

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **OMP(T)(COMM) 84/2017**
+ **OMP(T)(COMM) 85/2017**

Reserved on: 1st November, 2017
Date of decision: 22nd November, 2017

BHARAT BROADBAND NETWORK LIMITED Petitioner
Through Mr.Chandan Kumar and Mr.Rahul
 Kumar, Advs.
versus

UNITED TELECOMS LIMITED Respondent
Through Mr.Pawan Upadhyay, Mr.Rajesh
 Chhetri, Mr.Rajeev Chhetri and
 Ms.Meenakshi Rawat, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. These petitions raise an important and interesting issue of law arising out of Section 12(5) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') and proviso thereto. The question of law being as to whether a party, who appoints an arbitrator knowing fully well that such arbitrator is suffering from a disability that falls under any of the categories specified in the Seventh Schedule of the Act and shall be ineligible to be appointed as an arbitrator, can later challenge his appointment on the ground that he was ineligible to be appointed as an arbitrator under Section 12(5) of the Act.

2. The disputes between the parties have arisen out of the Purchase Order bearing No. MM/APO/007/2014-15 dated 30th September, 2014. Clause III.20.1 thereof provides for the resolution of the disputes between the parties through arbitration and the same is quoted herein below:-

“III.20 ARBITRATION

“III.20.1 In the event of any question, dispute or difference arising under the agreement or in connection there-with (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the CMD, BBNL or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CMD, BBNL or by whatever designation such an officer may be called (hereinafter referred to as the said officer), and if the CMD or the said officer is unable or willing to act as such, then to the sole arbitration of some other person appointed by the CMD or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act 1996. There will be no object to any such appointment on the ground that the arbitrator is a Government Servant or that he has to deal with the matter to which the agreement relates or that in the course of his duties as a Government Servant/PSU Employee he has expressed his views on all or any of the matters in dispute. The award of the arbitrator shall be final and binding on both the parties to the agreement. In the event of such an arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason whatsoever, the CMD, BBNL or the said officer shall appoint another person to act as an arbitrator in

accordance with terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors.” (emphasis supplied)

3. A bare reading of the above clause would show that in terms thereof, the CMD of the petitioner or his nominee was to act as the Sole Arbitrator. The Supreme Court in ***TRF Ltd. Vs Energo Engineering Projects Ltd.*** (2017) 8 SCC 377, interpreting Section 12(5) of the Act and a similar clause in the agreement held as under:-

“53. First, we shall deal with Clause (d). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is

altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the “named sole arbitrator” and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction”.

xxxx xxxxx

“57. 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 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.”

4. The Supreme Court in the above judgment has, therefore, held that not only the person who suffers an ineligibility under the Seventh Schedule

cannot be appointed as an arbitrator but also his nominee would suffer from the same statutory ineligibility.

5. In the present case, however, the respondent invoked the arbitration clause vide its letter dated 3rd January, 2017. The CMD of the petitioner vide its letter dated 17th January, 2017 appointed/nominated the present Sole Arbitrator for adjudication and determination of the disputes between the parties. I am informed that the Sole Arbitrator held the first sitting on 26th February, 2017. The Statement of Claim was filed by the respondent on 28th April, 2017 and the petitioner took time to file its reply to the same. On 4th July, 2017, the petitioner filed its reply to the said Statement of Claim, however, no objection was taken against the conduct of proceedings by the Sole Arbitrator or its jurisdiction. On 16th August, 2017, the petitioner filed an application under Section 17 of the Act, which was allowed by the Sole Arbitrator. On 5th September, 2017, the proceedings were adjourned for completion of pleadings. It was only on 28th September, 2017 that the petitioner raised a challenge before the Sole Arbitrator on the ground of his ineligibility under Section 12(5) of the Act. This was formally raised by way of an application dated 7th October, 2017 before the arbitrator. The same was, however dismissed by the Sole Arbitrator vide his order dated 21st October, 2017.

6. It is in the above factual background that the present application has been filed by the petitioner under Section 15 read with Section 14(2) of the Act seeking the following relief:-

“a) in the interim, this Hon'ble Court may direct status quo in the matter;

b) that this Hon'ble Court may hold that Ld. Arbitrator has become de jure incapable of acting as an Arbitrator since the very date of his appointment;
c) this Hon'ble Court may appoint a new Sole Arbitrator, who may preferably be a retired Hon'ble Judge of this High Court as stakes are high and substantial issues of law are involved;
d) this Hon ble Court may further pass such other and further orders as is deemed fit and proper in the facts and circumstances of the case.”

