



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

MISC. CIVIL APPLICATION (ARBN.) NO. 621 OF 2025

Ms. Neha Constructions,
through its Proprietor Shri Dilip V. Belsare. **APPLICANT**

VERSUS

(1) Union of India and others **RESPONDENTS**

Mr. Abhijeet Khare, Counsel for the applicant,
Mr. S.A. Chaudhari, Counsel for the respondents.

CORAM : NIVEDITA P. MEHTA, J.

DATE OF RESERVING THE ORDER : 24-12-2025

DATE OF PRONOUNCEMENT OF THE ORDER : 06-01-2026

P.C. :

Heard.

2. Impartiality and unbiased conduct of proceedings form the very soul of arbitration. For this reason, the question of neutrality of arbitrators, particularly in cases where arbitrators are unilaterally nominated by one party, has consistently engaged judicial scrutiny, notwithstanding the authoritative pronouncements of the Hon'ble Supreme Court holding that, after the 2015 amendment to the

Arbitration and Conciliation Act, 1996 (“the Act of 1996”), unilateral appointments are impermissible.

3. The present case is one such instance where this Court is once again called upon to examine the legality of appointment of arbitrators by the respondents, specifically in the context of waiver of the applicability of Section 12(5) of the Act of 1996, allegedly given by the applicant.

4. The applicant has invoked Section 11 of the Act of 1996 seeking a declaration that the mandate of the existing arbitral tribunal, constituted pursuant to the order of this Court dated 21st July 2023, stands terminated in view of subsequent developments, and consequently, for appointment of a sole, independent and impartial arbitrator to adjudicate the disputes arising out of the contract agreement dated 22nd May 2015.

5. The factual matrix, in brief, is as follows:

5.1 On 22nd May 2015, an agreement was executed between the applicant and non-applicant No.1 for designing, supplying, constructing, and commissioning a 132 KV double circuit transmission line from the 132 KV Grid Substation of MSETCL at Brahmapuri to the 132/25 KV Railway Traction Substation at Nagbhid Railway Station on turnkey basis.

5.2 According to the applicant, the work under the agreement was completed. However, during execution, certain issues arose which delayed completion, allegedly due to negligence of railway employees, which could have been avoided. It is contended that such delays resulted in financial loss and mental agony to the applicant. Consequently, invoking Clause 1.2.54 of the agreement, the applicant sought appointment of arbitrator by issuing a letter dated 10th October 2022.

5.3 As the arbitral tribunal was not constituted, the applicant approached this Court by filing Misc. Civil Application (Arbn.) No. 378 of 2023 seeking appointment of an arbitrator. By order dated 21st July 2023, after hearing the parties, this Court directed the respondents to appoint arbitrators for resolution of disputes within a period of six weeks.

5.4 Pursuant thereto, an arbitral tribunal came to be constituted. It is the applicant's case that the respondents sought a waiver to the effect that Section 12(5) of the Act of 1996 would not apply to arbitrators who were or are associated with the respondents. The applicant accorded such waiver as sought; however, it claims that the waiver was obtained prior to the constitution of the arbitral tribunal and before disclosure of the names of the proposed arbitrators.

5.5 Subsequently, the arbitral tribunal was constituted comprising serving railway officers. One Mr. Prateek Kumar Chaudhary was nominated as the Presiding Officer. On 26th February 2024, Mr. Chaudhary resigned from the post on the ground that he was being transferred and was due to retire on 29th February 2024. Thereafter, Mr. Kaushal Kumar Srivastava was appointed as the new Presiding Officer by letter dated 4th April 2024.

5.6 On 28th June 2024, the applicant filed its Statement of Claim before the arbitral tribunal. The applicant asserts that even thereafter the proceedings remained ineffective due to delays attributable to the respondents. Consequently, by communication dated 9th November 2024, the applicant intimated the respondents that it would be constrained to seek termination of the tribunal's mandate.

5.7 In response, the respondents communicated a date for the first arbitral meeting. A virtual meeting was requested by the applicant but was refused. On 27th January 2025, the tribunal held its first meeting and recorded minutes thereof. On 24th February 2025, the respondents filed their Statement of Defence along with a Counter Claim.

5.8 On 27th February 2025, the applicant's nominee arbitrator, Mr. Akash Sharma, withdrew from the tribunal citing inability to continue

due to his transfer. A meeting scheduled on 27th February 2025 was postponed to 3 March 2025. On 24th March 2025, the respondents sought postponement of the arbitral meeting, and thereafter, on 28th March 2025, a meeting was convened. As both parties expressed willingness to explore settlement, the matter was adjourned.

