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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 21 OF 2023**

1. M/s. Traviera Silk Mills Pvt. Ltd.
Having office at E514, Kailash
Industrial Complex Parksite,
Vikhroli (West), Mumbai-400 079
2. Mr. Manish Tibrewal
Director of M/s. Traviera Silk Mills Pvt. Ltd.
Having residence at A1/501, Minal
Apartments, Saki Vihar Road,
Sakinaka, Mumbai-400 072
3. Pushpadevi Kamalkishore Daga
Director of M/s. Traviera Silk Mills Pvt. Ltd.
Having residence at Gardenia Vasant Vally,
Film City Road, Near Dindoshi Bus Depot,
Malad (East), Mumbai-400 097 ... Petitioners

Versus

1. M/s. Toto Toya Spin Pvt. Ltd.
Having office at D.J. House, 4th floor,
Old Post Office Lane, Kalbadevi Road,
Mumbai-400 002
2. Mr. Govind Malpani
Gita Mandir, Wing B/19, Near Apex
Hospital, Chandra Worker Road,
Borivali (West), Mumbai-400 092 ... Respondents

Mr. Aman Kacheria a/w. Ms. Sakshi Agarwal. Ms. Saloni Doshi i/b. Mr. Bipin Joshi for the Petitioners.

Mr. Sandesh Shukla a/w. Mr. Arshaan Lentin i/b. K. Ashar and Co. for Respondent No. 1.

CORAM : GAURI GODSE J

RESERVED ON : 27th MARCH 2026

PRONOUNCED ON : 8th JUNE 2026

JUDGMENT:

1. This arbitration petition is filed by the original respondent under Section 34 of The Arbitration and Conciliation Act, 1996 [“The Arbitration Act”] to set aside the award passed by the arbitral tribunal comprising three arbitrators. By the impugned award, the respondents' claim is allowed, thereby directing the petitioners to pay the outstanding principal amount plus interest. The arbitration was invoked on the ground that the respondent-claimant is a member of The Bombay Yarn Merchants Association and Exchange Limited (“Association”). The petitioners are not members of the said association. Hence, according to the petitioners, the appointment of a constituent of the arbitral tribunal is unilateral, and thus the award is not sustainable.

2. Petitioner no. 1 is a manufacturer of textile suiting and shirting. Petitioner nos. 2 and 3 are directors of petitioner no.1. The dispute between the parties arose out of the alleged non-payment by the petitioners towards invoices raised by respondent no. 1 to the petitioners. The service of respondent no. 2 was engaged by the petitioners as a broker for various transactions.

3. Respondent no. 1 issued a letter dated 12th March 2021 to the association, submitting a claim on the alleged non-payment by petitioner no. 1. On the said letter, a notice was addressed by respondent no. 1 to the petitioners, intimating that the dispute has been referred to for arbitration before the association. By notice dated 1st April 2021, the association intimated the petitioners that respondent no. 1 had filed a claim for payment of Rs.1,72,308/- with interest on the ground that the payment towards four invoices raised by respondent no. 1 was unpaid.

4. The petitioners filed their reply dated 12th April 2021 and contended that respondent no. 2 had entered into a contract with the petitioners for the supply of yarn by respondent no. 1, but no payment was to be made to respondent no. 1. The

petitioners contended that respondent no. 2 owed an amount of Rs.1,20,000/- towards the petitioners. Hence, they had arrived at an arrangement whereby respondent no. 1's material, i.e. yarn would be delivered to the petitioners in lieu of the payment to be made by respondent no. 2 to the petitioners.

5. The association thereafter intimated the petitioners by a notice dated 24th June 2021 that it had appointed an arbitrator on their behalf, as the petitioners had failed to nominate their arbitrator. They were informed that the hearing was scheduled before the arbitral tribunal. The petitioners had intimated to the association that they would be unable to remain present on the scheduled date of hearing as their family member had tested positive for COVID-19. Accordingly, the association had intimated the petitioners that the hearing was adjourned to 26th July 2021. It appears that on the same day, the arbitral award was declared, and the petitioners were served with a copy of the award on 30th September 2021.

SUBMISSIONS ON BEHALF OF THE PETITIONERS:

6. No valid written arbitration agreement was executed between the parties. There is no valid arbitration agreement, in

writing or otherwise, executed between the parties. The invoices raised by Respondent No. 1 on the petitioners do not contain an arbitration clause. The petitioners are not members of the association; accordingly, the association could not have proceeded with arbitral proceedings against them.

