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

% **Date of decision: 20.03.2026**

+ **O.M.P. (COMM) 221/2023 & I.A. 11873/2023**

**rites LTD. THROUGH ITS GROUP GENERAL
MANAGER**Petitioner

Through: **Mr. G.S. Chaturvedi, Adv.**

versus

M/S APEX CONSTRUCTION CO. & ANR.Respondents

Through: **Mr. Ripudaman Bhardwaj,
CGSC with Mr. Kushagra
Kumar, Mr. Amit Kumar Rana
& Ms. Pragati Trivedi, Advs.**

CORAM:

HON'BLE MR. JUSTICE AVNEESH JHINGAN

AVNEESH JHINGAN, J. (ORAL)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') is against the award dated 11.01.2023.

2. The grievance is that the unilateral appointment of the arbitrator is in violation of the amended Section 12(5) of the Act.

3 The facts in brief are that the respondent was the successful bidder in tender invited by the RITES Limited (for short 'RITES') on behalf of the Delhi Police. The work awarded was for construction for Delhi Police Housing in Sector 11, Rohini, New Delhi, to be concluded within twenty four months from the date of handing over the site and was for approximately Rs. 20.89 crores. Dispute arose



between the parties to the *lis*. Clause 25 of the conditions of the contract reproduced below provides for settlement of disputes and arbitration:

“CLAUSE 25

Settlement of Disputes & Arbitration

Except where otherwise provided in the Contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right matter or thing whatsoever in any way arising out of or relating to the Contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

1) If the Contractor considers any work demanded of him to be outside the requirements of the Contract or disputes any drawings, record or decision given in writing by the Engineer on any matter in connection with or arising out of the Contract or carrying out of the work to be unacceptable, he shall promptly within 15 days request the Engineer-in-Charge in writing for written instruction or decision. Thereupon, the Engineer-in-Charge shall give his written instructions or decision within a period of one month from the receipt of the Contractor's letter.

If the Engineer-in-Charge fails to give his instructions or decision in writing within the aforesaid period or if the Contractor is dissatisfied with the Instructions or decision of the Engineer-in Charge, the contractor may, within 15 days of the receipt of the Engineer-in-Charge



decision, appeal to the Appellate Authority specified in Schedule 'F' who shall afford an opportunity to the Contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Appellate Authority shall give his decision within 30 days of receipt of Contractor's appeal. If the Contractor is dissatisfied with this decision, the Contractor shall within a period of 30 days from receipt of the decision, give notice to the Accepting Authority specified in Schedule 'F' for appointment of arbitrator failing which the said decision shall be final binding and conclusive and liable to adjudication by the Arbitrator.

2) Except where the decision has become final, binding and conclusive in terms of Sub Para (1) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Accepting Authority. The selection of Arbitrator by the Accepting Authority will be governed by the fact whether the dispute is (i) between two Public Sector Enterprises or (ii) between a Public Sector Enterprise and a Government Department or (iii) Otherwise.

In case the disputes does not fall under item (i) or (ii) of this Para the Accepting Authority, shall appoint the sole Arbitrator within 30 days of receipt of notice from the Contractor to refer the dispute for Arbitration, the Accepting Authority stipulated in Schedule F shall send to the Contractor a list of three serving officers of RITES of appropriate status depending on the total value of claim, who have not been connected with the work under the Contract. The Contractor shall, within 15 days of receipt of this list select and communicate to the Accepting Authority, the name of one officer from the list who shall then be appointed as the Sole Arbitrator. If the Contractor fails to communicate his selection of name within the stipulated period, the Accepting Authority shall without delay, select one officer from the list and appoint him as the Sole Arbitrator.



6) Parties to be impleaded in the arbitration proceedings.

In case of any claims by the Contractor, the Employer as well as RITES Ltd acting as Agent to the Employer will implead themselves as parties to the Arbitration Proceedings.”

3.1 A notice dated 03.06.2019 under Section 21 of the Act was issued by the respondent. It was specifically mentioned in the notice that after amendment of Section 12(5) of the Act, serving official of a party to the dispute cannot be appointed as an arbitrator without the consent of both parties and the respondent is not willing to give such consent. A request was made to intimate three names in terms of Clause 25 of the conditions of the contract but not being the serving officials of RITES. The three names suggested by the petitioner vide communication dated 20.06.2019 were not accepted by the respondent. Thereafter the respondent was given an option to select arbitrator from the panel maintained by the petitioner. The matter was referred to the arbitrator appointed by the petitioner but selected by the respondent. Aggrieved of the impugned award this petition is filed.

