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

+ **O.M.P. (T) (COMM.) 33/2020 & I.As. 6023-25/2020**

JMC PROJECTS (INDIA) LTD

..... Petitioner

Through: Mr. Dayan Krishnan, Sr. Adv.
with Mr. Shamik Sanjanwala,
Mr. Sunil Mittal, Mr. Venkat
Rao, Ms. Anu Tiwari and Mr.
Charul Mathur, Mr. Sanjeevi
Seshadari, Advs

versus

INDURE PRIVATE LIMITED

..... Respondent

Through: Mr. Prashant Mehta, Mr. Ankit
Shah, Mr. Varun Gupta and Ms.
Simran Wason, Advs.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

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20.08.2020

(Video-conferencing)

1. This petition has been preferred under Section 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”), seeking a declaration that the mandate of the learned Arbitrator, presently arbitrating on the dispute between the petitioner and the respondent, stands terminated under Section 14 (1) (a) of the 1996 Act, and to appoint a substitute arbitrator, in his place, to continue with the said arbitral proceedings and render award therein.

2. Given the nature of the controversy, any detailed reference to

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the dispute between the parties would be unnecessary, and a brief allusion would suffice.

3. The disputes between the parties emanate from a work order, dated 6th September, 2011, awarded by the respondent to the petitioner. The work order contained General Conditions of Contract (hereinafter referred to as “GCC”), Clause 14 of which contemplated resolution of disputes, relating to the contract, by arbitration, and read thus:

“14. Arbitration

Where any dispute is not resolved as provided for in the clause 13.5 then the following provisions shall apply:

a) The dispute shall be referred to arbitration at the request of either party upon written notice to that effect to the other party (a "Notice of Reference") in accordance with the Arbitration Rules of Indian Arbitration and Conciliation Act, 1996 in force at the date of the agreement. Where the rules do not deal with any issue arising in connection with the conduct and / or procedure of the arbitration such issue shall be resolved in accordance with the law of the place in which the arbitration is held and GCC clause 14 shall be construed accordingly.

b) Performance of the contract shall continue during any arbitration proceeding pursuant to the above clause unless the employer shall order the suspension thereof pursuant to GCC Clause 13.

c) Upon every or any such reference, the cost of and incidental to the reference and award respectively shall be on the direction of the Sole

Arbitrator so appointed who may determine the amount thereof or direct the same as between party & parties by whom and in what manner the same is to be borne and paid.

d) The place of arbitration shall be Delhi and the language of the arbitration shall be English.

e) The parties agree that any arbitration award shall be final and binding upon the parties (to the fullest extent permitted by applicable law) and the parties waive their right to any form of appeal or other similar recourse to a court of law.

f) The arbitration will take place before a Sole Arbitrator who shall be nominated by Mr. N. P. Gupta, Chairman of Desein Private Limited, Desein House, Greater Kailash-II, New Delhi -110048.”

4. Disputes arose between the petitioner and the respondent, resulting in the petitioner invoking the afore-extracted arbitration clause, *vide* paras EE and FF of communication dated 1st July, 2016, which read thus:

“EE. In these circumstances explained above and by way of the present notice and as per Clause 14 (f) of the General Condition of Contract for Civil Works provided in the Work Order dated 06.09.2011, entered into between the parties, JMC hereby invokes the Arbitration clause of the aforesaid Work Order. In view of this, please consider this as a 'Notice of Reference' to arbitration and nominate an Arbitrator through Mr. N.P. Gupta, Chairman of Desein Private Limited, Desein House, Greater Kailash-II, New Delhi-110048, as per law, failing which JMC will be forced to resort to legal remedies.

FF. Indure is hereby requested to communicate the above nomination in writing to the undersigned.”

5. On 26th July, 2016, Mr. N.P. Gupta, Chairman of the respondent, nominated a retired Judge of this Court as the sole arbitrator, to arbitrate on the disputes between the parties.

