IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO. 210 OF 2024

Suryadeep Engineering Pvt. Ltd. ...**Petitioner**

Versus

NM Construction ...**Respondent**

WITH

INTERIM APPLICATION NO. 38622 OF 2024

IN

COMMERCIAL ARBITRATION PETITION NO. 210 OF 2024

Mr. Akash Menon, *Advocate for the Petitioner.*

Mr. Shyam Kapadia, *a/w Gaurav Jain, Ashwath Reddy, Dhrupad Vaghani, Advocate for Respondent.*

CORAM: SOMASEKHAR SUNDARESAN, J

RESERVED ON: JANUARY 2, 2025
PRONOUNCED ON: JANUARY 10, 2025

JUDGEMENT: (*Per, Somasekhar Sundaresan J.*)

The Controversy:

1. The validity of an award passed by an arbitrator appointed unilaterally by the party invoking arbitration under an arbitration

agreement that does not envisage unilateral appointment, is under challenge in this Petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("***the Act***"). For the reasons recorded below, I hold that such Award deserves to be set aside, being a product of a process that is a patent contravention of the Act, and its finely nuanced scheme.

Factual Matrix:

2. The factual matrix for adjudication of this petition may be summarized as follows:

a) Sometime in 2013, a listed company called Pratibha Industries Limited ("***PIL***") was awarded two work orders by the Public Health Engineering Department, Government of Rajasthan. It is a matter of record that PIL is currently under liquidation under the Insolvency and Bankruptcy Code, 2016;

b) PIL awarded the Petitioner some part of the work orders awarded by the Government of Rajasthan. The Respondent claims to have "facilitated" the sub-contract work

from PIL, for which it claims "facilitation consideration" (the Petitioner characterises this as a "commission / bribe");

c) According to the Respondent, a Memorandum of Understanding dated January 15, 2019 ("***MOU***") had been executed between the Petitioner and Respondent, under which the facilitation consideration was payable, as a percentage of the value of work awarded by PIL to the Petitioner;

d) According to the Petitioner, no such MOU was executed, and the Petitioner had appointed the Respondent to execute "certain petty works" in connection with the Petitioner's work on PIL's projects. A first information report has been filed with the Jaipur Police alleging that the MOU claimed by the Respondent is a product of forgery and fabrication;

e) It is common ground that the Petitioner paid the Respondent a sum of Rs.25,75,500/- (Rs~25.75 Lakhs) by end of January 2020. The Petitioner asserts this was for the "petty works" assigned to the Respondent while the Respondent asserts that this was part payment of the facilitation

consideration payable under the MOU;

f) Between May 15, 2021 and June 21, 2021, the Respondent raised multiple demands on the Petitioner to make payments towards "consideration for facilitation of projects". The Respondent contended that the Petitioner ought to have kept the Respondent informed about the status and progress of the projects as well as money receipts from PIL to the Petitioner. The Respondent called upon the Petitioner to provide bank statements to show the receipts from PIL. PIL having gone insolvent and bankrupt, the Respondent did not have access to such proof from PIL;

g) On July 2, 2021 the Respondent invoked arbitration, recommending one Mr. A. Jagannathan, based in Bangalore, as a sole Arbitrator to resolve the disputes and differences between the parties pursuant to the arbitration clause (Clause 7) in the MOU;

h) On August 10, 2021, the Petitioner addressed a letter to Mr. Jagannathan purporting to appoint him as the Sole Arbitrator and on September 3, 2021, Mr. Jagannathan appears to have informed the parties that the first hearing

would be held on September 13, 2021;

i) On September 7, 2021 the Petitioner is said to have addressed a letter to the Respondent stating that the Petitioner was rejecting the appointment of the sole Arbitrator. According to the Respondent this letter was not received by him;

j) On September 13, 2021, Mr. Jagannathan conducted a hearing, which was not attended by the Petitioner. The Respondent contends that Mr. Jagannathan called the Petitioner on the phone, but the Petitioner failed to appear;

k) On September 27, 2021, the Petitioner wrote to the Respondent and copied Mr. Jagannathan, stating that the Petitioner had already denied any dispute between the parties and expressly stated that the Petitioner "*is not accepting Mr. A. Jagannathan as a(n) Arbitrator*". The receipt of this letter, which also refers to the letter dated September 7,2021, is not disputed;

l) On September 28, 2021, a second hearing was held by Mr. Jagannathan without the Petitioner's participation.