4. Learned counsel for the petitioner submits that the appointment of the arbitrator is in violation of Section 12(5) of the Act and the impugned award is liable to be set aside. Reliance is placed upon the decision of this court in **Railways Board, Ministry of Railways Vs. Titagarh Rail Systems Limited**, 2026:DHC:1720.

5. *Per contra* the respondent participated in appointment of the arbitrator, had selected the arbitrator from the panel of the petitioner



and the appointment is not unilateral. The argument is that the final determination of the arbitrator to be appointed was by the respondent and not of the petitioner. It is contended that the participation and the exercise of choice by the respondent in appointment of the arbitrator is evident from the fact that the respondent rejected the list of three arbitrators given by the petitioner. The decision relied upon by the petitioner is stated to be not applicable to the facts of this case.

6. Before proceeding further, it would be apposite to quote the following decisions:

6.1 The Supreme Court in **Bhadra International (India) Pvt. Ltd. & Ors. v. Airports Authority of India**, 2026 INSC 6 dealt with the following three issues:

- “29....i. Whether the sole arbitrator could be said to have become “*ineligible to be appointed as an arbitrator*” by virtue of sub-section (5) of Section 12 of the Act, 1996?
- ii. Whether the parties could be said to have waived the applicability of sub-section (5) of Section 12 of the Act, 1996, by way of their conduct, either expressed or implied?
- iii. Whether the appellants could have raised an objection to the appointment of the sole arbitrator for the first time in an application under Section 34 of the Act, 1996?”

Held:

- “123...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.”

6.2 The Division Bench of this court in **Mahavir Prasad Gupta and Sons v. Govt. of NCT of Delhi**, 2025 SCC OnLine Del 4241 dealt with the following issues:

- “74...a) When a party itself has unilaterally appointed the arbitrator, whether that party can object to the unilateral appointment of the arbitrator at any stage during or after the arbitration proceedings?
- b) If a party has unilaterally appointed an arbitrator, can that party be deemed to have given express waiver in writing under Section 12(5) of the Act while making the appointment itself?”

The court concluded:

- “84....a) **Mandatory Requirement:** Any arbitration agreement providing unilateral appointment of the sole or presiding arbitrator is invalid. A unilateral appointment by any party in the arbitrations seated in India is strictly prohibited and considered as null and void since its very inception. Resultantly, any proceedings conducted before such unilaterally appointed Arbitral Tribunal are also nullity and cannot result into an enforceable award being against Public Policy of India and can be set aside under Section 34 of the Act and/or refused to be enforced under Section 36 of the Act.
- b) **Deemed Waiver:** The proviso to Section 12(5) of the Act requires an express agreement in writing. The conduct of the parties, no matter how acquiescent or conducive, is inconsequential and cannot constitute a valid waiver under the proviso to Section 12(5) of the



Act. The ineligibility of a unilaterally appointed arbitrator can be waived only by an express agreement in writing between the parties after the dispute has arisen between them. Section 12(5) of the Act is an exception to Section 4 of the Act as there is no deemed waiver under Section 4 of the Act for unilateral appointment by conduct of participation in the proceedings. The proviso to Section 12(5) of the Act requires an 'express agreement in writing' and deemed waiver under Section 4 of the Act will not be applicable to the proviso to Section 12(5) of the Act.

- c) **Award by an Ineligible Arbitrator is a Nullity:** An award passed by a unilaterally appointed arbitrator is a nullity as the ineligibility goes to the root of the jurisdiction. Hence, the award can be set aside under Section 34(2)(b) of the Act by the Court on its own if it 'finds that' an award is passed by unilaterally appointed arbitrator without even raising such objection by either party.
- d) **Stage of Challenge:** An objection to the lack of inherent jurisdiction of an arbitrator can be taken at any stage during or after the arbitration proceedings including by a party who has appointed the sole or presiding arbitrator unilaterally as the act of appointment is not an express waiver of the ineligibility under proviso to Section 12(5) of the Act. Such objection can be taken even at stage of challenge to the award under Section 34 of the Act or during the enforcement proceedings under Section 36 of the Act."

