

**IN THE HIGH COURT AT CALCUTTA**  
**ORDINARY ORIGINAL CIVIL JURISDICTION**  
ORIGINAL SIDE

**PRESENT : THE HON'BLE JUSTICE SHAMPA SARKAR**

**A.P. No. 430 of 2019**

**Y D TRANSPORT COMPANY AND ANOTHER ... PETITIONERS**

**VS.**

**SREI EQUIPMENT FINANCE LIMITED ... RESPONDENT**

For the Petitioners : Mr. Jishnu Chowdhury, Sr. Adv  
Mr. Ritoban Sarkar, Adv.  
Mr. Soham Sur, Adv.  
Mr. Syamantak Banerjee, Adv.

For the Respondents : Mr. Swatarup Banerjee, Adv.  
Mr. Sariful Haque, Adv.  
Ms. Archana Chowdhury, Adv.  
Ms. Priyanka Ghosh, Adv.

Hearing reserved on : 27.11.2025

Judgment delivered on : 02.12.2025

**SHAMPA SARKAR, J.**

1. This is an application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act), challenging an award dated December 28, 2017 passed by the learned Arbitrator.

2. The dispute emanated from a loan agreement executed between the parties. The loan was obtained for purchase of heavy vehicles for mining related works and excavation. The petitioners contended to have

made certain payments from time to time between 2012-2014. According to the petitioners, an amount of Rs. 7.27 crores remained due and payable. Disputes arose over non-payments, inflated calculations and alleged breach of the loan agreement.

3. The respondent invoked the arbitration clause contained in the loan agreement and initiated a proceeding, by unilaterally appointing an Arbitrator.

4. The petitioners alleged that the copy of the loan agreement was not served upon them. The notice invoking arbitration was also not served upon them. It was further alleged that the proceedings continued ex parte and ultimately culminated in the passing of the award by the learned Arbitrator who was appointed at the behest of the respondent. The specific contentions of the petitioners were that, they came to know about the passing of the award when they received a copy of the execution petition filed by the respondent in the court of the District Additional Sessions Judge 1 and Special Judge at Jamshedpur being Execution Case No. 5 of 2022. From the execution petition, the petitioners came to know that the ex parte award was passed. The execution application was filed on February 05, 2019 and the matter appeared before the learned Judge of the executing court on March 06, 2019. The respondent was directed to serve a copy of the execution petition upon the petitioners. The petitioners obtained a copy of the

execution petition on April 09, 2019 and filed the instant application on July 05, 2019.

5. The impugned award has been challenged on the following grounds;

- (a) Unilateral appointment of the Arbitrator, in violation of the provisions of Section 12(5) of the Arbitration and Conciliation Act, 1996 and contrary to the statutory mandate of equal treatment of the parties under Section 18 of the said Act.
- (b) Legal embargo in the appointment of the Arbitrator by a party which had a substantial finance interest in the outcome of the arbitral proceeding and in the claim made before the learned Arbitrator. Violation of Article 14 of the Constitution of India. Improper constitution of the arbitral tribunal.
- (c) Violation of the principle of equal treatment of the parties in an arbitral proceeding which was applicable from the very initial stage of appointment of an Arbitrator.
- (d) Absence of an express agreement in writing by the petitioners, thereby waving the applicability of the provisions of the Section 12(5) of the said Act.
- (e) Mere participation in the arbitral proceeding would not amount to waiver of the applicability of the provisions of Section 12(5) of the said Act.

(f) The petitioners did not participate in the proceeding, but appeared before the learned Arbitrator and expressed inability to contest the proceeding, in view of the breach of the legal provisions.

(g) The award was silent on the issue as to whether the notice invoking arbitration had ever been served. Service of notice could was not proved by the respondent.

6. Reliance has been placed on the following decisions with regard to the issue of waiver and prohibition under the law on unilateral appointment of a learned Arbitrator:-

**(i) Perkins Eastman Architects DPC and another vs. HSCC (India) Ltd. reported in (2019) SCC Online SC 1517.**

**(ii) Proddatur Cable TV Digi Services vs. SITI Cable Network Ltd. reported in (2020) SCC Online Del 350.**

**(iii) Bharat Broadband Network Limited Vs. United Telecoms Ltd. reported in (2019) 5 SCC 755.**

**(iv) Ellora Paper Mills Limited Vs. State of Madhya Pradesh reported in (2022) 3 SCC 1.**

**(v) Central Organization for Railway Electrification vs. ECI SPIC SMO MCML (JV) a Joint Venture Company reported in 2024 SCC Online SC 3219.**

- (vi) Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited & Ors. Vs. Ajay Sales reported in (2021) 17 SCC 248.**
- (vii) Sohan Minerals and Mining Company Pvt. Limited Vs. Steel Authority of India Limited reported in (MANU/WB/0216/2021).**
- (viii) Ravi Realcons Pvt. Ltd. Vs. Chief Engineers and Another reported in (2022) SCC Online Cal 751**
- (ix) A.K. Builders Vs. Delhi State Industrial Infrastructure Development Corporation Ltd. (2022) SCC Online Del 627.**

7. Mr. Jishu Choudhary, learned senior advocate for the petitioners submitted that, even if the petitioners did not pray for termination of the mandate of the learned Arbitrator in the course of arbitral proceeding, challenge to the independence of the learned Arbitrator and violation of Schedule V and VII of the Act could be made after the award was passed, in an application under Section 34 of the said Act.

8. On the issue of limitation, Mr. Choudhary submitted that the application was not barred by limitation and the preliminary objection raised by the respondent was baseless and without any legal foundation. Although the award was passed in 2017, the present application was filed on July 05, 2019, well within the period of limitation. This application was filed within the statutory period,

calculated from the date of receipt of the award with the application under Section 36 of the said Act. The signed award had never been delivered upon the petitioners. Records were called for from the learned Arbitrator, but the same did not reflect dispatch of the award. A postal receipt was available in the records which indicated that the date of dispatch was sometime in December 14, 2018, but the said receipt was neither accompanied by any envelope nor any acknowledgment due card. No copy of the forwarding letter indicating that learned Arbitrator had sought to serve the award upon the petitioners, on or about February 14, 2018 was available in the records. Due proof of posting of the award at the correct address of the petitioners, was missing in the records. There was nothing on record which would indicate that the postal authorities had sought to deliver any postal article which was posted by the learned Arbitrator. As such, Section 3 of the said Act could not be applicable for the purpose of presumption of service of the award. The deeming fiction under The General Clauses Act, 1897, could not be applied in this case as there was no proof of due stamping and due dispatch of the award.

9. The decisions relied upon by the respondent on the applicability of the deeming fiction with regard to delivery and/or service of the award, could not be applicable in the case as the records did not reveal that an envelope containing a forwarding letter addressed to the award debtors with proper stamp had been posted at the particular post

office. There was nothing on record to show that the postal authority had returned the envelope with any endorsement at all.

10. It was further contended that the Hon'ble Apex Court time and again had held that delivery of a signed copy of the arbitral award even if it was not the original copy, but a true copy or a certified copy, thereof, was the mandate of the law. Section 31(5) of the said Act was relied upon to submit that applicability of the said section could not be tailor made to satisfy the factum of delivery of award on a case to case basis. The mandate of the law was clear and unambiguous and applicable in all situations.

11. Reliance had been placed on the following decisions on the issue of limitation.

**(i) *P Radha Bai & Others vs. P Ashok Kumar & another reported in (2019) 13 SCC 445.***

**(ii) *Union of India vs Tecco Trichy Engineers & Contractors reported in (2005) 4 SCC 239.***

**(iii) *State of Maharashtra v ARK Builders Pvt. Ltd. reported in (2011) 4 SCC 616.***

**(iv) *The State of West Bengal and Another vs. M/s. Motilal Agarwala and Another reported in AIR 2016 Cal 271.***

**(v) *Ashok Kumar Chaudhary and Another vs Kotak Mahindra Bank Limited reported in (2023) SCC Online Cal 5474***

**(vi) *Ajibar Rahman V. Choramandalam Investment passed in A.P 210 of 2023.***

12. It was urged that deemed service of an arbitral award had not been accepted by Courts and reference was made to several decisions of coordinate Benches, which held that physical delivery or actual delivery of arbitral award was an irrefutable statutory obligation. In order to satisfy the court as to the timeline within which the application has been filed, the dates were pointed out to the Court. April 09, 2019 was the date of knowledge of the award when a copy of the execution petition containing the award was received by the petitioners and this application was filed on July 5, 2019 i.e. within a period of 90 days from the receipt of copy of the award.

