

IN THE MATTER OF:

MOHD. SALEEM KHAN

.....PETITIONER

VERSUS

MS. ANISHA KHAN AND ANR

.....RESPONDENTS

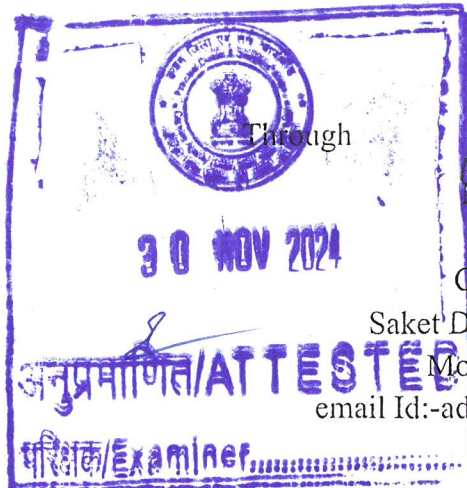
MEMO OF PARTIES

1. MOHD. SALEEM KHAN
S/o Mohd. Maqbool Khan
R/o F-38, Lajpat Nagar, Part-1
Ground Floor , New Delhi-110024 ... PETITIONER

Versus

1. MS. ANISHA KHAN
R/o A- 64, Second Floor
Lajpat Nagar -II
New Delhi-110024 ...RESPONDENT No.1
2. Liyakat Khan
S/o Isreal Khan
R/o 666-667/9
Prem Gali, Bhola Nagar
Kotla Mubarakpur
NewDelhi-110003 ...RESPONDENT No.2
3. SMS MEDIA
Partnership Firm
F-38 Lajpat Nagar-I ...RESPONDENT No.3

New Delhi
Dated: 23.12.2020



Manish Rajput
PETITIONER
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Nitin Bajaj and Manish Rajput
Advocates
Ch.No.347, Saket Court Complex
Saket District Court, New Delhi-110017
Mob No.:9999620990, 903208181
email Id:-advocatemanishrajput@gmail.com

IN THE COURT OF SH.RAJ KUMAR TRIPATHI:
DISTRICT JUDGE (COMMERCIAL COURT)-08
SOUTH-EAST DISTRICT, SAKET COURTS, NEW DELHI

OMP (Comm.) No.02/2021
(Mohd. Saleem Khan vs. Anisha Khan & Others)
CNR No. DLSE01-000172-2021

Mohd. Saleem Khan
S/o Mohd. Maqbool Khan,
R/o F-38, Lajpat Nagar, Part-1,
Ground Floor, New Delhi-110 024.

.....*Petitioner*
Through: Mr. Anuj Aggarwal, advocate

Versus

1. Ms. Anisha Khan
R/o A-64, Second Floor,
Lajpat Nagar-II,
New Delhi-110 024.

.....*Respondent no.1*

2. Mr. Liyakat Khan
S/o Mr. Isreal Khan
R/o 666-667/9,
Prem Gali, Bhola Nagar,
Kotla Mubarakpur, New Delhi-110 003.

.....*Respondent no.2*

3. SMS Media (Partnership Firm)
F-38, Lajpat Nagar-I, New Delhi.

.....*Respondent no.3*

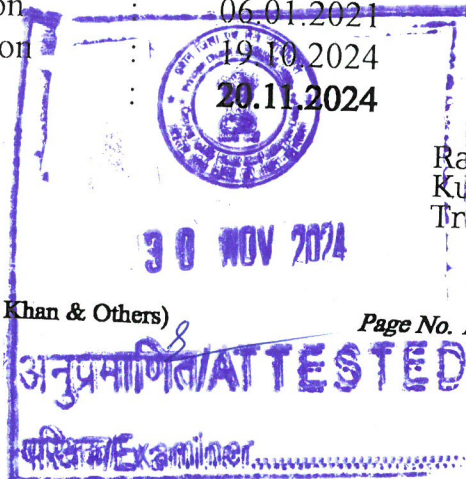
.....*Respondents*
Through:- Mr. Imran Ali
along with Ms. Aanchal Bumb, advocates

Date of filing of petition :
Arguments concluded on :
Date of Judgment :

06.01.2021

19.10.2024

20.11.2024



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अनुप्रमाणित/ATTESTED

परिष्ठा/Examiner

JUDGMENT

1.1 By way of present petition filed u/s 34 of The Arbitration and Conciliation Act, 1996 (in short 'The Act'), petitioner seeks to set aside the arbitral award dated 08.01.2020 passed by learned Sole Arbitrator Mr. Mohd. Rashid.

