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

% *Date of Decision: 18th September, 2023*

+ O.M.P. (T) (COMM.) 110/2022

SAROJ PANDEY

..... Petitioner

Through: Mr. Lohit Ganguly, Advocate.

versus

AARYAVRAT PRODUCTS INDIA

PVT. LTD

..... Respondent

Through: Mr. Akhilesh Tejpal, Advocate.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J. (ORAL)

I.A. 18802/2022 (Exemption)

1. Allowed, subject to all just exceptions.
2. Application stands disposed of.

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3. Present petition has been filed under Section 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the '1996 Act') for termination of the mandate of the learned sole Arbitrator.

4. Facts to the extent necessary for deciding the present petition are that Petitioner and the Respondent entered into an Agreement on 14.07.2021, whereby Petitioner was to act as Respondent's distributor for commodities such as pulses, dry fruits, turmeric powder etc., manufactured by the Respondent. Between July, 2021 to October, 2021, the parties worked together, however, thereafter certain disputes



arose in the course of some transactions, which could not be amicably resolved and the business relationships came to an end.

5. Respondent issued a legal notice dated 04.01.2022 to the Petitioner raising a claim of Rs.27,415/- with legal costs of Rs.21,000/-. As per the Petitioner, the Respondent, without his consent and acting contrary to the terms of the Arbitration Agreement contained in clause 8 of the Contract Agreement dated 14.07.2021, appointed Sh. Akash Swami, Advocate as a sole Arbitrator to adjudicate the disputes between the parties.

6. It is further averred that the learned Arbitrator entered upon reference and intimated the Petitioner telephonically to appear before him without informing the reasons for the call. Petitioner visited the office of the Arbitrator on 17.04.2022 and again on 11.05.2022, as requested by him and some papers, purporting to be the details of the claims of the Respondent, were given to him. Not proficient in legal matters or English language, Petitioner was unable to understand that he was being called to participate in arbitration proceedings. Signatures of the Petitioner on the proceeding sheet dated 17.04.2022 were, in his perception, only to mark his presence in the office of the learned Arbitrator.

7. It is further stated that in June, 2022, Petitioner sought legal consultation and was explained the purpose of the proceedings and on realising that arbitral proceedings were in progress, at the instance of Respondent, he requested the Respondent to resolve the disputes amicably and objected to the proceedings. Petitioner sent a communication on 20.06.2022 to the learned Arbitrator, objecting to his appointment and continuation of the arbitral proceedings. Learned



Arbitrator responded to the letter on 30.06.2022 refusing to put the proceedings in abeyance and this led to the Petitioner sending a legal notice on 06.07.2022 to the learned Arbitrator to withdraw from the proceedings, which were in violation of settled law, since learned Arbitrator was unilaterally appointed by the Respondent, without the consent of the Petitioner.

8. It is in this backdrop that the present petition has been filed by the Petitioner seeking termination of the mandate of the Arbitrator on the ground that he was appointed unilaterally by the Respondent. Learned counsel for the Petitioner submits that the Arbitration Clause 8 of the Contract envisages that if any dispute arises between the parties, it will be resolved under the provisions of the 1996 Act, which means the Arbitrator will be appointed at the cost of both parties and will resolve the disputes and his award will be binding on both the parties. Thus, there cannot be a unilateral appointment by one party without the consent of the other party to the Agreement. In the present case, Respondent appointed the learned Arbitrator without the consent and/or knowledge of the Petitioner and despite repeated requests the learned Arbitrator insisted on continuing with the arbitral proceedings. This according to the learned counsel is not only in the teeth of the arbitration clause between the parties but also against the judgment of the Supreme Court in *Perkins Eastman Architects DPC and Another v. HSCC (India) Limited*, (2020) 20 SCC 760. Reliance is also placed on the judgment of this Court in *Proddatur Cable TV Digi Services v. Siti Cable Network Limited*, 2020 SCC OnLine Del 350, to emphasize and highlight that party autonomy is the ethos of arbitration agreements.



