

Mukesh Agarwal vs M/S. Fiitjee Ltd on 19 May, 2023

IN THE COURT OF SH. SANJEEV AGGARWAL,
DISTRICT JUDGE (COMMERCIAL)-03, SOUTH,
SAKET COURTS, NEW DELHI

OMP (COMM)-28/2019
CNR NO. DLST010077742019

1. Mukesh Agarwal
S/o. Late Dr. S.R. Agarwal
R/o. C-210, Shekhar Enclave,
Kanadia Road,
Indore, Madhya Pradesh-452016

2. Ms. Srashti Agarwal
W/o. Mukesh Aggarwal
R/o. C-210, Shekhar Enclave,
Kanadia Road,
Indore, Madhya Pradesh-452016

...Petitioners

Versus

1. M/s. FIITJEE LTD.
29-A, Kalu Sarai, Sarvapriya Vihar
New Delhi-110016

2. Shri Subhash Tagra,
Sole Arbitrator
458, West Wing
Tis Hazari Courts, Delhi

...Respondents

Date of institution of petition : 25.11.2019
Date of reserving judgment : 11.05.2023
Date of pronouncement : 19.05.2023

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JUDGMENT

1. Vide this judgment, I shall dispose off the present petition / objections filed u/S. 34 of The Arbitration and Conciliation Act, 1996 (hereinafter referred to as an Act) by the petitioners against the arbitration award dated 05.04.2018, passed by Ld. Sole Arbitrator.

2. Brief facts which can be taken out from the relevant para(s) of the award dated 05.04.2018 are as under :

1. The claimant is a limited company registered under the Companies Act, New Delhi and is an Educational Institute engaged in teaching students preparing for IIT-JEE and other Engineering Entrance Examinations (hereinafter called "the company") Mr. Mukesh Kumar had joined the company as a Faculty in Physics Department on 16.11.2010 to serve the company for a minimum period of about three years w.e.f 16.11.2010 to 31.05.2014 as per the terms and conditions of the appointment letter and manual of service rules for he employees of the Company. The respondent no. 1 left the services of the claimant company abruptly in breach of the terms and conditions of the service manual and code of conduct on 23.05.2013. The respondent infringed and violated the terms and conditions of appointment letter and OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 2 of 32 manual of service rules of he company and abruptly left the services of the claimant company on 23.05.2013.

The dispute arose between the parties as the respondent did not pay the due amount and the same was referred to the undersigned under clause 26 of Manual of Service terms and conditions of the Company, as sole Arbitrator vide letter dated 13.06.2014.

2. It has been mentioned that the respondent has been mentioned that the respondent has joined the claimant company as Faculty in the department of Physics on 16.11.10. The respondent as per terms and conditions of the appointment letter and Manual of Service Rules for Employees of the Company, agreed to serve the company. The respondents had also signed joint declaration.

3. That on 23.05.2013, the respondent resigned from the service of the claimant and left the services of the claimant company in violation of the rules and regulations of service manual specially para 4. The claimant vide letter dated 28.04.2014 asked the respondent to fulfill his obligations and to resume his duties immediately and the company has invoked the Arbitration Clause as envisaged under Clause 26 of Salary Terms Conditions and appointed the OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 3 of 32 undersigned as Sole Arbitrator and filed a claim for recovery of Rs. 37,88,753/-.

It is stated that the respondent has committed willful and deliberate breach of agreement and the breach of contract started even prior to the leaving the claimant unauthorizedly on 23.05.2013.

4. That the summons/notices were sent to the respondents by Regd. AD. Notice was duly served on the respondents and the respondents had been appearing and participated in the proceedings through counsel.

5. That the respondents filed their replies-cum- counter claim to the statement of claim and had been represented by the counsel of the respondents.

The respondents have taken preliminary objections that the claim is without any cause of action. The claimant has concealed material facts. The salary terms and conditions are not the exclusive mode of this resolution as held by this Hon'ble High Court. It is further submitted that the claim is

based on forged documents. It is further stated that the appropriate remedy is to file a civil suit and not present arbitration and appointment of the arbitrator is also challenged. The claim has been filed to blackmail and to harass the respondent. The present claim is afterthought and the OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 4 of 32 same is frivolous. It is further stated that the documents were got executed under pressure and by misrepresentation and he respondent was assured that the same were mere formality and would not be enforced. It is further stated that the respondent has not left the claimant in contravention of service rules. It is further stated that no amount is due and the claimant is not entitled for the amount claimed. It is further stated that the claim is not maintainable as it involves question of facts and law and only civil court have the jurisdiction of the arbitral agreement is challenged. It is further alleged that the claim is not maintainable as the claimant has not approached this tribunal with clean hands and has concealed material facts. It is further alleged that the claim is an afterthought, it is respondent no.1 who has sent the legal notice for appointment of arbitrator for settlement of his dispute and it is the claimant after receiving the letter dated 11.08.14 sent by the respondent no. 1 created a false story in the reply dated 28.08.14 in order to avoid liability towards the respondent no.1. It is further respondent alleged that the claim is based on false and fabricated document which needs adjudication and therefore, this Forum has no jurisdiction. Jurisdiction of the arbitral tribunal OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 5 of 32 is challenged.

