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

Date of decision: 12th MAY, 2026

IN THE MATTER OF:

\+ **OMP (ENF.) (COMM.) 1/2022, EX.APPL.(OS) 232/2025, EX.APPL.(OS) 1068/2025, EX.APPL.(OS) 1333/2025**

BDR BUILDERS AND DEVELOPERS PVT.LTD. .....Decree Holder

Through: Mr. Manish Vashisht, Sr. Adv. with Mr. Prashant Mehta, Ms. Prachi Kohli, Ms. Diksha Goswami, Mr. Manish Rajput and Mr. Nitin Bajaj, Advocates

versus

MAHAMAYA EXPORTS PVT. LTD & ORS. .....Judgement Debtor

Through: Mr. Rajeev Saxena with Mr. Lalit Nagar, Advs.
Mr. J. Rajesh, Mr. Yashwardhan Aggarwal, Mr. Arsalan Ahmed, Mr. Ali Abbas Masoodi, Advs.
Mr. Aditya Bansal and Mr. Vansh, Advs for JD-2.
Mr. Rahul Sagar Sahay, Mr. Pratham Arora, Mr. Raghav Rajmalani, Advs for JD-3.
Mr Vivek Gurnani, Panel Counsel, ED, Mr Kanishk Maurya, Adv

**CORAM:**
**HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD**

**JUDGMENT (ORAL)**

1. The Petitioner/Decree Holder has approached this Court by filing the present petition for enforcement of the Award dated 30.08.2018 passed by the learned Sole Arbitrator in Arbitration Case No.4/2016 titled as BDR

Buildtech Pvt. Ltd. v. Mahamaya Exports Pvt. Ltd. & Ors.

2. The facts in brief as stated by the Petitioner/Decree Holder in the present execution petition are as follows:-

i. It is stated that agreements were entered into between the Petitioner/Decree Holder/Purchaser and the Judgment Debtor/Respondent as sellers of Floor Space Index (FSI) of 2,90,000 sq. ft. in the project of the Judgment Debtor on its land in Sector 63A, Gurgaon, Haryana.

ii. It is stated that a sum of Rs.29 crores were paid by the Decree Holder to the Judgment Debtor. It is the case of the Decree Holder that since the Judgment Debtor did not take necessary steps in terms of the Agreement dated 29.06.2015, a legal notice dated 12.07.2016 was issued by the Petitioner. Thereafter, arbitration proceedings were initiated by the Petitioner appointing Mr. S. K. Tandon, former ADJ, Delhi as the Sole Arbitrator. An Award dated 30.08.2018 was passed by the learned Sole Arbitrator directing the Respondent to pay a sum of Rs.29 crores to the Petitioner along with interest @ 18% per annum from 29.06.2015 along with costs.

iii. It is stated that till 31.12.2021, when this petition was filed, a sum of Rs. 62,93,00,000/- was due and payable by the Judgment Debtor.

iv. It is stated that since the Award has not been challenged by the Judgment Debtor by filing a petition under Section 34 of the Arbitration & Conciliation Act even after a lapse of three years, the present petition has been filed by the Decree Holder for execution of the said Award.

3. A preliminary objection has been raised by the Judgment Debtor stating that since the appointment of the Arbitrator is unilateral in nature, the same is hit by the Judgment of the Apex Court in Perkins Eastman Architects DPC & Anr. V. HSCC (India) Ltd., **(2020) 20 SCC 760** and the Judgment passed by the five Judges Bench of the Apex Court in Central Organisation for Railway Electrification (CORE) v. ECI SPIC SMO MCML (JV) A Joint Venture Co., **(2025) 4 SCC 641**, wherein it has been categorically held that any clause allowing any of the parties to unilaterally appoint the arbitrator is in violation of the principles of equality and gives rise to justifiable doubts as to the independence and impartiality of the arbitrator and such a clause hinders equal participation of the other party and therefore the same cannot be permitted.

4. At this juncture it is necessary to refer to the procedure adopted by the Petitioner/Decree Holder in the facts of this case.