6. Statement of Claim was filed before the learned arbitrator, on 11th November, 2016, and response thereto was filed by the respondent, whereafter the learned sole arbitrator framed issues.

7. Affidavit, by way of evidence, was filed before the learned sole arbitrator, by the petitioner, on 27th January, 2020, and the matter is presently pending before the learned sole arbitrator at the stage of evidence.

8. The petitioner has preferred the present petition, before this Court, seeking a declaration that the learned sole arbitrator, presently in *seisin* of the aforesaid arbitral proceedings, has been rendered *de jure* unable to continue with the proceedings, and, consequently, for the appointment of a substitute arbitrator, on the basis of judgments of the Supreme Court in ***TRF Ltd. v. Energo Engineering Projects Ltd.***¹, ***Perkins Eastman Architects DPC v. HSCC (India) Limited***², and ***Bharat Broadband Network Ltd. v. United Telecoms Ltd.***³, as well as a judgment of this Court in ***Proddatur Cable TV Digi Services v. Siti Cable Network Limited***⁴, as well as Section 12(5) of the 1996 Act.

9. For ready reference, Section 12(5) of the 1996 Act is

¹ (2017) 8 SCC 377

² 2019 SCC OnLine SC 1517

³ (2019) 5 SCC 755

⁴ (2020) SCC OnLine (Del.) 350

reproduced as under:

“12. Grounds for challenge.—

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances, —

- (a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and
- (b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1. — The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2. — The disclosure shall be made by such person in the form specified in the Sixth Schedule.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

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

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

(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."

(Emphasis supplied)

Employees, consultants, advisors, and persons who have any other past or present business relationship with either of the parties to the arbitration, are disqualified from arbitrating, *vide* S. No. 1 of the Seventh Schedule to the 1996 Act.

10. Section 12(5) of the 1996 Act was introduced, in the 1996 Act, by Section 8 (ii) of the Arbitration & Conciliation (Amendment) Act, 2015, with effect from 23rd October, 2015. All the aforesaid decisions, on which reliance has been placed by the petitioner, were rendered after such introduction.

11. In *TRF Ltd.*¹, the arbitration clause, in the agreement between the parties, contemplated the reference of disputes to the sole arbitration of the managing director of the respondent, or his nominee.

In view of Section 12(5) of the 1996 Act, the appointment of the arbitrator was annulled by the High Court, in the said case, against which the matter travelled to the Supreme Court.

12. The Supreme Court took stock of the categories of relationships, enumerated in the Seventh Schedule of the 1996 Act, possession of which would render a person ineligible to function as an arbitrator, and found that the managing director was statutorily disqualified as a result thereof.

13. It was, however, sought to be contended before the Supreme Court, that the managing director was not, thereby, disabled from appointing an arbitrator, unrelated to Energo, i.e. the respondent before the Supreme Court.

14. The Supreme Court addressed the issue in the following words (in paras 50 and 54 of the report):

“50. 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. In this regard, our attention has been drawn to a two-Judge Bench decision in *State of Orissa v. Commr. of Land Records & Settlement*⁵. In the said case, the question arose, can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held:

“25. We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in *Roop Chand v. State of Punjab*⁶. In that case, it was held by the majority that where the State Government had, under Section 41(1) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, delegated its appellate powers vested in it under Section 21(4) to an “officer”, an order passed by such an officer was an order passed by the *State Government* itself and “not an order passed by any *officer* under this Act” within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revision

⁵ (1998) 7 SCC 162

⁶ AIR 1963 SC 1503

by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer *in his own right* and *not as a delegate* of the State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate.

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

15. Clearly, therefore, the Supreme Court held that, once the managing director of Energo was incapable of functioning as an arbitrator, by virtue of Section 12(5) of the 1996 Act, he was also rendered ineligible to appoint an arbitrator as his nominee.