Brief facts of petitioner's case

2.1 Petitioner and respondents no.1 and 2 are the partners of respondent no.3 (partnership firm) as per Partnership Deed dated 01.10.2017 and 05.04.2018.

2.2 Petitioner was inducted as a salaried partner in respondent no.3 firm on 01.10.2017 along with profit sharing ratio of 33%. Respondents no.1 and 2 were also partners of respondent no.3. On 01.04.2018, amended Partnership Deed was made. According to the same, petitioner's amended profit sharing ratio was 30%.

2.3 As per petitioner, he was receiving salary on monthly basis after deduction of TDS. His salary was additional to profit and loss sharing ratio. As per the documents, year ended 31.03.2019, his account was credited with salary amounting to Rs.11,32,623/- after deducting TDS and the profit earned during the year i.e. Rs.1,23,777/-. Further, as per the current account details for the year ended 31.03.2019, petitioner was under the liability to the tune of Rs.83,448/- towards the partnership firm.

2.4 Petitioner alleged that dispute arose in September, 2019, when he found his blank signed cheques and blank signed papers missing. He lodged NCR (Annexure-P4) dated 05.09.2019 regarding the same. He received SMS from his bank that one of his missing cheques was presented for clearance

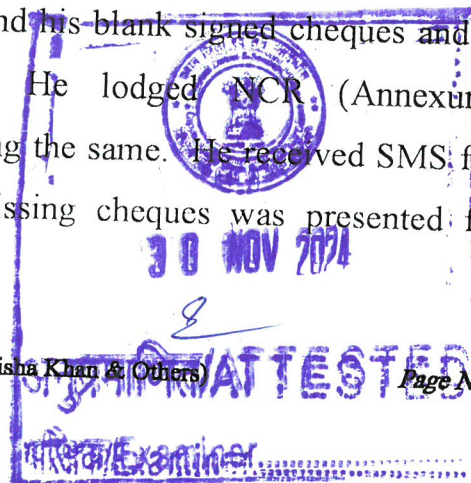
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amounting to Rs.30,00,000/- and the said cheque was dishonoured due to insufficient fund. Then petitioner filed complaint dated 11.09.2019 (Annexure-P5-colly.) before the bank and requested to stop payment of the same in future.

2.5 Petitioner further alleged that as the said nefarious plan to harass him failed, defendants opted for initiating arbitration proceedings against him just to grab handsome money with ulterior motive by imposing false allegations against him.

2.6 Petitioner was served with undated legal notice (Annexure-P6) u/s 21 of The Act sent by respondent no.1 through her counsel apprising about appointment of Arbitrator in accordance of Clause-16 of The Partnership Deed dated 05.04.2018. The said notice was duly replied by plaintiff by objecting unilateral appointment of Sole Arbitrator without following due process of law as mentioned in Partnership Deed dated 05.04.2018.

2.7 Petitioner alleged that the impugned award dated 08.01.2020 is contrary to the provision of The Act as well as Indian Partnership Act because the appointment of Arbitrator itself is done arbitrarily and unlawfully without following the due process of law.

2.8 Petitioner filed a petition u/s 14 and 15 of The Act before the court challenging the appointment of Sole Arbitrator. Notice of application was served in advance to respondents on 07.01.2020. However, the Sole Arbitrator has passed the impugned award in back date in collusion with respondents. It is alleged that, the stamp paper amounting to Rs.2,500/- affixed on the award was purchased on 10.01.2020. In view of subsequent