5.9 On 7th April 2025, the respondents issued a communication proposing replacement of the withdrawn co-arbitrator and supplied a panel of arbitrators comprising serving railway officers. The applicant contends that such officers are disqualified under the Seventh Schedule to the Act of 1996.

5.10 On 30th May 2025, the applicant requested the Presiding Arbitrator to reject the Counter-claim as being hopelessly delayed. It is asserted that despite repeated communications and despite refusal of a co-arbitrator, the arbitral tribunal was not duly constituted. According to the applicant, the tribunal had become *de jure* and *de facto* ineligible to continue, was non-functional, improperly constituted and incapable of proceeding further.

5.11 The applicant further contends that the waiver procured from it was prior to constitution of the tribunal and prior to disclosure of the arbitrators' names, and therefore such waiver is invalid. It is argued

that such waiver cannot be construed as a blanket or prospective waiver applicable to subsequent appointments or reconstitution.

5.12 Reliance is placed on Section 14(1)(a) of the Act of 1996 to contend that the mandate of an arbitrator stands terminated if he becomes *de jure* or *de facto* incapable of performing his functions. It is argued that continuous changes in composition, refusal of virtual hearings, repeated adjournments and prolonged non-functionality satisfy the statutory test.

5.13 The applicant therefore seeks termination of the mandate of the existing tribunal and appointment of a sole, independent and impartial arbitrator.

SUBMISSIONS

6. To substantiate its case, the applicant has relied upon the judgments in *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, AIR 2020 SC 59; *Bharat Broadband Network Ltd. v. United Telecom Ltd.*, (2019) 5 SCC 755, *Rail Vikas Nigam Ltd. v. Simplex Infrastructure Ltd.*, Special Leave to Appeal (C) No(s). 5992/2019; *Arvind Mishra v. Union of India*, 2024 SCC OnLine Bom 1094, and *M.V. Omni Projects (India) Ltd. v. Union of India* decided by the Delhi High Court on 15 May 2025.

7. It is argued that arbitral proceedings must be conducted impartially and without bias, and that where the appointing authority itself is disqualified, any appointment made by such authority is void. Appointment of serving officers of one party as arbitrator is stated to be in violation of Section 12(5) read with the Seventh Schedule of the Act of 1996.

8. *Per contra*, learned Counsel for the respondents contends that due process was followed, that delays are attributable to the applicant, and that the applicant participated in the proceedings without objection. It is argued that departmental arbitration by serving officers is valid when Section 12(5) is waived in writing, that such waiver was voluntarily executed, and that replacements are part of the same contractual mechanism.

9. The respondents rely on *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)*, (2020) 14 SCC 712 and *Union of India v. Tania Constructions Pvt. Ltd.*, 2021 SCC Online Del 4417.

CONSIDERATION AND FINDINGS:

10. The question that arises for consideration is whether the mandate of the arbitral tribunal stands terminated and whether the

waiver allegedly given by the applicant is valid, in the facts and circumstances of the case.

11. It is well settled that one of the primary objectives of the Act of 1996 is to ensure fair, neutral, and efficient arbitral procedures. Party autonomy is the backbone of arbitration; however, such autonomy is subject to the fundamental requirement of impartiality.

12. Section 12 of the Act, read with the Fifth and Seventh Schedules introduced by the 2015 amendment, sets out strict standards of independence and neutrality. Individuals falling within the Seventh Schedule are statutorily ineligible to act as arbitrators unless such ineligibility is expressly waived in writing after disputes have arisen.

13. In the present case, the record clearly demonstrates that the waiver was obtained prior to disclosure of the names of the arbitrators. The waiver was therefore to the process of constitution and not to the persons comprising the tribunal. The waiver contemplated under Section 12(5) is person-specific and not mechanism-specific.

14. The timeline reveals that the waiver was furnished before the names of the arbitrators were communicated. Hence, it cannot be said that the applicant waived its objection to the appointment of specific serving railway officers as arbitrators.

15. Further, repeated resignations, prolonged delays, refusal of virtual hearings, and non-functionality of the tribunal cumulatively establish *de jure* and *de facto* incapacity under Section 14(1)(a) of the Act of 1996. Participation in proceedings does not amount to waiver of statutory ineligibility. The mandate of law cannot be defeated by acquiescence.

16. In this context, it is worthwhile to rely on ***Bharat Broadband Network Limited versus United Telecom Limited*** (supra), more particularly paras 15, 16 and 17 which read thus:

“15. Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non-obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be “ineligible” to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an “express agreement in writing”. Obviously, the “express agreement in writing” has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is

interdicted by the Seventh Schedule.