9. Respondent has contested the petition and filed a reply. In a nutshell, the defence is that Petitioner has participated in the arbitration proceedings on various occasions, which is reflected from the various order sheets of the proceedings jointly signed by the parties herein. Intimation was sent to the Petitioner before the start of the arbitral proceedings and he deliberately stayed away initially and appeared on 17.04.2022, after coming to know that he had been proceeded *ex parte*. Upon entering appearance, time was sought to take appropriate legal advise and the matter was posted for 11.05.2022 with the consent of the parties. A similar request was made by the Petitioner on the said date and he sought adjournment to engage an Advocate, which request was allowed by the learned Arbitrator. Therefore having participated in the arbitral proceedings, Petitioner is estopped from joining issues on the appointment of the learned Arbitrator as he has by his conduct, impliedly waived his right under Section 12(5) of the 1996 Act.

10. I have heard the learned counsels for the parties.

11. The first issue that arises for consideration before this Court is the entitlement of the Respondent under the Arbitration Clause 8, incorporated as a part of the Contract Agreement dated 14.07.2021, to unilaterally appoint a sole Arbitrator, to adjudicate the disputes between the parties. Clause 8 is extracted hereunder, for ready reference:-

*“8. **Arbitration:** By the term Arbitration it has been agreed by the parties that if any Dispute arises among the parties then it will be resolved by The Arbitration and Cancellation Act 1996 which mean arbitrator will be appointed at the cost of both parties and Legal dispute will be resolved by Arbitrator and the Award of Arbitrator*



will be binding on both the Parties.”

12. From a reading of the arbitration clause, it is evident that the Arbitrator could only be appointed with the consent of the parties to the Agreement and there is no scope for unilateral appointment. Even otherwise, the law on this subject is no longer *res integra*. In this context, I may first refer to the judgment of the Supreme Court in ***Perkins (supra)***, where the Supreme Court held as follows:-

“21. But, in our view that has to be the logical deduction from TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Para 50 of the decision shows that this Court was concerned with the issue, “whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator” The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and recognised by the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]

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28. *In TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , the Managing Director of the respondent had nominated a former Judge of this Court as sole arbitrator in terms of the aforesaid Clause 33(d), after which the appellant had preferred an application under Section 11(5) read with Section 11(6) of the Act. The plea was rejected by the High*



Court and the appeal therefrom on the issue whether the Managing Director could nominate an arbitrator was decided in favour of the appellant as stated hereinabove. As regards the issue about fresh appointment, this Court remanded the matter to the High Court for fresh consideration as is discernible from para 55 of the judgment. In the light of these authorities there is no hindrance in entertaining the instant application preferred by the applicants.”

13. Therefore, there can be no doubt that unilateral appointment by the Respondent violates the principle of party autonomy elucidated by the Supreme Court and cannot be sustained in law. This Court also does not find merit in the contention of the Respondent that the Petitioner is precluded from raising any objection to the appointment of the Arbitrator as he participated in the arbitral proceedings. Firstly, from the factual perspective, this position adopted by the Respondent is incorrect. Letter dated 20.06.2022 and legal notice dated 06.07.2021 sent by the Petitioner to the learned Arbitrator and the order sheets reveal that Petitioner never subjected himself to the jurisdiction of the Arbitrator and repeatedly voiced his objections and protest in one form or the other to his appointment. Even assuming that there was participation, the right of the Petitioner to seek termination of the mandate cannot be taken away or treated as implied waiver under Section 12(5) of the 1996 Act. Reading of the said provision clearly shows that waiver of any right is required to be by an ‘Agreement in writing’, entered into after the disputes have arisen. Section 12(5) reads as follows:-

“12. Grounds for Challenge-

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(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.”

14. Law on this issue is no longer *res integra*. In ***Bharat Broadband Network Limited v. United Telecoms Limited, (2019) 5 SCC 755***, the Supreme Court held as follows:-

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

“9. Promises, express and implied.—Insofar as the proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.”