13. Mr. Choudhary next contended that the objection of the respondent that this Court did not have territorial jurisdiction to entertain the application was unacceptable in law. Only because the execution case has been filed in the Special Court at Jamshedpur prior to filing of the application under Section 34 of the said Act, this Court would not lose its jurisdiction to entertain the application. The cause of action arose within the jurisdiction of this Court. The respondent's address was within the jurisdiction of this Court. The seat of

arbitration was Hastings Chambers, Ground Floor Room No. GG 7C, Kiran Shankar Roy Road. At the relevant point of time the respondent also functioned from its office at Kiran Shankar Roy Road.

14. It was urged that, the decision in ***State of West Bengal and others vs. Associated contractors*** reported in ***(2015) 1 SCC 32***, would not be applicable. In the decision of ***Sundaram Finance Limited vs. Abdul Samad and another*** reported in ***(2018) 3 SCC 622***, the Apex Court laid down that, upon publication of the award the arbitral proceedings stood terminated, and as such, an application for execution could be filed anywhere. The award being a deemed decree, was executable in terms of the provisions of the Code of Civil Procedure. The same was filed at Jamshedpur in view of the presence of the petitioners and their assets at Jamshedpur. An execution proceeding was free from the shackles of Section 42 of the said Act.

15. Reliance has been placed on the following decisions;

- (i) ***Sundaram Finance Limited vs. Abdul Samad and another*** reported in ***(2018) 3 SCC 622***
- (ii) ***BLA projects Pvt. Ltd. vs. Asansol Durgapur Development Authority*** reported in ***(2019) SCC Online Cal 1868***.
- (iii) ***TIL Limited vs. Shapoorji Pallonji & Co. Private Limited*** reported in ***2023 (4) CHN (CAL) 346***.

- (iv) ***Gujarat Jhm Hotels Ltd vs. Rajasthali Resorts and Studios Limited*** reported in ***(2023) SCC Online Del 161***.

16. On the objection that this application was barred the principle of issue estoppel, Mr. Choudhary submitted that, although an application under Section 47 of the Code of Civil Procedure was filed before the learned executing Court alleging that the award was a nullity in view of the unilateral appointment of the learned Arbitrator, and the executing Court had discussed the issue and refused to exercise jurisdiction thereby rejecting the application, learned executing Court was of the view that an application under Section 34 was pending on all issues and the objection could be canvassed before the appropriate court.

17. Challenging the said order, the respondent preferred a civil revisional application before the Hon'ble High Court of Jharkhand, Ranchi. Upon considering the matter, the Hon'ble High Court disposed of the petition, refusing to interfere with the order passed by the executing court and refusing to stay the execution. However, the revisional Court was of the view that since the petitioners had already filed an application under Section 34 of the said Act, which was pending, immediate steps should be taken to pursue the said application. Against such order, the petitioners preferred a Special Leave Petition. The Hon'ble Apex Court did not interfere with the order. Relying on observation of the High Court of Jharkhand, Ranchi, Mr.

Choudhary submitted that the issue was not finally decided between the parties and must be decided in this proceeding.

18. Mr. Satarup Banerjee, learned advocate for the award holder/respondent opposed this application on various grounds i.e., lack of jurisdiction of this court, limitation and issue estoppel. It was submitted that the application was not maintainable either in law or in facts and should be rejected. Section 42 of the said Act, began with a non obstante clause. The same had an overriding effect over all other provisions under Part-I of the said Act. The same also had an overriding effect over the provisions of the Code of Civil Procedure. Section 36 of the said Act, which dealt with execution proceedings, was within Part-I of the said Act. Section 42 imposed a mandatory jurisdictional bar in continuation of the instant proceeding before this Court as the execution was pending before the competent Civil Court at Jamshedpur. The respondent had already approached the competent executing court at Jamshedpur. The same was a prior application, and as such, the principal Civil Court at Jamshedpur alone, would have exclusive jurisdiction to entertain any further application under the said Act.

19. Learned Advocate submitted that, the Execution Case No. 5 of 2019 was initiated before the learned District Additional Session Judge-I and Special Judge at Jamshedpur, seeking enforcement of the award. The said Court had already passed multiple orders, including orders for

appointment of a receiver to take possession of the assets of the petitioners. The petitioners have actively participated in the execution proceeding from the outset and had not challenged any of those orders. Thus, the Special Court at Jamshedpur would be the competent court in respect of all proceedings under Part-I of the said Act, as a consequence to the applicability of Section 42 of the said Act.

20. The provision of Section 36(1) made an award enforceable “as if it were a decree”. However, the proceeding was not one under the Code of Civil Procedure because the award was not a decree. The proceeding for execution was rooted in and emanated from the said Act. Right to enforce the award had also been provided for under the said Act. Enforcement of an award under Section 36 of the said Act, was not a civil proceeding as contemplated under the Code of Civil Procedure, but a proceeding under Part-I of the said Act and was subject to the exclusive jurisdiction of the principal Civil Court within whose jurisdiction the prior proceeding had been instituted.

21. Reliance has been placed on the following decision;

- (i) ***Indian Media Services Pvt. Ltd. vs. SBPL Infrastructure Ltd.*** reported in ***(2022) SCC OnLine TS 3422.***
- (ii) ***Pipeline Infrastructure vs. Nagarjuna Fertilizers*** reported in ***(2024) SCC OnLine TS 4026.***

(iii) ***State of West Bengal and others vs. Associated Contractors*** reported in ***(2015) 1 SCC 32***.

22. Mr. Banerjee further submitted that the decision in ***Sundaram Finance Limited (supra)*** was distinguishable on facts, inasmuch as, the issue before the Apex Court was, whether an arbitral award could be enforced anywhere in the country under Section 36 of the said Act, without the need to first obtain a transfer of the decree from the Court having jurisdiction over the arbitral proceeding. The Apex Court clarified that no such requirement existed either under the said Act or under the Code of Civil Procedure. The said decision did not consider the effect of institution of a prior proceeding under any of the provisions of Part-I of the said Act before another Court. In the said case, the award had become final and enforcement was sought straightway under Section 36 of the said Act, before the court having jurisdiction over the assets.

23. On the issue of limitation it was submitted that this application was barred under the provisions of Section 34 (3) of the said Act. The period of limitation was three months, extendable by another thirty days from the date of receipt of the award. The award was passed on December 28, 2017 and duly communicated to the petitioners. The postal receipt stood testimony to such fact. Even if there is no service return or signature of the addressee in the acknowledgment due card, the records of the arbitral tribunal clearly demonstrated that the

petitioners were not only aware of the arbitral proceeding, but they also participated in the same. Moreover, the arbitral award was dispatched by registered post to the same address of the petitioners in which the application for execution has been received. The postal receipt evidencing such dispatch was a part of the records and the same had gone unconverted.

24. Under Section 3(1)(b) of the said Act, even in the absence of actual refusal or return of the AD card with an endorsement undelivered, service shall be deemed to be effected, upon dispatch to the correct address, with proper postage.

25. Reliance had been placed on the following decisions;

- (i) ***Logic Eastern India Pvt vs. KEC International Limited*** reported in ***(2018) SCC OnLine Bom 916***.
- (ii) ***Magma Fincrop Limited vs. Ashok Kumar and other*** reported in ***(2017) SCC OnLine Cal 13129***.
- (iii) ***Santanu Sarkar -vs- SREI Equipment Finance Ltd*** passed in ***A.P. No. 321 of 2019***.
- (iv) ***New Globe Transport Corp -Vs- Magma*** reported in ***(2011) 2 CHN 287***.
- (v) ***Jindal Dychem Industries PVT -Vs. Pahwa International*** reported in ***(MANU/ DE/ 2280/2009)***.

