IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATON PETITION NO. 267 OF 2024

WITH

INTERIM APPLICATION (L) NO. 35308 OF 2022

Jalaram Fabrics .....PETITIONER

: VERSUS :

Nisarg Textiles Pvt. Ltd. ....RESPONDENT

Mr. Shubhro Dey with Mr. Apoorv Srivastava and Mr. Tanvir Kazi for the Petitioner.

Mr. Dhruva Gandhi with Mr. Lalit V. Jain and Ms. Gayatri Devendra for the Respondent.

CORAM : SANDEEP V. MARNE, J.

JUDGMENT RESD. ON : 22 DECEMBER 2025.

JUDGMENT PRON. ON : 8 JANUARY 2026.

JUDGMENT :

1) By this Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**), the Petitioner has challenged the Award dated 21 July 2022 passed by the three Member Arbitral Tribunal of Bharat Merchants' Chamber. By the

impugned Award, the Arbitral Tribunal has directed the Petitioner to pay to the Respondent sum of Rs.11,44,850/- together with interest @ 18% p.a. on the principal amount of Rs.6,37,146/- till the date of the Award, totalling Rs.17,81,996/-. The Arbitral Tribunal has also granted post award interest @ 18% p.a. and costs of arbitration in favour of the Respondent.

2) Petitioner-Jalaram Fabrics is a proprietary concern engaged in the business of dealing with garments. Respondent is a private limited company registered under the Companies Act, 1956 and carries on business, *inter alia* of manufacture of fabrics including shirtings. Petitioner placed orders with the Respondent for supply of fabrics. Respondent supplied the goods to the Petitioner from time to time and various invoices were raised by the Respondent on the Petitioner. According to the Petitioner, during March 2019 to July 2019, it noticed issues in the supply, quality and pricing of Respondent's goods and claims to have requested Respondent to have the defective goods exchanged and replaced. By letter dated 20 November 2021, Respondent claimed that a sum of Rs.11,92,614/- was due and payable by the Petitioner towards the goods supplied. Respondent referred to arbitration clause printed on the invoices. Respondent claimed total amount of Rs.17,26,641/- including interest @ 18% p.a. and threatening the Petitioner to refer the disputes to the Arbitration Bench of Bharat Merchants' Chamber. Petitioner replied to the Respondent on 4 December 2021 claiming that an amount of Rs.10,87,534/- was already paid by the Petitioner to the Respondent in cash from time to time and that the balance amount was only Rs.1,05,071/-. It was claimed that three cheques were issued towards balance payment, but they were required to be stopped as Respondent had failed to deliver the goods.

Petitioner claimed that if Respondent was to deliver the goods, he was ready to pay the balance amount of Rs.1,05,071/-.

3) On 8 March 2022, Petitioner's Advocate addressed letter to Bharat Merchants' Chamber branding the same as 'say' of the Petitioner and repeating the stand taken in the previous reply dated 4 December 2021. Petitioner did not question the jurisdiction of Bharat Merchants' Chamber to conduct arbitral proceedings. It appears that the Respondent was given copy of 'say' dated 8 March 2022 and Respondent's Advocate responded on 17 March 2022 denying the contents of the same and once again demanded amount of Rs.11,92,614/- alongwith 18% interest. Since the Petitioner failed to nominate his arbitrator, letter dated 22 March 2022 was issued by Bharat Merchants' Chamber nominating Mr. Nilesh Khushiram Vaish as nominee arbitrator of the Petitioner. The arbitral proceedings were scheduled to be held on 2 May 2022. On 16 June 2022, Office Secretary of Bharat Merchants' Chamber communicated the next date of hearing of 21 July 2022 to the Petitioner alongwith the names of the two nominee arbitrators and the Presiding Arbitrator. It appears that the Petitioner failed to appear before the Tribunal. The Tribunal proceeded to make Award dated 21 July 2022 awarding sum of Rs.17,81,996/- in favour of the Respondent alongwith post award interest @ 18% p.a. Aggrieved by the Award dated 21 July 2022, Petitioner has filed the present Petition under Section 34 of the Arbitration Act.

4) Mr. Dey, the learned counsel appearing for the Petitioner would submit that the impugned Award is a nullity as the Arbitral Tribunal is constituted unilaterally by the Respondent. He would submit that the Arbitral Tribunal has not been constituted with

consensus of both the parties. That under the so-called arbitration clause, Respondent alone had the authority to refer the disputes to arbitration to be conducted by the chosen agency of Bharat Merchants' Chamber. That Respondent never agreed for resolution of disputes by Bharat Merchants' Chamber. That Respondent had no choice but to select any other institute/arbitrator for conduct of arbitral proceedings. That therefore the impugned Award suffers from the vice of unilateral appointment of Arbitrator and is therefore a nullity. He relies on judgment of this Court in ***Chhabriya Cloth Stores vs. Kamal Synthetics***[1] in support of his contention that arbitral award delivered by the Arbitrators from the panel of Bharat Merchants' Chamber has been set aside by this Court due to lack of consensus. He also relies on judgment of Delhi High Court in ***M/s. Alpro Industries vs. M/s. Ambience Pvt. Ltd. & Anr.***[2] in support of his contention that the Award rendered by the unilaterally appointed Arbitrator is held to be nullity.

5) Mr. Dey would further submit that the Arbitral Tribunal did not disclose the number of cases in which the arbitrators were appointed by the Respondent, details of fees paid etc. That such non-disclosure raised a serious and reasonable apprehension regarding independence and impartiality of the Tribunal. That the Award is in conflict with the public policy of India under Section 34(2)(b)(ii) of the Arbitration Act and the composition and procedure of Arbitral Tribunal is not in consonance with Section 34(2)(a)(v) of the Act. Mr. Dey would further submit that Petitioner is not a member of Bharat Merchants' chamber. He would submit that panel of arbitrators was not given to the Petitioner alongwith notice invoking

[1] 2025 SCC Online Bom 1950

[2] O.M.P.(Comm) 480/2019 decided on 14 November 2025

arbitration. He would further submit that the entire arbitral proceedings are sham and bogus as the Award bears the date '21 July 2022' but the same was forwarded by the Office Secretary of Bharat Merchants' Chamber to the Petitioner by letter dated '21 April 2022'. On above broad submissions, Mr. Dey would pray for setting aside the impugned Arbitral Award.

6) Mr. Gandhi, the learned counsel appearing for the Respondent would oppose the Petition and support the Award. He submits that the Award does not suffer from the vice of unilateral appointment of Arbitrators. That parties had agreed for institutional arbitration through Bharat Merchants' Chamber. That both the parties had choice of nominating their respective arbitrators and only Presiding Arbitrator has been nominated by independent institute i.e. Bharat Merchants' Chamber. That despite being given a choice to nominate its own arbitrator from the panel, Petitioner failed to avail the opportunity which led to appointment of Petitioner's nominee by Bharat Merchants' Chamber. That the arbitral proceedings are thus conducted by an independent institute of arbitration and not by an arbitrator chosen/nominated by the Respondent. He would deny that necessary disclosures of Respondent's nominated arbitrator were not made and would invite my attention to disclosure dated 7 February 2022. In support of his contention that arbitral proceedings conducted by institute of arbitration do not suffer from the vice of unilateral appointment, he relies on following judgments (i)***Sundaram Finance Ltd. vs. Ajith Lukose &***

Anr.,[3] (ii)*Balaji Enterprises & Ors. Versus. Sundaram Finance Ltd.*[4], and (iii) *KNR Tirumala Infra Pvt. Ltd Versus. National Highways Authority of India*[5].