In parawise reply, para 1 is denied. It is stated that the claimant company is registered in M.P. and Chattisgarh and the address mentioned in the claim petition is incorrect. Para 2 and 3 are admitted. Para 4 is denied. It is denied that the respondent had left the services of the claimant abruptly. It is submitted that the respondent worked normally in the claimant company till 30.04.13 and performed his duties. IFS on 01.05.2013 respondent no. 1 received a notice stating that his work was not upto the mark and therefore, his salary by 25%. The respondent no. 1 was expecting a hike in the salary as he has been working on the same salary for three years and notice was a shock and insult to him. The respondent no. 1 protested the said notice and on 22.05.2013 the centre head relieved him and asked him to stop coming to work. It is further submitted that there was no allegation as mentioned in Section 7 of the service rules of the employees. It is further submitted that it is respondent no. 1 who has invoked the arbitration clause and the claimant has withheld a sum of Rs. 13,06,667/- plus interest @ 18% pa from the claimant and notice dated 11.08.14 was sent by the respondent no.1 through his counsel. It is stated that claimant company is liable to pay the above OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 6 of 32 said amount on various heads and when the respondent realized that the claimant is not willing to pay the above said amount only then he had asked to invoke the arbitration clause. The respondent has prayed that the claims of the claimant be dismissed as he is not liable to pay any amount to the claimant. It is further submitted that the arbitrator was appointed without consulting the respondent.

The respondent has filed counter claim for recovery under the following heads:

- i) Sincerity or benevolent funds Rs.4,55,631/-.
- ii) Salary for five months and seven days Rs. 7,19,566/-.

iii) Leave encashment for the year 2012-13 Rs. 1,17,488/-

iv) Leave travel encashment for the year 2012-13 Rs. 14,000/-

v) compensation towards mental tension and agony Rs.

20,00,000/-

Total Rs. 33,06,667/- plus interest @ 18% pa. However, respondent no. 2 has not claimed any amount in counter claim and no counter claim has been filed by respondent no. 2 and the respondent no. 2 has prayed for the dismissal of the claim of the claimant with cost.

Rejoinder was filed to the reply taking the OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 7 of 32 preliminary objections that the respondent has concealed true facts from this tribunal and has concocted a story in order to deny rightful claim of the claimant. IFS that the respondent has failed to substantiate his facts with relevant documents and evidence and therefore, reply of the respondent is liable to be rejected. The claimant has denied the preliminary objections taken by the respondent. It is denied by the claimant that there was any procedural mistake in filing the claim petition. It is stated that the arbitration clause is well defined and in furtherance of the same, the arbitration clause has been invoked. It is denied that the claim based on false and forged documents. It is stated that the respondent was provided with the copies of the documents well within advance alongwith appointment letter dated 28.10.2010 and respondent no. 1 joined the claimant after going through the documents. It is denied that the present proceedings are filed in order to avoid the court fee or the appointment of the arbitrator is illegal or against the principle of law. It is denied that the claimant is not approached the present tribunal with clean hands.

Reply to the legal notice contained the true facts. It is denied that he service rule manual was under

pressure or under misrepresentation. It is submitted OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 8 of 32 that respondent no. 1 joined the claimant at Delhi after going through the documents provided to him alongwith the appointment letter. It is denied that the amount of Rs.13,06,667/- plus interest is due or further wrong and denied that the claimant is liable to pay the amount of counter claim of Rs.33,06,667/-. It is further wrong and denied that the claim petition has been filed to avoid the payment to blackmail the respondent. It is denied that the claim requires adjudication by a civil court. It is reiterated that the Ld. Arbitrator is authorized to adjudicate by the present claim. The contents of the reply on merits are denied and those of contents of statement of claim are reiterated to be correct.

XXXX XXXX XXXX XXXX The respondent no. 1 has claimed a total sum of Rs. 33,06,667/- plus interest @ 18% pa towards:

i) Sincerity or benevolent funds Rs.4,55,631/-.

- ii) Salary for five months and seven days Rs. 7,19,566/-.
- iii) Leave encashment for the year 2012-13 Rs. 1,17,488/-
- iv) Leave travel encashment for the year 2012-13 Rs. 14,000/-
- v) compensation towards mental tension and agony Rs.

20,00,000/-

OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 9 of 32 I do not find any infirmity in the claim of the claimant company.

From the conspectus of the matter as discussed above, I hold that the claimant company is entitled to recover a sum of Rs. 32,38,753/- from the respondents as they are liable to indemnify the claimant company, jointly and severally.

The claimant has also claimed Rs.1 lac towards the legal expenses and the said claim of the claimant is not allowed as nothing has been proved on record that the claimant has incurred such expenses. The claimant has also claimed interest @ 18% pa. The undersigned is not inclined to allow the interest @ 18% pa. The interest is allowed @ 10% pa from the date of the award.

Hence, the respondent are liable to pay the aforesaid awarded amount to the claimant company alongwith interest @ 10% pa from the date of award. Besides above, the respondent is also liable to pay the cost of proceedings is also liable to pay the cost of proceedings which is quantified at Rs. 30,000/- only.

Award is awarded accordingly.

