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

CNR No. DLHC010362832026

+ **FAO (COMM) 225/2026 & CM APPL. 52219/2026, CM APPL. 52220/2026, CM APPL. 52221/2026**

ROHINI HELIPORT LIMITED

.....Appellant

Through: Mr. Sunil Mutreja, Ms.
Aashima Choubey, Ms. Pratiksha Dhanik,
Advs.

versus

CLOUDATIX BIZ INDIA VENTURE PVT LTD ...Respondent
Through:

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

HON'BLE MR. JUSTICE AMIT MAHAJAN

JUDGMENT (ORAL)

% **10.08.2026**

C. HARI SHANKAR, J.

1. This case is fully covered by the judgment of the Supreme Court in *Bhadra International (India) (P) Ltd v. Airports Authority of India*¹.

2. We do not, therefore, deem it necessary to burden this order by any detailed reference to facts. A brief recital would, therefore, suffice.

3. An agreement dated 13 January 2017 was executed between the

¹ 2026 SCC OnLine SC 7, referred to, hereinafter, as “Bhadra”.



appellant Rohini Heliport Ltd and the respondent Cloudatix Biz India Venture Pvt. Ltd. for operating a snack bar at a Heliport at Rohini. Operations in the Heliport were discontinued owing to governmental intervention. This resulted in discontinuation of the services at the snack bar as well. Entry of the staff of the respondent into the Heliport was also blocked. The respondent, therefore, discontinued payment of lease rental, resulting in a termination notice being issued by the appellant to the respondent on 4 October 2019.

4. As a result, the dispute arose between the appellant and the respondent.

5. Page 8 of the agreement between the appellant and the respondent provided for resolution of disputes by conciliation/arbitration and read as under:

“CONCILIATION/ARBITRATION

“I. If any dispute(s) or difference(s) of any kind whatsoever arise, between the contractor and PHL, both the parties hereto shall negotiate with a view to its amicable resolution and settlement through a committee appointed by CMD, PHL.

II. In the event, no amicable resolution or settlement is reached between the parties within 15 days after receipt of notice by one party, then dispute or differences are detailed above shall be referred to and settled by Sole Arbitrator to be appointed by CMD (PHL).”

6. As an attempt at conciliation did not succeed, the Chairman and Managing Director of the appellant, by notice dated 8 June 2021, appointed one Mohan Sharma as the Sole Arbitrator to arbitrate on the



disputes between the parties.

7. The arbitration culminated in an award dated 24 July 2023.
8. The respondent challenged the award under Section 34 of the Arbitration and Conciliation Act, 1996², before the learned District Judge (Commercial Court-2), South District, Saket Courts, New Delhi³ by way of OMP (Comm) 10/2024.
9. The OMP was contested by the respondent *inter alia* on the ground that the appointment of the learned Arbitrator was in the teeth of Section 12(5)⁴ of the 1996 Act and that, therefore, the arbitration was null and void *ab initio*. The arbitral award was, therefore, unenforceable in law.
10. The learned Commercial Court has, by order dated 16 May 2026, accepted this submission, following the judgment of the Supreme Court in **Bhadra**. As a result, the learned Commercial Court has held the appointment of the learned Sole Arbitrator as being hit by Section 12(5) read with the Seventh Schedule to the 1996 Act and has, therefore, set aside the award.
11. Before the learned Commercial Court, as well as before us, the

² “the 1996 Act”, hereinafter

³ “learned Commercial Court”, hereinafter

⁴ (5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.



contention of the appellant was that the case falls within the proviso to Section 12(5) of the 1996 Act and that, therefore, the learned Commercial Court erred in applying Section 12(5) and nullifying the arbitral award.

12. The only issue which arises for consideration is, therefore, whether, in the facts of the present case, the proviso to Section 12(5) of the 1996 Act does, or does not, apply.

