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

% **Date of decision: 21.07.2026**

+ O.M.P. (COMM) 375/2018, I.A. 11860/2018, I.A. 11861/2018
& I.A. 8500/2021

BHARAT HEAVY ELECTRICALS LIMITEDPetitioner

Through: Ms. Mani Gupta, Mr. Pranav
Malhotra & Mr. Udwipt Verma,
Advs.

versus

PROGRESSIVE CONSTRUCTION LIMITEDRespondent

Through: Mr. Arjun D Singh & Mr.
Yimyanger L, Adv.

+ O.M.P. (COMM) 388/2018

PROGRESSIVE CONSTRUCTION LIMITEDPetitioner

Through: Mr. Arjun D Singh & Mr.
Yimyanger L, Adv.

versus

BHARAT HEAVY ELECTRICALS LIMITEDRespondent

Through: Ms. Mani Gupta, Mr. Pranav
Malhotra & Mr. Udwipt Verma,
Advs.

CORAM:

HON'BLE MR. JUSTICE AVNEESH JHINGAN

AVNEESH JHINGAN, J. (ORAL)

1. These petitions are filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') challenging the arbitral award dated 01.05.2018 (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. For convenience sake, the facts are being taken from O.M.P. (COMM) 375/2018. The brief facts are that the petitioner/ Bharat Heavy Electricals Limited (BHEL) was awarded a work contract by National Electricity Corporation (Sudanese Thermal Power Generating Co. Ltd.) for ‘civil, structural & architectural works of buildings, roads/drains & boundary wall/ fencing of 4 X 125 MW power plant in Kosti, Sudan’. The petitioner further gave a sub contract to the respondent vide Letter of Intent dated 24.04.2007, with a stipulated completion period of thirty seven months. Subsequently, an agreement dated 29.06.2007 was entered into between the parties to the *lis*.

3.1 Clause 33 of the General Conditions of Contract (for short ‘GCC’) provides for resolution of disputes by arbitration. As per the said clause, disputes shall be referred to the sole arbitration of the General Manager of BHEL or a nominee appointed by it and no objection shall lie if the appointed arbitrator is an employee of BHEL. The relevant clause is reproduced below:

“33.0 **ARBITRATION**: All disputes between the parties to the contract arising out of or in relation to the contract, other than those for which the decision of the Engineer or any other person is by the contract expressed to be final and conclusive, shall after written notice by either party to the contract to the other party, be referred to sole arbitration of the General Manager or his nominee. The arbitration shall be conducted in accordance with the provisions of the Arbitration and Reconciliation Act, 1996. The parties to the contract understand and agree that it will be no objection that the General Manager or the person nominated as Arbitrator had earlier in his official capacity to deal directly or indirectly with the matters to which the



contract relates or that in the course of his official duties had expressed views on all or any of the matters in dispute or difference. The award of the Arbitrator shall be final and binding on the parties to this contract. In the event of the Arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason or his award being set aside by the Court for any reason, it shall be lawful for the General Manager or his successor, as the case may be, either to act himself as the Arbitrator or to appoint another Arbitrator in place of the outgoing Arbitrator in the manner aforesaid. The Arbitrator may, from time to time, with the consent of both the parties to the contract, enlarge the time for making the award. Work under the contract shall be continued during the arbitration proceedings. The venue of the arbitration shall be the place from which the contract is issued or such other place as the Arbitrator at his discretion may determine.”

3.2 Disputes arose between the parties with regard to delay in execution of the work, levy of liquidated damages and release of pending amounts. The respondent by letter dated 09.09.2016 and email dated 20.09.2016 requested for referring the disputes to arbitration. The petitioner appointed the sole arbitrator on 28.10.2016 and proceedings culminated in the impugned award and hence the present petition.

4. Learned counsel for the petitioner submits that the appointment of the sole arbitrator is in violation of amended 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 the decisions of this Court in **Railways Board, Ministry of Railways vs. Titagarh Rail Systems**



Limited, 2026:DHC:1720 and **Engineering Projects (India) Ltd. v. Allied Construction**, 2026:DHC:2540 to contend that unilateral appointment of an arbitrator is void *ab-initio* and objection to such appointment can be raised even in proceedings under Section 34 of the Act.