(vi) **A.G. Aerovision Electronics -Vs- TATA Capital Finance** reported in **(2018) SCC ONLINE DEL 10825**

(vii) **Krishnabhagwan Rajaram Sharma -vs Tata Motors** reported in **(MANU/ MH/ 034/2015)**

(viii) **Ranjeet Bafna -Vs- Kotak Mahendra Bank** reported in **(2015) 3 ARBLR 82 MANU/RH/0396/2014.**

26. The decision in **Cholamandalam Investment vs. Ajibar Rahaman** passed in **A.P. No. 248 of 2023** was distinguished, *inter alia*, on the ground that the letter containing the award returned undelivered with the endorsement that the addressee could not be located.

27. The decision in **Union of India and others vs. TECCO Trichy Engineers** reported in **(2005) 4 SCC 241**, was also distinguished on facts, inasmuch as, the matter related to the need for service of an award upon an officer of the department who was acquainted with the arbitral proceeding and not on any other office or receiving section.

28. **State of Maharashtra vs. ARK Builders Private Limited** reported in **(2011) 4 SCC 616** was distinguished on facts. **Ashok Kumar Chaudhury vs. Kotak Mahindra Bank** reported in **(2023) SCC OnLine Cal 5474** was also distinguished on the ground that the dispatch of the award to an incomplete and insufficient address, was not treated as sufficient compliance of the law.

29. Mr. Banerjee also submitted that the petitioner had made incorrect and false statements with regard to prior proceedings having been filed before this Court, inasmuch as, those proceedings were between the other parties and the respondents. The petitioners were not parties to those proceedings. The present proceeding arose out of the loan agreement entered into between the petitioners and the respondent and not the parties who were before this court on earlier occasions.

30. On the doctrine of issue estoppel, it was submitted that the petitioners were trying to re-agitate the same issues which were raised before the learned executing court at Jamshedpur with regard to prohibition of law on unilateral appointment of the arbitrator. The said issue was decided by the executing court and the objection was not accepted on the ground that the petitioners had already participated in the proceeding, but did not raise such objection before the learned Arbitrator. The petitioner had missed the bus. The same issue could not be reopened in the present proceeding. The revisional court also did not interfere with the order of the executing court.

31. The contentions of the parties have been duly considered. With regard to the objection as to this application being barred by limitation, this court holds that the application has been filed within time. Section 34(3) of the said Act, is quoted below.

32. “34(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that

*application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:*

33. *Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."*

34. It is the specific case of the petitioner that, the award was received on April 09, 2019, when the execution application containing a copy of the award was served upon the petitioners. The petitioners filed the application challenging the said award, on July 5, 2019 i.e. within the time prescribed under Section 34(3) of the said Act.

35. With regard to the contention of Mr. Banerjee as to deemed service of the award and applicability of section 3(1)(b) of the said Act, this Court holds that the provisions of deemed service of the award is not applicable in this case. The original records of the learned Arbitrator had been called for. It appears that notices with regard to the arbitral proceedings were issued. The postal envelopes containing those notices were sent back to the learned arbitrator and the copies of those notices have also been maintained by the learned arbitrator in the records. The fact that the notices were sent to the petitioners by the learned arbitrator at the time of commencement of the proceeding is not in doubt. Deemed service of those notices can be gathered from the envelopes and A/D cards which returned to the Arbitrator. It is also available that the petitioners were represented before the learned arbitrator at least on three occasions. Submission was made on behalf

of the petitioners that, another agreement had been entered into between the parties after March 27, 2016 and until and unless a copy of the same was served upon the petitioners, they were not in a position to take steps before the learned Arbitrator by filing their written statement of defence.

36. The question is whether the award was received by the award debtors as per law, and what will be the computation of the period of limitation under Section 34(3) of the said Act. The original records reveal that, a communication to the respondents on the letter head of the learned Arbitrator dated December 28, 2017, bearing the original signature of the learned Arbitrator along with the original award on a stamp paper of Rs.150/- duly signed by the learned Arbitrator was still retained with the records. The contents of the letter is reproduced below:

**Partha Sarathi Ghosh**  
**Advocate, High Court Calcutta**

CHAMBER  
P. G. & Associates,  
Advocates,  
NPS Business Centre, 2"d  
Floor,  
A, Kiran Shankar Roy  
Road, Kolkata - 700 001,

Date: 28/12.2017

Ref: A.C/ 25/2016

1. **M/S SREI EQUIPMENT FINANCE LIMITED**  
At "VISWAKARMA" 86C, Topsia Road(South), Kolkata - 700 046,  
Legal Office:6A, Kiran Sankar Roy Road, Kolkata - 700 001. West Bengal.
2. **BISHNU CHANDRA CHOUDHARY**  
Y. D. TRANSPORT CO.  
Ashiana Garden, Sonari, Jhamshedpur,

PIN - 831011, Jharkhand, India.

3. **BISHNU CHANDRA CHOUDHARY**  
 S/O Omkar Nath Choudhary,  
 B-31, Lotus Building, Ashiana Gardens,  
 Sonari, East Singhbhum, Jhamshedpur,  
 PIN - 831011, Jharkhand

Dear Sir(s)

***Re: Arbitration Case No. 25 of 2016***

**In the Matter of :**

**ARBITRATION**

**- Between -**

**Srei Equipment Finance Limited**

**- AND -**

**Bishnu Chandra Choudhary & Another**

Enclosed herewith please find a copy of the award dated .... passed by me under the captioned arbitration proceeding.

Yours faithfully

(Partha Sarathi Ghosh)  
 Arbitrator

37. Two postal receipts both addressed to Shri Bishnu Choudhury, i.e, the petitioner No.2 are available, but the date of dispatch of those receipts is February 14, 2018. Whereas, the forwarding letter of the learned arbitrator dated December 28, 2017 along with the original award duly signed and printed on a non judicial stamp paper of Rs. 150 was still retained with the records. Thus, there cannot be any presumption in this case that, the award, duly signed in original by the learned arbitrator, had actually been dispatched on February 14, 2018 to Mr. Bishnu Choudhury, who is the award debtor no.2 What was forwarded on February 14, 2018, is not available. Neither any postal envelope nor the acknowledgement due card is available to show that the postal article dispatched on February 14, 2018 was either delivered

or sought to be delivered at the last known address of the respondents. The envelopes has not returned undelivered. Thus, the presumptions under Section 3 of the said Act and The General Clauses Act are not available. Had the award been sought to be served upon the award debtors at a later date, in that event a further forwarding letter would have been available with the records.

38. This Bench is unable to accept that the same letter dated December 28, 2017 containing the original award was the duplicate/ second copy maintained by the learned arbitrator in his records and the originals were dispatched on February 14, 2018. The mandate of Section 31(5) of the said Act, had not been complied with. There must be substantial compliance of the said provision and presumption of service cannot be imported in this case by giving a complete go by to the statutory provision and holding that the award was actually delivered. The petitioners cannot be deprived of their right to challenge.

39. There is no evidence that the postal authority, after making adequate attempts, had failed to deliver the award. As such, in the absence of any other supporting document from the postal authorities, the court is unable to accept compliance of mandatory provision of section 31(5) of the said Act. The application has been filed within 90 days from the receipt of the award and the period of limitation shall be reckoned from April 09, 2019. This application has been filed within the period of limitation.

40. The decision in ***Magma Fincrop Limited (supra)*** is distinguishable on facts, inasmuch as, in the said case, the Hon'ble Division Bench recorded that the records revealed that the envelope containing forwarding letter dated 13<sup>th</sup> August, 2014 and the arbitral award dated August 13, 2014 were properly addressed to the respondents at the addresses mentioned in the arbitration agreement and proper stamps were affixed thereon and the envelopes were posted from Princep Street post office on August 21, 2014. Due postage was paid by affixing pre-paid addressee postal stamp and the postal articles were duly put in course of transmission by registered post in the manner provided in Chapter VI of the Indian Post Act, 1898. Thus, due effect to the fiction contained in section 3 of the said Act should be given. In the instant case, apart from a postal receipt dated February 14, 2018 addressed to the award debtor no.2, no other document is available, which would indicate that, the procedure envisaged under Chapter VI of the Indian Post Act had been followed. Moreover, the existence of the original letter enclosing the award on the stamp paper bearing the original signature of the learned arbitrator in the records, raises a doubt as to what was actually sought to be dispatched to the award debtor no.2 on February 14, 2018. Why, the forwarding letter bearing the date December 28, 2018 along with the original/award bearing the signature of the learned Arbitrator would be posted at a

much later date, remains a mystery. Thus, it cannot be concluded that the communication of February 14, 2018 was a service of the award.

