



2025:DHC:9095-DB



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 8th OCTOBER, 2025

IN THE MATTER OF:

+ **FAO(OS) (COMM) 40/2024**

AIR FORCE NAVAL HOUSING BOARDAppellant

Through: Mr. Yoginder Handoo, Mr. Ashwin
Kataria, Mr. Garvit Solanki,
Advocates

versus

UMAXE PROJECTS PVT LTDRespondent

Through: Mr. Anirudh Bakhru, Mr. Ayush Puri,
Ms. Vasundhara Bakhru, Ms. Archita
Mahlawat, Mr. Kanav Manmani,
Mr.Mohd Umar, Ms. Vijay Laxmi
Rathi, Mr. Umang Tyagi, Mr.Sultan
Jafri, Advocates

+ **FAO(OS) (COMM) 41/2024**

AIR FORCE NAVAL HOUSING BOARDAppellant

Through: Mr. Yoginder Handoo, Mr. Ashwin
Kataria, Mr. Garvit Solanki,
Advocates

versus

UMAXE PROJECTS PVT LTDRespondent

Through: Mr. Anirudh Bakhru, Mr.Ayush Puri,
Ms. Vasundhara Bakhru, Ms. Archita
Mahlawat, Mr. Kanav Manmani,
Mr.Mohd Umar, Ms. Vijay Laxmi
Rathi, Mr. Umang Tyagi, Mr.Sultan
Jafri, Advocates



CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN
SHANKAR

JUDGMENT

SUBRAMONIUM PRASAD, J.

1. The Petitioner has filed FAO(OS)(COMM) No. 40 of 2024 and FAO(OS)(COMM) No. 41 of 2024 under Section 37 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as “the Act”*), seeking to appeal against the common Judgment and Order dated 01.12.2023 (*hereinafter referred to as “Impugned Judgment”*) passed by this Court in OMP (COMM) No. 470 of 2023, and OMP (COMM) No. 469 of 2023 respectively, wherein this Court allowed these Petitions filed by the Respondent under Section 34 of the Act and set aside the final arbitral awards, both dated 28.06.2023 (*hereinafter referred to as “Impugned Awards”*).

2. Both the Impugned Awards were delivered by the same Sole Arbitrator between the parties, albeit with respect to different projects. As the parties were same and the contentions raised were common in both the petitions, the same were taken up for consideration together by the learned Single Judge of this Court *vide* the Impugned Judgment. This Court, in the same vein, will take up both the cases, together.

3. Shorn of unnecessary details, the facts leading to the filing of the present Appeals are as follows:-

- i. The impugned award in FAO(OS)(COMM) No. 41 of 2024, was passed in the context of Letter of Acceptance (LOA) dated 04.05.2010 issued to the Respondent being the lowest bidder for



the project to construct 430 flats in eight towers in a housing scheme near Jhajjar Village, Prem Nagar, Dehradun, for an estimated cost of Rs. 98.01 crores (hereinafter referred to as “**Dehradun Project**”). An agreement was executed on 10.06.2010.

- ii. The impugned award in FAO(OS)(COMM) No. 40 of 2024, was passed in the context of LOA dated 30.11.2017 issued to the Respondent to complete the balance work at the project site comprising 545 flats in eight towers for an amount of Rs. 38.33 crores (hereinafter referred to as “**Meerut Project**”). Notably, the Petitioner in the year 2010 had launched a housing scheme at Shatabdi Nagar, Meerut, which it had awarded to one M/s Omaxe Infrastructure & Construction Limited. However, the contract was terminated on 27.10.2017 resulting in issuance of LOA in favour of the Respondent. An agreement was executed on 17.01.2018.
- iii. Disputes arose between the parties regarding delayed construction and other ancillary issues connected therewith, in both, the Dehradun Project and the Meerut Project.
- iv. On 13.07.2019, the Appellant terminated the contract with respect to the Dehradun Project by invoking Clause 7 of the Contract Agreement and the balance/unfinished work was undertaken at the risk and cost of the Respondent.
- v. On 22.06.2019, the Appellant terminated the Contract with respect to the Meerut Project for non-performance.



