



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION NO.320 OF 2024

1. Manmohan Bhimsen Goyal
2. Kavita Manmohan Goyal

...Petitioners

V/s.

Madhuban Motors Pvt. Ltd.

...Respondent

Mr. Dharam Juman with *Mr. Ketan Parekh & Mr. Mihir Nerurkar i/b. M/s. K.R. Parekh & Co. for the Petitioners.*

Mr. Mutahhar Khan with *Mr. Chandrajit Das & Mr. P.R. Hariharan i/b. M/s. Parinam Law Associates for the Respondent.*

CORAM: SANDEEP V. MARNE, J.

JUDGMENT RESERVED ON: 15 DECEMBER 2025.
JUDGMENT PRONOUNCED ON: 23 DECEMBER 2025.

JUDGMENT:

1) By this Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**), Petitioners challenge Award dated 18 March 2024 passed by the learned sole Arbitrator. By the impugned Award, the learned Arbitrator has allowed the claim of the Respondent in the sum of Rs.1,26,46,303/- under Loan Agreement dated 1 November 2014 alongwith interest @ 12% per annum from the date of filing of Statement of Claim i.e. 21 April 2017 till the date of

actual payment. The Arbitral Tribunal has also awarded costs of arbitration in the sum of Rs.30,000/- in favour of the Respondent.

2) The Respondent- M/s. Madhuban Motors Pvt. Ltd. is an incorporated entity engaged *inter alia* in the business of sales and services of Toyota branded motor vehicles. In or about 2014, the dealership run by the Respondent set up a new division viz. Madhuban Travels. Petitioner No.1 Manmohan Goyal is the former vice president of the travel division of the Respondent. Petitioner No.2 is the wife of Petitioner No.1. Petitioner No.1 approached the Respondent for taking over his travel business run in the name and style as 'M/s. Geetee Travels Pvt.Ltd.'. The Respondent agreed to take over Petitioners' fleet of vehicles. Petitioner No.1 was appointed as vice president of Madhuban Travels. Petitioner No.1 was in need of loan facility. The Respondent advanced loan of Rs.2,50,00,000/- to Petitioner No.1, who executed Loan Agreement dated 1 November 2014 in favour of the Respondent. The loan was secured by personal guarantee of Petitioner No.2. For generation of funds, Petitioner No.1 entered into Agreement for Sale with the Respondent in respect of office Nos.503-504 and 505-506 in the building named as 'Aditya Heritage' at Andheri (East), Mumbai.

3) Disputes arose between the parties and the Respondent called upon Petitioner No.1 to repay the outstanding loan amount with interest. In July 2015, the Respondent sought to press into service the two Agreements for Sale and accordingly the Respondent and Petitioner No.1 entered into deeds of transfer in respect of two sets of office premises for the purpose of adjusting the same towards

repayment of loan. After giving credit for the value of the said office premises, the loan amount due and payable was reduced to Rs.95,27,080/-. Petitioner No.1 apparently did not repay the outstanding amount, which rose to Rs.1,26,46,303/- by 7 January 2017. On 6 February 2017 the Respondent invoked arbitration clause of the Loan Agreement and appointed the learned sole Arbitrator. There is dispute between the parties as to whether Petitioners consented for nomination of the learned sole Arbitrator, which is the main subject matter of controversy between the parties. The Respondent filed Statement of Claim. In addition to opposing the claim of the Respondent, Petitioners filed counterclaim claiming various amounts from the Respondent. The Respondent filed application under Section 16 of the Arbitration Act, which was allowed by the Arbitral Tribunal and the counterclaim was held to be outside the jurisdiction of the arbitral reference. Petitioners challenged the order passed under Section 16 of the Arbitration Act by filing Commercial Arbitration Petition No.1036 of 2019, which was dismissed as withdrawn by order dated 10 December 2019. Based on the pleadings in the Statement of Claim and Statement of Defence, the Arbitral Tribunal framed issues. Parties led evidence in support of their respective cases.

4) The Arbitral Tribunal has made Award dated 18 March 2024 allowing the claim of the Respondent in the sum of Rs.1,26,46,303/- alongwith interest @12% p.a. from the date of filing of Statement of Claim. The Arbitral Tribunal has also awarded costs of Rs.30,000/- in favour of the Respondent. Aggrieved by the Award

dated 18 March 2024, Petitioners have filed the present Petition under Section 34 of the Arbitration Act.

5) Mr. Jumani, the learned counsel appearing for the Petitioners has raised a singular objection of arbitrator's unilateral appointment. He would submit that the arbitration clause permitted nomination of the arbitrator by the lender alone and in exercise of the said clause, the Respondent has unilaterally appointed the learned sole Arbitrator. That after receipt of email from the learned Arbitrator, the Advocate for the Petitioners had sought time for taking instructions on the issue of his nomination. Again, during meeting on 8 March 2017, the Advocate for the Petitioners had specifically informed the learned Arbitrator that instructions were awaited regarding his nomination. That on 14 March 2017, the learned Arbitrator had recorded non-receipt of any instructions relating to nomination of the learned sole Arbitrator. That Petitioners never gave consent for nomination of the learned sole Arbitrator and in absence of consent of the Petitioners, the learned Arbitrator erroneously proceeded ahead with the arbitral proceedings.

6) Mr. Jumani would further submit that since appointment of the learned sole Arbitrator was unilaterally done, the Award is liable to be set aside. That mere participation by Petitioners in arbitral proceedings or filing of statement of defence/counterclaim does not disentitle the Petitioners from challenging the Award on the ground of unilateral appointment of the learned Arbitrator. Objection of the unilateral appointment of the learned Arbitrator can be taken for the first time under Section 34 Petition without raising the same before the

learned Arbitrator. In support of his contentions, he would rely upon following judgments:

- (i) *Perkins Eastman Architects DPC V/s. HSCC India Ltd.*¹
- (ii) *Bharat Broadband Network Ltd. V/s. United Telecoms Ltd.*²
- (iii) *Naresh Kanayalal Rajwani and Others V/s. Kotak Mahindra Bank Limited and Another*³
- (iv) *Hanuman Motors Private Limited Vs. Tata Motors Finance Ltd.*⁴
- (v) *RIAK Insurance and Financial Services V/s. HDFC Bank Ltd.*⁵
- (vi) *Govind Singh V/s. Satya Group Pvt. Ltd.*⁶
- (vii) *Lite Bite Foods Pvt. Ltd. V/s. Airports Authority of India*⁷

7) Mr. Jumaní would further submit that in *Bharat Broadband Network Ltd.* (supra) the Apex Court has held that what is required under Section 12(5) of the Arbitration Act is express agreement in writing and that mere filing of Statement of Claim did not amount to express agreement in writing. He would submit that provisions under Sections 4, 7, 12, 13 or 16 have been interpreted by the Hon'ble Apex Court as not diluting mandatory requirement under Section 12(5) of the Arbitration Act. He would also rely upon judgment of Constitution Bench in *Central Organisation for Railway Electrification V/s. ECI SPIC SMO MCML (JV) A Joint Venture Company*⁸ in support of his contention that the view taken in *Bharat Broadband Network Ltd.* (supra) has been confirmed. He would rely upon judgment of Delhi High Court in *Siddhartha Construction Co. V/s. India Tourism Development Corporation and Another*⁹ in support

¹ (2020) 20 SCC 760

² (2019) 5 SCC 755

³ Com. Arb. Petition (L) No.1444 of 2019, decided on 23 November 2020

⁴ 2023 SCC OnLine Bom 523

⁵ 2024 SCC OnLine Bom 982

⁶ 2023 SCC OnLine Del 37

⁷ Com. Arb. Application (L) No.495 of 2019, decided on 4 December 2019

⁸ (2025) 4 SCC 641

⁹ 2025 SCC OnLine Del 2159

of his contention that Award has been set aside by the Delhi High Court on the ground of unilateral appointment holding that mere participation in arbitral proceedings does not amount to express waiver in writing. He would also rely upon judgment of Delhi High Court in ***Mahavir Prasad Gupta and Sons V/s. Govt. of NCT of Delhi***¹⁰ in support of his contention that consent given by the Petitioner before the Arbitrator, which was recorded in one of the arbitral orders is held to be inconsequential. The judgment is also relied upon in support of the contention that unilateral appointment of the Arbitrator can be set aside even in absence of objections being raised in Section 34 Petition.