16. In *Perkins Eastman Architects DPC²*, the respondent - HSCC (India) Limited (hereinafter referred to as “HSCC”), as an executing agency of the Ministry of Health and Family Welfare, floated a

Request For Proposals, on 15th July, 2016, for the appointment of design consultants for a project. A consortium, of the appellants before the Supreme Court (hereinafter referred to as “the consortium”) submitted their bid, which was accepted, resulting, eventually, in a contract, dated 22nd May, 2017. Clause 24.0 of the contract dealt with dispute resolution, of which the modes of resolution were set out in sub-clause 24.1, which may be reproduced thus:

“24.1 Except as otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before mentioned and as to the quality of services rendered for the works or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, design, 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 thereof shall be dealt with as mentioned hereinafter:

(i) If the Design Consultant considers any work demanded of him to be outside the requirements of the contract or disputes on any drawings, record or decision given in writing by HSCC on any matter in connection with arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request CGM, HSCC in writing for written instruction or decision. There upon, the CGM, HSCC shall give his written instructions or decision within a period of one month from the receipt of the Design Consultant’s letter. If the CGM, HSCC fails to give his instructions or decision in writing within the aforesaid period or if the Design Consultant(s) is dissatisfied with the instructions or decision of the CGM, HSCC, the Design Consultants(s) may, within 15 days of the receipt of decision, appeal to the Director (Engg.) HSCC who shall offer an opportunity to the Design Consultant to be heard, if the latter so

desires, and to offer evidence in support of his appeal. The Director (Engg.), HSCC shall give his decision within 30 days of receipt of Design Consultant's appeal. If the Design Consultant is dissatisfied with the decision, the Design Consultant shall within a period of 30 days from receipt of this decision, give notice to the CMD, HSCC for appointment of arbitrator failing which the said decision shall be final, binding and conclusive and not referable to adjudication by the arbitrator.

(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 CMD HSCC within 30 days from the receipt of request from the Design Consultant. 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 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 CMD, HSCC of the appeal. It is also a term of this contract that no person other than a person appointed by such CMD, HSCC as aforesaid should act as arbitrator. It is also a term of the contract that if the Design Consultant 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 HSCC that the final bill is ready for payment, the claim of the Design Consultant shall be deemed to have been waived and absolutely barred and HSCC shall be discharged and released of all liabilities under the contract and 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.”

17. Almost immediately consequent on signing of the aforesaid contract, disputes arose between the Consortium and HSCC, resulting in a termination notice, issued by HSCC, on 11th January, 2019, followed by a formal letter of termination, dated 20th February, 2019.

18. *Vide* notice dated 11th April, 2019, the Consortium invoked the afore-extracted clause 24 of the agreement. On 28th June, 2019, the Consortium called on the Chief Managing Director of HSCC to appoint a sole arbitrator, in terms of the afore-extracted Clause 24.

19. On 30th July, 2019, the Chief General Manager of HSCC appointed one Major General K.T. Gajria, as the sole arbitrator. This appointment was assailed by the Consortium, and the challenge, in due course, travelled to the Supreme Court.

20. Before the Supreme Court, the Consortium contended, *inter alia*, that the Chief General Manager was incompetent to appoint an arbitrator, as Clause 24 required such appointments to be made by the CMD of HSCC. It was, however, further contended that the arbitrator appointed had to be independent and impartial, and that Clause 24 of the contract, if allowed free rein, would confer absolute discretion on the CMD of the respondent to appoint an arbitrator of his choice, which would compromise the element of impartiality; a necessary incident of any valid arbitral proceeding. As such, the Supreme Court was requested to appoint the arbitrator.

21. This prayer was resisted, by HSCC, contending that the appointment had been made by the CMD (though it was conveyed by the Chief General Manager) in accordance with clause 24, within the time stipulated in that regard.

22. The Supreme Court pointedly addressed the issue of “whether a case (had) been made out for exercise of power by the court for an appointment of an arbitrator”.