3. The said arbitration award has been questioned on the following main grounds :

OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 10 of 32 That the clauses 6(e), 6(g), 6(o), 9(b) and 26(a) of the Employment Agreement in question are unconscionable against the principles of natural justice and are barred by Section(s) 23 & 28 of the Contract Act and are against the public policy. It is further stated that the petitioner no. 1 had not acted in breach of the employment agreement which was signed at the time of joining the services with the respondent, in fact it is the respondent no. 1, who relieved the petitioner no. 1 from the services in contravention of the employment agreement. It is also stated that there is no valid arbitration agreement between the parties and the appointment of the sole arbitrator of its own choice by respondent unilaterally is against the principles of natural justice and of the The Arbitration and Conciliation Act, 1996.

It is also stated that there is no breach of contract by the petitioner, entitling the respondent no. 1 for recovering any money. It is further stated that the power of appointment of the Ld. Arbitrator is unilateral, as per clause 26A of the arbitration agreement. It is also stated that Ld. Arbitrator has acted in a biased manner and has not given equal opportunity to both the parties, therefore, it is stated that the impugned award is liable to be set aside.

4. Reply has been filed by the respondent no. 1 stating that the petition has been filed by the petitioners on the wrong interpretation of Section 74 of the Indian Contract Act. It is further stated as under :

That appellant claiming pre-estimated damages had to lead evidence to show the damages suffered and OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 11 of 32 Arbitrator had not given any finding to the effect that the pre-estimated damages in the form of double of the gross salary for the unexpired notice period / unexpired academic years is a genuine pre-estimate of the damages, which the Respondent had suffered after the Petitioner left the employment of the respondent Institute without serving the mandatory notice period.

Further in para 4 of the reply, it is stated as under :

The Petition is liable to be dismissed as a plain reading of Section 74 of the Indian Contract Act would exempt to prove actual damage and enable him to claim compensation inspite of his failure to prove the actual extent of the loss or damages provided of course he establishes the basic requirement for award of compensation viz, the fact that he has suffered sum loss or damage. The same is also in contravention of settled law in this regard.

It is also stated that there is nothing unconscionable in the terms of the employment agreement, as claimed by the petitioner. Further the petition is liable to be dismissed as it is beyond the scope of Section 34 of The Arbitration and Conciliation Act, 1996 and none of the grounds as stated in Section 34 of the Act are made up.

It is further stated in para 11 as under :

The Petition is liable to be dismissed as the terms and conditions of the service manual are conscionable.

OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 12 of 32 The terms and conditions incorporated in the service manual have been imposed keeping in mind the welfare of the students who aspirants of IIT. All the contentions raised by the Respondent has been duly answered by the Ld. Arbitrator while passing the impugned Award. It is submitted that the respondent is an institute preparing the students to enable them to qualify in the highly professional courses like IIT and

therefore, faculties are appointed only by way of rigorous selection process. Even after selection, selected candidate is made to go through the special training programs. It is submitted that keeping in view the interest of the students, even the process of leaving the Institute is also designed in the manner that it does not harm the students in any manner and the same is made known to the faculty even before joining the Appellant-Institute.

Regarding the grounds taken in the petition, it is denied that petitioner no. 1 had not acted in breach of employment agreement, which is signed at the time of joining service. It is denied that the petitioner no. 1 never left the job violating the terms of the service agreement or had not committed breach thereof. It is also denied that the sole arbitrator was appointed by the respondent unilaterally against the provisions of The Arbitration and Conciliation Act, 1996 or the same is invalid as per the settled law.

OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 13 of 32 It is stated that the award has been rightly passed by the Ld. Arbitrator taking all the relevant material after following due process of law. It is denied that the terms of the service agreement are unconscionable and are hit by Section 23 & 28 of the Indian Contract Act.

5. Ld. counsel for the petitioners has filed written submissions and also relied upon the following judgment(s) in support of his contentions :

- a) Vivek Rai Vs. Aakash Institute, OMP 561/2014;
- b) Score Information Technologies Limited Vs. GR Infra Projects Limited, OMP (T) (Comm). 59/2020;
- c) Alupro Building System Pvt. Ltd. Vs. Ozone Overseas Pvt. Ltd., OMP No. 3/2015;
- d) Perkins Eastman Architects DPC & Ors. HSCC (India) Ltd. Arbitration Application No. 32/2019;
- e) Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd., Appeal (Civil) 7419/2001;
- f) Pankaj Rastogi Vs. Fiitjee Ltd. & Anr., Arb. No. 344/2017;
- g) Prashant Jain Vs. Fiitjee Ltd. & Ors., Arb. No. 225/14 ;
- h) Hemant Kumar Vs. Fittjee Ltd. & Ors., CS No. 536/2015, New No. 17811/2016;
- i) D.N. Kochhar Vs. Fiitjee, Arb. No. 05/11;

j) Sanjiv Dutta Vs. Bikaji Maintenance Compine, OMP (Comm) No. 65/20.

6. On the other hand, Ld. counsel for respondent no.1 has relied upon the following judgment(s) in support of his contentions :

a) Kailash Nath Associates vs. Delhi Development Authority & Anr.;

b) Maula Bux Vs. Union of India, 1970 AIR 1955;

c) Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd., Appeal OMP (Comm) 28/2019 (CNR No. DLSTo10077742019) Page No. 14 of 32 (Civil) 7419/2001.

