2026:DHC:3715

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

Date of decision: 29.04.2026

\+ O.M.P. (COMM) 111/2024

PUBLIC WORKS DEPARTMENT EDUCATION WEST DIVISION (N) THROUGH EXECUTIVE ENGINEER

.....Petitioner

Through: Mr. Lalltaksh Joshi and Ms. Minu Kumari, Advocates.

versus

M/S TEWATIA CONSTRUCTION PRIVATE LIMITED THROUGH ITS DIRECTOR .....Respondent

Through: Mr. Avinash Trivedi, Mr. Rahul Aggarwal and Mr. Rhythem Nagpal, Advocates.

CORAM:
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

% JUDGEMENT (ORAL)

HARISH VAIDYANATHAN SHANKAR, J.

1. The present Petition has been filed under Section 34 of the **Arbitration and Conciliation Act, 1996**[1], seeking to challenge the **Arbitral Award dated 25.10.2023, as corrected on 13.11.2023**[2], rendered by the learned Arbitrator, Mr. Kamlesh Kumar (Former ADG, CPWD), in arbitral proceedings titled *"M/s Tewatia Construction Private Limited and Union of India"*.

2. By way of the Impugned Award, the **Public Works Department [*"PWD"*] (Government of NCT of Delhi, Education**

[1] Act
[2] Impugned Award

West Division (N)[3], has been directed to pay to **M/s Tewatia Construction Private Limited**[4], an amount of approximately Rs. 2.5 Crore along with interest.

3. Learned counsel appearing on behalf of the Petitioner, at the outset, raises a primary and foundational issue that strikes at the very root of the validity and subsistence of the arbitral proceedings and the resultant Award.

4. It is submitted by the learned counsel for the Petitioner that the appointment of the learned Arbitrator, who subsequently entered upon the reference and rendered the Impugned Award, was void *ab initio*, as it was effected through a unilateral appointment mechanism in clear contravention of the mandatory provisions of Section 12(5) of the Act. Consequently, it is contended that such an appointment is legally unsustainable, thereby vitiating the entire arbitral process and rendering the Impugned Award liable to be set aside.

5. Learned counsel for the Petitioner, in support of the aforesaid proposition, places reliance upon the decision of the Hon'ble Supreme Court in ***Bhadra International (India) Pvt. Ltd. & Ors. v. Airports Authority of India***[5], to submit that any appointment of an Arbitrator by an interested party, PWD herein, or its controlling authority stands vitiated in law, and any Award rendered pursuant thereto is rendered unsustainable and liable to be set aside.

6. Learned counsel appearing on behalf of the Petitioner, to substantiate the plea of unilateral appointment, draws the attention of this Court to Paragraph No. 1 of the Impugned Award, to submit that

[3] Petitioner
[4] Respondent
[5] (2026) SCC OnLine SC 7

the learned Arbitrator himself records therein that the appointment was made by the **Chief Engineer (Projects), PWD, Government of N.C.T. Of Delhi**[6], thereby leaving no ambiguity as to the source and nature of appointment.

7. Learned counsel for the Petitioner further draws the attention of this Court to the **letter dated 10.06.2022**[7], whereby the Chief Engineer addressed a communication to, *inter alia*, the Respondent, appointing Mr. Kamlesh Kumar as the Arbitrator to adjudicate upon the disputes *inter se* the parties. Learned counsel submits that the said communication itself demonstrates that the appointment emanated solely from the designated authority of the Petitioner Department.

8. Learned Counsel for the Petitioner, while summing up the contention that the appointment of the learned Arbitrator was unilateral, further draws the attention of this Court to Clause 25 of the **General Conditions of Contract**[8], particularly Sub-clause (ii) thereof, to submit that the power exercised by the Chief Engineer *vide* the Letter of Appointment traces its origin entirely to the contractual stipulation contained in the GCC.

9. Learned counsel for the Petitioner, in light of the aforesaid submissions, contends that once the appointment of the learned Arbitrator is shown to be unilateral and contrary to the statutory mandate of Section 12(5) of the Act, the very constitution of the Arbitral Tribunal stands vitiated.

10. Learned counsel for the Petitioner thus submits that the Impugned Award cannot be permitted to stand and is liable to be set

[6] Chief Engineer
[7] Letter of Appointment
[8] GCC

aside on this ground alone.

11. ***Per contra***, learned counsel appearing on behalf of the Respondent opposes the submissions advanced by learned counsel for the Petitioner.