- vi. As per clause 18.2 of the Contract Agreement dated 04.05.2010/ Clause 18.2 of GCC forming part of the Agreement dated 10.06.2010, executed for the Dehradun Project, the Chairman of the Appellant vide appointment letter dated 24.07.2019 appointed Mr. Vinod Kumar Maheshwari as the Sole Arbitrator for adjudication of disputes.
- vii. Similarly, as per clause 18.2 of the Contract Agreement dated 30.11.2017/Clause 22 of the Agreement dated 17.01.2018, executed for the Meerut Project, the Chairman of the Appellant vide appointment letter dated 15.07.2019 appointed Mr. Vinod Kumar Maheshwari the Sole Arbitrator for adjudication of disputes. The relevant extract of the Arbitration Clause reads as under:-

"22. All disputes arising if or in any way connected with this agreement shall be referred to the Chairman, AFNHB within 28 days of cause of action requesting to appoint an Arbitrator to adjudicate the dispute. The decision of the Chairman would be final and binding on both the parties, any recourse to court by both the parties can be initiated only after exhausting the arbitration clause. Such legal proceeding of any kind shall be initiated in Delhi or New Delhi only notwithstanding the location of the property/disputes which may be subject matter of the dispute."

- viii. Accordingly, the Sole Arbitrator appointed by the Chairman of the Appellant, pronounced the Impugned Awards with respect to each of the project separately, though both dated 28.06.2023.
- ix. The Sole Arbitrator partly allowed the claims and counter-claims of the parties in the Dehradun and the Meerut Project.



- x. Aggrieved by the Impugned Awards, the Respondent filed a petition under Section 34 of the Act seeking to set aside the Impugned Awards, which were delivered by the same Sole Arbitrator.
 - xi. This Court set aside the Impugned Awards vide the Impugned Judgment holding that the Sole Arbitrator was unilaterally appointed by the Appellant pursuant to Clause 18.2 of GCC forming part of the Agreement dated 10.06.2010 and Clause 22 of the Agreement dated 17.01.2018. The said clauses did not countenance any say of the Petitioner in the appointment of the arbitrator.
 - xii. The present Appeals are filed against this Impugned Judgment.
4. The Counsel for the Appellant states that the Respondent had themselves filed an application under Section 29(A) of the Act seeking extension of the mandate of the Learned Sole Arbitrator, which was not objected to and rather accepted by the Appellant as recorded in the Order dated 04.11.2022 passed by the Single Judge of this Court. As per the Counsel of the Appellant, the said application constituted an express agreement in writing, recorded by way of a judicial order whereby the mandate of the Learned Sole Arbitrator was extended under Section 29A of the Act.
5. He further stated that the Learned Sole Arbitrator before entering into reference had obtained consent of both the parties on 14.08.2019 and the Respondent consciously accepted the appointment of the Learned Sole Arbitrator.



6. The learned Counsel of the Appellant has placed reliance on a Judgment passed by the Division Bench of this Court in Bhadra International Private Limited & Ors. v. Airports Authority of India, **2025 SCC OnLine Del 698**; and VR Dakshin Private Limited v. SCM Silks Private Limited, **2024 SCC OnLine Mad 6761** to substantiate his arguments.

7. On the other hand, learned Counsel for the Respondent stated that to attract the proviso of Section 12(5) of the Act to be applicable, a party must expressly show awareness of the disqualification of the arbitrator under the Seventh Schedule of the Act and expressly waive that disqualification and such waiver must be recorded in writing either in an agreement or must be explicit in exchange of emails, etc and in the present case there is no document on record. He states that there is no document on record where the parties have expressly waived the disqualification by stating that they wish to continue with these proceedings notwithstanding the disqualification of the Learned Sole Arbitrator.

