2026:DHC:3863

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

Date of decision: 05.05.2026

\+ O.M.P. (COMM) 40/2023 & I.A. 9919/2023

WIRETEL SOLUTION PVT.LTD. .....Petitioner

Through: Mr. Ravikesh K. Sinha, Adv.

versus

ANNU INFRA CONSTRUCT INDIA PVT. LTD. .....Respondent

Through: Mr. Deepak Dahiya & Mr. Dharmender Dahiya, Advs.

CORAM:
HON'BLE MR. JUSTICE AVNEESH JHINGAN

AVNEESH JHINGAN, J. (ORAL)

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') seeking setting aside of the arbitral award dated 30.09.2022 (for brevity 'the award').

2. The short issue is that whether the unilateral appointment of the sole arbitrator is in violation of amended Section 12(5) of the Act.

3. The brief facts are that the respondent was awarded a work contract originating from Bharat Sanchar Nigam Limited (BSNL) tender which was sub-contracted on back to back basis. The respondent issued Letter of Intent dated 26.03.2015 for execution of work relating to obtaining row, survey, trenching, laying, installation, testing & commissioning of optical fibre cable, PLB duct and accessories for construction of Exclusive Optical National Long Distance (NLD) backbone and optical access route for

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defence network for specified part of package 'F' totaling to 365 km (approx.) in the States of West Bengal and Jharkhand.

3.1 On 15.05.2015, the work order was issued and work was to be completed by 31.12.2015. There was a delay in handing over the site consequently, dispute arose between the parties to the *lis*. Clause 23 of the General Conditions of Order (for short 'GCO') reproduced below provides for dispute resolution through arbitration.

> "23. DISPUTE RESOLUTION
>
> If any dispute arises between the parties hereto during the subsistence of this Work Order or thereafter, including in connection with the validity, interpretation, implementation or any alleged breach of any provision of this Work Order or relating to any question with reference to or in connection with this Work Order, including the question as to whether any termination of this Work Order has been legitimate, the parties hereto shall endeavor to settle such dispute amicably within 30 days from raising of the dispute by either of the parties in writing to other party mentioning the exact nature of the subject in dispute.
>
> In case, the said dispute could not be resolved amicably within the said period of 30 days, then immediately upon expiry of the said period in a written communication by either party to the dispute shall inform the other party that the subject matter in dispute shall be referred to arbitration. The arbitration shall be in accordance with Arbitration and Conciliation Act 1996 including any statutory amendments made thereof. The arbitration proceedings shall be conducted by a sole arbitrator appointed by the Company.
>
> In case of a dispute, the Company shall appoint the sole arbitrator and send notice of such appointment in writing to the Contractor.

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> The sole arbitrator shall give the award as expeditiously as possible. The award of the sole arbitrator shall be binding on the parties. The venue of the arbitration as mutually agreed by the parties to this Work Order shall be exclusively and only held in New Delhi.
>
> It is mutually agreed between the parties hereto that Courts in New Delhi subject to the aforesaid shall have exclusive jurisdiction. During the process of arbitration, the Order should be executed with no interruption, any party defaulting in performing their scope of work prior or during the subsistence or after the award has been made but before it is enforced as a rule of the court, shall be held liable for the cost incurred by the other party/parties for executing the scope of work of the defaulting party."

3.2 A notice dated 30.10.2019 under section 21 of the Act was issued by the petitioner and the respondent vide communication dated 27.11.2019 appointed the sole arbitrator. The proceedings culminated in the impugned award.

4. Learned counsel for the petitioner submits that the appointment of the arbitrator is in violation of Section 12(5) read with Seventh Schedule of the Act and the impugned award is liable to be set aside. Reliance is placed upon the decision of the Supreme Court in **Bhadra International (India) Pvt. Ltd. & Ors. v. Airports Authority of India**, 2026 INSC 6 and on the decision of this court in **Railways Board, Ministry of Railways vs. Titagarh Rail Systems Limited,** 2026:DHC:1720.

5. *Per contra,* the arbitrator was appointed at the request of the petitioner and there are no pleadings in the petition under Section 34 of the Act challenging the unilateral appointment of the arbitrator.