8) Lastly, Mr. Jumaní would rely upon judgment of Delhi High Court in ***M/s. Satya Parkash and Brothers (P) Ltd. V/s. Union of India***¹¹ in support of his contention that unilateral appointment can be held to be invalid even in absence of any objection under Section 34 of the Arbitration Act. He would also rely upon judgment of this Court in ***Ravi Raghunath Khanjode and Ors. V/s. Harasiddh Corporation***¹² in support of contention that patent illegality can be found by the Court in the arbitral award in absence of a pleaded ground. He would accordingly pray for setting aside the impugned Award.

9) Mr. Khan, the learned counsel appearing for the Respondent would oppose the Petition submitting that the objection of unilateral appointment of Arbitrator is raised by way of an afterthought since the Petitioners had expressly consented for appointment of the learned sole Arbitrator. He would rely upon correspondence between the parties to demonstrate that there was agreement by Petitioners to

¹⁰ 2025 SCC OnLine Del 4241

¹¹ FAO(COMM) 80/2025 decided on 4 August 2025

¹² Arbitration Petition No.95 of 2024, decided on 19 November 2025.

the appointment of the learned sole Arbitrator. He would submit that the learned Arbitrator has himself recorded consent of the Petitioners and in the light of this position, an objection of absence of consent cannot be entertained in absence of specific pleadings to that effect in the Arbitration Petition. That in the present case, Petitioners have wrongfully raised the objection of unilateral appointment of Arbitrator or absence of consent. He would further submit that the Petitioners had also filed counterclaim before the very same learned Arbitrator thereby expressly acquiescing in his appointment. He would further submit that on two occasions, extension of mandate was applied before this Court, in which again consent of parties to extension of mandate of the Arbitrator was recorded. That the case thus involves complete relinquishment /waiver of any objection to the appointment the learned Arbitrator. Mr. Khan would place reliance on judgment of Division Bench of this Court in ***Mr. R.B. Krishnani V/s. M/s. STEM Water Distribution and Infrastructure Com. Pvt. Ltd.***¹³ in support of his contention that even conduct of participation in arbitration proceedings can be construed as waiver under Section 12(5) of the Arbitration Act. He would also rely upon judgments of this Court in ***Truly Pest Solution Private Limited (Being A MSME) V/s. Principal Chief Mechanical Engineering (P.C.M.E.), Central Railway***¹⁴ and ***MPD Associates Pvt. Ltd. V/s. Angel Broking Ltd. and Anr.***¹⁵ in support of his contention that a ground, which is not raised in an application under Section 16 of the Arbitration Act, cannot be permitted to be raised before the Court under Section 34 of the Arbitration Act. Mr. Khan has sought to rely upon judgments of this

¹³ Commercial Arbitration Appeal No.8 of 2023, decided on 21 April 2025.

¹⁴ 2024 SCCO nLine Bom 3528

¹⁵ Arbitration Petition No.1634 of 2014 decided on 2 December 2025.

Court in *Patel Engineering Company Ltd. V/s. Konkan Railway Corporation Ltd.*¹⁶ and *Ashesh Busa V/s. Atul Gandhi*¹⁷ in support of his contention that Petitioners cannot be permitted to orally raise the objection of unilateral appointment of Arbitrator in absence of pleadings in the Petition. Mr. Khan would accordingly pray for dismissal of the Petition.

10) Rival contentions of the parties now fall for my consideration.

11) The sole objection raised to the validity of impugned arbitral Award dated 18 March 2024 is unilateral appointment of the Arbitrator. According to Petitioner, the Arbitrator of choice is appointed by the Respondent, who alone had the power of appointment under the Loan Agreement and that therefore the award is liable to be set aside. Therefore, it is necessary to examine the arbitration clause in the Agreement. In the Loan Agreement dated 1 November 2014, clause 10.2(i) reads thus:

10. GOVERNING LAW AND ARBITRATION

xxx

10.2 Arbitration

(i) Any dispute, controversy, claim, breach or difference (including as to whether such dispute or difference has arisen) arising out of or in relation to this Agreement including any dispute as to the existence or validity of this Agreement shall be referred for arbitration to a Sole Arbitrator to be appointed by the Lender.

¹⁶ (2009) 5 Bom CR 256

¹⁷ 2019 SCC OnLine Bom 1102

12) Thus, the Respondent was empowered to nominate the Sole Arbitrator under clause 10.2(i) of the Loan Agreement. When disputes arose between the parties, arbitration clause was invoked by the Respondent vide Advocate's notice dated 6 February 2017. Paragraph 7 of the Advocate's notice reads thus:-

7. Further as a result of non-compliance of the above mentioned notice and since all the attempts by our Client to amicably resolve the matter have failed, disputes have arisen between our Client, the Borrower and the Guarantor. Our Client is compelled to exercise its rights under clause 10.2 of the Loan Agreement vide which all disputes in connection with the Loan Agreement shall be referred to arbitration. In pursuance of the rights of our Client under clause 10.2(i) of the Loan Agreement, **our Client hereby nominates Advocate Ranjeev P. Carvalho to be the Sole Arbitrator to resolve the current disputes between you i.e. the Borrower and the Guarantor and our Client.**

(emphasis added)

13) While invoking the arbitration clause vide notice dated 6 February 2017, the Arbitrator was also nominated by the Respondent. Copy of the said letter was addressed to learned sole Arbitrator.

14) It appears that by a separate letter dated 22 February 2016 Advocate for the Respondent informed the learned Arbitrator about his nomination. Accordingly, the learned sole Arbitrator proceeded to fix the preliminary meeting on 8 March 2017. The minutes of meeting dated 8 March 2017 indicates that Petitioners' Advocate had telephonically informed the learned Arbitrator on 3 March 2017 that he was awaiting instructions from his clients *inter alia* with regard to his appointment as Arbitrator. Relevant portion of the email of the learned Arbitrator recording the minutes, reads thus:

By a letter dated 22 February 2016, I have been informed by the Advocates for the Claimants that the disputed and differences arising out of a Loan Agreement dated 1 November 2014 entered into between the parties.

Pursuant thereto, Mr. Parekh, Ld. Advocate for the proposed Respondents, telephonically informed me on 3rd March 2017 that he was awaiting instruction from his clients, first as to whether they were agreeable to having their disputes referred to arbitration and secondly as to whether his clients were agreeable to my nomination as arbitrator.

In these circumstances, subject to Mr. Parekh obtaining instructions as aforesaid, you are requested to attend a preliminary meeting on 08 March 2017 at 5:30 pm in the chambers of Dr. Birendra Saraf, 302 Oval House, British Hotel Lane, off Nagindas Master Road, Fort Mumbai- 400 023, when preliminary directions would be issued in the matter.

You are requested to kindly file a letter of authority on behalf of your clients authorizing you to represent your respective clients in the arbitration proceedings.

15) Next preliminary meeting was conducted on 10 March 2017 and on account of non-appearance on behalf of the Petitioners the preliminary hearing was deferred to 14 March 2017.