8. Learned Counsel for the Respondent has placed reliance on the Judgments passed by the Apex Court in TRF Limited v. Energo Engineering Projects Limited, **(2017) 8 SCC 377** and Bharat Broadband Network Ltd. v. United Telecoms Ltd. **(2019) 5 SCC 755**.

9. Heard the learned Counsel for the parties and perused the material on record.

10. The issue for consideration is whether in the facts of the present case the unilateral appointment of the Sole Arbitrator by the Appellant is violative of Section 12(5) read with Seventh Schedule of the Act rendering the Sole Arbitrator *de jure* ineligible or has the Respondent waived the



disqualification of the arbitrator and consequently, whether the Impugned Awards in the Dehradun Project and the Meerut Project, both dated 28.06.2023 were rightly set aside by the Single Judge of this Court.

11. The question whether a person, who is ineligible to act as an arbitrator can appoint an arbitrator, is no longer *res integra*. The law on this aspect has been settled by the Supreme Court in TRF Limited v. Energo Engineering Projects Limited, (2017) 8 SCC 377, which held as under:-

*“54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. **It is inconceivable in law that person who is statutorily ineligible can nominate a person.** Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.”* (emphasis supplied)

12. The decision of the Constitutional Bench of the Supreme Court in Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Co., (2025) 4 SCC 641, while upholding judgments of TRF Limited (*supra*), has held as under:-



“70. The concept of equality under Article 14 enshrines the principle of equality of treatment. The basic principle underlying Article 14 is that the law must operate equally on all persons under like circumstances. [M. Nagaraj v. Union of India, (2006) 8 SCC 212, para 106 : (2007) 1 SCC (L&S) 1013] The implication of equal treatment in the context of judicial adjudication is that “all litigants similarly situated are entitled to avail themselves of the same procedural rights for relief, and for defence with like protection and without discrimination” [Shree Meenakshi Mills Ltd. v. A.V. Visvanatha Sastri, (1954) 2 SCC 497, para 6 : (1954) 26 ITR 713] . In Union of India v. Madras Bar Assn. [Union of India v. Madras Bar Assn., (2010) 11 SCC 1, para 102 : (2010) 156 Comp Cas 392] , a Constitution Bench held that the right to equality before the law and equal protection of laws guaranteed by Article 14 of the Constitution includes a right to have a person's rights adjudicated by a forum which exercises judicial power impartially and independently. Thus, the constitutional norm of procedural equality is a necessary concomitant to a fair and impartial adjudicatory process.

xxx

128. If a person having a financial interest in the outcome of the arbitral proceedings unilaterally nominates a sole arbitrator, it is bound to give rise to justifiable doubts on the independence and impartiality of the arbitrator. The possibility of bias by the arbitrator is real because the person who has an interest in the subject-matter of the dispute can chart out the course of the entire arbitration proceeding by unilaterally appointing a sole arbitrator. A party may select a particular person to be appointed as a sole arbitrator because of a quid pro quo arrangement between them. Moreover, the fact that the sole arbitrator owes the appointment to one party may



make it difficult to decide against that party for fear of displeasure. It is not possible to determine whether the sole arbitrator will be prejudiced, but the circumstances of the appointment give rise to the real possibility of bias.

