Form No. J(2)

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

BEFORE:
THE HON'BLE JUSTICE OM NARAYAN RAI

C.O. 1015 OF 2026

K.A. MALLE PHARMACEUTICALS LIMITED
-VS-
MSTC LIMITED

For the Petitioner	:	Mr. Kishore Dutta, Sr. Adv. Mr. Debasish Ghosh, Adv. Mr. Shuvasish Sengupta, Adv. Mr. Lalit Baid, Adv. Mr. Akash Munshi, Adv. Ms. Sanjana Shaw, Adv. Mr. Kuldip Das, Adv.
For the Opposite Party	:	Mr. Abhrajit Mitra, Sr. Adv. Mr. Ritoban Sarkar, Adv. Mr. Dhruv Chaddha, Adv. Mr. Barnik Ghosh, Adv.
Heard on	:	22.05.2026
Judgment on	:	19.08.2026

OM NARAYAN RAI, J. :-

1. This revisional application is directed against an order dated February 16, 2026 passed by the learned Judge, Commercial Court at Alipore in Misc. Arb (Com.) 73 of 2023 thereby disposing of the petitioner's application under Section 36 (2) of the Arbitration and Conciliation Act, 1996[1] seeking stay of the Arbitral Award dated February 18, 2023.

FACTUAL MATRIX:

2. Shorn of meticulous details, the facts relevant for adjudication of the present revisional application, as may be gathered from the material on record, are as follows:-

a. The petitioner and the opposite party herein had entered into a Memorandum of Agreement dated September 15, 2008 for the purpose of business pertaining to export of gold and jewellery.

b. The said agreement contained an arbitration clause whereunder the Chairman cum Managing Director of the opposite party had the authority to appoint an

[1] **Hereafter "the 1996 Act"**

arbitrator for adjudicating the disputes between the parties. Accordingly, when disputes and differences arose between the petitioner and the opposite party, the opposite party invoked the arbitration clause contained in the agreement and appointed an arbitrator. The said learned Arbitrator held the first sitting on or about January 29, 2010.

c. During the continuance of the arbitration proceedings, the opposite party approached the learned District Judge, Alipore under Section 9 of the 1996 Act praying for certain interim reliefs. In the said proceeding, the learned Court had initially passed an interim order but the same was ultimately vacated on May 22, 2017 on the ground of lack of territorial jurisdiction.

d. Feeling aggrieved thereby, the opposite party approached the Hon'ble Division Bench of this Court by filing an appeal under Section 37 of the 1996 Act which was registered as FMA 982 of 2017.

e. The said appeal was entertained by the Hon'ble Division Bench and an ad interim order staying the operation of the order dated May 22, 2017 was passed.

f. During the hearing of the said appeal, the parties agreed, without prejudice to their rights and contentions in the pending arbitral reference, that the order subsisting in the said appeal would be continued for a limited period to enable the opposite party to approach the learned Arbitrator under Section 17 of the amended 1996 Act. The parties further agreed that the 1996 Act (as amended in 2015) would apply to the arbitral proceedings and the learned Arbitrator would thus have the authority under the amended Section 17 of the 1996 Act to decide on the interim measures. The parties also agreed that the prayers made by the opposite party before the Section 9 Court would be made before the learned Arbitrator by way of a fresh petition under Section 17 of the 1996 Act. Accordingly, FMA 982 of 2017 was disposed of by the Hon'ble Division Bench by passing an order dated February 02, 2018 recording the agreement between the parties as aforesaid.

g. Thereafter, during the 54th meeting in the arbitral reference held on March 18, 2018, the learned Sole Arbitrator recused from the arbitral reference observing that since that the said Arbitrator had been appointed as Arbitrator by the claimant (i.e., the opposite party herein) in other matters also, therefore, the same might give rise to justifiable doubts as to the independence and impartiality of the Arbitral Tribunal. The learned Arbitrator also reasoned that since the parties had agreed that oral evidence might be required it might not be possible for him to conclude the reference within the statutory period. Having thus recused himself, the learned Arbitrator requested the parties to take appropriate step in accordance the law.

h. Subsequently, on December 21, 2018 the learned Advocates representing the petitioner issued a letter to the opposite party's Chairman cum Managing Director[2] seeking appointment of a substitute Arbitrator by the addressee under Section 15(2) of the 1996 Act. The said letter also referred to an earlier letter dated July 10, 2018 that had been issued on behalf of the petitioner and put the addressee on notice that the petitioner would be *"constrained to initiate appropriate legal action against"* the opposite party, if the opposite party did not respond within fifteen days from the date of receipt of the said notice.