7. It is trite law that in the absence of an arbitration agreement between the parties, disputes inter se cannot be referred to arbitration. The petitioners' conduct before the arbitral tribunal is immaterial. The association had no jurisdiction to entertain the disputes raised by respondent no. 1 against the petitioners. A ground for challenge to jurisdiction, can be raised at any point in proceedings, including in the proceedings initiated under Section 34 of the Arbitration Act. The impugned Award is not reasoned, and accordingly, against the public policy of India as held by the Apex Court in ***Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India***¹.

8. Learned counsel for the petitioners referred to clauses 150 and 152 of the bylaws of the association. He submits that the president of the association appointed the arbitrator on behalf of

¹ (2019) 14 SCC 131

the petitioner. Hence, the appointment is vitiated in view of Section 12(8) of the Arbitration Act. As per Clause 151 of the bye-laws the panel of arbitrators is amongst the members of the association. The claimant is a member of the association. Hence, firstly, in view of item no. 1 in VII Schedule to the Arbitration Act, appointment of a joint arbitrator by the president of the association is a unilateral appointment, inasmuch as when the arbitrator has in the past or present been in a business relationship with a party, the appointment of or by such person is not permissible under Section 12(5) of the Arbitration Act.

9. To support his submissions, learned counsel for the petitioners relied upon the decision of this court in *Manmohan Bhimsen Goyal and Another vs. Madhuban Motors Pvt. Ltd.*² He submits that the said decision follows the legal principles settled by the Apex Court in *Bhadra International (India) Pvt. Ltd and Others vs. Airports Authority of India*³.

10. Learned counsel for the petitioners therefore submits that the impugned award is without jurisdiction and is vitiated in view of sub-section (5) of Section 12 of the Arbitration Act. Hence, a

² 2025 SCC OnLine Bom 5665

³ 2026 SCC OnLine SC 7

patently illegal award passed without jurisdiction is liable to be set aside under Section 34 of the Arbitration Act.

SUBMISSIONS ON BEHALF OF RESPONDENT NO. 1 :

11. Learned counsel for respondent no.1 supports the impugned award. He submits that unless the criteria prescribed under sub-section (5) of Section 12 are satisfied, it cannot be assumed that the appointment was unilateral. To support his submissions, learned counsel for the respondents relied upon the decision of the Apex Court in the case of *MSP Infrastructure Limited vs. Madhya Pradesh Road Development Corporation Limited*.⁴ He submits that the Apex Court has held that a party is bound by the virtue of sub-section (2) of Section 16 to raise any objection on the jurisdiction before or at the time of submissions of its statement of defence and is prohibited from raising an objection on jurisdiction at a later stage. He submits that the petitioners participated in the arbitration proceedings and are therefore precluded from raising objections to jurisdiction.

12. Learned counsel for the respondents relied upon the decision of the Apex Court in *Gayatri Project Limited vs.*

⁴ (2015) 13 SCC 713

*Madhya Pradesh Road Development Corporation Limited*⁶.

Learned counsel for respondent no. 1 submitted that the petitioners, though raised objection on jurisdiction on the ground that the petitioners are not members of the association and there is no arbitration agreement between the parties, however, the petitioners never raised such a preliminary objection on jurisdiction and thus objection raised in Section 34 petition is stalled by Section 4 read with section 16(2) of the Arbitration Act.

13. The petitioners daily participated in the proceedings and also filed their response affidavit. Hence, petitioners waived their right to object to the arbitral jurisdiction. The legal principles governing unilateral appointment in the decision of *Bhadra International (India) Pvt. Ltd.* are inconsequential, as the petitioners have accepted the appointment and participated in the arbitral proceedings.

14. Appointment of the arbitrator on behalf of the petitioner is covered under the bylaws as referred to in the letter dated 1st April 2021 and the petitioner's response letter dated 24th June 2021. Hence, the objection to set aside an arbitral award solely

⁵ (2025) 10 SCC 750

on the ground of unilateral appointment would not be sustainable in a Section 34 petition.

15. So far as Clause 152(b) and (c) is concerned, all the bye-laws of the association would apply to the petitioners even if they are not members, inasmuch as they have entered into a contract with Respondent No. 1, who is a member of the association. Hence, in view of the letters exchanged between the petitioners and the association, the appointment is accepted by the petitioners, and thus the award cannot be set aside in a Section 34 petition on the ground that it is a unilateral appointment and thus not permissible in view of sub-section (5) of Section 12 of the Arbitration Act.

ANALYSIS AND CONCLUSIONS

16. I have perused the papers of the petition. There is no dispute that the petitioners are not members of the association. There is no arbitration agreement between the parties. However, respondent no. 1 has invoked arbitration clause under the bye-laws of the association requesting to constitute an arbitral tribunal to settle the respondent no. 1 of the claim of alleged non payment towards the invoices raised by respondent no. 1. There

is also no dispute that after the notice was served by the association the petitioners responded to the same and submitted their response denying the demand of respondent no. 1 mentioned in the association's notice.

