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

Date of decision: 11.11.2025

+ **O.M.P. (COMM) 287/2022**

ABHAY GARG

.....Petitioner

Through: Mr. Kirtiman Singh, Sr. Adv. with
Mr. Yash Tyagi, Mr. Maulik Khurana, Advs and
Mr Ankit Siwach, Advs.

versus

M/S SURYA MAINTENANCE AGENCY PVT. LTD.....Respondent

Through: Mr. Sumit Bansal Sr. Adv. with
Mr. Pankaj Gupta, Mr. Udaibir Singh Kochar, Mr.
Utsav Garg, Ms. Tulna Rampal, Ms. Nikita Gupta,
Advs.

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+ **OMP (ENF.) (COMM.) 28/2024**

M/S. SURYA MAINTENANCE AGENCY PVT LTD

.....Decree Holder

Through: Mr. Sumit Bansal Sr. Adv. with
Mr. Pankaj Gupta, Mr. Udaibir Singh Kochar, Mr.
Utsav Garg, Ms. Tulna Rampal, Ms. Nikita Gupta,
Advs.

versus

ABHAY GARG

.....Judgement Debtor

Through: Mr. Kirtiman Singh, Sr. Adv. with
Mr. Yash Tyagi, Mr. Maulik Khurana, Advs and
Mr Ankit Siwach, Advs.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (ORAL)**

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 seeking setting aside of the Award dated 29.10.2021 passed in the matter of "*M/s Surya Maintenance Agency Pvt. Ltd. vs. Abhay*



Garg”.

2. The facts are that the petitioner purchased 8 units bearing Nos. 201, 202, 229, 230, 203, 204, 205, 206 located at Ring Road Mall, Plot No. 21, Sector-3, Mangalam Palace, Rohini, Delhi-110085.

3. The above said shops were leased out by the petitioner to M/s Third Innings Impex Pvt. Ltd. (lessee for Shop Nos. 204-206) and M/s Allied Perfumers Pvt. Ltd. (lessee for 5 shops bearing Nos. 201, 203, 229 and 230) vide 2 lease Agreements dated 01.05.2014 and 01.07.2014 respectively.

4. The petitioner entered into 2 separate Maintenance Agreements dated 20.06.2014 (for four shops each) with M/s Surya Maintenance Pvt. Ltd and M/s AZZ Infraservices Ltd. as per which the maintenance charges were required to be paid.

5. The Maintenance Agreements contain an arbitration Clause being Clause No. 20.4 which reads as under:

“20.4 That all the disputes differences between the parties or in respect of any matter with regard to rights, dues and liabilities of any of the parties shall be settled by reference to Arbitration to a sole Arbitrator to be appointed by the Company as per provision of Arbitration and Conciliation Act, 1996, together with any statutory proceeding shall be held and conducted at Delhi”

6. Since there were disputes with regard to the maintenance charges, the respondent in exercise of its power under Clause 20.4 appointed the sole arbitrator for adjudication of disputes with the petition.

7. The petitioner participated in the proceedings and thereafter an Award dated 29.10.2021 was passed holding the petitioner liable to pay Rs. 2.67



Crores towards maintenance charges with interest at the rate of 24 % per annum along with arbitration cost of Rs. 5.67 lakhs. It is this award which is being challenged by the petitioner.

8. Mr. Singh, learned senior counsel appearing for the petitioner urges that the facts are squarely falling within the provision of Section 12(5) of the Arbitration and Conciliation Act, 1996 as the Arbitrator was unilaterally appointed by the respondents. The same is hit by *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, (2020) 20 SCC 760 as well as *Mahavir Prasad Gupta & Sons v. State (NCT of Delhi)*, 2025 SCC OnLine Del 4241.

9. *Per Contra*, Mr. Bansal, learned senior counsel appearing for the respondent Nos. 1-6 has placed reliance on *Bhadra International India (P) Ltd. v. Airports Authority of India*, 2025 SCC OnLine Del 698 and states that once the petitioner has participated before the Arbitrator and filed its response, the objection of unilateral appointment is no longer available. Additionally no ground of unilateral appointment has been raised in the objection petition.

10. He also states that the controversy with the position of law as raised in *Bhadra International (Supra)* and *Mahavir Prasad (Supra)* is pending adjudication before the Hon'ble Supreme Court and the Hon'ble Supreme Court has concluded the arguments and reserved the judgment in *Bhadra International (Supra)*.