7. The respondent, who appeared on advance notice, has also been heard. He waived his right to file a reply to the petitions.

8. Relying on the above referred judgment in **TRF Ltd. (supra)**, the counsel for the petitioner submits that the appointment of the Sole Arbitrator was void *ab initio* and in terms of Section 14(1)(a) of the Act, the arbitrator had become *de jure* ineligible to perform his functions as an arbitrator and had to be substituted by this Court by another arbitrator.

9. Section 12(5) and Section 14(1) of the Act are quoted herein below:-

“12. Grounds for challenge -

xxxxxx

(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.”

“Section 14. Failure or impossibility to act -

“14. Failure or impossibility to act.—(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if—

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate”.

10. On the other hand, the counsel for the respondent submits that as the Sole Arbitrator had been appointed by the petitioner itself and the respondent had not raised any objection to such appointment, in fact, had opposed the application of the petitioner for substitution not only before the arbitrator but also before this Court, the case was governed by the proviso to Section 12(5) of the Act. In the alternative, it was submitted that as various proceedings had taken place before the arbitrator, which have been referred above, in terms of Section 4 of the Act, the objection to the appointment of arbitrator should be deemed to have been waived by the petitioner. Reference was also made to Section 13(2) of the Act to submit that a party who intends to challenge an arbitrator must do so within 15 days after becoming aware of the constitution of the Arbitral Tribunal or after becoming aware of the circumstances that make such arbitrator ineligible to continue as Sole Arbitrator. Reference was also made to Section 16(2) of the Act to submit that a plea that the Arbitral Tribunal does not have jurisdiction, can be raised not later than the submission of the statement of defence. In the present case, no such plea had been taken by the petitioner in

its statement of defence and therefore, the petition is liable to be dismissed. Reference was also made to the judgment of Supreme Court in ***Aravali Power Company Pvt. Ltd. vs. Era Infra Engineering Ltd.*** 2017 SCC Online SC 1072, to submit that challenge under Section 13 of the Act having not been made within the time prescribed, High Court would have no jurisdiction to interfere with the process and progress of arbitration. Reliance was also placed on the judgment of Karnataka High Court in ***Rail India Technical. and Economic Services Ltd. vs. Ravi Constructions and Anr.*** 2002 (1) Karnataka LJ 419, to submit that the petitioner having submitted to arbitration not only waived its right to object to such appointment but is estopped from challenging the validity of the appointment.

11. I have considered the rival submissions made by the counsel for the parties.

12. It is no doubt correct that the Supreme Court in the judgment in ***TRF Ltd. (supra)*** has clearly held that if any person falls under any of the categories specified in the Seventh Schedule, not only he shall be ineligible to be appointed as an arbitrator in view of Section 12(5) of the Act, even his nominee would also suffer from such ineligibility. But what is to be considered is whether the plea of such ineligibility can be taken by a party who appoints such arbitrator.

13. In the case of ***Voestalpine Schienen GMBH v. Delhi Metro Rail Corpn. Ltd.*** (2017) 4 SCC 665, Supreme Court analyzed the object of introduction of Section 12(5) of the Act in the following words:-

“15. It is a well-known fact that the Arbitration and Conciliation Act, 1996 was enacted to consolidate and amend the law relating to domestic arbitration, inter alia, commercial arbitration and enforcement of foreign arbitral awards, etc. It is also an accepted position that while enacting the said Act, basic structure of UNCITRAL Model Law was kept in mind. This became necessary in the wake of globalisation and the adoption of policy of liberalisation of Indian economy by the Government of India in the early 90s. This model law of UNCITRAL provides the framework in order to achieve, to the maximum possible extent, uniform approach to the international commercial arbitration. Aim is to achieve convergence in arbitration law and avoid conflicting or varying provisions in the Arbitration Acts enacted by various countries. Due to certain reasons, working of this Act witnessed some unpleasant developments and need was felt to smoothen out the rough edges encountered thereby. The Law Commission examined various shortcomings in the working of this Act and in its first report i.e. 176th Report made various suggestions for amending certain provisions of the Act. This exercise was again done by the Law Commission of India in its Report No. 246 in August 2004 suggesting sweeping amendments touching upon various facets and acting upon most of these recommendations, the Arbitration Amendment Act of 2015 was passed which came into effect from 23-10-2015.