129. *Equal treatment of parties at the stage of appointment of an arbitrator ensures impartiality during the arbitral proceedings. A clause that allows one party to unilaterally appoint a sole arbitrator is exclusive and hinders equal participation of the other party in the appointment process of arbitrators. Further, arbitration is a quasi-judicial and adjudicative process where both parties ought to be treated equally and given an equal opportunity to persuade the decision-maker of the merits of the case. An arbitral process where one party or its proxy has the power to unilaterally decide who will adjudicate on a dispute is fundamentally contrary to the adjudicatory function of Arbitral Tribunals. [Gary Born, International Commercial Arbitration, (2nd Edn., Kluwer 2014) p. 1952.]*

xxx

163. *The possibility of bias is real in situations where an arbitration clause allows a government company to unilaterally appoint a sole arbitrator or control the majority of the arbitrators. Since the Government has control over the Arbitral Tribunal, it can chart the course of the arbitration proceedings to the prejudice of the other party. Resultantly, unilateral appointment clauses fail to provide an effective substitute for judicial proceedings in India. Further, a unilateral appointment clause is inherently exclusionary and violates the principle of equal treatment of parties and procedural equality.*



164. *Unilateral appointment clauses in a public-private contract fail to provide the minimum level of integrity required in authorities performing quasi-judicial functions such as Arbitral Tribunals. Therefore, a unilateral appointment clause is against the principle of arbitration, that is, impartial resolution of disputes between parties. It also violates the nemo judex rule which constitutes the public policy of India in the context of arbitration. Therefore, unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution for being arbitrary in addition to being violative of the equality principle under the Arbitration Act.*

xxx

170. *In view of the above discussion, we conclude that:*

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;*

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;*

170.6. *The principle of express waiver contained under the proviso to Section 12(5) also applies to situations where the parties seek to waive the allegation of bias against an arbitrator appointed unilaterally by one of the parties. After the disputes have arisen, the parties can determine whether there is a necessity to waive the nemo judex rule; and*

170.7. *The law laid down in the present reference will apply prospectively to arbitrator appointments to be made after the date of this judgment. This direction applies to three-member tribunals.”*

13. The Apex Court has held that an arbitration clause that allows one party to unilaterally appoint the Sole Arbitrator gives rise to justifiable doubt as to the independence and impartiality of the Arbitrator, and the fact that such a unilateral appointment clause in Public-Private contract has been held to be violative of Article 14 of the Constitution of India, the appointment of such an Arbitrator is bad, rendering the award void. Once the appointment itself becomes bad, then the Award automatically becomes unenforceable in law.



14. The second question that is to be considered is as to whether in the facts of the case the Respondent had expressly waived its claim under Section 12(5) of the Act.

15. The Apex Court in Bharat Broadband Network Ltd. v. United Telecoms Ltd. (2019) 5 SCC 755, has held as under:

“17. The scheme of Sections 12, 13 and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes “ineligible” to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case i.e. a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e. de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of



the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them.

XXX

20. This then brings us to the applicability of the proviso to Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an “express agreement in writing”. The expression “express agreement in writing” refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct. Here, Section 9 of the Contract Act, 1872 becomes important. It states:

“9. Promises, express and implied.—Insofar as the proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.”

It is thus necessary that there be an “express” agreement in writing. This agreement must be an agreement by which both parties, with full knowledge



of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court as indicating an express agreement on the facts of the case is dated 17-1-2017. On this date, the Managing Director of the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as an arbitrator. Shri Khan's invalid appointment only became clear after the declaration of the law by the Supreme Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] which, as we have seen hereinabove, was only on 3-7-2017. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an application on 7-10-2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] and asking him to declare that he has become de jure incapable of acting as an arbitrator. Equally, the fact that a statement of claim may have been filed before the arbitrator, would not mean that there is an express agreement in words which would make it clear that both parties wish Shri Khan to continue as arbitrator despite being ineligible to act as such. This being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2) and Section 16(2) of the Act to the facts of the present case, and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator. The judgment under appeal is also incorrect in stating that there is an express waiver in writing from the fact that



an appointment letter has been issued by the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate.”

16. In Telecommunication Consultants India Ltd. v. Shivaa Trading, 2024 SCC OnLine Del 2937, this Court has affirmed the view taken in Bharat Broadband (*supra*). The relevant portion of the Judgment passed by this Court reads as under:

“13. The court has further held, that the concept of deemed waiver of the right to object by conduct under section 4 of the A&C Act does not apply to a situation under section 12(5), which requires express waiver in writing subsequent to the disputes having arisen between the parties.”