7) Mr. Gandhi would further submit that Petitioner never challenged jurisdiction of Bharat Merchants' Chamber to conduct arbitral proceedings. He would take me through the correspondence, especially the response by the Petitioner to Bharat Merchant Chamber on 8 March 2022 seeking to justify its action on merits rather than questioning the jurisdiction of the institute to conduct institutional arbitration. He relies on judgment of this Court in *Hi Style India Pvt. Ltd Versus. Rakesh Corporation*[6] in support of his contention that a losing party cannot raise the issue of jurisdiction of Arbitral Tribunal directly in Section 34 petition without filing application under Section 16 of the Arbitration Act. He also relies upon judgment of the Apex Court in *Gayatri Projects Ltd. Versus. Madhya Pradesh Road Development Corporation Ltd.*[7] in support of his contention that arbitral award cannot be set aside only on the ground of absence of jurisdiction especially after the arbitral award is delivered. Mr. Gandhi would further submit that Petitioner has accepted all the invoices and has never raised the issue of absence of arbitration agreement. He relies upon judgment of this Court in *Benett Coleman & Co. Ltd. Versus. MAD (India) Pvt. Ltd.*[8]. He would submit that Petitioner adopted false defence of payment of the invoice amounts, but has not produced any iota of evidence either before the Arbitral Tribunal or even before this Court of having made such payment. That his so-called defence of defect in the goods raised in

3 2025 SCC Online Ker 6754

4 2025 SCC Online Del 8195

5 2025 SCC Online Del 5701

6 Arbitration Petition (L) No. 1127 of 2018 decided on 19 November 2025

7 Civil Appeal No.6856 of 2025 decided on 15 May 2025

8 2022 SCC Online Bom 7807

correspondence is not backed by any contemporaneous evidence. Similarly, his defence of non-delivery of goods is also not supported by any evidence on record. Mr. Gandhi would pray for dismissal of the petition.

8) Rival contentions of the parties now fall for my consideration.

9) The main objection to the arbitral award raised by the Petitioner is about unilateral appointment of the Arbitrators. It is contended that Respondent alone had unilateral power of making reference to arbitration to be conducted by Bharat Merchants' Chamber with no choice left to the Petitioner to choose the Arbitrator. It is contended that since Petitioner did not nominate the Arbitrator, the arbitral proceedings are conducted by Arbitrators unilaterally nominated at the behest of the Respondent, and that therefore the Arbitral Award is a nullity.

10) In the present case, disputes between Petitioner and Respondent have arisen over non-payment of invoice amounts by the Petitioner for supply of goods by the Respondent. In all the tax invoices raised by the Respondent on the Petitioner, there was following clause :

> 4. In case any dispute arise regarding this transaction the matter shall have to refer to arbitration of Bharat Merchant's Chamber Mumbai under their arbitration rule, Any legal proceeding arising out of these arbitration agreement shall be filled in Mumbai court only to the exclusion of all other courts.

11) There is no dispute to the position that Petitioner has accepted all the tax invoices containing the above arbitration clause. He has paid many of them. In none of the correspondence, Petitioner has ever disputed existence of arbitration clause. Even before me, it is not contended by the Petitioner that printed Clause-4 on the invoice does not constitute arbitration agreement. When Respondent invited attention of the Petitioner to the arbitration clause in the invoices by letter dated 20 November 2021, Petitioner responded on 7 December 2021 and did not dispute existence of arbitration clause. Further when Bharat Merchants' Chamber issued letters dated 8 February 2022 and 4 March 2022 to the Petitioner calling him upon to nominate his Arbitrator and file Statement of Defence, Petitioner's advocate responded on 8 March 2022 seeking to dispute Respondent's claim on merits but did not raise any objection with regard to the existence of arbitration agreement. Even in the present Arbitration Petition, Petitioner has not disputed existence of arbitration agreement. Even otherwise, in ***Benett Coleman*** (supra), a Single Judge of this Court has held that once the invoices containing arbitration clause are honoured on some occasions, it is not open to contest existence of arbitration agreement. This Court referred to the judgment of the Delhi High Court in ***Swastik Pipes Ltd. vs. Dimple Verma***[9] and of this Court in ***Ingram Micro India Pvt. Ltd.*** v. ***Mohit Raghuram Hegde, Proprietor Creative Infotech***[10] and held in paras-20, 21, 22, 23 and 27 as under:

> **20.** This decision is relied upon by the Delhi High Court in ***Swastik Pipe Ltd.*** v. ***Dimple Verma***, (ARBP 100/2021), where it was held as under:
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> "8. Having heard the learned counsel for the parties, the issue which arises is, whether the tax invoice stipulating an arbitration

[9] Arbitration Petition No. 100 of 2021
[10] Commercial Arbitration Application No. 235/2021 decided on 30 August 2022

clause as referred to above can bind the parties and consequently the dispute inter-se be referred to arbitration. The issue is no more res-integra in view of the Judgment of the Division Bench of this court in the case *Scholar Publishing House Pvt. Ltd.* (supra), wherein this Court in paragraphs 5 and 6 held as under:

> 5. Learned Senior Counsel for the respondents submitted that the appeal lacks in merit. He relied on the observations in *Newsprint Sales Corporation* (supra), as well as the decisions reported as *Lewis W. Fernandez* v. *Jivatlal Partapshi*, AIR 1947 Bom 65 and *Ram Chandra Ram Nag Ram Rice & Oil Mills Ltd.* v. *Howrah Oil Mills Ltd.*, AIR 1958 Cal 620. The respondent/claimants also urge that the history of transactions between the parties clearly showed that the appellant had accepted by his conduct, the invoices which contained the arbitration clause, and on most occasions honored them. It was therefore, not open for him to contest the existence of an arbitration agreement. Reliance was also placed on the findings and observations of the arbitrator in the award published by him.
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> 6. In the award, while dealing with the question of whether the parties had entered into an arbitration agreement, the arbitrator held as follows:
>
> ".....The bills filed with the petition clearly show that there is an arbitration clause between the parties and the claimant is the member of the Paper Merchant Association. The bills/invoices issued by the claimant have been duly received and acknowledged by the defendants. The claimant and defendants are working together since 1996 and the opposite party has made payment against the supplies made by the claimant prior to the arising of the present controversy. From 1996 when the business dealings were started the claimant and defendants were duly placing orders and were receiving goods and was making the payments. The bills issued were having arbitration clause as per which this Arbitrator has got power to adjudicate the dispute. The rates and terms mentioned on all the bills have been acknowledged and accepted by the defendants. The statements of accounts have been signed by the Director and confirmed by the defendants. The Debit Notes for interest issued by the claimant were accepted and the required TDS was deducted and TDS certificates were issued. The defendants have never made any objection with regard to the bills, rates and terms or the adjudication of the dispute by this tribunal, thus, it can be easily said that defendants have nothing to say in their defence....."

21. The Delhi High Court also make a reference to the decision of the Apex Court in case of *MTNL* v. *Canara Bank*, Civil Appeal 6202-6205 of 2019, where the existence of a valid arbitration agreement, came to be reiterated in the following words:—

> 9.2. The arbitration agreement need not be in any particular form. What is required to be ascertained is the intention of the parties to settle their disputes through arbitration. The essential elements or attributes of an arbitration agreement is the agreement to refer their disputes or differences to arbitration, which is expressly or impliedly spelt out from a clause in an agreement, separate agreement, or documents/correspondence exchanged between the parties.
>
> 9.3. Section 7(4)(b) of the 1996 Act, states that an arbitration agreement can be derived from exchange of letters, telex, telegram or other means of communication, including through electronic means.
>
> The 2015 Amendment Act inserted the words "including communication through electronic means" in Section 7(4)(b). If it can prima facie be shown that parties are ad idem, even though the other party may not have signed a formal contract, it cannot absolve him from the liability under the agreement.
>
> 9.4. Arbitration agreements are to be construed according to the general principles of construction of statutes, statutory instruments, and other contractual documents. The intention of the parties must be inferred from the terms of the contract, conduct of the parties, and correspondence exchanged, to ascertain the existence of a binding contract between the parties. If the documents on record show that the parties were ad idem, and had actually reached an agreement upon all material terms, then it would be construed to be a binding contract.
>
> The meaning of a contract must be gathered by adopting a common sense approach, and must not be allowed to be thwarted by a pedantic and legalistic interpretation.
>
> 9.5. A commercial document has to be interpreted in such a manner so as to give effect to the agreement, rather than to invalidate it. An 'arbitration agreement' is a commercial document inter partes, and must be interpreted so as to give effect to the intention of the parties, rather than to invalidate it on technicalities."

