***Sub-Section (2) of Section 13 of the Arbitration and conciliation Act 1996 but the same has not been submitted within prescribed period of 15 days from the date of becoming aware of the Constitution of Arbitral Tribunal****. Thus the situation of having raised the defense in this case, in terms of the said provisions of Law, is also obtaining in the instant case. So far as first part of Sub Section (2) of the Section 13 of the Act is concerned it is abundantly clear that the said challenge through communication letter dated 09.09.2015 has not been made within fifteen days from the date of coming to aware about the constitution of the Arbitral Tribunal. In the first instance the Respondents came to know about such constitution of the Arbitral Tribunal in the matter in December 2014 when they received the legal notice dated 15.12.2014 to which they have raised their counter claims through their reply dated 23.12.2014 and had simultaneously acquiesced in the appointment of Sole Arbitrator.*

Secondly, if by any stretch of imagination it is considered that they acquired such knowledge from the notice dated 12.08.2015 issued by the Arbitral Tribunal for appearance in the Arbitration case then also it is abundantly clear that the Respondents have consumed at least 25 (twenty five) days from the date of receipt of the said notice based on the

communication dated 12.08.2015fixing the date of hearing as 12.09.2015. Therefore, in this view of the matter also per force of the provisions of Section 13 of the Act also it cannot be said that the challenge to constitution of Arbitral Tribunal has been made in accordance with Law or within the prescribed period of time as prescribed in Section 13 of the Act.

Considered from any view point in exercise of jurisdiction vested in it by law, whether in exercise of powers under Section 16 or under Section 13 of the Arbitration and Conciliation Act 1996 the constitution of the Arbitral Tribunal is upheld to be valid and in accordance with Law."

44. As noted above, R1 sent 3 notices to the BF Infrastructure on 03.06.2013, 24.07.2014 and on 15.12.2014, requesting for appointment of an arbitrator through consent. This shows that R1 was aware that under the terms of the SPA, the arbitrator had to be appointed with consent of both parties, however, R1 in its final notice dated 15.12.2014 after giving a cautionary caveat appointed an arbitrator unilaterally.
45. The same has been upheld by the arbitral tribunal, as the tribunal has concluded in its findings, that BF Infrastructure Limited and Bharat Forge Limited acquiesced to the appointment of the Arbitrator so appointed by R1.
46. I am of the view that the same is not the correct position in law. When R1 was aware that under the SPA, the appointment of an arbitrator

cannot be done unilaterally, the doctrine of acquiescence could not have been applicable. A Co-ordinate Bench of this Court in the case of ***Lt. Col. H.S. Bedi (Retd.) &Anr. V. STCI Finance Limited 2018 SCC OnLine Del 12577*** observed as under:-

> *"8. A reading of the above notice would show that the respondent was aware that it requires the consent of the petitioners for the appointment of the proposed Arbitrator. However, it on its own put a condition on the petitioners that incase the petitioners do not respond to the notice, it shall be construed that they have consented to the name of the Sole Arbitrator to be appointed as such. This was a unilateral condition being put by the respondent on the petitioners without any backing in the Contract or in Law."*

47. The Hon'ble Apex Court in the case of ***Dharma Prathisthanam v. Madhok Construction (P) Ltd., (2005) 9 SCC 686*** observed; -

> *"25. Failure to give consent or to appoint an arbitrator in response to a notice for appointment of an arbitrator given by the other party provides justification to the other party for taking action under subsection (2) of Section 8 of the Act and then it is the court which assumes jurisdiction to appoint an arbitrator as held by the High Court of Orissa in Niranjan Swain v. State of Orissa.*
>
> *……..*
>
> *27. In the event of the appointment of an arbitrator and reference of disputes to him being void ab initio as totally*

incompetent or invalid the award shall be void and liable to be set aside dehors the provisions of Section 30 of the Act, in any appropriate proceedings when sought to be enforced or acted upon. This conclusion flows not only from the decided cases referred to hereinabove but also from several other cases which we proceed to notice.

……..