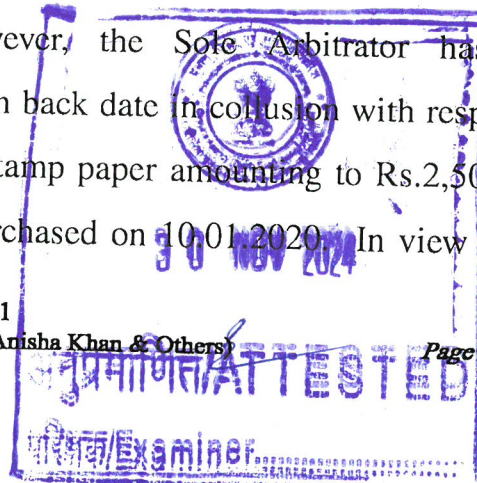
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developments, the said petition was withdrawn on 23.12.2020 on technical flaw with liberty to file fresh petition before appropriate forum.

2.9 Aggrieved by the arbitral award dated 01.10.2020, petitioner has filed the present petition.

3.1 Learned counsel for petitioner submitted that the unilateral appointment of the Sole Arbitrator by the respondent/claimant Ms. Anisha Khan is illegal and therefore, same is liable to be set aside. There was no clause for making appointment of a Sole Arbitrator in the Partnership Deed dated 21.07.2011, 01.10.2017 and 05.04.2018. In the Partnership Deed dated 01.10.2017, the majority shareholders had the right to make an appointment of Arbitrator. Petitioner Mr. Salim Khan and respondent no.2 Mr. Liyakat Khan are/were majority shareholders in the said Partnership Deed.

3.2 He further argued that there was no clause for making appointment of a Sole Arbitrator and the appointment of Arbitrator was to be done in accordance with the provisions of The Act. As per last and effective partnership Deed dated 05.04.2018, respondent no.1 Ms. Anisha Khan had no power to appoint the Sole Arbitrator. As per Partnership Deed dated 01.10.2017, it was petitioner and respondent no.2 (Mr. Liyakat Khan), who were the major shareholders and who could have together made appointment of the Arbitrator.

3.3 It is submitted that no interested party can make appointment of a Sole Arbitrator. Since, the appointment of Arbitrator is illegal, it can be challenged at any stage of litigation.

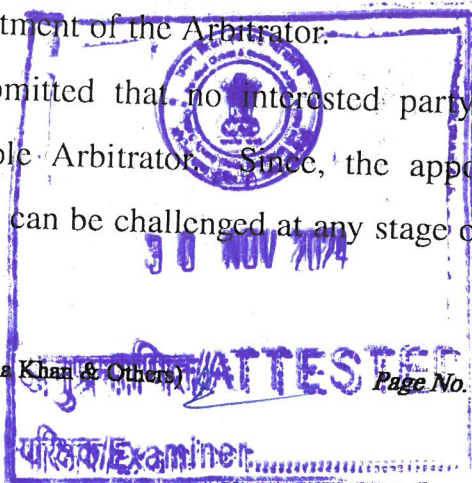
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The award dated 08.01.2020 passed by the Sole Arbitrator is *void ab initio*. The impugned arbitral award dated 08.01.2020 is printed on a stamp paper purchased on 10.01.2020. This proves that Sole Arbitrator was biased against the petitioner and acted as an agent of the respondents. It is prayed to allow the petition and set aside the impugned arbitral award passed by learned Sole Arbitrator.

3.4 *Per contra*, learned counsel for respondents submitted that the captioned petition filed by petitioner is frivolous and same should be dismissed on *inter alia* the following grounds:-

- a. There was an arbitration clause in the agreement;
- b. The learned Arbitrator was appointed as per the agreement following the due process of law; and
- c. Petitioner herein, intentionally with complete knowledge of the consequences, did not appear before the learned Arbitrator, thus, waiving his rights u/s 4 of The Act.

