



2025:DHC:9096-DB



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

Date of decision: 8th OCTOBER, 2025

IN THE MATTER OF:

+ **FAO(OS) (COMM) 172/2023 & CM APPL. 43016/2023**

INDIAN OIL CORPORATION LIMITED

.....Appellant

Through: Ms. Pooja Saigal, Senior Advocate
with Ms. Aditi Sinha, Mr. Jatin Dua,
Mr. Dhruv Malik, Advocates

versus

MAN INDUSTRIES (INDIA) LIMITED

.....Respondent

Through: Ms. Amrita Singh, Mr. Vinod Mehta,
Mr. Ankit Gupta, Advs.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

HON'BLE MR. JUSTICE HARISH VAIDYANATHAN

SHANKAR

JUDGMENT

SUBRAMONIUM PRASAD, J.

1. The present Appeal is filed by the Appellant under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as '***the Act***') seeking to challenge the Judgment dated 01.06.2023 (hereinafter referred to as '***Impugned Judgment***') passed in O.M.P. (Comm.) 252 of 2018 and I.A. No. 13103 of 2022, whereby the Single Judge has held that the unilateral appointment of the Arbitrator by the Appellant makes the Arbitrator *de jure* ineligible to act as such and has set aside the Arbitral Award dated 03.02.2018 (hereinafter referred to as '***Award***'), which was passed in favour of the Appellant, as being void and unenforceable.



2. Shorn of unnecessary details, the facts leading to the filing of the present Appeal are as follows:

- i. The Appellant launched SMPL Debottlenecking of Salya-Mathura Project (hereinafter referred to as '**Project**') to feed three refineries. Vide Tender No. PLM/SMPL-DBL/13/70 (hereinafter referred to as '**Tender**'), the Appellant invited bids for the Project for supply of steel pipes. As per the Special Conditions of Contract (hereinafter referred to as '**SCC**') and the General Conditions of Contract (hereinafter referred to as '**GCC**') provided in the Tender, it was *inter-alia*, stated that for the tendered pipes, the Appellant shall avail the benefit of the Export Promotion Capital Goods Scheme (hereinafter referred to as '**EPCG Scheme**') under EXIM Policy of Government of India and would issue EPCG Invalidation Letter to the suppliers.
- ii. The Tender under clause 4.26.1 of the SCC contained an arbitration clause which stated that any dispute or difference arising between the parties shall be referred to arbitration by a Sole Arbitrator appointed by the General Manager of the Appellant.
- iii. Pursuant to the Tender, the Appellant issued a Letter of Intent to the Respondent.
- iv. In 2013-2014, the Appellant *inter-alia* complained about the slow progress of the work in production of the steel pipes and delay in transportation for the same.



- v. The Respondent alleged that due to delay in issuance of the EPCG Invalidation Letter by the Appellant, there was a chain reaction, leading to delay.
- vi. The Respondent invoked arbitration under clause 4.26.1 of the SCC in the Tender requesting the Appellant to nominate an arbitrator as per the terms of the Tender.
- vii. The Appellant nominated Mr. A.K. Sharma, Former GM (Law), MMTC as the Sole Arbitrator to adjudicate the disputes between the parties.
- viii. The Arbitral Award was passed by the Arbitrator in favour of the Appellant rejecting all the claims of the Respondent.
- ix. The Respondent filed a petition under Section 34 of the Act by filing OMP (COMM) 252/2018 before this Court.
- x. The learned Single Judge *vide* the Impugned Judgment has set aside the Award holding that since the Arbitrator has been appointed unilaterally, he was *de jure* ineligible to act as such and set aside the Award as void and unenforceable.
- xi. Hence, the Appellant has filed the present Appeal challenging this Impugned Judgment.

3. The Counsel for the Appellant states that the Respondent had never raised any objection *qua* the eligibility of the Arbitrator at any point prior to filing of the Application (I.A. No. 13103 of 2022) in OMP (COMM) 252/2018. It was by way of this application, the Respondent for the first time took the leave of the Court to raise an additional ground in the Section 34 Petition of *de jure* ineligibility of the Arbitrator in terms of Section 12(5) of



the Act. The Counsel for the Appellant further states that the Petition filed under Section 34 of the Act cannot be amended under the guise of filing an application which raises an entirely new challenge with no foundation in the original petition.

4. He places reliance on the Judgment dated 12.07.2022 passed by the Bombay High Court in Friends and Friends Shipping Pvt. Ltd. v. Central Warehousing Corporation, Writ Petition No. 6501/2022. The same was affirmed by the Supreme Court by its Order dated 14.10.2022 passed in SLP (C) No.17522/2022. He further places reliance on the judgment of Supreme Court in State of Maharashtra v. Hindustan Construction Company Limited, (2010) 4 SCC 518.

5. He further submits that Section 34(3) of the Act prescribes the period within which a challenge to the Award can be made. It also prescribes the period within which the Court can condone the delay in filing of the challenge to the Award. Any delay beyond the said period cannot be condoned by the Court. Therefore, the Respondent, cannot lay a new challenge to the Arbitral Award at this belated stage in the garb of filing of an application seeking amendment to the original petition.

6. He submits that the Respondent never challenged the eligibility of the Sole Arbitrator. In fact, the Sole Arbitrator was appointed at the request of the Respondent. Thereafter, The Respondent, twice, filed applications under Section 29A of the Act seeking extension of mandate of the Sole Arbitrator. He submits that the filing of the application under Section 29A of the Act by the Respondent would satisfy the proviso to Section 12(5) of the Act and the ineligibility, would stand waived.