12. It is contended that the appointment of the learned Arbitrator cannot, at this belated stage, be assailed as being in contravention of Section 12(5) of the Act, particularly when the arbitral proceedings have already culminated in the passing of the Award, without any contemporaneous objection having been raised by the Petitioner during the course of the proceedings.

13. It is further submitted that the Petitioner, having participated in the arbitral process and having suffered the Award, cannot now be permitted to invoke Section 12(5) of the Act as a ground to seek setting aside of the Award.

14. In such circumstances, according to learned counsel for the Respondent, the arbitral proceedings cannot be said to be vitiated on the ground of the alleged ineligibility of the learned Arbitrator under Section 12(5) of the Act.

ANALYSIS:

15. This Court has heard learned counsel appearing on behalf of the parties and, with their able assistance, perused the material on record and precedents passed across the bar.

16. At the outset, it is apposite to emphasise that the Petitioner has consciously confined the present challenge to the Impugned Award within a narrow compass, *namely*, the legality of the appointment of the learned Sole Arbitrator on the ground of unilateral constitution of the Arbitral Tribunal. Learned counsel for the Petitioner has fairly

stated that the other grounds raised in the pleadings, touching upon the merits, as adjudicated by the learned Arbitrator, are not being pressed into service in the present proceedings. The controversy before this Court, therefore, stands restricted to the issue of jurisdictional validity of the arbitral constitution under Section 34 of the Act.

17. In the aforesaid backdrop, this Court is therefore not called upon to undertake any examination of the merits of the present Petition, reasoning accorded to the findings therein, or the correctness of factual findings returned in the Impugned Award. The enquiry stands confined to the anterior and foundational issue as to whether the Arbitral Tribunal was constituted in accordance with the mandatory requirements of the Act. If the constitution of the Arbitral Tribunal itself is found to be contrary to law, the consequential Impugned Award would be rendered vulnerable, irrespective of the merits of the adjudication undertaken therein.

18. At this juncture, it is necessary to observe that the **Arbitration and Conciliation (Amendment) Act, 2015**[9], brought about a marked shift in the statutory framework governing arbitral appointments. Independence and impartiality of the Arbitral Tribunal, which always formed part of the concept of fair adjudication, were elevated into a binding legislative mandate under Section 12(5) of the Act.

19. Section 12(5) of the Act, read with the Seventh Schedule, renders certain categories of persons ineligible to act as Arbitrators and equally proscribes appointment mechanisms that permit an interested party, directly or indirectly, to unilaterally constitute the Arbitral Tribunal. The objective is rather clear; arbitral justice must

[9] 2015 Amendment

not only be done, but must manifestly appear to be done.

20. At this juncture, this Court deems it apposite to reproduce Section 12 of the Act, which reads as follows:

> "**12. Grounds for challenge. -** (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances—
> (a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional, or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and
> (b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.
>
> **Explanation 1.-** The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.
>
> **Explanation 2.-** The disclosure shall be made by such person in the form specified in the Sixth Schedule.
> (2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.
> (3) An arbitrator may be challenged only if—
> (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality; or
> (b) he does not possess the qualifications agreed to by the parties.
> (4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.
> (5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:
> Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

21. Further, the decision of the Hon'ble Supreme Court in ***Bhadra International*** *(supra)* reiterates the settled principle that unilateral appointments by an interested party or its instrumental

mechanism cannot be sustained in law. The ratio flowing therefrom reinforces the legislative objective that arbitral tribunals must be constituted through neutral processes, free from unilateral dominance and specifically that there can be no deemed waiver or waiver by conduct of the parties. The relevant portion of the said decision is reproduced herein under for ready reference:

> **"71.** It was submitted on behalf of the appellants herein that the appellants never waived their right to object in terms of the *proviso* to Section 12(5) of the Act, 1996. The *proviso* to Section 12(5) requires that the ineligibility of an arbitrator could only be waived by an "*express agreement in writing*" between the parties, and such agreement must be entered into after the dispute has arisen. It was further canvassed by the appellants that no agreement was executed, signed, or even contemplated by the parties to this effect after the dispute arose.
>
> **72.** In this regard, the respondent vociferously submitted that the present case falls within the *proviso* to Section 12(5). To indicate the same, instances like recording of "no objection" in the first procedural order, submission of statement of claim, the joint request to extend the mandate under Section 29A, and continued participation in the proceedings, were highlighted to submit that the appellants had waived their right to object. The procedural order constitutes an "*express agreement in writing*" and satisfies the requirement under the *proviso* to Section 12(5) of the Act, 1996. At the cost of repetition, the procedural order reads thus:-
>
> *"PROCEDURAL ORDER NO. 1*
> *With*
> *Minutes of, and the Directions made at, the hearing on 22.03.2016 at 1 : 00 pm*
> *[AT D-247 (Basement), Defence Colony, New Delhi-110024]*
>
> *This preliminary meeting of the Tribunal was held D-247 (Basement), Defence Colony, New Delhi-110024 on 22nd March, 2016 at 1 : 00 PM. None of the parties have any objection to my appointment as the Sole Arbitrator. I declare that I have no interest in any of the Parties, or in the disputes referred to the Sole Arbitrator.[…]*"
>
> (Emphasis supplied)
>
> **73.** On the aforesaid issue, the High Court, in its impugned judgment, observed that the sole arbitrator obtained the consent of the parties for the purpose of continuing to arbitrate in the form of the procedural order. What weighed with the High Court was that the appellants participated in the proceedings, which continued for

over two years, and did not they invoke Section 12(5), or object against the jurisdiction of the arbitrator at any stage.

a. Meaning and Import of the expression "*express agreement in writing*" used in *proviso* to sub-section (5) of Section 12 of the Act, 1996

74. Sub-section (5) of Section 12 of the Act, 1996, reads thus:—

> "*[(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:*
> *Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.]*"

75. The essentials of the *proviso* to Section 12(5) are:-

i. The parties can waive their right to object under sub-section (5) of Section 12;
ii. The right to object under the sub-section can be waived only subsequent to a dispute having arisen between the parties;
iii. The waiver must be in the form of an express agreement in writing.

76. The *proviso* to sub-section (5) of Section 12 stipulates that parties, after disputes have arisen, must expressly agree in writing to waive the ineligibility of the proposed arbitrator. This impliedly means that the parties are waiving their right to object to the arbitrator's ineligibility in terms of Section 12(5) of the Act, 1996.

77. Waiver means the intentional giving up of a right. It involves a conscious decision to abandon an existing legal right, benefit, claim, or privilege that a party would otherwise have been entitled to. It amounts to an agreement not to enforce that right. A waiver can occur only when the person making it is fully aware of the right in question and, with complete knowledge, chooses to give it up. [See: ***State of Punjab* v. *Davinder Pal Singh Bhullar*, (2011) 14 SCC 770**]

78. What flows from the aforesaid is when a right exists, i.e., the right to object to the appointment of an ineligible arbitrator in terms of Section 12(5), such a right cannot be taken away by mere implication. For a party to be deprived of this right by way of waiver, there must be a conscious and unequivocal expression of intent to relinquish it. Needless to say, for a waiver to be valid, it is necessary that the actor demonstrates the intention to act, and for an act to be intentional, the actor must understand the act and its consequences.

79. The expression "*express agreement in writing*" demonstrates a deliberate and informed act that although a party is fully aware of the arbitrator's ineligibility, yet it chooses to forego the right to object against the appointment of such an arbitrator. The requirement of an express agreement in writing has been

introduced as it reflects awareness and a conscious intention to waive the right to object under sub-section (5) of Section 12. A clear manifestation of the expression of waiver assumes greater importance in light of the fact that the parties are overcoming a restriction imposed by law.

80. It is in the same breath we say that appointment of an arbitrator with the consent of both parties is the general rule, while unilateral appointment is an exception. When one party appoints an arbitrator unilaterally, even if its own consent is implicit, the consent of the opposite party stands compromised, and the choice of the former is effectively imposed upon the latter.

81. It is **only** through an express agreement in writing, waiving the bar under sub-section (5) of Section 12, that the other party can be said to have voluntarily consented to the unilateral appointment of such an arbitrator. The *proviso* conveys that the arbitrator, although ineligible to be appointed, yet can continue to perform his functions, as it is oriented towards facilitating party autonomy. Thus, the *proviso* reinforces party autonomy and equal treatment of parties in arbitration.

82. In other words, even though the appointment had been made by one of the parties, by the act of entering into an agreement in writing, the other party expresses its consent. The manner of the agreement prescribed by the statute demonstrates voluntariness by the parties.

83. In a case of unilateral appointment, the waiver mentioned in the *proviso* is an indication of party autonomy in two ways: *first*, that the parties, by entering into an agreement, are waiving the bar under Section 12(5). *Secondly*, by the act of entering into an agreement, the parties, more particularly, the non-consenting party, are expressing their consent for appointment of the proposed arbitrator.