17. So far as this letter dated 12th March 2021 is concerned, it is considered as respondent no. 1's claim before the arbitral tribunal. The petitioners were intimated only by way of notice by the association regarding respondent no. 1's claim. Hence, based on the contents of the notice, the petitioners had responded to the letter, thereby contending that the contract was between the petitioner and respondent no. 2 for the supply of respondent no. 1's yarn. However, based on the petitioners' response, the association appointed an arbitrator on their behalf. Therefore, it is submitted on behalf of the petitioners that they are neither members of the association nor was there any contract with respondent no. 1, who is a member of the association.

18. The petitioners have therefore rightly raised an objection that the letter, which is construed as an arbitral claim, was never served upon the petitioner and is produced for the first time in

this court. The petitioners have therefore contended that they were unaware of the enclosures to the letter, based on which respondent no. 1 claimed the amount towards alleged non-payment towards the invoices. The copy of the notice dated 24th June 2021 was also addressed to respondent no. 2, who has acted as a broker. However, respondent no. 2 had chosen to remain absent.

19. The arbitral tribunal, without considering the petitioners' submissions regarding the contract between the petitioners and respondent no. 2, proceeded to arbitrate respondent no. 1's claim to recover the amount from the petitioners based on the invoices raised by them. Thus, for the purpose of examining whether the constitution of the arbitral tribunal was unilateral, it is necessary to refer to the well-established legal principles settled by the Apex Court in *Bhadra International (India) Pvt. Ltd.*

20. It is a well-established legal principle, as held by the Apex Court, that proceedings conducted by unilateral appointment can be held null and void and set aside in a Section 34 petition. The Apex Court in *Bhadra International (India) Pvt. Ltd.*

summarises the legal principles for challenging the ineligibility of the party to be appointed as arbitrator. The Apex Court held that an award passed by an ineligible arbitrator is a nullity, against the public policy of India, and therefore liable to be set aside under Section 34 of the Arbitration Act. The issue of jurisdiction is explained by the Apex Court as the authority of the arbitral tribunal to render a decision on the merits of the case; hence, it is held that an arbitrator who lacks jurisdiction cannot make an award on the merits. Thus, a question of jurisdiction arises when the arbitral tribunal is fundamentally incompetent to render a decision until an award is passed. The Apex Court therefore concluded regarding the position of law with regard to Section 12 of the Arbitration Act in paragraph 123, which reads as under :

“123. A conspectus of the aforesaid detailed discussion on the position of law as regards Section 12 of the Act, 1996, is as follows:-

i. The principle of equal treatment of parties provided in Section 18 of the Act, 1996, applies not only to the arbitral proceedings but also to the procedure for appointment of arbitrators. Equal treatment of the parties entails that the parties must have an equal say in

the constitution of the arbitral tribunal.

ii. Sub-section (5) of Section 12 provides that any person whose relationship with the parties or counsel, or the dispute, whether direct or indirect, falls within any of the categories specified in the Seventh Schedule would be ineligible to be appointed as an arbitrator. Since, the ineligibility stems from the operation of law, not only is a person having an interest in the dispute or its outcome ineligible to act as an arbitrator, but appointment by such a person would be ex facie invalid.

iii. The words "an express agreement in writing" in the proviso to Section 12(5) means that the right to object to the appointment of an ineligible arbitrator cannot be taken away by mere Implication. The agreement referred to in the proviso must be a clear, unequivocal written agreement.

iv. When an arbitrator is found to be ineligible by virtue of Section his mandate is 12(5) read with the Seventh Schedule, automatically terminated. In such circumstance, an aggrieved party may approach the court under Section 14 read with Section 15 for appointment of a substitute arbitrator. Whereas, when an award has been passed by such an arbitrator, an aggrieved party may approach the court under Section 34 for setting aside the award.

v. In arbitration, the parties vest jurisdiction in the

tribunal by exercising their consent in furtherance of a valid arbitration agreement. An arbitrator who lacks jurisdiction cannot make an award on the merits. Hence, an objection to the inherent lack of jurisdiction can be taken at any stage of the proceedings.”