41. Section 31(5) of the Arbitrator and Conciliation Act which has been held to be mandatory in nature, is quoted below:

42. “31(5) After the arbitral award is made, a signed copy shall be delivered to each party.”

43. Reference is made to the following decisions with regard to the computation of period of limitation in case of non-delivery of the award:-

(i) ***P Radha Bai & Others Vs. Ashok Kumar & another*** reported in **(2019) 13 SCC 445**. Paragraphs are quoted below:-

“

**43.** The fraudulent conduct where Section 17 of the Limitation Act would have helped the objecting party is where there was a fraud in the delivery of the award. However, in such a scenario, resort to Section 17 is not necessary. If there is any fraud in the delivery of award, the requirement of receipt of award under Section 34(3) itself is not satisfied. Any receipt of award must be effective receipt. This Court in *Union of India v. Tecco Trichy Engineers & Contractors* [*Union of India v. Tecco Trichy Engineers & Contractors*, (2005) 4 SCC 239] held that: (SCC pp. 243-44, paras 8-9)

“8. The delivery of an arbitral award under sub-section (5) of Section 31 is not a matter of mere formality. It is a matter of substance. It is only after the stage under Section 31 has passed that the stage of termination of arbitral proceedings within the meaning of Section 32 of the Act arises. The delivery of arbitral award to the party, to be effective, has to be “received” by the party. This delivery by the Arbitral Tribunal and receipt by the party of the award sets in motion several periods of limitation such as an application for correction and interpretation of an award within 30 days under Section 33(1), an application for making an additional award under Section 33(4) and an application for setting aside an award under Section 34(3) and so on. As this delivery of the copy of award has the effect of conferring certain rights on the party as also bringing to an end the right to exercise those rights on expiry

of the prescribed period of limitation which would be calculated from that date, the delivery of the copy of award by the Tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceedings.

9. In the context of a huge organisation like the Railways, the copy of the award has to be received by the person who has knowledge of the proceedings and who would be the best person to understand and appreciate the arbitral award and also to take a decision in the matter of moving an application under sub-section (1) or (5) of Section 33 or under sub-section (1) of Section 34.”

(emphasis supplied)

**44.** In view of the above, we hold that once the party has received the award, the limitation period under Section 34(3) of the Arbitration Act commences. Section 17 of the Limitation Act would not come to the rescue of such objecting party.”

(ii) ***Union of India Vs. Tecco Trichy Engineers & Contractors***

reported in **(2005) 4 SCC 239**. Paragraphs are quoted below:-

“**8.** The delivery of an arbitral award under sub-section (5) of Section 31 is not a matter of mere formality. It is a matter of substance. It is only after the stage under Section 31 has passed that the stage of termination of arbitral proceedings within the meaning of Section 32 of the Act arises. The delivery of arbitral award to the party, to be effective, has to be “received” by the party. This delivery by the Arbitral Tribunal and receipt by the party of the award sets in motion several periods of limitation such as an application for correction and interpretation of an award within 30 days under Section 33(1), an application for making an additional award under Section 33(4) and an application for setting aside an award under Section 34(3) and so on. As this delivery of the copy of award has the effect of conferring certain rights on the party as also bringing to an end the right to exercise those rights on expiry of the prescribed period of limitation which would be calculated from that date, the delivery of the copy of award by the Tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceedings.”

(iii) ***State of Maharashtra v AKA Builders Pvt. Ltd.*** reported in

**(2011) 4 SCC 616**. Paragraphs are quoted below:-

“**12.** The appellants are now before this Court by grant of special leave. The two provisions of the Arbitration and Conciliation Act, 1996, relevant to answer the question raised in the case are Sections 31 and 34. Section 31 deals with form and contents of arbitral award; and insofar as relevant for the present provides as follows:

“**31. Form and contents of arbitral award.**—(1) An arbitral award shall be made in writing and shall be signed by the members of the Arbitral Tribunal.

(2)-(4)\*\*\*

(5) After the arbitral award is made, a *signed* copy shall be delivered to each party.

(6)-(8)\*\*\*”

(emphasis added)

Section 31(1) obliges the members of the Arbitral Tribunal/arbitrator to make the award in writing *and to sign it* and sub-section (5) then mandates that a *signed* copy of the award would be delivered to each party. A signed copy of the award would normally be delivered to the party by the arbitrator himself. The High Court clearly overlooked that what was required by law was the delivery of a copy of the award *signed* by the members of the Arbitral Tribunal/arbitrator and not any copy of the award.

\* \* \*

\* \* \*

**15.** The highlighted portion of the judgment extracted above, leaves no room for doubt that the period of limitation prescribed under Section 34(3) of the Act would start running only from the date a signed copy of the award is delivered to/received by the party making the application for setting it aside under Section 34(1) of the Act. The legal position on the issue may be stated thus. If the law prescribes that a copy of the order/award is to be communicated, delivered, dispatched, forwarded, rendered or sent to the parties concerned in a particular way and in case the law also sets a period of limitation for challenging the order/award in question by the aggrieved party, then the period of limitation can only commence from the date on which the order/award was received by the party concerned in the manner prescribed by the law.”

(iv) ***The State of West Bengal and Another vs. M/s. Motilal Agarwala and Another*** reported in ***AIR 2016 Cal 271***. Paragraphs are quoted below:-

**“26.** In our view, limitation under Section 34(3) would start running from the date on which the party applying for setting aside of the arbitral award received a signed copy of the award from the Arbitral Tribunal. Such copy need not necessarily be signed in original by the Arbitrator/majority of the Arbitrators. An authentic photo copy along with signatures would suffice. This issue is covered by a judgment dated 28<sup>th</sup> August, 2015 of this Bench in APOT 337 of 2015 (*National Agricultural Cooperative Marketing Federation of India Ltd. v. R. Piyarelall Import & Export Ltd.*).

**27.** The award made over by the learned Arbitrator to Sri. Pradip Saha, Assistant Engineer was a signed copy. However, the question is whether the period of limitation for making an application under Section 34 of the 1996 Act, would start running from the date on which the signed copy was received by Mr. Pradip Saha, Assistant Engineer.

**28.** In *State of Maharashtra v. ARK Builders* reported in (2011) 4 SCC 616, cited by Mr. Sen, the issue was, whether the period of limitation for making an application under Section 34 of the 1996 Act, for setting aside an arbitral award, was to be reckoned from the date on which a copy of the award was received by the applicant by any means or source, or whether it was to start running from the date a signed copy of the award was delivered to the applicant by the Arbitrator.

**29.** The Supreme Court held that the period of limitation prescribed under Section 34(3) of the 1996 Act, could only commence from the date on which the award was received by the applicant in the manner prescribed by law and/or in other words, in the manner for service of the award prescribed in Section 31(5) of the 1996 Act.

**30.** In *ARK Builders* (supra) the Arbitrators had not supplied a copy of the award to the appellants. The award holder had, however, forwarded a photocopy of the award to the appellant and claimed payment in terms of the award. The Supreme Court held that limitation would run from the time the award duly signed, was received by the appellant, from the Arbitrator.

**31.** In *ARK Builders* (supra) the Supreme Court did not consider the question of whether the copies served by the Arbitrators to the parties concerned, would all have to actually and separately be signed by the Arbitrators themselves. However, the Supreme Court clearly held that limitation would start running from the date on which a copy of the award was received by the applicant from the Arbitral Tribunal.

**32.** In *Benarsi Krishna Committee v. Karmyogi Shelters Private Limited* reported in (2012) 9 SCC 496 the Supreme Court held that the expression 'party' as defined in Section 2(i)(h) of the 1996 Act clearly indicates a person who is a party to an arbitration agreement. The said definition is not clarified in any way so as to include the agent of the party to such agreement. Any reference, therefore, made in Section 31(5) and Section 34(2) of the 1996 Act could only mean the party himself and not his or her agent or advocate empowered to act on the basis of a vakalatnama. In the aforesaid case, the award had been served on the advocate."