22. By relying upon the aforesaid observation, the Delhi High Court with reference to the tax invoices raised against which the payments were made, held that it amounted to an arbitration clause, particularly when the petitioner has not disputed receipt of the tax invoices. Holding that the respondent cannot disown the

clear stipulation in the tax invoice with regard to any dispute being referred to arbitration, an arbitrator came to be appointed.

23. A single Judge of this Court (Justice G.S. Kulkarni) on 30/8/2022 in case of ***Ingram Micro India Pvt. Ltd.*** **v.** ***Mohit Raghuram Hegde, Proprietor Creative Infotech*** (Commercial Arbitration Application No. 235/2021) was dealing with a purported arbitration clause contained in the sale terms and conditions accepted by the respondent, being available on it's website and a specific contention, that the arbitration clause is contained in the invoices raised by the applicant upon the respondent, which are accepted and acted upon. The applicant contended before the Court that in pursuance of acceptance of such conditions which are uniformly applicable to all the customers of the applicant, the respondent entered into regular dealings and accordingly, from time to time, purchase orders were placed by the respondent for supply of products as specifically set out in the purchase orders. The applicant also contended that these purchase orders were required to be executed as per the terms and conditions as accepted by the respondent which contained an arbitration agreement where the parties agreed to the jurisdiction clause.

...

27. Since in the present case, it can be clearly seen that the parties have acted upon the invoices and there was no denial of the invoices raised by the applicant, the clause contained in the invoices which clearly stipulate a reference to arbitration, deserve to be construed as an arbitration clause. The decision of this Court in case of *Concrete Additives* (supra) is delivered in the peculiar facts of the case and the law being well crystallized to the effect that any document in writing exchanged between the parties which provide a record of the agreement and in respect of which there is no denial by the other side, would squarely fall within the ambit of Section 7 of the Arbitration and Conciliation Act, 1996 and would amount to an arbitration clause.

12) Also as held by the Apex Court in ***Gayatri Projects*** (supra) the objection of non-existence of arbitration agreement is subject to principle of waiver. By participating in arbitral proceedings and by not raising the objection within time prescribed in Section 16(2) of the Arbitration Act, a party can waive the objection. Under Section 7(4)(c), existence of arbitration agreement

can also be presumed if the existence is stated in the statement of claim and is not denied in the statement of defence. In his 'Say' dated 8 March 2022, Petitioner did not dispute existence of arbitration agreement. In any case, it is not necessary to delve deeper into this aspect as Petitioner has not questioned existence of arbitration agreement before me.

13) Thus, there is no dispute between the parties about existence of arbitration agreement. Having held that there existed arbitration agreement between the parties, I proceed to examine the objection of unilateral appointment raised on behalf of the Petitioner.

14) The effect of unilateral appointment of arbitrator on the award has been discussed in my recent judgment in ***Manmohan Bhimsen Goyal & anr. Vs. Madhuban Motors Pvt. Ltd.***[11] in which the principles have been summarised after taking into consideration the applicable judgments, particularly the judgments of the Apex Court in ***TRF Ltd Vs. Energo Engineering Projects Ltd.***[12] ***Perkins Eastman Architects DPC and another Vs. HSCC (India) Ltd.***[13], ***Bharat Broadband Network Ltd. Vs. United Telecoms Ltd.***[14] and of Constitution Bench in ***Central Organisation for Railway Electrification (CORE) Vs. ECI SPIC SMO MCML (JV) A Joint Venture Company***[15]. The principles summarized in para-38 of the judgment are as under:

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11 Commercial Arbitration Petition No. 320 of 2024 decided on 23 December 2025

12 Civil Appeal No. 5306 of 2017 decided on 3 July 2017

13 (2020) 20 SCC 760

14 (2019) 5 SCC 755

15 (2025) 4 SCC 641

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 (i) 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/s. Madhya Pradesh Road Development Corporation Ltd.* [2025 SCC OnLine SC 1136] 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.

15) Perusal of Clause-4 printed on the invoices would indicate that the parties agreed for resolution of disputes arising out of transactions by reference to arbitration of Bharat Merchants' Chamber, Mumbai under their arbitration rules. Thus, parties essentially agreed for resolution of disputes through institutional arbitration. Respondent, who printed arbitration clause on the invoices, did not have any choice to make appointment of Arbitrator. On the other hand, parties agreed that approach would be made to an institute viz. Bharat Merchants' Chamber, who would resolve the disputes as per their arbitration rules. It therefore cannot be contended that Respondent had right to unilaterally nominate or appoint the arbitrator. The appointment of the arbitrator was to be made by the Institute (Bharat Merchants' Chamber) and not by the Respondent.

16) In terms of Clause-4 of the arbitration agreement, Respondent wrote to the Petitioner on 20 November 2021 inviting his attention to the arbitration clause and thereafter filed dispute before Bharat Merchants' Chamber on 7 February 2022 alongwith the dispute form. Petitioner nominated Mr. Pradeepkumar Jain as his nominee Arbitrator, who gave disclosure under Section 12(1)(a) and (b) of the Arbitration Act. After receipt of the arbitration case form alongwith all accompanying documents, Bharat Merchants'

Chamber issued notice dated 8 February 2022 to the Respondent which reads thus :

> We hereby inform you that the above mentioned Plaintiff has filed an Arbitration Case against you in the Chamber, copy of which is enclosed herewith for your information.
>
> In this regard you are requested to send your reply in Two Copies along with all relevant documents in your defence, along with the name of One Arbitrator selected by you from enclosed Panel of Arbitrators, within 7 days of receipt of this letter, so that case can proceed further.

17) Thus, the Petitioner was given a copy of the entire papers filed by the Respondent (including the details of nominated Arbitrator) and was called upon to nominate his own Arbitrator from the panel. Petitioner has placed on record at page-84 of the Petition, copy of panel of Arbitrators of Bharat Merchants' Chamber. Thus, it cannot be contended that Petitioner did not have right to choose the Arbitrator. Petitioner received letter dated 8 February 2022, but it failed to respond. Therefore, one more notice dated 4 March 2022 was issued to the Petitioner, which reads thus:

> In the above case we had sent a letter dated 08.02.2022 along with the copy of the case filed by the plaintiff, with a request to send Two Copies of your reply about the case within seven days of receipt of the letter, but you have not sent any reply till date.
>
> Thus with this letter we are intimating you for the last time that within 48 hours of receipt of this letter send your reply about the case, else please note we will be compelled to proceed with next step as per the Arbitration Rule.

18) This time, Petitioner responded vide advocate's letter dated 8 March 2022 and it would be apposite to reproduce the same :

To,
BHARAT MERCHANTS'' CHAMBER
(a Premier Chamber of Textile, Trade, Commerce & Industry),
Bharat Chamber Bhavan,
1st Floor, Kalbadevi Road,
Mumbai – 400002

Sub: Arbitrator Case No.A/44/2021/2022.
Plaintiff: M/s. Nisarg Textiles Pvt. Ltd.
Defendant: M/s. Jalaram Traders.

SAY OF THE DEFENDANT

Respected Sir,

My client Shri Ramesh Lalji Maru, Proprietor of Jalaram Fabrics, address at 12/23, Kailash Ashish, Dr. Ambedkar Road, Mulund (West), Mumbai-400080 has placed into my hands your letter dated 04/03/2022 address by you, with instruction to reply the same as under;

(1) That the case of the plaintiff is totally false, fabricated, misconceived and not maintainable in the eyes of law and hence denied defendant.

(2) That as per the notice of the plaintiff, the plaintiff has claimed the principal amount of Rs.11,92,614/- and also the interest amount of Ra-5,34,027/- of the Raw Material (Taka) send by plaintiff to my client/defendant.

(3) It is submitted that the notice sent by the plaintiff is not admitted by my client/defendant and denied the same, because my client/defendant has already paid plaintiff the amount of Rs.10,87,534/- by cash time to time and there is remaining balance amount of Rs.1,05,071/- only upon my client/defendant, which amount my client/defendant was stop payment of cheque Nos. 891223, 891224 and 891225 because, the plaintiff were failed to deliver the goods to my client/defendant of the abovesaid balance amount and except the abovesaid amount, there is no due amount upon my client/defendant.

