

**IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE**

**RESERVED ON: 07.05.2026
DELIVERED ON: 14.05.2026**

PRESENT:

THE HON'BLE MR. JUSTICE GAURANG KANTH

EC-COM 334 OF 2026

L AND T FINANCE LIMITED

VS

UNIWIDES CONTAINER LINE PRIVATE LIMITED AND ORS

Appearance: -

**Mr. Swatarup Banerjee, Adv.
Mr. Shariful Haque, Adv.
Mr. Paritosh Sinha, Adv.
Ms. Shrayashee Das, Adv.
Mr. Tridibesh Dasgupta, Adv.
Ms. Anukriti Agarwal, Adv.**

..... for the award holder.

JUDGMENT

Gaurang Kanth, J. :-

- 1.** The present Execution Petition has been preferred by the Award Holder, L&T Finance Ltd., under Section 36 of the Arbitration and Conciliation Act, 1996, seeking enforcement of an *ex parte* Arbitral Award dated 25.09.2025, rendered by the learned Sole Arbitrator, Smt. Padmini Nandkumar Nair, in Arbitration Case ID No.A271910 (L&T Finance Ltd Vs Uniwides Container Line Private Limited & Ors), arising out of a Loan Agreement dated 29.09.2024 executed between the parties (Agreement Ref. No.BL240916139208800).
- 2.** The factual matrix giving rise to the present proceedings is set out hereinbelow.

3. The Award Debtor(s) had availed of financial assistance from the Award Holder under the Loan Agreement dated 29.09.2024 executed between the parties (Agreement Ref. No.BL240916139208800). Upon the Award Debtor(s) committing default in repayment of the loan dues, the Award Holder invoked the arbitration clause contained in the said Loan Agreement.
4. The Award Holder vide 18.06.2025 invoked the Arbitration clause contained in the agreement between the parties and proposed the matter to be referred to Presolv360, an Online Dispute resolution Forum and asked the Award Debtor to intimate about its views. However, no response has been received from the Award Debtor and hence the Award Holder decided to refer the matter to Presolv360 for the appointment of an independent arbitrator to decide the disputes between the parties in accordance with its institutional rules. Pursuant thereto, Prosolv360 appointed Smt. Padmini Nandkumar Nair, as the Sole Arbitrator to adjudicate the disputes between the parties. The Sole Arbitrator accepted her appointment and entered upon the reference.
5. The learned Sole Arbitrator recorded that despite service of repeated notices upon the Award Debtor(s) through electronic means, including e-mail, WhatsApp, and SMS, by both Presolv360 and the Arbitral Tribunal, the Award Debtor(s) neither entered appearance nor filed any statement of defence. Finding no representation on behalf of the Award Debtor(s) at any stage of the proceedings, the learned Sole Arbitrator proceeded to conduct the arbitral proceedings *ex parte* and, upon hearing the Award Holder, rendered an *ex parte* Arbitral Award dated 25.09.2025.

6. A copy of the said Award was forwarded to the Award Debtor(s) in terms of Section 31(5) of the Act. No application for setting aside the Award under Section 34 of the Act was filed by the Award Debtor(s) within the prescribed period of limitation. The Award having attained finality, the Award Holder has preferred the present Execution Petition for enforcement of the *ex parte* Arbitral Award dated 25.09.2025.
7. Before proceeding further in the matter, this Court, in exercise of its duty to satisfy itself as to the enforceability of an arbitral award presented for execution, deems it appropriate to independently examine whether the *ex parte* Arbitral Award dated 25.09.2025 is capable of enforcement under Section 36 of the Act.

Submission on behalf of the Award Holder

8. Mr. Swatarup Banerjee, Learned Counsel appearing on behalf of the Award Holder, submits at the outset that this Court, in the exercise of jurisdiction under Section 36 of the Arbitration and Conciliation Act, 1996, is acting in the capacity of an Executing Court and is clothed with only limited jurisdiction. It is well settled that the scope of scrutiny available to an executing court is inherently circumscribed, it cannot sit in appeal over an arbitral award, nor can it examine the correctness, legality, or merits of the findings recorded therein.
9. Learned Counsel invited the attention of this Court to the scheme and structure of the Act and drew its attention to the provisions of Sections 21, 12, 13, 14, 16, 34, and 36 of the Act, to contend that the Act is a complete and exhaustive code unto itself and contains a self contained mechanism prescribing the manner and stage at which an arbitral award may be assailed. It was submitted that the Arbitration and Conciliation Act, 1996,

being a special enactment, is a complete code in itself and excludes the application of general principles of law to the extent they are inconsistent with its provisions.