i. Thereafter, on December 31, 2018, the CGM (F & A)[3] of the opposite party wrote a letter of even date to the Chairman thereby briefly referring to the backdrop of the case and the recusal of the learned Arbitrator, and requesting the addressee to appoint an Arbitrator. A copy of the said letter was also marked to the petitioner.

j. The petitioner responded to the said letter by a letter dated January 15, 2019 by alluding to its earlier letter dated December 21, 2018 and stated that the petitioner had *"initiated the requisite steps for appointment of an Arbitrator"* as the opposite party had failed to do so.

k. On January 16, 2019, the Chairman issued an order appointing an Arbitrator, with a copy thereof marked to the petitioner.

l. The learned Arbitrator who had been appointed by the aforesaid order dated January 16, 2019 accepted the appointment and issued a letter dated January 21, 2019 calling upon the parties to attend a meeting with him on February 04, 2019.

m. Subsequently, the petitioner as well as the opposite party filed a joint application under Section 16 of the 1996 Act. The said application was considered by the learned Arbitral Tribunal and an order dated April 28, 2021 was passed.

n. The learned Arbitrator thereafter proceeded with the reference and ultimately passed an Award on February 18, 2023. The said Award has been challenged by the petitioner by way of an application filed under Section 34 of the 1996 Act, which has been registered as Misc. Arb (Com.) 73 of 2023 before the learned Commercial Court, Alipore, South 24 Parganas.

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[2] **Hereafter "the Chairman"**

[3] **Chief General Manager, Finance and Accounts**

o. Pending the said challenge to the Award, the petitioner filed an application under Section 36(2) of the 1996 Act seeking unconditional stay of the Arbitral Award dated February 18, 2023.

p. The learned Commercial Court has by the impugned order, refused to grant an unconditional stay and has directed the petitioner to secure the sum Awarded by the Arbitral Award by way of a renewable bank guarantee. Feeling aggrieved by the said order, the petitioner has approached this Court by way of the present revisional application.

<u>SUBMISSIONS ON BEHALF OF THE PETITIONER:</u>

3. A brief summary of the submissions made by Mr. Dutta, learned Senior Advocate appearing for the petitioner, is as follows:-

a. The learned Commercial Court has committed a jurisdictional error in refusing to stay the Award unconditionally while failing to appreciate that the Award is wholly illegal and has been passed *quorum non judice*.

b. The learned Commercial Court has refused to pass an unconditional order of stay on three reasons i.e. - (i) there is no room to exercise discretion while deciding an application for stay of an Arbitral Award if a case of fraud or corruption or a case of inducement by fraud or corruption is not made out; (ii) the aspect as to whether an Award would be set aside or not would be decided while adjudicating the application under Section 34 of the 1996 Act and (iii) if the aspect as to whether the compliance required under Section 12(5) of the 1996 Act has been met or not is examined under Section 36(3) of the 1996 Act, the same would amount to a mini trial.

c. The arbitration clause contained in the agreement would indicate that Arbitrator was to be appointed by the Chairman. The order dated January 16, 2019 issued by the Chairman would indicate that the learned Arbitrator who passed the Award had been appointed by the Chairman only. Since the said Chairman was himself ineligible to act as or to be appointed as an Arbitrator, therefore, the said chairman could not have appointed any Arbitrator and the learned Arbitrator appointed by such Chairman would *ipso facto* be ineligible to proceed with the reference and pass the arbitral Award. Such an appointment would be an illegal appointment.

d. A judgment of the Hon'ble Supreme Court in the case of ***Perkins Eastman Architects DPC & Another vs. HSCC (India) Limited***[4] was relied on to buttress the aforesaid submission.

e. In view of the law laid down in ***Perkins Eastman Architects DPC & Another*** (supra), the learned Arbitrator was *de jure* disqualified from performing arbitral functions from the very day of his appointment i.e. January 16, 2019.

f. The judgment of the Hon'ble Supreme Court in the case of ***Bhadra International (India) Private Limited & Others vs. Airports Authority of India***[5] was placed to demonstrate that an Award rendered by an ineligible Arbitrator is bound to be set aside and that in order to escape the rigours of Section 12(5) of the 1996 Act, it is mandatory for the parties to enter into an agreement in writing and waive the ineligibility of the proposed Arbitrator.

g. A co-ordinate Bench judgment of this Court in the case of ***Cholamandalam Investment and Finance Company Limited vs. Amrapali Enterprises & Another***[6] was cited to contend that an Award passed by a *de jure* ineligible Arbitrator is unsustainable and *non-est* in the eyes of law.