16. Apart from other amendments, Section 12 was also amended and the amended provision has already been reproduced above. This amendment is also based on the recommendation of the Law Commission which specifically dealt with the issue of “neutrality of arbitrators” and a discussion in this behalf is contained in paras 53 to 60 and we would like to reproduce the entire discussion hereinbelow:

“NEUTRALITY OF ARBITRATORS

53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of arbitration,

neutrality of arbitrators viz. their independence and impartiality, is critical to the entire process.

54. In the Act, the test for neutrality is set out in Section 12(3) which provides—

‘12. (3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality....’

55. The Act does not lay down any other conditions to identify the “circumstances” which give rise to “justifiable doubts”, and it is clear that there can be many such circumstances and situations. The test is not whether, given the circumstances, there is any-actual-bias for that is setting the bar too high; but, whether the circumstances in question give rise to any-justifiable apprehensions-of bias.

*56. The limits of this provision has been tested in the Indian Supreme Court in the context of contracts with State entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court (See *Executive Engineer, Irrigation Division v. Gangaram Chhapolia*, (1984) 3 SCC 627, *Transport Deptt. v. Munuswamy Mudaliar* 1988 Supp SCC 651, *International Airports Authority v. K.D. Bali* (1988) 2 SCC 360, *S. Rajan v. State of Kerala* (1992) 3 SCC 608, *Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd.* (1996) 1 SCC 54, *Union of India v. M.P. Gupta* (2004) 10 SCC 504 and *ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.* (2007) 5 SCC 304 that arbitration agreements in government contracts which provide for arbitration by a serving*

employee of the department, are valid and enforceable. While the Supreme Court, in Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd., (2009) 8 SCC 520 : (2009) 3 SCC (Civ) 460, carved out a minor exception in situations when the arbitrator 'was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject-matter of the dispute' (SCC p. 533, para 34) and this exception was used by the Supreme Court in Denel (Proprietary) Ltd. v. Ministry of Defence, (2012) 2 SCC 759 : (2012) 2 SCC (Civ) 37 : AIR 2012 SC 817] and Bipromasz Bipron Trading Sa v. Bharat Electronics Ltd., (2012) 6 SCC 384 : (2012) 3 SCC (Civ) 702, to appoint an independent arbitrator under Section 11, this is not enough.

57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the Arbitral Tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles — even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for

instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr P.K. Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous — and the right to natural justice cannot be said to have been waived only on the basis of a “prior” agreement between the parties at the time of the contract and before arising of the disputes.

58. Large-scale amendments have been suggested to address this fundamental issue of neutrality of arbitrators, which the Commission believes is critical to the functioning of the arbitration process in India. In particular, amendments have been proposed to Sections 11, 12 and 14 of the Act.

59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his-possible-appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the

red and orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a “guide” to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed Section 12(5) of the Act and the Fifth Schedule which incorporates the categories from the red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be –ineligible- to be so appointed, - notwithstanding - any prior agreement - to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed Explanation to Section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the red and orange lists of the IBA Guidelines), the-ineligibility-to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the red list of the IBA Guidelines).

60. The Commission, however, feels that - real-and-genuine-party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective “justifiable doubts” regarding his independence and impartiality. To deal with

such situations, the Commission has proposed the proviso to Section 12(5), where parties may, -subsequent to disputes having arisen between them-, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all other cases, the general rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1) and in which context the High Court or the designate is to have “due regard” to the contents of such disclosure in appointing the arbitrator.”

17. We may put a note of clarification here. Though, the Law Commission discussed the aforesaid aspect under the heading “Neutrality of Arbitrators”, the focus of discussion was on impartiality and independence of the arbitrators which has relation to or bias towards one of the parties. In the field of international arbitration, neutrality is generally related to the nationality of the arbitrator. In international sphere, the “appearance of neutrality” is considered equally important, which means that an arbitrator is neutral if his nationality is different from that of the parties. However, that is not the aspect which is being considered and the term “neutrality” used is relatable to impartiality and independence of the arbitrators, without any bias towards any of the parties. In fact, the term “neutrality of arbitrators” is commonly used in this context as well.