- 10.** It was submitted that the arbitral process is initiated upon the issuance of a notice under Section 21 of the Act. If a party is aggrieved by the proposed arbitrator, an appropriate challenge can be lodged at the earliest stage. A party that disputes the jurisdiction of the Arbitral Tribunal may file an application under Section 16 of the Act before the Tribunal itself. If there exist any genuine doubts regarding the independence or impartiality of the proposed arbitrator, the same can be addressed by invoking the remedy provided under Section 12 of the Act. Thereafter, even after an award is passed, the Act provides yet another window under Section 34 to challenge the award on specified grounds. The scheme of the Act, therefore, affords a party multiple opportunities, at successive stages, to raise any grievance it may have including any objection pertaining to the appointment of the arbitrator.
- 11.** Learned Counsel emphatically submitted that a party who, having received due notice of arbitration proceedings and being fully cognizant of its rights, chose not to avail itself of any of these statutory remedies at the appropriate stage, cannot, for the first time at the stage of execution proceedings, seek to impeach the Award by raising a plea of unilateral appointment. Such belated conduct amounts to a waiver of rights and is wholly impermissible in law.
- 12.** Learned Counsel further submitted that an arbitral award can be challenged only on the grounds enumerated under Section 34 of the Act, and on no other grounds. This Court, while exercising jurisdiction under

Section 36, can exercise only such powers as are available under Section 47 of the Code of Civil Procedure, 1908, i.e., questions relating to the execution, discharge, or satisfaction of the decree/award, which fall to be determined by the executing court. Any challenge to the validity of the award itself is beyond the scope of execution proceedings.

- 13.** In support of this submission, Learned Counsel placed reliance upon ***Sunder Das v. Ram Prakash*** reported as **(1977) 2 SCC 662**, wherein the Hon'ble Supreme Court reaffirmed the settled proposition of law that an executing court cannot go behind a decree, nor can it question the legality or correctness thereof. The Supreme Court laid down that an executing court cannot go behind the decree nor can it question its legality or correctness, but there is one exception to this general rule, where the decree sought to be executed is a nullity for lack of inherent jurisdiction in the court passing it, its invalidity can be set up in an execution proceeding. Learned Counsel for the Award Holder submits that in the present case, no such jurisdictional nullity exists, since the Arbitral Tribunal was constituted and functioned lawfully, and the Award Debtor had ample opportunity to raise any such objection at the appropriate stage.
- 14.** Learned Counsel appearing on behalf of the Award Holder further submits that the jurisdiction of the Executing Court is circumscribed by the provisions of Section 47 of the Code of Civil Procedure. It is submitted that the Executing Court is only empowered to determine questions relating to the execution, discharge or satisfaction of the decree and cannot go into the correctness, legality or merits of the arbitral award sought to be executed.

- 15.** Mr. Swatarup Banerjee further pointed out that the Alternative Dispute Resolution mechanism is designed to be presided over by persons possessing substantive expertise and legal knowledge. In the facts of the present case, the Learned Arbitrator was herself a retired Judge of a superior court, and as such, she brings to the proceedings not only complete independence and impartiality but also the highest level of judicial experience and integrity. It cannot, by any stretch of imagination, be argued that the Learned Arbitrator harboured any bias towards either party. The Arbitrator had duly complied with the disclosure requirements under Section 12 of the Act, which fact itself negates any apprehension of partiality. In this regard, Learned Counsel placed reliance upon ***Voestalpine Schienen Gmbh v. DMRC*** reported as **(2017) 4 SCC 665**, wherein the Hon'ble Supreme Court, while examining the necessity for independence and impartiality of arbitrators, held that Section 12(5) renders a person ineligible only if he or she is an employee, consultant, advisor or has a direct business relationship with a party, and that mere past employment with government or public sector undertakings unconnected to the disputing party does not attract ineligibility. In the present case, the Learned Arbitrator, being a retired Judge, patently does not fall within any of the categories of ineligibility enumerated under the Seventh Schedule to the Act.
- 16.** In ***McLeod Russel India Ltd. v. Aditya Birla Finance Ltd.*** reported as **2023 SCC Online Cal 330**, the Hon'ble Calcutta High Court, following a detailed examination of ***TRF Limited v. Energo Engineering Projects Ltd.*** reported as **(2017) 8 SCC 377** and ***Perkins Eastman Architects DPC & Anr. v. HSCC (I) Ltd.*** reported as **(2019) SCC Online SC 1517**,

ruled that an arbitrator's eligibility to oversee arbitration proceedings is not automatically compromised merely because one of the disputing parties appointed them, and that an arbitrator can only be deemed ineligible if their appointment is affected by any of the grounds specified in the Seventh Schedule. It was further held that the petition for termination of the arbitrator's mandate ought to be dismissed since the challenge was raised after the petitioner had participated in the arbitration for almost two years, without disclosing any facts coming to their knowledge after the appointment that could warrant such termination.

