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

Date of decision: 07th AUGUST, 2026

CNR No. DLHC010321062022

+ O.M.P. (COMM) 359/2022 & I.A. 13641/2022

PUBLIC WORKS DEPARTMENT

.....Petitioner

Through: Mr Sameer Vashisht, Standing
Counsel (Civil) GNCTD with Mr
Aryaman Vachher, Advocate.

versus

BL INFRA PROJECTS PVT LTD

.....Respondent

Through: Mr. Avinash Trivedi, Advocate.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

1. The present petition under Section 34(1) read with Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as "A&C Act"*) has been filed by the Petitioner challenging the Award dated 14.01.2022, corrected on 09.02.2022, passed by the Ld. Arbitral Tribunal comprising the Sole Arbitrator.
2. The facts of the case as stated by the Petitioner are that a contract was awarded by the Petitioner to the Respondent for construction of Additional SPS Class rooms in the existing premises under jurisdiction Zone-17 of District West-B (Priority) at GBSS Kalan and GSKV Tikri Kalan. It is stated that as per the contract, the entire work was to be completed in 135 days, starting from 16.03.2016 and, therefore, the stipulated date of completion



was 28.07.2016. It is stated that the work was actually completed with a delay of about 472 days. It is stated that disputes arose between the Petitioner and the Respondent regarding completion of work and clearance of bills of the Respondent. Consequently, an Arbitral Tribunal comprising Sole Arbitrator was appointed by the Chief Engineer, CPWD of the Petitioner to adjudicate upon the disputes between the Parties.

3. The following are the claims totalling to Rs.13,68,96,679/- raised by the Claimant/Respondent before the Ld. Arbitrator under various heads:

“CLAIM NO. 1:- Balance payment for work executed but not paid. Extra items, Deviated items paid on lesser side than the market Rates, Item wrongly measured and paid, wrong recovery of cost Index of 12%. Illegal recovery & Balance payment of Final bill etc.

CLAIM NO. 1.1:- work executed but not paid.

CLAIM NO. 1.2:- Extra item paid on lesser side than market rates or not paid.

CLAIM NO. 1.3:- Deviated Quantity paid on lesser side than market rate/agreed rates.

CLAIM NO. 1.4:- Wrongly measured and paid items (Not measured as per CPWD specification and IS Code}.

CLAIM NO. 1.5:- Wrongly Recovery of 12% cost Index on Non-schedule items. Extra items and Agreement items of work executed beyond stipulated date of completion.

CLAIM NO. 1.6:-Refund of withheld / Recovered amount on account of GST, Illegal Recovery of Design mix, & Testing charges of excess test in Final bill.

CLAIM NO. 2:- Additional cost payable on account of



extended stay period of contract for Escalation on labour and material.

CLAIM NO. 2.1:- Compensation on account of escalation on labour rates from stipulated date of completion to Actual date of completion (Prolonged period).

CLAIM NO. 2.2:- Compensation on account of Price Escalation on material other than cement & Steel for stipulated date of completion to Actual date of completion.

CLAIM NO. 2.3:- Compensation on account of Price Escalation on material Cement & Steel for stipulated Date of completion to Actual date of Completion.

CLAIM NO. 3:- Claim on account of incentive @5% on Tender value as per Clause 2A of the agreement.

CLAIM NO. 4:- Additional Cost payable on account of overhead cost and other charges due to extended stay period of contract.

CLAIM NO. 4.1: Claim on account of Contractor's profit & Over heads on agreement items less executed or not executed.

CLAIM NO. 4.2:- Claim on account of Over heads and other charges@ 7.5% on prorogation or contract.

CLAIM NO. 4.3:- Additional cost payable on account of Damages suffered during extended period of contract.

CLAIM NO. 4.3.1:- Claim of damages / compensation on account of bank guarantee extension charges taken by bank on different types of guarantee that is performance guarantee, mobilization advance guarantee & Bank guarantee against security etc.



CLAIM NO. 4.3.2:- Claim of damages / compensation on account of refund of Insurance charges of all risk policy taken beyond stipulated date of completion.

CLAIM NO. 4.3.3:- Claim of damages / compensation on account of T&P and Equipments, shuttering and scaffolding etc. lying idle at site or underutilized due to prolongation of contract.

CLAIM NO. 4.3.4:- Claim of damages / compensation on account of refund of bank charges on amount of agreement item less executed, not executed & performance guarantee taken by department.