18. Keeping in mind the aforequoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, sub-section (5) of Section 12 lays down that 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, he shall be ineligible to be appointed as an arbitrator. In such an eventuality i.e. when the arbitration clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of the arbitration agreement.

xxxx

xxxx

20. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in Hashwani v. Jivraj, (2011) 1 WLR 1872 : 2011 UKSC 40] in the following words: (WLR p. 1889, para 45)

“45. ... the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution

of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.”

21. Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in Consorts Ury, underlined that:

“an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator.”

22. Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings.

23. It also cannot be denied that the Seventh Schedule is based on IBA guidelines which are clearly regarded as a representation of international based practices and are based on statutes, case law and juristic opinion from a cross-section on jurisdiction. It is so mentioned in the guidelines itself.

xxxxxx

xxxxx

25. Section 12 has been amended with the objective to induce neutrality of arbitrators viz. their independence and impartiality. The amended provision is enacted to identify the “circumstances” which give rise to “justifiable doubts” about the independence or

impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, the Seventh Schedule mentions those circumstances which would attract the provisions of sub-section (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empanelled by the respondent are not covered by any of the items in the said list.”

14. From the above judgment, it is apparent that Section 12(5) of the Act has been introduced by the Legislature to allay the fear of partiality or perceived bias of an arbitrator who is in a relationship with parties or counsels or the subject matter of the dispute falling under the Seventh Schedule of the Act. Certainly, such fear cannot be in a party appointing such arbitrator but in the opposite party. Can, therefore, the opposite party waive such an objection against appointment of an arbitrator who suffers from an ineligibility due to his relationship with the appointer as mentioned in the Seventh Schedule? The answer to this lies in the proviso to Section

12(5) of the Act. It has been quoted above and provides that subsequent to disputes having arisen between the parties, the parties can waive the applicability of Section 12(5) of the Act by an Express Agreement in writing. The said proviso was analyzed by the Supreme Court in **TRF Ltd.** (*supra*) and it was observed that;

“12. Sub-section (5) of Section 12, on which immense stress has been laid by the learned counsel for the appellant, as has been reproduced above, commences with a non obstante clause. It categorically lays down that if a person whose relationship with the parties or the counsel or the subject-matter of dispute falls under any of the categories specified in the Seventh Schedule, shall be ineligible to be appointed as an arbitrator. There is a qualifier which indicates that parties may, subsequent to the disputes arisen between them, waive the applicability by express agreement in writing. The qualifier finds place in the proviso appended to sub-section (5) of Section 12. On a careful scrutiny of the proviso, it is discernible that there are fundamentally three components, namely, the parties can waive the applicability of the sub-section; the said waiver can only take place subsequent to dispute having arisen between the parties, and such waiver must be by an express agreement in writing.”

15. In the present case, in my opinion the three conditions that have been laid down by the Supreme Court in **TRF Ltd.** (*supra*) were fulfilled. The petitioner, knowing fully well that the arbitrator suffered from an ineligibility in terms of Section 12(5) of the Act proceeded to nominate him as a Sole Arbitrator after the disputes had arisen between the parties and the Respondent concurred in such appointment and even proceeded to file its Statement of Claim before the Arbitrator. Though it was contended that the

appointment was made before the decision in **TRF Ltd.**, this would not help the petitioner inasmuch as *TRF Ltd. (supra)* only applied Section 12(5) of the Act to the facts of the case therein. Petitioner cannot claim ignorance of Section 12(5) of the Act when it had proceeded to appoint the arbitrator and then turn around to challenge the appointment once it finds that the arbitration proceedings are not taking the direction it would like.

16. The appointment was accepted by the respondent who even proceeded to file the Statement of Claim before such arbitrator, without objections to his appointment or jurisdiction. Therefore, the disputes having arisen between the parties, both parties waived the applicability of Section 12(5) of the Act. The appointment being in writing and the filing of the Statement of Claim without any reservation also being in writing, in my opinion, in the facts of the case, the same would amount to an express agreement in writing as required under proviso to Section 12(5) of the Act.

