

Dtdc Express Ltd vs Om Enterprises And Anr on 14 July, 2022

IN THE COURT OF SH. DIVYAM LILA: CIVIL JUDGE-01:
SOUTH WEST DISTRICT: DWARKA COURT: NEW DELHI

EXECUTION NO. 220/20

DTDC EXPRESS LTD.

..... Plaintiff

VS.

OM ENTERPRISES AND ANR.

..... Defendant

14.07.2022

ORDER DECIDING ON OBJECTIONS BY THE JD UNDER
SECTION 47 CPC.

A. Introduction:

- a. Present order has occasioned out of the objections filed by the JD to the execution petition filed by the DH. The JD has filed the detailed written submissions to the same and both parties have filed compilation of judgments.

B. Objections filed by the JD against the execution petition filed by the DH:

- a. it is submitted that the present proceedings are vitiated/premature, by the mere fact that the time limit for making an application for setting aside the award has not expired since the Judgment Debtors have received the copy of the award dated 08.07.2018 [notably only photocopy and not original] only when the summons were issued in the present enforcement petition. Therefore, the present enforcement petition is bad in law and is directly in teeth of Section 36 (1)

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of the Arbitration and Conciliation Act, 1996 [the Act]. It is further submitted that it is a settled position in law that mere delivery of an award [if presumed to have been affected] does not amount to service of award on party itself under Section 31 (5) and Section 34(2) of the Act. As such the Judgment Debtor reserves its rights to file an appropriate petition under Section 34 of the Act before the appropriate court seeking setting aside of the said arbitral award dated 03.07.2018.

- b. That is an attempt at seeking enforcement of a decree passed without jurisdiction and therefore, a nullity in the eyes of law.
- c. That a bare perusal of the factual conspectus as elaborated in

the alleged arbitral award dated 03.07.2018 shows:

- i. That the Judgement Debtor had entered into a franchisee-ship agreement with the Decree holder on 22.11.2013.
- ii. That there were some dues on the part of Judgment Debtors to the tune of Rs. 2,39,939/- [Two Lakhs Thirty Nine Thousand Nine Hundred and Thirty nine Rupees only].
- iii. That the Decree Holder invoked the arbitration clause and sent a notice to the Judgement Debtors on 11.01.2018 which was not served and returned un-served.
- iv. That subsequently an arbitrator was unilaterally and solely appointed by the Decree Holder and summons

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was issued to the Judgement debtors vide speed post on 13.01.2018 [Exh. P-4 and 4A] and vide RPAD on 20.01.2018 [Exh. P-6] and ultimately through newspaper publication [Not exhibited].

- v. That without any findings whatsoever, the Ld. Sole Arbitrator passed an award dated 03.07.2018 directing Judgement Debtors to pay Rs. 2,39,939/- [along with accrued interests] to the Decree Holder.

- d. That the factual position reflects that the Ld. Sole Arbitrator was appointed unilaterally and solely by the Decree Holder which is violative of Section 12 r/w Seventh Schedule of the Arbitration and Conciliation Act, 1996 [as amended upto date] and the law as laid down by the Hon'ble Supreme Court in TRF Limited vs. Energo Projects Limited (2017) 8 SCC 377 and later clarified in Perkins Eastman Architects DPC v. HSCC (India) Limited, reported as 2019 SCC OnLine SC 1517 wherein the Hon'ble Supreme Court has held that any arbitrator appointed in violation of the mandatory provisions of Section 12 of the Act is a nullity and hence, any proceedings emanating therefrom is non-est in law. As such the present execution proceedings are liable to be dismissed on this ground alone.
- e. Further clarified that the applicability of de jure termination under Section 12(5) of the Act to an on-going arbitration has been settled by the Hon'ble Supreme Court in Bharat

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Broadband Network Private Limited v. United Telecoms

Limited, (2019) 5 SCC 755 wherein the Hon'ble Supreme Court held:

- i. "18. On the facts of the present case, it is clear that the Managing Director of the appellant could not have acted as an arbitrator himself, being rendered ineligible to act as arbitrator under Item 5 of the Seventh Schedule, which reads as under: "Arbitrator's relationship with the parties or counsel 5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration." Whether such an ineligible person could himself appoint another arbitrator was only made clear by this Court's judgement in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] on 3-7-2017, this Court holding that an appointment made by an ineligible person is itself void ab initio. Thus, it was only on 3-7-2017, that it became clear beyond doubt that the appointment of Shri Khan would be void ab initio. Since such appointment goes to "eligibility" i.e. to the root of the matter, it is obvious that Shri Khan's appointment would be void. There is no doubt in this