According to the Respondent, the Petitioner "*ignored the tele-communication and WhatsApp messages*" of Mr. Jagannathan. In the List of Dates presented by Mr. Kapadia, this is an assertion about each of the multiple subsequent hearings in the matter – the calls and WhatsApp messages of Mr. Jagannathan being ignored by the Petitioner;

m) On October 20, 2021, the Petitioner filed a Civil Suit in Jaipur seeking a declaratory relief that the MOU was null and void *ab initio*. Since the MOU had an arbitration clause, this Suit came to be disposed of, directing the Petitioner to go to arbitration;

n) On December 20, 2021, the Respondent filed a Statement of Claim before Mr. Jagannathan;

o) On January 7, 2022, the Petitioner registered a first information report with the Jaipur Police against the Respondent;

p) On January 21, 2022 and January 24, 2022, Mr. Jagannathan wrote to the Petitioner calling for a Statement of Defence;

q) On January 29, 2022, the Petitioner reiterated the objections to Mr. Jagannathan, again stating that the Petitioner never signed any MOU with the Respondent and asserting that the MOU in question is a forged document. The Petitioner took up the plea that the content of the MOU makes it apparent that it is a contract for bribe money which is against public policy and would not be executable in the eyes of law;

r) On February 9, 2022, the Respondent refuted all the allegations of the Petitioner, while on March 9, 2022 the Petitioner reiterated all his contentions and objections;

s) On March 16, 2022, Mr. Jagannathan passed an order narrating all the contentions of the parties made until then. He ruled that he intended to continue with the arbitration proceedings and complete it. He returned a finding that the Petitioner has not filed a challenge to appointment of the arbitrator within the time stipulated under Section 13(2) of the Act and any objection from the Petitioner was "time barred" (not being within the time-frame of 15 days after becoming aware of the constitution of the arbitral tribunal);

t) On October 14, 2022, Mr. Jagannathan made the award in the proceedings conducted by him ("***Impugned Award***"). He awarded the Respondent an amount of Rs. 11,20,90,862/- (Rs~11.21 Crores) along with interest at the rate of 12%.

Contentions Analysed:

3. Mr. Akash Menon, Learned Counsel for the Petitioner submits that the fact that the appointment was unilateral is adequate to set aside the Impugned Award.

4. Mr. Shyam Kapadia, Learned Counsel for the Respondent submits that unilateral appointment of the arbitrator is not fatal to the Impugned Award. He argues that the Petitioner neither filed an application before the arbitrator so appointed, challenging his jurisdiction on the ground of unilateral appointment (under Section 16 of the Act), nor filed an application to the jurisdictional court asking for an independent arbitrator to be appointed to replace the unilaterally-appointed arbitrator (under Section 11 of the Act). Therefore, he would argue, the Petitioner has lost his right to challenge the Impugned

Award.

5. If Mr. Kapadia's contention were to be accepted, it would mean that an arbitrator may be appointed by a party in direct conflict with the arbitration agreement, and such illegally-appointed arbitrator could power on with the arbitration proceedings, and despite such genesis, the award could still be immune from challenge under Section 34 of the Act.

6. Mr. Kapadia also finds fault with the Petitioner for adopting varying stances to oppose the arbitration – for example, the Petitioner first asserted that there is no dispute for arbitration to be initiated; later, he asserted that no arbitration agreement was signed; then, he alleged that the purported agreement is forged and fabricated; and now, is arguing that the appointment is illegal because it is a unilateral appointment.

7. While these are attractive submissions on equity, they do not turn the needle in favour of the validity of the Impugned Award – it is trite law that equity can supplement the law when there is a gap in it,

but it cannot supplant the law[1].

8. The Petitioner too has invoked equity by arguing that the purported (he denies having executed it) agreement containing the arbitration clause is for payment of "commission / bribe" and therefore against public policy. This submission too is irrelevant for purposes of adjudicating this Petition, for which I am guided solely by the limited scope for interference under Section 34 of the Act.