23. The Supreme Court took note of the earlier decision in *TRF Ltd.*¹, as well as the fact that the said decision had been followed, subsequently, in *Chairman, Indore Vikas Pradhikaran v. Pure Industrial Coke & Chemicals Ltd.*⁷.

24. The Supreme Court also relied on the well-known *qui facit per alium facit per se* maxim, and the invocation, thereof, in the following passage from *Firm of Pratapchand Nopaji v. Firm of Kotrike Venkata Setty & Sons*⁸.

“52. Mr. Sundaram, has strongly relied on *Pratapchand Nopaji*. In the said case, the three-Judge Bench applied the maxim “*qui facit per alium facit per se*”. We may profitably reproduce the passage:

“9. ... The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim: “*qui facit per alium facit per se*” (what one does through another is done by oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to do the

⁷ (2007) 8 SCC 705

⁸ (1975) 2 SCC 208

illegal act within the prohibited area. It is immaterial whether, for the doing of such an illegal act, the agent employed is given the wider powers or authority of the “pucca adatia”, or, as the High Court had held, he is clothed with the powers of an ordinary commission agent only.”

25. Thereafter, after a detailed analysis of the legal position, it was held that the nominee of the managing director of the respondent could not competently function as the sole arbitrator and, therefore, appointed another learned sole arbitrator in his place.

26. In *Bharat Broadband Network Ltd.*³, the same principle was reiterated. Without adverting to the facts of the case, one may reproduce, directly, paras 15, 17 and 20 thus:

“15. Section 12(5), on the other hand, is a new provision which relates to the *de jure* inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the *non obstante* clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be “ineligible” to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an “express agreement in writing”. Obviously, the “express agreement in writing” has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have

arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.

17. The scheme of Sections 12, 13, and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes “ineligible” to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case, i.e., a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e. *de jure*), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become *de jure* unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being *de jure* unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. *As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them.*

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 Indian 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 17-01-2017. 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. (*supra*) which, as we have seen hereinabove, was only on 3-07-2017. 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. (supra) 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)

27. The import of these decisions is as unequivocal as it is inexorable. An "express agreement in writing", waiving the applicability of Section 12(5), is the statutory *sine qua non*, for a person, who is otherwise subject to the rigour of Section 12(5), to remain unaffected thereby. Nothing less would suffice; no conduct, howsoever extensive or suggestive, can substitute for the "express agreement in writing". Sans such "express agreement in writing", Section 12(5), by operation of law, invalidates the appointment, of any person whose relationship, with the parties to the disputes, falls under any of the categories specified in the Seventh Schedule of the 1996 Act. The invalidity, which attaches to such a person would also, *ipso*

facto, attach to her, or his, nominee.

28. Mr. N.P. Gupta, who was authorized by the arbitration clause in the present case, to appoint the arbitrator being the Chairman of the respondent, was, therefore, invalidated from either acting as the arbitrator or nominating or appointing any arbitrator.

29. Conscious of the statutory interdict, Mr. Prashant Mehta, learned counsel appearing for the respondent, sought to pitch his case on the proviso to Section 12(5) of the 1996 Act, which excepts the applicability of the said sub-section to cases in which, subsequent to the arising of disputes, the parties waived the applicability of sub-subsection by an express agreement in writing.

30. A reading of the afore-extracted passages from ***Bharat Broadband Network Ltd.***³, however, make it abundantly clear that, unlike Section 4 of the 1996 Act, the agreement in writing, to which the proviso to sub-Section 12(5) refers, has to be express. Agreement, by conduct, is excluded, *ipso facto*, from the applicability of the said proviso.

31. Mr. Prashant Mehta has invited my attention to the fact that, by seeking extension, twice, for the completion of arbitral proceedings by the existing learned sole arbitrator, as well as by communicating, via e-mails, to the learned sole arbitrator, on 6th January, 2020 and 20th January, 2020, seeking, *inter alia*, extension of time to file the affidavit by way of evidence of its witnesses, the petitioner has

expressly consented, in writing, to the functioning of the learned sole arbitrator, as the arbitrator to adjudicate the disputes between the petitioner and the respondent.