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case that disputes arose only after the introduction of Section 12(5) into the statute book, and Shri Khan was appointed long after 23-10-2015. The judgement in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 (2017) 4 SCC (Civ) 72] nowhere states that it will apply only prospectively i.e. the appointments that have been made of persons such as Shri Khan would be valid if made before the date of the judgement. Section 26 of the Amendment Act, 2015 makes it clear that the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after 23-10-2015. Indeed, the judgement itself set aside the order appointing the arbitrator, which was an order dated 27-1-2016, by which the Managing Director of the respondent nominated a

former Judge of this Court as sole arbitrator in terms of Clause 33(d) of the purchase order dated 10-5-2014. It will be noticed that the facts in the present case are somewhat similar. The APO itself is of the year 2014, whereas the appointment by the Managing Director is after the Amendment Act,

2015, just as in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 (2017) 4 SCC (Civ) 72] Considering that the appointment in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 Digitally signed by DIVYAM LILA DIVYAM Civil Suit No. 220/20 Date:

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(2017) 4 SCC (Civ) 72] of a retired Judge of this Court was set aside as being non est in law, the appointment of Shri Khan in the present case must follow suit.

ii. 19. However, the learned Senior Advocate appearing on behalf of the respondent has argued that Section 12(4) would bar the appellant's application before the Court. Section 12(4) will only apply when a challenge is made to an arbitrator, inter alia, by the same party who has appointed such arbitrator. This then refers to the challenge procedure set out in Section 13 of the Act. Section 12(4) has no applicability to an application made to the Court under Section 14(2) to determine whether the mandate of an arbitrator has terminated as he has, in law, become unable to perform his functions because he is ineligible to be appointed as such under Section 12(5) of the Act. iii. 20. This then brings us to the applicability of the proviso to Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing. For this reason, the Digitally signed by DIVYAM LILA DIVYAM Date:

DTDC express Ltd. vs. Om Enterprises and Anr. LILA 2022.07.14 14:56:27 Order dated 14.07.2022 +0530 Page no. 6 of 32 argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an "express agreement in writing". The expression "express agreement in writing" refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct. Here, Section 9 of the Contract Act, 1872 becomes important. It states: Promises, express and implied. Insofar as the proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such a proposal or acceptance is made otherwise than in words, the promise is said to be implied." iv. 8. It is thus necessary that there be an "express"

agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court as indicating an express Digitally signed by DIVYAM LILA DIVYAM Date:

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being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2) and Section 16(2) of the Act to the facts of the present case, and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator. The judgment under appeal is also incorrect in stating that there is an express waiver in writing from the fact that an appointment letter has been issued by the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate."

f. Recently the Hon'ble Delhi High Court in Proddatur Cable TV Digi Services v. Siti Cable Network Limited, O.M.P (T) (Comm.) No. 109 of 2019 categorically held: i. "27. The respondent is not right in its contention that only because the arbitration agreement was entered into on 30.08.2015, i.e. before the coming into force of the Amendment Act, 2016, the judgment of Perkins (supra) and Section 12(5) of the Act would not apply.

First and foremost, Section 12(5) of the Act itself begins with a non□obstante clause stipulating that DIVYAM LILA DTDC express Ltd. vs. Om Enterprises and Anr.

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Section 12(5) would apply notwithstanding any prior agreement to the contrary. Secondly, the relevant date to decide the applicability of Section 12(5) is not the date of the agreement but the date on which the Arbitration commences. By virtue of Section 21 of the Act, the Arbitration commences when the notice invoking arbitration is sent. In the present case, the notice invoking the arbitration agreement was sent by the petitioner on 28.10.2018, which is after the insertion of Section 12(5) of the Act by the Amendment Act, 2016. Thus, there is no doubt that Section 12(5) would apply to the present case and the Company is debarred in law from appointing the Arbitrator." g. The abovementioned judicial principles indubitably proves that the appointment of the Ld. Sole Arbitrator unilaterally and solely in the present case, is violative of Section 12(5) of the provisions of the Act and therefore, a nullity. Therefore, any proceedings much less an arbitral award, emanating out of an Arbitrator whose very appointment is illegal, is non-existent in law and a nullity, then any award passes/ rendered by it suffers from a jurisdictional infirmity which goes to the root of the matter and as such the instant execution proceedings deserves to be dismissed.

h. Furthermore, the decree as sought to be enforced against the Judgement Debtor is patently illegal as it has been obtained Civil Suit No. 220/20 DIVYAM LILA DTDC express Ltd. vs. Om Enterprises and Anr. LILA Date:

2022.07.14 Order dated 14.07.2022 15:01:23 +0530 Page no. 10 of 32 by playing a fraud upon the Judgement Debtors thereby, preventing it from defending the false and frivolous claims of the Decree Holder before the Ld. Sole arbitrator. The fraud perpetrated by the Decree Holder, in connivance with the Ld. Sole Arbitrator is writ large on the face of record, as a bare perusal of the alleged award shows that the JD was actively prevented from participating in the arbitral proceedings. Moreso, there was no attempt whatsoever by the Ld. Sole Arbitrator to ensure participation of the Judgment Debtor in the arbitral proceedings, despite all the contact details being readily available with the Decree Holder. As from the inception, fraud was perpetrated upon the Judgment Debtor, thereby preventing it from raising a defence in the arbitral proceedings, the alleged arbitral award suffers from a patent illegality which goes to the root of the matter and as such, the present proceedings deserves to be rejected at the very threshold.