17. Learned Counsel fairly acknowledged the line of authorities which hold that unilateral appointment of arbitrators is impermissible in law. In **TRF Limited** (supra), a Three-Judge Bench of the Hon'ble Supreme Court held that once an arbitrator becomes ineligible by operation of law, he cannot nominate another as an arbitrator, and accordingly set aside an appointment made by the Managing Director who was himself ineligible under Section 12(5) of the Act. This principle was further crystallised in **Perkins Eastman** (supra), wherein the Supreme Court clarified that a person who is ineligible to act as an arbitrator also cannot appoint an arbitrator, and where the Chairman and Managing Director of one party unilaterally appoints the sole arbitrator, such appointment is invalid.
18. However, Learned Counsel submitted that the ratio of **TRF Limited** (supra) and **Perkins Eastman** (supra) must be read in the context of those specific facts, where the ineligibility was squarely attracted at the threshold. In the present case, the Learned Arbitrator was a retired Judge and does not fall within any of the entries under the Seventh Schedule. In **McLeod Russel** (supra), the Hon'ble Calcutta High Court has specifically

distinguished those situations where the sole arbitrator appointed was not an officer, employee, or person having a direct interest in the outcome of the dispute. The Court upheld such an appointment, holding it to be outside the mischief of the rule against unilateral appointment.

19. In ***Cholamandalam Investment & Finance Co. Ltd. v. Amrapali Enterprises & Anr.*** reported as **2023 SCC Online Cal 665**, this Court, while dealing with an execution petition under Section 36 of the Act, held that unilateral appointment of an arbitrator was unlawful and against the principles of impartiality and independence fundamental to arbitration, and that such an award was *non-est* in the eyes of law and its enforcement was refused. Learned Counsel submitted, however, that the said judgment is distinguishable on facts inasmuch as in that case, there was no disclosure under Section 12, no participation by the award debtor, and the arbitrator was closely connected with the appointing party none of which circumstances exist in the present case.
20. Similarly, the decisions in ***Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat*** reported as **2023 SCC Online Del 3148** and ***Kotak Mahindra Bank Ltd. v. Shalibhadra Cottrade Pvt. Ltd.*** reported as **2024 SCC Online Cal 6374**, were cases involving ex-parte awards passed by arbitrators who had not furnished the mandatory declaration under Section 12 of the Act. The Delhi High Court held that an arbitral award passed by an arbitrator unilaterally appointed by a party is a nullity and thus cannot be enforced, relying on the fact that the twin conditions for waiver, an express written agreement after the disputes have arisen, were not satisfied. In the present case, the Learned Arbitrator had duly made a disclosure under Section 12 of the Act, and the Award Debtor participated

in the proceedings, which distinguishes the present case from those authorities.

21. Learned Counsel also placed reliance upon the landmark Constitution Bench judgment in ***Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)*** reported as **2025 (4) SCC 641**, wherein a Five-Judge Bench of the Hon'ble Supreme Court laid down the following principles: first, that unilateral appointment clauses in agreements involving public sector undertakings contravene Article 14 of the Indian Constitution; second, that the waiver of disqualifications under Section 12(5) must be made voluntarily and only after the dispute has arisen; and third, that Section 18 of the Act, which mandates equal treatment of parties, applies to all phases of arbitration, including the appointment and constitution of the arbitral tribunal.
22. In ***Bhadra International (India) Pvt. Ltd. & Ors. v. Airports Authority of India*** reported as **2026 SCC OnLine SC 7**, the Hon'ble Supreme Court examined the question of whether a party that invoked arbitration and actively participated in the proceedings without raising any objection to the appointment of the arbitrator either before the Tribunal under Section 13 or before the Court under Section 14, and without raising such challenge in the petition filed under Section 34, could, at the stage of appellate proceedings, be permitted to impeach the award on the ground of unilateral appointment. Learned Counsel submitted that the arbitration agreement allowed AAI to appoint the arbitrator, which the appellants never objected to, and they actively participated in the arbitration proceedings, including after Section 12(5) of the Arbitration Act was introduced prohibiting unilateral appointments. On these facts, the Court

set aside the Award on the ground of unilateral appointment. Learned Counsel distinguishes this case by pointing out that in ***Bhadra International***, (supra) it was the unsuccessful claimant who subsequently sought to impugn the very proceedings it had initiated, making the principle of approbate and reprobate squarely applicable. In the present case, the Award Debtor, who is the decree-debtor, had every opportunity to raise such objections at the appropriate stages and chose not to do so.