17. The five Judges Bench of the Apex Court in Central Organisation for Railway Electrification (*supra*) has discussed this aspect in detail and has observed as under:-

“121. An objection to the bias of an adjudicator can be waived. [Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 808, para 30 : (2016) 3 SCC (Civ) 492 : (2016) 3 SCC (Cri) 173 : (2016) 2 SCC (L&S) 253] A waiver is an intentional relinquishment of a right by a party or an agreement not to assert a right. [State of Punjab v. Davinder Pal Singh Bhullar, (2011) 14 SCC 770, para 41 : (2012) 4 SCC (Civ) 1034 : (2012) 4 SCC (Cri) 496 : (2014) 1 SCC (L&S) 208] The Arbitration Act allows parties to waive the application of Section 12(5) by an express agreement after the disputes have arisen. However, the waiver is subject to two factors. First, the parties can only waive the applicability of Section 12(5) after the



dispute has arisen. This allows parties to determine whether they will be required or necessitated to draw upon the services of specific individuals as arbitrators to decide upon specific issues. To this effect, Explanation 3 to the Seventh Schedule recognises that certain kinds of arbitration such as maritime or commodities arbitration may require the parties to draw upon a small, specialised pool. [“Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently, to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.”] The second requirement of the proviso to Section 12(5) is that parties must consciously abandon their existing legal right through an express agreement. Thus, the Arbitration Act reinforces the autonomy of parties by allowing them to override the limitations of independence and impartiality by an express agreement in that regard.

122. The proviso to Section 12(5) is a reflection of the common law doctrine of necessity. The *nemo iudex* rule is subject to the doctrine of necessity and yields to it. [Union of India v. Tulsiram Patel, (1985) 3 SCC 398, para 101 : 1985 SCC (L&S) 672; Swadeshi Cotton Mills v. Union of India, (1981) 1 SCC 664 : (1981) 51 Comp Cas 210, para 44] The doctrine of necessity allows an adjudicator who may be disqualified because of their interest in the matter to continue to adjudicate because of the necessity of the circumstances. [Charan Lal Sahu v. Union of India, (1990) 1 SCC 613, para 105] The proviso to Section 12(5) allows parties to exercise their autonomy to determine if there is a necessity to waive the applicability of the ineligibility prescribed under Section 12(5). Thus, common law



principles and doctrines are adjusted to subserve the fundamental principles of arbitration by giving priority to the autonomy of parties.”

18. The proviso to Section 12(5) of the Act allows a waiver from the disqualification to act as an arbitrator, however such waiver shall be by an express agreement in writing. Any waiver to object against the unilateral appointment of the arbitrator by participating in the arbitration proceedings or by not objecting to the disclosure of independence and impartiality by the unilaterally appointed sole arbitrator, must be agreed in terms of Section 12(5) of the Act.

19. Even the question as to whether filing of an application under Section 29 of the Act would amount to express waiver or not is also no longer *res integra*. A Division Bench of this Court in M/s Mahavir Prasad Gupta and Sons v. Govt of NCT of Delhi, **2025 SCC OnLine Del 4241**, addressed two issues, namely:-

“A. In view of requirement of express waiver in writing under proviso to Section 12(5) of the Act, can the parties by conduct of participating in arbitration proceedings and not raising objection before the arbitrator, be deemed to have waived the objection against the unilateral appointment?”

B. Does the award passed by unilaterally appointed arbitrator is per se bad and a nullity, which goes to the root of the jurisdiction of the arbitrator, that entitles any party (including the party that unilaterally appointed the arbitrator itself) to object at any stage during or after the arbitration proceedings including the proceedings for challenge to the award under Section 34 of the Act and/or enforcement of the award under Section 36 of the Act?”