i. It is submitted that the lack of jurisdiction and fraud perpetrated on the Judgment Debtors is patent on the face of record and does not require any inquiry into the merits of the case and as such this Hon'ble Court is well within its power to take cognizance of such an illegality and reject/ dismiss the above captioned enforcement petition.

j. It is pertinent to highlight that it is now a settled position in law that objections qua violation of public policy of India can Civil Suit No. 220/20 DIVYAM LILA DTDC

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2022.07.14 Order dated 14.07.2022 15:01:36 +0530 Page no. 11 of 32 even be taken at the stage of execution. A bare perusal of the aforesaid contentions show that since the very appointment of the Ld. Sole Arbitrator was in sheer disregard of the orders/judgments of the Hon'ble Supreme Court, the same is directly violative of the fundamental policy of Indian law and as such, the alleged arbitral award dated 03.07.2018 cannot be allowed to be executed by way of the present execution proceedings. the petition deserves to be dismissed on this ground alone. k. Moreover, the arbitral award had been passed in sheer violation of the rule of audi alteram partem which is a cherished facet of the principles of natural justice. Therefore, by not complying with the requirement of the principles of natural justice, in its letter and spirit, the arbitral award suffers from the vice of patent illegality as it has been induced, affected and procured by fraud and corruption. As such, the present execution.

l. It is pertinent to mention here that the illegality of the entire arbitral proceedings is apparent from the mere fact that although the arbitral award as sought to be enforced is against M/s. OM Enterprises (SF 291), however, a bare perusal of the award would show that the award is passed w.r.t some M/s. Usha Enterprises. This fact by itself show that the entire arbitral proceedings as allegedly conducted at the behest of the Decree Holder is nothing but a sheer abuse of process of law to cause wrongful loss to the Judgement Debtors.

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m. Judgments relied upon by i. Rigors of Section 47 CPC are applicable to execution		

proceedings qua arbitral awards. Khanna Traders v. Scholar Publishing House Delhi High Court 2017 SCC OnLine 7684 ii. Scope of inquiry of an executing court. Brakewel Automotive Components (India) Private Limited v. P.R. Selvam Alagappan (2017) 5 SCC 371, M/s. India Cements Capital Limited v. William of Hon'ble Kerala High Court 2015 SCC OnLine Ker 24805.

iii. Nullity of award on the basis of public policy can be challenged in execution proceedings: Bijendra Kumar v. Pradeep Kumar and Ors. of Hon'ble Delhi High Court Ex. F.A. No. 38 of 2012, judgment dated 15.10.2014 iv. Unilateral appointment of arbitrator is void ab initio:

TRF Limited v. Energo Engineering Projects Supreme Court of India (2017) 8 SCC 377, Bharat Broadband Network Limited v. United 3. Telecoms Limited Supreme Court of India (2019) 5 SCC 755 C. Reply on behalf of the decree holder to the objections filed by the judgement debtors.

a. It is denied that the Arbitral Award suffers from Jurisdictional infirmity, is obtained by fraud and is violative of the public policy of India as alleged. The DH states that the above Civil Suit No. 220/20 by DIVYAM DTDC express Ltd. vs. Om Enterprises and Anr.

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objections cannot be taken before this Hon'ble Court in Execution Petition. The JD should have taken the said objections in his challenge to the award dated 3.7.2018. The JD, having not challenged the award dated 3.7.2018 till date is now stopped from making any objections on the merits of the award in the preset proceedings. Rest all is false and therefore denied.

b. It is denied that the present proceedings are premature for the reason that the same was allegedly filed before the expiry of the statutory period of filing a challenge to the award. The JD has till date not filed any challenge to the award. The DH states that there is no bar in filing an Execution Petition within the statutory period of challenging the award and therefore, the objection in this regard is wrong and illegal and is liable to be read to be rejected.

c. It is denied that the present petition is a mischievous attempt at seeking enforcement of a decree passed without Jurisdiction and therefore nullity in the eyes of law as alleged. The DH states that the above objections cannot be taken before this Hon'ble Court in Execution Petition. The JD should have taken the said objections in his challenge to the award dated 3.7.2018. The JD, having not challenged the award dated.

d. The DH submits that the DH has not played any fraud upon the JD. The award has not been obtained by fraud and the Digitally signed by DIVYAM LILA Civil Suit No. 220/20 DIVYAM Date:

DTDC express Ltd. vs. Om Enterprises and Anr. LILA 2022.07.14 15:02:10 Order dated 14.07.2022 +0530 Page no. 14 of 32 present proceedings cannot be dismissed for the reasons stated in the paras under reply. The DH further states that the objections pleaded by the JD in the paras under reply cannot be taken and or considered before this Hon'ble Court in Execution Petition. The JD should have taken the said objections in his challenge to the award dated 3.7.2018. The JD, having

not challenged the award dated 3.7.2018 till date, is now estopped from making any objections on the merits of the award in the preset proceedings. Rest all is false and therefore denied.