5. Material on record indicates that a legal notice dated 12.07.2016 had been issued by the Petitioner to the Respondent stating that the Respondent approached the Petitioner stating that the Respondent is the absolute owner in possession of certain lands measuring 14.025 acres forming part of the revenue estate of Village Khadarpur, Tehsil Sohna, Haryana and that the Director of Town & Country Planning, Haryana as forming part of Urban Sector 63A, Gurgaon-Manesar, Urban Complex, Haryana and that the Directorate of Town and Country Planning, Haryana, after completion of formalities and payment of necessary license fee and other charges, had granted the Letter of Intent dated 22.07.2014 and the License Dated 06.08.2014 to the Respondent for developing a residential group housing on

the said lands.

6. It is stated that acting on the said representation by the Respondent, the Petitioner had agreed to purchase the said land for developing the project. The legal notice indicates that contrary to the representations made by the Respondent, permission had not been obtained from the authorities.

7. Since issues were not resolved, a letter dated 31.08.2016 was sent by the Petitioner to the Respondent appointing Mr. S. K. Tandon, former ADJ, Delhi as the Sole Arbitrator.

8. Clause 36 of the agreement dated 29.06.2015, which contains an arbitration clause, reads as under:-

> *"Clause 36 : That it is further agreed between the parties that in case of any dispute pertaining to and arising out of the present agreeing the same shall, be initially settled by mutual discussion and in case the discussions fail or do not start, **the disputes shall be referred to Arbitration of a Sole Arbitrator to be appointed by the second party**. The Arbitration shall be governed by the procedure and provisions of the Arbitration and Conciliation Act 1996. The seat of arbitration shall be at Delhi/ Haryana and courts of Delhi/ Haryana shall have jurisdiction over the disputes."*
>
> (emphasis supplied)

9. By the said letter dated 31.08.2016, the Arbitrator has been appointed unilaterally. The entire letter, which was sent to the Arbitrator, is being reproduced as under:-

> *"Mr. S.K. Tandon,*
> *Additional District Judge (Retd.),*
> *244, Bank Enclave, New Laxmi Nagar,*
> *New Delhi - 110098.*

*Subject: Pre-Arbitration "Request for Consent" under Section 12 (a) and 12(b) of the Arbitration and Conciliation Act 1996 (As amended), to Arbitrate as a Sole Arbitrator.*

*Our clients: M/s BDR Buildtech Pvt. Ltd., 31, Jangpura, Bhogal, New Delhi - 110014, through its Director Shri Rajesh Gupta.*

*Respected Sir,*

*1. We on behalf of our clients above named have to make a request to you to consent to your appointment as the sole Arbitrator to adjudicate certain disputes which have arisen between our clients above named and M/s Mahamaya Exports Pvt. Ltd., 208-210, Second floor, Rectangle No. 1, Saket District Centre, New Delhi -1l0017 also at M/s Mahamaya Exports Pvt. Ltd, ABW Tower, 2nd Floor, IFFCO Chowk, District Gurgaon (Haryana) through its Directors Shri Atul Bansal and Smt. Sona Bansal, Farm No.22, Green Khasra No. 413-414,Village Rajokri, Near Market, New Delhi- 110037 as regards the agreement in favour of our clients to purchase fully developed and licensed FSI under their agreement dated 29.6.2015, in the Residential Group Housing Project of Mahamaya Exports Pvt. .Ltd. coming up on land admeasuring 14.025 Acres at Villages Medawas and Khadarpur, Tehsil Sohna, District Gurgaon, Haryana, as forming part of Urban Sector 63A , Gurgaon- Manesar, Urban Complex, Haryana where under our clients have agreed to purchase a total licensed and developed FSI (to be built space) of 2, 15,000 sq. ft. in the said project and have already paid substantial consideration for the same.*

*2. That as certain disputes have arisen between our clients and M/s Mahamaya Exports Pvt. Ltd.*

*concerning the aforesaid agreement to sell - purchase and the amicable settlement of the same has since not been possible. The said disputes e now required to be decided by the process of arbitration.*

*3. That as per the terms of the agreement dated 29.6.2015, Clause No.36, as reproduced below, our clients above named (being the second party the agreement) through their Director have the power to appoint the Sole Arbitrator.*

> *Clause 36 : That it is further agreed between the parties that in case of any dispute pertaining to and arising out of the present agreeing the same shall, be initially settled by mutual discussion and in case the discussions fail or do not start, the disputes shall be referred to Arbitration of a Sole Arbitrator to be appointed by the second party. The Arbitration shall be governed by the procedure and provisions of the Arbitration and Conciliation Act 1996. The seat of arbitration shall be at Delhi/ Haryana and courts of Delhi/ Haryana shall have jurisdiction over the disputes.*