7. I have gone through the rival contentions.

8. The service agreement between the parties signed on 10.11.2010 which is in standard form is admitted, which is signed between M/s. Startford Academy Pvt. Ltd. (the predecessor-in-interest of present respondent no. 1). The relevant clauses 6(e), 6(g), 6(j), 6(o), 9(b) and 26 of the same are reproduced as under :

6(e) Corollary of clause 5 and 6(a) is that if in the last year of the contract period or extension thereof at Stratford, an employee does not submit his resignation by 30th Nov., it will be assumed that he/she is willing to continue for another term of three years subject to the conditions contained in this manual.

6(g) It is agreed and undertaken by you that the present service manual is meant to be complied with and the terms & conditions stated therein are towards compliance, to ensure continuity of coaching students, upholding Stratford tradition of high ethics & values, rather than committing breach of any of its terms. The surety is required to guarantee on you behalf for the compliance of terms & conditions of this contract. In addition to compliance, the surety is further required to ensure that in case of breach of terms & conditions of OMP (Comm) 28/2019 (CNR No. DLSTo10077742019) Page No. 15 of 32 the contract, you are liable to pay expenses & damages as stipulated herein above. It is made clear that at the time of signing of this manual the age of the surety should not be more than 50 years.

On your joining, you have to submit an undated cheque equivalent to 12 months gross salary as per the calculation of salary sheet, towards a part discharge of your liabilities towards damages as stated above in the relevant clauses.

In case of breach of contract, Stratford is mandated to encash this undated cheque. You and the surety both agree to authorize Stratford for the filling up of the date and further authorize to encash the said cheque in case of non compliance of the contract terms contained in this manual.

You and the surety are also jointly & severally liable to pay the total liability towards damages as specified in any of the relevant clauses mentioned above. The employee & the surety undertake to keep sufficient balance in the bank account on which the above mentioned cheque is drawn to ensure the encashment of the said cheque.

Cheque no. 371034 drawn on ING Vysya Bank Indore (Bank Name & Branch) Stratford is further authorized to take appropriate legal action without prejudice to their OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 16 of 32 rights to recover the amount by way of above specified undated cheque. Willful & intentional breach of this contract would attract liability upon the employee & the surety for compensatory & exemplary damages in addition to contractual liabilities mentioned above or under any other provision of this manual.

6(j) In the event of your default, non-compliance or willful breach of the contract or sudden termination of the contract and/or your leaving the institute without following the proper procedure, as laid down in this manual, and the employee's/surety's refusal to meet his/her/their obligation towards Stratford in letter and spirit of the service rules, and the matter becoming subjudice, the employee and the surety, jointly and severally, shall be responsible for the entire litigation expenses including arbitration proceedings, organizing hearing in the arbitration and other legal proceedings if any required to be initiated to facilitate arbitration proceedings. Needless to say, litigation expenses are subjective. However, such expenses cannot be less than Rs. 1000/- per hearing either before the court or before the arbitrator apart from the other expenses as elucidated above.

6(o) After leaving Stratford you agree not to compete in any manner directly or indirectly with Stratford nor OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 17 of 32 you can join any of Stratford's competitors for a period of at least one year after the date of expiry of your notice period in the city of your current posting & other postings held over the preceding 12 months from the date of leaving the organization.

9 (b) In case an employee leaves service in contravention to Rule 5 and 6 or any relevant rule or is dismissed from service on violation of Code of Conduct, he shall not be entitled to the amount of Employees Benevolent and Sincerity Fund.

26 (a) All disputes and differences of any nature with regard to the Stratford service manual and the interpretation & adjudication of clauses and claims respectively shall be referred to the Sole Arbitrator appointed by the company. The arbitration proceedings shall be conducted in accordance with the provisions of the Arbitration & Conciliation Act, 1996 and statutory modification thereof & rules made thereunder. The award of arbitrator shall be final & binding on both the parties. The award of the arbitrator shall be final & binding on every matter arising hereunder. It is further agreed that in spite of the fact that the Sole Arbitrator may be known to any of the

Directors or share holders and that he may have been dealing with the company or had occasion to deal with any matter of this agreement OMP (Comm) 28/2019 (CNR No. DLSTo10077742019) Page No. 18 of 32 shall not disqualify him. Even if the Arbitrator may have expressed opinion in similar matter earlier shall also not render him disqualified. The venue of the arbitration shall be Delhi/New Delhi only.

(b) Subject to 26 (a) hereinabove, the exclusive jurisdiction in the matter shall vest in Delhi/New Delhi Courts.

9. The Ld. Counsel for the petitioner has relied upon clause 26(a), whereby the Ld. Arbitrator was to be appointed by respondent no. 1 and has questioned the said appointment relying upon the judgment of Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd." decided on 26 November, 2019 in Arbitration Application No.32 of 2019, in which it has been held as under :

"16....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 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited(2017)8SCC377."

He has argued that the very power of appointment of the Ld. Arbitrator unilaterally with the respondent no. 1 is in direct conflict of the aforesaid judgment of the Hon'ble Supreme Court.

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10. On the other hand, Ld. Counsel for the respondent no. 1 has argued that the petitioner had very much participated in the arbitration proceedings by filing reply and counter claim before the Ld. Arbitrator, therefore, he having participated in the said proceedings cannot take the advantage of the said plea, as he deemed to have waived the said objection, which he should have taken u/S. 12(5) of the The Arbitration and Conciliation Act, 1996.