(4) It is submitted that if the plaintiff delivered the goods to my client/defendant, he is ready to pay plaintiff the balance amount of Rs.1,05,071/-.

(5) It is submitted that therefore the amount claimed in abovesaid case under reply is totally false, baseless and fictitious and my client/defendant is not liable and responsible to pay the abovesaid principal amount and interest amount thereon.

(6) In view of above detail reply, facts and circumstances, the present matter may kindly be rejected/dismissed and oblige

Yours Faithfully,
Sd/-
Advocate

19) The letter dated 8 March 2022 is titled 'Say of the Defendant'. Petitioner thus partially complied with the requisition made by the Institute and submitted its defence on 8 March 2022 but failed to avail the opportunity of nominating its Arbitrator. Since Petitioner failed to nominate the Arbitrator, Bharat Merchants' Chamber proceeded to nominate arbitrator on behalf of the Petitioner vide letter dated 22 March 2022, which reads thus:

With regard to above mentioned arbitration case, we had sent setters dated 08.02.2022 & 04.03.2022 requesting you to send reply in two copies along with the arbitrator selected by you along with their acceptance, but you have not informed about your chosen arbitrator.

According to arbitration rule no. 12, President has selected on your behalf Shri Nilesh Khushiram Vaish of M/s Nilesh Tex as your arbitrator which please note.

Hearing of the above mentioned arbitration case will be held at the Chambers' office on Monday, 02.05.2022, at 4.30 p.m. Hence you are requested to be present in front of arbitration panel with all the relevant documents pertaining to the case. Please note that in your absence, the case will proceed as per the rules, which will be binding on you. Kindly make a note of this.

(emphasis added)

20) Thus, the Respondent has chosen only its nominee Arbitrator, and a choice was left to the Petitioner to nominate its own Arbitrator. It is not that the Petitioner's Arbitrator came to be nominated by the Respondent. Nomination of Petitioner's arbitrator (on account of its own failure to nominate) has been done by the Institute and not by the Respondent. Even appointment of the Presiding Arbitrator is made by the Institute and not by the Respondent. In my view, therefore it cannot be contended that the appointment of the Arbitrator/Arbitral Tribunal is done unilaterally by the Respondent.

21) The arbitration can be ad hoc or institutional. Ad hoc arbitration is regulated by parties themselves where the procedures are regulated by mutual consent. The institutional arbitration is governed by established rules and procedures. While ad hoc arbitration provides flexibility to parties, institutional arbitration many times has procedural advantages. More importantly, institutional arbitration provides cost effective private dispute resolution mechanism. In smaller trade disputes involving peculiar trade practices, the traders do prefer informal, quicker and cheaper dispute resolution mechanism through institutional arbitration rather than going for ad hoc arbitration. In such smaller trade disputes, ad hoc arbitration may prove expensive and time consuming. In the present case, parties have chosen to resolve their disputes and differences through institutional arbitration of Bharat Merchants' Chamber. The choice of institutional arbitration by the parties has resulted in quicker and cost-effective resolution of disputes. Despite granting repeated opportunities to Petitioner by dispatching multiple notices, not only the arbitral proceedings are concluded in a short time, but the costs of arbitration by three-

member tribunal is just Rs. 21,000/-. In such circumstances, resolution of disputes through such independent institutional arbitration needs to be encouraged as it fulfills the objectives behind the Arbitration Act.

22) The arbitration in the present case is held by the three-member Arbitral Tribunal under the aegis of the Institute. The Respondent had to choose the arbitrator from the broad-based panel of the Institute. He did not have right of nominating the arbitrator of his choice. The Respondent did not curate the panel of arbitrators of the Institute. Petitioner also had similar choice to make. The Presiding Arbitrator has been appointed by the Institute. Even Petitioner's nominee arbitrator is appointed by the Institute. Therefore, the case does not involve resolution of disputes through arbitrator of Respondent's choice. In my view therefore, the Award does not suffer from the illegality of unilateral appointment.

23) The issue of institutional arbitration not suffering from the vice of unilateral appointment is otherwise no more *res integra* and is covered by several decisions of various High Courts. In ***Sundaram Finance*** (supra), a Single Judge of Kerala High Court has dealt with the case where arbitration agreement provided for nomination of arbitrator by MCCI Arbitration Mediation and Conciliation Centre run by the Madras Chamber of Commerce and Industry (**MCCI**). The Petitioner therein had invoked arbitration clause and referred the dispute to MCCI for nomination of arbitrator. The Registrar of MCCI was requested to appoint arbitrator and accordingly the sole Arbitrator was appointed by MCCI. In the light of the above position, the Kerala High Court held in paras-17, 18, 19, 21 and 23 as under :

17. In the present case, Article 22 of the loan agreement stipulates that the sole arbitrator shall be nominated by the MCCI Arbitration, Mediation and Conciliation Centre (MAMC), an entity operated by the Madras Chamber of Commerce and Industry (MCCI). Thus, the arbitrator's nomination does not originate from either party. The petitioner requested the institution to make the nomination, and the nomination was subsequently carried out by this independent body, which adheres to its own rules for Arbitration and Conciliation. Consequently, this nomination cannot be construed as one prescribed by the petitioner. The court's judgment in *Hedge Finance* (supra) addressed a scenario where one party unilaterally nominated the arbitrator without the other party's concurrence or a prior agreement as contemplated under Section 12(5) or its proviso of the Arbitration Act.

18. The apex court in *Nandan Biomatrix Limited* (supra) held that the crucial determination for the court is the existence of an agreement to refer the dispute to arbitration, with the intention to be discerned from the clauses within the loan agreement. A reading of Article 22 of the loan agreement unequivocally demonstrates the parties' agreement to resolve disputes through institutional arbitration, as opposed to an ad-hoc arrangement.

19. When an institution is approached for arbitration, it is the institution itself that nominates the arbitrator in accordance with its established rules. Neither party holds the prerogative to choose the arbitrator. The apex court in *Sanjeev Kumar* (supra), in paragraph 39, affirmed that an arbitrator can be appointed directly by the parties, without court intervention, or by an institution specified in the arbitration agreement. In the absence of consensus regarding the arbitrator's appointment, or if the designated institution fails to fulfill its function, the party seeking arbitration is entitled to file an application under Section 11 of the Act for the appointment of arbitrators.

21. The Counsel also invoked Section 13 of the Act, which mandates that a party intending to challenge an arbitrator must, within 15 days of becoming aware of the arbitral tribunal's composition or any circumstances outlined in Section 12(3), submit a written statement detailing the reasons for the challenge to the arbitral tribunal. Section 12(3) specifies that unless the challenged arbitrator withdraws or the other party agrees to the challenge, the arbitral tribunal shall rule on the challenge. If the challenge is unsuccessful, the arbitral tribunal shall continue the arbitral proceedings and issue an arbitral award. In

the present case, the respondent has, to date, not approached the Arbitral Tribunal to challenge the arbitrator's appointment.

23. Turning to the facts of this case, there was no unilateral appointment by the petitioner. The appointment resulted from a nomination by an institution. Therefore, the court's judgment in *Hedge Finance* (supra) is not applicable to the present circumstances. Therefore, the appointment in this case stands on a distinct footing.

(emphasis added)

24) In ***Balaji Enterprises*** (supra), the Division Bench of the Delhi High Court has dealt with a case where arbitration clause provided for resolution of disputes by sole arbitrator nominated by Madras Chamber of Commerce and Industry. The Award was sought to be challenged on the ground that the appointment of Arbitrator was unilateral. The issue before the Delhi High Court is captured in para-2 of the judgment and has been decided in paras-4 and 6 as under :

2. The short question that arises for consideration in these appeals is whether the learned Arbitrator had been unilaterally appointed by the respondent, thereby rendering the Award a nullity in terms of the Judgment of the Supreme Court on this issue.

4. From the above clause, it is apparent that where any dispute arises between the parties in relation to the Agreement, the same was to be referred to a Sole Arbitrator to be nominated either by the Madras Chamber of Commerce & Industry (in short 'MCCI') or by the Managing Director of the lender. In the present case, the respondent admittedly did not choose the second option; instead, by notice dated 21.08.2023, they invoked the Arbitration Agreement and requested the MCCI to appoint an Arbitrator.