16) On 14 March 2017 again, Advocate appearing for the Petitioners telephonically informed the learned Arbitrator that process of obtaining instructions from his clients was still underway. Minutes of the meeting dated 14 March 2017 read thus:-

1. Further to my email dated 3 March 2017, a preliminary meeting in the aforesaid matter was held on **8 March 2017** at 5.00 p.m. in the Chambers of Dr. Birendra Saraf, 302 Oval House, Fort, Mumbai. AT the said time, Ms. Pooja Tidke and Ms. Pooja Tated instructed by M/s. ALMT Legal, appeared on behalf of the proposed Claimants. None appeared on behalf of the proposed Respondents. **Mr. Ketan Parekh, Ld. Advocate appearing on behalf of the Respondents, telephonically informed that he was in the process of obtaining instructions from clients.**

2. In these circumstances and with a view to avoid unnecessary controversy and to expedite the arbitral proceedings, the preliminary meeting was deferred to 14th March 2017 at 5.15 p.m. in the Chambers of Dr. Birendra Saraf, 302 Oval House, Fort, Mumbai for the purpose of preliminary directions. An email dated 10 March to that effect, intimating the parties of the deferred date of the preliminary meeting was sent and duly received by the Advocates appearing for both parties. As reflected in the appearance above, at the said time, Ms. Pooja Tated instructed by M/s. ALMT Legal, appeared on behalf of the proposed Claimants. Once again, none appeared for the Respondents. **Mr. Ketan Parekh, Ld. Advocate appearing on behalf of the Respondents, telephonically informed that he had not received any instructions from his clients.**

(emphasis added)

Accordingly, the learned Arbitrator proceeded to issue directions for filing of the pleadings in the meeting held on 14 March 2017.

17) It appears that Petitioners participated in the arbitral proceedings and filed statement of defence to the statement of claim filed by the Respondent. Additionally, Petitioners also filed a counterclaim against the Respondent claiming various amounts aggregating Rs.62 crores. Thus, there is no dispute to the position that Petitioners have participated in the arbitration proceedings by filing their statement of defence as well as counterclaim and thereby did not question unilateral appointment of the learned Arbitrator. As observed above, the counterclaim filed by the Petitioners was rejected as outside the scope of arbitral reference by the learned sole Arbitrator in application under Section 16 of the Arbitration Act by Respondent, which order has not been disturbed by this Court. Petitioners thereafter continued participating in arbitral proceedings and led evidence.

18) It is only after the arbitral award is made that the Petitioners have sought to raise the issue of unilateral appointment of the learned Arbitrator. Here again, the ground of unilateral appointment of the learned Arbitrator is not specifically raised in the grounds of the present Petition. For ready reference, the pleaded grounds in the Petition are extracted below:-

A. The Award passed by the Arbitral Tribunal is against the evidence on record and requires to be set aside.

B. The Award is arbitrary, unjust, illegal, unreasoned, contrary to settled law and ignores the documents on record.

C. The Award fails to correctly consider the documents on record.

D. The Award is completely unreasoned on the aspects of other Agreements executed between the parties.

E. The Arbitral Tribunal though has recorded the submissions of the parties, on the aspects of other Agreements executed between the parties, no findings are arrived at in that regard.

F. The Arbitral Tribunal has completely misread, misconstrued and misunderstood the entire transactions between the parties.

G. The Award passed by the Arbitral Tribunal is in contravention with the fundamental policy of Indian law, it is against the provisions of Indian Contract Act and therefore, requires to be set aside.

H. The Award passed by the Arbitral Tribunal is in contravention of the contract between the Petitioners and the Respondents, by not taking into account the other agreements which are supplementary and/or consequential agreement to the main agreement between the parties. In fact the loan agreements were in consequence of the main MOU signed by the parties.

I. The Arbitral Tribunal ought not to have permitted the claims based on mere furnishing of a "note" styled as ledger chart explaining the discrepancies in the claim of the Respondent.

J. The said note was nothing but an attempt to improve upon the lacunas in the cross examinations of respondents Witness.

K. The Arbitral Tribunal having taken the "note" on record, ought to have granted an opportunity to the Petitioners to deal with the same.

L. The Arbitral Tribunal ought to have directed the Respondent to amend, modify, alter the claim.

M. It is respectfully submitted that on admitted dispensaries in the amounts claimed by the Respondent, the Arbitral Tribunal should not have proceeded to render the Award without necessary pleadings.

N. The Arbitral Tribunal ought to have considered both references together as common issues arise in both references. In effect the Arbitral Tribunal has even considered claims in the second reference in the Award. This is seriously prejudicial to the Petitioners.

O. The Arbitral Tribunal ought to have appreciated that the Respondents had already enforced the security in their favour.

P. It is respectfully submitted that, the Award is contrary to Section 31(3) of the Arbitration and Conciliation Act, 1996.

Q. The Award is thus completely unreasoned and fails to deal with issues within the scope of reference.

R. The Arbitral Tribunal gave over weightage to the so called admission of Petitioners rather than appreciating that it was for the Respondents to first prove their own case.

S. The Arbitral Tribunal ought to have appreciated no evidence was given by the persons who had signed the said documents but merely an Chief Accountant was examined who had no personal knowledge of the understanding between the parties.

T. It is submitted that the Award is perverse inasmuch as the material on record has been ignored before passing the Impugned Award;

U. It is submitted that the Award suffers from various infirmities and is liable to be and ought to be quashed and/or set aside;

V. It is submitted that the Award arbitrary and contrary to settled principles of justice, equity and good conscience.

W. It is respectfully submitted that the Arbitral Tribunal has been swayed by the case of the Respondent.

Thus, the objection of unilateral appointment of arbitrator is not specifically pleaded in the Petition. In the light of the factual position, I proceed to examine the law about effect of unilateral appointment of arbitrator on the award, how the objection can be waived, stage at which the objection can be raised and whether the Court can entertain the same in absence of pleadings.

19) Section 12 of the Arbitration Act deals with grounds for challenge of Arbitrator. Sub-section (5) has been inserted in Section 12 by the 2015 Amendment Act, which provides for ineligibility of a person to act as an arbitrator. Sub-section (5) of Section 12 provides thus:-

Section 12 Grounds for challenge

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

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

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

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

(3) An arbitrator may be challenged only if—

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

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

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

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

(emphasis added)

20) Thus, a person whose relationship falls in any of the categories specified in seventh schedule becomes ineligible to be appointed as an Arbitrator. However, it is open to the parties to waive applicability of objection under Section 12(5) by express agreement in writing.

21) The leading judgment on issue of unilateral appointment of Arbitrator is *TRF Ltd. V/s. Energo Engineering Projects Ltd.*¹⁸ which has been followed by the Apex Court in *Perkins Eastman Architects DPC* (supra). The Apex Court in *Perkins Eastman Architects DPC* has dealt with two categories of cases where the employee himself is named as arbitrator and where the employee is empowered to appoint other person of his choice as the arbitrator. It is held that a person having an interest in the dispute or in the outcome thereof, is ineligible not only to act as an Arbitrator, but, is also

¹⁸ CIVIL APPEAL NO. 5306 OF 2017 decided on 3 July 2017

rendered ineligible to appoint anyone else as an Arbitrator It is held thus:

“20. We thus have two categories of cases. **The first, similar to the one dealt with in TRF Limited 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 Limited, 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 Limited. Paragraph 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 (Act 3 of 2016) and recognised by the decision of this Court in *TRF Limited*.”