84. Undoubtedly, the statute does not prescribe a format for the agreement. However, the absence of a prescribed format cannot be construed to mean that the waiver may be inferred impliedly or through conduct. We say so because the legislature has consciously prefaced the term "*agreement*" with the word "*express*" and followed it with the phrase "*in writing*". This semantics denote the intention of the legislature that the waiver under the *proviso* to Section 12(5) must be made only through an express and written manifestation of intention.

85. The conscious use of the prefatory expression also serves to differentiate such waiver from 'deemed waiver' as stipulated under Section 4 of the Act, 1996. We must be mindful of the fact that if the legislature intended that waiver under Section 12(5) could similarly arise by implication or conduct as mentioned under Section 4, it would have refrained from introducing a heightened and mandatory requirement, more particularly, in light of the rigours of the Seventh Schedule. The statutory design therefore

makes it evident that the bar under Section 12(5) can be removed only by a clear, unequivocal, and written agreement executed after the dispute has arisen, and not by any form of tacit acceptance or procedural participation.

86. The mandate of an express agreement in writing in the present case may looked at from one another angle. The unilateral appointment of an arbitrator is assessed from the viewpoint of the parties. However, when the parties later execute an express written agreement waiving the ineligibility of the proposed arbitrator, the position gets altered. Such written waiver supplies the very consent that was previously missing, thereby placing the appointment on the same footing as a mutually agreed appointment and addresses concerns regarding neutrality and fairness.

87. In ***Bharat Broadband*** (supra), this Court categorically held that the expression "*express agreement in writing*" refers to an agreement made in words and cannot be inferred by conduct. The word "express" denotes that the agreement must be entered into with complete knowledge that although the proposed arbitrator is ineligible to be appointed as an arbitrator, yet they express their confidence in him to continue as the arbitrator. The relevant observations read thus:-

> "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. *v.* Energo Engg. Projects Ltd., *(2017) 8 SCC 377***, *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. *v.* Energo Engg. Projects Ltd., *(2017) 8 SCC 377*** *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.*"

(Emphasis supplied)

88. In *CORE II* (supra), this Court underscored the rationale behind the first two essentials of the *proviso*. It reads thus:—

"*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***] *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]*** *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*."

(Emphasis supplied)

89. What can be discerned from the above discussion is that the ineligibility of an arbitrator can be waived only by an express agreement in writing. In the present case, there is no agreement in writing, after the disputes arose, waiving the ineligibility of the sole arbitrator or the right to object under Section 12(5) of the Act, 1996.

90. The conduct of the parties is inconsequential and does not constitute a valid waiver under the *proviso*. The requirement of the waiver to be made expressly in the form of agreement in writing ensures that parties are not divested of their right to object inadvertently or by procedural happenstance.

91. We are not impressed by the aforesaid submission of the respondent for all the reasons stated above. The following decisions of this Court and the High Court of Delhi respectively deal with the all the factual submissions made by the respondent to submit that the present case falls within the *proviso* to Section 12(5) of the Act, 1996."

22. Further, a perusal of Clause 25 of the GCC leaves little room

for doubt that the appointment of the learned Sole Arbitrator in the present case emanated from the authority of the Chief Engineer (Projects), PWD, Government of NCT of Delhi, acting under Clause 25 of the GCC, which reads as follows:

> "**CLAUSE 25- Settlement of Disputes & Arbitration**
> Except where otherwise provided in the contract, ail questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:
>
> ****
>
> (ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (1) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Special Director General or the Director General, CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.
> It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.
> It is also a term of this contract that no person, other than a person appointed by such Chief Engineer CPWD or Additional Director General or Special Director General or Director General, CPWD, as aforesaid, should act as arbitrator and it for any reason that is not possible, the matter shall not be referred to arbitration at all.
> It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the Intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been

waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/-, the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties. It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit the statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be pay half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid."