*4. That our clients in the aforesaid facts and circumstances express through us, their desire to appoint you as the Sole Arbitrator in the above matter in which our clients are the claimants. It is informed that another associate company of our clients namely M/s BDR Builders & Developers Pvt. Ltd. have also sought your consent to act as Arbitrator as regards their agreements to Purchase FSI of 2,90,000 sq. ft. in the same project, from Mahamaya Exports Pvt. Ltd.*

***5. That as you are a Honorable Arbitrator on the panel of the Delhi International Arbitration Centre also and are arbitrating similar commercial disputes, our clients wish to seek your consent for your***

***appointment as an Arbitrator to decide the claims of our clients which involve the specific performance of the above stated agreement to sell - purchase and also would involve a claim of damages against the seller for breach of contract etc.***

*6 . That we request you to consider the present request as urgent and intimate your con sent to appointment as an Arbitrator in the above case. The consent may be conveyed to us on email address lawvalue@hotmail.com."*

*Thanking you,*

*Sd/-*

*Sanjay Goswami*
*Advocate*
*For Goswami & Associates*
*9810164579.*

*CC: 1. M/s Mahamaya Exports Pvt. Ltd .,*
*208-210, Second floor, Rectangle No. I,*
*Saket District Centre, New Delhi -110017 .*

*Also at*

*M/s Mahamaya Exports Pvt. Ltd,*
*ABW Tower, 2nd Floor, IFFCO Chowk,*
*District Gurgaon (Haryana).*

*2. Shri Atul Bansal, Farm No.22,*
*Green Khasra No. 413-414,Villaage Rajokri,*
*Near Market, New Delhi- 110037*

*3. Smt. Sona Bansal, Farm No.22,*
*Green Khasra No. 413-414,Villaage Rajokri,*

*Near Market, New Delhi - 110037"*

(emphasis supplied)

10. The learned Arbitrator gave his consent *vide* Communication dated 06.09.2016.

11. Material on record indicates that on 15.09.2016, the Respondents had shown its disagreement for the request of the appointment of the Arbitrator as the same has not been mutual. The appointment was, therefore, unilateral in nature.

12. Be that as it may, the proceedings were conducted before the Arbitrator and the Award has been passed. A challenge to the same has been dismissed on the ground of delay. The objection regarding the appointment of Arbitrator was not considered at that stage and has been raised at the execution stage.

13. Learned Counsel for the Petitioner places reliance on the Judgment passed by a Coordinate Bench of this Court in Anglo-American Metallurgical Coal Pvt. Ltd. v. MMTC Ltd., **MANU/DE/3182/2025**.

14. *Per contra*, learned Counsel for the Respondent places reliance on the Judgment passed by the Division Bench of this Court in Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat, **2023 SCC OnLine Del 3148** and M/s Mahavir Prasad Gupta & Sons v. Govt. of NCT of Delhi, **2025 SCC OnLine Del 4241**.

15. Heard learned Counsel for the parties and perused the material on record.

16. A perusal of the arbitration clause indicates that the clause gives the right to the Decree Holder to unilaterally appoint the Sole Arbitrator. Such a

clause has been held to be bad by the five Judges Bench of the Apex Court in Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Co., **(2025) 4 SCC 641**, wherein the Apex Court has observed as under:-

> *"**70**. The concept of equality under Article 14 enshrines the principle of equality of treatment. The basic principle underlying Article 14 is that the law must operate equally on all persons under like circumstances. [M. Nagaraj v. Union of India, (2006) 8 SCC 212, para 106 : (2007) 1 SCC (L&S) 1013] The implication of equal treatment in the context of judicial adjudication is that "all litigants similarly situated are entitled to avail themselves of the same procedural rights for relief, and for defence with like protection and without discrimination" [Shree Meenakshi Mills Ltd. v. A.V. Visvanatha Sastri, (1954) 2 SCC 497, para 6 : (1954) 26 ITR 713] . In Union of India v. Madras Bar Assn. [Union of India v. Madras Bar Assn., (2010) 11 SCC 1, para 102 : (2010) 156 Comp Cas 392] , a Constitution Bench held that the right to equality before the law and equal protection of laws guaranteed by Article 14 of the Constitution includes a right to have a person's rights adjudicated by a forum which exercises judicial power impartially and independently. Thus, the constitutional norm of procedural equality is a necessary concomitant to a fair and impartial adjudicatory process.*
>
> *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, International Commercial Arbitration, (2nd Edn., Kluwer 2014) p. 1952.]"*