6. Upon receiving the said notice, the MCCI, by its notice dated 27.09.2023, appointed a Sole Arbitrator to adjudicate the disputes between the parties. This notice was also duly sent to the appellants herein. Therefore, it cannot be said that the appointment of the learned Arbitrator was unilaterally made by the respondent. On the contrary, the appointment was made by the Institution which, as per the agreement, had been earmarked by the mutual consent of the parties, as the appointing authority. Such an appointment, in

terms of Section 11 of the Arbitration and Conciliation Act, 1996, would be a valid appointment and would not fall foul of Section 12(5) of the said Act.

25) In ***KNR Tirumala*** (supra), a Single Judge of Delhi High Court has dealt with a case where the arbitration agreement provided for resolution of disputes in accordance with rules of Society For Affordable Redressal of Disputes (**SAROD**). After the disputes arose between the parties, arbitration clause was invoked and an Arbitrator was nominated by the Petitioner therein. NHAI insisted that the Arbitrator can only be chosen from SAROD panel and called upon the Petitioner to issue notice to SAROD for nomination of Arbitrator. Petitioner insisted that it was not bound to nominate Arbitrator from SAROD panel as the same was not broad based. Petitioner thereafter filed application under Section 11(6) of the Arbitration Act. Petitioner therein relied upon judgment of the Apex Court in ***Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)***[16], (***CORE***) and contended as under :

> **31.** The petitioner has contended that the panel maintained by SAROD is not broad-based and that requiring it to nominate its Arbitrator from such a panel would compromise one of the hallmarks of arbitration, namely the independence and impartiality of Arbitrators. Reliance is placed on the Conclusion part of ***CORE*** (supra) which reads as under:
>
> > *"**170.1.** The principle of equal treatment of parties applies at all stages of arbitration proceedings, including the stage of appointment of arbitrators;*
> >
> > ***170.2.** The Arbitration Act does not prohibit PSUs from empanelling potential arbitrators. However, an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by PSUs;*
> >
> > ***170.3.** A clause that allows one party to unilaterally appoint a sole arbitrator gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further, such a unilateral clause is exclusive and hinders equal participation of the other party in the appointment process of arbitrators;*

[16] (2020) 14 SCC 712

> ***170.4.*** *In the appointment of a three-member panel, mandating the other party to select its arbitrator from a curated panel of potential arbitrators is against the principle of equal treatment of parties. In this situation, there is no effective counterbalance because parties do not participate equally in the process of appointing arbitrators. The process of appointing arbitrators in CORE* [Central Organisation for Railway Electrification *v.* ECI-SPIC-SMO-MCML (JV), *(2020) 14 SCC 712] is unequal and prejudiced in favour of the Railways;*
>
> ***170.5.*** *Unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution."*

26) The Delhi High Court has however distinguished the judgment in ***CORE*** holding that the same had no applicability to the facts of that case. It is held that in ***CORE***, the Contractor could select two names from list of four officers of Railways from which General Manager could choose Contractor's nominee while reserving exclusive power to appoint remaining arbitrators. The Delhi High Court held that SAROD panel is not curated by NHAI and that the same was a broad based and independent panel of Arbitrators. The Delhi High Court held in paras-32, 33, 34, 35, 36, 37 and 38 as under :

> **32.** The judgment in *CORE* (supra) is distinguishable on the facts and has no application to the present case. In *CORE* (supra), the contractor was confined to selecting two names from a list of four officers of the Railways, from which the General Manager would choose the contractor's nominee, while retaining the exclusive power to appoint the remaining arbitrators. The clause was struck down as it vested one party with a dominant role in the appointment process. Such a situation is entirely different from cases of institutional arbitration, such as under the SAROD or ICA framework, where appointments are regulated by independent rules and drawn from a neutral panel.
>
> **33.** The petitioner's contention, therefore, does not merit acceptance. Unlike in *CORE* (supra), the SAROD panel is not curated by NHAI, which is itself a party to the dispute. Rather, it is a broad-based and independent panel comprising former Judges of the Supreme Court and various High Courts, retired Bureaucrats, Secretaries to the Government of India, former Chief Information

Commissioners, Chairpersons of statutory bodies, senior engineers, and other eminent professionals. This diverse and neutral composition ensures that there exists no conflict of interest with NHAI, and adequately addresses any apprehension regarding the independence or impartiality of the arbitrators so appointed.

34. Further, the Court in *Kamlesh Kumar* v. *Society for Affordable Redressal of Disputes*, 2024 SCC OnLine Del 4856 has held that SAROD is an independent body not controlled by NHAI. The relevant paragraph reads as under:

> *"14. Applying the tests to the facts of the present case, it is seen that Respondent No. 1 primarily functions as an Arbitral Institution and is not performing any governmental functions. Respondent No. 1primarily provides for panel of Arbitrators for conducting arbitration. Respondent No. 1 has got its arbitration rules. The arbitration rules provides the procedure as to how arbitration has to be conducted. The arbitration which is conducted by Respondent No. 1 is ultimately governed by the provisions of the Arbitration and Conciliation Act. 1996. Material on record indicates that the purpose of the society is to provide only a forum to ensure cost effective and time bound resolution of disputes between Respondent No. 2 and other entities. Respondent No. 1 also selects and maintains the list of experts who can provide their assistance in the working of the society. Respondent No. 1 provides for panel of Arbitrators and also provides for moral conduct of the Arbitrators. A perusal of aims and objects of Respondent No. 1 does not show, that it performs any kind of governmental function. The Respondent. No. 1 has got its own General Body and Governing Body. The Governing Body consists of eight (8) members. The appointment of the President of Governing Body is nominated by Respondent No. 2, however, it does mean that only an officer of Respondent No. 2 has to be nominated. Any person can be nominated by Respondent No. 2 and it could be a Retired Judge or an expert in the relevant field. The Vice President is nominated by the National Highways Builders Federation (NHBF) which is completely a private entity of contractors and builders. Three members are nominated by Respondent No. 2 and three members are nominated by National Highways Builders Federation (NHBF). There is equal amount of private participation in the Governing Body. Rules and regulations also do not in any manner suggest any kind of deep and pervasive control by Respondent No. 2 over Respondent No. 1."*

35. The aforesaid decision was further challenged before the Division Bench of this Court, in the case of *Kamlesh*

Kumar v. *Society for Affordable Redressal of Disputes*, 2025 SCC OnLine Del 2055, and it was held as under:—

> *"17. Accordingly, if we closely scrutinize the functions of the respondent no. 1/society and the manner in which its affairs are run and managed by the governing body and also the constitution of the governing body, we do not find that the NHAI exercises deep and pervasive control or even supervision over its affairs, both administratively as also financially. For this reason, we are unable to agree with the submissions made by the learned counsel representing the appellant that the respondent no. 1/society is either a State or its instrumentality within the meaning of Article 12 of the Constitution of India. We, thus, find ourselves in complete agreement with the findings recorded by the learned Single Judge in this regard in the judgment under appeal herein."*
>
> *(Emphasis supplied)*

36. The question whether the SAROD panel is broad-based or not and whether it upholds the concept of impartiality was recently discussed by this Hon'ble Court in *Villupuram Highways Construction (P) Ltd.* v. *National Highway Authority of India*, 2025 SCC OnLine Del 5167. The relevant portion reads as under:

> *"20. The short issue that arises for consideration in the three petitions is whether Petitioners are obliged to nominate their respective Arbitrators under Rule 11 of SAROD Rules from the panel maintained by SAROD or have the autonomy to nominate from outside the said panel. ...*
>
> *23. From the aforementioned arbitration clause, it is clear that parties agreed that their inter se disputes shall be referred to SAROD, a society registered under the Societies Registration Act, 1860 duly represented by NHAI and NHBF and will be dealt in terms of Rules of SAROD. Concededly, Petitioners agreed that the arbitral proceedings, commencing from appointment of the Arbitrator till the passing of the award will be regulated by SAROD Rules read with the 1996 Act. Therefore, the rival stands of the parties will have to be tested on the anvil of the SAROD Rules with regard to constitution of the Arbitral Tribunal under Rule 11.*
>
> *...*
>
> *29. ... In my view, this apprehension is taken care of by SAROD, by ensuring that the panel is broad-based as also making the procedure for appointment of Arbitrators to constitute the panel transparent through a committee appointed by the Governing Body of SAROD which has equal participation from NHAI and NHBF. NHAI has placed on record the list of Arbitrators maintained by SAROD as on 16.01.2025 valid for a period of two years, which shows that as many as 92 Arbitrators*

are empanelled and belong to diverse fields. As rightly flagged by counsel for NHAI, the list of Arbitrators includes former Judges of the Supreme Court and High Courts of different States; retired Bureaucrats such as Secretaries to Government of India having served in different Ministries/CVC/CIC/Parliamentary Affairs; Chairman, Railway Board; Chief Advisor, Bihar State Planning Board; Member, NHRC; Special Director General, CPWD; Engineer-in-Chief/Chief Engineer, PWD; DG, CPWD etc. as also former officers of NHAI. The panel is broad-based with people of considerable standing, experience and repute in diverse fields and offers a free and wide choice to the Petitioners to choose from.

30. The apprehension of any bias or impartiality is further allayed by the fact that the panel is not curated by NHAI and as explained by counsel for NHAI, is prepared and maintained by SAROD, which is an independent arbitral institution run by the society formed by NHAI and NHBF, where NHBF is an organisation of all contractors/builders of National Highways, State Highways and Bridges in organised sectors across the country in a representative capacity, with approximately 108 members. Management of affairs of SAROD is entrusted to a Governing Body which comprises of office bearers and members with the President being nominated by NHAI, Vice President by NHBF from its members and amongst the members, three are nominated by NHAI while the other three by NHBF. Clause 23.2 of Articles of Association of SAROD provides for formation of a Committee to prepare a panel of Arbitrators which examines and evaluates applications for empanelment/reempanelment of Arbitrators with four members having equal representation of NHAI and NHBF. SAROD invites applications from candidates/Arbitrators desirous of being empanelled and after careful scrutiny of the applications, credentials etc. of the applicants, prepares the panel in a transparent manner. The endeavour is to take Arbitrators from diverse fields with experiences in law, administration, engineering etc. The panel therefore cannot be held to be hit by the judgment in CORE *(supra)."*

(Emphasis supplied)

37. Similarly in the present case, as per the list of empaneled Arbitrators, the SAROD panel comprises of as many as 92 arbitrators drawn from diverse backgrounds, including former Supreme Court judges, former High Court judges across several States, retired Secretaries to the Government of India, Members of statutory bodies such as the NHRC, senior engineers, financial experts, and other professionals of high repute. The list placed on record by the respondent clearly demonstrates that the panel is not

limited to NHAI officials or any single category, but instead includes individuals of considerable standing across multiple disciplines.

38. This Court is of the opinion that such a panel is broad-based and offers the petitioner a wide and meaningful choice, thereby he contention of the petitioner that its autonomy is curtailed by being confined to the SAROD panel is, therefore, without merit. Once the petitioner has agreed to arbitration under SAROD Rules, it must adhere to the appointment procedure in its entirety. Party autonomy does not extend to selectively applying institutional rules while discarding others.

27) The Delhi High Court in **KNR Tirumala** (supra) further held that once parties consciously agree to submit their disputes to arbitration institution, the rules of that institute must be followed in entirety. It further held that institutional arbitration has provided a neutral and strong mechanism for appointment and conduct of proceedings. It has held in para-40 and 42 as under :

40. It must also be emphasised that once parties consciously agree to submit their disputes to an arbitral institution, the rules of that institution must be followed in their entirety. Institutional arbitration is designed to provide a neutral and structured mechanism for appointment and conduct of proceedings, and selective adherence to only those provisions that suit one party would undermine the very purpose of choosing institutional arbitration which also goes against Section 43D(2)(h) of the Act which talks about promotion of institutional arbitration by strengthening arbitral institutions.

...

42. Lastly, in the present case, the proceedings do not impinge upon the validity of the SAROD Arbitration Rules or the functioning of SAROD as an arbitral institution. The adjudication is confined to the rights and obligations of the parties inter se under the arbitration Agreement. Accordingly, SAROD is neither a necessary nor a proper party to these proceedings, and its non-impleadment does not render the petition defective.

28) The law thus appears to be fairly well-settled that when parties agree for resolution of disputes through institutional

arbitration and when the institute appoints the Arbitrator, the arbitral proceedings would not suffer from the vice of unilateral appointment. In the present case, parties agreed for resolution of disputes through the institute, viz. Bharat Merchants' Chamber. Under the Rules of the Institute, a broad-based panel of arbitrators was maintained and each party was given a right to nominate their own arbitrator. The Petitioner was given a choice to nominate its arbitrator, which opportunity Petitioner failed to avail. Since the Petitioner failed to nominate the arbitrator, the appointment was made by the Institute and not by the Respondent. Even Presiding Officer is nominated by the Institute. It therefore cannot be contended that the Respondent unilaterally appointed or constituted the Arbitral Tribunal.

29) Petitioner has placed strenuous reliance on judgment of this Court in ***Chhabriya Cloth Stores*** (supra), in which First Appeal was filed under the provisions of Section 39 of the Arbitration Act, 1940 challenging the judgment the City Civil Court dismissing the objection to the Arbitral Award and making the Arbitral Award rule of the Court under Section 17 of that Act. The dispute between the parties arose out of supply of goods. The invoice contained arbitration clause for resolution of disputes vide arbitration rules of Bharat Merchants' Chamber. After the Respondent therein approached Bharat Merchants' Chamber and nominated one Mr. Anil Agrawal from the panel of arbitrators of the Institute, Bharat Merchants' Chamber called upon appellant therein to appoint its arbitrator from the panel. The appellant therein refused to appoint Arbitrator nor participated in the arbitral proceedings. Bharat Merchants' Chamber appointed arbitrator for the appellant and proceeded with the arbitration. In the light of the above position,

award was sought to be challenged on the ground that appointment of the Arbitrator was without concurrence by the appellant therein. This Court held in paras-10, 11, 12, 13, 15 and 16 as under :

10. Ms. Khairnar has fairly conceded that condition printed overleaf of the invoice agreeing to dispute being made subject to the arbitration rules of Bharat Merchants' Chamber constitutes an Arbitration Agreement. The condition in the invoice was that dispute relating to transactions will be subject to Arbitration Rules of Bharat Merchants' Chamber, Bombay only. The Arbitration Rules of Bharat Merchants' Chamber are not produced on record. However, the fact remains that Arbitration clause did not name any Arbitrator and only provided for the dispute to be subject to Arbitration Rules. From the communication dated 29th March, 1994 addressed by the Bharat Merchants' Chamber to the Appellant, calling upon Appellant to appoint an Arbitrator of his choice and from the Arbitral Award, it is evident that the Rules provided for appointment of two arbitrators, one by each party. The Appellant by communication dated 7th April, 1994 speciOcally informed Bharat Merchants' Chamber that it is not willing to appoint an Arbitrator.

11. Chapter II of Arbitration Act provides for arbitration without intervention of Court and Section 8 which is contained in Chapter II provides that where an Arbitration Agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties and all parties do not concur in the appointments, the Court may on application of the party who gave notice and after hearing, appoint an arbitrator to enter upon the reference. Chapter III deals with arbitration with intervention of Court and Section 20(4) provides that where no sufficient cause is shown, the Court shall order the agreement to be Oled and make an order of reference to the arbitrator appointed by the parties and in absence of concurrence, to an arbitrator appointed by the court.

12. Admittedly in the present case, the Appellant did not concur in appointment of arbitrator and in such eventuality, the Respondent should have taken recourse to Section 20 of Arbitration Act. The Arbitration Agreement between the parties merely provided that Arbitration is subject to Rules of Bharat Merchants' Chamber and there was no named arbitrator. In absence of named arbitrator, Bharat Merchants' Chamber could not have unilaterally appointed an Arbitrator for the Appellant. The Appellant did not acquiesce in the appointment and did not participate in the arbitration proceedings.