h. A judgment of the Hon'ble Delhi High Court in the case of ***M/s Gowra Petrochem Private Limited vs. M/s Alfa Chem & Others***[7] was also cited for the same proposition that an Award rendered by an ineligible Arbitrator is *non est* in law and is incapable of enforcement.

i. A judgment of the Hon'ble Delhi Court in the case of ***Umaxe Projects Private Limited vs. Air Force Naval Housing Board***[8] was cited to demonstrate that continued participation in arbitral proceedings and preferring a petition under Section 29A of the 1996 Act would not preclude a party from challenging the *de jure* ineligibility of the Arbitrator.

j. The main part of Section 36(3) of the 1996 Act permits the Court to pass orders staying the operation of arbitral Awards without imposing any condition, in exceptional cases. An Award rendered by an ineligible Arbitrator in an arbitral proceeding conducted in defiance of the provisions of Section 12(5) of the 1996 Act would constitute an exceptional case deserving unconditional stay of its operation.

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[4] **(2020) 20 SCC 760**
[5] **2026 SCC OnLine SC 7**
[6] **2023 SCC OnLine Cal 605**
[7] **OMP (ENF.) (COMM.) 215 of 2019, decided on May 14, 2026**
[8] **2023 SCC OnLine Del 7684**

k. The ruling of the Hon'ble Supreme Court in the case of ***Lifestyle Equities C.V. & Another vs. Amazon Technologies Inc.***[9] was pressed into service to fortify such submission. Relying on the said judgment it was contended that power to impose conditions would also impose the power not to impose conditions.

l. ***Popular Caterers vs. Ameet Mehta & Others***[10], being yet another judgment rendered by the Hon'ble Supreme Court was relied on to show that operation of an Award can be unconditionally stayed if the same is egregiously perverse or is riddled with patent illegalities or the same is facially untenable.

m. The learned Commercial Court has failed to appreciate the principles of law enunciated by the above-mentioned authorities and has proceeded to impose condition for staying the operation of the Award thereby indirectly holding that there is no scope of discretion left for Court in money decrees.

<u>SUBMISSIONS ON BEHALF OF THE OPPOSITE PARTY:</u>

4. A brief summary of the submissions made by Mr. Mitra, learned Senior Advocate appearing for the opposite party, is as follows:-

a. The order impugned in this revisional application does not suffer from any jurisdictional error at all.

b. If the series of correspondences between the parties viz., letters dated December 21, 2018, December 31, 2018, January 15, 2019 and January 16, 2019 and the joint application made by the parties before the learned Arbitrator are taken together, it would be safely inferred that the parties had waived the ineligibility of the learned Arbitrator, if any.

c. Paragraph 16 of the joint application and prayer (b) thereof clearly indicate the manifest intention of the parties to accept the jurisdiction of the learned Arbitrator to continue with the arbitral proceeding and pass the Award.

d. A combined reading of the provisions of Section 34(2)(b) of the 1996 Act together with its Explanation and the second proviso to Section 36(3) of the said Act would at once make it clear that the intention of the Legislature was not to stall Awards which were not vitiated by fraud or corruption.

e. Two elements whose presence would render an Award in conflict with public policy in terms of Section 34(2)(b) of the 1996 Act are fraud and corruption. Both these elements have been bodily lifted and incorporated in the second proviso to Section 36(3) of the 1996 Act as conditions for grant of unconditional stay of an arbitral Award.

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[9] **2025 SCC OnLine SC 2153**

[10] **2025 INSC 1354 : 2025 SCC OnLine SC 3334**

f. It is nobody's case that the subject Award is vitiated by fraud or corruption. The powers of Court under Section 36(3) are limited and the same are not akin to the powers of the Court under Section 34 or Section 11 of the 1996 Act or Section 47 of the Code of Civil procedure, 1908[11].

g. A judgment of the Co-ordinate Bench of this Court in the case of ***West Bengal Industrial Development Corporation Limited vs. Tata Motors Limited***[12] was cited to contend that the scope of adjudication under Section 34 and Section 36(2) and (3) of the 1996 Act are absolutely different.

h. Another Co-ordinate Bench judgment in the case of ***Damodar Valley Corporation vs. AKA Logistics Private Limited***[13] was pressed to assert that operation of an Award could be unconditionally stayed only if a special case was made out and the threshold to establish *prima facie* fraud or corruption was very high.

i. Yet another Co-ordinate Bench judgment of this Court in the case of ***Chittaranjan Locomotive Works vs. Arihant Electricals***[14] was shown to emphasise that a special case has to be made out for granting an unconditional stay of an arbitral Award.

