2026:DHC:9233-DB

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

% Date of decision: 15.10.2026

\# **CNR No. DLHC010267372023**

\+ FAO(OS) (COMM) 140/2023, CM APPL. 35663/2023, CM APPL. 1874/2024 & CM APPL. 6096/2026

M/S TELECOMMUNICATIONS CONSULTANTS INDIA LTD. (A GOVT. OF INDIA ENTERPRISE) .....Appellant

Through: Mr. Viraj Datar, Sr. Adv. with Ms. Karnnika A Seth, Mr. Gurneev Singh, Mr. Garvit Mathur, Advs.

versus

M/S VISTA INFORMATION SYSTEMS PRIVATE LTD. .....Respondent

Through: Mr. Saurav Aggarwal, Mr. Omar Ahmed, Mr. Asav Rajan, Mr. Ajay Sharma, Mr. Devang Shrotriya, Mr. Kashish Chadha, Advs.

CORAM:
HON'BLE MR. JUSTICE AVNEESH JHINGAN
HON'BLE MS. JUSTICE SHAIL JAIN

AVNEESH JHINGAN, J. (ORAL)

1. This appeal is filed under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') against the judgment dated 18.04.2023 passed by the learned Single Judge in O.M.P. (COMM) 481/2019 dismissing the petition filed under Section 34 of the Act.

2. The brief facts are that the appellant, Telecommunications

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Consultants India Limited (hereinafter 'TCIL') is a Government of India enterprise. The respondent is a company incorporated under the Companies Act, 1956. The parties to the *lis* entered into an agreement dated 02.05.2012 for completion of the residual obligations under the earlier contracts.

2.1 Disputes arose between the parties regarding the release of amounts payable under the agreement. Clause 6 of the agreement provides for resolution of disputes through arbitration by a sole arbitrator appointed by the Chairman and Managing Director (CMD) of TCIL and in the eventuality of the parties failing to agree on the sole arbitrator, the appointment shall be made by the International Centre for Alternative Dispute Resolution (for short 'ICADR'), New Delhi. Clause 6 of the agreement is reproduced below:

> "This Agreement shall be governed by and construed in all respects in accordance with the laws of India. The Parties shall attempt to resolve any dispute arising out of or in connection with this Agreement by mutual consultation. Failing such resolution, any and all disputes, issues or claims arising out of, or in connection with, or with respect to the validity, interpretation and enforcement of the Agreement, including the breach thereof, shall be referred to and finally resolved by binding arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory amendment or re-enactment thereof for the time being in force which shall be applicable to such arbitration proceedings under the Agreement. The arbitral tribunal shall consist of a sole arbitrator, who will be appointed by CMD, TCIL. If the parties fail to agree on the sole arbitrator, then the arbitral tribunal shall consist of a sole arbitrator, who will be appointed by

> International Centre of Alternative Dispute Resolution (ICADR), New Delhi. Such arbitration shall take place at New Delhi, India in the English language. Each Party shall be responsible for its own legal costs during the course of arbitration. Only the common costs such as arbitrator's fees and venue expenses shall be shared equally between the Parties."

2.2 The arbitration was invoked at the instance of the respondent by notice dated 21.11.2018. TCIL *vide* letter dated 19.12.2018 appointed the sole arbitrator. The arbitral proceedings culminated in an award dated 01.07.2019 (hereinafter 'impugned award').

2.3 TCIL challenged the award under Section 34 of the Act. The learned Single Judge dismissed the petition *vide* judgment dated 18.04.2023. Hence, the present appeal.

3. Learned counsel for TCIL submits that the appointment of the sole arbitrator is in violation of Section 12(5) read with the Seventh Schedule of the Act and consequently the impugned award and the judgement is liable to be set aside. Reliance is upon the decision of the Supreme Court in ***Bhadra International (India) Pvt. Ltd. v. Airports Authority of India,*** 2026 INSC 6 and the decision of this Court in ***Mahavir Prasad Gupta and Sons v. Government of NCT of Delhi,*** 2025 SCC OnLine Del 4241 to contend that the unilateral appointment of an ineligible arbitrator is void *ab initio* and the objection can be raised even at this stage.