13. Ms. Khairnar is right upon relying upon the decision of Apex Court in the case of *Dharma Prathishthanam* v. *Madhok Construction (P) Ltd.* (supra) where the Court has held in Paragraph Nos. 7 and 12 as under:—

> "**7.** An arbitrator or an Arbitral Tribunal under the Scheme of the 1940 Act is not statutory. It is a forum chosen by the consent of the parties as an alternate to resolution of disputes by the ordinary forum of law courts. The essence of arbitration without assistance or intervention of the Court is settlement of the dispute by a Tribunal of the own choosing of the parties. Further, this was not a case where the arbitration clause authorized one of the parties to appoint an arbitrator without the consent of the other. Two things are, therefore, of essence in cases like the present one : firstly, the choice of the Tribunal or the arbitrator; and secondly, the reference of the dispute to the arbitrator. Both should be based on consent given either at the time of choosing the Arbitrator and making reference or else at the time of entering into the contract between the parties in anticipation of an occasion for settlement of disputes arising in future. The law of arbitration does not make the arbitration an adjudication by a statutory body but it only aids in implementation of the arbitration contract between the parties which remains a private adjudication by a forum consensually chosen by the parties and made on a consensual reference.
>
> 12. On a plain reading of the several provisions referred to hereinabove, we are clearly of the opinion that the procedure followed and the methodology adopted by the respondent is wholly unknown to law and the appointment of the sole arbitrator Shri Swami Dayal, the reference of disputes to such arbitrator and the *ex parte* proceedings and award given by the arbitrator are all void *ab initio* and hence nullity, liable to be ignored. In case of arbitration without the intervention of the Court, the parties must rigorously stick to the agreement entered into between the two. If the arbitration clause names an arbitrator as the one already agreed upon, the appointment of an arbitrator poses no difficulty. If the arbitration clause does not name an arbitrator but provides for the manner in which the arbitrator is to be chosen and appointed, then the parties are bound to act accordingly. If the parties do not agree then arises the complication which has to be resolved by reference to the provisions of the Act. One party cannot usurp the jurisdiction of the Court and proceed to act unilaterally. A unilateral appointment and a unilateral reference - both will be illegal. It may make a difference if in respect of a unilateral appointment and reference the other party submits to the jurisdiction of the arbitrator and waives its rights which it has under the agreement, then the arbitrator may proceed with the reference and the party submitting to his jurisdiction and participating in the proceedings before him may later on be precluded and estopped from raising any

objection in that regard. According to Russell (*Arbitration*, 20th Edn., p. 104) -

> "An Arbitrator is neither more nor less than a private judge of a private court (called an arbitral tribunal) who gives a private judgment (called an award). He is a judge in that a dispute is submitted to him; ...
>
> He is private in so far as (1) he is chosen and paid by the disputants, (2) he does not sit in public, (3) he acts in accordance with privately chosen procedure so far as that is not repugnant to public policy, (4) so far as the law allows he is set up to the exclusion of the State courts, (5) his authority and powers are only whatsoever he is given by the disputants' agreement, (6) the effectiveness of his powers derives wholly from the private law of contract and accordingly the nature and exercise of these powers must not be contrary to the proper law of the contract or the public policy of England, bearing in mind that the paramount public policy is that freedom of contract is not lightly to be interfered with."

15. In the absence of consensual reference, the unilateral reference and unilateral award would render the reference void *ab initio.*

16. In the present case, admittedly the petitioner did not concur in an appointment of Arbitrator, in which case, in absence of any Application under Section 20 of the Arbitration Act seeking appointment of Arbitrator, the unilateral appointment and unilateral reference would be illegal. In the absence of any recourse to Section 20 of the Act, the Arbitrator did not have an inherent jurisdiction to enter into reference. Under Section 30 of Arbitration Act, the Award is liable to be set aside where the Award is otherwise invalid.

30) The judgment in ***Chhabriya Cloth Stores,*** though relates to arbitration through the same institute viz. Bharat Merchants' Chamber, the same is delivered in the context of provisions of the Arbitration Act, 1940. Under Section 8 of the Arbitration Act, 1940 if all the parties do not concur in the appointment of arbitrator, any party can serve written notice on the other party to concur in the appointment and thereafter approach the Court for appointment of arbitrator. Section 8 of the Arbitration Act, 1940 provided thus :

> **8. Power of Court to appoint arbitrator or umpire .-**
>
> (1) In any of the following cases,-

(a)where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b)if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c)where the parties or the arbitrators are required to appoint an umpire and do not appoint him; any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2)If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

31) As against Section 8 of the Arbitration Act, 1940, the statutory scheme under Section 11 of the Arbitration Act, 1996 is entirely different. For facility of reference, provisions of Section 11(6) of the Arbitration Act, 1996 are extracted below:

11. Appointment of arbitrators.—

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or
(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
(c) a person, **including an institution**, fails to perform any function entrusted to him or it under that procedure,

a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the

> appointment procedure provides other means for securing the appointment.
>
> *(emphasis added)*

Some of the amendments effected in Section 11 by Amendment Act 2019, such as introduction of sub-section (3A) for designation of arbitral institutions by Supreme Court and High Court or in sub-section (6) for appointment to be made by the arbitral institution, are yet to be notified.

32) Thus, an application to the Court for appointment of Arbitrator can be made under Clause 11(6)(c) of Arbitration Act only when an institute fails to perform any function entrusted to it. Thus, in case of an institutional arbitration, application for appointment of Arbitrator under Section 11(6) needs to be made only when the institute fails to perform its functions. In a case where the arbitration institute proceeds ahead by appointing the arbitrators and conducts arbitral proceedings, it is not necessary to approach the Court under Section 11(6) merely because one of the parties refuses to concur in appointment of arbitrator by the institute. In an institutional arbitration, where the appointment of arbitrator is made by the institute, there is no question of concurrence by the opposite party. This would be the first point of distinction between the present case and the judgment of this Court in ***Chhabriya Cloth Stores***. Additionally and more importantly, in ***Chhabriya Cloth Stores***, after the Respondent therein had nominated its arbitrator from the panel and when the appellant therein was called upon by the Institute to nominate its arbitrator from the panel, the appellant had declined to appoint arbitrator and had refused to participate in the arbitration proceedings. In the present case, after the Petitioner received communications dated 8 February 2022 and 4 March 2022 calling it upon to nominate its arbitrator,

the Petitioner did not refuse to nominate the arbitrator and instead gave response dated 8 March 2022 which has already been reproduced above. Petitioner did not refuse to participate in the arbitration proceedings and instead filed 'Say of the Defendant' on 8 March 2022. Thus, apart from difference in the statutory scheme, the facts in ***Chhabriya Cloth Stores*** are also clearly distinguishable and therefore the ratio of the judgment therein would not apply to the present case.

33) Even otherwise, the judgment of this Court in ***Chhabriya Cloth Stores*** cannot be cited in support of an abstract principle that in every case, where the institutional arbitration is held under aegis of Bharat Merchants' Chamber, the award must be set aside on the ground on unilateral appointment. It is well-settled position of law that a judgment is an authority for what it decides and not what can be logically deduced therefrom [SEE : ***Commissioner of Customs (Port) vs. Toyota Kirloskar Ltd***[17] and ***Secunderabad Club vs. CIT***[18]] It is also well settled position that a little difference in facts makes a lot of difference in the precedential value of a decision. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. In ***Union of India v. Major Bahadur Singh***[19], the Apex Court has held thus:

> *9.* **The courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of the courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of the courts are not to be construed as statutes.** To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define.