j. ***Union of India & Others vs. Rahul Kumar Thakur***[15] another judgment rendered by a Co-ordinate Bench of this Court was relied on to contend that in order to grant unconditional stay of the Award, the petitioner would be required to show, *prima facie,* that the learned Arbitrator deliberately passed the Award in abuse of process of law and had illegally obstructed the course of justice.

k. A judgment of the Hon'ble Supreme Court in the case of ***Afcons Infrastructure Limited & Another vs. Cherian Varkey Construction Company Private Limited & Others***[16] was cited to assert that a joint petition can also be treated as an agreement.

l. ***Cholamandalam Investment and Finance Company Limited*** (supra) cannot aid the petitioner that as the same was passed in exercise of powers akin to Section 47 of the Code which are available to the Court while execution of the Award under Section 36 of the 1996 Act by the Court. Further in that case the Award had been passed without participation of the parties.

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[11] **Hereafter "the Code"**
[12] **2025 SCC OnLine Cal 4969**
[13] **2025 SCC OnLine Cal 7998**
[14] **MANU/WB/2625/2025**
[15] **AP-COM 657 of 2024, decided on March 05, 2025**
[16] **(2010) 8 SCC 24**

m. ***Perkins Eastman Architects DPC & Another*** (supra) was passed in the context of Section 11 of the 1996 Act and cannot be applied to the present case under Section 36(3) of the 1996 Act.

n. The judgment of the Hon'ble Supreme Court in the case of ***State of U.P. & Others vs. Jeet S. Bisht & Another***[17] was relied on to demonstrate that a decision passes *sub silentio* when a particular point of law involved in the decision is not perceived the Court or present to its mind.

o. It was contended that since none of the decisions cited by the petitioner have been passed in the context of Section 36(3) of the 1996 Act, therefore none would help the petitioner in the present case.

a. A judgment of the Hon'ble Division Bench of the Madras High Court in the case of ***General Manager, CORE, Allahabad vs. JV Engineering Associate Civil Engineering Contractors***[18] to contend that the expression *"express agreement in writing"* cannot be confined to only a legal document which would be signed by two parties and the person waiving the right would include words *"as I hereby expressly waive …"* or the like.

REJOINDER OF THE PETITIONER:

5. Mr. Dutta learned Senior Advocate appearing for the petitioner made the following rejoinder submissions:-

a. Section 16 of the 1996 Act is not concerned with the qualification or ineligibility of the Arbitrator. Eligibility and qualification of an Arbitrator are governed by Section 12 of the said Act.

b. Section 16 of the 1996 Act is independent of Section 12 thereof and that being so, the ineligibility of an Arbitrator under Section 12 of the 1996 Act would be required to be expressly waived.

c. ***Bhadra International (India) Private Limited & Others*** (supra) has made it absolutely clear that prayer for extension of time by a joint application would amount to waiver only in cases which do not involve statutory ineligibility under Section 12(5) of the 1996 Act. Going by the mandate of the Hon'ble Supreme Court in paragraph 96 of the said judgment, the application under Section 16 of the 1996 Act filed by parties would not amount to express agreement in writing contemplated under Section 12(5) of the 1996 Act.

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[17] **(2007) 6 SCC 586**

[18] **2021 SCC OnLine Mad 2892**

d. Since the Award is inexecutable in terms of the judgment in the case of ***M/s Gowra Petrochem Private Limited*** (supra), therefore, unconditional stay should be granted.

e. ***Afcons Infrastructure Limited & Another*** (supra) cannot help the opposite party since the same was rendered in the context of Section 89 of the Code which provides for settlements of disputes outside Court. The issues that were involved in the said case were entirely alien to the one at hand.

f. ***Rahul Kumar Thakur*** (supra), ***Chittaranjan Locomotive Works*** (supra) and ***West Bengal Industrial Development Corporation Limited*** (supra) were all decided on the basis that unconditional stay cannot be granted unless there is a case of fraud or corruption and none of them involved ineligibility of the Arbitrator.

g. ***Damodar Valley Corporation*** (supra) holds in paragraph 39 thereof that unconditional stay can be granted if the Award is in violation of any law.

h. Even an obiter dictum in a judgment of the Hon'ble Supreme Court is binding on this Court and as such, the judgment in the case of ***Jeet S. Bisht & Another*** (supra) would not help the opposite party.