11. I have considered the said contention, in this regard, it has been held in the judgment relied upon by the Ld. Counsel for the petitioner in Score Information Technologies Limited Vs. GR Infra Projects Limited O.M.P.(T)(COMM) 59/2020 decided on 28.01.2021 as under :

25. The said view has also been followed by a Coordinate Bench of this Court. In M/s Omcon Infrastructure pvt. Ltd. v. Indiabulls Investment Advisors Limited: OMP(T)(COMM.) 35/2020, decided on 01.09.2020, the Court allowed the petition filed under Section 14 of the A&C Act and terminated the mandate of an Arbitrator who had been unilaterally appointed by a party. The Court following the decision of the Supreme Court in Perkins Eastman Architects DPC and Anr. v. HSCC (India) Limited (supra), held as under:-

"9.The ratio of the decision in Perkins Eastman Architects DPC & Anr. (supra) cannot be read in such a narrow manner as has been sought to be done by the learned Arbitrator. In my view, once the Managing Director of the Respondent Company was ineligible to appoint the arbitrator in the light of the decision in Perkins Eastman Architects DPC & Anr. (supra), the same would also bar the Company itself from unilaterally appointing the sole arbitrator."

26. After some arguments, Mr. Chandhok, learned counsel appearing for the respondent fairly conceded that in view of the decisions of the Supreme Court in TRF Limited v. Energo Engineering Projects OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 20 of 32 Limited (supra), Perkins Eastman Architects DPC and Anr. v. HSCC (India) Limited (supra) and the decision of this Court in Proddatur Cable TV Digi Services v. Citi Cable Network Limited (supra), it is no longer open for a company to unilaterally appoint an Arbitrator. However, he submitted that in the present case, the petitioner had agreed to the appointment of the learned Arbitrator and therefore, waived the applicability of Section 12(5) of the A&C Act. Therefore, it was not open for the petitioner to now challenge the appointment of the learned Arbitrator. He also referred to the minutes of the first meeting held before the Arbitral Tribunal on 07.01.2020, wherein the Arbitrator had recorded the statement made on behalf of the parties that they had no objection to the constitution of the Arbitral Tribunal.

27. Thus, the limited issue to be addressed is whether the petitioner has waived the applicability of Section 12(5) of the A&C Act.

28. Section 12(5) of the A&C Act reads as under:-

"12(5) 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 shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub- section by an express agreement in writing."

29. In terms of the proviso to Sub-section 12(5) of the A&C Act, the parties may waive the applicability of Section 12(5) of the Act. However, the said waiver has to be (i) subsequent to the disputes having arisen; and (ii) made by way of "an express agreement in writing".

30. Concededly, in this case, there is no written agreement between the parties, whereby the petitioner has agreed to waive the applicability of Section 12(5) of the A&C Act.

31. This Court is also unable to accept that the proceedings recorded by the Arbitrator would constitute such an express agreement in the facts of this case. The petitioner had pointed out that on that date, its representatives were not assisted by any counsel. It is also averred by the petitioner that the proceedings of the day, which are not signed by the parties, incorrectly record that the

petitioner had no objection for the appointment of the learned Arbitrator. The petitioner had OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 21 of 32 immediately on receipt of the notice of appointment of the learned Arbitrator, had objected to such appointment.

32. As noticed above, the petitioner had in its letter dated 23.12.2019, clearly stated that it had not submitted to the jurisdiction of the learned Sole Arbitrator. Although the petitioner had not specifically referred to its objection to the respondent unilaterally appointing the learned Arbitrator, it nonetheless, had expressed its opposition to the appointment of learned Arbitrator. Thereafter, the petitioner had objected to the appointment of the learned Arbitrator and contended that the respondent had appointed the Arbitrator as a dilatory tactic to withhold the payments due to the petitioner.

33. Thus, it is difficult to accept that the petitioner had not objected to the appointment of the learned Arbitrator. Subsequently, by an email dated 10.09.2020, the petitioner had expressly stated that the unilateral appointment of the Tribunal is contrary to the decision of the Supreme Court in Perkins Eastman Architects DPC and Anr. v. HSCC (India) Limited (supra).

12. The said judgment Score Information Technologies Limited Vs. GR Infra Projects Limited (supra) is squarely applicable to the facts of the present case, as the petitioner no. 2 in her reply and counter claim filed before the Ld. Arbitrator has stated in para 8 as under :

8. That the appointment of sole arbitrator of their own choice by the claimant without any consultation with or consent from the respondent is illegal and against the settled principle of law.

Therefore, it is not that the petitioner no. 2 had not specifically objected to the appointment of the arbitrator by the respondent no. 1 unilaterally, which objection she took in her reply cum counter claim filed before the Ld. Arbitrator. Same / ditto objection was also taken by the petitioner no. 1 in his reply in the counter claim filed before the Ld. Arbitrator. Therefore, it appears that OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 22 of 32 both the petitioners had objected to be appointment of the Ld. Arbitrator unilaterally by respondent no. 1.