21. This court in ***Manmohan Bhimsen Goyal*** referred to the well-settled legal principles and, by referring to the various decisions, including ***Bhadra International (India) Pvt. Ltd .*** After referring to and discussing all the legal principles on the scope of Section 12 of the Arbitration Act, this court summarises the legal principles in paragraph 38 as under : -

“38. From the above discussion, the principles which can be summarized are thus:

(I) Every arbitration agreement providing for unilateral appointment of the sole or the presiding arbitrator is invalid. Consequently, any proceedings conducted before such unilaterally appointed Arbitral Tribunal are nullity and cannot result into an enforceable award, being against Public Policy of India, warranting its invalidation under Section 34 of the Arbitration Act.

(II) Unilateral appointment also includes the vice of authorizing only one of the parties to appoint the arbitrator, though that person himself may not act as

arbitrator. Appointment made by one party to the dispute by calling upon the opposite party to choose only one of the named persons as arbitrator also constitutes unilateral appointment.

(III) The waiver of applicability of Section 12(5) of the Arbitration Act requires an express agreement in writing under the Proviso. The conduct of the parties, such as participation in arbitral proceedings, filing of statement of claim/defence, filing of counterclaim, etc., is inconsequential and cannot constitute a valid waiver under the Proviso to Section 12(5) of the Act.

(IV) Since the arbitral award made by unilaterally appointed arbitrator is a nullity, even a party appointing arbitrator is not precluded from raising objection to unilateral appointment and seeking annulment of the award. Principle of estoppel does not apply.

(V) The objection of unilateral appointment of arbitrator can be raised at any stage of the proceedings and even while challenging the award under Section 34 or opposing enforcement under Section 36 of the Act.

(VI) Section 12(5) of the Arbitration Act is an exception to Sections 4, 7, 12(4), 13(2) and 16(2) of the Act. Thus, there is no deemed waiver of right to object (1) by proceeding with arbitration without

objection under Section 4, (II) by exchange of statement of claim/defence under Section 7, (iii) by failure to challenge arbitration under Section 13(2) or (iv) by failure to raise objection of jurisdiction under Section 16(2) of the Arbitration Act. Therefore, the principle propounded in Gayatri Projects Limited v. Madhya Pradesh Road Development Corporation Ltd.²² about waiver of objection of non-existence of arbitration agreement does not apply to Section 12(5) of the Act.

(VII) As the ineligibility goes to the root of the jurisdiction, it is not necessary for a party to raise that objection before arbitrator or even in the Petition filed under Section 34 of the Act. Sub-Sections (2)(b) and (2A) use the expression 'if court finds that..' enabling the Court to invalidate the award even in absence of objection in the Petition."

22. Thus, the legal principles in ***Gayatri Projects Limited***, relied upon by the learned counsel for respondent no. 1, regarding waiver of plea of jurisdiction are also considered in the decision of this Court in ***Manmohan Bhimsen Goyal***. The decision in ***MSP Infrastructure*** was discussed in ***Gayatri Projects Limited***, while dealing with the objection of lack of jurisdiction. It is held in ***Manmohan Bhimsen Goyal*** that the plea

about waiver of jurisdiction would not apply to Section 12(5). Thus, the legal principles regarding the unilateral appointment and the award liable to be set aside on the ground that it is in breach of the public policy of India are no longer res integra.

23. In the present case, admittedly, the petitioners are not members of the association; there is no agreement between the petitioners and respondent no. 1, who filed the claim before the arbitral tribunal constituted under the byelaws of the association. The petitioners' reply/letter, which is considered the agreement for constituting the arbitral tribunal, refers to the petitioners' contract with respondent no. 2. Thus, the contents of the letter issued by the petitioners itself shows that the petitioners had never consented to the constitution of the arbitral tribunal under the bye-laws of the association. Hence, in view of these facts, there is substance in the arguments raised on behalf of the petitioners that the impugned award is based on a unilateral constitution of the arbitral tribunal by the association by relying on the byelaws of the association to which the petitioners are admittedly not members. Hence, in the absence of any arbitration agreement between the petitioners and respondent

no. 1, and in the absence of a valid constitution of the arbitral tribunal, the impugned award would not be sustainable, as it is against the public policy of India.

24. Hence, in light of the well-settled legal principles referred to in the above paragraphs, the impugned award is in conflict with Section 12(5) of the Arbitration Act and is thus patently illegal, as it is against the public policy of India. None of the grounds raised on behalf of respondent no. 1 would constitute an express or implied consent in writing by the petitioners as required under the proviso to sub-section (5) of section 12 of the Arbitration Act. Hence, the impugned award is a nullity and thus liable to be set aside.

25. For the reasons recorded above, the arbitration petition is allowed by passing the following order : -

- (i) The impugned award dated 26th July 2021 passed by the arbitral tribunal is quashed and set aside.

[GAURI GODSE, J.]