32. Mr. Mehta has also relied on Section 13(4) of the 1996 Act, to state that the present petition could not have been directly moved before this Court, without, in the first instance, raising the challenge before the learned sole arbitrator himself.

33. “Express waiver of rights”, as a jurisprudential concept, has invoked judicial cogitation, on more than one occasion. In *Inderpreet Singh Kahlon v. State of Punjab*⁹, it was held thus:

“Waiver is the abandonment of a right, and thus is a defence against its subsequent enforcement. Waiver may be express or, where there is knowledge of the right, may be implied from conduct which is inconsistent with the continuance of the right. A mere statement of an intention not to insist on a right does not suffice in the absence of consideration; but a deliberate election not to insist on full rights, although made without first obtaining full disclosure of material facts, and to come to a settlement on that basis, will be binding.”

Thus, even where waiver was allowable by consent – which, notably, the proviso to Section 12(5) of the 1996 Act *does not permit* – the Supreme Court opined that a mere statement not to insist on a right was insufficient to constitute waiver. In *Mademsetty Satyanarayana v. G. Yelloji Rao*¹⁰, the Supreme Court quoted, approvingly, the definition of “waiver”, as devised by the Privy Council in *Dawson’s Bank Ltd v. Nippon Menkwa Kabushiki Kaisha*¹¹, as “an agreement

⁹ (2006) 11 SCC 356

¹⁰ AIR 1965 SC 1405

¹¹ AIR 1935 PC 79

to release or not to assert a right”. Emphasizing that “waiver” involved “intentional relinquishment of a known right”, it was underscored, in *Associated Hotels of India Ltd v. S. B. Sardar Ranjit Singh*¹², that “there can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights”. Waiver, whether express or implied, necessarily requires “an intentional act with knowledge.”¹³ Even more emphatic is the following exposition, to be found in *State of Punjab v. Davinder Pal Singh Bhullar*¹⁴ (in para 41 of the report):

“Waiver is an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. In fact, it is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. (Vide *Dawsons Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha*, (1934-35) 62 IA 100 : AIR 1935 PC 79, *Basheshar Nath v. CIT*, AIR 1959 SC 149, *Mademsetty Satyanarayana v. G. Yelloji Rao*, AIR 1965 SC 1405, *Associated Hotels of India Ltd. v. S.B. Sardar Ranjit Singh*, AIR 1968 SC 933, *Jaswantsingh Mathurasingh v. Ahmedabad Municipal Corpn.*, 1992 Supp (1) SCC 5, *Sikkim Subba Associates v. State of Sikkim*, (2001) 5 SCC 629 : AIR 2001 SC 2062 and *Krishna Bahadur v. Purna Theatre*, (2004) 8 SCC 229 : 2004 SCC (L&S) 1086 : AIR 2004 SC 4282.)”

“Waiver”, held *Joginder Singh Sodhi v. Amar Kaur*¹⁵, “is a question of fact which must be expressly pleaded *and clearly proved*.” To the

¹² AIR 1968 SC 933

¹³ *Motilal Padampat Sugar Mills v. State of U.P.*, AIR 1979 SC 621 : (1979) 2 SCC 409

¹⁴ (2011) 14 SCC 770

¹⁵ JT 2004 (9) SC 100 : (2005) 1 SCC 31

same effect, as the above decisions, is *A.P.S.R.T.C. v. S. Jayaram*¹⁶.

34. In the face of the law laid down in the aforesaid decisions, chiefly, in *Bharat Broadband Network Ltd.*³, it is not possible to accede to the submissions of Mr. Mehta.

35. The Supreme Court has laid down clearly and unmistakably, that the “express agreement in writing”, to which the proviso to Section 12(5) alludes, has to be exactly that, and no less; in other words, the parties must expressly agree in writing to a waiver of Section 12(5) of the 1996 Act.