31. Three types of situations may emerge between the parties and then before the court. Firstly, an arbitration agreement, under examination from the point of view of its enforceability, may be one which expresses the parties' intention to have their disputes settled by arbitration by using clear and unambiguous language, then the parties and the court have no other choice but to treat the contract as binding and enforce it. Or, there may be an agreement suffering from such vagueness or uncertainty as is not capable of being construed at all by culling out the intention of the parties with certainty, even by reference to the provisions of the Arbitration Act, then it shall have to be held that there was no agreement between the parties in the eye of the law and the question of appointing an arbitrator or making a reference or disputes by reference to Sections 8, 9 and 20 shall not arise. Secondly, there may be an arbitrator or arbitrators named, or the authority may be named who shall appoint an arbitrator, then the parties have already

been ad idem on the real identity of the arbitrator as appointed by them beforehand; the consent is already spelled out and binds the parties and the court. All that may remain to be done in the event of an occasion arising for the purpose, is to have the agreement filed in the court and seek an order of reference to the arbitrator appointed by the parties. Thirdly, if the arbitrator is not named and the authority who would appoint the arbitrator is also not specified, the appointment and reference shall be to a sole arbitrator unless a different intention is expressly spelt out. The appointment and reference — both shall be by the consent of the parties. Where the parties do not agree, the court steps in and assumes jurisdiction to make an appointment, also to make a reference, subject to the jurisdiction of the court being invoked in that regard. We hasten to add that mere inaction by a party called upon by the other one to act does not lead to an inference as to implied consent or acquiescence being drawn. ***The appellant not responding to the respondent's proposal for joining in the appointment of a sole arbitrator named by him could not be construed as consent and the only option open to the respondent was to have invoked the jurisdiction of court for appointment of an arbitrator and an order of reference of disputes to him.*** *It is the court which only could have compelled the appellant to join in the proceedings."*

48. Further, recently a co-ordinate bench of this Court in ***M/S Supreme Infrastructure India Limited v. Freyssinet Memard India Pvt. Limited*** in ***O.M.P (COMM.) 395/2024*** held:-

> *"22. It needs to be emphasised that present case relates to a period prior to amendment of Section 12(1) of the 1996 Act since the amendment came into force by Section 8(i) of the Arbitration and Conciliation (Amendment) Act, 2015. However, this would make no difference as even prior to the amendment of 1996 Act, the Supreme Court had clearly held that the very essence of the arbitral proceedings is consensus ad idem and therefore, there was no question of arbitration being conducted by an Arbitrator appointed by one party without the consent of the other. This issue came up before this Court in Vineet Dujodwala (supra), where the Court was dealing with a petition under Section 34 of the 1996 Act and one of the grounds urged was the unilateral appointment of the Arbitrator. Relying on the earlier judgments of the Supreme Court, Court held that the appointment of the Arbitrator being unilateral, this singular factor, without reference to any other infirmity, was sufficient to vitiate the award and I quote:-*
>
> > *"Re. unilateral appointment of the learned Arbitrator*
> >
> > *20. Perhaps the most damaging defect in the entire process is the fact that the appointment of the learned arbitrator was unilateral. A unilateral appointment, in*

an arbitral proceeding, is completely impermissible in law.

21. This is the position that has existed even prior to the amendment of the 1996 Act. The Supreme Court has, even in its decisions prior to the said amendment, clearly held that the very essence of arbitral proceedings is consensus ad idem and that, therefore, there can be no question of an arbitration by an arbitrator appointed by one of the parties without the consent of the other. One may refer, in this context, to the following passage from Dharma Prathishthanam v. Madhok Construction (P) Ltd.:

> *"14. In Thawardas Pherumal v. Union of India 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."

(emphasis in original)

15. A Constitution Bench held in Waverly Jute Mills Co. Ltd. v. Raymon and Co. (India) (P) Ltd. that:

"[A]n 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 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)

22. Admittedly, the appointment of the arbitrator in the present case was unilateral. That single factor, even without reference to any other infirmity, is sufficient to vitiate the award."