(v) ***Ashok Kumar Chaudhary and Another Vs. Kotak Mahindra Bank Limited*** reported in (2023) SCC Online Cal 5471. Paragraphs are quoted below:-

**"13.** The statutory position is clear. Delivery of a signed copy of the arbitral award to a party is the only mechanism known to law for effecting service of an award. The mandate of section 31(5) cannot be tailored to suit the particular facts of each case. If this is done, the award-holder can always get away by showing deemed service of an award to the award-debtor and proceed to execute the award on the plea of a time-barred section 34 application.

**14.** The Supreme Court in *State Maharashtra v. Ark Builders Private Limited*, (2011) 4 SCC 616 held that the legal position would not change even if a party derives undue advantage from the omission of the arbitrator to deliver a signed copy of the award since individual facts of a case cannot change the law. A Single Bench of the Bombay High Court in *Ritz Fashions v. Bhagyashri Textiles Pvt. Ltd.*; Arbitration Petition No. 803 of 2017 relied on *Ark Builders* and held that observance of section 31(5) is not a matter of mere formality and has to be given due weightage. *A.G. Aerovision Electronics Pvt. Ltd. v. Tata Capital Finance Services Ltd.*, 2018 SCC OnLine Del 10825 dwelt on the conduct of the appellants before the Court who had adopted dilatory and devious tactics to avoid service in the arbitral proceedings and continued to evade receipt of the award. *SRS Entertainment Limited v. Home Stores (India) Limited*, (2009) 112 DRJ 555 took into account practical realities and the presumption that a party may avoid delivery/receipt of an award and that such a party cannot be permitted to hold the enforcement in abeyance. The Single Bench of the Delhi High

Court specifically found in the facts of that case that the award had been delivered to the concerned party.

**15.** In the absence of any compelling material before the Court to prove delivery of a signed copy of the impugned award to the petitioner, the Court is constrained to reject the preliminary objection taken on behalf of the respondent. The balance of convenience is also in favour of such a view since the petitioner, having suffered an award, would also be deprived of the opportunity to argue in favour of setting aside of the award for all times to come. The respondent, at best, would have to defend the award and will have an equal opportunity of doing so by taking the Court to the merits/legality of the award. It is made clear that the respondent will get the opportunity to continue with the enforcement proceedings until the petitioner takes appropriate measures under the 1996 Act to stay of the award.”

(vi) ***Ajibar Rahaman Vs. Chola mandalam Investment*** passed in ***A.P***

**210 of 2023**, the relevant portion is quoted below:-

**“18.** Needless to say, delivery of an arbitral award in the manner contemplated in Section 31(5) entails important consequences. The delivery must be effective inasmuch as the party must “receive” a signed copy of the award. Delivery of a signed copy of the award to a party under Section 31(5) sets in motion important rights of the party at several levels including for correction and application for an additional award. The rights conferred would also include the right to apply for setting aside of the award within the prescribed time limits under Section 34(3) read with the proviso. Therefore, it is of utmost importance that any contention with regard to deemed service of the award on a party to an arbitration agreement be guided by all the attending circumstances. The Court must ascertain the existence of all facts on which the deeming fiction rests. A mistaken presumption as to a party having received the award may lead to an irrevocable loss of valuable statutory rights in respect to the award. As much as the presumption is one of necessity to keep the proceedings moving, the real consequences of that fiction must also not lead to miscarriage of justice.

**19.** The presumption of service is therefore not to be taken lightly and the Court must be satisfied that there are sufficient factual inconsistencies or lackings for the deeming fiction to be pressed into service. If the facts are clear before the Court, there is no place for presumptions.”

44. With regard to the jurisdiction of this Court, the decision of the ***Sundaram Finance (supra)*** is applicable, and the position of law has been clarified accordingly:-

“17. However, what has been lost sight of is Section 32 of the said Act, which reads as under:

“**32. Termination of proceedings.**—(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the Arbitral Tribunal under sub-section (2).

(2) The Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings where—

(a) the claimant withdraws his claim, unless the respondent objects to the order and the Arbitral Tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings; or

(c) the Arbitral Tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to Section 33 and sub-section (4) of Section 34, the mandate of the Arbitral Tribunal shall terminate with the termination of the arbitral proceedings.”

The aforesaid provision provides for arbitral proceedings to be terminated by the final arbitral award. Thus, when an award is already made, of which execution is sought, the arbitral proceedings already stand terminated on the making of the final award. Thus, it is not appreciated how Section 42 of the said Act, which deals with the jurisdiction issue in respect of arbitral proceedings, would have any relevance. It does appear that the provisions of the said Code and the said Act have been mixed up.

45. Once the award is passed, the arbitral proceeding is terminated. Once the proceeding is terminated, the proceeding under section 36 of the said Act, seeking execution of the award as a deemed decree under the provisions of Order 21 of the Code of Civil Procedure, is free from

the clutches of section 42 of the said Act. It is no longer a proceeding under Part-I unlike, an application under Section 34 of the said Act. For executing the award no application under part 1 has to be filed.

46. The relevant paragraphs in the decision of **BLA projects Pvt. Ltd. (supra)** are quoted below:-

“**35.** However, Section 36 merely provides for enforcement of an arbitral award and acts as a bridge enabling the provisions of the Code of Civil Procedure to be applied to the enforcement of an arbitral award, in the same manner as if it were a decree of the court. No application is envisaged under the said section for the enforcement of an award.

**36.** Hence, it cannot be said that an application for enforcement of an arbitral award is made under Section 36, sufficient to bring it within the fold of Section 42 of the 1996 Act. An application for execution, as provided in Section 36, would have to be made “in accordance with the provisions of the Code of Civil Procedure, 1908”, thereby enabling full application of Order XXI of the Code of Civil Procedure and other connected provisions as regards the mode and manner of application as well as the form of such application.

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**39.** It is evident that the logic, that Section 42 was not applicable to a proceeding for enforcement of the award since the same arose after termination of the proceedings, was contrary to the three-Judge bench decision of *Associated Contractors* (supra). In the said case, it was decided that the expression “with respect to an arbitration agreement” in Section 42 of the 1996 Act are words of wide import and would take in all applications made before, during or after the arbitral proceedings are over. On such premise, the Supreme Court went on to observe that Section 42 would apply to applications made after the arbitral proceedings have come to an end, provided they are made under Part I.

**40.** The Supreme Court, in its conclusive paragraph (paragraph 25) took into consideration applications under Sections 9 and 34 of the 1996 Act.

**41.** However, it is notable to mention that Section 36 of the 1996 Act did not find place in the said consideration.

**42.** In fact, in the opening paragraph of *Associated Contractors* (supra), it was indicated that the reference in that case was on the question, which court will have the jurisdiction to entertain and decide an application under Section 34 of the 1996 Act. The entire judgment was rendered in such context.

**43.** Nowhere in *Associated Contractors* (supra) did the Supreme Court consider the context of Section 36 of the 1996 Act.

**44.** As such, although one could arguably be justified in observing that *Sundaram Finance* (supra) (rendered by a two-Judge bench) went contrary to the logic of *Associated Contractors* (three-Judge bench decision) inasmuch as the effect of Section 42 on post-arbitral proceeding termination applications was concerned, *Associated Contractors* was not rendered in the context of the of Section 36 of the 1996 Act and did not consider the legal effect thereof.

**45.** Thus, *Sundaram Finance* can at best be seen as an authority on the proposition that an award was enforceable as a decree under Section 36 of the 1996 Act and thus, could be filed anywhere in the country where such decree could be executed, without obtaining a transfer of the decree from the court, which would have jurisdiction over the arbitral proceedings. However, the same ought not to be deemed as an authority on the proposition that Section 42 is inapplicable to applications within part I of the 1996 Act initiated after termination of arbitral proceedings, in view of being contrary to *Associated Contractors*.

**46.** Even if we see the conclusions arrived at in *Associated Contractors*, in paragraph 25 thereof, it is abundantly clear that the Supreme Court held that Section 42 would apply to 'applications' made under part I.

**47.** A close examination of Section 36 of the 1996 Act, which never fell for consideration in *Associated Contractors* (supra), shows that no application for enforcement of an arbitral award is envisaged in the said provision.

**48.** Section 36 at best creates a fiction that an arbitral award would operate as a decree of a civil court for the limited purpose of being executed. The section provides that an arbitral award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.