17. Though provisions of Section 7 of the Act may not strictly apply to the present case but it gives an indication, how an express agreement can be inferred. Section 7(3) requires an arbitration agreement to be in writing. However, under sub-section (4) of Section 7, even in the absence of signed agreement between the parties, it would be possible to infer such an agreement from various documents duly approved and signed by the parties in the form of exchange of e-mails, letter(s), telex, telegrams and other means of telecommunications, as was held by Supreme Court in *Trimex International Fze Ltd. vs. Vedanta Aluminum Ltd.* (2010) 3 SCC 1.

18. In case titled ***Great Offshore Ltd. vs. Iranian Offshore Engineering and Construction Company*** (2008) 14 SCC 240, Supreme Court has held as under:-

“59) The court has to translate the legislative intention especially when viewed in light of one of the Act’s ‘main objectives’: ‘to minimize the supervisory role of courts in the arbitral process’. [See Statement of Objects and Reasons of Section 4(v) of the Act] If this Court adds a number of extra requirements such as stamps, seals and originals, we would be enhancing our role, not minimizing it. Moreover, the cost of doing business would increase. It takes time to implement such formalities. What is even more worrisome is that the parties’ intention to arbitrate would be foiled by formality. Such a stance would run counter to the very idea of arbitration, wherein tribunals all over the world generally bend over backwards to ensure that the parties’ intention to arbitrate is upheld. Adding technicalities disturb the parties’ ‘autonomy of the will’ (l’*autonomie de la volonté*) i.e. their wishes. (For a general discussion on this doctrine see *Law and Practice of International Commercial Arbitration*, Alan Redfern and Martin Hunter, Street & Maxwell, London, 1986 at pp.4 and 53)

60) Technicalities like stamps, seals and even signatures are red tape that have to be removed before the parties can get what they really want—an efficient, effective and potentially cheap resolution of their dispute. The *autonomie de la volonté* doctrine is enshrined in the policy objectives of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International commercial Arbitration, 1985, on which our Arbitration Act is based.(see Preamble to the Act) The courts must implement legislative intention. It would be improper and undesirable for the courts to add a number of extra formalities not envisaged by the legislation. The courts’ directions should be to achieve the legislative intention.

61) *One of the objectives of the UNCITRAL Model Law reads as under:-*

‘..... the liberalization of international commercial arbitration by limiting the role of national courts, and by giving effect to the doctrine “autonomy of will”, allowing the parties the freedom to choose how their disputes should be determined’.(See Policy Objectives adopted by UNCITRAL in the preparation of the Model Law, as cited in Law and Practice of International Commercial Arbitration, Alan Redfern and martin Hunter, Street & Maxwell, London (1986) at p.388 (citing UN doc.A/CN.9/07, paras 16-27)].

62) *It goes without saying, but in the interest of providing the parties a comprehensive review of their arguments, I note that once it is established that the faxed CPA is valid, it follows that a valid contract and a valid arbitration clause exist. This contract, the faxed CPA, does not suffer from a conditional clause, as did the letter of intent. Thus, the respondent’s argument that the parties were not ad idem must fail.”*

19. It is also of some importance that the Petitioner participated in various proceedings before the Arbitrator that have been noted by me in paragraph 5 above. Neither was any objection to the ineligibility of the Arbitrator taken in those proceedings nor any other ground or circumstance, except the one under Section 12(5) of the Act, has been urged before me.

20. Though again it may not be strictly applicable, the intent of legislature can be gathered from Section 12(4) of the Act which states that a party may challenge an arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made. In this case, the ground of ineligibility was known on the date of appointment itself,

however, the Petitioner proceeded with appointment. It cannot now challenge the same.

21. Another important aspect to be kept in mind is that the intention of the legislature in framing the 1996 Act was to provide speedy solution of commercial disputes and to limit the intervention of the Court in arbitral process. Obstructive tactics adopted by the parties in arbitration proceedings are sought to be thwarted by express provisions inasmuch as if a party knowingly keeps silent and then suddenly raises a question on jurisdiction or competence of arbitration proceedings or arbitrator, it will not be allowed to do so. Section 4, 12(4), 13(2) and 16(2) of the Act are intended to achieve this object. In the present case, to allow the Petitioner to raise issue of eligibility of the arbitrator, having itself appointed him, would clearly run counter to the object of the Act and, hence, cannot be allowed.

22. In view of the above, I find no merit in the present petition and the same is accordingly dismissed with no orders as to costs.

NOVEMBER 22, 2017/nk

NAVIN CHAWLA, J