CLAIM NO. 4.3.5:- Claim @1% of work done per school as extra overheads expenses for simultaneous execution of work at 3 sites instead of 1 Site for extended period (Total 2% of work Done during extended period).

CLAIM NO. 4.3.6:- Claim of damages / compensation on account of @ 0.5% of the Work Done during prolongation period beyond stipulated date of completion for maintaining special condition as per agreement No.1.1 to 1.77 except special condition 1.52.

CLAIM NO. 4.3.7:- Claim of damages / compensation on account of @0.5% of the Work Done during prolongation period for maintaining special condition of green building as per agreement No.2.12 to 2.25.

CLAIM NO. 4.3.8:- Claim @1 % for fulfilling special condition 1.52 of this agreement on Work Done during Prolongation period.

Claim no. 5:- Claim Interest @ 15% P.A on the above claims from the date of respective cause of action.



Claim no. 5.1: Claim of 15 % interest on account of illegal withheld amount of Milestone in RA bill, part rate payment on Agreement items. Extra items, Substitute items and Deviated items in RA bills and Delay payment and illegal withheld amount in final bill.

Claim No. 5.2:- Claim on account of interest @ 15% on above claims from date of cause of action till the date of Arbitration.

Claim No. 5.3: Claim on account of interest @ 15% per annum Pre-Award and Post Award.

Claim No.6:- Claim on account of loss of profit due to loss of opportunity @7.5% due to extended period of contract.

CLAIM NO. 7: Claim on account of cost of Arbitration and other connected proceedings.

Claim No.7.1:- Claim on account of invoking charges of clause 25 upto DRC fees paid to our counsel, consultant. Engineer, Accountant and other administrative staff.

Claim no. 7.2: Claim on account of Arbitration cost and fees & misc charges to be paid to our counsel, consultant, Engineer, Account etc.

Claim no. 7.3: Claim on account of fee paid to CA & Sales tax advocate during the extended period due to prolongation of contract.

CLAIM NO. 8:- Claim on account of GST @12% on awarded amount.”

4. The Arbitrator passed the Award on 14.01.2022 awarding and rejecting the following claims:



Claim Nos.	Claim Description	Claim Amt as per ref Rs.	Claim Amt as per pleadings Rs.	Award
1	Balance payment			
1.1	Work executed but not paid	14,90,970.0	28,71,642.0	9,17,509.0
1.2	Extra Item paid on lesser side than Market rates	46,42,586.0	28,87,852.0	Nil
1.3	Deviated Qty. paid on lesser side than market rates	39,80,400.0	43,08,850.0	41,591.0
1.4	Wrongly measured and paid items	2,77,184.0	2,76,521.0	Nil
1.5	Wrong recovery of cost index beyond SDOC	58,32,400.0	2,00,23,889.0	Nil
1.6	Refund of withheld/Recovered amount	1,84,370.0	2,09,370.0	Nil
2	On a/c of Escalation on labour & material			
2.1	On a/c of escalation on labour	90,14,440.0	1,04,90,820.0	90,14,440.0
2.2	On a/c of escalation on material	26,17,400.0	26,17,444.0	15,32,283.0
2.3	On a/c of escalation on materials under 10CA	3,00,000.0	7,96,553.0	3,00,000.0
3	Claim on account of 5% bonus as per clause-2A.	94,89,713.0	94,89,713.0	56,23,533.0
4	Additional cost due to extended period of contract			
4.1	Profit & OHs on items less executed/not executed	36,23,313.0	29,52,988.0	Nil
4.2	Over heads and other charges @ 7.5 %	2,31,97,075.0	2,78,63,013.0	83,61,949.0
4.3	Damages suffered during prolongation period			
4.3.1	Bank guarantee extension charges	1,00,000.0	1,00,000.0	Nil
4.3.2	Refund of insurance charges	2,50,000.0	2,50,000.0	Nil
4.3.3	Compensation on account of idle T&P, equipments etc	48,50,000.0	48,50,000.0	Nil
4.3.4	Refund of bank charges on item less executed	4,00,000.0	4,00,000.0	Nil
4.3.5	Claim @ 1% of work done per school as extra	37,97,300.0	42,48,230.0	Nil