<u>ANALYSIS & DECISION:</u>

6. Heard the learned Senior Advocates appearing for the respective parties and considered the material on record.

7. The order impugned before this Court is one under Section 36(3) of the 1996 Act. The Hon'ble Supreme Court has clearly carved out the boundaries for grant of an unconditional stay of arbitral Awards not tainted with fraud or corruption in terms of Section 36(3) of the 1996 Act.

8. In the case of ***Lifestyle Equities C.V. & Another*** (supra) the Hon'ble Supreme Court considered its earlier judgments in the cases of ***Sepco Electric Power Construction Corpn. v. Power Mech Projects Ltd***.[19], and ***Pam Developments (P) Ltd. v. State of W.B***[20]., and held that unconditional stays can be granted even in cases falling outside the second proviso to Section 36(3) of the 1996 Act.

9. What was laid down in ***Lifestyle Equities C.V. & Another*** (supra) was again reiterated by the Hon'ble Court in the case of ***Popular Caterers*** (supra) in the following words:-

> *"**26.** In the present case, it is not even the case of the judgment-debtor, i.e., respondents before us that the making of the Award was induced or effected by fraud or corruption.*

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[19] **(2026) 3 SCC 701**
[20] **(2019) 8 SCC 112**

Even if we have to apply the general principles of CPC in the present case, the High Court should have considered the matter asking a question whether the respondents herein (Award-debtors) could be said to have made out an "exceptional case" for the purpose of granting benefit of unconditional stay of the execution of the Award which is in the form of a money-decree. In Lifestyle Equities (supra), we said in so many words that for the purpose of granting of benefit of unconditional stay of the execution of money-decree, it has to be established more than prima facie that:

(i) The decree is egregiously perverse,

(ii) is riddled with patent illegalities,

(iii) is facially untenable; and/or

(iv) such other exceptional causes similar in nature.

27. *We are of the considered view that the case in hand does not fall in any of the aforesaid categories so as to seek the benefit of unconditional stay of the arbitral Award which is in the form of a money-decree."*

10. It therefore follows that apart from cases of the Award being vitiated by fraud and corruption as indicated in the second proviso to Section 36(3) of the 1996 Act, an unconditional stay can be granted only in cases where the impugned Award falls under any of the aforementioned four categories.

11. The learned Commercial Court has refused to grant an unconditional stay. In order to determine whether the impugned order deserves interference it must be examined if the arbitral Award suffers from any of the infirmities/vices indicated either by the second proviso to Section 36(3) of the 1996 Act or the judgments of the Hon'ble Supreme Court in ***Lifestyle Equities C.V. & Another*** (supra) and ***Popular Caterers*** (supra).

12. As the petitioner has not made out any case of fraud or corruption, therefore, that aspect need not be examined.

13. The petitioner has vehemently contended that the Award, being rendered by an ineligible Arbitrator, is a nullity. This is an important aspect which needs to be examined keeping in mind that this Court is exercising its supervisory jurisdiction over the learned Commercial Court which has passed an order under Section 36(3) of the 1996 Act. Given the stage of the proceeding, the nature of enquiry would only be *prima facie*, cautiously avoiding a mini trial or a full merits audit of the matter.

14. The arbitral reference between the parties, commenced prior to the 2015 Amendment to the 1996 Act. The parties agreed to the application of the amended 1996 Act to the proceedings in 2017, however, the proceedings could not continue before the originally appointed learned Arbitrator as he recused from the reference. It is noteworthy that the petitioner itself requested the opposite party to appoint another Arbitrator initially by a letter dated July 10, 2018 which was followed up by another letter dated December 21, 2018. The opposite party ultimately appointed the substitute Arbitrator by an order dated January 16, 2019 in terms of the request of the petitioner.

15. Before the learned substitute Arbitrator a joint petition was filed by both the parties under Section 16 of the 1996 Act. The specific text of certain paragraphs of the said application jointly filed by the parties may be noted:-