(emphasis supplied)

17. A perusal of the above Paragraphs shows that the Apex Court has held that an arbitration clause that allows one party to unilaterally appoint the arbitrator casts a doubt on the independence and impartiality of the arbitrator and the appointment of such arbitrator is bad rendering the award *void* and once the award becomes *void*, it becomes unenforceable in law. The fact that the Respondent participated in the arbitration does not amount to express consent.

18. At this juncture it is necessary to reproduce Section 12(5) of the Arbitration & Conciliation Act, 1996, which reads as under:-

> *"**12(5)** Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:*
>
> *Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."*

19. A perusal of Section 12(5) refers to the words "*express agreement in*

*writing*" which clearly indicates that the requirement is to have a written agreement in words that parties have waived their rights to the applicability of this sub-section. It is now settled by the Apex Court that the said waiver cannot be inferred from the conduct of the parties.

20. The five Judges Bench of the Apex Court in <u>CORE</u> (supra) expressed on this aspect in detail and has held as under:-

> *"**121**. An objection to the bias of an adjudicator can be waived. [Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 808, para 30 : (2016) 3 SCC (Civ) 492 : (2016) 3 SCC (Cri) 173 : (2016) 2 SCC (L&S) 253] 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, para 41 : (2012) 4 SCC (Civ) 1034 : (2012) 4 SCC (Cri) 496 : (2014) 1 SCC (L&S) 208] 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 recognises that certain kinds of arbitration such as maritime or commodities arbitration may require the parties to draw upon a small, specialised 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, specialised pool. If in such fields it is the custom and practice for parties frequently, to appoint the same arbitrator in different 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. [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] , 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. [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755, para 20 : (2019) 3 SCC (Civ) 1] 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. [Bharat Broadband Network, (2019) 5 SCC 755, p. 771, para 20. This Court observed:"20. ... 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 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."*

21. Recently, the Apex Court in Bhadra International (India) Pvt. Ltd. & Ors. v. Airport Authority of India, **2026 SCC OnLine SC 7,** has held as under:-

> ***"b. Challenge to the ineligibility of the arbitrator after arbitral award has been passed***
>
> ***109.*** *When an award has been passed, the proceedings before the arbitral tribunal conclude, leaving no possibility of substituting the arbitrator at this stage. In other words, once an award is passed, the mandate of the arbitral tribunal also arrives at a conclusion. In such circumstances, a party aggrieved by the arbitrator's ineligibility may challenge the award by filing an application under Section 34 of the 1996 Act, as an award passed by an ineligible arbitrator is nullity, non-est, or void ab initio, and against the public policy of India.*
>
> ***110.*** *Even where an interim award has been passed, it is liable to be set aside, as it is not capable of being enforced. The fate of an interim award and that of an arbitral award, in this regard, is identical. In either circumstance, the parties would be required to initiate fresh arbitration proceedings as per law. In Alpro Industries v. Ambience (P) Ltd., 2025 SCC OnLine Del 8373, the petitioner assailed an interim award under Section 34 on the primary ground of unilateral appointment. The Court observed thus:—*
> *"41. In light of the findings in Mahavir Prasad (supra) and my findings that the unilateral appointment of the Sole Arbitrator in the present case is invalid and there has been no express waiver in writing in terms of the proviso to clause 12(5) of the Act, the Impugned*

*Interim Award is liable to be set aside. Consequently, the issue raised by the respondents as to whether the Impugned Interim Award constitutes an 'interim award' or not would not be relevant. The Court cannot permit continuation of arbitral proceedings before an Arbitral Tribunal which would be a nullity and cannot result into an enforceable award. Hence, I do not deem it necessary to go into the merits of the challenge to the Impugned Interim Award."*