**49.** It is noteworthy that Section 36(1) does not make any distinction as to modalities and forum while making the provisions of the Code of Civil Procedure applicable to an arbitral

award. Hence, nothing in the Arbitration Act, in particular Section 36 thereof, provides that an application for execution of an arbitral award has to be filed before the district court, as provided in Section 2(1)(e) of the 1996 Act. In fact, the application for enforcement/execution of an arbitral award is not an application under Section 36 of the 1996 Act at all but under Order XXI of the Code of Civil Procedure, as provided in Section 36 itself.

**50.** Thus, such an application is not an “application under part I” of the 1996 Act, which takes it outside the purview and rigours of Section 42 of the 1996 Act.

**51.** *Associated Contractors* (supra) contemplated only ‘applications’ under part I to be governed by Section 42.

**52.** In view of the discussion above, an application for enforcement of an arbitral award is not covered by Section 42 of the 1996 Act.”

47. The relevant paragraphs of ***TIL Limited (supra)*** are quoted below:-

**“17.** Having considered the rival contentions of the parties, this Court is of the view that the learned court below had not committed any error in directing the award debtor to secure the arbitral award by furnishing a bank guarantee of the full amount with interest. Although, it was an application made by the award holder, the law is clear that unless the amount was secured, the execution would proceed. Either way, if the award debtor wants to press his application under Section 34 of the said Act and desires that the proceeding under Section 36 be stayed till the rights are decided, entire arbitral award would have to be furnished or else the execution will proceed.

**18.** The issue of jurisdiction and bar under Section 42 has been answered by the Hon’ble Apex Court in Sundaram Finance Limited (supra). Application for execution of an award is not an application within Part-1 of the Arbitration and Conciliation Act. According to the Hon’ble Apex Court, Section 42 applied to those applications arising from the arbitration agreement and the arbitration proceedings, but not to a proceeding which stood terminated upon making of the final award. Section 32 of the said Act was discussed and it was held that an arbitral award passed by an Arbitral Tribunal was deemed to be a decree under

Section 36 of the Act and there was no deeming provision anywhere to hold that the Court within whose jurisdiction the arbitral award was passed, should be taken to be the court which passed the decree. For enforcement of an award the execution case could be filed anywhere in the country, where such decree could be executed, and there was no requirement to obtain a transfer of the decree from the court which would have the jurisdiction over the arbitral proceedings.

**19.** In the case in hand, the jurisdiction of the commercial court has been invoked on the basis of the subject matter of the dispute, the quantum of the arbitral award, the territorial jurisdiction of the court over assets of the award debtor.

**20.** Under such circumstances, the point raised by Mr. Rajarshi Dutta is not entertained by this Court. The Court also does not find that the issue of incorrect verification of the application goes to the very root of maintainability of the execution case.

**21.** Accordingly, the revisional application is dismissed”

48. The above decision clarified that there was no conflict with the proposition of law laid down in ***Associated Contractors (supra)*** and ***Sundaram Finance (supra)***.

49. Paragraph 47 and 48 of ***Gujarat JHM Hotels Ltd. (supra)***, are quoted below:-

“**47.** As was eloquently observed by the Bombay High Court in **Global Asia, Sundaram Finance** is to be understood as holding that the Act transcends territorial barriers and conferring a choice on the party in favour of which the Award may have been rendered to institute proceedings for enforcement in accordance with the choice which was recognized to exist in **Sundaram Finance**. The learned Judge also held that such a party cannot be compelled to first approach the “2(1)(e) Court” and thereafter be forced to approach the local court for execution of the award. In summation, it may thus be held that the party which seeks to initiate enforcement action could institute proceedings either before the seat court or to proceed further and directly to the court within the territorial limit of which the assets

of the judgment debtor may be located. It essentially frees the decree holder from being compelled to first approach the seat court, obtain a certificate of transfer and then initiate proceedings before the court which may by virtue of its geographical location be entitled to take appropriate action against the properties of the judgment debtor.

**48.** The Court further finds that the decision of the Supreme Court in **Associated Contractors** cannot be read or understood *de hors* the context in which it came to be rendered. As was noticed hereinabove, the question which stood raised was itself relating to the correctness of petitions under Section 34 of the Act being preferred and instituted before a particular court. The Supreme Court had found that undisputedly prior to the award coming to be delivered, proceedings under Section 9 of the Act had been instituted before the Calcutta High Court. It was in the aforesaid context that it was held that Section 42 of the Act would apply and consequently the Calcutta High Court would have the requisite jurisdiction and authority to entertain the petition under Section 34 of the Act. As was noted hereinabove, a petition under Section 9 of the Act as also certain others which fall in Part I are those which are made before a court. It is in that backdrop that Section 42 assumes significance and was so recognized to be an answer to the question which stood posited. The Supreme Court then went on to observe that the phrase “*with respect to arbitration agreement*” widens the scope of Section 42 of the Act to bring within its ambit all matters directly or indirectly relating to an arbitration agreement. It was thus held that all applications which are made to a Court either before, during or after arbitral proceedings and referable to Part I of the Act would stand covered by Section 42 of the Act.”

50. In this case, the respondent is situated in Kolkata. Arbitration was held within the jurisdiction of this Court the award passed within the jurisdiction of this court. The proceeding stood terminated with the passing of the award, thereby setting the award holder free to approach the court within whose territorial limits the assets were situated, seeking enforcement of the award under the provisions of Order 21 of

the CPC. Thus, this Court has the jurisdiction to entertain this application under Section 34 of the said Act.

51. The Dispute Resolution Clause 9.11 of the loan agreement dated March 22, 2016 is quoted below.

**“9.11 Dispute Resolution Arbitration**

“Any disputes and/or differences arising out of or in connection with the Agreement during its subsistence or thereafter between the parties including any disputes and differences relating to the interpretation of the agreement or any clause thereof shall be adjudicated by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and rules framed there under and any amendment, modification, statutory enactment thereto from time to time and shall be referred to the Arbitration of a sole Arbitrator appointed by the Company upon intimation to all parties to this Agreement. The proceedings shall be held at Kolkata. The cost of the proceedings shall be borne by the parties to this Agreement. The award of the arbitrator shall be final, conclusive and binding on all the parties.”

52. According to the agreement, the proceeding was to be held at Kolkata and the proceeding was held within the jurisdiction of this Court. Thus, the seat was agreed to be Kolkata. When seat is prescribed, all proceedings emanating from the award will be at seat. Only execution can be sought for at the place where the award debtors or their assets are located.

53. With regard to principle of issue estoppel, this court finds that by an order dated May 30, 2024, passed in Execution Case No.5 of 2019, by the District Judge-III-cum- Presiding Officer, Commercial Court, Jamshedpur, the application under section 47 of the Code of Civil Procedure filed by the petitioner was dismissed. The executing court

held that the execution was maintainable and the plea of unilateral appointment was not accepted. The relevant portion of the order is quoted below:-

“ The Hon’ble Apex Court ***Perkins Eastmen Case (supra)*** has observed that the objection with regard to appointment or proceeding should have been raised at the proper time, however, the Judgment Debtor has failed to raise objection even after entering into Arbitration proceeding as well as during proceeding filed u/s 34 of the Arbitration Act, hence the ploy of Judgment Debtor challenging the Arbitral Award at this stage is not proper and can be considered only as a ploy to linger the proceeding of Executing application.

Thus on the basis of aforesaid observation and discussion, I find that the contention so made by Judgment Debtor with regard to this part of objection questioning the jurisdiction of the Arbitrator is not maintainable, on the basis law as well as factual Matrix.

(3) LEGALITY OF ARBITRAL AWARD U/S 47 CPC:- In the light of observation made by this court with regard to objection as to jurisdiction of learned Arbitrator, this part of objection is not to be discussed in detail in as much as the same is not so relevant. Accordingly I find and hold that the petition bearing MCA no. 61 of 2023 does not holds merit accordingly the same stands disposed of as rejected. Let a report be called for from Nazir, Civil Court, Dumka with regard to attachment of the movable properties belonging to Judgement Debtor. Put up on 07-06-2024 for awaiting report.”

54. The executing court held that notice of arbitration proceeding was duly served upon the petitioners, who appeared through counsel before the learned arbitrator and willfully decided to abstain from participating in the proceeding. Such willful absence of the petitioners would not render the arbitral award to be an exparte award. It was held that if the petitioners had an objection with regard to the jurisdiction of the arbitrator, an application under section 16 of the Arbitration and Conciliation Act should have been filed, instead the petitioners sat idle

and waited for the award to be passed. It was also observed that the application challenging the maintainability of the execution case was filed only to delay the proceeding.