On the first issue, after placing reliance on Central Organisation for Railway Electrification (supra), the Coordinate Bench of this Court in Mahavir Prasad Gupta (supra) has held as under:-

“38. The proviso to Section 12(5) of the Act allows a waiver from the disqualification to act as an arbitrator, however such waiver shall be by an express agreement in writing. The waiver under Section 4 of the Act will be inapplicable to the unilateral appointments as it is governed by Section 12(5) of the Act, which specifically provides for waiver by express agreement in writing. Hence, any waiver to object against the unilateral appointment of the arbitrator by participating in the arbitration proceedings or by not objecting to the disclosure of independence and impartiality by the unilaterally appointed sole arbitrator or the presiding arbitrator, must be agreed in writing in terms of Section 12(5) of the Act. Hence, waiver by conduct of the parties under Section 4 of the Act is not applicable to unilateral appointment of the sole or presiding arbitrator.

39. As Section 12(5) of the Act is subsequent to Section 4 in the Act sequentially, it would override the general waiver by requirement of waiver by express agreement in writing under Section 12(5) of the Act. The express agreement in writing under Section 12(5) of the Act is an exception to the general rule of waiver under Section 4 of the Act. In the case of Bharat Broadband (supra), the Supreme Court held that when a person is rendered ineligible to be appointed as an arbitrator under Section 12(5) of the Act read with the Seventh Schedule of the Act, such ineligibility operates de jure, and the arbitrator's mandate terminates automatically by virtue of Section 14(1)(a) of the Act. The Supreme Court clarified that where a controversy arises about whether the arbitrator has become de jure incapable of acting, a party may approach the Court to decide on



the termination of the mandate, unless otherwise agreed.

40. The Supreme Court further held that the proviso to Section 12(5) of the Act refers to an “express agreement in writing”, which clearly indicates that the requirement under the proviso is to have an agreement written in words that the parties have agreed to waive their right to object to the jurisdiction of the arbitrator and such waiver cannot be inferred from the conduct of the parties:

“17. The scheme of Sections 12, 13 and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes “ineligible” to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case i.e. a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e. de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5),



read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them.

xxxxxxx

20. This then brings us to the applicability of the proviso to Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. **On the other hand, Section 12(5) refers to an “express agreement in writing”. The expression “express agreement in writing” refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct.”**

41. In *Telecommunication Consultants India Ltd. v. Shivaa Trading*, 2024 SCC OnLine Del 2937 this Court



has affirmed the view in *Bharat Broadband (supra)* that:

“13. The court has further held, that the concept of deemed waiver of the right to object by conduct under section 4 of the A&C Act does not apply to a situation under section 12(5), which requires express waiver in writing subsequent to the disputes having arisen between the parties.”

42. In *CORE (supra)*, the Supreme Court has laid down twin conditions for a valid waiver under the proviso to Section 12(5) of the Act. These conditions are : (i) the express agreement in writing shall be made ‘after’ the xxxxxx dispute has arisen; and (ii) the parties must consciously abandon their existing legal right through an ‘express agreement’. It was held that:

“121. An objection to the bias of an adjudicator can be waived. A waiver is an intentional relinquishment of a right by a party or an agreement not to assert a right. The Arbitration Act allows parties to waive the application of Section 12(5) by an express agreement after the disputes have arisen. However, the waiver is subject to two factors. First, the parties can only waive the applicability of Section 12(5) after the dispute has arisen. This allows parties to determine whether they will be required or necessitated to draw upon the services of specific individuals as arbitrators to decide upon specific issues. To this effect, Explanation 3 to the Seventh Schedule recognises that certain kinds of arbitration such as maritime or commodities arbitration may require the parties to draw upon a small, specialised pool. [“Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the



custom and practice for parties frequently, to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.”] The second requirement of the proviso to Section 12(5) is that parties must consciously abandon their existing legal right through an express agreement. Thus, the Arbitration Act reinforces the autonomy of parties by allowing them to override the limitations of independence and impartiality by an express agreement in that regard.”