It is thus necessary that there be an “express” agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court as indicating an express agreement on the facts of the case is dated 17-1-2017. On this date, the Managing Director of the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as an arbitrator. Shri Khan's invalid appointment only became clear after the declaration of the law by the Supreme Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] which, as we have seen hereinabove, was only on 3-7-2017. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an



application on 7-10-2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in *TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]* and asking him to declare that he has become de jure incapable of acting as an arbitrator. Equally, the fact that a statement of claim may have been filed before the arbitrator, would not mean that there is an express agreement in words which would make it clear that both parties wish Shri Khan to continue as arbitrator despite being ineligible to act as such. This being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2) and Section 16(2) of the Act to the facts of the present case, and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator. The judgment under appeal is also incorrect in stating that there is an express waiver in writing from the fact that an appointment letter has been issued by the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate."

15. Following the said judgment, this Court in ***A.K. Builders v. Delhi State Industrial Infrastructure Development Corporation Ltd., 2022 SCC OnLine Del 627***, held as follows:-

"11. In view of the authoritative pronouncement of the Supreme Court regarding the proviso to Section 12(5) of the A&C Act, there is no scope for entertaining the submission that the petitioner had, by his conduct, impliedly waived its right under Section 12(5) of the A&C Act. The waiver under Section 12(5) of the A&C Act has to be by an express agreement in writing. The contention that the Arbitrator was appointed by the Chief Engineer, DSIIDC pursuant to the request of the petitioner to appoint an arbitrator is of little relevance when one considers the case of *Bharat Broadband Network Limited v. United Telecoms Limited (supra)*. In that case the arbitrator was, in fact, appointed by the appellant who had then sought to challenge the same as being in violation of Section 12(5) of the A&C Act.

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15. A petition under Section 14 of the A&C Act, on the ground that an Arbitrator is ineligible under Section 12(5) of the A&C Act to act as an arbitrator, is maintainable. This issue is also no longer res integra in view of the decision of the Supreme Court in *HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Limited, (2018) 12 SCC 471*. In that case, the Supreme Court had



expressly held that a petition under Section 14 of the A&C Act would be maintainable if the arbitrator was ineligible to act in terms of Section 12(5) of the A&C Act. The relevant extract of the said decision is set out below:

“12. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become “ineligible” to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes “ineligible” to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as “ineligible”. In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal.””

16. Subsequently, another Co-ordinate Bench of this Court in ***Osho G.S. and Company v. Wapcos Limited, 2022 SCC OnLine Del 4598,***



observed as under:-

“19. As this Court reads paragraph 7 and 8 of the original communication addressed by the petitioner, it is evident that it had merely conveyed its intent for the referral of disputes to arbitration as per the agreement encapsulated in clause 25 read with clause 5.30.2 noticed hereinabove. The aforesaid communication required parties to take further steps for appointment of an independent and impartial sole arbitrator. The said notice further recorded that the aforesaid request was being made without prejudice to the rights and contentions of the petitioner here. In the considered opinion of this Court, the said communication cannot possibly be construed or understood as answering the requirements of a waiver as contemplated under Section 12(5). It would be important to recall that Section 12(5) and more particularly the Proviso thereto contemplates parties waiving the applicability of the said provision “by an express agreement in writing”. A unilateral request made by one of the parties for setting the appointment procedure in motion would clearly not answer the description of an express agreement in writing executed by the parties agreeing to the waiver of a disqualification of a nominated arbitrator under Section 12(5). The Court further notes that the aforesaid communication was in any case without prejudice to the rights and contentions which were available to the petitioner to urge and advocate.

20. Accordingly, and for all the aforesaid reasons, this Court is of the considered opinion that the unilateral appointment of the sole arbitrator by the CMD of the respondent would not sustain. A declaration is consequently entered that the mandate of the Arbitral Tribunal shall stand terminated.”