*(Emphasis supplied)*

***111.*** *An award passed by an arbitrator who is found to be ineligible cannot be enforced. In CORE II (supra), a Constitution Bench of this Court held that the concept of "public policy of India" and "fundamental policy of Indian law" means complying with statues and judicial precedents, and principles of natural justice. It was categorically held that "the most basic notions of morality and justice" mentioned in the* Explanation *1 to Section 34(b) includes bias. The observations of this Court in paragraphs 163 and 164 respectively reproduced hereinbelow squarely apply to the facts of the present case. The relevant extract has been reproduced thus:—*

*"158. Section 34(2)(b) specifically provides that an arbitral award may be set aside if the court finds that the arbitral award conflicts with the public policy of India. The provision further clarifies "public policy of India" to only mean that : (i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.*

*159. This Court has construed the expression "public policy of India" appearing under Section 34 to mean the "fundamental policy of Indian law". [Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI, (2019) 15*

*SCC 131, para 34 : (2020) 2 SCC (Civ) 213; NHAI v. P. Nagaraju, (2022) 15 SCC 1 : (2024) 2 SCC (Civ) 414, para 39] The concept of "fundamental policy of Indian law" has been held to cover compliance with statutes and judicial precedents, adopting a judicial approach, and compliance with the principles of natural justice. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163, para 11 : (2019) 2 SCC (Civ) 293] In OPG Power Generation (India) (P) Ltd. v. Enexio Power Cooling Solutions (India) (P) Ltd. [OPG Power Generation (India) (P) Ltd. v. Enexio Power Cooling Solutions (India) (P) Ltd., (2025) 2 SCC 417 : (2025) 1 SCC (Civ) 54], this Court explained the concept of "fundamental policy of Indian law" thus : (SCC pp. 467-68, paras 55-56)*

*"55. ... The expression "in contravention with the fundamental policy of Indian law" by use of the word "fundamental" before the phrase "policy of Indian law" makes the expression narrower in its application than the phrase "in contravention with the policy of Indian law", which means mere contravention of law is not enough to make an award vulnerable. To bring the contravention within the fold of fundamental policy of Indian law, the award must contravene all or any of such fundamental principles that provide a basis for administration of justice and enforcement of law in this country.*

*56. Without intending to exhaustively enumerate instances of such contravention, by way of illustration, it could be said that*

*(a) violation of the principles of natural justice;*

*(b) disregarding orders of superior courts in India or the binding effect of the judgment of a superior court; and*

*(c) violating law of India linked to public good or public interest, are considered contravention of the fundamental policy of Indian law."*

*160. In Avitel Post Studioz Ltd. v. HSBC PI Holdings*

*(Mauritius) Ltd. [Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2024) 7 SCC 197, para 34 : (2024) 3 SCC (Civ) 780]* <u>*, this Court held that the most basic notions of morality and justice under the concept of "public policy" will include bias*</u>*.*

*161. […] As a corollary, Section 34 places a responsibility on the Arbitral Tribunals to ensure that the arbitral proceedings are consistent with the fundamental policy of Indian law. [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, pp. 69-70, para 70:"70. Arbitrators, like the courts, are equally bound to resolve and decide disputes in accordance with the public policy of the law. Possibility of failure to abide by public policy consideration in a legislation, which otherwise does not expressly or by necessary implication exclude arbitration, cannot form the basis to overwrite and nullify the arbitration agreement. This would be contrary to and defeat the legislative intent reflected in the public policy objective behind the Arbitration Act. Arbitration has considerable advantages as it gives freedom to the parties to choose an arbitrator of their choice, and it is informal, flexible and quick. Simplicity, informality and expedition are hallmarks of arbitration. Arbitrators are required to be impartial and independent, adhere to natural justice, and follow a fair and just procedure. Arbitrators are normally experts in the subject and perform their tasks by referring to facts, evidence, and relevant case law."]*

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*163.* <u>*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*</u>

*<u>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</u>.*

*164. <u>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</u>."*

*(Emphasis supplied)*

***112.*** *What emerges from the foregoing is that the appellants were well within their right to challenge the ineligibility of the sole arbitrator in an application under Section 34 of the Act, 1996.*