5. *Per contra*, it is not a case of unilateral appointment as the arbitrator was appointed by the petitioner and the parties participated in the arbitral proceedings without raising an objection. It is submitted that petitioner having appointed the arbitrator and on failing is now taking a u-turn. Further that no objection with regard to the appointment of the arbitrator was raised before the arbitral tribunal.

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.”

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. In the case in hand, the arbitrator was unilaterally appointed by the petitioner in terms of clause 33 of the GCC without compliance of proviso to Section 12(5) of the Act.

8. 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.

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.

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.”

9. In view of the law laid down by the Supreme Court in **Bhadra International** (supra) and the decisions of this Court in **Titagarh Rail Systems Limited** (supra) & **Allied Construction** (supra) affirmed by the Division Bench of this court, the appointment of the arbitrator falls in the teeth of the amended Section 12(5) of the Act.

10. The issue now to be determined is as to whether after the dispute arose was there an express waiver in writing between the parties that the provisions of Section 12(5) of the Act shall not apply.

11. The Supreme Court in **Bhadra International** (supra) held that waiver involves a conscious decision to abandon the existing legal right and can be made only by a person fully aware of such right. A legal right cannot be taken away by implications. The waiver has to be an unequivocal expression and it cannot be lost sight of that by such waiver the restriction imposed by Section 12(5) of the Act is sought to be overcome.

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. The factum of the petitioner having appointed the arbitrator cannot be construed as compliance of proviso to Section 12(5) of the Act. The waiver has to be express and cannot be construed or inferred through conduct. The Division Bench of this court in **Mahavir Prasad Gupta** (supra) held that an appointment of an ineligible person as an arbitrator is void ab-initio and can be challenged by the party making such appointment. The relevant paragraphs of the judgment are:

“81. Accordingly, the party that unilaterally appointed the arbitrator cannot be deemed to have agreed in writing to waive the ineligibility of the arbitrator by act of appointment. When appointment itself is ineligible under the provisions of Section 12(5) of the Act read with Seventh Schedule of the Act, it does not take away the right of the party to challenge such an appointment merely because that party had made the appointment in absence of express agreement in writing between the parties to waive the applicability of Section 12(5) of the Act. 82. Hence, a party which unilaterally appointed the arbitrator has right to object to such appointment irrespective of fact that that party itself made the appointment of the arbitrator. Mere fact of making appointment in writing will not make the ineligible appointment a valid appointment unless there is express agreement in writing waiving such ineligibility.

83. Although it appears disingenuous, a party appointing an the sole or presiding arbitrator unilaterally can challenge the award on the ground that the award has been rendered



in contravention of Section 12(5) of the Act read with Seventh Schedule of the Act notwithstanding that the said party itself made such an appointment. When the Arbitral Tribunal inherently lacked jurisdiction to act, the arbitration proceedings are void *ab initio*, rendering the award unenforceable irrespective of which party made such unilateral appointment. The arbitral proceedings and an award made by an unilaterally appointed sole or presiding arbitrator, who is *de jure* ineligible to be appointed as an arbitrator by virtue of the Seventh Schedule of the Act are void *ab initio*. The waiver under the proviso to Section 12(5) of the Act must be express and subsequent to the disputes having been arisen between the parties. Hence, the party which appointed the sole or presiding arbitrator unilaterally can also challenge the award under Section 34 of the Act on the ground of such ineligibility.”

14. In the absence of an express agreement in writing under proviso to Section 12(5) of the Act, the appointment of the arbitrator by the petitioner is in violation 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 a nullity.

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

16. Since the award has been set aside no separate order is required to be passed in O.M.P. (COMM) 388/2018.

AVNEESH JHINGAN, J

JULY 21, 2026

‘Ch’/ ‘Vs’

Reportable: Yes