17. Recently, a Division Bench of this Court in ***Govind Singh v. Satya Group Pvt. Ltd. and Another, 2023 SCC OnLine Del 37***, was dealing with an appeal under Section 37 of the 1996 Act, impugning an order passed by learned Commercial Court, whereby Appellant’s application under Section 34 of the 1996 Act, seeking setting aside of the arbitral award was rejected. The principal question that fell for consideration before the Division Bench was whether the impugned award was liable to be set aside on the ground that the learned Arbitrator was ineligible to be appointed as an Arbitrator. The learned Commercial Court had found that the Arbitrator had complied with



provisions of Section 12 of the 1996 Act by making necessary disclosures before accepting the appointment and the Appellant had not challenged the appointment. Dealing with the question and relying on the judgment of the Supreme Court in ***TRF Limited v. Energo Engineering Projects Limited*, (2017) 8 SCC 377** and ***Perkins (supra)***, amongst other judgments, the Division Bench held that the contention that the Appellant by its conduct has waived the right to object to the appointment of the learned Arbitrator was without merit. The question whether a party can, by its conduct, waive its right under Section 12(5) of the Act is no longer *res integra*. The Court observed that under Section 12(5) any waiver would be valid only if it is by an express agreement in writing and there is no scope for imputing any implied waiver under the said provision. It was further observed that even if it is assumed that Appellant had participated in the arbitral proceedings without raising any objection to the appointment of the learned Arbitrator, it is not open to hold that it had waived its right under Section 12(5). Relevant paragraphs from the judgment are as under:-

“7. The principal question that falls for consideration for this Court is whether the impugned award is liable to be set aside on the ground that the learned Arbitrator was ineligible to be appointed as an arbitrator. The learned Commercial Court had found that the learned Arbitrator had complied with the provisions of Section 12 of the A&C Act by making the necessary disclosures before accepting his appointment as the Sole Arbitrator. The appellant had not challenged the said appointment and therefore, the learned Arbitrator's appointment was in accordance with the provisions of the A&C Act.

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14. *In TRF Ltd. v. Energo Engineering Projects Ltd. : (2017) 8 SCC 377, the Supreme Court had authoritatively held that a person who is ineligible to act as an arbitrator is also ineligible to be appointed as an arbitrator. It is important to note that the*



controversy before the Supreme Court was addressed in the context of Section 12(5) of the A&C Act. The relevant extract of the said decision, which clearly indicates the above, is set out below:—

“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 any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by nor impartiality 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, 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 : (SCC p. 173, para 25)

“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. 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 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 revisions 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 that 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.”

(emphasis in original)

53. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. According to the learned counsel for the appellant, ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee.

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. *In Perkins Eastman Architects DPC v. HSCC (India) Ltd. : (2020) 20 SCC 760, the Supreme Court referred to the earlier decision in TRF Ltd. v. Energo Engineering Projects Ltd. (supra) and held that in the cases where the arbitration clause provided that*



the party or its official would appoint an arbitrator, the element of ineligibility would also extend to the persons so appointed. The relevant extract of the said decision reads as under:—

“21. But, in our view that has to be the logical deduction from TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Para 50 of the decision shows that this Court was concerned with the issue, “whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator” The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and recognised by the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]”

“28. In TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72], the Managing Director of the respondent had nominated a former Judge of this Court as sole arbitrator in terms of the aforesaid Clause 33(d), after which the appellant had preferred an application under Section 11(5) read with Section 11(6) of the Act. The plea was rejected by the High Court and the appeal therefrom on the issue whether the Managing Director could nominate an arbitrator was decided in favour of the appellant as stated hereinabove. As regards the issue about fresh appointment, this Court remanded the matter to the High Court for fresh consideration as is discernible from para 55 of the judgment. In the light of these authorities there is no hindrance in entertaining the instant application preferred by the applicants.”