> *"1). **This is a Joint Application of the parties under section 16 of the Arbitration and Concilaition Act, 1996** (hereinafter referred to as the said Act. Under the said provision, the Learned Arbitrator is competent to rule on its Jurisdiction and pass necessary orders as prayed for.*
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> **************************** **************************** ****************************
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> *12) As a result by a letter dated December 21, 2018, the Respondent through its Advocate Udaipuri & Cop. Requested the Claimant to appoint a substitute Arbitrator in accordance with Section 15(2) of the said Act.*
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> *13. Pursuant to the aforesaid, the Claimant appointed the present Learned Arbitrator the Hon'ble Justice Sailendra Prasad Talukdar, Sole Arbitrator vide memo dated January 16, 2019. A copy of the said order/memo dated January 16, 2019 is annexed hereto and marked as Annexure '**G**'*
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> **************************** **************************** ****************************
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> *16) In terms of the above section, the present Arbitral Tribunal is deemed to have entered upon the reference on the date on which the Arbitrator received the notice in writing of appointment which is January 21, 2019. Such appointment is also in accordance with Section 15(2) of the said Act. Therefore the Award as per section 29A above was required to be made within 12 months from such date.*
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> **************************** **************************** ****************************
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> *24) Accordingly, the parties herein have agreed to and request this Tribunal to exclude the aforesaid period and extend the time for a period of 6 months from the date of passing of the order in the present application.*
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> *25) **The Learned Arbitrator has jurisdiction and is competent to rule of its jurisdiction under section 16 of the said Act.** Arbitral proceedings may be allowed to continue from the stage already reached and on the basis of the evidences and material already on record and shall be deemed to be in continuation of the previously appointed Arbitral Tribunal.*
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> *26) Unless orders as prayed for are passed in favour of your petitioner, your petitioner will suffer irreparable loss, prejudice and injury."*

(Emphasis supplied)

16. The prayers made in the said application also deserve notice:-

> *"(a) The Learned Arbitrator has entered the present reference in terms of Section 15 (2) of the Arbitration and Conciliation Act, 1996 on January 21, 2019*
>
> *(b) **The Learned Arbitrator has jurisdiction to continue with the present reference and make and publish and Award"***
>
> *(c) Accordingly, the time for completion of the present proceeding be extended by consent of parties till for a further period of six months from the date of passing of an order in the present application.*
>
> *(d) Such further order or orders and/or direction or directions as may deem fit and proper."*

(Emphasis supplied)

17. Certain aspects of the matter are quite striking at least *prima facie*. Firstly, once the parties jointly say that the learned Arbitral Tribunal has jurisdiction, would that not mean that the learned Arbitrator is eligible as well?

18. Mr. Dutta had contended that as Section 16 and Section 12(5) operate independently therefore a joint application as regards jurisdiction would not amount to waiver of ineligibility. The argument arrests attention at the first blush but fails to endure closer legal scrutiny.

19. The meaning of the expression jurisdiction, was elaborately explained by an Hon'ble Judge of this Court in the case of ***Hirday Nath Roy v. Ramachandra Barna Sarma***[21] which was quoted with approval by the Hon'ble Supreme Court in the case of ***Official Trustee vs. Sachindra Nath Chatterjee***[22], in the following words:-

> *"**13**. What is meant by jurisdiction? This question is answered by Mukherjee, Acting C.J. speaking for the Full Bench of the Calcutta High Court in Hirday Nath Roy v. Ramachandra Barna Sarma. At p. 146 of the report the learned judge explained what exactly is meant by jurisdiction. We can do no better than to quote his words:*
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> *"In the order of Reference to a Full Bench in the case of Sukhlal v. Tara Chand6 it was stated that jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it : in other words, <u>by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision</u>. An examination of the cases in the books discloses numerous attempts to define the term 'jurisdiction', which has been stated to be 'the power to hear and determine issues of law and fact', the authority by which the judicial officer take cognizance of and 'decide causes'; 'the authority to hear and decide a legal controversy', 'the power to hear and determine the subject-matter in controversy between parties to a suit and to adjudicate or exercise any judicial power over them;' 'the power to hear, determine and pronounce judgment on the issues before the Court'; 'the power or authority which is conferred upon a Court by the Legislature to hear and determine causes between parties and to carry the judgments into effect'; 'the power to enquire into the facts, to apply the law, to pronounce the judgment and to carry it into execution'."*
>
> (Emphasis supplied)

20. Thus, the authority of the arbitrator to decide the case would be dependent on his eligibility and that being so the eligibility of an Arbitrator would be a necessary facet of the arbitrator's inherent jurisdiction. If it had not been so, the Hon'ble Supreme Court would not have annulled arbitral Awards rendered by ineligible arbitrators. Judgments in the cases of ***Perkins Eastman Architects DPC & Another*** (supra) and ***Bhadra International (India) Private Limited & Others*** (supra) clearly instruct that ineligibility of the arbitrator strikes at the root of the jurisdiction. In such view of the matter, upon once stating on oath that the learned Arbitrator has jurisdiction, can the parties or any one of them still say that the

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[21] **ILR LXVIII, Cal 138**
[22] **1968 SCC OnLine SC 103**

arbitrator is ineligible? The ultimate answer will have to be rendered by the Section 34 Court or may be the Executing Court, if a point that the Award is a nullity on the ground of ineligibility of the arbitrator is raised before it, but *prima facie,* this Court does not find any affirmative answer to the question posed.