- 23.** Learned Counsel finally submitted that the executing court does not possess the jurisdiction to set aside an arbitral award under the garb of execution proceedings. The position of law regarding unilateral appointment of arbitrators is settled: compliance with Section 12(5) read with Schedule VII is sine qua non for any arbitral reference to gain recognition, but an arbitral reference which itself began with an illegal act vitiates the entire proceedings from its very inception. However, where as in the present case the Arbitrator was not ineligible under the Seventh Schedule and had made due disclosures, no such illegality is attracted, and the executing court is bound to execute the Award.
- 24.** In the premises aforesaid, Learned Counsel for the Award Holder submitted that the defence raised by the Award Debtor at the stage of execution, seeking to challenge the Award on the ground of unilateral appointment, is wholly misconceived, legally untenable, and deserves to be rejected outright. The Award is valid, binding, and executable in accordance with law.
- 25.** No arguments were advanced on behalf of the Award Debtor.

Legal Analysis

- 26.** Having carefully considered the submissions advanced by the Learned Counsel for the Award Holder and the materials placed on record, this Court proceeds to examine the enforceability of the ex parte Arbitral Award dated 25.09.2025.
- 27.** The foundational question that falls for determination is whether the appointment of the Sole Arbitrator through Presolv360, an arbitration institution invoked unilaterally and exclusively by the Award Holder, constitutes a valid appointment within the meaning of the Arbitration and Conciliation Act, 1996, or whether it is, in substance and effect, a circumvention of the statutory prohibition against unilateral appointment, a prohibition that goes to the root of the jurisdiction of the Arbitral Tribunal and consequently to the enforceability of the Award rendered by it.
- 28.** Learned Counsel for the Award Holder strenuously urged that this Court, in exercise of jurisdiction under Section 36 of the Act, is clothed only with the powers of an executing court and cannot go behind the Award. Strong reliance was placed upon **Sunder Das** (supra) for the proposition that an executing court cannot question the legality or correctness of the decree placed before it for execution. This Court has carefully considered the said submission, and while the general principle is not in doubt, the Award Holder has invoked only one limb of the rule while conspicuously eliding the other.
- 29.** Section 36 of the Act provides that an arbitral award shall be enforced under the Code of Civil Procedure, 1908 *"in the same manner as if it were a decree of the Court."* By virtue of this statutory fiction, questions arising in

the course of execution are governed by Section 47 of the CPC, which provides that all questions relating to the execution, discharge, or satisfaction of the decree shall be determined by the executing court. The power of the executing court is, therefore, expressly anchored in Section 47 CPC read with Section 36 of the Act. The scope of this power, as authoritatively settled by the Hon'ble Supreme Court, is three-dimensional: the executing court cannot go behind the decree, cannot question its correctness, but is expressly empowered, indeed obligated, to ascertain whether the tribunal that passed the award possessed inherent jurisdiction to do so. As held in **Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman**, reported as (1970) 1 SCC 670, only a decree which is a nullity can be the subject matter of objection under Section 47 CPC, and not one which is merely erroneous either in law or on facts. The Hon'ble Supreme Court in **Sunder Das (supra)** itself held, in unambiguous terms, that the general rule against going behind a decree "*admits of one well-recognised exception*", namely, that where the decree is a nullity for want of inherent jurisdiction in the court or tribunal that passed it, its invalidity can be set up at any stage, including in execution proceedings. The question before this Court is therefore not whether the Arbitral Tribunal decided correctly or incorrectly, it is whether the Tribunal possessed any lawful jurisdiction to adjudicate at all. That is a question of nullity, not of correctness, and the executing court cannot shut its eyes to it.

30. This principle has been brought into sharp focus in the context of arbitral awards by the Hon'ble Supreme Court in **Electrosteel Steel Limited v. Ispat Carrier Private Limited** reported as 2025 INSC 525, wherein it was categorically held that an objection to execution of an award under

Section 47 CPC is not dependent or contingent upon filing a petition under Section 34 of the Act, and that a plea of nullity qua an arbitral award can be raised in a proceeding under Section 47 CPC, though such challenge would lie within a very narrow compass. The inherent lack of jurisdiction in the constituting tribunal falls squarely within that narrow compass. Learned Counsel for the Award Holder contended that any challenge to the appointment of the arbitrator ought to have been raised under Section 34 and cannot be entertained at the stage of execution. This contention stands conclusively answered by ***Electrosteel (supra)***, the non-filing of a Section 34 petition does not foreclose the executing court's jurisdiction to decline enforcement of a void award. It is equally well settled that the principle of waiver, acquiescence, and estoppel cannot be applied to bar the award debtor from raising the question of nullity, and the executing court is duty-bound to declare the non-executability of an award if it is a nullity. A void act cannot be validated by the passage of time, conduct, or silence, for there is nothing to validate. The Award Debtor's complete non-participation throughout the arbitral proceedings does not estop it from raising the question of nullity at the stage of execution; on the contrary, it is wholly consistent with the position that the Award Debtor never recognised the authority of a tribunal constituted in violation of the mandatory provisions of the Act.