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17. Following the aforesaid decision of the Supreme Court in *Perkins Eastman Architects DPC v. HSCC (India) Ltd.* (supra), a learned Single Judge of this Court in *Proddatur Cable TV Digi Services v. Citi Cable Network Limited* : (2020) 267 DLT 51 held that it would be impermissible for a party to unilaterally appoint an arbitrator. In terms of Section 12(5) of the A&C Act read with the Seventh Schedule of the A&C Act, an employee would be ineligible to act as an arbitrator by virtue of the law as explained by the Supreme Court in *TRF Ltd. v. Energo Engineering Projects Ltd.* (supra) and *Perkins Eastman Architects DPC v. HSCC (India) Ltd.* (supra). Such ineligibility would also extend to a person appointed by such officials who are otherwise ineligible to act as arbitrators.

18. In view of the law as noted above, the learned Arbitrator unilaterally appointed by the respondent company was ineligible to act as an arbitrator under Section 12(5) of the A&C Act.

19. The contention that the appellant by its conduct has waived its right to object to the appointment of the learned Arbitrator is also without merit. The question whether a party can, by its conduct, waive its right under Section 12(5) of the A&C Act is no longer *res integra*. The Supreme Court in the case of *Bharat Broadband Network Limited v. United Telecoms Limited* : (2019) 5 SCC 755 had explained that any waiver under Section 12(5) of the A&C Act would be valid only if it is by an express agreement in writing. There is no scope for imputing any implied waiver of the rights under Section 12(5) of the A&C Act by conduct or otherwise. The relevant extract of the said decision reads as under:—

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



“9. Promises, express and implied. -Insofar as the proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.”

It is thus necessary that there be an “express” agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such...”

20. *Thus, it is not necessary to examine the question whether the appellant had raised an objection to the appointment of the learned Arbitrator. Even if it is assumed that the appellant had participated in the arbitral proceedings without raising any objection to the appointment of the learned Arbitrator, it is not open to hold that he had waived his right under Section 12(5) of the A&C Act. Although it is not material, the record does indicate that the appellant had objected to the appointment of respondent no. 2 as an arbitrator.*

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23. *We are unable to agree that the decision in Bharat Broadband Network Limited v. United Telecoms Limited (supra) can be distinguished on the aforesaid ground. The said decision had authoritatively held that in terms of the proviso of Section 12(5) of the A&C Act, the ineligibility of an arbitrator under Section 12(5) of the A&C Act could be waived only by an express agreement in writing and cannot be inferred by the conduct of the parties. Thus, the fact that the parties had participated before the arbitral tribunal cannot be construed as a waiver of their rights to object to the ineligibility of the arbitrator(s). We are unable to accept that while such a right could be exercised prior to the delivery of the award, it would cease thereafter. If the arbitrator is ineligible to act as an arbitrator, the arbitral award rendered by the arbitral tribunal would be without jurisdiction.”*

18. In view of the aforesaid judgments, this Court cannot accept the contention of the Respondent that participation, assuming any, in the arbitral proceedings would amount to a waiver of the rights of the Petitioner under Section 12(5) disentitling the Petitioner from seeking termination of the mandate of learned sole Arbitrator in the absence of an express agreement in writing waiving its right. No material has been placed on record by the Respondent which even remotely

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indicates that the Petitioner had expressly in writing waived the applicability of sub-section (5) of Section 12 so as to fall within the rigors of proviso to the said provision. Even going by the conduct of the Petitioner *albeit* the same is immaterial in view of the law laid down, it cannot be construed that the Petitioner accepted the appointment of the learned Arbitrator and willingly participated in the arbitral proceedings.

19. In this view, present petition is allowed and the mandate of Sh. Akash Swami, Advocate, learned sole Arbitrator, who was unilaterally appointed by the Respondent, is terminated. Parties are left to appoint a substitute Arbitrator, if they so desire, in consonance with Arbitration Clause 8.

20. Petition is disposed of in the aforesaid terms.

JYOTI SINGH, J

SEPTEMBER 18, 2023/shivam