13. Further Ld. Counsel for the petitioner has relied upon the judgment titled as Vivek Rai Vs. Aakash Institute O.M.P 561/2014 decided on 04.03.2015, wherein it has been held as under :

11. Turning to the merits of the Award, the Court finds that the learned Arbitrator has simply gone by the clauses in the agreement and even without scrutinising the calculation of the amount claimed by the Respondent, has awarded it in toto. The Court finds that this is a case where the Respondent is seeking to enforce terms and conditions of an agreement dated 1 st March 2012 which are on the face of it opposed to public policy and clearly hit by Sections 23 and 28 of the Contract Act, 1872. In particular, the Court would like to refer to the following clause in the agreement:

"7 (b) In the event an employee wishes to leave the services of Aakash Institute, Lucknow Centre He/She is required to give notice in writing giving clear 3 months time to Aakash Institute Lucknow Centre so that such period co-terminates with expiry of the academic session. The said notice is required to be delivered to the Centre Director/Centre Manager by Regd. AD post or hand delivered but duly acknowledged to be received so that there would be ambiguity regarding the contents of your notice and its serving upon Aakash Institute (Lucknow Centre). The notice for 3 months can be given only between 15 th November to 28th November in any year after completion of the initial period of three years. If any employee gives notice at any time other than specified, it will not be accepted and will be invalid as per the terms between the above mentioned period, it will be assumed he/she is going to complete the coming next session."

12. Clauses 7 (d), 7(e) and 7 (f) read as under:

"7(d) In case you are unable to adhere to the said mandatory notice period, you would be liable to pay to Aakash Institute (Lucknow Centre) a minimum pre-estimated & pre- determined damage to the tune of double the gross-salary for OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 23 of 32 the deficient notice period or the remaining period of the academic year/contract period of three years, whichever is higher e.g. if a person quits on 31st October of any given year after completion of three years, he/she will be required to pay $4 \times 2 \times Y$ rupees as damages to Aakash Institute (Lucknow Centre) (the value of Y will be gross monthly salary). Such liability would be automatically incurred once the breach is committed by the employee & no notice in this regard would be served upon you to claim the said pre- determined & pre- estimated damages. You would be severally liable to pay the same within (seven) days of your leaving. If Aakash Institute (Lucknow Centre) does not receive the payments within 7 days of leaving towards the damages as stated above, Aakash Institute (Lucknow Centre) shall have the right to recover the same along with interest @ Z p.a. through legal process ($Z = \text{PLR} + 3\%$;

where PLR is Prime Lending Rate of Aakash institute (Lucknow Centre) Bankers).

The above damages are not punitive but only a part compensation for the huge loss of face, reputation, brand equity, mind equity, future business losses due to your quitting without completing the academic year & leaving the students in a lurch. The damages are payable at the sole discretion of Centre Director of the Institute.

(e) After the expiry of the initial & minimum contract period, this contract will continue subject to clause 6(b) above for another term of 3 (three) years subject to the candidate being capable of rendering effective services.

(f) Corollary of clause (6) and 7(a) if in the last year of the contract period or extension thereof at Aakash Institute (Lucknow Centre), an employee does not

submit his resignation between 15th February to 28th February, it will be assumed that he/she is willing to continue his/her job for another term of three years subject to the conditions contained in this manual."

13. Apart from the above, in Clause 7 (g) it is mandated as under:

"You will submit three undated blank cheques in favour of OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 24 of 32 Aakash Institute.

You hereby authorize Aakash Institute (Lucknow Centre) for the filling up of the date and amount on the cheques and thereafter to encash the said cheques. In case of non-compliance of the contract terms contained in this manual, the cheques become payable immediately. That the said cheques shall not be treated as a security cheque(s) for legal or any other purposes as it is issued by you in order to discharge of your liability which may occur on account of damages as mentioned under clause 7(d) of the agreement.

I, Vivek Rai undertake to keep sufficient balance in my bank account on which the above mentioned cheque are drawn to ensure the encashment of the said cheques. Cheque nos are 328569, 328570 and 328571 drawn Punjab National Bank, Aliganj, Lucknow, (UP) Signature.....

In case, the above said cheque gets dishonoured on its presentation to the banker for the reason of insufficient funds, a/c closed, stop payment or any other reason, you shall be deemed to commit an offence u/s 138 of N.I. Act and the appropriate proceedings shall be initiated against you before the appropriate courts of law.

Aakash Institute (Lucknow Centre) is further authorized to take appropriate legal action to recover the balance amount if any. Wilful & intentional breach of this contract would attract liability upon the employee for compensatory & exemplary damages in addition to contractual liabilities mention in clause 7(d) and 7(k) and under any other provision of this manual."

14. The above clauses appear to the Court to be wholly unconscionable and opposed to public policy and, therefore, hit by Section 23 of the Contract Act. An award based on the above clauses which promise the Respondent to recover an unconscionable sum would be clearly opposed to the public policy of India and likely to be interfered with under Section 34 (2) (b) (ii) of the Act.