13. Section 12(5) of the 1996 Act expressly prohibits any person who is related to any of the parties to the arbitration in one or more of the ways envisaged in the Seventh Schedule to the 1996 Act from acting as arbitrator. S. No. 12⁵ in the Seventh Schedule covers every director of either of the parties. The CMD of the appellant would, therefore, be clearly disqualified from acting as arbitrator.

14. The proscription contained in Section 12(5) was extended by the Supreme Court, in *TRF Ltd v. Energo Engineering Projects Ltd*⁶, additionally to the unilateral appointment of the arbitrator by a person who was disqualified from acting as arbitrator under the clause:

“54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the

⁵ 12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

⁶ (2017) 8 SCC 377



conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.”

This position stands reiterated, later, in a plethora of decisions, including *Bharat Broadband Network Ltd. v. United Telecoms Ltd*⁷, *Perkins Eastman Architects DPC v. HSCC (India) Ltd*⁸ and *Haryana Space Application Centre v. Pan India Consultants (P) Ltd*⁹.

15. These decisions also clarify, therefore, that any arbitration agreement which permits appointment of an arbitrator unilaterally by one of the parties is unenforceable in law. Any such unilateral appointment would equally be rendered illegal.

16. The only exception to this would be in a case which falls within the proviso to Section 12(5), which applies where there is waiver of the application of Section 12(5) by one or other of the parties *by an express agreement in writing*.

17. All doubts regarding the exact import of the expression “by an express agreement in writing”, as employed in Section 12(5), now stand dispelled by the pronouncement in *Bhadra*.

⁷ (2019) 5 SCC 755

⁸ (2020) 20 SCC 760

⁹ (2021) 3 SCC 103



18. *Bhadra*, incidentally, emanated from a judgment rendered by one of us (C. Hari Shankar, J.), sitting singly, in *Bhadra International (India) (P) Ltd v. Airports Authority of India*¹⁰. In that case, the arbitrator had been appointed by the parties. Though there was no express waiver of the applicability of Section 12(5) in writing by either party, the Arbitrator, in his procedural order recorded during the hearing, expressly sought the consent of the parties to his continuing to as Arbitrator and, on such consent being granted, recorded in the order. This Court held that the reducing of the consent provided by the parties to the arbitration of the dispute by the arbitrator in writing in the procedural order amounted to an express written waiver of Section 12(5).

19. The Supreme Court has however, negatived this view in its decision in *Bhadra*. We may usefully reproduce the following passages:

“48. If any entry in the Seventh Schedule is attracted, the consequences under Section 12(5) follow. In such circumstances, the disclosure made by the arbitrator does not save the mandate of the arbitrator, and an agreement referred to in the proviso assumes importance. We shall discuss the scope and application of the sub-section (5), as well as its proviso, in more detail in the latter part of this judgment.

57. When an arbitration agreement is in violation of sub-section (5) of Section 12 of the Act, 1996, the parties can neither insist on appointment of an arbitrator in terms of the agreement nor would any appointment so made be valid in the eyes of law.

¹⁰ 2024 SCC OnLine Del 10223



58. Unilateral appointments are not consistent with the basic tenet of arbitration, i.e., mutual confidence in the arbitrator. It would not be unreasonable for a party to apprehend that an arbitrator unilaterally appointed by the opposite party may not act with complete impartiality.

60. It is apposite to understand that Section 12(5) does not prohibit unilateral appointment of an arbitrator. It provides that whenever an appointment of an arbitrator is hit by the bar under Section 12(5), the arbitrator would be ineligible to act, irrespective of whether the appointment was unilateral or with consent of both parties. In such circumstances, the parties may, in the manner provided under the proviso, waive the ineligibility. We shall discuss the scope and application of the proviso in more detail in the latter part of this judgment.

68. We are in complete agreement that the present case is squarely covered by the decisions of this Court in *Perkins Eastman (supra)* and *Bharat Broadband (supra)* respectively. *The unilateral appointment of a sole arbitrator is void ab initio, and the sole arbitrator so appointed is de jure ineligible to act as an arbitrator in terms of Section 12(5) read with the Seventh Schedule of the Act, 1996.*

69. Thus, we have no hesitation in saying that the High Court, in the impugned judgment, committed an error in holding that the appointment was not unilateral merely because the respondent proceeded to appoint the sole arbitrator pursuant to notice invoking arbitration.