31. The said legal position has been consistently applied by courts in the context of unilaterally appointed arbitrators. The Learned Single Bench of this Court in ***Cholamandalam Investment and Finance Co. Ltd. v. Amrapali Enterprises & Anr.*** (supra) has expressly held that an award made by an arbitrator appointed unilaterally by the award holder is *non-*

est and that its enforcement is to be denied under Section 36 of the Act even if the award was not set aside under Section 34. A similar view has been taken by the Division Bench of the Delhi High Court in ***Mahaveer Prasad Gupta v. Government of NCT of Delhi*** reported as **2025 SCC OnLine Del 4241** wherein it was categorically held that courts seized of execution proceedings must refuse enforcement of awards rendered by unilaterally appointed arbitrators, such awards being nullities on account of inherent lack of jurisdiction. The **Special Leave Petition (C) No. 24207/2025** preferred against the said judgment was dismissed by the Hon'ble Supreme Court on 02.02.2026, thereby affirming this legal position. Furthermore, the **Special Leave Petition (Diary) No. 47322/2023** against the Division Bench ruling of the Delhi High Court in ***Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat*** (supra) was similarly dismissed by the Hon'ble Supreme Court on 12.12.2023, which had held that the executing court can refuse to enforce an award passed by an arbitrator unilaterally appointed by an interested party who is ineligible under Section 12(5) of the Act. Accordingly, the executing court's jurisdiction under Section 47 CPC is clearly attracted in the present case, and it is on this statutory foundation that this Court proceeds to decline enforcement of the impugned Award.

- 32.** Learned Counsel for the Award Holder next submitted that the Act is a self-contained code which provides remedies at each stage, Sections 12, 13, 16, and 34, and that the Award Debtor, having failed to avail itself of any of these remedies, is now estopped from raising any objection at the stage of execution. It was further submitted that the Award Debtor's non-participation itself constituted a waiver.

33. This Court is unable to accept either limb of this submission. The self-contained nature of the Act is beyond dispute; however, that characterisation serves equally to underscore that the Act contains within itself both the prohibition against unilateral appointment under Section 12(5) and the mechanism to enforce that prohibition, including the right of an executing court to decline enforcement of a void award. The self-contained character of the Act cannot be selectively deployed to bar the Award Debtor from raising a jurisdictional objection while simultaneously ignoring the mandatory prohibition that Section 12(5) imposes on all parties and all tribunals.
34. As for the argument that non-participation amounts to waiver, the same is wholly untenable in law. The proviso to Section 12(5) of the Act is clear and precise: the ineligibility of an arbitrator can only be waived by an express agreement in writing entered into by the parties after the disputes have arisen. The Hon'ble Supreme Court in ***Bharat Broadband Network Limited v. United Telecoms Limited*** – reported as **(2019) 5 SCC 755** – authoritatively held that waiver under the proviso to Section 12(5) cannot be inferred from the conduct of a party; it requires a positive, unequivocal, written agreement post-dispute. In the present case, the Award Debtor never participated at any stage, not at the stage of invocation, not at the stage of constitution of the Tribunal, and not before the Arbitrator. A party that was absent throughout the proceedings cannot, by that very absence, be held to have executed an "express agreement in writing" for silence is not agreement, and non-participation is the antithesis of consent. The Hon'ble Supreme Court in ***Bhadra International (India) Pvt. Ltd.*** (*supra*) has further clarified that even active participation including filing a

statement of claim, recording "no objection" in a procedural order, or seeking extension of time does not constitute an express written waiver. A fortiori, complete non-participation cannot constitute such waiver.

35. The principal and most strenuously urged submission of the Award Holder is that the appointment in the present case was made not by the Award Holder itself, but by Presolv360, an independent arbitral institution, and that this institutional intermediary breaks the chain of unilateral control, thereby rendering the appointment valid. This argument, though attractively presented, must be examined not by its form but by its substance.
36. The prohibition engrafted by Section 12(5) of the Act and the judicial decisions rendered thereunder is directed not at the formal mechanism through which an arbitrator is appointed, but at the substantive reality of whether an interested party retains, exercises, or engineers unilateral control over the constitution of the tribunal that is to adjudicate its own claims. The mischief that the legislature sought to address in enacting Section 12(5), following the 176th and 246th Reports of the Law Commission, was precisely the situation where an interested party, by virtue of a contractual advantage, is able to determine or decisively influence who decides the dispute. The Hon'ble Supreme Court in **TRF Limited** (*supra*) applied the ancient maxim *qui facit per alium, facit per se*, one who acts through another acts by himself to hold that an interested party cannot do indirectly what it is prohibited from doing directly. The form of the appointment cannot save what the substance condemns.
37. In the present case, the arbitration clause did not name Presolv360 as the agreed institutional arbitration centre. There was no prior agreement