17 (2007) 5 SCC 371
18 2023 SCC Online SC 1004
19 (2006) 1 SCC 368

Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd.* v. *Horton* [1951 AC 737 : (1951) 2 All ER 1 (HL)] (AC at p. 761) Lord MacDermott observed : (All ER p. 14 C-D)

> 'The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge....'

xxx

11. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

12. The following words of Hidayatullah, J. in the matter of applying precedents have become locus classicus : (Abdul Kayoom v. CIT [AIR 1962 SC 680] , AIR p. 688, para 19)

> '19. ... Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo [Ed. : The Nature of the Judicial Process, p. 20.]) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.'
>
> * * *
>
> 'Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.' "

The above principles have been restated by the Apex Court in judgment in ***State of Haryana Vers. AGM Management Services Ltd.***[20]

34) Applying the above principles, in my view, since the statutory scheme under the Act of 1940 and the Act of 1996 is different and since the facts of the two cases are also entirely different, the ratio of

[20] (2006) 5 SCC 520

the judgment in ***Chhabriya Cloth Stores*** would not apply to the present case.

35) Mr. Dey has also relied upon the judgment of Single Judge of the Delhi High Court in ***Alpro Industries*** (supra), which in my view is clearly distinguishable. In case before the Delhi High Court, the arbitration clause conferred power on the Respondent therein to appoint the arbitrator and the arbitrator was appointed by the Respondent therein unilaterally. The facts in the case of ***Alpro Industries*** are thus entirely distinguishable.

36) Mr. Gandhi has also contended that the objection of jurisdiction of Arbitral Tribunal ought to have been raised before the Tribunal by filing application under Section 16 of the Arbitration Act and that the Petitioner, having not filed Section 16 application, is precluded from raising the same before this Court in petition under Section 34 of the Act. Reliance is placed on judgment of Single Judge of this Court in ***Hi Style India Pvt. Ltd.*** and of judgment of the Apex Court in ***Gayatri Projects Ltd.*** (supra). In my view however, there is distinction between the objection of non-existence of arbitration agreement and the objection of unilateral appointment of arbitrator. The Apex Court in ***Gayatri Projects Ltd.*** has relied on its judgment in ***Union of India vs. Pam Development (P) Ltd.***[21] and has held that the objection of absence of arbitration agreement is subject to the principle of waiver. However, so far as the objection of unilateral appointment of arbitrator is concerned, the principle of waiver does not apply on account of proviso to Section 12(5) of the Arbitration Act which requires waiver by express agreement in writing. In ***Bharat Broadband*** (supra), the Apex Court has held that

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provisions of Sections 4, 7, 12(4), 13(4) and 16(2) of the Arbitration Act do not dilute the requirement of express agreement in writing under Proviso to Section 12(5) of the Arbitration Act. In ***Manmohan Bhimsen Goyal*** (supra), the principles in this regard are summarised in para-38 (VI) which has been culled out in the preceding part of the judgment. I have held that the principle propounded in ***Gayatri Project*** about waiver of objection of non-existence of arbitration agreement does not apply to the vice of unilateral appointment under Section 12(5) of the Act. It is further held that even participation in arbitral proceedings by a party does not prevent him from raising the issue of unilateral appointment of the arbitrator.

37) In the present case, Petitioner has neither raised in the Petition nor has argued before me the issue of non-existence of arbitration agreement. Therefore, it is not necessary to discuss the principle of waiver in relation to objection of absence of arbitration agreement. So far as the objection of appointment of unilateral arbitrator is concerned, the principle of waiver does not apply. However, I have arrived at the conclusion that there is no appointment of unilateral arbitrator in the present case. It is therefore not necessary to delve any further into the aspect of applicability of principle of waiver and mere failure to file application under Section 16 of the Arbitration Act by the Petitioner does not preclude him from raising the issue of unilateral appointment of Arbitrator before Section 34 Court. However, since the Arbitral Tribunal is constituted by the Institute after due grant of opportunity to the Petitioner to nominate his arbitrator with Respondent not having any right to choose or appoint the Arbitrators, in my view, the impugned Award does not suffer from

the vice of unilateral appointment. Therefore, the objection of unilateral appointment sought to be raised by the Petitioner deserves to be repelled.

38) So far as the objection of failure to make disclosure under Section 12(1)(a) and (b) of the Arbitration Act is concerned, the same is without any substance. As observed above, the Respondent-nominated Arbitrator had clearly made disclosure required under Section 12(1)(a) and (b) and Petitioner was served with the same along with notice issued by the Institute. Petitioner never objected the appointment of the said nominee nor availed the opportunity of nominating his own Arbitrator. He cannot now be permitted to raise the objection of non-receipt of disclosure under Section 12(1)(a) and (b) of the Act.

39) So far as the objection by the Petitioner about Award being forwarded vide letter dated 21 April 2022 is concerned, it is seen that the Arbitral Award has been rendered on 21 July 2022. Respondent has placed before me copy of the entire records of the arbitral proceedings, which indicates that the first date of the arbitral proceedings was fixed on 2 May 2022 (after receipt of Petitioner's 'Say' dated 8 March 2022) and notice thereof was received by the Petitioner vide letter dated 22 March 2022. Copy of acknowledgement card by Petitioner in respect of the said notice is also placed on record. On 2 May 2022, Petitioner failed to appear on that date. Though Petitioner had filed his 'Say', he had failed to nominate his arbitrator and the Institute therefore proceeded to appoint Petitioner's nominee arbitrator and presiding arbitrator on hearing of 2 May 2022. The Arbitral Tribunal adjourned the proceedings to 9 June 2022 and decided to give one more

opportunity to the Petitioner to appear. Accordingly, notice dated 10 May 2022 was addressed to the Petitioner at its two addresses at Kalbadevi Road and Mulund (West) which have been received by the Petitioner. However, again on 9 June 2022 Petitioner failed to appear before the Arbitral Tribunal. Therefore, it was decided to give one more opportunity to the Petitioner and the arbitral proceedings were adjourned to 21 July 2022. Accordingly, by notice dated 16 June 2022 Petitioner was communicated the next date of hearing of 21 July 2022. Despite receipt of the notice, Petitioner once again failed to appear before the Arbitral Tribunal. Finally, the Arbitral Tribunal conducted hearing on 21 July 2022 and made Award on the same day. However, it appears that the Office Secretary while forwarding the Award to the Petitioner, erroneously mentioned the date of '21 April 2022' on the forwarding letter. However though the forwarding letters bear the date of '21 April 2022', there is acknowledgement on the same by the Petitioner of 14 December 2022. In that view of the matter, the objection of the Petitioner about arbitral proceedings being sham or bogus, on account of inadvertent reflection of date of '21 April 2022' on forwarding letter, cannot be upheld.

40) So far as the merits of the Award are concerned, no serious contest is made by the Petitioner. Petitioner's only defence before the Arbitral Tribunal in the form of 'Say' dated 8 March 2022 was that he had made payment of Rs.10,87,534/- in cash. However, no evidence was produced by the Petitioner of making any cash payment to the Respondent. The defence of defect in the goods could also not be proved by the Petitioner. In that view of the matter, the Arbitral Tribunal has rightly awarded the claim in favour of the Respondent. The Arbitral Tribunal however took note of payment of

Rs.47,764/- by Petitioner to the Respondent during pendency of arbitral proceedings and has accordingly reduced the claim amount to Rs.11,44,850/- plus 18% interest aggregating to Rs.17,81,996/-.

41) In my view, no valid ground of challenge is made out by the Petitioner to the impugned Award. The Award, to my mind, appears to be unexceptionable. The Arbitration Petition accordingly deserves to be dismissed.

42) The Arbitration Petition arises out of commercial transaction between the parties. Petitioner has unjustifiably refused to pay the balance invoice amounts to the Respondent for a considerable period of time. It has sought to escape the liability by raising technical and baseless objections to the Arbitral Award. The Arbitral Tribunal had granted costs of arbitration of only Rs.21,000/- in favour of the Respondent. Since, the present Arbitration Petition is found to be entirely baseless and without any substance, it would be appropriate to award costs of the present Arbitration Petition in favour of the Respondent. Considering the nature of transaction between the parties, I deem it appropriate to determine the costs at Rs. 50,000/-.

43) The Arbitration Petition is accordingly **dismissed** with costs of Rs.50,000/- which shall be payable by the Petitioner to the Respondent.

44) With the dismissal of the Arbitration Petition, the Interim Application also stands disposed of.

[SANDEEP V. MARNE, J.]