7. *Per contra*, The Counsel for the Respondent submit that the Sole Arbitrator having been appointed by the Petitioner, albeit in terms of the Arbitration Agreement between the parties, was *de jure* ineligible to act as an Arbitrator in view of Section 12(5) of the Act. He places reliance on the judgments in TRF Limited v. Energo Engineering Projects Limited, (2017) 8 SCC 377 and Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd., (2020) 20 SCC 760.

8. It is argued that the applicability of Section 12(5) of the Act can be waived only by an express agreement of the Respondent. There was no express waiver of the ineligibility of the Sole Arbitrator by the Respondent. He further states that the fact that the Respondent filed an application under Section 29A of the Act seeking extension of mandate of the Sole Arbitrator would not satisfy the condition of the proviso to Section 12(5) of the Act and therefore the Award passed by the Sole Arbitrator is a nullity. He places reliance on the Supreme Court judgment in Bharat Broadband Network Limited v. United Telecoms Limited, (2019) 5 SCC 755.

9. He further argues that the plea of lack of jurisdiction of the Arbitrator can be raised at any stage of the proceedings, including before the Supreme Court. The incorporation of additional grounds by way of an amendment can be allowed depending on the facts and circumstances of each case. The Counsel places reliance on the judgments of Supreme Court in Hindustan Zinc Limited (HZL) v. Ajmer Vidyut Vitran Nigam Limited, (2019) 17 SCC 82 and Lion Engineering Consultants v. State of Madhya Pradesh and Ors., (2018) 16 SCC 758.

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



11. It is an admitted position that the Sole Arbitrator was appointed by the Appellant as per the terms of the Arbitration Agreement. The Arbitration Agreement between the parties was contained in Section 4.26.1 of the SCC attached to the Purchase Order and is reproduced hereinbelow:-

“4.26.1 Any dispute or difference of any kind at any time(s) between the Purchaser and the vendor arising out of in connection with or incidental to the contract (including any dispute or difference regarding the interpretation of the contract or the termination thereof, or resulting from a termination thereof), shall be referred to arbitration by a Sole Arbitrator appointed by the General Manager. The provisions of the Arbitration & Conciliation Act, 1996 and all statutory re-enactments and modifications thereof and the Rules made thereunder shall apply to all such arbitrations. The venue of the arbitration shall be New Delhi (India).” (emphasis supplied)

12. The Respondent invoked Arbitration vide its notice dated 15.01.2016. The relevant extract is as under:-

“Our efforts in the past in getting this withheld amount released from you have not yielded any result so far though we are always open for amicable settlement.

Therefore, through this letter and in terms of clause 4.26.1 of SCC are formally invoking arbitration to settle the dispute of un-authorised deduction of Rs.2,74,88,893.27 and associated compensation.

We, therefore, in terms of Arbitration Clause request you to nominate a person to act as an Arbitrator. Please ensure that names being proposed meet the requirement of independence and impartiality as envisaged in the Arbitration and Conciliation (Amendment) Ordinance, 2015.”



13. On the said request, the Appellant appointed the learned Arbitrator *vide* Letter dated 15.02.2016.

14. The question whether a person, who is ineligible to act as an arbitrator can appoint an arbitrator is no longer *res integra*. The Supreme Court in TRF Limited v. Energo Engineering Projects Limited, (2017) 8 SCC 377, has 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)

15. The Supreme Court in Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd., (2020) 20 SCC 760, has held as under:-

“20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] where the Managing Director himself



is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an arbitrator.

21. But, in our view that has to be the logical deduction from TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Para 50 of the decision shows that this Court was concerned with the issue, “whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator” The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be



ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and recognised by the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] ”

16. The Supreme Court in Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Co., (2025) 4 SCC 641, 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.

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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.]

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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.

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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.”

17. 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, that such a unilateral appointment clause in Public-Private contract is violative of Article 14 of the Constitution of India, and that 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.

18. 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.

19. The Supreme Court in Bharat Broadband Network Limited v. United Telecoms Limited, (2019) 5 SCC 755, held that the proviso in 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. The relevant extract of the said Judgment is as follows:

“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.

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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.”

20. 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 judex 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.”

21. In Hindustan Zinc Limited (HZL) v. Ajmer Vidyut Vitran Nigam Limited, (2019) 17 SCC 82, the Supreme Court held that the plea of lack of jurisdiction can be taken at any stage of the proceedings, and also in collateral proceedings. An award made by an arbitrator who was ineligible to be an arbitrator is a non-est award. It was held as under:-

“17. We are of the view that it is settled law that if there is an inherent lack of jurisdiction, the plea can be taken up at any stage and also in collateral proceedings. This was held by this Court in Kiran Singh v. Chaman Paswan [Kiran Singh v. Chaman Paswan, (1955) 1 SCR 117 : AIR 1954 SC 340] as follows : (SCR p. 121 : AIR p. 342, para 6)



“6. ... It is a fundamental principle well-established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was coram non judice, and that its judgment and decree would be nullities.”

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23. This being the case, the High Court is right in stating that the arbitrator could not, in law, have been appointed by the State Commission under Section 86 of the Electricity Act. The award based on such appointment would be non est in law.”

22. 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.

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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.

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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.

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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)

23. 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.”

24. The appointment of the Sole Arbitrator was done by the General Manager of the Appellant as per Clause 4.26.1 of the SCC. The Sole Arbitrator was appointed unilaterally by the General Manager of the Appellant, who was ineligible to act as an arbitrator by virtue of Section 12(5) of the Act and the Seventh Schedule of the Act.

25. As the General Manager 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.



26. In view of the above, the Impugned Judgment has rightly set aside the Arbitral Award. Accordingly, the Appeal is hereby dismissed as there is no infirmity with the Impugned Judgment.

SUBRAMONIUM PRASAD, J

HARISH VAIDYANATHAN SHANKAR, J

OCTOBER 8, 2025

hsk/mt