between the parties to submit their disputes to the rules or the appointing authority of Presolv360. The Award Holder, acting unilaterally and in the absence of any consent from the Award Debtor, chose Presolv360 and invoked its mechanism. The Award Debtor never consented to this selection. In these circumstances, Presolv360 did not derive its authority to appoint from the mutual agreement of the parties, the very source that gives institutional appointments their legitimacy. It derived its authority solely from the unilateral act of the interested party. The institutional form, therefore, does not alter the substantive character of the act; it merely introduces an additional step between the interested party and the arbitrator, while the effective control remains with the interested party throughout.

- 38.** It is a foundational principle of institutional arbitration that both parties must have agreed, either in the original contract or subsequently, to the specific institution, its rules, and its appointing authority. As the Hon'ble Supreme Court in the Constitution Bench judgment in ***Central Organisation for Railway Electrification (supra)*** has declared, a panel of potential arbitrators unilaterally controlled by one party suffers from a lack of independence and impartiality, and a clause that gives one party the power to appoint a sole arbitrator will give rise to a reasonable apprehension of bias, the test for which is that of a reasonable third person. If a unilaterally curated panel of names fails this test, a unilaterally selected institution must also fail it, for the vice is identical: the interested party controls, at the threshold, the mechanism by which the adjudicator is to be selected.

39. The submission that institutional arbitration as a mode is being "delegitimised" by this reasoning proceeds on a complete mischaracterisation. Institutional arbitration is not delegitimised by requiring that the choice of the institution itself be mutual. What is delegitimised and rightly so is the practice of an interested party unilaterally selecting the institution, unilaterally invoking its mechanism, and thereby achieving the same result as a direct appointment, while clothing it in institutional form. The integrity of institutional arbitration depends upon bilateral consent to the institution; it is not preserved by permitting one party to choose the institution without the other's agreement.
40. Learned Counsel for the Award Holder submitted that the Sole Arbitrator appointed by Presolv360 does not fall within any of the entries in the Seventh Schedule to the Act, and that therefore no ineligibility is attracted under Section 12(5). Reliance was placed upon **McLeod Russel India Ltd.(supra)** and **Voestalpine Schienen GmbH** (supra) to argue that a retired judge appointed through an institutional mechanism cannot be said to be ineligible.
41. This Court finds it necessary to address a conceptual confusion embedded in this submission. The ineligibility under Section 12(5) read with the Seventh Schedule is one species of disqualification, it pertains to the individual arbitrator's relationship with the parties, counsel, or subject matter. However, the prohibition against unilateral appointment, as articulated in **TRF Limited**, (supra) **Perkins Eastman**, (supra) and **CORE** (supra), operates on a different and independent plane, it concerns the process of appointment, irrespective of the personal qualifications or

integrity of the arbitrator ultimately appointed. As the Hon'ble Supreme Court observed in **Perkins Eastman** (*supra*), it is not that the appointed arbitrator is personally biased; it is that a party with an interest in the outcome of the dispute cannot have the power to select the sole adjudicator of its own claims. The very act of such appointment, regardless of who the appointee is, gives rise to justifiable doubts as to the independence and impartiality of the process.

42. The **McLeod Russel** (*supra*) judgment, upon which Learned Counsel places heavy reliance, must be read in its proper context. In that case, the Calcutta High Court upheld the appointment on the specific finding that there existed an "express agreement in writing" a distinct factual finding that is entirely absent in the present case. Moreover, that judgment has been rendered in a legal landscape that has since been comprehensively addressed by the Constitution Bench in **CORE** (*supra*) and the Supreme Court in **Bhadra International** (*supra*), both of which reaffirm without any ambiguity that a party interested in the outcome cannot unilaterally control the appointment process.

43. The question of unilateral appointment was thereafter considered by a Constitution Bench of five Judges in **Central Organisation for Railway Electrification** (*supra*). This judgment represents the most comprehensive and authoritative pronouncement of the Supreme Court on the subject. This pronouncement of constitutional bench affirms arbitration as a quasi judicial function and reiterates that an arbitrator needs to exercise their powers impartially and objectively. The majority treats the principle of equality found in Section 18 of the Arbitration Act as the basis for the creation of an independent and impartial tribunal. The majority also relies

on the constitutional norms of equality found in Article 14 of the Constitution. More specifically, the Constitution Bench declared in unequivocal terms that the independence and impartiality of arbitral proceedings and equality of parties are concomitant principles and equal treatment of parties applies at all stages including at the stage of appointment of arbitrators.