15. Clauses 7 (h) and 7 (k) read as under:

OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 25 of 32 "7(h) In the event of your default, non-compliance or wilful breach of the contract or sudden termination of the contract and/or your leaving the institute without following the proper procedure, as laid down in this manual, and the employee s refusal to meet

his/her obligation towards Aakash Institute (Lucknow Centre) in letter and spirit of the service rules, and the matter becoming subjudice, the employee shall be responsible for the entire litigation expenses including, arbitration proceedings, organizing hearing in the arbitration and other legal proceedings if any required to be initiated to facilitate arbitration proceedings. Needless to say, litigation expenses are subjective. However, such expenses cannot be less than Rs.10,000/- per hearing either before the Court or before the arbitrator apart from the other expenses as elucidated above.

7(k) Whoever commits any act in violation to the provision of clause 7(j) of the agreement, with intend to cause wrongful loss to Aakash Institute (Lucknow Centre), shall be held liable to pay a fixed sum of Rs.5 lacs to Aakash Institute (Lucknow Centre) towards damages."

16. The above clauses clearly constitute an unconscionable restraint on the right of one of the parties to seek legal redress. The clauses are hit by Section 28 of the Contract Act. What is even strange is that even a copy of the said agreement is not made available to the other party. The Petitioner was only allowed to see/read the agreement. The Petitioner was required to contact the Centre Director with prior appointment. In fact, it is the Petitioner's case that he was not even given a copy of the agreement.

17. It shocks the judicial conscience that the Arbitrator mechanically proceeded to pass an Award in favour of the Respondent on the basis of the aforementioned patently illegal clauses of the contract. The Court is unable to sustain the impugned Award of the learned Arbitrator. Accordingly, the impugned Award is hereby set aside. The petition is allowed but in the circumstances with no order as to costs.

14. The bare perusal of the clauses 6(e), 6(g), 6(o), 9(b) reproduced above more specifically clause 6(e) shows that if in the last OMP (Comm) 28/2019 (CNR No. DLST010077742019) Page No. 26 of 32 year of the contract period or extension thereof at Startford an employee does not submit his resignation by 30 November, it will be presumed that she / he is willing to continue another term of three years, further, as per clause 6(g), the employee had to submit an undated cheque equivalent to 12 months gross salary towards the discharge of liabilities towards the damages, as stated in relevant clauses of the contract and in case of breach, the Startford was mandated to encash his undated cheque authorizing them to fill up the date and further the Startford was further authorized to take appropriate legal action for breach of contract attracting liability upon employee and the surety for compensatory and exemplary damages.

15. Further as per clause 6(o) after leaving Startford the employee could not join any of the Startford competitors for atleast one year after the date of expiry of the notice period in the city of his posting and other posting held over preceding 12 months on the date of leaving the organization, and as per clause 9(b), once the employee leaves service or is dismissed from service, he shall not be entitled to the amount of employees benevolent and sincerely fund.

16. Further as per clause 6(j), the employee in case of non compliance or the breach of the contract or upon sudden termination or leaving the institute without proper procedure, the employee and the surety jointly and severally shall be responsible for the entire litigation expenses including arbitration proceedings, organizing hearing in the OMP (Comm) 28/2019 (CNR No. DLSTO10077742019) Page No. 27 of 32 arbitration and other legal proceedings and which expenses shall not be less than Rs. 1,000/- per hearing.

17. The aforesaid judgment Vivek Rai Vs. Aakash Institute (supra) is squarely applicable to the facts of the present case.

The aforesaid clause(s) appear to this Court to be wholly unconscionable and heavily loaded in favour of respondent no. 1, which does not allow level playing between the parties and the terms of the same can be said to be arbitrary and opposed to public policy, and therefore, are hit by Section 23 of the Indian Contract Act and accordingly the award based upon the above clauses would be itself clearly opposed to the public policy of India and is liable to be interfered u/S. 34(2)(b)(ii) of the Act.

18. Further, in view of the afore discussed legal position as held in Perkins Eastman Architects DPC & Ors. HSCC (India) Ltd. and Score Information Technologies Limited Vs. GR Infra Projects Limited (supra), this court is satisfied that the procedure of appointment of sole arbitrator, as specified in the clause 26(a) of the Terms & Conditions i.e. the arbitration of a single arbitrator to be nominated by the company, is not in accordance with law and therefore, this Court finds that the Ld. Sole Arbitrator was de-jure ineligible to act as an arbitrator under Section 12(5) r/w Schedule VII of The Arbitration and Conciliation Act, 1996.

19. With regard to another argument raised by the Ld. Counsel for OMP (Comm) 28/2019 (CNR No. DLSTO10077742019) Page No. 28 of 32 the petitioners that the arbitration award is liable to be set aside in terms of Schedule 5 of Item Nos. 22 & 24 of the Act, as it was argued that the Ld. Arbitrator in this case Sh. Subhash Tagra had in the past three years appointed as arbitrator on number of occasions pertaining to the other case(s) of respondent no. 1.

20. Ld. Counsel for respondent no. 1 has denied the same during the course of arguments. Though in the arbitration record, the Ld. Arbitrator has made a declaration u/S. 12 of The Arbitration and Conciliation Act, 1996 that he in no way is connected with the parties to the dispute and there are no such circumstances, which may give rise to any doubt as to his independence and impartiality.