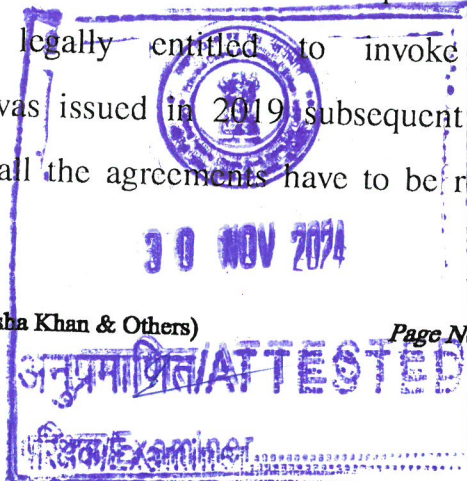
3.5 Referring to agreement dated 04.10.2017 and subsequent agreement dated 05.04.2018, counsel for respondents submitted that the agreement dated 05.04.2018 supersedes the prior agreement dated 04.10.2017 in terms of the amended arbitration clause. Even otherwise, as on the date of dispute, the respondent (who appointed the Arbitrator) had 40% share, whereas, petitioner only had 30% share in the partnership. Thus, respondents were legally entitled to invoke arbitration. Arbitration notice was issued in 2019 subsequent to both the agreements. Thus, all the agreements have to be read together.

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Reliance is placed on *M/s KGPS Mechanical Pvt. Ltd. v. Cinda Engineering & Construction Pvt. Ltd.*, ARB.P. 143/2023

3.6 He further submitted that the Arbitrator was appointed as per the agreement between the parties and petitioner was duly informed of the said appointment. The contention of petitioner of placing reliance on *Perkins Eastman Architects DPC & Another v. HSCC (India) Ltd.* (2020) 20 SCC 760 contending the appointment of Sole Arbitrator to be illegal is invalid. Firstly, the Arbitrator was appointed prior to the judgment of Hon'ble Apex Court in *Perkins case (supra)*. Secondly, the said argument cannot be raised for the first time at the stage of proceedings u/s 34 of The Act. The reliance on Perkins is nullified by Delhi High Court judgment passed in *Kanodia Infratech Ltd. v. Dalmia Cement (Bharat) Ltd.* OMP (COMM) 297/2021.

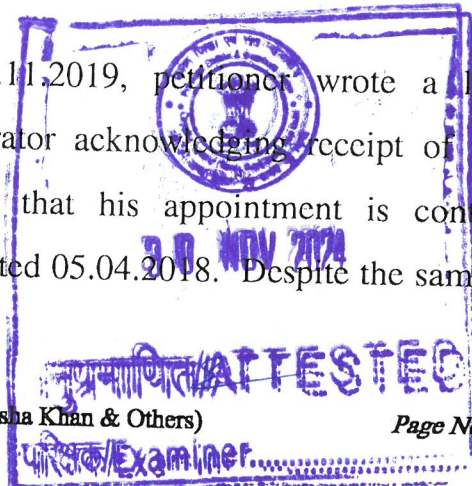
3.7 He further argued that a legal notice was sent to petitioner invoking arbitration. On 19.09.2019, a notice u/s 12 (1) and 23 of The Act was issued and duly served upon all the parties vide which parties were directed to appear before the Tribunal on 28.09.2019. Copy of order dated 28.09.2019 was also sent to petitioner via speed post, however, he again deliberately chose not to appear on 12.10.2019 and 16.11.2019 and thus, was proceeded *ex parte*.

3.8 On 08.11.2019, petitioner wrote a letter to the learned Sole Arbitrator acknowledging receipt of statement of claim and alleging that his appointment is contrary to the Partnership Deed dated 05.04.2018. Despite the same, he did not

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appear and therefore, the learned Arbitrator was constrained to proceed *ex parte*. Thus, it is clear that petitioner was well aware of the arbitration proceedings initiated against him and deliberately chose not to appear before the Arbitral Tribunal.

3.9 It is submitted that petitioner neither challenged the appointment of learned Arbitrator within fifteen days of becoming aware of the constitution of the Tribunal as stipulated u/s 13 (2) of The Act nor same were raised before the learned Arbitral Tribunal. Thus, he has waived his right to object as per section 4 of The Act. He relied upon *Quippo Construction Equipment Ltd. v. Janardan Nirman Private Limited Civil Appal No.2378 of 2020* and *Arjun Mall Retail Holdings Pvt. Ltd. & Ors. v. Gunece IC, FAO (Comm) 31/2021*.

3.10 Learned counsel for respondents submitted that the entire petition is bereft of any particulars or grounds on the basis of which a detailed and reasoned award that has been passed can be interfered with. He prayed to dismiss the petition.