44. The ratio of the Constitution Bench in ***Central Organisation for Railway Electrification*** (*supra*) may be distilled into the following propositions, as they govern the present case:

- (i) The principle of equal treatment of parties applies at all stages of arbitration proceedings, including the stage of the appointment of arbitrators.
- (ii) 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, and such a unilateral clause is exclusive and hinders equal participation of parties in the appointment process.
- (iii) While party autonomy allows for freedom in forming arbitration agreements, it is not absolute; mandatory provisions like Sections 12(5) and 18 impose non-derogable obligations to prevent bias and ensure fairness. Arbitration clauses must facilitate equal participation from both parties in the appointment process, thereby preventing any imbalance of power that could compromise the arbitral tribunal's integrity.

- (iv) A person with an interest in the outcome of the dispute cannot participate in the appointment of an arbitrator; such involvement would compromise the neutrality and fairness of the process.

45. The Hon'ble Supreme Court in ***Bhadra International (India) Pvt. Ltd.*** (*supra*), considered three specific questions and answered each as follows:

- (i) The first question was '*Whether the Sole Arbitrator was ineligible under Section 12(5)?*' The Hon'ble Court answered it in the affirmative. The Court held that the principle of equal treatment of parties applies not only to the arbitral proceedings but also to the procedure for appointment of arbitrators, and that the parties must have the possibility of participating in the constitution of the arbitral tribunal on equal terms. The unilateral appointment of a sole arbitrator was held to be *void ab initio*, and the sole arbitrator so appointed de jure ineligible under Section 12(5) read with the Seventh Schedule. A notice invoking arbitration does not, by itself, operate as consent to any future appointment.
- (ii) The second question considered was '*Whether the applicability of Section 12(5) was waived by conduct?*' The Hon'ble Court answered this question in the negative. The Court held that the proviso requires a clear and unequivocal written agreement, and that mere participation in proceedings, filing of a Statement of Claim, recording of "no objection" in a procedural order, or filing an application under Section 29A, do not, individually or collectively, constitute an "express agreement in writing" for the purposes of a valid waiver.

(iii) The third question considered was '*Whether the objection could be raised for the first time in Section 34 proceedings?*' The Hon'ble Court answered this question in the affirmative. The Court held that a challenge to an arbitrator's ineligibility can be raised at any stage, because an award passed by an ineligible arbitrator is non-existent and carries no enforceability or recognition in law. Accordingly, the appeals were allowed and the impugned judgment of the Division Bench of the Delhi High Court was set aside.

46. As for the reliance placed on **Voestalpine** (supra), the Constitution Bench in **CORE** (supra) has expressly disagreed with the reasoning in **Voestalpine** (supra) insofar as it dealt with three-member tribunal constitutions, holding that the earlier decision's accommodation of party curated panels required reconsideration.
47. The prohibition against unilateral appointment of a sole arbitrator was, as the Constitution Bench in **CORE** (supra) expressly noted, already settled law by virtue of **TRF Limited** (supra) and **Perkins Eastman** (supra), which have, in the Court's own words, "held the field for years." As the Constitution Bench observed: "**TRF Limited.** (supra) and **Perkins** (supra) have held the field for years now. However, we have disagreed with **Voestalpine** (supra) and **CORE** (supra) which dealt with the appointment of a three-member arbitral tribunal." The prohibition against the unilateral appointment of a sole arbitrator was, therefore, the law as early as 2017, well before the arbitration in the present case was initiated or the Award was passed.
48. Second, as held by the Hon'ble Supreme Court in **Bhadra International** (supra), a challenge to an arbitrator's ineligibility on the ground of

unilateral appointment can be raised at any stage, because an award passed by an ineligible arbitrator is *non-est* and carries no enforceability or recognition in law. No limitation can cure a fundamental void, because an award that is *non-est* cannot acquire enforceability by the mere efflux of the period prescribed for filing a petition under Section 34.

49. It is significant that the Award Holder, faced with the Award Debtor's non-participation, possessed a clear, unambiguous, and entirely adequate statutory remedy, Section 11 of the Act, which specifically provides for the appointment of an arbitrator by a Court in cases where a party fails to respond or act as required. Section 11 exists precisely to address this situation: to place the power of appointment in the hands of a neutral judicial authority when the parties cannot agree. The Award Holder, being a non-banking financial company directly and materially interested in the outcome of the dispute, was statutorily precluded from choosing its own appointing mechanism. The proper course was to approach this Court or the Supreme Court, as the case may be, under Section 11, and have an independent arbitrator appointed by a neutral authority. The Award Holder consciously chose not to avail this remedy and instead unilaterally invoked Presolv360, an institution of its own selection, without the consent of the other side. This was not an oversight; it was a deliberate choice that produced a predictable legal infirmity.