*23. In this context, I may also refer to an order of the same Bench in **M/s. ABL Biotechnologies Ltd. (supra)**, where the Court reiterated that it was settled by the judgment of the Supreme Court in **Dharma Prathishthanam (supra)**, which was followed by this Court in **S.K. Builders v. CLS Construction Pvt. Ltd., 2024 SCC OnLine Del 5498**, that even in respect of arbitrations which commenced prior to introduction of Section 12(5) of the 1996 Act, Arbitrators could not be unilaterally appointed and any arbitration by a unilaterally appointed Arbitrator would be a nullity ab initio. Therefore, even on this score, the impugned award cannot be upheld.*

……..

*25. The matter can be seen from another angle. Assuming for the sake of argument, notice sent by the Respondent invoking arbitration under Section 21 of the 1996 Act was delivered to the Petitioner and it was the Petitioner, which did not respond to the notice. **Even in this circumstance, the only option open to the Respondent was to have invoked the***

jurisdiction of the Court for appointment of an Arbitrator and reference of the disputes. It is settled that if one party to the arbitration agreement does not consent for an appointment of the Arbitrator and/or there is no response from the recipient of the notice under Section 21 of the 1996 Act, the sender invoking the arbitration agreement can only fall back on the Court appointing the Arbitrator. *The underlying principle is 'party autonomy' and 'appointment of an impartial and independent Arbitrator', both of which are the foundations of the arbitration regime……..*

26. This Court in Lt. Col. H.S. Bedi (Retd) (supra), while adjudicating a petition under Section 34 of the 1996 Act, relying on the judgment in Dharma Prathishthanam (supra), held that ***Arbitrator can only be appointed with the consent of both the parties and any unilateral appointment would be void and that mere inaction by a party called upon by the other one to act, cannot lead to an inference as to implied consent or acquiescence of such party to such appointment of the Arbitrator.*** *Holding that the appointment of the Arbitrator and reference of the disputes to him was void ab initio, the Court set aside the impugned award. Mr. Mohan is thus right in his contention that assuming that Petitioner did not respond to the Section 21 notice after receipt, the only*

option with the Respondent was to invoke the jurisdiction of the Court under Section 11 for appointment of the Arbitrator and reference of disputes.

49. Thus, the law is settled with regard to the unilateral appointment of an Arbitrator.

50. The Arbitrator appointed unilaterally is *void ab initio* and any proceedings carried out by the Arbitrator unilaterally appointed area nullity.

51. In the order of 16.12.2015, while disallowing the objections, and upholding its jurisdiction, the arbitrator held that:

    a) The petitioner acquiesced in the proceedings and waived its rights to challenge the appointment of the arbitrator,
    b) Raised no objection within 15 days of becoming aware of the constitution of the Arbitral Tribunal (Section 13),
    c) No application under Section 16 was made as the petitioner had only filed an affidavit objecting to the appointment of the arbitrator,
    d) Petitioner should have filed a petition under Section 11 if they had an objection to the constitution of the arbitral tribunal,
    e) In the closing arguments, BF Infrastructure acceded to the fact that the arbitral tribunal was duly constituted.

52. The above observations are totally contrary to law, as there is no concept of deemed consent. Valuable rights of neutrality, impartiality (hallmark of the 1996 Act) are attached to the process of appointment of

an arbitrator. In the absence of an agreement between the parties, consent of another party to appointment of an arbitrator cannot be taken in a light and a casual manner.