4.3.6	Claim@ 0.5% for maintaining spl condition no. 1.1 to 1.77	7,99,300.0	10,62,059.0	Nil
4.3.7	Claim@ 0.5% for maintaining special condition 2.12 to 2.25	7,99,300.0	10,62,059.0	Nil
4.3.8	Claim @ 1% for fulfilling special conditions 1.52	15,98,600.0	21,24,119.0	Nil
6	Loss of profit @ 7.5% during extended period	2,31,97,075.0	1,86,42,008.0	Nil
5	Interest @ 15% P.A. from the date of cause of action			
5.1	15% interest on account of illegal withheld amount etc	16,00,000.0	18,31,168.0	Nil
5.2	Interest @ 15% on Claim No. 1 & 2 from 16.04.2018 to 28.06.2019	58,23,806.3	91,41,244.4	Nil
5.3	Interest @ 15% pre - award and post award.	1,06,33,105.5	1,25,27,290.2	Nil
	Total All claim plus interest pre suite	11,78,99,277.8	14,11,26,840.6	2,57,91,305.0
5.3(ii)	Int @ 15% pendente lite & post award, from 05.03.2020 to date of award & future interest	2,65,27,112.5	3,17,53,539.13	For interest See para 18.13 & 18.14 of Award
7	7.1; 7.2; 7.3 Cost of proceedings	15,00,000.0	28,50,000	10,00,000.0
	Total	14,59,25,390.3	17,57,30,379.7	2,67,91,305.0
8	Claim of GST @ 12%	1,75,11,046.5	2,10,83,645.8	Declaratory award
	Total amount of claims	16,34,36,437.1	19,68,18,025.3	
9	Counter claim no. 1	17,19,000.0	17,19,000.0	Nil
	Grand total of amount in dispute	16,51,55,437.1	19,85,37,025.3	

5. It is stated that after passing of the Award dated 14.01.2022, there were proceedings initiated under Section 33 of the A&C Act and certain corrections were made to the Award on 09.02.2022 which is under challenge in the present petition.



6. Though various grounds have been taken by the learned Counsel for the Petitioner, however, the only ground pressed by the learned Counsel for the Petitioner is that the Arbitrator has been appointed unilaterally by the Petitioner and, therefore, the Award must be set aside on that ground alone.

7. Learned Counsel for the Petitioner draws the attention of this Court to a Judgment passed by the Apex Court in Bhadra International (India) (P) Ltd. v. Airports Authority of India, 2026 SCC OnLine SC 7 and a Judgment passed by the Division Bench of this Court in Mahavir Prasad Gupta & Sons v. State (NCT of Delhi), 2025 SCC OnLine Del 4241 to contend that the issue of unilateral appointment stands squarely covered in these judgments and, therefore, the Award must be set aside.

8. Learned Counsel for the Respondent draws the attention of this Court to Paragraph No.2 of the Award to state that there is a waiver under Section 12(5) of the A&C Act and therefore, the Award cannot be set aside on the ground of unilateral appointment. He also states that the Award has been accepted and implemented.

9. Heard learned Counsel appearing for the Parties and perused the material on record.

10. The Arbitrator has been appointed in terms of Clause 25 of the General Conditions of Contract. The said Clause contains an arbitration clause and the same also prescribes the manner of appointment of Arbitrator which reads as under:

“CLAUSE 25

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in



before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

(i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with the decision of the Chief Engineer, the contractor may within 30 days from the receipt of the Chief Engineer decision, appeal before the Dispute Redressal Committee (DRC) along with a list of disputes with



amounts claimed in respect of each such dispute and giving reference to the rejection of his disputes by the Chief Engineer. The Dispute Redressal Committee (DRC) shall give his decision within a period of 90 days from the receipt of Contractor's appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F'. If the Dispute Redressal Committee (DRC) fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC), then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Chief Engineer for appointment of arbitrator on prescribed proforma as per Appendix XV, failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

It is a term of contract that each party invoking arbitration must exhaust the aforesaid mechanism of settlement of claims/disputes prior to invoking arbitration.

(ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Special Director General or the Director General, CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.



It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person, other than a person appointed by such Chief Engineer CPWD or Additional Director General or Special Director General or Director General, CPWD, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of the contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/-, the arbitrator shall give reasons for the award.



It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.”

(emphasis supplied)

11. A perusal of the aforesaid clause indicates that the appointment of Arbitrator was to be done by the Chief Engineer, CPWD of the Petitioner and the Respondent had no say in the appointment of Arbitrator.