(emphasis added)

22) In *Bharat Broadband Network Ltd.* (supra) two issues were involved before the Hon'ble Apex Court viz. (i) bar for a person appointing Arbitrator from raising the plea that the Arbitrator was incapable of arbitrating and (ii) the effect of the expression '*express agreement in writing*' appearing in proviso to Section 12(5) of the Act. In case before the Apex Court, the Respondent therein invoked arbitration and called upon the Appellant to appoint an impartial arbitrator. In response, the Appellant therein appointed one Mr. Khan as the Arbitrator. Since the Apex Court in *TRF Ltd.* (supra) has ruled that a party cannot himself appoint an arbitrator, the Appellant sought withdrawal of Mr. Khan as Arbitrator. The Appellant filed application before Delhi High Court, which was dismissed holding that person appointing Arbitrator was estopped from challenging the appointment and that filing of Statement of Claim by him, without reservation, amounted to express agreement in writing and waiver of the applicability of Section 12(5) of the Act. However, the Apex Court in paragraph 15 of the Judgment held that the waiver under Section 12(5) of the Arbitration Act could only be by way of express agreement in writing. Though the Appellant itself had appointed arbitrator, and filed statement of claim before him, the Apex Court still held that the

arbitrator was ineligible. The Apex Court thereafter dealt with Section 12(5) of the Arbitration Act and held that, unlike Section 4 envisaging waiver by conduct, Section 12(5) connotes an express agreement in writing. The Apex Court rejected the proposition that party, by conduct, can waive the right to object to the unilateral appointment of the arbitrator. The Apex Court further held mere filing of statement of claim by the Appellant did not amount to express agreement in writing. The Apex Court held in paragraphs 18 to 20 and 23 as under:

18. On the facts of the present case, it is clear that the Managing Director of the appellant could not have acted as an arbitrator himself, being rendered ineligible to act as arbitrator under Item 5 of the Seventh Schedule, which reads as under:

“Arbitrator’s relationship with the parties or counsel

xxx xxx xxx

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration”

Whether such ineligible person could himself appoint another arbitrator was only made clear by this Court’s judgment in TRF Ltd. (supra) on 03.07.2017, **this Court holding that an appointment made by an ineligible person is itself void ab initio**. Thus, it was only on 03.07.2017, that it became clear beyond doubt that the appointment of Shri Khan would be void ab initio. **Since such appointment goes to “eligibility”, i.e., to the root of the matter, it is obvious that Shri Khan’s appointment would be void**. There is no doubt in this case that disputes arose only after the introduction of Section 12(5) into the statute book, and Shri Khan was appointed long after 23.10.2015. The judgment in TRF Ltd. (supra) nowhere states that it will apply only prospectively, i.e., the appointments that have been made of persons such as Shri Khan would be valid if made before the date of the judgment. Section 26 of the Amendment Act, 2015 makes it clear that the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after 23.10.2015. Indeed, the judgment itself set aside the order appointing the arbitrator, which was an order dated 27.01.2016, by which the Managing Director of the respondent nominated a former Judge of this Court as sole arbitrator in terms of clause 33(d) of the Purchase Order dated 10.05.2014. It will be noticed that the facts in the present case are somewhat similar. The APO itself is of the year 2014, whereas the

appointment by the Managing Director is after the Amendment Act, 2015, just as in the case of TRF Ltd. (supra). Considering that the appointment in the case of TRF Ltd. (supra) of a retired Judge of this Court was set aside as being non-est in law, the appointment of Shri Khan in the present case must follow suit.

19. However, the learned Senior Advocate appearing on behalf of the respondent has argued that Section 12(4) would bar the appellant's application before the Court. Section 12(4) will only apply when a challenge is made to an arbitrator, inter alia, by the same party who has appointed such arbitrator. This then refers to the challenge procedure set out in Section 13 of the Act. Section 12(4) has no applicability to an application made to the Court under Section 14(2) to determine whether the mandate of an arbitrator has terminated as he has, in law, become unable to perform his functions because he is ineligible to be appointed as such under Section 12(5) of the Act.

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

"9. Promises, express and implied.—In so far as a proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."

It is thus necessary that there be an "express" agreement in writing. **This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him** to continue as such. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court as indicating an express agreement on the facts of the case is dated 17.01.2017. On this date, the Managing Director of the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12(5) read with the

Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as an arbitrator. Shri Khan's invalid appointment only became clear after the declaration of the law by the Supreme Court in TRF Ltd. (supra) which, as we have seen hereinabove, was only on 03.07.2017. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an application on 07.10.2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in TRF Ltd. (supra) and asking him to declare that he has become de jure incapable of acting as an arbitrator. **Equally, the fact that a statement of claim may have been filed before the arbitrator, would not mean that there is an express agreement in words which would make it clear that both parties wish Shri Khan to continue as arbitrator despite being ineligible to act as such.** This being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2), and Section 16(2) of the Act to the facts of the present case, and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator. The judgment under appeal is also incorrect in stating that there is an express waiver in writing from the fact that an appointment letter has been issued by the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate.

xxx

23. Vide order dated 25.01.2018, we had issued notice in the Special Leave Petition as well as notice on the interim relief prayed for by the appellant. Since there was no order of stay, the arbitral proceedings continued even after the date of the impugned judgment, i.e., 22.11.2017, and culminated in two awards dated 11.07.2018 and 12.07.2018. We have been informed that the aforesaid awards have been challenged by the appellant by applications under Section 34 of the Act, in which certain interim orders have been passed by the Single Judge of the High Court of Delhi. **These awards, being subject to the result of this petition, are set aside. Consequently, the appellant's Section 34 proceedings have been rendered infructuous.** It will be open to the appellant to approach the High Court of Delhi to reclaim the deposit amounts that have been made in pursuance of the interim orders passed in the Section 34 petition filed in the High Court of Delhi.

(emphasis added)

23) Thus, in *Bharat Broadband Network Ltd.* (supra) the Apex Court has held that even a party appointing ineligible Arbitrator can challenge the appointment. It is further held that mere act of making the appointment of an ineligible Arbitrator did not amount to agreement for waiver in writing. The Apex Court has further held that mere participation in arbitral proceedings by filing statement of claim /defence did not amount to express agreement in writing within the meaning of proviso to Section 12(5) of the Arbitration Act. The Apex Court further held that provisions of Sections 4, 7, 12(4), 13(2) and 16(2) of the Arbitration Act do not dilute the requirement of express agreement in writing under proviso to Section 12(5) of the Arbitration Act.

24) Since the principle of non-waiver by person himself appointing arbitrator is discussed in the preceding paragraph, it would also be apposite to make a quick reference to the judgment of Division Bench of Delhi High Court in *Mahavir Prasad Gupta* (supra). The principle of party appointing arbitrator objecting to his own appointment on the ground of unilateral appointment is also recognised by the Division Bench judgment of Delhi High Court in *Mahavir Prasad Gupta* in which it is held thus:

83. Although it appears disingenuous, a party appointing an the sole or presiding arbitrator unilaterally can challenge the award on the ground that the award has been rendered in contravention of Section 12(5) of the Act read with Seventh Schedule of the Act notwithstanding that the said party itself made such an appointment. When the Arbitral Tribunal inherently lacked jurisdiction to act, the arbitration proceedings are void ab initio, rendering the award unenforceable irrespective of which party made such unilateral appointment. The arbitral proceedings and an award made by an unilaterally appointed sole or presiding arbitrator, who is de jure ineligible to be appointed as an arbitrator by virtue of the Seventh Schedule of the Act are void ab initio. The waiver under the proviso to Section 12(5) of the Act

must be express and subsequent to the disputes having been arisen between the parties. **Hence, the party which appointed the sole or presiding arbitrator unilaterally can also challenge the award under Section 34 of the Act on the ground of such ineligibility.**

(emphasis added)

25) Relying on judgment of *Bharat Broadband Network Ltd.* Petitioners contend that mere participation by the Petitioner in the arbitration proceedings by filing statement of defence and counterclaim does not amount to waiver by way of express agreement in writing under proviso to sub-section (5) of Section 12 of the Arbitration Act.