53. Express consent is *sine qua non* while appointing an arbitrator under the 1996, Act. In the absence of the same, the appointment of an arbitrator will be unilateral and thus null and void. The Division Bench of this Court in the case of ***Envisage v. Sak Buildtech (P) Ltd., 2024 SCC OnLine Del 1452*** has observed as under: -

> *"14. It is apparent from the plain reading of the aforesaid clause that the same does not contain any provision for the appointment of an arbitrator.* ***Thus, in any view, the arbitrator could only be appointed by the express consent of the parties. Absent any such consent, it was incumbent upon the appellant to file an appropriate application under Section 11 of the A&C Act for appointment of an arbitrator.*** *The appellant could, under no circumstances, proceed to unilaterally appoint an arbitrator."*

54. Additionally, Clause 20.4 of the SPA, reads as under; -

> "*20.4 If the parties are unable to resolve the Dispute by amicable negotiation within the time period referred to in clause 20.3,* ***the Dispute shall be submitted to Arbitration before a single arbitrator appointed in accordance with the Arbitration and Conciliation Act, 1996,*** *upon the request of either party Seat of arbitration shall be New Delhi, India.*

The language to be used in the arbitral proceedings shall be English. The award delivered in such Arbitration shall be final and binding upon the parties."

55. A perusal of the above clause shows that the provisions of the Arbitration and Conciliation Act, 1996 will be applicable to the appointment of the Arbitrator in the present dispute.

56. It can be observed that the appointment of the arbitrator was not *consensus ad idem* as provided under Section 11 of the 1996 Act. Consequently, in the absence of positive consent on part of BF Infrastructure Limited the appointment of arbitrator is unilateral and *ex facie* illegal.

57. Further, the fact that BF Infrastructure raised counterclaims to the tune of Rs. 51,28,423/- vide letter dated 23.12.2014 without disagreeing to the name of the suggested arbitrator does not hold good in law. Consent must be unambiguous and unequivocal. Mere silence or no response on part of BF Infrastructure cannot be equated with 'consent' mandated under the 1996 Act.

58. Failure on part of BF Infrastructure to act in pursuance to the cautionary note given in letter dated 15.12.2015 does not *ipso facto* lead to the conclusion that BF Infrastructure had given its consent to the appointment of the arbitrator.

59. Hence, non-traversing the suggestion of R1 in the notice dated 15.12.2014 is meaningless and does not amount to acquiescence/consent on part of BF Infrastructure.

60. In the present case, if BF Infrastructure was not consenting to the appointment of the Arbitrator, the only recourse available under the 1996 Act to R1 was to approach the Court by filing a petition under Section 11 of the Arbitration and Conciliation Act, 1996.Having not done that, the unilateral appointment of Mr. Hukam Chand Sukhija cannot be sustained.

61. The next question is that whether BF Infrastructure by not challenging the order passed under Section 16 and by participating in the arbitration proceedings - in framing of issues, leading evidence, examining and cross-examining the witnesses has acquiesced to the jurisdiction of the arbitrator.

62. I am of the view; mere participation in the arbitral proceedings would not make the appointment of the arbitrator legal. It is now settled law that when an application under Section 16 has been dismissed by the arbitral tribunal, no appeal for the same lies. Additionally, no remedy against a Section 16 dismissal order is also provided under Section 37 of the 1996 Act. It can only be challenged once the final award is passed under Section 34 of the 1996 Act. The same has been stated by the Hon'ble Supreme Court in the case of ***Deep Industries Limited v. Oil and Natural Gas Corporation Limited and Another (2020) 15 SCC 706***, wherein it was observed: -

> *"22. One other feature of this case is of some importance. As stated hereinabove, on 9-5-2018, a Section 16 application had been dismissed by the learned arbitrator in which*

substantially the same contention which found favour with the High Court was taken up. ***The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34****……."*

63. Further, a similar view was taken by a Co-ordinate Bench of this Court in ***IDFC First Bank Limited v. Hitachi MGRM Net Limited 2023 SCC OnLine Del 4052*** wherein it was observed: -

"21. The above provision makes it clear that an order passed under Section 16 is appealable if the plea raised is held to be maintainable and the arbitral proceedings are terminated. However, ***if the plea is rejected and the arbitral proceedings continue, no appeal is provided. Clearly, therefore, the intention is not to permit an appellate remedy in case the Arbitral Tribunal holds that it has jurisdiction to proceed with the reference. Further, an order under Section 16 which is not appealable under Section37 would, in the scheme of the Arbitration and Conciliation Act,1996 be liable to be challenged only once the final award is passed by invoking the terms of Section 34 of the Act****."*

64. The argument raised by R1 that BF Infrastructure did not take recourse under Section 11(6) or under Section 14 of the 1996 Act, after the arbitrator upheld his jurisdiction vide order dated 16.12.2015, to my

mind, does not hold merit. Section 11 of the 1996 Act, does not contemplate for the Court to sit in appeal against an earlier constituted arbitral tribunal. The court's scope under S.11 is limited only to *prima facie* ascertain the existence of a valid arbitration agreement.

