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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 13.08.2026

CNR No. DLHC010300362023

+ O.M.P. (COMM) 292/2023

BHARAT HEAVY ELECTRICALS LTDPetitioner

Through: Mr. Vidur Bhatia & Ms. Mrinal
Gupta, Advs.

versus

FITWELL CONSTRUCTIONSRespondent

Through: Mr. Govind Manoharan, Mr. A
Karthik & Ms. Smrithi Suresh,
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') challenging the award dated 08.02.2023 (for brevity 'the Award')
2. The issue is whether the appointment of the sole arbitrator is unilateral and in violation of amended Section 12(5) of the Act.
3. The brief facts are that the petitioner/ Bharat Heavy Electricals Limited (hereinafter referred to as 'BHEL') was awarded a contract by National Thermal Power Corporation Ltd. (NTPC). The BHEL gave a sub-contract to the respondent/Fitwell Constructions (hereinafter referred to as 'FC') for 'Material handling and erection, testing, commissioning & trial operation of Pelton type turbines, generators, switchgear, bus duct,



excitation system, C&I etc of 4 x 130 MW Tapovan Vishnugad Hydro Electric Project of NTPC Limited at Animathgad (Helong), 14 km from Josimath and 20km from Pipalkoti in District- Chamoli, Uttarakhand' vide Letter of Intent dated 27.09.2010. The parties to the *lis* entered into a contract dated 21.02.2011 having contract no. 740/2011 for a value of Rs.13,93,00,000/- and the stipulated completion date was 11.04.2013.

3.1 Clause 33 of the General Conditions of Contract (for short 'GCC') provides for resolution of disputes through arbitration. The Clause stipulates that 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 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 Dispute arose between the parties with regard to delay in execution of the work and payment of compensation. The FC vide notice dated 03.08.2020 requested for referring the disputes to arbitration. The BHEL appointed the sole arbitrator on 16.08.2021 and proceedings culminated in the impugned award. Hence, the present petition.

4. Learned counsel for the BHEL submits that the appointment of the 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. It is contended that the FC in the written submissions filed before this court accepted the appointment of the arbitrator was from the curated panel constituted by the BHEL. Reliance is placed upon the decisions of the Supreme Court in *Bhadra International (India) Pvt. Ltd. & Ors. V. Airports Authority of India*, 2026 INSC 6, *Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)*, (2025) 4 SCC 641 and on the decision of this Court in *Railways Board, Ministry of Railways v. Titagarh Rail Systems Limited*, 2026:DHC:1720.

5. *Per contra*, it is not a case of unilateral appointment as the BHEL proposed three names out of which one was selected by the FC and it is a joint appointment. The argument is that a notice was issued under Section 21 of the Act specifically stating that an official of the BHEL cannot be appointed as the arbitrator and reliance was placed on *Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.*, (2020) 20 SCC 760.



5.1 The plea taken is that the names proposed by the BHEL were not from the panel maintained by it and it was not mandatory that the arbitrator was to be selected from the proposed three names.

6. Heard learned counsel for the parties at length. *Albeit*, written submissions have been filed by the parties but no other issue than those noted above was pressed.

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

7.1 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.”



7.2 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."

8. 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.



9. The law is well settled that the official of a party to the dispute can neither be appointed as an arbitrator nor can appoint an arbitrator. In the case in hand, the arbitrator was appointed by the BHEL. The Supreme Court in ***Central Organisation for Railway Electrification*** (supra) held that curating a panel of arbitrators by one of the parties to the dispute and requiring the other party to exercise its choice from such a panel affects the freedom of the party to appoint the arbitrator, thereby raising a reasonable doubt. The contention of learned counsel for the FC that the names proposed were not from the panel constituted by the BHEL is contrary to the written submissions filed. Be that as it may, it is a case of limiting the choice of the other party in appointing the arbitrator and is violation of Section 18 of the Act.

10. In view of the law laid down by the Supreme Court in ***Bhadra International*** (supra), ***Central Organisation for Railway Electrification*** (supra) and the decision of this Court in ***Mahavir Prasad Gupta*** (supra) the appointment of the arbitrator is in violation of the amended provisions of Section 12(5) of the Act.

11. 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.

12. In the notice served by the FC under Section 21 of the Act, a specific objection was raised against the appointment of an employee of the BHEL as an arbitrator meaning thereby that there was no waiver of rigours of Section 12(5) of the Act.

13. The Supreme Court in ***Bhadra International (India) Pvt. Ltd*** (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.

14. 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 (India) Pvt. Ltd.*** (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.”

15. 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 a case set up by the FC that the BHEL consented for waiver of applicability of Section 12(5) of the Act. The waiver has to be expressed and cannot be construed or inferred through conduct. The Division Bench of this court in ***Mahavir Prasad Gupta and Sons*** (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.”

16. In the absence of compliance of proviso to Section 12(5) of the Act by the parties, the appointment of the arbitrator by the BHEL 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 nullity.



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

AVNEESH JHINGAN, J

AUGUST 13, 2026

Ch

Reportable: **Yes**