16. *The Law Commission Report, which has been extensively referred to in some of our judgments, makes it clear that there are certain minimum levels of independence and impartiality that should be required of the arbitral process, regardless of the parties' agreement. This being the case, the Law Commission then found:*

“59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a “guide” to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed [section 12 \(5\)](#) of the Act and the Fifth Schedule which incorporates the categories from the Red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed explanation to [section 14](#). Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the Red and Orange lists of the IBA Guidelines), the ineligibility to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the Red list of the IBA Guidelines).

.....

Thus, it will be seen that party autonomy is to be respected only in certain exceptional situations which could be situations which arise in family arbitrations or other arbitrations where a person subjectively commands blind faith and trust of the parties to the dispute, despite the existence of objective justifiable doubts regarding his independence and impartiality.

17. *The scheme of [Sections 12,13, and14](#), therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under*

Sections 12(1) to 12(4) read with Section 13. However, where such person becomes “ineligible” to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case, i.e., a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e., de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them.”

It is held that any person who falls within the seventh schedule of the Act of 1996, becomes ineligible for appointment as an arbitrator, unless the party categorically waves of the applicability of Section 12 (5).

17. Further, in *Truly Pest Solution (P) Ltd. v. Railway, 2024 SCC OnLine Bom 3528* passed by this Court, it is held as under:

"16. It is the case of the petitioner/claimant that the Arbitral

Tribunal consisting of sole arbitrator who was an employee of the respondent (Railways), hence, he could not have being adjudicating the issue between the claimant and the respondent. It is the case of the claimant that after the amendment to the Arbitration Act, in the year 2015, there were major changes made in Section 12 of the said Act Section 12 of the Arbitration Act mentions about the grounds for challenge. One of such ground of challenge is sub-clause (5) which mentions that any person whose relationship with the parties or the subject-matter of the dispute which falls under the Seventh Schedule shall not be eligible to be appointed as an arbitrator. The Seventh Schedule refers to about 19 sub-clauses under which, if the arbitrator has relationship with the parties or the counsel, he would be ineligible to be appointed as an arbitrator. The first of such clause mentions about an arbitrator being an employee, consultant or advisor in past or present with one of the parties, then he would be ineligible to be appointed as an arbitrator.

17. In the present proceedings, the petitioner/claimant invoked the Arbitration clause by its Letter dated 7-12-2020.

.....

Therefore, the claimants have themselves invoked arbitration clause, wherein it is specifically mentioned that the sole arbitrator, would be employee of Railways. Being aware of this fact they have chose to go ahead with the arbitration. The claimant had invoked the arbitration clause by their Letter dated 7-12-2020. The said letter was addressed by the claimant through their advocates hence, the claimant cannot now take a defence that they were not aware about the legal implications while they issued the letter of invocation of arbitration.

In my opinion, even at that stage, if the claimant desired to appoint sole arbitrator by mutual consent, the claimant could have filed an application under Section 11 of the Arbitration Act, whereby they could have sought for appointment of the sole arbitrator to decide the dispute between the parties. Admittedly, the claimants have not taken any such steps.

18.3. Though Section 12(5) specifically mentions that the arbitrator should disclose his relationship with the parties, however, proviso to Section 12(5) mentions about waiver in writing. In the present proceedings, the claimant by express agreement in writing had waived the applicability of sub-section (5) of Section 12. Therefore, according to me, the claimant at the stage of Section 34 is bared from taking up a ground under Section 12(5) for challenging the award.

.....

20. Subsequently, when the arbitration proceedings commenced, the claimant had an option to file an application

before the Arbitral Tribunal under Section 16 read with Section 13(2) of the Arbitration Act. However, the claimant has not taken up any such steps as contemplated under Section 16 of the said Act. Section 16 of the Arbitration Act, envisages the jurisdiction of the Arbitral Tribunal wherein if a party has to take an objection about the jurisdiction of the Arbitral Tribunal, the same can be made before the Arbitral Tribunal, and the Arbitral Tribunal can decide the same. If the said application is allowed, the Arbitral Tribunal proceedings come to an end. However, if such an application is not allowed, the same can be taken as a ground along with the other grounds while challenging to the arbitral award, if it is against the said party. In the present proceeding, no such steps were taken up by the claimant, as contemplated under Section 13(2).