9. For purposes of the analysis here, even assuming that the contract had indeed been signed, when it is common ground that the arbitrator was unilaterally appointed by one party to the contract, and that too when even the contract does not even envisage unilateral appointment of an arbitrator, this is no longer a case of just considering whether a unilateral appointment of arbitrator is illegal, but in fact, a case of the appointment being in conflict with the very arbitration agreement that is invoked. Therefore, the appointment is void *ab initio* because of the patent illegality in the very appointment of the arbitrator.

[1] *2011 (4) SCC 266*

Party Autonomy and Independence:

10. The doctrine of "party autonomy" in determining, among others, who the arbitrator should be, and the "independence" of the arbitrator so appointed, are twin facets that lie at the heart of privatised dispute resolution in the form of arbitration. The Act accords to an arbitral award, the statutory treatment given to a decree of a court, in enforcement of the award (under Section 36 of the Act). The Act also limits the grounds of challenge to an arbitral award (under Section 34 of the Act). Therefore, when parties agree to repose confidence in a private quasi-judicial arbitral tribunal, giving up precious rights to a first appeal and a second appeal, it is expected that the contracting party ought to be able to bring to bear its full sovereign autonomous power in deciding who should man that tribunal.

11. Where the parties have executed an arbitration agreement that permits one of the parties to unilaterally choose the arbitrator, it would give rise to a potential conflict between "party autonomy" and "independence". The thinking that "party autonomy" is supreme endorses the theme that a contracting party should be able to agree, for consideration, that it would abide by the choice of arbitrator made by

the other contracting party. The thinking that "independence" is supreme endorses the theme that if one party can dictate who the arbitrator should be, it would undermine the very core element of impartiality, fairness and balance that is essential for an arbitrator who is given the powers to adjudicate and make an award that is on par with a court judgement, and that too, protected from two rounds of appeal that even a court's judgement would be subjected to.

12. In *Central Organisation for Railway Electrification vs. ECI SPIC SMO MCML (JV) A Joint Venture Company*[2] (***Unilateral Reference Case***), dealing with this very conflict, a five-judge bench of the Supreme Court answered a reference to declare that "party autonomy" would give way to "independence". The majority judgement by three judges, declared that even if the parties agree by contract that one of the parties may unilaterally appoint an arbitrator, such provision in the contract would be in contravention of the Act and would not be enforceable. Two separate judgements, dissenting on some facets of the majority view (to state that every clause providing for unilateral appointment need not be inexorably illegal), also firmly iterated that independence and impartiality of the arbitral tribunal is sacrosanct.

[2] *2024 SCC OnLine SC 3219*

13. It should be remembered that the ***Unilateral Reference Case*** was dealing with arbitration agreements that had clauses providing for unilateral appointment by one of the parties to the arbitration agreement. Although the Act allows parties to agree to the procedure for appointment of arbitrators, the principle of independence, impartiality and fairness of the procedure for appointing the arbitrator was held to be immutable, thereby rendering such clauses illegal despite being founded on party autonomy.

Arbitration Agreement Violated:

14. In the matter at hand, the Respondent admits that the appointment of Mr. Jagannathan was unilateral. It was evident that the appointment was not the product of mutual consent or a Court's direction.

15. What stands out is that Clause 7 of the MOU, which contains the arbitration agreement (even if its execution is in dispute) does not even purport to enable the Respondent to unilaterally appoint the Sole Arbitrator. For felicity, Clause 7 of the MOU is extracted below:-

> *7. The parties agree any dispute or difference arising under this MOU that the Arbitration shall be conducted in accordance with the Arbitration and Conciliation Act, 1996. The Venue of*

> *Arbitration shall be at Mumbai. The fee and other expenses to be paid to the Arbitrator shall be borne by the invoking party. All other expenses such as venue, attorney fee, making and presenting their case, etc. shall be borne by the respective parties on their own.*

16. This provision is significant for what it does not state – the power of a party to appoint an arbitrator unilaterally. The arbitration agreement provides that the arbitration shall be conducted in accordance with the Act. It is apparent that the Petitioner had not agreed to the procedure unilaterally adopted by the Respondent, or to the identity of the arbitrator to be appointed.

17. In the conventional understanding of a "unilateral appointment", the premise would be that the arbitration agreement, which autonomous parties have chosen to execute, provides for unilateral appointment by one party . Yet, the law declared is that such an agreed procedure would be illegal. The case at hand indeed involves unilateral appointment, but such appointment is not even in consonance with the arbitration agreement, which simply means that the unilateral appointment in this case is in direct conflict with the very arbitration agreement under which the arbitration has been invoked.