6. Before proceeding further, it would be apposite to quote the following decisions:

6.1 The Supreme Court in **Bhadra International** (supra) dealt with the following three issues:

> "29….i. Whether the sole arbitrator could be said to have become "*ineligible to be appointed as an arbitrator*" by virtue of sub-section (5) of Section 12 of the Act, 1996?
>
> ii. Whether the parties could be said to have waived the applicability of sub-section (5) of Section 12 of the Act, 1996, by way of their conduct, either expressed or implied?
>
> iii. Whether the appellants could have raised an objection to the appointment of the sole arbitrator for the first time in an application under Section 34 of the Act, 1996?"
>
> **Held:**
>
> "123…i. The principle of equal treatment of parties provided in Section 18 of the Act, 1996, applies not only to the arbitral proceedings but also to the procedure for appointment of arbitrators. Equal treatment of the parties entails that the parties must have an equal say in the constitution of the arbitral tribunal.
>
> ii. Sub-section (5) of Section 12 provides that any person whose relationship with the parties or counsel, or the dispute, whether direct or indirect, falls within any of the categories specified in the Seventh Schedule would be ineligible to be appointed as an arbitrator. Since, the ineligibility stems from the operation of law, not only is a person having an interest in the dispute or its outcome ineligible to act as an arbitrator, but appointment by such a person would be *ex facie* invalid.
>
> iii. The words "an express agreement in writing" in the proviso to Section 12(5) means that the right to object to the appointment of an ineligible arbitrator cannot be taken away

by mere implication. The agreement referred to in the proviso must be a clear, unequivocal written agreement.

iv. When an arbitrator is found to be ineligible by virtue of Section 12(5) read with the Seventh Schedule, his mandate is automatically terminated. In such circumstance, an aggrieved party may approach the court under Section 14 read with Section 15 for appointment of a substitute arbitrator. Whereas, when an award has been passed by such an arbitrator, an aggrieved party may approach the court under Section 34 for setting aside the award.

v. In arbitration, the parties vest jurisdiction in the tribunal by exercising their consent in furtherance of a valid arbitration agreement. An arbitrator who lacks jurisdiction cannot make an award on the merits. Hence, an objection to the inherent lack of jurisdiction can be taken at any stage of the proceedings."

6.2 The Division Bench of this court in **Mahavir Prasad Gupta and Sons v. Govt. of NCT of Delhi**, 2025 SCC OnLine Del 4241 dealt with the following issues:

"74…a) When a party itself has unilaterally appointed the arbitrator, whether that party can object to the unilateral appointment of the arbitrator at any stage during or after the arbitration proceedings?

b) If a party has unilaterally appointed an arbitrator, can that party be deemed to have given express waiver in writing under Section 12(5) of the Act while making the appointment itself?"

The court concluded:

"84….a) **Mandatory Requirement:** Any arbitration agreement providing unilateral appointment of the sole or presiding arbitrator is invalid. A unilateral appointment by any party in the arbitrations seated in India is strictly prohibited and considered as null and void since its very inception.





Resultantly, any proceedings conducted before such unilaterally appointed Arbitral Tribunal are also nullity and cannot result into an enforceable award being against Public Policy of India and can be set aside under Section 34 of the Act and/or refused to be enforced under Section 36 of the Act.

b) **Deemed Waiver:** The proviso to Section 12(5) of the Act requires an express agreement in writing. The conduct of the parties, no matter how acquiescent or conducive, is inconsequential and cannot constitute a valid waiver under the proviso to Section 12(5) of the Act. The ineligibility of a unilaterally appointed arbitrator can be waived only by an express agreement in writing between the parties after the dispute has arisen between them. Section 12(5) of the Act is an exception to Section 4 of the Act as there is no deemed waiver under Section 4 of the Act for unilateral appointment by conduct of participation in the proceedings. The proviso to Section 12(5) of the Act requires an 'express agreement in writing' and deemed waiver under Section 4 of the Act will not be applicable to the proviso to Section 12(5) of the Act.

c) **Award by an Ineligible Arbitrator is a Nullity:** An award passed by a unilaterally appointed arbitrator is a nullity as the ineligibility goes to the root of the jurisdiction. Hence, the award can be set aside under Section 34(2)(b) of the Act by the Court on its own if it 'finds that' an award is passed by unilaterally appointed arbitrator without even raising such objection by either party.

d) **Stage of Challenge:** An objection to the lack of inherent jurisdiction of an arbitrator can be taken at any stage during or after the arbitration proceedings including by a party who has appointed the sole or presiding arbitrator unilaterally as the act of appointment is not an express waiver of the ineligibility under proviso to Section 12(5) of the Act. Such objection can be taken even at stage of challenge to the award under Section 34 of the Act or during the enforcement proceedings under Section 36 of the Act."