20.1. The Supreme Court in HRD Corpn. v. GAIL (India) Ltd.⁷ has held that if the arbitrator fails to file disclosure in terms of Section 12(1) read with Fifth Schedule of the Arbitration and Conciliation Act, 1996, the remedy of the party in that event would be to apply under Section 14(2) of the Arbitration and Conciliation Act, 1996 to the court to decide about the termination of the mandate of the Arbitral Tribunal on that ground.

20.2. Under Section 16, the Arbitral Tribunal is empowered to rule on its own jurisdiction including ruling on any objection with respect to the existence or validity of arbitration agreement. Such plea shall be raised not later than the submission of the statement of defence. If such plea is rejected by the Arbitral Tribunal, it has to proceed with the arbitral proceedings and declare an award. If plea of jurisdiction is accepted by the Arbitral Tribunal, the respondent may file an appeal under Section 37. If plea of jurisdiction is not accepted, the respondent may challenge such ruling along with award under Section 34."

While it is true that in the aforesaid case, this court has upheld the waiver given by the claimant therein, however, the same was challenged in proceedings under Section 34 and not at the stage of appointment of arbitrator under Section 11. Therefore, the said precedent would not be applicable to the present factual matrix.

18. In *Central Organisation for Railway Electrification Versus ECI SPIC SMO MCML (JV)*, 2024 SCC Online SC 3219, the Hon'ble Apex Court held as under:

“161. By agreeing to arbitrate in a public-private contract, the government or its companies agree to settle their disputes with private contractors through arbitration. Since the activities of the government have a public element, it is incumbent upon the government to ensure that it enters into a contract with the public without adopting any unfair or unreasonable procedure. Every action of a public authority or a person acting in the public interest or any act that gives rise to a public element must be based on principles of fairness and non-arbitrariness. Therefore, government agencies have to consider the principles of equality and non-arbitrariness when crafting arbitration procedures, including the procedure for the appointment of arbitrators. The terms of the arbitration agreement must meet the minimum standards of equality and fairness. In a public-private contract, the government and its instrumentalities must ensure that the arbitral process contemplated by the contract is also fair to the other party to avoid arbitrariness.

162. The possibility of bias is real in situations where an arbitration clause allows a government company to unilaterally appoint a sole arbitrator or control the majority of the arbitrators. Since the government has control over the arbitral tribunal, it can chart the course of the arbitration proceedings to the prejudice of the other party. Resultantly, unilateral appointment clauses fail to provide an effective substitute for judicial proceedings in India. Further, a unilateral appointment clause is inherently exclusionary and violates the principle of equal treatment of parties and procedural equality.

163. Unilateral appointment clauses in a public-private contract fail to provide the minimum level of integrity required in authorities performing quasi-judicial functions such as arbitral tribunals. Therefore, a unilateral appointment clause is against the principle of arbitration, that is, impartial resolution of disputes between parties. It also violates the nemo judex rule which constitutes the

public policy of India in the context of arbitration. Therefore, unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution for being arbitrary in addition to being violative of the equality principle under the Arbitration Act.

.....

J. Conclusion

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

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

the date of this judgment. This direction applies to three-member tribunals.

170. The reference is answered in the above terms.

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

The judgment reveals that unilateral appointment clauses are against the principles of arbitration and more particularly Article 14 of the Constitution of India. In case of public private contract, there is a possibility of bias where the state unilaterally appoints arbitrator as it has a direct control over the arbitrator. Such course gives a go by to the objective of a neutral arbitral process.

19. The cumulative effect of the aforesaid discussion is that the party autonomy in arbitration proceedings is of pivotal importance and the same commences from the stage of choosing the members of the arbitral tribunal. If the arbitration agreement is considered by the court as not enabling constitution of an independent and impartial tribunal, judicial intervention is warranted. As regards waiver, while the waiver can be valid, the stage at which waiver is sought is crucial as potential bias can be waived only when the names of the arbitrator are communicated to the other party.

20. In the aforesaid context and in view of the settled legal position, serving employees of the respondents are ineligible to act as arbitrators,

and the waiver in the present case cannot be held to be valid.

CONCLUSION:

21. In light of the above discussion, this Court holds that the mandate of the arbitral tribunal constituted pursuant to the order dated 21st July 2023 stands terminated. In the facts and circumstances of the case, appointment of an independent and impartial arbitrator is warranted.

22. The application is allowed. The mandate of the existing arbitral tribunal stands terminated. The parties are directed to suggest and mutually agree upon the name of a sole arbitrator or nominate their respective arbitrators within a period of one week from today. In the event of failure to do so, this Court shall proceed to appoint a sole arbitrator/arbitral tribunal.

23. List the matter on 12-01-2026 for further consideration.

(NIVEDITA P. MEHTA, J.)