21. Secondly, it is noted that the application also refers to Section 29A and seeks extension of time by six months. It can be said that it is an application where the parties have consented to extend time by six months. Indeed that is one way to look at it. If that is so, the application would not qualify for an express agreement required under Section 12(5) of the 1996 Act. As regards applications seeking extension under Section 29A of the 1996 Act, the Hon'ble Supreme Court has in the case of ***Hindustan Construction Co. Ltd. vs. Bihar Rajya Pul Nirman Nigam Ltd.***[23] which has been referred to and reiterated in ***Bhadra International (India) Private Limited & Others*** (supra) very clearly held as follows: -

> *"**13.10** Thus when a party joins in seeking extension under Section 29A despite having the opportunity to object or seek termination, it signifies a higher degree of consent. However, such consent cannot be equated with an express written waiver under Section 12(5). The statutory language is categorical: only an express written post-dispute waiver can cure Seventh Schedule ineligibility."*

22. Now, in the facts of the present case the prayer clauses/prayer portion are not only confined to extension of time. The application is also not one that only seeks extension of time. In the *prima facie view* of this Court, if extension of time was the only objective of such an application, the preceding prayers would serve no purpose. In fact no prayer was required to be made at all. The parties could have extended the time under Section 29A and could have communicated such extension jointly or the agreement between the parties to extend time could have been brought on record before the arbitral Tribunal by way of an application. This Court, again *prima facie,* does not find any reason for the parties to file a detailed application running into several pages containing 27 paragraphs and four prayers.

23. In paragraph 16 of the said joint application, the parties have asserted that the learned Arbitrator's "*appointment is also in accordance with Section 15(2) of the said Act".* Then paragraph 25 of the joint application and prayer (b) thereof explicitly state that *"The Learned Arbitrator has jurisdiction to continue with the present reference and make and publish an Award".* All of this taken cumulatively, prima *facie,* indicate an express agreement in writing in terms of the proviso to Section 12(5) of the 1996 Act.

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[23] **2025 SCC OnLine SC 2578**

24. The petitioner has not just passively participated or simply appended signature on procedural minutes. *Prima facie*, the joint application by the parties is a clear statement in writing, signed after the dispute arose, directly granting the arbitral Tribunal the authority to pass a final Award. In ***Bhadra International (India) Private Limited & Others*** (supra), the Hon'ble Supreme Court has observed thus:-

> "***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."*

(Emphasis supplied)

25. The statue requires a post dispute written agreement which the Hon'ble Supreme Court has felicitously stated to be a *written manifestation of intention.* Can the joint application not be said to be a *written manifestation of intention? Prima facie*- YES. However, the final answer will have to be rendered by the Section 34 Court.

26. ***Afcons Infrastructure Limited & Another*** (supra) was indeed rendered in the context of Section 89 of the Code as rightly contended by Mr. Dutta, but then that by itself will not make the joint application filed by the parties anything less than an agreement. It has all the characteristics of an express written agreement. After all an agreement is the manifestation of mutual assent between parties. It is an expression of consensus. Can the parties say, that they did not agree to what they wrote in the joint application? The answer has to be in the negative.

27. The matter can be seen from yet another angle - while the original mechanism under the agreement allowed the opposite party to make unilateral appointments, the subsequent procedure followed an entirely different path. After the parties had agreed that the amended 1996 Act would apply, the petitioner wrote to the opposite party to appoint an arbitrator and after appointment of such arbitrator, the parties executed a joint petition before the substitute arbitrator. In such a scenario, the appointment *prima facie* ceased to be unilateral. Signing a joint petition of such nature as indicated after adopting the amended Act, *prima facie* represents a conscious choice by the parties to utilize the post-amendment substitution framework.

28. As already stated hereinabove, we are at the Section 36(3) stage where the only requirement is to see if the Award is tainted by fraud or corruption or is *egregiously perverse* or is *riddled with patent illegalities* or is *facially untenable*. It has already been indicated hereinabove that the question of the Award being vitiated by fraud or corruption has not arisen in this case.

29. The case at hand is also not one where the Award is *egregiously perverse*. No perversity, not to speak of egregious perversity has been demonstrated before this Court.

30. The next two infirmities of the Award being *riddled with patent illegalities and facially untenable* have been sought to be attributed to the Award on the sole ground of the ineligibility of the learned Arbitrator. Both the said infirmities, to the mind of this Court must be apparent from the Award and a facial scrutiny of the records. A deep drive into the case and a rigorous scrutiny of the records would be a prohibited exercise at the Section 36(3) stage.