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?

71. It was submitted on behalf of the appellants herein that the appellants never waived their right to object in terms of the proviso to Section 12(5) of the Act, 1996. The proviso to Section 12(5) requires that the ineligibility of an arbitrator could only be waived by an “*express agreement in writing*” between the parties, and such agreement must be entered into after the dispute has arisen. It was further canvassed by the appellants that no



agreement was executed, signed, or even contemplated by the parties to this effect after the dispute arose.

72. In this regard, the respondent vociferously submitted that the present case falls within the *proviso* to Section 12(5). To indicate the same, instances like recording of “no objection” in the first procedural order, submission of statement of claim, the joint request to extend the mandate under Section 29A, and continued participation in the proceedings, were highlighted to submit that the appellants had waived their right to object. The procedural order constitutes an “express agreement in writing” and satisfies the requirement under the proviso to Section 12(5) of the Act, 1996. At the cost of repetition, the procedural order reads thus:—

“PROCEDURAL ORDER NO. 1

With

Minutes of, and the Directions made at, the hearing on 22.03.2016 at 1 : 00 pm

[AT D-247 (Basement), Defence Colony, New Delhi-110024]

This preliminary meeting of the Tribunal was held D-247 (Basement), Defence Colony, New Delhi-110024 on 22nd March, 2016 at 1 : 00 PM. None of the parties have any objection to my appointment as the Sole Arbitrator. I declare that I have no interest in any of the Parties, or in the disputes referred to the Sole Arbitrator.[...]”

(Emphasis supplied)

73. On the aforesaid issue, the High Court, in its impugned judgment, observed that the sole arbitrator obtained the consent of the parties for the purpose of continuing to arbitrate in the form of the procedural order. What weighed with the High Court was that the appellants participated in the proceedings, which continued for over two years, and did not they invoke Section 12(5), or object against the jurisdiction of the arbitrator at any stage.

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

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



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

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

77. Waiver means the intentional giving up of a right. It involves a conscious decision to abandon an existing legal right, benefit, claim, or privilege that a party would otherwise have been entitled to. It amounts to an agreement not to enforce that right. A waiver can occur only when the person making it is fully aware of the right in question and, with complete knowledge, chooses to give it up. [See: *State of Punjab v. Davinder Pal Singh Bhullar*¹¹]

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

79. The expression “*express agreement in writing*” demonstrates a deliberate and informed act that although a party is fully aware of the arbitrator's ineligibility, yet it chooses to forego the right to object against the appointment of such an arbitrator. The requirement of an express agreement in writing has been introduced as it reflects awareness and a conscious intention to waive the right to object under sub-section (5) of Section 12. A clear manifestation of the expression of waiver assumes greater importance in light of the fact that the parties are overcoming a restriction imposed by law.

¹¹ (2011) 14 SCC 770



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

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

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

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

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

85. The conscious use of the prefatory expression also serves to differentiate such waiver from ‘deemed waiver’ as stipulated under Section 4 of the Act, 1996. We must be mindful of the fact that if the legislature intended that waiver under Section 12(5) could similarly arise by implication or conduct as mentioned under Section 4, it would have refrained from introducing a heightened



and mandatory requirement, more particularly, in light of the rigours of the Seventh Schedule. The statutory design therefore makes it evident that *the bar under Section 12(5) can be removed only by a clear, unequivocal, and written agreement executed after the dispute has arisen, and not by any form of tacit acceptance or procedural participation.*

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

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

“20. This then brings us to the applicability of the proviso to Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an “express agreement in writing”. The expression “express agreement in writing” refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct. Here, Section 9 of the Contract Act, 1872 becomes important. It states:

“9. Promises, express and implied.—Insofar as the proposal or acceptance of any promise is made in



words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.”