18. The Respondent had proposed the name of Mr. Jagannathan,

when invoking the arbitration. The Respondent admits that the Petitioner did not consent to the name. Even if one assumes that the Respondent is right in its claim that the letter dated September 7, 2021 from the Petitioner was not received, the letter dated September 27, 2021 had admittedly been received. What is writ large on the face of the record is that there was no consensus that the parties would have Mr. Jagannathan as the agreed arbitrator in exercise of their autonomy. In that event, it was for the party invoking the arbitration (the Respondent) to approach the jurisdictional Court under Section 11 of the Act. The Respondent simply did not take this logical and imperative next step provided for in the scheme of the Act.

19. Instead, the Respondent finds fault with the Petitioner for not having gone to the jurisdictional Court under Section 11 of the Act, requesting the Court to appoint an arbitrator. This is an inexplicable expectation – to argue that the party that denies the existence of an agreement to approach the Court to appoint an arbitrator on the premise that the party that asserts the existence of the agreement is violating that agreement. The only logical and evident next step for the Respondent was to approach the Court under Section 11 to appoint an arbitrator. An arbitrator so appointed would then have had to deal with

his jurisdiction under Section 16, dealing with the question of the existence and validity of the arbitration agreement.

Scope of Section 16:

20. Mr. Jagannathan's ruling dated March 16, 2022 in favour of his own jurisdiction, even while claiming that a challenge under Section 13 of the Act had not been mounted within the time stipulated, and thereby powering on with the arbitral proceedings, making phone calls and sending WhatsApp messages to the Petitioner asking him to appear, is also inexplicable. The provisions of Section 16 are instructive and would be worthy of being extracted here for convenience:-

> ***Section 16. Competence of arbitral tribunal to rule on its jurisdiction.***—
>
> *(1)* ***The arbitral tribunal may rule on its own jurisdiction****, including* ***ruling on any objections with respect to the existence or validity of the arbitration agreement****, and for that purpose,—*
>
> *(a)* ***an arbitration clause*** *which forms part of a contract* ***shall be treated as an agreement independent*** *of the other terms of the contract; and*
>
> *(b)* ***a decision*** *by the arbitral tribunal* ***that the contract***

is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

[Emphasis Supplied]

21. It can be seen that Section 16(1) of the Act confers an expansive and wide power on the arbitral tribunal – to rule on its own

jurisdiction, ***including*** ruling on objections with respect to the existence or validity of the arbitral agreement. Even if one were to assume that the letter dated September 7, 2021 addressed to Mr. Jagannathan was not received by him (the Respondent disclaims receipt), admittedly, the letter dated September 27, 2021 was indeed received by them. The contents of that letter, stating that there is an objection to Mr. Jagannathan as the arbitrator, ought to have alerted the arbitrator that there is an objection that raises issues of both party autonomy as well as absence of agreed procedure for appointment. That objection ought to have been noticed and dealt with.

22. Instead, the ruling by Mr. Jagannathan in favour of his own jurisdiction by his order dated March 16, 2022, does not address the issue of unilateral appointment in violation of the arbitration agreement. Instead, it proceeds to state that a challenge to the procedure could only be made under Section 13, and no objection having been received within the time stipulated in Section 13(2), the arbitral tribunal would proceed with the arbitration.

23. Mr. Kapadia's submission that Mr. Jagannathan did not deal with the issue of unilateral appointment vitiating the proceedings, since

the ground of unilateral appointment had not been explicitly raised by the Petitioner before Mr. Jagannathan, is not convincing. It is apparent from a plain reading of Clause 7 of the MOU that there was no power to make a unilateral appointment. That is the first provision that an arbitral tribunal is expected to read even in a non-contested arbitral appointment. The arbitral tribunal was in receipt of at least the letter dated September 27, 2021, and therefore had notice that the arbitral tribunal's appointment is under cloud on the ground that the arbitrator's appointment was not a product of consent of the parties.