31. As would be evident from the discussion made hereinabove, none of the two infirmities can be said to be evident form the *ex facie* examination of the Award and the records. The case, as it stands requires a proper and comprehensive evaluation of the material on record, of course within the limits of Section 34 of the 1996 Act (or Section 47 of the Code in case of the Executing Court). In the facts of the present case, the question as to whether the joint application serves merely as a tool for procedural extension or amounts to a valid waiver under the proviso to Section 12(5) of the 1996 Act is highly triable and requires a full hearing under Section 34.

32. In the considered view of this Court patent illegality and facial untenability of an Award for the purpose of examination under Section 36(3) of the Act should be obvious on the face of the Award and the record. The present case is not an open and shut case of *ex facie* nullity of the Award.

33. Since the arbitral Award does not fall under any of the exceptions carved out either by the statute or by the Hon'ble Supreme Court, therefore, the discretion exercised by the learned Commercial Court in refusing to grant unconditional stay warrants no interference. In the present case where the Award holder has an arguable defence to the challenge thrown to the Arbitral Award, the Award does not deserve to be unconditionally stayed more so when it does not fall under any of the infirmity brackets framed by the statute as well as by the Hon'ble Supreme Court.

34. The judgments in the case of ***Cholamandalam Investment and Finance Company Limited*** (supra) cannot aid the petitioner for at least two reasons. Firstly, it was rendered by the Court at the execution stage where the Executing Court in exercise of its powers under or akin to those under Section 47 of the Code is empowered to refuse to execute an Award which is a nullity. The stage here is interlocutory where a deep merit scrutiny is impermissible and the facial scrutiny of the Award does not reveal that kind of infirmity which is required to be there in the Award for it to be interdicted by an unconditional stay. Secondly on facts too, it was a case where the Award was passed ex parte and there was clear finding that the arbitrator was ineligible.

35. ***M/s Gowra Petrochem Private Limited*** (supra) is yet another judgment passed at the execution stage and in that case unilateral appointment of the arbitrator was not disputed as would be evident from paragraph 23 of the judgment. The same cannot help the petitioner.

36. ***Umaxe Projects Private Limited*** (supra) was rendered on an application under Section 34 of the 1996 Act where the Court ultimately found the arbitrator to be ineligible. Such a stage is yet to be reached in the present case.

37. ***Perkins Eastman Architects DPC & Another*** (supra) is an authority for the proposition that a person or party who has an interest in the outcome or decision of a dispute is legally ineligible to unilaterally appoint a sole arbitrator**.** The proposition is salutary and binding but in the instant case, the same would not help the petitioner since *prima facie* the arbitrator's ineligibility, if any, seems to have been waived by an express agreement in writing.

38. ***West Bengal Industrial Development Corporation Limited*** (supra) has noted the difference in the scope of adjudication under Section 34 and Section 36(2) and Section 36 (3) of the 1996 Act. While adjudication under Section 34 is elaborate and detailed within the frame work of the provisions of Section 34, the enquiry under Section 36(3) of the Act is *prima facie* which stops short of mini trial.

CONCLUSION:

39. For all the reasons aforesaid, the discretion exercised by the learned Commercial Court in the impugned order is not interfered with.

40. It is clarified that all observations made hereinabove are tentative and *prima facie* and neither the learned Commercial Court dealing with the petitioner's application under Section 34 of the 1996 Act nor the Executing Court where the Award would be placed for execution would be influenced by any of the aforesaid observations. The aforesaid observations have been made only for the purpose of deciding as to whether the Award is required to be unconditionally stayed or not. The said observations would therefore not preclude the petitioner from arguing all points available in law, including the point that the Award is a nullity or *non-est*, *inter alia*, on the grounds of ineligibility of the learned Arbitrator and non-fulfilment of the mandatory requirement of an "express agreement in writing" in terms of the proviso to Section 12(5) of the 1996 Act. Likewise, the opposite party would also be entitled to take all its defences available to it in law.

41. The petitioner shall also be entitled to pray for preponement of the date for hearing of its application under Section 34 of the 1996 Act. If such an application is made, the learned Commercial Court is requested to prepone the date and hear out the said application expeditiously, preferably within a month from the preponed date.

42. C.O. 1015 of 2026 stands disposed of with the above observations. No costs.

43. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties on urgent basis after completion of necessary formalities.

(Om Narayan Rai, J.)