55. Challenging the order dated May 30, 2024, a Civil Revisional application was filed before the High Court at Ranchi being Civil Revision No.28 of 2024. Petitioner No.2 prayed for stay of the order and also the execution proceeding.

56. The petitioners urged before the Revisional Court that, an illegal proceeding was continuing and if the same was not stayed, the petitioners would suffer injustice and prejudice. It was also urged that the execution proceeding was contrary to the law and the same should be stayed. Considering the prayer for interim stay and the application as a whole, the revisional application was disposed of, upon holding that, because a challenge to the award was pending before the Calcutta High Court, the revisional Court was not inclined to consider the prayer for stay of the execution at that stage. Liberty was granted to the petitioners to move the High Court by filing a fresh application in aid of the prayer for stay of the arbitral award. The prayer of the learned advocate for an interim order restraining any coercive action till an appropriate application was filed before the court was also allowed. Thus, it appears to this Court that the High Court at Ranchi did not stay the execution case on the ground that a challenge to the award was pending and the same should be decided on the issues raised

therein, which included the issue of illegality of an arbitral award passed by a unilaterally appointed Arbitrator. Thus, it cannot be held that the issue of unilateral appointment rendering the award to be a nullity, was finally decided by the respective courts in the execution case.

57. Relevant portions of the order is quoted below:-

“Having heard the learned counsel for the petitioner, this Court is of the considered view that when already the petitioner has challenged the Arbitral Award before the Hon’ble Kolkata Court, which is still pending, it is not open to the petitioner to move an application before this Court for stay of the execution case. At this juncture, this Court is not inclined to interfere in the matter.

Liberty is reserved with the petitioner to move a fresh application before the Hon’ble Kolkata High Court where the Arbitral Award is under challenge.”

58. With regard to waiver to the applicability of the section 12(5) of the said Act, this Court is of the view that there was no such waiver. There was no express agreement between the parties by which the petitioners had agreed to waive their objections with regard to applicability of section 12(5) of the said Act. Section 12(5) of the said Act will apply to all arbitral proceedings commenced after October 23, 2015, even if the contract was executed earlier. Reference is made to ***Bharat Broadband (supra)***. The relevant paragraphs is quoted below:-

“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.”

59. In the decision of ***Ellora paper Mills Ltd. (supra)***, the Hon’ble Apex Court held as follows:-

**“19.** In the aforesaid decision in *Ajay Sales & Suppliers case* [*Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers*, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730] , this Court also negated the submission that as the contractor participated in the arbitration proceedings before the arbitrator therefore subsequently, he ought not to have approached the High Court for appointment of a fresh arbitrator under Section 11 of the Arbitration Act, 1996. After referring to the decision of this Court in *Bharat Broadband Network Ltd. v. United Telecoms Ltd.* [*Bharat Broadband Network Ltd. v. United Telecoms Ltd.*, (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] , it is observed and held in para 18 as under : (*Ajay Sales & Suppliers case* [*Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers*, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730] )

**“18.** Now so far as the submission on behalf of the petitioners that the respondents participated in the arbitration proceedings before the sole arbitrator — Chairman and therefore he ought not to have approached the High Court for appointment of arbitrator under Section 11 is concerned, the same has also no substance. As held by this Court in *Bharat Broadband Network* [*Bharat Broadband Network Ltd. v. United Telecoms Ltd.*, (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] there must be an “express agreement” in writing to satisfy the requirements of Section 12(5) proviso. In paras 15 & 20 it is observed and held as under : (SCC pp. 768 & 770-71)

‘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.

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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 a 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 [*Bharat Broadband Network Ltd. v. United Telecoms Ltd.*, 2017 SCC OnLine Del 11905] 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 [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 [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.’ ”

60. In the decision of **Sohan Minerals (supra)**, this Court held as follows:-

“15. The correspondence exchanged between the parties do not establish that the petitioner waived its objection by express agreement. Participation in the arbitration proceeding per se does not qualify as an express agreement in writing to waive the objection under Section 12(5) of the Act of 1996 by participating in the arbitration proceeding.

16. The appointment of the Arbitrator being de jure bad, is required to be declared as so. This, however, is not a reflection on the competence or the impartiality of the Arbitrator in any manner whatsoever.”

61. It is well settled that participation in an arbitral proceeding does not amount to waiver. Moreover in this case, the learned advocate submitted that, unless the subsequent loan agreement was handed over to the petitioner, the petitioner would not be in a position to either file their written statement or participate in the proceeding. Such participation will not amount to waiver as contemplated under the proviso to Section 12(5) of the said Act.

62. With regard to unilateral appointment, the Dispute Resolution Clause provides that a sole arbitrator shall be appointed by the Company. This provision is contrary to law and could not have been invoked, after the amendment of the said Act of 2015. The proper course of action should have been for the respondent to approach this court for appointment of an arbitrator under section 11(6) of the said Act. Section 12(5) and 8, 18 are quoted below:-

**“12(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”

**“8. Power to refer parties to arbitration where there is an arbitration agreement.—** (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:

[Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”

**“18. Equal treatment of parties.—**The parties shall be treated with equality and each party shall be given a full opportunity to present this case.”

63. Unilateral appointment is contrary to the concept of equal treatment of the parties in an arbitral proceeding and it operates from the very stage of the appointment of the arbitrator. The law provides that the parties can agree to settlement of the dispute through an alternative dispute redressal mechanism, but the tribunal constituted as per the agreement shall be independent and impartial. The

arbitrator can never be a chosen person of only one party. The said unilateral appointment is totally contrary to party autonomy. Each party has an equal role in the matter of appointment/nomination of the tribunal and parties must have confidence that the Arbitrator will not be biased. As the lender(respondent) and/or any of its officers was unable to act as an Arbitrator, the said respondent was disqualified by law from appointing an Arbitrator.

64. The relevant paragraphs of ***Perkins Eastman Architects DPC and Another vs. HSCC (India) Ltd.*** reported in **2019 SCC OnLine SC 1517** are quoted below:-

...“**20.** We thus have two categories of cases. The first, similar to the one dealt with in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an arbitrator on its own and it would always be available to

argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an arbitrator.

**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]

...

**24.** In Voestalpine [Voestalpine Schienen GmbH v. DMRC, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , this Court dealt with independence and impartiality of the arbitrator as under : (SCC pp. 687-88 & 690-91, paras 20 to 22 & 30)

“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* [*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* [Fouchard, Gaillard, Goldman on International Commercial Arbitration, 562 [Emmanuel Gaillard & John Savage (Eds.) 1999] {quoting Cour de cassation [Cass.] [Supreme Court for judicial matters] *Consorts Ury v. S.A. des Galeries Lafayette*, Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France)}.], 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.

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30. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by DMRC. It, therefore, becomes imperative to have a much broadbased panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. We, therefore, direct that DMRC shall prepare a broadbased panel on the aforesaid lines, within a period of two months from today...”

65. In the decision of ***Central Organisation for Railway Electrification vs. ECI SPIC SMO MCML (JV) A Joint Venture Company*** reported in **2024 SCC OnLine SC 3219**, the Hon’ble Apex Court considered the issues with regard to ineligibility of an arbitrator by operation of law under the amended Act of 1996. It was held that unilateral appointment of an arbitrator was violative of Section 18 of the said Act. The law mandated that the parties should be treated equally. The relevant paragraphs are quoted below:-

**“133.** Many PSUs are regularly involved in arbitration disputes and constantly need the services of arbitrators. Such institutions often maintain a pool of potential arbitrators with the sole object of having a ready pool of qualified professionals who have committed their time and consented to act as arbitrators for fixed fees. The Arbitration Act does not prohibit parties to an arbitration agreement from maintaining a curated panel of potential arbitrators. However, the problem arises when the PSUs

make it mandatory for other parties to select their nominees from the curated panel of arbitrators. When a PSU exercises its discretion to curate a panel, the very factor that the PSU is choosing only a certain number of persons as potential arbitrators and not others will raise a reasonable doubt in the mind of a fair-minded person. The PSUs may conceivably have nominated a person on the panel of potential arbitrators because they have a certain predisposition in favour of the former. This doubt is reinforced when the other party is given no choice but to select its arbitrator from the curated panel.