e. It is denied that the objections qua violative of public policy of India can be taken in the present proceedings as alleged. The said objection ought to have been taken in a proceeding challenging the award in question. The award at this stage cannot be challenged and its merits cannot be challenged in the present execution proceedings. The JD has not pleaded as to how the award is against the public policy of India. Rest all is false and therefore denied.

f. The DH states that the reference to the JDs in the award as Usha Enterprises instead of Om Enterprises is merely a typographical error. The first page of the award clearly shows the name of the parties to the Arbitral proceedings and against whom the award is passed. The other factual aspects are correct and have not been denied by the JD. The amount due from the JD is also not denied. The objection taken by the JD Civil Suit No. 220/20 DIVYAM LILA DTDC express Ltd. vs. Om Enterprises and Anr. LILA Date:

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g. That it is agreed that the arbitrator appointed under the agreement was on the basis of sole discretion of the company/ DH, but the said objection cannot be raised by the JD in these proceedings and the said objection can be raised by the JD under Sec. 34 of arbitration act and the arbitrator can then decide upon his jurisdiction as per law.

h. Judgments of JD:

i. Dakshin Haryana Bijili Vitran Nigam Vs Navy Grand Technologies (P) Ltd (Civil Appeal /791/2021 SC) State of Himachal Pradesh Engineers & Anr vs. Himachal Techno Engineers (2010 12 SCC 210 SC) both the judgments are with respect to limitation period for the filing of application under section 34 CPC.

ii. Shiv Shankar Gurgar Vs Dilip (Civil Appeal/ 52/2014 SC) - the relevancy of judgment is not made out in the present case.

iii. Deepa Bhargava Vs Mahesh Bhargava (Civil Appeal 7310/7311/2008 SC) the said judgment is filed to showcase that the executing court cannot go behind the decree.

iv. Bhawarlal Bhandari Vs M/s. Universal Heavy Mechanical Lifting Enterprises (1998(3)

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331,SC) □ the said judgment is with respect to Arbitration Act of 1940 and the present case is with respect to Arbitration Act of 1996.

v. Vasudev Dhanjibhai Modi Vs Rajabhal Abdul Rehman (1970 AIR 1475) □ the said judgment relied upon to showcase that executing court cannot be behind the decree and cannot decide upon the whether the decree is incorrect in law and facts.

vi. Jnanendra Mohan Bhaduri Vs Rabindra Nath Chakravrti (AIR 1933 PC 61) 1895 □ the relevancy of the said judgment is not made out and the same is with respect to Arbitration Act 1899.

vii. M/s IndusInd Bank Ltd vs Sunil Kumar Sahu (HC 49 □ 54 Chhattishgarh WP.(227) No.691/2016.

D. Brief submissions on behalf of judgment debtors:

a. Rigours of Section 47 CPC, 1908 are applicable to enforcement of arbitral awards. It is submitted that the Judgment Debtors have preferred certain objections under Section 47, CPC, 1860 thereby, challenging the executability/ enforceability of the said arbitral award dated 03.07.2018. b. In this behalf, it is submitted that this Hon'ble Court is very much empowered by law to determine all questions arising between the parties relating to the execution/ discharge or satisfaction of the arbitral award/ decree as mandated by Civil Suit No. 220/20 DIVYAM LILA DTDC express Ltd. vs. Om Enterprises and Anr. LILA Date:

2022.07.14 Order dated 14.07.2022 15:02:46 +0530 Page no. 17 of 32 Section 47 CPC, 1908 and there is no difference between a decree passed in a civil suit or an award rendered by an arbitral tribunal constituted under the Arbitration Act and the rigours of Section 47 equally applies to enforcement of an arbitral award.

c. Attention is invited to the ruling of the Hon'ble Delhi High Court in Khanna Traders Scholar Publishing House P. Ltd. and Ors., reported as 2017 SCC OnLine 7684 the Hon'ble Court has observed that once the Arbitration Act has itself conferred on an Arbitral Award the status of a decree (Refer to Section 36 of Arbitration Act), there can be no prohibition upon a party to take objections as permissible under Section 47 of the Act.

d. Scope of inquiry of an executing court vis-à-vis objections under Section 47 of the CPC, 1908 as to the executability of a decree/ award. It is submitted that it is no longer res integra that an executing court can neither travel behind the decree nor sit in appeal over the same. However, it is an equally settled position that an executing court can allow objections vis-à-vis the executability of the decree if it is found that the same is void ab initio and is a nullity, apart from the ground that it is

not capable of execution under the law, either because the same was passed in ignorance of such provision of law or the law was promulgated making a decree unexecutable after its passing. Reliance is placed upon the Digitally signed by DIVYAM LILA DIVYAM Date:

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dicta of the Hon'ble Supreme Court in Brakewel Automotive Components (India) Private Limited v. P.R. Selvam Alagappan, reported as (2017) 5 SCC 371. e. No requirement under law to necessarily file an application for setting aside an award under Section 34 of the Arbitration Act for a null/ void and non-executable/ unenforceable decree/ award. It is submitted that the primary and sole contention of the Decree Holder, as evident from their reply to the objections filed by the Judgement Debtors and additional written arguments/ submissions filed right before the final hearing is to the non-maintainability of the objections filed by the Judgement Debtors before an executing court i.e., this Hon'ble Court. f. The Decree Holder has maintained/ contended that the objections as raised by the Judgment Debtors in the present proceedings ought to have been taken before the competent court in an Application seeking setting aside the arbitral award under Section 34 of the Arbitration Act. Ergo, once the Judgement Debtor has failed to file said remedy, the same cannot be entertained by an executing court i.e. Hon'ble Court under the garb of objections as to the executability/ enforceability of there/ award.

g. It is firstly submitted that the judgments cited above clearly elucidates the settled position in law that objections as to the executability/ enforceability of a decree/ award being nullity/ Digitally signed by Civil Suit No. 220/20 DIVYAM DIVYAM LILA Date:

DTDC express Ltd. vs. Om Enterprises and Anr. LILA 2022.07.14 15:03:05 Order dated 14.07.2022 +0530 Page no. 19 of 32 non-est can very well be taken before an executing court. Even otherwise, all the case laws relied upon by the Decree Holder (though distinguishable on law and facts) clearly upholds/ reiterates the said position.

h. Secondly, in so far as the submission regarding filing an Application under Section 34 of the Arbitration Act is concerned, it is submitted that it is an indisputable position that in order to set aside a decree/ award, there must be one in existence. In other words, a decree/ award not in existence cannot be set aside. No one can seek to set aside a decree or award which is not in existence, and it would be tantamount to attempting to commit feticide of an unborn fetus. Hence, what is sought to be achieved by taking recourse to Section of the CPC, 1908 is to make a declaration that the decree/ award is not an executable decree/ award at all. If the result of such an adjudication is entering a finding that there is no decree/ award, there cannot be any question of setting aside such a decree or award. Reliance in this behalf is placed on the ruling of the Hon'ble Kerala High Court in M/s. India Cements Capital Limited v. William, reported as 2015 SCC OnLine Ker 24805.

i. The Arbitral Award dated 03.07.2018 is void ab initio and suffers from jurisdiction infirmity which goes to the root of the matter and thus, inexecutable/ unenforceable □Admittedly, the arbitral award dated 03.07.2018 has been Civil Suit No. 220/20 DIVYAM LILA DTDC express Ltd. vs. Om Enterprises and Anr. LILA Date:

2022.07.14 Order dated 14.07.2022 15:03:13 +0530 Page no. 20 of 32 passed ex□ parte and more importantly by an arbitrator appointed solely by and at the behest of the Decree Holder which is clearly proscribed and prohibited as per Section 12(5) r/e Seventh of the Arbitration Act as it enumerates certain categories of persons who are to be appointed as an arbitrator. In this behalf, reliance is placed on the dicta of the Hon'ble Apex Court in TRF Limited v. Energo Engineering Projects, reported as (2017) 8 SCC 377 later followed by Bharat Broadband Network Limited v. United Telecoms Limited, reported as (2019) 5 SCC 755 wherein, the Hon'ble Court has clearly held that eligibility of an arbitrator goes to the root of the matter and an arbitrator falling within the proscriptions under Section 12(5) r/w the Seventh Schedule of the Arbitration Act can neither be appointed nor the can he appoint an arbitrator to adjudicate the disputes between the parties. The arbitration clause as applicable between the parties and evident from the standard arbitration agreement taken on record by this Hon'ble Court vide its order dated 04.06.2022 and also admitted to by the Decree Holder in their written arguments provides: "If such a dispute cannot be resolved amicably.....the Parties hereby agree to refer the matter to a SOLE ARBITRATOR appointed by the Company at its sole discretion for adjudication of the dispute/ claim in accordance with the provisions of the Arbitration and Conciliation Act, 1996." A bare perusal of the aforesaid Civil Suit No. 220/20 DIVYAM LILA DTDC express Ltd. vs. Om Enterprises and Anr. LILA Date:

2022.07.14 15:03:24 +0530 Order dated 14.07.2022 Page no. 21 of 32 arbitration clause clearly establishes the position that the arbitral award dated 03.07.2018 was in□fact, passed by a sole arbitrator appointed by the Decree Holder at its sole discretion, which by operation of law was impermissible. j. In light of the aforesaid factual position, it is now submitted that interpreting the principles as laid down by the Hon'ble Supreme Court in TRF (Supra) and Bharat Broadband (Supra), the Hon'ble Delhi High Court in Proddatur Cable TV Digi Services v. Siti Cable Network Limited, reported as 2020 SCC OnLine Del 350 has held that a unilateral appointment by an authority which is interested in the outcome or decision of the dispute is impermissible in law and finally in Simmi Sethi v. Fullerton India Credit Co. Ltd., O.M.P. (Comm.) No. 334 of 202, dated 08.04.2022, the Hon'ble Delhi High Court has reiterated the settled position in law that an award made by an arbitrator unilaterally appointed by a party would be void ab initio. It is submitted that once the admitted position of the arbitral award dated 07.2018 having been passed by a unilaterally appointed arbitrator is brought before Hon'ble Court, it is the solemn duty of this Hon'ble Court to apply the aforesaid settled position in law and declare that the arbitral award dated 03.07.2018 is non□executable/ unenforceable and accordingly, dismiss the present execution/ enforcement proceedings.

k. Lastly, it is submitted that the fraud as sought to be Digitally signed by DIVYAM LILA DIVYAM Civil Suit No. 220/20 Date:

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perpetrated by the Decree Holder is evident from the fact that a cursory glance of the arbitral award dated 03.07.2018 would show that though the title of the award reflects that it has been passed against M/s. Om Enterprises and Anr. However, the findings by the Ld. Sole Arbitrator have been recorded against M/s. Usha Enterprises. Such a glaring omission, having not been admittedly rectified by the Decree Holder by taking recourse to the Section 33 of the Arbitration Act, even after two years of its passing (award is dated 03.07.2019; execution is sought in the year 2020) clearly exposes the contumacious conduct of the Decree Holder and warrants outright dismissal of the present execution/ enforcement proceedings with exemplary costs in favour of the Judgment Debtors.

E. Observations and conclusion:

a. The foremost observation that is required to be recorded in the present matter is that the glaring error in the arbitration award dated 03.07.2018 passed by Ld. Arbitrator in claim petition no. 16/2018 between DTDC Exp vs M/s Om Enterprises. The award in its facts of the case mentions that the franchise agreement was entered with the respondent carrying business in the name of M/s Om Enterprises represented by the prop. Mrs. Manisha Sharma. Thereafter proceeds to record the averment of the claim without Civil Suit No. 220/20 DIVYAM LILA DTDC express Ltd. vs. Om Enterprises and Anr. LILA Date:

2022.07.14 Order dated 14.07.2022 15:03:45 +0530 Page no. 23 of 32 mentioning the name of the respondent expressly. However, in the award, at the discussion and adjudication of the issues, it mentions the name of the business as M/s Usha Enterprises appears in the adjudication discussion. In the later paragraph also the name of M/s Usha Enterprises has been used. Thereafter, no repetition of names of either M/s Om nor Ms/ Usha appears in the whole award thereafter. The ld. counsel for DH had made submission that the said mistake is merely clerical and typographical. Whereas the ld counsel for JD has argued that this is not a typographical mistake as it is not a spelling error, not this is clerical mistake but it is a glaring error going to root of the said award and the said error appear in the adjudication of the issues, which is the most important part of any judgement/ speaking order and as such it cannot be ascertained from the said award that whether the said adjudication is actually even for the M/s Om enterprises or the said adjudication is actually for the M/s Usha enterprises and the claim with respect to the said docket was considered. He further submitted that even if the said award had any such admitted error, the recourse under Sec. 33 of The arbitration act, 1996 is

conveniently available to the DH but the same was not followed. Admittedly, the said application for correction of error was not followed by the DH nor any corrected award has been filed consequently. In my considered opinion, the said award has certain glaring errors Digitally signed by DIVYAM LILA Civil Suit No. 220/20 DIVYAM Date:

DTDC express Ltd. vs. Om Enterprises and Anr. LILA 2022.07.14 15:03:56 Order dated 14.07.2022 +0530 Page no. 24 of 32 in the award itself where the issues were adjudicated. The issue adjudication itself is the most important part of the award, which admittedly has the error in naming the claim respondent, which error goes to the root of the award. This executing court does not have power to rectify the error under Sec 33 of the act as the court is not the arbitral tribunal, no application for correction is made and certainly more than 30 days have passed since passing of award. Hence, this court cannot rectify the error which goes to the root of the very decision/ award of the case.

b. The second observation that is required to be recorded is that the law with respect to unilateral appointments is now set by passing of judgments of the TRF Limited vs. Energo Projects Limited (2017) 8 SCC 377 and later clarified in Perkins Eastman Architects DPC v. HSCC (India) Limited, reported as 2019 SCC OnLine SC 1517 wherein the Hon'ble Supreme Court has held that any arbitrator appointed in violation of the mandatory provisions of Section 12 of the Act is a nullity and hence, any proceedings emanating therefrom is non-existent in law. Admittedly, the DH company had in pursuance of the clause 27.2 of the agreement between the party, which is reproduced here "27.2 if such a dispute cannot be resolved amicably or any payments are overdue from the franchise or for enforcement of any other claims, whatsoever, the parties hereby agree to refer the matter to a Civil Suit No. 220/20 DIVYAM LILA DTDC express Ltd. vs. Om Enterprises and Anr. LILA Date:

2022.07.14 15:04:05 +0530 Order dated 14.07.2022 Page no. 25 of 32 sole arbitrator appointed by the company at its sole discretion for adjudication of the dispute/ claim in accordance with the arbitration & conciliation act, 1996. The findings/ award given by the said arbitrator shall be binding on both the parties" ; appointed a sole arbitrator for adjudication of the claim and there is no denial to the same and further in Abraham Memorial Education trust vs Prodigy Development Institution decided by Hon'ble Delhi High court on 23.03.2021 held that an award made by an arbitrator unilaterally appointed by a party would be void ab initio.

c. I hold that the objections under sec 47 CPC by the JD against the arbitral award can be entertained as the arbitral award is the decree and hence rigours of Sec. 47 are applicable on the same. Reliance can be placed on the judgment passed by Hon'ble Delhi High Court in Khanna Traders v. Scholar Publishing House 2017 SCC OnLine 7684, it clearly laid down that "18. In my view, the observations MSP Infrastructure Ltd. and Bharti Cellular Ltd. supra to the effect that the judgments of civil law would

not apply to a proceeding under special law as the Arbitration Act, apply to only the proceedings provided for under the Arbitration Act and cannot be extended to the proceedings for execution of an Arbitral Award, as if it were a decree of the Court. Once the Arbitration Act, 1996 itself has conferred on the Arbitral Digitally signed by Civil Suit No. 220/20 DIVYAM DIVYAM LILA Date:

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Award the status of a decree of the Civil Court and made the same executable in accordance with the provisions of CPC, I see no reason to apply the aforesaid observations made in an entirely different context i.e. to execution proceedings. To interpret so would be a violation of the express provision of Section 36(1) of enforcement of the Arbitral Award in accordance with the provisions of the CPC in the same manner as if it were a decree of the Civil Court. If the intent of the legislature while enacting the Arbitration Act, 1996 had been to exclude objections of the nature permitted to be taken under Section 47 of the CPC in execution proceedings in execution of arbitral awards, for the reason of time limited for taking thereof under Section 34 of the Arbitration Act, 1996 or otherwise, it would have provided so and which has not been done. In the absence of any prohibition, the rights under the CPC cannot be taken away."

d. That the executing court can go behind the decree if the said decree is null, void ab initio and a non est and under sec. 47 of CPC the executing court can allow the objection to the executability of the decree, if the same is found null ad void ab initio. Reliance is placed upon the dicta of the Hon'ble Supreme Court in Brakewell Automotive Components (India) Private Limited v. P.R. Selvam Alagappan, reported as (2017) 5 SCC 371 at para 23 "Though this view has echoed time out of number in similar pronouncements of this Court, Digitally signed by DIVYAM LILA DIVYAM Date:

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in Dhurandhar Prasad Singh vs. Jai Prakash University and others, AIR 2001 SC 2552, while dwelling on the scope of Section 47 of the Code, it was ruled that the powers of the court thereunder are quite different and much narrower than those in appeal/revision or review. It was reiterated that the exercise of power under Section 47 of the Code is microscopic and lies in a very narrow inspection hole and an executing court can allow objection to the executability of the decree if it is found that the same is void ab initio and is a nullity, apart from the ground that it is not capable

of execution under the law, either because the same was passed in ignorance of such provision of law or the law was promulgated making a decree unexecutable after its passing. None of the above eventualities as recognised in law for rendering a decree unexecutable, exists in the case in hand. For obvious reasons, we do not wish to burden this adjudication by multiplying the decisions favouring the same view."

e. Further, that the executing court can decide under sec 47 CPC with respect to the arbitration award being a nullity/ void ab initio and the JD is required to do so in Sec. 36 of arbitration act, 1996. Reliance can be placed on Bijendra Kumar vs Pradeep Kumar & Ors. passed by Hon'ble Delhi High Court on 15 October, 2014, where it held on para 7 that "7. Counsel for the petitioner also sought to urge that objections DIVYAM LILA LILA Date:

2022.07.14 DTDC express Ltd. vs. Om Enterprises and Anr. 15:04:35 +0530 Order dated 14.07.2022 Page no. 28 of 32 which were filed under Section 34 of the Arbitration and Conciliation Act, 1996 to the Award by the respondent and which were dismissed, and therefore the executing court had no option but to proceed to execute the Award, however, it is conceded on behalf of the petitioner that the objections filed by the respondent against the Award dated 9.5.2005 were dismissed not on merits but only on the ground that they were time barred. The issues which have been raised and decided by the impugned judgement were therefore not decided by the court in which objections were filed under Section 34 of the Arbitration and Conciliation, 1996. An Award which is a nullity being against public policy can always be challenged even at the stage of execution inasmuch as, if we take a most extreme example that an Award is passed that 'A' will steal money for 'B' then surely 'B' cannot enforce the Award/decree stating that 'A' should give him particular amount of money which was to be stolen by 'B' for being given to 'A'." and the Judgement of Hon'ble Kerala High Court in M/s. India Cements Capital Limited v. William, reported as 2015 SCC OnLine Ker 24805 at the para no. 20 "20. Petitioner's contention that if an award is declared to be a nullity in execution proceedings, it will amount to adding one more ground to Section 34 of the Act is totally unacceptable. As mentioned earlier, Section 34 of the Act provides seven grounds to set aside an award. If the Digitally signed by DIVYAM LILA Civil Suit No. 220/20 DIVYAM Date:

DTDC express Ltd. vs. Om Enterprises and Anr. LILA 2022.07.14 15:04:44 Order dated 14.07.2022 +0530 Page no. 29 of 32 expression "set aside" is understood correctly, there will not be any lack of clarity or obfuscation. Ordinarily the expression "set aside" is understood as meaning abandon, abjure, abrogate, discard, dispense with, to omit, reject, repudiate, etc. The term "set aside" is defined in Black's Law Dictionary (Eighth Edition) as vb. (of a court) to annul or vacate (a judgement, order, etc.). The term "set aside" in the legal parlance means, to cancel, annul or revoke a judgement or order. It is an indisputable proposition that in order to set aside a decree or order or award, there must be one in existence. In other words, a decree or award not in existence cannot be set aside. No one can seek to set aside a

decree or award which is not in existence. That exercise will be as futile, rather as impossible, as one attempting to commit feticide of an unborn foetus. Therefore, what is provided in Section 34 of the Act is only ways and means to set aside an award made in an arbitral proceedings. As succinctly stated by the Supreme Court, what is sought to be achieved by taking recourse to Section 47 of the Code is to make a declaration that the decree (here, an award) sought to be executed is a nullity. In other words, seeking a pronouncement that there is no executable decree or award at all. If the end result of an adjudication under Section 47 of the Code is entering a finding that there is no decree or award at all, there cannot be a question of setting aside such Digitally signed by DIVYAM LILA DIVYAM Civil Suit No. 220/20 LILA Date:

2022.07.14 DTDC express Ltd. vs. Om Enterprises and Anr. 15:04:55 +0530 Order dated 14.07.2022 Page no. 30 of 32 a decree or award in that proceedings. Therefore, the contention of the revision petitioner that the declaration of nullity of an award in a proceeding under Section 47 of the Code will tantamount to adding one more ground to Section 34 of the Act is legally incorrect and, therefore, not acceptable." Although there is a judgement filed by the DH, which holds a contrary view, passed by Hon'ble Chhattisgarh High Court in M/s Induslnd Bank Ltd vs Sunil Kumar Sahu (Chhattishgarh WP.(227) No.691/2016 where it is held that "22. Thus, in the aforesaid judgments legal view has been crystallised by the Supreme Court that the Executing Court cannot go beyond the decree in absence of challenge to the decree in appropriate proceeding and such a question that decree is a nullity cannot be raised and decree is binding between the parties" The said judgement can be distinguished on the facts that the executing court held the award execution as non-maintainable on the ground that it being against the public policy on the ground that the arbitrator without noticing to the respondents; which is not the factual matrix in the present case.

f. Hence, in conjoint reading of the catena of judgments deciding upon the various aspects of the power of the executing court to adjudicate under Sec. 47 CPC with respect to arbitration award as decree on ground of nullity and void ab initio; I hold that in the present case, it Civil Suit No. 220/20 DIVYAM LILA DTDC express Ltd. vs. Om Enterprises and Anr. LILA Date:

2022.07.14 15:05:22 +0530 Order dated 14.07.2022 Page no. 31 of 32 is not denied that the award prima facie suffers from a substantive error on the face of it with respect to naming the respondent/ JD and further it is not denied that the ex parte award was passed by an arbitrator appointed unilaterally in exercise of clause for sole discretion of unilateral appointment of sole arbitrator for dispute resolution in arbitration, and thus, in view of catena of judgments and set view of law, the said award falls into the category of the award void ab initio and nullity which is incapable of execution. Since the arbitration award is also covered under the rigours of the decree under Sec. 47 CPC, the objections on the executability can be raised by JD at this stage, and thus, the present arbitral award is one being suffering from

infirmitiy making it void ab initio and nullity, the same cannot be executed and thus the execution is decided to be non-maintainable in the present case and hence, the execution petition is dismissed.

g. File be consigned to Record Room after compliance with due formalities.

ANNOUNCED IN THE OPEN

DIVYAM LILA
LILA Date:
2022.07.14
15:05:30 +0530

COURT ON 14.07.2022

(DIVYAM LILA)

CIVIL JUDGE-01(SW)/DWARKA COURTS
NEW DELHI

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