43. Consenting to the extension of the mandate of the arbitrator under Section 29A(3) of the Act does not constitute a valid express waiver in writing as required under the proviso to Section 12(5) of the Act. The view of the learned Single Judge of the Court in Man Industries (India) Ltd. (supra) is the correct as participation in the arbitral proceedings or seeking an extension of the mandate of the arbitrator does not constitute a valid waiver. It is held that:

“22. In view of the above authorities, there can be no doubt that the learned Arbitrator appointed by the respondent was de jure ineligible to act as such. The petitioner by its participation in the arbitration proceedings or by its filing of applications under Section 29A of the Act seeking extension of the mandate of the learned Arbitrator, cannot be said to have waived the ineligibility of the learned Arbitrator under Section 12(5) of the Act, and, therefore, the Arbitral Award passed by the learned Arbitrator is invalid.

xxxxxxx

27. Applying the above principles to the facts of the present case, the plea of the Arbitrator being de jure ineligible to act as such is a plea of lack of



jurisdiction. This plea can be allowed to be raised by way of an amendment and even without the same.

XXXXXX

30. In view of the above, it has to be held that the learned Arbitrator was de jure ineligible to act as such and the Award passed by the learned Arbitrator is void and unenforceable. The same is, therefore, set aside.” (emphasis supplied)

20. Regarding the second issue, the Coordinate Bench of this Court in Mahavir Prasad Gupta (supra), after analysing the law on the point, has observed as under:-

“53. In view of the above analysis, in absence of any express waiver in writing by the party objecting to the unilateral appointment can raise the issue at any time even at the stage of Section 34 proceedings or during the xxxxxx enforcement under Section 36 of the Act.

54. In any event, Section 34(2)(b) of the Act empowers the Court to set aside the award if ‘the Court finds that’, which means that it is an obligation of the Court to ensure that that award is not against the Public Policy of India. Hence, even if any of the parties have not raised an objection regarding the unilateral appointment, if the Court while considering the application under Section 34 of the Act finds that the Award is null and void due to the unilateral appointment of the arbitrator, has power to set aside the award without any objection by any of the parties. The concept of Public Policy of India is explained and clarified in Explanation 1 to Section 34(2)(b) of the Act that the award must not be in contravention with the fundamental policy of Indian law or in conflict with the most basic notions of morality or justice. Right to equality is part of the basic structure of the Constitution of India and integral to the



fundamental policy of India law. The judgment in CORE (supra) has held as under:

“70. The concept of equality under Article 14 enshrines the principle of equality of treatment. The basic principle underlying Article 14 is that the law must operate equally on all persons under like circumstances. [M. Nagaraj v. Union of India, (2006) 8 SCC 212, para 106 : (2007) 1 SCC (L&S) 1013] The implication of equal treatment in the context of judicial adjudication is that “all litigants similarly situated are entitled to avail themselves of the same procedural rights for relief, and for defence with like protection and without discrimination” [Shree Meenakshi Mills Ltd. v. A.V. Visvanatha Sastri, (1954) 2 SCC 497, para 6 : (1954) 26 ITR 713]. In Union of India v. Madras Bar Assn. [Union of India v. Madras Bar Assn., (2010) 11 SCC 1, para 102 : (2010) 156 Comp Cas 392], a Constitution Bench held that the right to equality before the law and equal protection of laws guaranteed by Article 14 of the Constitution includes a right to have a person's rights adjudicated by a forum which exercises judicial power impartially and independently. Thus, the constitutional norm of procedural equality is a necessary concomitant to a fair and impartial adjudicatory process.”