3.1 The submission is that waiver under the proviso to Section 12(5) of the Act must be by an express agreement in writing between the parties, after the disputes have arisen and cannot be inferred from

the appointment or participation in the arbitral proceedings, no such waiver was given in the present case.

4. *Per contra,* the proviso to Section 12(5) of the Act is not applicable. The submission is that the respondent accepted the appointment made by TCIL and the alternative mechanism under clause 6 of the agreement for appointment through ICADR was not invoked. Further that the appointment mechanism under the agreement is different from the unilateral appointment considered in ***TRF Ltd. v. Energo Engineering Projects Ltd.,*** (2017) 8 SCC 377, ***Perkins Eastman Architects DPC v. HSCC (India) Ltd.,*** (2020) 20 SCC 760 and ***Bharat Broadband Network Ltd. v. United Telecoms Ltd.,*** (2019) 5 SCC 755. It is contended under clause 6 of the agreement the arbitrator cannot be appointed without the consent of the other party and it is not a case of unilateral appointment.

4.1 The contention is that the objection to the appointment of the sole arbitrator was not raised before the arbitral tribunal or the learned Single Judge and is being raised for the first time in the present appeal.

5. Heard learned counsel for the parties at length. No other contentions than those noted above are pressed.

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

6.1 The Supreme Court in ***Bhadra International***(supra) dealt with the following three issues:

> "29….i. Whether the sole arbitrator could be said to have

become "*ineligible to be appointed as an arbitrator*" by virtue of sub-section (5) of Section 12 of the Act, 1996?

ii. Whether the parties could be said to have waived the applicability of sub-section (5) of Section 12 of the Act, 1996, by way of their conduct, either expressed or implied?

iii. Whether the appellants could have raised an objection to the appointment of the sole arbitrator for the first time in an application under Section 34 of the Act, 1996?"

Held:

"123…i. The principle of equal treatment of parties provided in Section 18 of the Act, 1996, applies not only to the arbitral proceedings but also to the procedure for appointment of arbitrators. Equal treatment of the parties entails that the parties must have an equal say in the constitution of the arbitral tribunal.

ii. Sub-section (5) of Section 12 provides that any person whose relationship with the parties or counsel, or the dispute, whether direct or indirect, falls within any of the categories specified in the Seventh Schedule would be ineligible to be appointed as an arbitrator. Since, the ineligibility stems from the operation of law, not only is a person having an interest in the dispute or its outcome ineligible to act as an arbitrator, but appointment by such a person would be *ex facie* invalid.

iii. The words "an express agreement in writing" in the proviso to Section 12(5) means that the right to object to the appointment of an ineligible arbitrator cannot be taken away by mere implication. The agreement referred to in the proviso must be a clear, unequivocal written agreement.

iv. When an arbitrator is found to be ineligible by virtue of Section 12(5) read with the Seventh Schedule, his mandate is automatically terminated. In such circumstance, an aggrieved party may approach the court under Section 14 read with Section 15 for appointment of a substitute arbitrator. Whereas, when an award has been passed by such an arbitrator, an aggrieved party may approach the court under Section 34 for setting aside the award.

v. In arbitration, the parties vest jurisdiction in the tribunal by exercising their consent in furtherance of a valid arbitration agreement. An arbitrator who lacks jurisdiction cannot make an award on the merits. Hence, an objection to the inherent lack of jurisdiction can be taken at any stage of the proceedings."

6.2 The Division Bench of this court in ***Mahavir Prasad Gupta and Sons v. Govt. of NCT of Delhi***, 2025 SCC OnLine Del 4241 dealt with the following issues:

"74…a) When a party itself has unilaterally appointed the arbitrator, whether that party can object to the unilateral appointment of the arbitrator at any stage during or after the arbitration proceedings?

b) If a party has unilaterally appointed an arbitrator, can that party be deemed to have given express waiver in writing under Section 12(5) of the Act while making the appointment itself?"