65. Additionally, it is the case of R1 that the disputes should be referred to an arbitrator, thus an application under S.11 should have been filed by R1 and not BF Infrastructure. BF Infrastructure as a respondent could have challenged the jurisdiction of the tribunal under S.16 and thereafter under S.34 of the 1996 Act. The said course has been followed by BF Infrastructure Limited and Bharat Forge. The Hon'ble Supreme Court in the case of ***Interplay Between Arbitration Agreements under A&C Act, 1996 & Stamp Act 1899, In re, (2024) 6 SCC 1***, wherein it was held: -

> *"165. The legislature confined the scope of reference under Section 11(6-A) to the examination of the existence of an arbitration agreement. The use of the term "examination" in itself connotes that the scope of the power is limited to a prima facie determination. Since the Arbitration Act is a self-contained code, the requirement of "existence" of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In Duro Felguera132, this Court held that the Referral Courts only need to consider one aspect to determine the existence of an arbitration agreement - whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the*

disputes which have arisen between the parties to the agreement. Therefore, the scope of examination under Section 11(6-A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by Arbitral Tribunal under Section 16. We accordingly clarify the position of law laid down in Vidya Drolia in the context of Section 8 and Section 11 of the Arbitration Act."

166. The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. In jurisdictions such as India, which accept the doctrine of competence-competence, only prima facie proof of the existence of an arbitration agreement must be adduced before the Referral Court. The Referral Court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the Arbitral Tribunal.

This position of law can also be gauged from the plain language of the statute."

66. The reliance on ***Walter Bau (supra)*** and ***Perkins (supra)*** by R1 is misplaced as in both the cases the Hon'ble Supreme Court was of the view that in case appointment of the arbitrator is contrary to the terms of the agreement the parties are required to approach the court under S. 11(6) of the 1996 Act. Relying on the said judgments R1 should have approached the court under S.11 rather than unilaterally appointing the arbitrator.

67. Lastly, the contention of R1 that the arbitral award falls under International Commercial Arbitration and thus cannot be interfered with by this court ought to be rejected. Even if it is assumed that the arbitral award is a foreign award for the reasons noted above, I am of the clear view that the same is in contravention with principles of natural justice. The arbitrator appointed is unilateral, without the consent of BF Infrastructure Limited and hence is void. Reliance is placed on ***Ssyangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)(2019) 15 SCC 131,*** wherein it was observed as under: -

"34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders i.e. the fundamental policy of Indian law would be

relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco expansion has been done away with. In short, Western Geco, as explained in paras 28 and 29 of Associate Builders, would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. ***However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders***."

68. In view of the finding that the arbitrator is unilaterally appointed, the appointment is *void ab initio* and subsequently the proceedings conducted by the arbitrator are also a nullity. Hence, I need not dwell any further into merits/demerits of the controversy. Consequently, O.M.P (COMM.) 382/2019 and O.M.P (COMM.) 378/2019 are allowed and the impugned award dated 10.05.2019 is set aside.

O.M.P. (ENF.) (COMM.) 47/2024

69. Since the award dated 10.05.2019 has been set aside, the petition filed by the decree holder seeking enforcement of the said award dated

10.05.2019 in the case titled *Tarsem Jain v. BF Infrastructure Ltd. and Anr*. under section 36 of 1996 Act is dismissed.

JASMEET SINGH, J

MAY 26th, 2025
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Click here to check corrigendum, if any