(emphasis supplied)

23. Further, perusal of Paragraph No. 1 of the Impugned Award makes it manifest that the learned Arbitrator came to be appointed in pursuance of the aforesaid contractual authority, designated upon the Chief Engineer, under the GCC. Paragraph No. 1 of the Impugned Award reads as follows:

> "**1.** I was appointed as sole Arbitrator by Chief Engineer (Projects), PWD, GNCTD, I.P, ESTATE, New Delhi vide his letter no: 55(42)/CE(proj)./PWD/Arb./FO./492-(E) dated 10.06.2022 to decide and make the reasoned award regarding 11 nos. of claims/ disputes as listed by the claimant contractor and two counter claims/ disputes as listed by the respondent EE © PWD, Education West Division (N)."
>
> ***(emphasis supplied)***

24. The Letter of Appointment dated 10.06.2022 further establishes that the constitution of the Arbitral Tribunal flowed solely from the exercise of power vested in the said departmental authority according to Clause 25(ii) of the GCC. The relevant portion of the said letter reads as follows:

> "**Sub:-** In the matter of arbitration between M/s Tewatia Construction Pvt. Ltd. and UOI (through E.E., PWD, Education West Division (N) for the work C/o 177 Nos. Additional Class Rooms in 04 Nos. School Buildings under EO Zone-14 &16 of DDE (West-A) (Priority-I) (SH: C/o Main SPS type building i/c internal & external water supply, sanitary installation and electrical installation, development of site and fire fighting system etc.) School of Ramesh Nagar & Patel Nagar (Package-B). Agreement No.:- 09/EE/Edu. (M) West/2015-16
>
> Whereas M/s Tewatia Construction Pvt. Ltd. has written to Chief Engineer, vide their letter dated Nil that certain disputes have arisen between them & UOI in respect of the above noted work. I, M.K Mallick, Chief Engineer (Projects), PWD (GNCT), in exercise of the powers conferred on me, under Clause 25 of the said agreement, hereby appoint Sh. Kamlesh Kumar, ADG, CPWD, Retd. as Sole Arbitrator to decide & make his award regarding claims/disputes given by the claimant, as shown in the statement enclosed, subject always to their admissibility under Clause 25 of the aforesaid agreement.
>
> However, this reference is further without prejudice to the defense that may be raised by the Department regarding the tenability of the claim on all necessary and available grounds including those in limitation.
>
> The amount of the claims/ disputes being more than Rs. 1,00,000/, the arbitrator shall give reasoned award according to Clause 25 of the agreement.
>
> The Arbitrator's fee and other conditions will be as per letter no. E-in-C/PWD/Works/Arb./2022/276 dated 03.02.2022 from Director (Works) (copy enclosed).
>
> Sd/-
> (M.K. Mallick)
> Chief Engineer (Projects)"

25. In view of the aforesaid factual backdrop, it is manifestly clear that the source of appointment in the present case lies in an appointment made by an authority which is itself a contesting party to

the dispute. Once this position is borne out from the record, the nomenclature of the clause or any marginal variation, if any, in the procedure adopted for such appointment becomes wholly immaterial.

26. It is now well settled that, for a consent to constitute a valid waiver under the proviso to Section 12(5), there must exist an "*express agreement in writing*" entered into after the disputes have arisen, clearly demonstrating an informed and conscious relinquishment of the statutory safeguard.

27. In this regard, the decision of the Hon'ble Supreme Court in ***Bharat Broadband Network Ltd. v. United Telecoms Ltd.***[10] calls for reliance, wherein it was held that the proviso to Section 12(5) of the Act requires *"an express agreement in writing*" after disputes have arisen, and waiver of statutory ineligibility cannot be lightly inferred.

28. The said decision makes it abundantly clear that the issue of unilateral appointment is not a mere technical objection, but one that goes to the legitimacy of the arbitral forum itself. The relevant paragraphs of the ***Bharat Broadband*** *(supra)* casting light upon the interpretation of the term "*an express agreement in writing*" in terms of Section 12(5) of the Act, are reproduced herein under for ready reference:

> "**15.** Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an

[10] (2019) 5 SCC 755

express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.

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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. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377** 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. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377** 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.
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> **22.** We thus allow the appeals and set aside the impugned judgment [**Bharat Broadband Network Ltd. v. United Telecoms Ltd., 2017 SCC OnLine Del 11905**]. The mandate of Shri Khan having been terminated, as he has become de jure unable to perform his function as an arbitrator, the High Court may appoint a substitute arbitrator with the consent of both the parties."
>
> ***(emphasis supplied)***

29. In the present case, no material has been placed on record by the Respondent which can be construed as a waiver in the form of an express agreement in writing.

30. Further, the statutory scheme, as well as the law declared by the Hon'ble Supreme Court, makes it clear that any waiver under the proviso to Section 12(5) of the Act must be post-dispute and subsequent to the party's awareness of the disqualification. Such a waiver must arise only after the stage for appointment has crystallized.