26) The contours defining the independence and impartiality of the Arbitral Tribunals under the Arbitration Act and the issue of interplay between party autonomy and independence and impartiality of the Arbitral Tribunal was referred to the Constitution Bench in *Central Organisation for Railway Electrification [CORE]* (supra). In the majority judgment, it is held as under:-

121. An objection to the bias of an adjudicator can be waived. [(Supreme Court Advocates-on-Record Association (supra) (30)] A waiver is an intentional relinquishment of a right by a party or an agreement not to assert a right (State of Punjab v. Davinder Pal Singh Bhullar, (2011) 14 SCC 770 [41]). The Arbitration Act allows parties to waive the application of Section 12(5) by an express agreement after the disputes have arisen. However, the waiver is subject to two factors. First, the parties can only waive the applicability of Section 12(5) after the dispute has arisen. This allows parties to determine whether they will be required or necessitated to draw upon the services of specific individuals as arbitrators to decide upon specific issues. To this effect, Explanation 3 to the Seventh Schedule recognizes that certain kinds of arbitration such as maritime or commodities arbitration may require the parties to draw upon a small, specialized pool [Explanation 3 – For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such field it is the custom and practice for parties frequently to appoint the same

arbitrator in difference cases, this is a relevant fact to be taken into account while applying the rules set out above.”]. The second requirement of the proviso to Section 12(5) is that parties must consciously abandon their existing legal right through an express agreement. Thus, the Arbitration Act reinforces the autonomy of parties by allowing them to override the limitations of independence and impartiality by an express agreement in that regard.

xxx

123. In *Bharat Broadband Network Ltd.* (supra), this Court held that the proviso to Section 12(5) requires an express agreement in writing, that is, an agreement made in words as opposed to an agreement that can be inferred by conduct. It was explained that such an agreement must be made by both parties with full knowledge of the fact that although a particular person is ineligible to be appointed as an arbitrator, the parties still have full faith and confidence in them to continue as an arbitrator. 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 judex rule. This balances the autonomy of parties and the principles of an independent and impartial arbitral tribunal.

vi. Unilateral appointment of arbitrators is violative of the equality clause under Section 18

xxx

129. Equal treatment of parties at the stage of appointment of an arbitrator ensures impartiality during the arbitral proceedings. **A clause that allows one party to unilaterally appoint a sole arbitrator is exclusive and hinders equal participation of the other party in the appointment process of arbitrators.** Further, arbitration is a quasi-judicial and adjudicative process where both parties ought to be treated equally and given an equal opportunity to persuade the decision-maker of the merits of the case. **An arbitral process where one party or its proxy has the power to unilaterally decide who will adjudicate on a dispute is fundamentally contrary to the adjudicatory function of arbitral tribunals**[Gary Born (supra) 1952]

xxx

134. In *CORE*, 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 [Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)]*, (2020) 14 SCC 712 , 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 judex* rule.

(emphasis added)

27) The Apex Court has concluded in paragraph 170 of *CORE* by the majority decision as under:-

J. Conclusion

170. In view of the above discussion, we conclude that:

170.1. The principle of equal treatment of parties applies at all stages of arbitration proceedings, including the stage of appointment of arbitrators;

170.2. 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;

170.3. 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;

170.4. 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* [Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV), (2020) 14 SCC 712] is unequal and prejudiced in favour of the Railways;

170.5. Unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution;

170.6. 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

170.7. 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.

(emphasis added)

Thus, in *CORE*, the Constitution Bench has held that unilateral appointment of Arbitrator is violative of equality clause under Article 14 of the Constitution of India. It is held that the clause permitting Railways to suggest names of four arbitrators, out of whom only contractor could suggest two names, with final authority to the General Manager to choose the contractor's arbitrator out of the two names chosen by him, with further right of the General Manager to appoint

the other two arbitrators was violative of right to have equal participation in appointment of arbitrator. Similarly, right of the General Manager to choose Presiding Arbitrator is also held to be violative of equality clause. The Constitution Bench has recognised right of Public Sector Undertakings to empanel the potential arbitrators, but they cannot insist for selection of arbitrator only from their panel.

28) In *Lite Bite Foods Pvt. Ltd.* (supra) the learned Single Judge of this Court (*G.S. Patel, J.*), has held that a clause that confers on one party's employee, the sole right to appoint an arbitrator, though that employee is himself not the arbitrator, is also not valid. This Court held in paragraph 23, 25 and 26 and under:-

23. The present case may not be within the confines of TRF Ltd, i.e. the tender approving authority is not both arbitrator and, if disqualified, the sole repository of arbitrator-appointing power. He is only the latter. But that now matters at all. Perkins Eastman clearly holds the field and it covers a situation precisely such as the present one where AAI — and only AAI — has the exclusive right of appointed (not merely nominating) an arbitrator. The question is not, as Ms Munim would have it, the perceived bias or impartiality of the arbitrator. He may well be an unknown entity. The question is of one-sidedness in the arbitral tribunal appointment procedure itself. This is the destination to which Perkins Eastman takes us for it requires that there be neutrality in the dispute resolution process throughout. If I might be permitted a license, in my reading of it, what Perkins Eastman says is this: that you cannot have an impartial arbitration free from all justifiable doubt if the manner in which the arbitral tribunal is constituted itself is beset by justifiable doubt.

xxx

25. Ms Munim's last submission is that the only prohibition is against a named person being the arbitrator or empowered to appoint an arbitrator. This is clearly incorrect. The interdiction runs against any one party being given unilateral or one-sided power in the matter of constitution of the arbitral tribunal

26. In summary, the legal principles are these:

(a) **An officer or employee of one party cannot be the arbitrator or, upon eligibility, the person empowered to appoint an arbitrator. This is the TRF Ltd category or rule.**

(b) Where the arbitration clause provides for nomination by each side, and for the appointment of an umpire by the two nominee arbitrators, of a person from a panel: (i) that panel cannot be hand-picked by one side; and (ii) it must be broad-based and inclusive, not narrowly tailored to persons from a particular category. The opponent and the two nominee arbitrators must have the plenitude of choice. This is the rule in *Voestalpine Schienen*. Conceivably, a broad-based panel commonly agreed in the contract by both sides would serve the purpose.

(c) **A clause that confers on one party's employee the sole right to appoint an arbitrator, though that employee is himself not to be the arbitrator, is also not valid, and this is a logical and inescapable extension of the TRF Ltd doctrine.** It makes no difference whether this power is to be exercised by choosing from a panel or otherwise. This is the rule in *Eastman Perkins*.

The guiding principle is neutrality, independence, fairness and transparency even in the arbitral-forum selection process.