24. The next question the arbitral tribunal ought to have considered is whether, in the absence of consent, it was the Court with jurisdiction under Section 11 that had appointed the arbitrator. Evidently, Mr. Jagannathan was not appointed by the Court, and this ought to have been dealt with by him at the threshold. The scope of power under Section 16(1) is not limited by the need for a party to raise an objection. The provision empowers the tribunal to rule on its jurisdiction, including objections raised by a party. In my opinion, in the fact pattern at hand, the arbitral tribunal, which was discharging serious powers under the Act, ought to have been mindful of the fact that the very foundation of the edifice that it went on to build, was

undermined.

Scope of Section 13:

25. The position taken by Mr. Jagannathan for purposes of the limitation period under Section 13(2) of the Act calls for some analysis. Section 13 contains the procedural law for a challenge on the grounds set out in Section 12(3) of the Act. Those are grounds based on circumstances that either give rise to justifiable doubts as to the independence and impartiality of the arbitrator, or demonstrate that the arbitrator appointed does not possess the qualifications that the parties had agreed he ought to have. It is evident that Mr. Jagannathan understood the objections of the Petitioner as being linked to doubts as to his independence. That is why he had referred to Section 13(2) of the Act when ruling in favour of his own jurisdiction. He was aware that he was unilaterally appointed by the Respondent. Even in the proceedings before me, Mr. Kapadia fairly stated that there is no contest as to whether Mr. Jagannathan was unilaterally appointed. That being so, the provisions of Clause 7 of the MOU could only inexorably show that the very foundation of consent to the identity of the arbitrator did not exist. It was equally evident that the only remedy for this situation was

the invocation of Section 11 of the Act. That invocation of Section 11, ought to have been by the party invoking arbitration.

26. In any case, under Section 16(6) read with Section 16(5) of the Act, such a decision to proceed with the arbitration and to make an award, would render the award amenable to a challenge under Section 34 of the Act. Therefore, the challenge can only be mounted after the award is made, and to the award. This Petition is precisely such a challenge.

27. Mr. Menon fairly states that there is no material on record to bring to bear a factual finding of a relationship between Mr. Jagannathan and the Respondent that would fall within the categories of relationships stipulated in the Seventh Schedule of the Act. However, Mr. Menon would firmly assert that the said issue is moot, since, evidently and admittedly, the appointment of the arbitrator was unilateral. In my opinion, the mere fact that the appointment was unilateral is not the only vitiating facet here. That such a unilateral appointment was forced on a counterparty, not by the arbitration agreement, but by the conduct of the other counterparty, without

support for it the arbitration agreement, is fatal to the arbitral proceedings that has culminated in the Impugned Award.

No Estoppel against Law:

28. Mr. Kapadia would submit that the correspondence from the Petitioner would point to the fact that the Petitioner provided some factual inputs on facets of merits to Mr. Jagannathan. The insinuation is that the Petitioner is seeking to enjoy the luxury of challenging the Impugned Award on the premise of unilateral appointment, after having failed to convince the arbitrator. I am not persuaded by this line of reasoning, which appears to be an argument of estoppel. It is trite law that there can be no estoppel against law. Assuming Mr. Kapadia's contention that the Petitioner made some submissions on merits, is factually accurate, it would not follow that a forum without jurisdiction could be conferred jurisdiction. This is not a case where the Petitioner waived or withdrew its earlier objections, and changed its mind to participate in the arbitration. On the contrary, from a review of the material on record, it is apparent that at every stage, the Petitioner reiterated that it was opposed to Mr. Jagannathan as the arbitrator.

29. The scheme of Section 16(2) of the Act is also noteworthy – an objection to jurisdiction can be made before filing a Statement of Defence. In fact, Section 16(2) goes a step further to provide that even a party that has participated in the appointment of an arbitrator can raise an objection that the arbitral tribunal does not have jurisdiction. This only goes to show that jurisdiction being the very foundation of the proceedings, and consent in the appointment of an arbitrator being the primary means of conferring jurisdiction, the ability to raise a jurisdictional objection is wide. A party, despite having appointed an arbitrator, could still tell the arbitrator that the scope of his jurisdiction does not extend to the issues on which the arbitrator seeks to exercise the jurisdiction conferred. In any case, the Petitioner filed no Statement of Defence. Mr. Jagannathan understood the objection to be one of jurisdiction, which is why, making his comments on the objection being time-barred under Section 13(2), he still ruled in favour of his jurisdiction, which corresponds to the scope of Section 16. That having been done, and the arbitration having been persisted with, culminating in an award, this Petition under Section 34 of the Act, is the avenue stipulated in the Act for the decision to be challenged.