36. The said agreement in writing must reflect awareness, on the parties, to the applicability of the said provision as well as the resultant invalidation, of the learned arbitrator, to arbitrate on the disputes between them, as well as a conscious intention to waive the applicability of the said provision, in the case of the disputes between them.

37. It is obvious that the filing of applications for extension of time for continuance and completion of the arbitral proceedings, or applications to the arbitrator, for extension of time to file the affidavit of evidence, etc., cannot constitute an “agreement in writing” within the meaning of the proviso to Section 12(5) of the 1996 Act.

38. In view of the aforesaid discussion, it is apparent that, by the

¹⁶ (2004) 13 SCC 792

operation of Section 12(5) of the 1996 Act, in the light of the decisions of the Supreme Court in *TRF Ltd.*¹, *Perkins Eastman Architects DPC*² and *Bharat Broadband Network Ltd.*³, the learned sole arbitrator, appointed by Mr. N.P. Gupta, before whom the arbitral proceedings have been continuing thus far, has been rendered *de jure* incapable of continuing to function as arbitrator, within the meaning of Section 14(1)(a) of the 1996 Act.

39. It is made clear that, by so holding, this Court is not seeking to doubt either the competence or the impartiality of the learned sole arbitrator, who is a respected retired Judge of this Court, with a wealth of judicial experience behind him, and for whom this Court has the highest regard.

40. The learned sole arbitrator has been rendered *de jure* incapable to continue to function as such, not because of any failing on the part of the learned sole arbitrator, but because of statutory compulsion, enforced by judicial precedents on the issue.

41. In view thereof, the mandate of the learned sole arbitrator, presently arbitrating on the dispute between the parties would stand terminated with immediate effect.

42. Given the nature of the disputes, this Court appoints Hon'ble Ms Justice G. Rohini, Chief Justice (Retd.) of this Court (Tel. 8527027027 , r/o Flat No. 1001, Tower 12, Supreme Towers, Sector 99, Noida, Gautam Buddha Nagar, Uttar Pradesh), and an experienced

arbitrator, to arbitrate on the disputes between the parties.

43. The learned sole arbitrator would arbitrate under the aegis of the Delhi International Arbitration Centre (DIAC) and would be entitled to fees in accordance with the Rules of the Delhi International Arbitration Centre, as the proceedings are still at the stage of recording of evidence. Other terms and conditions governing the parties would be the same as those applying during the proceedings before the learned sole arbitrator. The venue of the arbitral proceedings would be mutually decided, as per the convenience of the parties and the learned Arbitrator.

44. It is made known, by learned counsel for the parties, that the time available with the learned sole arbitrator, to arbitrate on the disputes, has already expired on 6th May, 2020.

45. In view of the fact that the learned sole arbitrator appointed today would have to enter on the reference and start the proceedings from the stage they stand today, in the interests of justice, the time for completion of pleadings and rendering of award is extended till 31st March, 2021.

46. At this stage, Mr. Prashant Mehta, learned counsel for the respondent, submits that these proceedings are not maintainable, as the agreement dated, 6th September, 2011, between the parties, was unstamped. No such contention has been advanced in the response filed by the respondent to the petition; neither has any such contention

ever been raised before the learned sole arbitrator, or in any of the arbitral proceedings thus far. It is obvious that the said contention is being raised solely as a plea of desperation, to contest the present petition, which, otherwise, is bound to succeed. I am not, therefore, inclined to return any finding on the said submission.

47. In view of the aforesaid discussion, this petition succeeds and is allowed in the aforesaid terms, with no order as to costs.

I.As. 6023-25/2020 in O.M.P. (T) (COMM.) 33/2020

1. In view of the disposal of O.M.P. (T) (COMM.) 33/2020, these applications do not survive for consideration and are disposed of accordingly.

AUGUST 20, 2020
dsm

C. HARI SHANKAR, J.