(emphasis added)

29) The judgment in *Lite Bite Pvt. Ltd.* (supra) is followed in *Hanuman Motors Private Limited* (supra), in which it is held in paragraphs 19 and 20 as under:-

19. A perusal of judgment of the Supreme Court in the case of *Perkins Eastman Architects DPC and Anr. Vs. HSCC (India) Limited* (supra), shows that after taking into consideration the earlier judgment in the case of *TRF Ltd. Vs. Energo Engineering Projects Limited* (supra), the Supreme Court considered two distinct categories of cases in which Section 12(5) read with the Seventh Schedule of the said Act could apply, which would vitiate the appointment of the arbitrator and consequently the arbitration proceedings. This Court relied upon the said judgements in the case of *Lite Bite Foods Pvt.*

Ltd. Vs. Airports Authority of India (supra). The relevant portion of the said judgement reads as follows:

“26. xxx”

20. In the case of Bharat Broadband Network Limited Vs. United Telecoms Limited (supra) the Supreme Court had an occasion to consider the said aspect of unilateral appointment of an arbitrator and the position of law was reiterated to indicate that **whenever either party had exclusive power to appoint a sole arbitrator, a situation was created where serious doubts would arise about eligibility of said arbitrator, simply for the reason that the party appointing the sole arbitrator would have exclusive power in determining the course of dispute resolution, which vitiated the entire proceedings.**

(Emphasis added)

30) Again, in ***Naresh Kanayalal Rajwani*** (supra), this Court has reiterated that ineligibility referred to in Section 12(5) of the Arbitration Act also applies to a person, who is empowered to nominate the Arbitrator. It is held thus :-

The Supreme Court has clearly laid down that a person having an interest in the dispute or in the outcome thereof, is ineligible not only to act as an Arbitrator, but, is also rendered ineligible to appoint anyone else as an Arbitrator. In the present case, as noted above, the arbitration clause gave power and authority to the respondent – Bank to unilaterally appoint the Arbitrator. As a matter of fact, in the present case, the learned Arbitrator was appointed unilaterally by the respondent – Bank, which was clearly in the teeth of the position of law clarified by the Supreme Court in the context of Section 12(5) of the said Act, read with Seventh Schedule thereof.

(Emphasis added)

31) In ***Siddharth Constructions Co.*** (supra) Division Bench of Delhi High Court has held that a clause in arbitration agreement for appointment of person as an arbitrator is barred by seventh schedule of the Arbitration Act and hence invalid under Section 12(5) of the

Arbitration Act. The Delhi High Court has held in paragraphs 23 and 24 as under:-

23. As is evident from the above stated decisions that have already discussed the law, it is settled that any clause in an arbitration agreement that permits appointment of a person as an arbitrator who has a relationship with the parties concerned or even appointment by a person who has a relationship with the parties concerned, would be barred by the Seventh Schedule to the Act. The appointment so made would be rendered invalid in terms of Section 12(5) of the Act.

24. In view of the above legal position, the Arbitrator in the present case being ineligible in terms of Section 12(5) of the Act and there being no express waiver of right in writing to challenge the appointment of the Sole Arbitrator by the Appellant, the award dated 9th May, 2020 is set aside. The order dated 14th September, 2021 passed by the Id. Single Judge is also set aside.

32) However, in the present case, Petitioners have failed to raise the objection of unilateral appointment of the Arbitrator in the Petition filed under Section 34 of the Arbitration Act. This is sought to be taken care of by the Petitioners by relying on judgment of Single Judge of this Court in ***Riak Insurance and Financial Services*** (supra), in paragraphs 15,17 and 18 of which it is held as under:-

15. I have considered the submissions as well as the aforementioned facts on unilateral appointment of the Arbitrator which are undisputed viz. with regard to the appointment of the Arbitrator under Clause 22 of the Agreement by the Respondent herein which is borne out from the relevant correspondence addressed at the time of the appointment of the Arbitrator. There appears to be no doubt that the learned Arbitrator was unilaterally appointed. It is clear from a reading of Clause 22 of the Agreement, that the Sole Arbitrator is to be nominated by the Respondent – Bank. Further, it is apparent from letter dated 17th September, 2018 of the Respondent wherein the Respondent has stated that the Sole Arbitrator will be appointed by the Respondent for adjudication of the disputes as per the terms of arbitration Clause 22 of the said Agreement. Further, the letter of the learned Arbitrator dated 26th September, 2018 to the Respondent in

response to the Respondent's letter of same date accepting his appointment.

xxx

17. Thus, the applicability of Section 12(5) read with the 7th schedule which does not permit such unilateral appointment can only be waived by express agreement in writing. In the present case, there is no written consent of the parties to waive the applicability of the aforementioned provision.

18. Further, the submission of the learned Counsel for the Respondent that the challenge to the Award cannot be entertained in view of there being no specific ground taken either in the arbitral proceedings or in the Arbitration Petition viz. on the unilateral appointment of learned Arbitrator vitiating the arbitral proceedings and rendering the Award amenable to be set aside on this ground alone, has not merit in view of the decision of this Court in **Naresh Kanayalal Rajwani (Supra)**. By the said decision this Court has held that in view of admitted facts, the issue of unilateral appointment of the Arbitrator and Award being vitiated on this ground as being contrary to Section 12(5) of the Arbitration Act is a pure question of law that goes to the root of the matter.

(emphasis added)

33) Thus, in ***Riak Insurance and Financial Services*** (supra), this Court has held that since the issue of unilateral appointment of arbitrator is pure question of law going to the root of the matter, the same can be entertained even if no specific ground is taken in the arbitration proceedings or in the arbitration petition. Same view appears to have been taken by Delhi High Court in ***Mahavir Prasad Gupta and Sons*** (supra) in which the Division Bench has held that conduct of parties cannot be construed as waiver and the court can entertain objection of unilateral appointment of arbitrator in absence of a pleaded ground. The Delhi High Court has held thus:

54. In any event, Section 34(2)(b) of the Act empowers the Court to set aside the award if 'the Court finds that', which means that it is an obligation of the Court to ensure that that award is not against the Public Policy of India. Hence, even if any of the parties have not raised an objection regarding the unilateral appointment, if the Court while considering the

application under Section 34 of the Act finds that the Award is null and void due to the unilateral appointment of the arbitrator, has power to set aside the award without any objection by any of the parties. The concept of Public Policy of India is explained and clarified in Explanation 1 to Section 34(2)(b) of the Act that the award must not be in contravention with the fundamental policy of Indian law or in conflict with the most basic notions of morality or justice. Right to equality is part of the basic structure of the Constitution of India and integral to the fundamental policy of India law.

(emphasis added)

34) In *Ravi Raghunath Khanjode* (supra) this Court had an occasion to decide whether a ground not pleaded in Petition under Section 34 of the Arbitration Act being canvassed during oral submissions. After considering the ratio of the judgments in *Sal Udyog Private Limited*¹⁹ and *Hindustan Construction Co. Ltd.*²⁰, I have held that while determining the issue of conflict with public policy under clause (b) of sub-section (2) of Section 34 and ground of patent illegality under clause (a) sub-section (2) of Section 34, the Court in appropriate cases can invalidate the Award even though any specific ground is not pleaded in the Petition on account of use of expression '*the court finds that in those provisions*'. In my view therefore since vice of unilateral appointment of Arbitrator goes to the root of the matter reflecting conflict with public policy and patent illegality, the Award can be set aside in absence of pleaded ground.

35) In *M/s. Satya Parkash and Brothers (P) Ltd.* (supra) the Division Bench of Delhi High Court has surveyed the judgments of the Apex Court including *TRF Ltd.*, *Bharat Broadband Network Ltd.* and *Central Organisation for Railway Electrification* (supra) and has concluded that Award passed by unilaterally appointed Arbitrator,

¹⁹ (2022) 2 SCC 275

²⁰ (2010) 4 SCC 518

who has conflicted Section 12(5) of the Arbitration Act, would be against public policy.