In the present case, it is not disputed that no such post-dispute express agreement, in terms of the proviso to Section 12(5), has come into existence.

31. In light of the foregoing discussion, this Court is of the considered view that the proviso to Section 12(5) of the Act constitutes an exception to a rule grounded in public policy. Such an exception must, therefore, be construed strictly. A waiver of a statutory safeguard intended to secure the neutrality and impartiality of adjudication cannot be inferred from implication, acquiescence, or silence; it must be explicit, conscious, and unequivocal.

32. In the present case, at the cost of repetition, it is reiterated that no material has been placed before this Court to demonstrate the existence of any express written agreement, whereby the Petitioner unequivocally waived the applicability of Section 12(5) of the Act and consented to a unilateral appointment by the departmental authority.

33. The legal position concerning the appointment of an arbitrator, particularly in circumstances where one party enjoys a position of dominance or an undue advantage in the constitution of the arbitral tribunal, has been authoritatively and comprehensively examined by the Constitution Bench of the Hon'ble Supreme Court in ***Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)***[11].

34. In the aforesaid decision, the Hon'ble Supreme Court undertook an exhaustive and authoritative analysis of the statutory framework governing arbitration under the Act, with particular emphasis on the scheme and object of Sections 11, 12 and 18, read in conjunction with

[11] (2025) 4 SCC 641

the Fifth and Seventh Schedules. The Court also traced the evolution of judicial precedents on the issue, while simultaneously examining the constitutional underpinnings of the arbitral process, including the principles of fairness, impartiality, and equality before the law.

35. Upon a comprehensive and holistic consideration of these facets, the Hon'ble Supreme Court in the said judgement clarified and restated the governing principles relating to unilateral appointments, delineating the permissible limits of party autonomy in the constitution of arbitral tribunals. The conclusions arrived at in the said decision are succinctly set out as follows:

> "**J. *Conclusion***
> **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 ***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.
> **171.** The reference is answered in the above terms."

36. Further, the recent decision of the Hon'ble Supreme Court in ***Bhadra International*** *(Supra)* reiterates that unilateral appointments are *per se* unsustainable in the absence of an explicit waiver. The legal position is thus no longer *res integra* that any appointment traceable to a unilateral mechanism controlled by an interested party is *void ab initio*, and any award rendered pursuant thereto stands vitiated at its very inception.

37. In view of the foregoing discussion, the facts of the present case and the judicial precedents as adverted to, this Court is of the considered view that the appointment of the learned Sole Arbitrator by the Chief Engineer, acting under the authority of the GCC, cannot withstand statutory and judicial scrutiny under Section 12(5) of the Act. The said appointment stood vitiated at inception and consequently, the learned Arbitrator lacked the statutory competence to enter upon reference and render the Impugned Award.

38. Once the constitution of the Tribunal is found to be contrary to the mandatory statutory framework, the Award rendered by such Tribunal cannot be permitted to stand. The defect is not curable by recourse to merits, nor can it be brushed aside as a mere procedural irregularity. It goes to the root of jurisdiction and legitimacy of the adjudicatory process.

39. This Court reiterates that the requirement of neutrality in arbitral appointments is not a mere procedural formality, but a substantive guarantee of fairness embedded in the statutory

framework. Any deviation therefrom, howsoever justified on convenience or past practice, cannot be countenanced in law.

DECISION:

40. In view of the foregoing discussion, this Court is of the considered opinion that the Impugned Award is liable to be set aside on the ground that the appointment of the learned Arbitrator was made unilaterally by the Petitioner, in contravention of the law governing such appointments.

41. Accordingly, the present Petition is allowed, and the Impugned Award stands set aside.

42. At this juncture, this Court takes note of the fact that a portion of the Award amount was deposited with the worthy Registrar General of this Court in compliance with the Order dated 04.03.2024 passed in this case, pursuant to which a stay on the operation of the Award was granted in the present petition.

43. In view of the fact that the Impugned Award has now been set aside, this Court is of the considered opinion that the amount so deposited by the Petitioner, along with any interest accrued thereon, be released in favour of the Petitioner within a period of four weeks from today.

44. It is, however, clarified that setting aside of the Impugned Award shall not prevent the parties from taking recourse to such remedies as may be available to them in law.

45. Accordingly, the present Petition, along with pending Application(s), if any, stands disposed of in the above terms.

HARISH VAIDYANATHAN SHANKAR, J.

APRIL 29, 2026/nd/DJ