***c. Challenge to the ineligibility of the arbitrator at any stage of the proceedings***

***113.*** *A challenge to an arbitrator's ineligibility could be raised at <u>any stage</u> because an award passed in such circumstance is non-est, i.e., it carries no enforceability or recognition in law. We say so because an arbitrator does not possess the jurisdiction to pass an award. In arbitration, the parties vest the jurisdiction in the tribunal by virtue of a valid arbitration agreement and an appointment made in accordance with the provisions of the Act, 1996. This jurisdiction is grounded in the consent of the parties as explained in the foregoing paragraphs of this* *judgment.*

***114.*** *In this context, jurisdiction means the authority of an arbitral tribunal to render a decision affecting the merits of the case. An arbitrator who lacks jurisdiction cannot make an award on the merits. With a view to dispel any doubt and lend clarity, we deem it appropriate to observe that the jurisdiction of the arbitral tribunal is distinct from the admissibility of the dispute, i.e., the arbitrability of the claims.*

***115.*** *A question pertaining to the jurisdiction of the arbitral tribunal arises when the tribunal is fundamentally incompetent to render any decision at all. In other words, a question of jurisdiction pertains to the ability of the tribunal to hear a case, whereas questions of admissibility presuppose that the tribunal has jurisdiction. An award passed by an arbitrator who does not have jurisdiction strikes at the very authority of the arbitrator.*

***116.*** *This Court, in catena of decisions, has held that the validity of a decree can be challenged even in execution proceedings if the court passing such decree lacked subject-matter jurisdiction over the dispute. As a decree passed by a court without jurisdiction goes to the root of the matter. Any decision passed by a court lacking jurisdiction would be coram non judice, since a court cannot give itself jurisdiction. No act of the parties can cure an inherent lack of jurisdiction.*

***117.*** *In Hira Lal Patni v. Kali Nath, 1961 SCC OnLine SC 42, this Court held that competence of a court to decide a case goes to the root of the matter, and incompetency results in inherent lack of jurisdiction. As a result, a decision rendered by a court that lacks jurisdiction is a nullity. The relevant observations read thus:—*

*"4. […] The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it. But in the instant case there was no such inherent lack of jurisdiction. The decision of the Privy Council in the case of* Ledgard v. Bull *[13 Indian Appeals 134] is an authority for the proposition that consent or waiver can cure defect of jurisdiction but cannot cure inherent lack of jurisdiction. In that case, the suit had been instituted in the Court of the Subordinate Judge, who was incompetent to try it. By consent of the parties, the case was transferred to the Court of the District Judge for convenience of trial. It was laid down by the Privy Council that as the court in which the suit had been originally instituted was entirely lacking in jurisdiction, in the sense that it was incompetent to try it, whatever happened subsequently was null and void because consent of parties could not operate to confer jurisdiction on a court which was incompetent to try the suit. […] It is well settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like Section 21 of the Code of Civil Procedure.[…]"*

*(Emphasis supplied)*

***118.*** *We may look into the decision of this Court in Hindustan Zinc Ltd. v. Ajmer Vidyut Vitran Nigam Ltd., (2019) 17 SCC 82. The submission canvassed before this Court was that an objection to jurisdiction could not have been raised in a proceeding under Section 37 of the Act, 1996, once the parties had consented to arbitration. In the said decision it was held that an objection to the inherent lack of jurisdiction can be taken at any stage and also in collateral proceedings. Furthermore, that a decree passed without jurisdiction is a nullity. The relevant observations read thus:—*

*"17. We are of the view that it is settled law that if there is an inherent lack of jurisdiction, the plea can be taken up at any stage and also in collateral proceedings. This was held by this Court in Kiran Singh v. Chaman Paswan [Kiran Singh v. Chaman Paswan, (1955) 1 SCR 117 : AIR 1954 SC 340] as follows : (SCR p. 121 : AIR p. 342, para 6)*

*"6. … It is a fundamental principle well-established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was coram non judice, and that its judgment and decree would be nullities."*

*18. Therefore, it is a little difficult to countenance Shri Vaidyanathan's argument that having consented, the* *respondent cannot now turn around and challenge the very appointment of the arbitrator as being invalid and without jurisdiction."*

*(Emphasis supplied)*

***119.*** *In Bhim Bahadur v. Vikram Singh, 2015 SCC OnLine Utt 1563, when the issue before the High Court was whether the subject land therein was agricultural or abadi in nature. The Court held that the matter had to be referred to a revenue court under the Uttar Pradesh Zamindari Abolition & Land Reforms Act. The relevant observations read thus:—*