Absurdity Underlined:

30. It is fallacious to suggest that once an arbitrator has been appointed unilaterally (and that too without the agreement providing for it), the party not consenting to the appointment has to either file a challenge under Section 13 of the Act or approach the jurisdictional Court under Section 11 of the Act to replace the arbitrator, failing which, such party is estopped from mounting a challenge under Section 34 of the Act. The absurdity in this proposition would become clear from a hypothetical example. Take a case where there are two parties to an agreement and each has concurrently and unilaterally appointed an arbitrator. Each party could then assert that it is the arbitrator unilaterally appointed by it that should be approached by the other party under Section 13 of the Act. Each party could argue that it need not invoke Section 11 of the Act, and it is the other party that ought to approach the Court under Section 11. In that case, two unilaterally appointed arbitrators could make two distinct awards, and neither party can challenge the award passed by the arbitrator unilaterally appointed by the other party, being estopped from doing so, as claimed by Mr. Kapadia. Such a position would lead to chaos in the field of commerce. This is precisely why, there can be no estoppel against law, and also why

arguments founded on seemingly equitable principles may appear attractive, but can never supplant the law.

Conclusion – Impugned Award Set Aside:

31. Consequently, the appointment of Mr. Jagannathan i.e. the composition of the arbitral tribunal, in my opinion, was void *ab initio*. All consequences flowing from such appointment have to necessarily suffer the same fate of incurable illegality.

32. Under Section 34(2)(a)(v) of the Act, an arbitral award may be set aside if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless the agreement itself was in conflict with a provision of Part I of the Act from which the parties cannot derogate. If the composition of the arbitral tribunal or the arbitral procedure was not in accordance with Part I of the Act, then too the arbitral award would be amenable to being set aside.

33. Under Section 34(2)(b)(ii) of the Act, if the Court finds that the arbitral award is in "conflict with the public policy of India", the arbitral award may be set aside. Two of the three conditions stipulated

for regarding an award as being in "conflict with the the public policy of India" are relevant in this case – (i) that the award is in contravention of the fundamental policy of Indian law; and (ii) that the award is in conflict with the most basic notions of morality or justice. If either of these two factors are met, the award would be regarded as being in conflict with the public policy of India, and thereby the award would be amenable to being set aside under Section 34(2)(b)(ii) of the Act.

34. Under Section 34(2-A) of the Act, an arbitral award may also be set aside if the Court finds that the award is vitiated by patent illegality appearing on the face of the award. The appointment was not in accordance with the agreement under which arbitration was invoked. The composition was in conflict with party autonomy, which is one of the principles that represent the bedrock of the Act. The manner of persisting with proceedings in the teeth of there being no consent to the appointment is in conflict with the most basic notions of justice. Despite the Act actually having stipulated a mechanism in Section 11 to deal with the absence of consent to an arbitrator, it was not invoked. All of these point to patent illegality on the face of the award. To not set aside such an award passed by such a tribunal would have the effect of rendering Section 11 *otiose* and redundant, and being effaced from the statute.

Parties to agreements could then take the law into their own hands when there is an absence of consent, and not follow the due process under Section 11 of the Act, to have an independently chosen arbitrator appointed.

35. Therefore, these are not pointers to a mere error in the application of law without vitiating the very core and scheme of the Act. Instead, all factors clearly point to patent and manifest illegality on the face of the arbitral proceedings and thereby, the Impugned Award. As a result, the position that emerges in the matter leaves no manner of doubt that the conduct of the arbitration proceedings, and thereby its final product i.e. the Impugned Award, deserve to be set aside pursuant to the provisions contained in Section 32(2)(a)(v), Section 32(2)(b)(ii) and indeed Section 32(2-A) of the Act. It is hereby set aside.

36. These proceedings are under a Commercial Arbitration Petition, which requires me to apply my mind to whether and how much costs ought are to be imposed. Taking into account the parameters applicable to costs, and the conduct of both parties, I am persuaded not to impose costs.

37. This petition is ***finally disposed of*** in the aforesaid terms. As a result, any Interim Application filed in connection with this Petition, would also stand finally disposed of.

38. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]