The court concluded:

"84….a) **Mandatory Requirement:** Any arbitration agreement providing unilateral appointment of the sole or presiding arbitrator is invalid. A unilateral appointment by any party in the arbitrations seated in India is strictly

prohibited and considered as null and void since its very inception. Resultantly, any proceedings conducted before such unilaterally appointed Arbitral Tribunal are also nullity and cannot result into an enforceable award being against Public Policy of India and can be set aside under Section 34 of the Act and/or refused to be enforced under Section 36 of the Act.

b) **Deemed Waiver:** The proviso to Section 12(5) of the Act requires an express agreement in writing. The conduct of the parties, no matter how acquiescent or conducive, is inconsequential and cannot constitute a valid waiver under the proviso to Section 12(5) of the Act. The ineligibility of a unilaterally appointed arbitrator can be waived only by an express agreement in writing between the parties after the dispute has arisen between them. Section 12(5) of the Act is an exception to Section 4 of the Act as there is no deemed waiver under Section 4 of the Act for unilateral appointment by conduct of participation in the proceedings. The proviso to Section 12(5) of the Act requires an 'express agreement in writing' and deemed waiver under Section 4 of the Act will not be applicable to the proviso to Section 12(5) of the Act.

c) **Award by an Ineligible Arbitrator is a Nullity:** An award passed by a unilaterally appointed arbitrator is a nullity as the ineligibility goes to the root of the jurisdiction. Hence, the award can be set aside under Section 34(2)(b) of the Act by the Court on its own if it 'finds that' an award is passed by unilaterally appointed arbitrator without even raising such objection by either party.

d) **Stage of Challenge:** An objection to the lack of inherent jurisdiction of an arbitrator can be taken at any stage during or after the arbitration proceedings including by a party who has appointed the sole or presiding arbitrator unilaterally as the act of appointment is not an express waiver of the ineligibility under proviso to

> Section 12(5) of the Act. Such objection can be taken even at stage of challenge to the award under Section 34 of the Act or during the enforcement proceedings under Section 36 of the Act."

7. After amendment of Section 12(5) of the Act an employee of a party in dispute can neither be appointed arbitrator nor can nominate or appoint any other person as an arbitrator. The unilateral appointment of an arbitrator in the 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.

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

9. The respondent issued a notice dated 21.11.2018 under Section 21 of the Act requesting TCIL to appoint an arbitrator under clause 6 of the agreement. The contention that the arbitrator was appointed at the request of the respondent, no objection was raised by respondent to the name proposed and the appointment was not unilateral, lacks merit. From a reading of the notice, it is evident that there was no express waiver by the respondent to the applicability of Section 12(5) of the Act. Moreover, the appointment of an arbitrator by TCIL and not objected to by the respondent shall not tantamount to an express waiver and is based on the conduct of the parties. Supreme Court in ***Bhadra International (India) Pvt. Ltd*** (supra) held that waiver has to

be express and in writing, not be implied from conduct of the parties.

10. 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.

11. 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."

12. 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 and after the disputes have arisen. It is not the case set up by the respondent that TCIL expressly agreed in writing to waive the applicability of Section 12(5) of the Act. The

waiver has to be express and cannot be construed or inferred by relying on the fact that the appellant appointed the arbitrator. 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.
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> 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.
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> 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."

13. In view of the law laid down by the Supreme Court in ***Bhadra International*** (supra) and the decision of this Court in ***Mahavir Prasad Gupta*** (supra) the unilateral appointment of the sole arbitrator by TCIL in violation of Section 12(5) of the Act read with the Seventh Schedule is void *ab initio.* This issue of ineligibility of arbitrator goes to the root of the jurisdiction and can be raised for the first time in an appeal under Section 37 of the Act, even at the stage of execution.

14. The appeal is allowed and the impugned award and the judgment are set aside.

15. All pending applications stand disposed of.

AVNEESH JHINGAN, J

SHAIL JAIN, J

OCTOBER 15, 2026
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Reportable: **Yes**