4.1 I have considered the rival submissions of both the parties and perused the material on record.

4.2 For ease of reference, the relevant clause of agreement dated 04.10.2017 and subsequent agreement dated 05.04.2018 pertaining to arbitration clause is reproduced hereunder for ready reference:-

"Clause-18 of agreement dated 04.10.2017 reads as under:-
That all the disputes or differences arising out of it and connected with the Partnership shall be referred to the Arbitrator in accordance with The Indian Arbitration Act. The majority shareholder(s) shall have sole right to appoint

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an Arbitrator and refer the dispute to arbitration.”

4.3 The Partnership Deed dated 05.04.2018 categorically provides that this deed is supplemental to the Deed of Partnership dated 01.10.2017 in which new partners have entered into the partnership with the same object. It is mentioned in Clause-16 of Partnership Deed dated 05.04.2018, “that all the disputes or differences arising out of it and connected with the partnership shall be referred to the Arbitrator in accordance with The Indian Arbitration Act.”

4.4 In the case in hand, the Sole Arbitrator was unilaterally appointed by respondent no.1 Ms. Anisha Khan to adjudicate the dispute between the parties. In the Partnership Deed dated 01.10.2017, the majority shareholders had the right to make an appointment of Arbitrator. In the said Partnership Deed, petitioner and respondent no.2 Mr. Liykat Khan were the majority shareholders. Therefore, only they could have together made appointment of an Arbitrator. Respondent no.1 Ms. Anisha Khan did not have power and authority to appoint the Sole Arbitrator as per Partnership Deed dated 01.10.2017.

4.5 So far as, Partnership Deed dated 05.04.2018 is concerned, admittedly, there was no clause for making appointment of a Sole Arbitrator. The appointment of Arbitrator was to be done in accordance with The Arbitration Act. Thus, respondent no.1 Ms. Anisha Khan did not have power to appoint the Sole Arbitrator even as per Partnership Deed dated 05.04.2018. Accordingly, unilateral appointment of the Sole

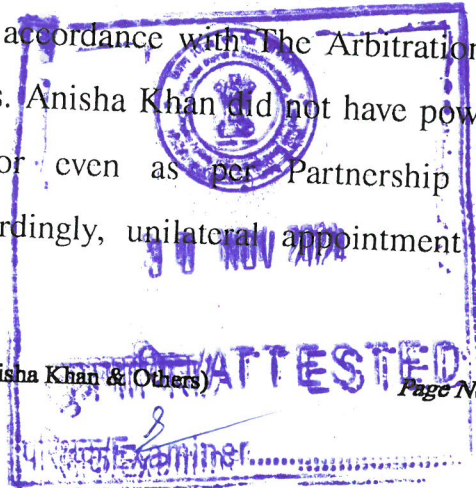
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Arbitrator by respondent no.1 is illegal and *void ab initio*.

4.6 It is well settled that appointment of an Arbitrator made unilaterally by one of the parties is *de jure* untenable (*Perkin's case supra*). An arbitral award passed by an Arbitrator unilaterally appointed by a party is a nullity and thus, cannot be enforced. Reliance is placed upon ***Kotak Mahindra Bank Ltd. vs. Narender Kumar Prajapat*** 2023 SCC OnLine Del. 3248.

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

"21. The primordial question that falls for consideration before this Court is whether the impugned Awards are liable to be set aside on the ground that the learned Arbitrator was appointed unilaterally by the Respondents and was thus ineligible by virtue of Section 12 of the 1996 Act as well as the law laid down by the Supreme Court, to conduct the arbitral proceedings and render the impugned Awards.

22. Arbitration is an alternate dispute resolution mechanism chosen by the parties to a contract incorporating the Arbitration Agreement, wherein a third party is chosen and appointed to resolve the disputes and which is why Arbitrators are commonly referred to as creatures of a contract. The ethos and first principle on which the arbitration mechanism functions is party autonomy i.e. freedom to choose an Arbitrator acceptable to both parties to the agreement, embedded in the principle of natural justice that 'no man can be a judge of his own cause' i.e. '*Nemo judex in causa sua*'.

23. In its landmark judgment in Perkins (supra), the Supreme Court crystallized the position in law that unilateral appointment of the Arbitrator will be vitiated under Section 12(5) of the 1996 Act as it hits the principle of autonomy.