*"11. In this regard, the law is well established to the effect that competency of the jurisdiction or the lack of the same in a particular Court cannot be determined by either of the parties through their pleadings, viz., the Court having jurisdiction under the law to decide a particular issue cannot be kept away from deciding the same on the basis of averments made by the parties and, in the same manner, the jurisdiction cannot be conferred on a particular Court on the basis of pleadings and admission thereof to decide a particular issue wherefor the law does not confer jurisdiction to the Court."*

*(Emphasis supplied)*

***120.*** *All that we are trying to convey is that, in civil law, the law itself confers subject-matter jurisdiction on specific courts. For instance, a suit seeking a declaration on the validity of marriage before the Civil Court is not maintainable, as such disputes fall within the exclusive jurisdiction of the Family Court. Similarly, in arbitration, the consent of parties confers subject-matter jurisdiction, i.e., the authority to decide the dispute. When an arbitral tribunal is unilaterally constituted, such consent is absent, thereby divesting the tribunal of subject-matter jurisdiction. The Act,* *1996, does not recognize the conferral of jurisdiction on an arbitral tribunal without the consent of the parties. By entering into an express agreement in writing as per the proviso to Section 12(5), the parties not only waive the ineligibility of the proposed arbitrator but also consent to his appointment.*

***121.*** *Before we part, we deem it fit to observe that an arbitrator is better equipped with the position of law on appointments, more particularly, unilateral appointments. Therefore, it becomes incumbent upon the arbitrator that upon entering reference and at the very first hearing, to ensure from the parties that they are willing to participate in the proceedings and to insist upon a written agreement waiving the requirement of Section 12(5) of the Act, 1996.*

***122.*** *Further, in such circumstances referred to above, if any party does not appear despite receipt of notice, the arbitrator shall not proceed further and shall immediately withdraw from the arbitral proceedings. The arbitrator must, along with the waiver agreement, record the minutes even when the parties are cooperating. This would certainly save time and avoid multiplicity of proceedings.*

***VIII. CONCLUSION***

***123.*** *A conspectus of the aforesaid detailed discussion on the position of law as regards Section 12 of the Act, 1996, is as follows:—*

*i. The principle of equal treatment of parties provided in Section 18 of the Act, 1996, applies not only to the arbitral proceedings but also to the procedure for appointment of arbitrators. Equal treatment of the parties entails that the parties must have an equal say in the constitution of the arbitral tribunal.*

*ii. Sub-section (5) of Section 12 provides that any person whose relationship with the parties or counsel, or the dispute, whether direct or indirect, falls within any of the categories specified in the Seventh Schedule would be ineligible to be appointed as an arbitrator. Since, the ineligibility stems from the operation of law, not only is a person having an interest in the dispute or its outcome ineligible to act as an arbitrator, but appointment by such a person would be ex facie invalid.*

*iii. The words "an express agreement in writing" in the proviso to Section 12(5) means that the right to object to the appointment of an ineligible arbitrator cannot be taken away by mere implication. The agreement referred to in the proviso must be a clear, unequivocal written agreement.*

*iv. When an arbitrator is found to be ineligible by virtue of Section 12(5) read with the Seventh Schedule, his mandate is automatically terminated. In such circumstance, an aggrieved party may approach the court under Section 14 read with Section 15 for appointment of a substitute arbitrator. Whereas, when an award has been passed by such an arbitrator, an aggrieved party may approach the court under Section 34 for setting aside the award.*

*v. In arbitration, the parties vest jurisdiction in the tribunal by exercising their consent in furtherance of a valid arbitration agreement. An arbitrator who lacks jurisdiction cannot make an award on the merits. Hence, an objection to the inherent lack of jurisdiction can be taken at any stage of the proceedings."*

22. The only question that is now left to be answered is whether this objection cannot be raised at the stage of execution.

23. Reliance placed by the learned Senior Counsel for the Petitioner on the Judgment passed by a Coordinate Bench of this Court in MMTC (supra), is faced with insignificance after the Judgment passed by a Division Bench of this Court in Kotak Mahindra Bank (supra) and M/s Mahavir Prasad Gupta (supra).