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7. After amendment of Section 12(5) of the Act an employee of a party in dispute can neither be appointed arbitrator nor can nominate or appoint any other person as an arbitrator. The unilateral appointment in absence of an express agreement in writing between the parties to waive applicability of Section 12(5) of the Act is void *ab initio*. The filing of the statement of claim or participation in the arbitral proceedings cannot be construed as waiver under the proviso to Section 12(5) of the Act. The unilateral appointment of the arbitrator can be objected to for the first time under Section 34 of the Act.

8. Clause 23 of the GCO provides for resolution of disputes through arbitration and the arbitrator was to be appointed by the respondent company.

9. The law is well settled that an official of a party to the dispute can neither be appointed as an arbitrator nor can appoint an arbitrator but in the case in hand the arbitrator was appointed by the respondent.

10. The contention that the appointment of the arbitrator was never objected to and that this issue was not pleaded in the petition under Section 34 of the Act is of no avail. The Supreme Court in **Bhadra International** (supra) held that the issue goes to the root of jurisdiction and can be raised for the first time under Section 34 of the Act. Moreover, the issue of jurisdiction can be raised at any stage, including the stage of execution. It is also held that there should be express written consent by the parties for waiver of the applicability of Section 12(5) of the Act. The relevant paragraphs are reproduced below:

> "97. One could argue that a miscreant party may participate in the arbitral proceedings up to the passing of the award, despite

having full knowledge of the arbitrator's ineligibility. While after an adverse award is rendered, such a party may then seek to challenge it with a view to having it set aside. Such an apprehension is reasonable, however, to obviate the possibility of such misuse, the party making unilateral appointment must endeavour to enter into an express written agreement as stipulated in the *proviso* to Section 12(5), so as to safeguard the proceedings from being rendered futile.

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109. When an award has been passed, the proceedings before the arbitral tribunal conclude, leaving no possibility of substituting the arbitrator at this stage. In other words, once an award is passed, the mandate of the arbitral tribunal also arrives at a conclusion. In such circumstances, a party aggrieved by the arbitrator's ineligibility may challenge the award by filing an application under Section 34 of the 1996 Act, as an award passed by an ineligible arbitrator is nullity, non-est, or void ab initio, and against the public policy of India.

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113. A challenge to an arbitrator's ineligibility could be raised at any stage because an award passed in such circumstance is non-est, i.e., it carries no enforceability or recognition in law. We say so because an arbitrator does not possess the jurisdiction to pass an award. In arbitration, the parties vest the jurisdiction in the tribunal by virtue of a valid arbitration agreement and an appointment made in accordance with the provisions of the Act, 1996. This jurisdiction is grounded in the consent of the parties as explained in the foregoing paragraphs of this judgment."

11. The Supreme Court in **Bhadra International** (supra) held that waiver under the proviso to Section 12(5) of the Act involves a conscious decision to waive rigour of statutory provisions and the person waiving such right should be aware of the right. A legal right cannot be taken away by implication and the waiver has to be an unequivocal expression.

12. There is no prescribed format under the proviso to Section 12(5) of the Act for an express agreement in writing but it shall not mean that the waiver can be inferred by implication or through conduct. It would be relevant to quote the following paragraph from **Bhadra International** (supra)**:**

> "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."

13. The matter needs to be considered from another angle. The express consent in writing under proviso to Section 12(5) of the Act has to be of both the parties. It is not the case set up before this Court that the respondent had given written consent under proviso to Section 12(5) of the Act.

14. The non- compliance of proviso to Section 12(5) of the Act by the parties brings the appointment of the arbitrator in teeth of Section 12(5) read with Seventh Schedule of the Act. The appointment of the arbitrator is void *ab initio* and renders the impugned award nullity.

15. The petition is allowed and the impugned award is set aside. Pending application also stands disposed of.

AVNEESH JHINGAN, J

MAY 5, 2026
Ch/Vs

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