38. This gets me to the next plank of argument of the Respondents that challenge to the impugned Awards should not be entertained in a petition under Section 34 of the 1996 Act, on the ground of alleged ineligibility attached to the

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अनुमानित/ATTESTED
परिष्कार/Examiner.....

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

39. From the aforesaid judgment, it is clear that the ineligibility of the Arbitrator goes to the root of the jurisdiction and vitiates the award. Such is the threshold of this disability that in a recent judgment in Kotak Mahindra Bank Ltd. (supra), the Division Bench of this Court had interfered at the stage of execution of the arbitral award and upheld the order of the learned Commercial Court, holding that an award rendered by a person who is ineligible to act as an Arbitrator by virtue of Section 12(5) is a nullity and cannot be enforced. In view of these judgments, in my considered view, the impugned awards cannot be sustained in law, solely on the ground of ineligibility of the learned Arbitrator and are accordingly set aside."

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

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

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

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

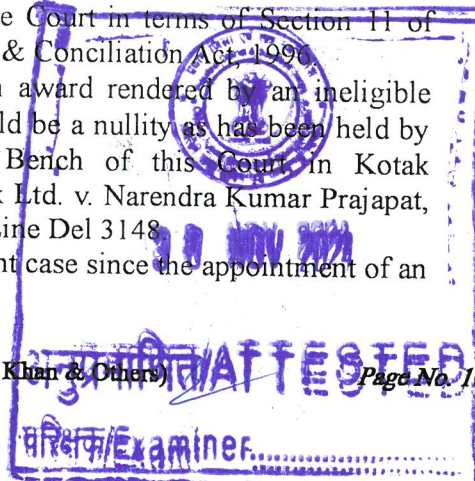
11. In the instant case since the appointment of an

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Arbitral Tribunal was unilateral and without recourse to Court, the Award rendered by the Arbitral Tribunal would also be a nullity. The Trial Court has clearly erred in not appreciating that the appointment was unilateral and consequently, the Award was a nullity."

4.9 In the instant case, the Arbitral Tribunal was appointed by respondent no.1 unilaterally and without recourse to the court. Therefore, the award rendered by the Arbitral Tribunal is nullity. Accordingly, same is liable to be set aside as being wholly without jurisdiction.

4.10 The next contention of respondent is that petitioner neither challenged the appointment of learned Arbitrator within 15 days of becoming aware of the constitution of the Tribunal as stipulated u/s 13 (2) of The Act nor he ever raised the said contention before the Arbitral Tribunal and thus, he has waived his right to object as per section 4 of The Act. On the other hand, learned counsel for petitioner submitted that since the appointment of Arbitrator is illegal, it can be challenged at any stage of litigation. He further submitted that the award dated 08.01.2020 passed by learned Sole Arbitrator is *void ab initio*.

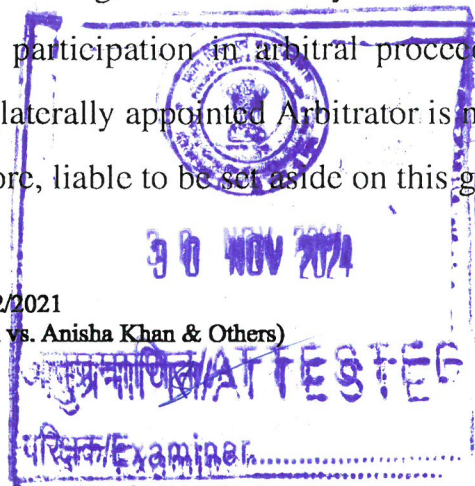
4.11 In the case of *Bihar State Backward Classes Finance and Development Corporation v. National Backward Classes Finance and Development Corporation & Others* MANU/DE/1960/2014, it was held that the waiver must be express and in writing. No waiver by conduct is to be inferred from a party's participation in arbitral proceedings. An award passed by a unilaterally appointed Arbitrator is nullity in law. The award is therefore, liable to be set aside on this ground alone.