55. Any unilateral appointment of the sole or presiding arbitrator militates against the most basic notion of justice. Hence, any unilateral appointment will take away the equal treatment of the parties enshrined under Section 18 of the Act, which is a complete code in itself as held by the Supreme Court in Kandla Export Corpn. v. OCI Corpn, (2018) 14 SCC 715.

56. Hence, the objection with regard to award being nullity due to unilateral appointment can be raised for the first time at the stage of Section 34 of the Act and



even in absence of the objection, if the Court while deciding the application under Section 34 of the Act finds that the award is vitiated by unilateral appointment can on its own set aside the award.

57. Similarly, the Court executing the award under Section 36 of the Act read with Order XXI of the Civil Procedure Code, 1908 ('CPC') can refuse to enforce the award, which is deemed to be a decree passed by the Indian Court at the stage of enforcement proceedings. Under CPC, a decree is said to be nullity if it passed by a Court having lack of inherent jurisdiction. The decree is called nullity if it is ultra vires the powers of the Court passing the decree and not merely voidable decree. Applying the same principles to the awards that are considered as decree under Section 36 of the Act, the Court enforcing the awards must refuse to enforce the awards that are passed by unilaterally appointed arbitrator, being a nullity having lack of inherent jurisdiction to pass the award.

58. The Supreme Court in *Sushil Kumar Mehta v. Gobind Ram Bohra*, (1990) 1 SCC 193 and *Harshad Chiman Lal Modi v. DLF Universal Ltd.*, (2005) 7 SCC 791, has held that a decree passed by a Court without the jurisdiction to try a suit is a nullity. It is not necessary that the objection to the jurisdiction should be made at the first instance. The objection can be raised even in the execution proceedings.

59. The Supreme Court in *Dharma Pratishthanam v. Madhok Constructions (P) Ltd.*, (2005) 9 SCC 686 held that in the event of the appointment of an arbitrator and reference of disputes to him being void ab initio, the award shall be liable to be set aside in any appropriate proceedings when sought to be enforced or acted upon.



60. Hence, the objection with regard to unilateral appointment can be taken at any stage even during the proceedings under Section 34 of the Act and during enforcement of the Award under Section 36 of the Act for the first time and even without raising such an objection by any of the parties, the Court has power to set aside or refuse to enforce the Award if the Court finds that the same is passed by a sole or presiding arbitrator that is unilaterally appointed as the Award passed by such an Arbitral Tribunal would be a nullity.”

21. The learned Single Judge in the Impugned Judgment referred to Man Industries (India) v. Indian Oil Corporation Ltd., **2023 SCC OnLine Del 3537**. The finding in Man Industries (*supra*) was affirmed by a Division Bench of this Court in Mahavir Prasad Gupta (*supra*).

22. Therefore, this Court finds that consenting to the extension of the mandate of the arbitrator under Section 29A of the Act does not constitute a valid express waiver in writing as required under the proviso of Section 12(5) of the Act.

23. The appointment of the Sole Arbitrator was done by the Chairman of Appellant Board as per Clause 22 of the Article of Agreement dated 17.01.2018 executed for the Meerut Project, and as per Clause 18.2 of the Contract Agreement dated 04.05.2010 executed for the Dehradun Project. The Sole Arbitrator was appointed unilaterally by the Chairman of the Appellant Board, who was ineligible to act as an arbitrator by virtue of Section 12(5) of the Act and the Seventh Schedule the Act.

24. As the Chairman was ineligible to be appointed as an arbitrator in terms of Section 12(5) of the Act, he was also ineligible to appoint an arbitrator. The express waiver as envisaged under the proviso to Section 12(5) of the Act has also not been obtained.



2025:DHC:9095-DB



25. In view of the above, the Impugned Judgment has rightly set aside the Impugned Awards. Accordingly, the Appeals are hereby dismissed as there is no infirmity with the Impugned Judgment.

SUBRAMONIUM PRASAD, J

HARISH VAIDYANATHAN SHANKAR, J

OCTOBER 8, 2025

hsk/mt