21. The perusal of record reveals that Ld. Counsel for the plaintiff has filed number of orders on the record including the order in arbitration case titled as Sh. Prashant Jain Vs. Lecturer M/s. FIITJEE Ltd. & Anr. ARB No. 225/14 2009, where Sh. Subhash Tagra stood as an arbitrator for FIITJEE i.e. respondent no. 1 in the present case. He has also relied upon another order titled as Hemant Kumar Vs. M/s. FIITJEE Ltd. & Anr., CS No. 536/15 in which in para no. 2, it appears that a list of cases has been reproduced, wherein almost 17 case(s) have been mentioned, in which Sh. Subhash Tagra had acted as an arbitrator on behalf of respondent no. 1, the said list reproduced from para 2 is as follows :

1 Mohit Kumar Tyagi Vs. Lecturer Suit M/s. FIITJEE Ltd. & OMP (Comm) 28/2019 (CNR No. DLSTO10077742019) Page No. 29 of 32 No. 65/2007 (Mathematics) before ADJ, Delhi Arbitration Anr.

2 Mrs. Binny Marwah Vs. Lecturer Award vs. M/s.

Arbitration Petition 2008 FIITJEE Ltd. & No. 118/2010 Set Aside, new, Anr. before Ld. ADJ-04, Arbitrator to be Saket, New Delhi 3 Sh. Prashant Jain Vs. Lecturer M/s. ARB No. 225/14 2009 FIITJEE Ltd. & Anr. before ADJ-5, set aside Saket, New Delhi 4 D.N. Kochhar Vs. M/s. Student FIITJEE Arbitration Petition before set aside ADJ-

01, Saket courts, New Delhi 5 Saurabh Seth Vs. M/s. Lecturer FIITJEE Arbitration Petition set aside before ADJ-

03, Saket courts, New Delhi 6 Sh. Utkarsh Srivastava Lecturer/R/o. C- Status- Not known 79, Sector -30, Faculty Noida, UP 7 Sh. Nitin Kumar Sinha, Lecturar/ R/o. Status - Not Known 73, Subhadra Faculty, Colony, Sarai Rohilla, Delhi 8 Sh. Pankaj Rastogi, R/o Lecturer/73, Status- not known Moti Bazar, Chandni Faculty Chowk, Delhi-110006 9 Sh. Ambrish Upadhyay, Lecturer/R/o Status- not known WB-121, Shakarpur, Faculty, New Delhi-110092 OMP (Comm) 28/2019 (CNR No. DLSTO10077742019) Page No. 30 of 32 10 Sh. Shahnawaz Faiyaz, Lecturer/R/o. Status- not known 190-J, Extension Faculty, Gali no. 6, Laxmi Nagar, Delhi-110092 Hemant Kumar Vs. M/s. FIITJEE Ltd. & Anr., CS No. 536/15 Status- not known 11 Sh. Rohit Kumar Gupta, Lecturer / R/o.

D1/22, Jewan Park, Faculty, Uttam Nagar, New Delhi-110059 12 Sh. Amit Kumar Sarkar, Lecturer/R/o. Status- not known Village & Post Faculty Amtala (schoolpara), PS Nowda, Distt.

Murshidabad, West Bengal-7442121 13 Sh. Deepak Singh, R/o/Lecturer/F-236, Status- not known Laxmi Nagar, Faculty Delhi-110091 14 Ms. Richa Aggarwal Lecturer/R/o. H.No. Status- not known 60, Meera Faculty Marg, PO Banipark, PS Banipark, Jaipur-302016, Rajasthan 15 Ms. Shikha Godha Lecturer/R/o F-184, Status- not known behind Faculty Gandhinagar, Jaipur-

302015, Rajasthan 16 Sh. Snehpal Singh Lecturer/R/o 28293, Status- not known Multania Faculty Road, Street No. 3, Bhatinda-151001 17 Ms. Richa Srivastava Lecturer/R/o 368, Status- not known C-Block, Faculty Ground Floor, Sector

-19, Noida, UP-201301

22. Therefore, the impartiality of the Ld. Arbitrator is clearly in doubt and it is contrary to the Clause(s) no. 22 & 24 of the Fifth Schedule of the Act. It has also been held in the judgment of M/s. Volstalpine Schiemen GMBH v. DMRC Ltd., 2017(173) AIC 129(SC) that "These OMP (Comm) 28/2019 (CNR No. DLSTO10077742019) Page No. 31 of 32 are hallmarks of arbitration proceedings. Arbitrator is required to rise above the partisan interest of parties."

Therefore, there is substantial material on the record from which it can be inferred or from which it can be discerned, giving rise to the suspicion or doubt regarding the impartiality of the Ld. Arbitrator, which is cornerstone of a fair arbitration proceedings.

23. In view of the afore going discussion, this Court is satisfied that the award dated 05.04.2018 passed by the Ld. Sole Arbitrator cannot be legally sustained and is therefore, set-aside. As a consequence, the present petition u/S. 34 of the The Arbitration and Conciliation Act, 1996 stands allowed. Parties to bear their own costs.

24. FDR, if any submitted by the petitioners in terms of order dated 17.01.2023 stands discharged and be released in favour of the petitioners after cancellation of endorsement, if any on the same on proper identity and receipt.

File be consigned to record room.

Announced in the open court today on 19.05.2023.

(Sanjeev Aggarwal) District Judge (Commercial)-03 South, Saket Courts, New Delhi OMP (Comm) 28/2019 (CNR No. DLSTo10077742019) Page No. 32 of 32