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4.12 The 2015 Amendment in section 12 (5) of The Act provides for a specific waiver i.e. (a) an express consent in writing and (b) the consent must be obtained after the dispute has arisen. In the case in hand, petitioner has never given his consent in writing for appointment of a Sole Arbitrator by respondent no.1. Rather it is seen from the record of the case that petitioner has been raising the objections for unilateral appointment of a Sole Arbitrator by respondent no.1 since the very beginning of invocation of arbitration clause and appointment of Arbitrator by her. Thus, it cannot be said that petitioner has waived his right to object for appointment of Arbitrator as per section 4 of The Act.

4.13 In the case of *Telecommunication Consultants India Ltd. v. Shivaa Trading*, OMP (COMM) 311/2022, Hon'ble Delhi High Court held that "*there also cannot be any cavil with the proposition of law, that a defect of jurisdiction, which renders a decision void, can be challenged at any stage, since such defect strikes at the very foundation of the power of the Court or Tribunal to decide a dispute.*"

4.14 In the case of *Supreme Infrastructure India Ltd. v. Central Public Works Department* MANU/DE/6024/2024, it was held by Hon'ble Delhi High Court that the objections to the appointment of the Arbitrator can be taken at any stage and even orally.

4.15 In view of above and as no such waiver was granted by petitioner to the appointment of Arbitrator in the present case, in my view, petitioner is entitled to challenge the jurisdiction of the Arbitrator in the proceedings u/s 34 of The Act.

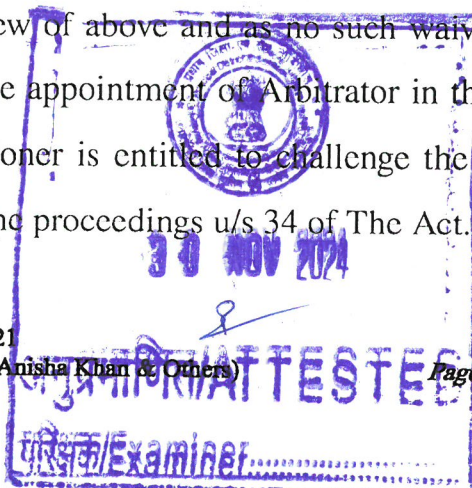
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4.16 For the foregoing reasons and discussions, the impugned arbitral award dated 08.01.2020 passed by learned Sole Arbitrator is set aside.

5.1 Parties are left to bear their own cost.

6.1 The petition filed by petitioner is hereby allowed and disposed off accordingly.

7.1 **File be consigned to Record Room.**

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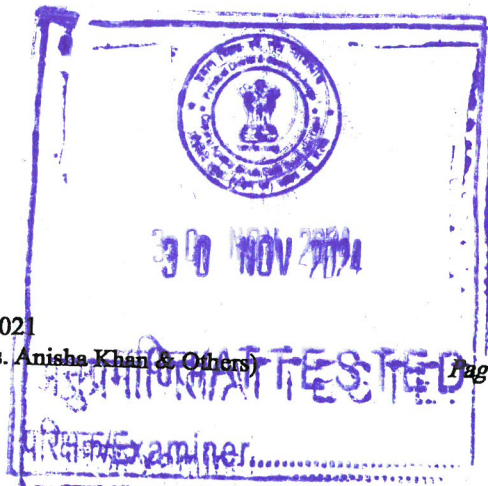
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(RAJ KUMAR TRIPATHI)

District Judge (Commercial Court)-08,
South-East District, Saket Courts,
New Delhi





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OMP (COMM.) 2/21
Mohd. Saleem Khan Vs. Anisha Khan & Ors.

Proceedings conducted through Hybrid Mode

20.11.2024

Present: Mr. Narendra Pratap, proxy counsel for Mr. Anuj Aggarwal
counsel for petitioner through VC.
Mr. M.Z. Khan, proxy counsel for Mr. Imran Ali counsel for
respondents.

1. Vide separate judgment of even date, the petition filed by petitioner is allowed. The impugned arbitral award dated 08.01.2020 is set aside.
2. Parties are left to bear their own cost.
3. **File be consigned to Record Room.**

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(Raj Kumar Tripathi)
District Judge (Commercial Court-08)
SE/Saket/New Delhi/20.11.2024 (BR)