12. Though, learned Counsel for the Respondent states that there is an express agreement between the Parties, the same cannot be accepted. The Apex Court in Bhadra International (*Supra*), while dealing with the issue regarding Section 12(5) of the A&C Act and proviso to Section 12(5) of A&C Act, has observed as under:

“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 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. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] 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. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] 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*), 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 India, (2016) 5 SCC 808, para 30 : (2016) 3 SCC (Civ) 492 : (2016) 3 SCC (Cri) 173 : (2016) 2 SCC (L&S) 253] 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 Bhullar, (2011) 14 SCC 770, para 41 : (2012) 4 SCC (Civ) 1034 : (2012) 4 SCC (Cri) 496 : (2014) 1 SCC (L&S) 208] 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. [“Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently, to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.”] 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.*



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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.”

13. The Petitioner has appointed the Arbitrator. There is nothing on record to show that there is any express waiver in writing by the Respondent. The Division Bench of this Court in Mahavir Prasad (*Supra*) has specifically dealt with the issue as to whether a Party who has appointed the Arbitrator unilaterally can seek for setting aside of the Award on account of unilateral appointment. The Division Bench in the said Judgment has observed as under:

“Objection by the party that made the unilateral appointment itself:

74. This issue requires consideration of following questions:

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?

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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.

CONCLUSION

84. In view of the above discussion, the legal position on the unilateral appointment of the Sole and Presiding Arbitrator is summarized as under:

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.”*
(emphasis supplied)

14. It is now well settled that after amendment to the A&C Act, a unilateral appointment of the Arbitrator in absence of an express agreement in writing between the Parties to waive applicability of Section 12(5) of the A&C Act is *void ab initio*. Moreover, mere participation in the arbitral proceedings, such as filing of the statement of claim, also cannot be construed as a valid waiver under the *proviso* to Section 12(5) of the A&C Act [Ref: TRF Ltd. v. EnergoEngg. Projects Ltd., (2017) 8 SCC 377]. Most importantly, after the judgment of the Division Bench of this Court in Mahavir Prasad (*Supra*), it is settled that the unilateral appointment of an Arbitrator can be objected to for the first time under Section 34 of the Arbitration Act, even by the very same party who unilaterally appointed the Arbitrator.



15. A perusal of the Judgment passed by the Division Bench of this Court in Mahavir Prasad (*Supra*) indicates that just because the party has unilaterally appointed its own Arbitrator, does not mean that it has deemed to have agreed in writing to waive the ineligibility of the Arbitrator by act of appointment. In fact, the said Judgment further goes on to say that the party which has unilaterally appointed the Arbitrator also has the right to object to such appointment, irrespective of the fact that that party itself has appointed the Arbitrator. It is thus clear that the mere fact of making appointment in writing will not make the ineligible appointment, a valid appointment. In this view of the matter, the argument of the learned Counsel for the Petitioner, relying on the Judgment of the Apex Court in Bhadra International (*supra*) that there is no fixed format of a waiver under Section 12(5) is of no consequence against the unilateral appointment. Further, the argument that no ground has been raised by the Petitioner earlier challenging the said appointment does not bar the Petitioner from making such a point when the appointment is contrary to the law laid down by the Apex Court, which the law of the land under Article 141 of the Constitution of India.

16. In the present case, the Arbitration Clause provides that for all disputes, or questions arising out of or relating to the Contract, or in respect of construction or performance, which cannot be settled amicably, may be resolved through arbitration and the Arbitrator shall be appointed by the Chief Engineer, CPWD of the Petitioner, and thus, an official of the Petitioner, who being a party to the dispute herein, as such, is not qualified to appoint an Arbitrator.

17. Proviso to Section 12(5) of the A&C Act states that there has to be an



express agreement in writing between the Parties to waive the applicability of Section 12(5) of the A&C Act. There is nothing on record to indicate that there is any express agreement in writing between the Parties. Therefore, Paragraph No.2 of the Award relied upon by the learned Counsel for the Respondent will not come within the proviso of Section 12(5) of the A&C Act.

18. In the absence of compliance of proviso to Section 12(5) of the A&C Act by the parties, the appointment of the Arbitrator by the Petitioner is in violation of Section 12(5) read with Seventh Schedule of the Arbitration Act. Since appointment of the Arbitrator is *void ab-initio*, it accordingly renders the Impugned Award into a nullity in view of the above law laid down by the Apex Court in Bhadra International (*supra*).

19. In view of the above, the Impugned Award is set aside. The present petition is accordingly disposed of.

20. Pending applications, if any, stand disposed of.

SUBRAMONIUM PRASAD, J

AUGUST 07, 2026

S. Zakir