It is thus necessary that there be an “express” agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court as indicating an express agreement on the facts of the case is dated 17-1-2017. On this date, the Managing Director of the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as an arbitrator. Shri Khan's invalid appointment only became clear after the declaration of the law by the Supreme Court in TRF Ltd. which, as we have seen hereinabove, was only on 3-7-2017. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an application on 7-10-2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in **TRF Ltd.** and asking him to declare that he has become de jure incapable of acting as an arbitrator. Equally, the fact that a statement of claim may have been filed before the arbitrator, would not mean that there is an express agreement in words which would make it clear that both parties wish Shri Khan to continue as arbitrator despite being ineligible to act as such. This being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2) and Section 16(2) of the Act to the facts of the present case, and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator. The judgment under appeal is also incorrect in stating that there is an express waiver in writing from the fact that an appointment letter has been issued by the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate.”

(Emphasis supplied)



88. In *CORE II (supra)*¹², this Court underscored the rationale behind the first two essentials of the *proviso*. It reads thus:—

“121. An objection to the bias of an adjudicator can be waived. [Supreme Court Advocates-on-Record Assn. v. Union of India¹³]. A waiver is an intentional relinquishment of a right by a party or an agreement not to assert a right. [State of Punjab v. Davinder Pal Singh Bhullar¹⁴]. The Arbitration Act allows parties to waive the application of Section 12(5) by an express agreement after the disputes have arisen. However, the waiver is subject to two factors. First, the parties can only waive the applicability of Section 12(5) after the dispute has arisen. This allows parties to determine whether they will be required or necessitated to draw upon the services of specific individuals as arbitrators to decide upon specific issues. To this effect, Explanation 3 to the Seventh Schedule recognises that certain kinds of arbitration such as maritime or commodities arbitration may require the parties to draw upon a small, specialised pool. ... The second requirement of the proviso to Section 12(5) is that parties must consciously abandon their existing legal right through an express agreement. Thus, the Arbitration Act reinforces the autonomy of parties by allowing them to override the limitations of independence and impartiality by an express agreement in that regard.”

(Emphasis supplied)

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

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

¹² Central Organization for Railway Electrification v. ECI SPIR SMO MCML (JV) A Joint Venture Company, (2025) 4 SCC 641

¹³ (2016) 5 SCC 808

¹⁴ (2011) 14 SCC 770



96. The net effect of the aforesaid is that *a notice invoking the arbitration clause under Section 21 of the Act, 1996, a procedural order, submission of statement of claim by the appellants, the filing an application seeking interim relief, or a reply to an application under Section 33 of the Act, 1996, cannot be countenanced to mean “an express agreement in writing” within the meaning of the proviso to sub-section (5) of Section 12 of the Act, 1996.*

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.

98. Thus, all the High Court decisions taking a contrary view to the present judgment would stand overruled.

123. A conspectus of the aforesaid detailed discussion on the position of law as regards Section 12 of the Act, 1996, is as follows:—

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.”

(Italics supplied; underscoring in original)

20. Following **Bhadra**, therefore, the law is clear that there has to be *express written waiver*, by the parties, of the applicability of Section 12(5) in order for the proviso to the said clause to apply. *There can be no waiver by consent unless the consent is reduced to writing by the party itself. Nor can there be waiver by conduct of parties. Expressing of agreement for continuation of the arbitral proceedings by the Arbitrator, during the course of arbitral proceedings, would not tantamount to an express waiver of the applicability of Section 12(5) in writing within the meaning of the proviso thereto.*

21. The learned Commercial Court has correctly held that, in the present case, there is no express waiver, in writing, by the respondent, of the applicability of Section 12(5).



22. In that view of the matter, we do not find this to be a case meriting interference, the issue being squarely covered by the judgment of the Supreme Court in *Bhadra*.

23. This appeal is accordingly dismissed.

C. HARI SHANKAR, J.

AMIT MAHAJAN, J.

AUGUST 10, 2026/dsn/aky