**134.** In *CORE* (supra), the three-member tribunal was sought to be constituted in the following manner : (i) the Railways would suggest at least four names of retired railway officers; (ii) the contractor would select two names out of the panel for appointment as their arbitrator; (iii) The General Manager (of the Railways) would thereafter choose at least one person out of the two to be appointed as the contractor's arbitrator; and (iv) The General Manager would proceed to appoint the balance arbitrators from the panel or outside the panel and also indicate the presiding arbitrator.

**135.** Such an arbitrator-appointment clause is likely to give rise to justifiable doubts as to the independence and impartiality of arbitrators for two reasons : (i) the contractor is restricted to choosing its arbitrator from the panel of four arbitrators nominated by the party who is a disputant; and (ii) the contractor's choice is further constrained because it is made subject to the decision of the General Manager who will choose one among the two persons suggested by the party. Since the contractor has to select its arbitrator from a curated panel, the arbitration clause does not allow the contractor equal participation in the appointment of their arbitrator. Moreover, the clause allows the General Manager to appoint the balance arbitrators from either the panel or outside the panel. Thus, the process of appointing the arbitrators is unequal because the General Manager can go beyond the panel of four potential

arbitrators, while the contractor is bound by the names enlisted in the panel.

**136.** In a three-member tribunal, the independence and impartiality of a third or presiding arbitrator are prerequisites to the integrity of the arbitral proceedings. In *CORE* (supra), the arbitration clause allowed the General Manager to unilaterally nominate the presiding officer out of the panel of three arbitrators. The clause does not countenance any participation from the contractor in the process of appointing or nominating the presiding officer. Thus, the process of appointing and nominating the presiding officer is unequal and prejudiced in favour of the Railways. The fact that the General Manager is nominating the presiding officer gives rise to a reasonable doubt about the independence and impartiality of the entire arbitration proceedings.

**137.** Given the above discussion, it needs reiteration that the Arbitration Act does not prohibit PSUs from empanelling potential arbitrators. However, an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by PSUs. The PSUs can give a choice to the other party to select its arbitrators from the curated list provided the other party expressly waives the applicability of the *nemo iudex* rule.”

In paragraph 169 of the majority view, the Hon’ble Apex Court concluded thus:-

“**169.** In view of the above discussion, we conclude that:

- a. The principle of equal treatment of parties applies at all stages of arbitration proceedings, including the stage of appointment of arbitrators ;
- b. The Arbitration Act does not prohibit PSUs from empanelling potential arbitrators. However, an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by PSUs;

- c. A clause that allows one party to unilaterally appoint a sole arbitrator gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further, such a unilateral clause is exclusive and hinders equal participation of the other party in the appointment process of arbitrators;
- d. In the appointment of a three-member panel, mandating the other party to select its arbitrator from a curated panel of potential arbitrators is against the principle of equal treatment of parties. In this situation, there is no effective counterbalance because parties do not participate equally in the process of appointing arbitrators. The process of appointing arbitrators in CORE (supra) is unequal and prejudiced in favour of the Railways;
- e. Unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution ;
- f. The principle of express waiver contained under the proviso to Section 12(5) also applies to situations where the parties seek to waive the allegation of bias against an arbitrator appointed unilaterally by one of the parties. After the disputes have arisen, the parties can determine whether there is a necessity to waive the nemo iudex rule; and
- g. The law laid down in the present reference will apply prospectively to arbitrator appointments to be made after the date of this judgment. This direction applies to three-member tribunals.

170. The reference is answered in the above terms.

171. Pending application(s), if any, shall stand disposed of.”

66. In the decision of ***Proddatur Cable TV Digi Services v. Siti Cable Network Ltd.***, reported in **2020 SCC OnLine Del 350**, the Delhi High Court held as follows:-

**“25.** Insofar as the reliance by the respondent on the judgments permitting unilateral appointment by the Authority designate of one party to the agreement is concerned, in my view, the same will have no relevance in view of the judgment of the Supreme Court in the case of *Perkins* (supra). The argument of the respondent that in the Arbitration Clause before the Supreme Court in the case of *Perkins* was with regard to the power of a Managing Director to appoint an Arbitrator whereas in the present case it is the Company only merits rejection. First and foremost, one has to see the rationale and the reasoning behind the judgment in the case of *Perkins* (supra). The Supreme Court held that the Managing Director was ineligible from appointing an Arbitrator on the simple logic that a Managing Director of a Company would always have an interest in the outcome of the arbitration proceedings. The interest in this context takes the shape of bias and partiality. As a natural corollary, if the Managing Director suffers this disability, even if he was to appoint another person as an Arbitrator, the thread of biasness, partiality and interest in the outcome of the dispute would continue to run. Seen in this light, it can hardly be argued that the judgment in *Perkins* (supra) will not apply only because the designated Authority empowered to appoint an Arbitrator is other than a Managing Director. Moreover, as brought out by the respondent itself, Company here is run by the Board of Directors. The ‘Board of Directors’ is defined in Section 2(10) of the Companies Act, 2013 as under:

*“2(10) “Board of Directors” or “Board”, in relation to a company, means the collective body of the directors of the company.”*

**26.** Thus, the Company is run none other than the Directors collectively. Duties of the Directors have been stipulated in Section 166 of the Companies Act, 2013. A bare perusal of the duties clearly reveals that the Director at all times, has to act in good faith to promote the objects of the Company and in the best interest of the Company, its employees and the shareholders. A Director shall not involve in a situation in which he may have a direct or an indirect interest that conflicts or possibly may conflict with the interest of the Company. It goes without saying that the Directors of the

Company as a part of the Board of the Directors would be interested in the outcome of the Arbitration proceedings. The Company therefore, acting through its Board of Directors would suffer the ineligibility under Section 12(5) read with Schedule VII of the Act. The same ineligibility would also apply to any person appointed by the said Company. Thus, in my view, for the purposes of Section 11(6) and Section 12(5) read with Schedule VII, there cannot be a distinction based on the appointing authority being a Company.”

67. In the decision of ***Chennai Metro Rail Ltd. v. Transtonnelstroy Afcons (JV) and Anr.***, reported in **(2024) 6 SCC 211**, the Hon’ble Apex Court held as follows:-

**“33.** The decisions in *HRD* [*HRD Corpn. v. GAIL*, (2018) 12 SCC 471 : (2018) 5 SCC (Civ) 401] and *Bharat Broadband* [*Bharat Broadband Network Ltd. v. United Telecoms Ltd.*, (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] are unequivocal and to the effect that the issue of bias should be raised before the same Tribunal at the earliest opportunity. The advertence of the time-limit of 15 days is nothing but a statutory incorporation of that idea. However, when the grounds enumerated in the Seventh Schedule occur or are brought to the notice of one party unless such party expressly waives its objections, it is ipso facto sufficient for that party, to say that the Tribunal's mandate is automatically terminated. The party aggrieved then can go ahead and challenge the Tribunal's continuation with the proceedings under Section 14.”

68. Thus, when the arbitrator was de jure unable to perform, he did not have a mandate. Hence the petitioners did not continue to participate. The petitioners did not challenge the proceeding on such ground before the said Arbitrator, but nothing prevents the petitioners from challenging the award on the ground of nullity.

69. Under such circumstances, the application is entertained by the Court, and the impugned award is set aside on the ground of lack of

mandate of the learned Arbitrator to adjudicate the dispute. The award is a nullity as the constitution of the tribunal was contrary to law and in disregard to the decisions of the Hon'ble Apex Court. The award is opposed to public policy, inasmuch as, the Arbitrator was de jure unable to act as the adjudicator. Unilateral appointment of an arbitrator is violative of principles of natural justice and offends the very concept of just and fair treatment of the parties in the proceeding. The award is also hit by the doctrine of bias. Bias also constitutes a reasonable apprehension that the Arbitrator, who was chosen by the respondent, would not decide the dispute independently. Likelihood of bias or reasonable apprehension of bias, also vitiates the award.

70. The application is allowed.

71. There shall be, however, no order as to costs.

(i) Urgent certified website copies of this judgment, if applied for, be supplied to the parties expeditiously on compliance with the usual formalities.

**( Shampa Sarkar, J. )**