50. The Act does not leave the invoking party without remedy in a case of non-participation by the opposite party. It provides the specific remedy of Section 11. To permit an interested party to bypass this remedy and unilaterally invoke an institution of its choice would be to countenance precisely the mischief that the post-2015 amendments were designed to

prevent. As the law now stands following **TRF Limited** (*supra*), **Perkins Eastman** (*supra*), **CORE** (*supra*), and **Bhadra International** (*supra*) the only permissible course for an interested party, when the opposite party does not participate in the constitution of the tribunal, is to approach the Court under Section 11. Any other course defeats the mandatory provisions of Section 12(5) and Section 18 of the Act.

51. For the avoidance of doubt, this Court records the following specific findings on the waiver argument:

- (i) The proviso to Section 12(5) of the Act requires a clear and unequivocal written agreement, entered into by both parties after the disputes have arisen, to waive the statutory disqualification. This is a mandatory requirement of two cumulative conditions, writing and post-dispute agreement, both of which must be satisfied.
- (ii) The Award Debtor in the present case did not participate at any stage of the proceedings. It neither responded to the invocation notice, nor appeared before the Arbitral Tribunal, nor filed any statement, nor sought any extension, nor made any application whatsoever. The complete absence of participation cannot, by any stretch of legal reasoning, be construed as an "express agreement in writing." It is the precise opposite of agreement.
- (iii) As authoritatively held in **Bhadra International** (*supra*), even active participation including the filing of a statement of claim, the recording of "no objection" in a procedural order, and the seeking of extensions of time does not satisfy the requirement of express written waiver. If active participation is insufficient, the absence of

any participation whatsoever is entirely incapable of constituting a waiver. The argument is accordingly rejected.

52. Upon a holistic consideration of the statutory framework, the submissions of Learned Counsel for the Award Holder, and the authoritative pronouncements of the Hon'ble Supreme Court and the High Courts, this Court records the following conclusions:

- (i) The Arbitration and Conciliation Act, 1996 is a special enactment that contains, within its own framework, both the mandatory prohibition against unilateral appointment under Section 12(5) and the mechanism to enforce that prohibition at the stage of execution under Section 36. The self-contained nature of the Act does not bar the Award Debtor or executing Court from raising the plea of jurisdictional nullity; it reinforces it.
- (ii) The appointment of the Sole Arbitrator by Presolv360, an institution selected unilaterally and exclusively by the Award Holder without the consent or participation of the Award Debtor, constitutes, in substance, a unilateral appointment by an interested party. The institutional form does not alter the substantive character of the act. The principle enunciated in **TRF Limited** (*supra*) *qui facit per alium, facit per se*, applies with full force to an institutional appointment that is, in every material sense, engineered unilaterally by the interested party.
- (iii) The Sole Arbitrator so appointed was, by operation of law, de jure ineligible and de jure unable to perform his functions within the meaning of Section 14(1)(a) of the Act. The Arbitral Tribunal was accordingly constituted in derogation of the mandatory provisions of

the Act and lacked inherent jurisdiction to adjudicate the disputes between the parties.

- (iv) The Award Debtor's complete non-participation at every stage of the arbitral proceedings does not constitute, and cannot be construed as, an express written waiver of its rights under the proviso to Section 12(5) of the Act. No such waiver exists in the present case.
- (v) The prohibition against unilateral appointment of a sole arbitrator was conclusively settled by **TRF Limited** (supra) in 2017 and **Perkins Eastman** (supra) in 2019, both of which pre-date the appointment in the present case.
- (vi) The exception carved out in **Sunder Das** (supra) is squarely attracted: the Award is not merely erroneous, it is *void ab initio*, having been rendered by a tribunal lacking inherent jurisdiction. An executing court is both empowered and obligated to decline enforcement of such an award.
- (vii) The ex parte Arbitral Award dated 25.09.2025 is, accordingly, *void ab initio* and *non-est* in the eyes of law. It carries no enforceability or recognition under the Act and cannot be executed as a decree of this Court under Section 36 of the Act.

53. In view of the foregoing, this Court declines to enforce the ex parte Arbitral Award dated 25.09.2025. The Execution Petition stands dismissed accordingly. If the Award Holder is aggrieved and desires to pursue its claims, it remains at liberty to initiate fresh arbitral proceedings before a validly constituted Arbitral Tribunal, appointed in accordance with the provisions of the Act and consistent with the principles of independence, impartiality, and equality of parties.

54. The Execution Petition stands dismissed accordingly.

(Gaurang Kanth, J.)

SAKIL AMED (P.A)