11. The Court in *Mahavir Prasad (Supra)* has held as under:

“72. The decision of the Coordinate Bench of this Court in Bhadra International (supra) holds that the proscription under Section 12(5) of the Act is not absolute and subject to the



proviso thereto. It holds that in view of the factual circumstances in which the appellant therein had invited the respondent therein to appoint an arbitrator, the appellant having consented to the jurisdiction of the arbitrator before the arbitrator and the appellant not having objected to the jurisdiction of the arbitrator after the introduction of Section 12(5) to the Act, either through an application before the arbitrator under Section 16 of the Act or before the court under Section 14(1) of the Act, the parties had consented to the jurisdiction of the sole arbitrator and this Court had refused to set aside the arbitral award. The relevant extract is reproduced as under:

“34. The decisions cited by Mr. Ashish Mohan are cases in which, at one stage or another, an objection to the jurisdiction of the learned Arbitrator was raised. We must be aware that the proscription under Section 12(5) of the 1996 Act is not absolute. It is subject to the proviso thereto, which envisages conscious waiver of Section 12(5). In the facts of this case, which need not be repeated, but particularly in view of the fact that (i) the appellants had themselves invited AAI to appoint the arbitrator, (ii) before the learned Arbitrator, too, the appellants consented to the learned Arbitrator proceeding with the matter, (iii) even after Section 12(5) was introduced in the statute book, the appellants never chose to move any application before the learned



Arbitrator under Section 16 of the 1996 Act, or before this Court under Section 14(1) thereof, challenging the jurisdiction of the learned Arbitrator but, rather, participated in the proceedings without demur, we are not inclined to interfere with the decision of the learned Single Judge. If, in such circumstances, the appellants is to be permitted to wish away the arbitral award which, for obvious reasons, is not palatable to the appellants, it would do complete disservice to the entire arbitral institution. Such a decision, we are seriously afraid, would erode, to a substantial degree, the faith of the public in the very institution of arbitration.”

73. However, the decision in Bhadra International (supra) does not consider the prior decision of the Constitutional Bench of the Supreme Court in CORE (supra) wherein, it is held that a unilateral appointment clause is invalid without an express agreement in writing as envisaged under the proviso to Section 12(5) of the Act. Hence, we agree with the Respondent that Bhadra International (supra) is also per incurium.

...

84. In view of the above discussion, the legal position on the unilateral appointment of the Sole and Presiding Arbitrator is summarized as under:

a) Mandatory Requirement: Any arbitration agreement providing unilateral appointment of the sole or presiding



arbitrator is invalid. A unilateral appointment by any party in the arbitrations seated in India is strictly prohibited and considered as null and void since its very inception. Resultantly, any proceedings conducted before such unilaterally appointed Arbitral Tribunal are also nullity and cannot result into an enforceable award being against Public Policy of India and can be set aside under Section 34 of the Act and/or refused to be enforced under Section 36 of the Act.

b) Deemed Waiver: The proviso to Section 12(5) of the Act requires an express agreement in writing. The conduct of the parties, no matter how acquiescent or conducive, is inconsequential and cannot constitute a valid waiver under the proviso to Section 12 (5) of the Act. The ineligibility of a unilaterally appointed arbitrator can be waived only by an express agreement in writing between the parties after the dispute has arisen between them. Section 12(5) of the Act is an exception to Section 4 of the Act as there is no deemed waiver under Section 4 of the Act for unilateral appointment by conduct of participation in the proceedings. The proviso to Section 12(5) of the Act requires an 'express agreement in writing' and deemed waiver under Section 4 of the Act will not be applicable to the proviso to Section 12(5) of the Act.

c) Award by an Ineligible Arbitrator is a Nullity: An award passed by a unilaterally appointed arbitrator is a nullity as the ineligibility goes to the root of the jurisdiction. Hence, the award can be set aside under Section 34(2)(b) of the Act by the



Court on its own if it 'finds that' an award is passed by unilaterally appointed arbitrator without even raising such objection by either party.

d) Stage of Challenge: An objection to the lack of inherent jurisdiction of an arbitrator can be taken at any stage during or after the arbitration proceedings including by a party who has appointed the sole or presiding arbitrator unilaterally as the act of appointment is not an express waiver of the ineligibility under proviso to Section 12(5) of the Act. Such objection can be taken even at stage of challenge to the award under Section 34 of the Act or during the enforcement proceedings under Section 36 of the Act.”