24. In the case of Kotak Mahindra Bank (supra), the Division Bench of this Court while dealing with an appeal in an execution proceedings in a case where the appointment of an Arbitrator was unilateral, has observed as under:-

> *"**6.** The learned counsel appearing for the appellant does not seriously dispute that the arbitrator unilaterally appointed by the claimant was ineligible to be appointed as an arbitrator by virtue of Section 12(5) of the Act. He has largely focused his contentions on assailing the decision of the learned Commercial Court to award costs. It was also contended that the respondent was aware of the appointment of the arbitrator and had not raised any objection to such appointment; therefore the respondent is now precluded from challenging the impugned award.*
>
> ***7.** We find little merit in the aforesaid contentions. The proviso to Section 12(5) of the A&C Act is unambiguous. A party can waive its right to object to the ineligibility of an arbitrator under Section 12(5) of the A&C Act but the same is subject to two conditions. First, that the waiver is required to be by and done by an express agreement in writing; and second, that such agreement is entered into after the disputes have arisen. Unless both the aforesaid conditions are satisfied, there can be no waiver of the ineligibility of*

*an arbitrator.*

***8.*** *In Bharat Broadband Network Limited v. United Telecoms Limited, (2019) 5 SCC 755, the Supreme Court had authoritatively held that waiver of a right to object to ineligibility of an arbitrator under Section 12(5) of the A&C Act cannot be inferred by conduct of a party. Such waiver can only be by an express agreement in writing. The Court had also clarified that "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".*

***9.*** *In view of the above, the failure, if any, on the part of the respondent to object to the unilateral appointment of the sole arbitrator, cannot be construed as waiver of his right under Section 12(5) of the A&C Act.*

***10. The award rendered by an arbitrator who is ineligible to be appointed as such cannot be enforced.***

***11.*** *In HRD Corporation v. GAIL (India) Ltd., (2018) 12 SCC 471, the Supreme Court held as under:*

> *"Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible". In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed*

*any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground."*
*[emphasis added]*

***12. In Govind Singh v. Satya Group Pvt. Ltd. : 2023/DHC/000081 this court held as under:***
***"In view of the above, the remaining question to be addressed is whether an arbitral award rendered by a person who is ineligible to act as an arbitrator is valid or binding on the parties. Clearly, the answer must be in the negative. The arbitral award rendered by a person who is ineligible to act as an arbitrator cannot be considered as an arbitral award. The ineligibility of the arbitrator goes to the root of his jurisdiction. Plainly an arbitral award rendered by the arbitral tribunal which lacks the inherent jurisdiction cannot be considered as valid. In the aforesaid view, the impugned award is liable to be set aside as being wholly without jurisdiction."***

*xxx*

***14. This Court finds no infirmity with the aforesaid view. A person who is ineligible to act an Arbitrator, lacks the inherent jurisdiction to render an Arbitral Award under the A&C Act. It is trite law that a decision, by any authority, which lacks inherent jurisdiction to make such a decision, cannot be considered as valid. Thus, clearly, such an impugned award cannot be enforced."***

(emphasis supplied)

25. Another Coordinate Bench of this Court in M/s Mahavir Prasad Gupta (supra), has considered specifically objections regarding appointment of the Arbitrator taken for the first time during the setting aside or enforcement

proceedings. The Division Bench after considering judgments that allowed the ground of unilateral appointment to be raised for the first time after the award having being considered and also after the Judgments which have held to the contrary, has held that the objections regarding unilateral appointment can be taken at any stage including at the time of enforcement of the award under Section 36 of the Arbitration & Conciliation Act as such the award by the Arbitrator who has been appointed unilaterally is void and unenforceable.

26. The Judgment passed by the Division Bench of this Court in M/s Mahavir Prasad Gupta (supra) has been followed by another Division Bench of this Court in Indian Oil Corporation Limited v. Man Industries (India) Limited, **FAO(OS) (COMM) 172/2023.**

27. In view of the fact that three Division Benches of this Court have now held that unilateral appointment of an arbitrator goes to the very root of jurisdiction making the award a nullity, and therefore, unenforceable, is binding on this Court.

28. Resultantly, the enforcement petition is dismissed along with pending application(s), if any.

29. Needless to state that it is open for the parties to take such steps as available to them under law for taking fresh steps for appointment of an Arbitrator to adjudicate the disputes.

**SUBRAMONIUM PRASAD, J**

**MAY 12, 2026**
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