36) On the other hand, the Respondent has relied upon Division Bench judgment of this Court in *R.B. Krishnani* (supra) in which the Respondent therein consented for appointment of the Arbitrator before commencement of arbitral proceedings through written communication. Furthermore, in reply filed to Section 11 proceedings, the Respondent had conceded to appointment of Arbitrator. Thirdly, Respondent therein had not assailed the jurisdiction of the arbitrator after the arbitrator consensually entered reference by having recourse to provisions of Section 16 of the Arbitration Act. The Division Bench took into consideration the ratio of the judgment of the Apex Court in *TRF Ltd., Bharat Broadband Network Ltd.* and *Central Organisation for Railway Electrification* (supra) and has concluded in paragraph 35 as under:-

35. Applying the aforesaid principles of law and more particularly the provisions of Sections 4 and 12(5) of the ACA, in our opinion, in passing the impugned order the Commercial Court, in the facts of the present case, was not correct to hold that the arbitral award was required to be set aside, purely applying the provisions of Section 12(5) of the ACA without considering the clear facts on record, which we have discussed hereinabove **of firstly a complete waiver of the applicability of Section 12(5) between the parties in writing as noted hereinabove, and thereafter, in the complete participation of the respondent in the arbitral proceedings without, at any time, assailing the jurisdiction of the arbitral tribunal thereby having waived its right to object to the appointment of the learned sole arbitrator and/or having acquiesced in such appointment.**

(Emphasis added)

37) Thus, the facts in *R.B. Krishnani* involved '**complete waiver of applicability of Section 12(5) ... in writing**'. Once waiver of

applicability of Section 12(5) is by way of an agreement in writing, Proviso to Section 12(5) applies and unilateral appointment of arbitrator acquires validity. Though the judgment also refers to ‘complete participation’ also, as held by the Apex Court in ***Bharat Broadband*** mere participation in arbitral proceedings does not constitute express agreement in writing as contemplated under Section 12(5) of the Arbitration Act. It is well settled principle that a judgment is an authority for what it decides and not what can be logically deduced therefrom [SEE: ***Commr. of Customs (Port) v. Toyota Kirloskar Motor (P) Ltd.***²¹ and ***Secunderabad Club v. CIT***²²]. Therefore the judgment of the Division Bench in ***R.B. Krishnani*** cannot be cited in support of an abstract principle that in every case where there is participation by a party in arbitral proceedings, applicability of Section 12(5) gets waived off.

38) From the above discussion, the principles which can be summarized are thus:

- (I) Every arbitration agreement providing for unilateral appointment of the sole or the presiding arbitrator is invalid. Consequently, any proceedings conducted before such unilaterally appointed Arbitral Tribunal are nullity and cannot result into an enforceable award, being against Public Policy of India, warranting its invalidation under Section 34 of the Arbitration Act.
- (II) Unilateral appointment also includes the vice of authorizing only one of the parties to appoint the

²¹ (2007) 5 SCC 371

²² 2023 SCC Online SC 1004

arbitrator, though that person himself may not act as arbitrator. Appointment made by one party to the dispute by calling upon the opposite party to choose only one of the named persons as arbitrator also constitutes unilateral appointment.

- (III) The waiver of applicability of Section 12(5) of the Arbitration Act requires an express agreement in writing under the Proviso. The conduct of the parties, such as participation in arbitral proceedings, filing of statement of claim/defence, filing of counterclaim, etc, is inconsequential and cannot constitute a valid waiver under the Proviso to Section 12(5) of the Act.
- (IV) Since the arbitral award made by unilaterally appointed arbitrator is a nullity, even a party appointing arbitrator is not precluded from raising objection to unilateral appointment and seeking annulment of the award. Principle of estoppel does not apply.
- (V) The objection of unilateral appointment of arbitrator can be raised at any stage of the proceedings and even while challenging the award under Section 34 or opposing enforcement under Section 36 of the Act.
- (VI) Section 12(5) of the Arbitration Act is an exception to Sections 4, 7, 12(4), 13(2) and 16(2) of the Act. Thus, there is no deemed waiver of right to object (i) by proceeding with arbitration without objection under Section 4, (ii) by exchange of statement of claim/defence under Section 7, (iii) by failure to challenge arbitration under Section 13(2) or (iv) by failure to raise objection of jurisdiction under

Section 16(2) of the Arbitration Act. Therefore, the principle propounded in *Gayatri Projects Limited V/s. Madhya Pradesh Road Development Corporation Ltd.*²³ about waiver of objection of non-existence of arbitration agreement does not apply to Section 12(5) of the Act.

- (VII) As the ineligibility goes to the root of the jurisdiction, it is not necessary for a party to raise that objection before arbitrator or even in the Petition filed under Section 34 of the Act. Sub-Sections (2)(b) and (2A) use the expression ‘if court finds that..’ enabling the Court to invalidate the award even in absence of objection in the Petition.

39) Having summarized the principles on the issue of waiver of objection to unilateral appointment of arbitrator deducible from various judgments discussed above, now I proceed to examine whether the arbitral award in the instant case deserves to be annulled as being in conflict with public policy doctrine.

40) In the present case, undoubtedly the Respondent was empowered to nominate and appoint the sole Arbitrator. Nomination and appointment of sole Arbitrator is unilaterally done by the Respondent, who appointed person of its choice to act as the Arbitrator. This is in clear conflict with provisions of Section 12(5) of the Arbitration Act.

41) Faced with the above difficulty, it is sought to be contended on behalf of Respondent that the appointment of the learned Arbitrator is with consent of the parties. Consent of Petitioners is

²³ 2025 SCC OnLine SC 1136

sought to be attributed on the factors of (i) consent through correspondence before commencement of arbitral proceedings, (ii) express recording of consent by the Arbitral Tribunal (iii) filing of counterclaim by Petitioners, thereby expressly acquiescing in the appointment of the learned sole Arbitrator (iv) not raising any objection to extension of mandate by this Court under Section 29A of the Arbitration Act and (v) not raising any objection before this Court when extension of mandate of the Arbitral Tribunal was twice sought.

42) So far as the first factor of consent to the appointment of the Arbitrator through correspondence is concerned, reliance is placed on letter dated 18 April 2017, which reads thus:-

REF: 4:33 1:17

18TH APRIL, 2017

To,
A.L.M.T. Legal
Advocates for Claimant,
1st floor, Free Press House,
215 Free Press Journal Marg, Nariman Point,
Mumbai 400 021,

Re. Before the Learned Sole Arbitrator
Mr. Ranjeev Carvalho, Advocate

In the matter of Arbitration between.
M/s. Madhuban Motors P. Ltd., ..Claimants
V/s.
Manmohan Bhimsain Goyal
& Anr., ..Respondents.

AND

M/s. Madhuban Motors P. Ltd., Claimants
V/s.
Manmohan Bhimsain Goyal
& Anr., ..Respondents

Sir,

With reference to above matter, we refer to the earlier correspondence, and in continuation thereof, we have to state that we have now received instructions in the matter from our clients, the Respondents to represent them in the above matter.

You may accordingly address all further correspondence to us. We have also noted the minutes of the First Meeting dated 14- 3-2017 and would await your client's statement of claim as per the Directions No. 3A of the Minutes dated 14-3-2017.

Yours truly,
For K.R. PAREKH & CO.,
Sd/-

ADVOCATES FOR RESPONDENT

43) Perusal of the letter dated 18 April 2017 does not contain any statement expressing agreement to appointment of the learned Arbitrator. However, even if some weightage is to be given to the letter dated 18 April 2017 for the purpose of construing Petitioner's willingness to participate in arbitral proceedings before the learned Arbitrator, the same would still not clear the muster of waiver by express agreement in writing. In *Bharat Broadband Network Ltd.* (supra) the Appellant therein himself had issued letter on 17 January 2017 for appointment of the arbitrator. However, after delivery of judgment by the Apex Court in *TRF Ltd.* the Appellant sought to replace the Arbitrator. The Apex Court in *Bharat Broadband Network Ltd.* has held that the express agreement in writing was required to be made with full knowledge of ineligibility and that since ineligibility become known only after pronouncement of judgment in *TRF Ltd.* on 3 July 2017, the appointment letter issued prior thereto on 17 January 2017 could not and did not constitute express agreement in writing as required under Section 12(5) of the Arbitration Act. Therefore even

otherwise, the letter dated 18 April 2017 issued before 3 July 2017 (date of judgment in **TRF Ltd**) is inconsequential.