12. I have heard learned counsels for the parties.

13. The Division Bench of this Court in ***M/S Satyaprakash and Brothers (P) Ltd. v. UOI FAO(COMM) 80/2025*** has considered the entire controversy between ***Mahavir Prasad (Supra)*** and ***Bhadra International (Supra)*** and in paragraph 22 has held as under:

“22. The Co-ordinate Bench of this Court, in Mahavir Prasad Gupta (Supra) also considered another decision of an earlier Co-ordinate Bench in FAO(OS) (COMM) 23/2025 titled Bhadra International India Pvt. Ltd. and Ors. v Airports Authority of India wherein the Court had taken an opposing view and had held that the conduct of the parties in participating in the arbitration proceedings would show that the arbitral award was not a nullity and it was held that there was also a written consent with respect to the appointment of



arbitrator. This decision in Bhadra International (supra) was also held to be per incurium. The relevant paragraph of the said judgment i.e. Mahavir Prasad Gupta (Supra) is extracted below: “73. However, the decision in Bhadra International (supra) does not consider the prior decision of the Constitutional Bench of the Supreme Court in CORE (supra) wherein, it is held that a unilateral appointment clause is invalid without an express agreement in writing as envisaged under the proviso to Section 12(5) of the Act. Hence, we agree with the Respondent that Bhadra International (supra) is also per incurium...”

14. In this view of the matter, even though the petitioner has participated in the arbitral proceedings the fact remains that the arbitration conducted by an Arbitrator unilaterally appointed by the respondents is *void ab initio* and participation in the arbitration will not legitimise statutory bar created by law.

15. Admittedly there is no stay in ***Mahavir Prasad (Supra)*** or ***Satyaprakash (Supra)*** and the judgments are binding as far as this Court is concerned.

16. Additionally, the objection with regard to unilateral appointment has been considered by this Court in ***Supreme Infrastructure India Ltd. v. CPWD 2024 SCC OnLine Del 6132*** wherein I have held as under:

“12. In the present case, it is pertinent to mention that the petitioner has never challenged the eligibility of the learned arbitrator during the pendency of the arbitral proceedings and the said plea has only been raised before this court. However,



this issue is no longer res integra that the objection to the appointment of the Arbitrator can be taken at any stage and even orally.

13. In “Hindustan Zinc Limited v. Ajmer Vidyut Vitran Nigam Limited” (2019) 17 SCC 82, the Hon'ble Supreme Court held that the plea with respect to the lack of jurisdiction of the Arbitrator can be raised at any stage and even during the collateral proceedings. The coordinate bench of this court in “Man Industries (India) Limited v. Indian Oil Corporation Limited” 2023 SCC OnLine Del 3537 while reiterating the said position of law inter alia held as under:

“26. In Hindustan Zinc Limited (HZL) (supra), the Court held that if there is an inherent lack of jurisdiction of the Arbitrator, the plea can be taken up any stage and also in collateral proceedings. Such plea can be taken even where the party has consented to the appointment of the Arbitrator.

27. Applying the above principles to the facts of the present case, the plea of the Arbitrator being de jure ineligible to act as such is a plea of lack of jurisdiction. This plea can be allowed to be raised by way of an amendment and even without the same.”

17. In the present case, the Arbitrator was appointed unilaterally by the respondents in terms of Clause 20.4 of the Maintenance Agreements. After the introduction of Section 12(5) of the Act, any unilateral appointment by an interested party is hit by the statutory bar unless there is an express



written waiver made after the disputes have arisen. Admittedly, there is no such express waiver in writing by the petitioner.

18. The law laid down by the in *Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)*, (2025) 4 SCC 641, and subsequently applied in *Mahavir Prasad (Supra)* and *Satya Prakash (Supra)*, makes it clear that a unilateral appointment clause is void, and any appointment made under such a clause renders the Arbitrator *de jure* ineligible. Once the ineligibility strikes at the very root of the tribunal's authority, the proceedings conducted by such an Arbitrator cannot be validated by consent, participation, or acquiescence of the parties.

19. In these circumstances, the arbitral proceedings stand vitiated from inception, and the Award rendered by the Arbitrator is a nullity in the eyes of law. Consequently, the petition under Section 34 of the Act is allowed.

20. The petition is allowed and the award dated 29.10.2021 is set aside.

21. Since the award has been set aside the parties are free to avail their legal rights in accordance with law.

22. Since the petition under Section 34 of the Act has been allowed, the enforcement petition OMP (ENF) (COMM) NO. 28 OF 2024 is infructuous and is dismissed.

JASMEET SINGH, J

NOVEMBER 11, 2025/AS
(Corrected and released on 19.11.2025)