44) Coming to the factor of recording of consent by the Arbitral Tribunal, in paragraph 3.1 of the Arbitral Award it is recorded as under:-

3.1 At the request of and with the consent of parties this Tribunal entered into upon the arbitral reference on 22nd February 2017.

45) However, observation of the Arbitral Tribunal about parties consensually entering into arbitral reference appear to be contrary to the minutes recorded by the Arbitral Tribunal itself. The minutes have been discussed above, in which what is recorded is Petitioner seeking time to revert on nomination. Therefore, not much can be read into the finding recorded by the Arbitral Tribunal in paragraph 3.1 of the impugned Award. In any event the learned Arbitrator's recording of consent is not sufficient and what must be demonstrated is existence of express agreement in writing under Section 12(5) of the Act. In **Smaaash Leisure Ltd. v. Ambience Commercial Developers Pvt. Ltd.**²⁴ Delhi High Court has held that even consent given by a party before arbitrator recorded in one of the procedural orders did not amount to waiving applicability of Section 12(5) of the Arbitration Act. The Delhi High Court in paragraph 35 held as under:-

"35. In view of these judgments, the argument of the Respondents that Petitioner has waived its right by conduct, owing to participation in the arbitral proceedings, under proviso to Section 12(5) cannot be countenanced in law. Coming to the next limb of

²⁴ 2023 SCC OnLine Del 8322

the argument of waiver, heavy reliance was placed by the Respondents on the statement made by the counsel for the came up for Petitioner before the Arbitrator that Petitioner was giving up the objection to the appointment. This very issue consideration before a Bench of this Court in **Larsen and Toubro Limited** (supra), wherein Petitioner had filed an application under Section 14 of the 1996 Act seeking termination of the mandate of the Arbitrator on the ground that Respondent had unilaterally appointed the sole Arbitrator and the grievance was predicated on Section 12(5) and the judgments of the Supreme Court in Perkins (supra), Bharat Broadband Network Limited (supra) and Haryana Space Application Centre v. Pan India Consultants Pvt. Ltd., (2021) 3 SCC 103: AIR 2021 SC 653. Petition was resisted by the Respondent inter alia on the **consent given by the Petitioner before the Arbitrator, which was recorded in one of the procedural orders**. The contention was that having given consent to the Arbitrator that both parties had no objection to the Arbitral Tribunal, it was not open to take a plea of unilateral appointment. Holding that the learned Arbitrator is de jure rendered incapable of continuing with the arbitral proceedings, being a unilateral appointment, the Court observed that this statement made before the Arbitrator in one of the procedural hearings will not operate as an express waiver in writing for the applicability of proviso to Section 12(5) of the 1996 Act. The Court relied on the judgment of the Supreme Court in to this Bharat Broadband Network Limited (supra) to come conclusion, wherein the Supreme Court held that there must be an 'express agreement in writing', waiving the applicability of Section 12(5).

(emphasis added)

46) The third factor of filing of counterclaim by the Petitioners before the Arbitral Tribunal would again not enure to the benefit of the Respondent. In several cases discussed above, parties had filed pleadings before the Arbitrator and had participated in the proceedings. To illustrate, in ***Bharat Broadband Network Ltd.*** (supra) the Appellant therein had not only itself appointed the Arbitrator but had also filed statement of claim. The Apex Court held that mere filing of statement of claim would not mean that there was express agreement in words for continuation of Mr. Khan as Arbitrator, who was otherwise ineligible to act as such. In ***Hanuman Motors Private Limited*** (supra) the Petitioner therein had participated in the arbitration proceedings, but

this Court nevertheless set aside the arbitral Award on the ground of unilateral power of the appointment of Arbitrator. In ***Siddhartha Construction Co.*** (supra) a counterclaim was filed by ITDC, who had unilaterally appointed the arbitrator. However, Division Bench of Delhi High Court still proceeded to set aside the arbitral Award on the ground of unilateral appointment of the Arbitrator being nullity under Section 12(5) of the Arbitration Act. In ***Mahavir Prasad Gupta and Sons*** (supra) the Respondent therein did not contest the appointment of the learned sole Arbitrator during arbitral proceedings and rather participated in the same and agreed to extension of mandate of the sole Arbitrator under Section 29A of the Arbitration Act. Delhi High Court still invalidated the Award. This takes care of even fourth factor raised by the Respondent.

47) Lastly, in ***M/s. Satya Parkash and Brothers (P) Ltd.*** (supra) the Appellant therein had not objected to appointment of sole Arbitrator and plea of consent was raised on account of failure to raise any objection by the Appellant. The Delhi High Court has invalidated the Award despite non-raising of objection holding that the Award passed by unilaterally appointed Arbitrator, who is conflicted under Section 12(5) of the Arbitration Act, would be against public policy.

48) Thus, filing of counterclaim, participation in the arbitral proceedings without raising objection and giving consent for extension of mandate under Section 29A are held to be not constituting waiver of ineligibility of arbitration under Section 12(5) of the Arbitration Act. In my view, therefore, none of the factors sought to be urged by the Respondent for inferring consent on the part of the Petitioners can be

treated as waiver of objection by express agreement in writing as per proviso to Section 12(5) of the Arbitration Act. So far as the failure on the part of the Petitioners to plead the ground of unilateral appointment of Arbitrator is concerned, the situation is covered by judgment of this Court in ***Naresh Kanayalal Rajwani*** and ***RIAK Insurance and Financial Services*** (supra) and of Delhi High Court in ***Mahavir Prasad Gupta and Sons*** (supra). As observed above, Judgment of Division Bench of this Court in ***Mr. R.B. Krishnani*** (supra) does not assist the case of the Respondent.

49) What remains now, is to deal with two judgments relied upon by Mr. Khan of learned Single Judge of this Court in ***Truly Pest Solution Private Limited*** and ***MPD Associates Pvt. Ltd.*** (supra). In ***Truly Pest Solution Private Limited*** (supra) the Claimant therein have themselves invoked arbitration clause knowing fully well that sole Arbitrator will be railway employee. Despite having three occasions to raise issue about Section 12(5) of the Arbitration Act, no objection was raised and the objection under Section 12(5) was raised only after passing of the Award. In the facts of that case learned Single Judge of this Court held that objection was an afterthought and was accordingly rejected. However, as observed above (i) invocation of arbitration clause by the aggrieved party (ii) filing of pleadings (statement of claim, statement of defence /counterclaim) by the aggrieved party and (iii) non-raising of any objection by the aggrieved party during arbitral proceedings are held to be not constituting waiver by Section 12(5) objection by way of an express agreement in writing. Therefore, in the present case as well, it is difficult to infer that there was any waiver by way of an express agreement in writing on the part of the Petitioners to

unilateral appointment of the learned sole Arbitrator, who was conflicted under Section 12(5) of the Arbitration Act.

50) In *MPD Associates Pvt. Ltd.* (supra) the learned Single Judge of this Court was persuaded to hold that once Award is passed and no objection as to jurisdiction is taken at relevant stage, the Award cannot be set aside only on the ground of lack of jurisdiction. This principle however would not apply to the objection of ineligibility of Arbitrator under Section 12(5) of the Arbitration Act.

51) Considering the overall conspectus of the case, I am of the view that the impugned Award of the Sole Arbitrator, who is clearly conflicted under Section 12(5) of the Arbitration Act, is against public policy and is patently illegal. None of the factors canvassed by the Respondent would constitute an express waiver in writing as required under proviso to Section 12(5) of the Arbitration Act. Since the Award is nullity, it is liable to be set aside.

52) Petition accordingly succeeds. Arbitral Award dated 18 March 2024 is set aside. Considering the facts and circumstances of the case, I deem it appropriate not to award any costs in the present Petition. Arbitration Petition is **allowed**.

[SANDEEP V. MARNE, J.]