7. After amendment of Section 12(5) of the Act an employee of the party in dispute can neither be appointed arbitrator nor can



nominate or appoint any other person as an arbitrator. The unilateral appointment in absence of express agreement in writing between the parties to waive applicability of Section 12(5) of the Act is void *ab initio*. The filing of the claim statement or participation in the arbitration proceedings cannot be construed to be waiver under the proviso to Section 12(5) of the Act. The unilateral appointment of the arbitrator can be objected to for the first time under Section 34 of the Act.

8. Clause 25(2) of the conditions of the contract provides for resolution of disputes except where the decision has attained finality under clause 25(1). In case the disputes are not between two Public Sector Enterprises or between a Public Sector Enterprise and a Government Department, the Accepting Authority i.e. RITES within thirty days on receipt of notice from the contractor is to send list of three serving officers of RITES to be appointed as arbitrator. The contractor within fifteen days of receipt of the list has to communicate one of the names from the list. In case of failure of the contractor to select the candidate within the stipulated period, RITES shall appoint arbitrator from the list.

9. The law is well settled that the official of a party to the dispute can neither be appointed arbitrator nor appoint an arbitrator. In the case in hand, the arbitrator was appointed by the petitioner from the panel maintained by it. The Supreme Court in **Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)**, (2025) 4 SCC 641 held that curating a panel of arbitrators by one of the parties to the dispute and requiring the other party to exercise its



choice from such a panel affects the freedom of the party to appoint the arbitrator, thereby raising a reasonable doubt. The relevant paragraphs are reproduced below:

“132. In *Voestalpine [Voestalpine Schienen GmbH v. DMRC Ltd.]*, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] and *CORE [Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)]*, (2020) 14 SCC 712], one of the parties curated a panel of arbitrators and mandated the other party to select their arbitrator from the panel. Since the curation of the list is exclusively undertaken by one party, the other party is effectively excluded from the process of curating the panel from which exclusively, the appointment of an arbitrator is to be made. The other party has to mandatorily select its arbitrator from a curated panel, restricting their freedom to appoint an arbitrator of their choice. This is against the principle of equal treatment contained under Section 18. In this situation, there is no effective counterbalance because both parties do not participate equally in the process of appointing arbitrators. The party curating the panel can restrict the choice of the party only to a person who is on the panel selected by the other party and to no other person.

133. Many PSUs are regularly involved in arbitration disputes and constantly need the services of arbitrators. Such institutions often maintain a pool of potential arbitrators with the sole object of having a ready pool of qualified professionals who have committed their time and consented to act as arbitrators for fixed fees. The Arbitration Act does not prohibit parties to an arbitration agreement from maintaining a curated panel of potential arbitrators. However, the problem arises when the PSUs make it mandatory for other parties to select their nominees from the curated panel of arbitrators. When a PSU exercises its discretion to



curate a panel, the very factor that the PSU is choosing only a certain number of persons as potential arbitrators and not others will raise a reasonable doubt in the mind of a fair-minded person. The PSUs may conceivably have nominated a person on the panel of potential arbitrators because they have a certain predisposition in favour of the former. This doubt is reinforced when the other party is given no choice but to select its arbitrator from the curated panel.

134. In *CORE [Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)]*, (2020) 14 SCC 712, the three-member tribunal was sought to be constituted in the following manner : (i) the Railways would suggest at least four names of retired railway officers; (ii) the contractor would select two names out of the panel for appointment as their arbitrator; (iii) The General Manager (of the Railways) would thereafter choose at least one person out of the two to be appointed as the contractor's arbitrator; and (iv) The General Manager would proceed to appoint the balance arbitrators from the panel or outside the panel and also indicate the presiding arbitrator.

135. Such an arbitrator-appointment clause is likely to give rise to justifiable doubts as to the independence and impartiality of arbitrators for two reasons : (i) the contractor is restricted to choosing its arbitrator from the panel of four arbitrators nominated by the party who is a disputant; and (ii) the contractor's choice is further constrained because it is made subject to the decision of the General Manager who will choose one among the two persons suggested by the party. Since the contractor has to select its arbitrator from a curated panel, the arbitration clause does not allow the contractor equal participation in the appointment of their arbitrator. Moreover, the clause allows the General Manager to appoint the balance arbitrators from either the panel or outside the panel. Thus, the



process of appointing the arbitrators is unequal because the General Manager can go beyond the panel of four potential arbitrators, while the contractor is bound by the names enlisted in the panel.”

10. In view of the law laid down by the Supreme Court in **Bhadra International (India) Pvt. Ltd.** (supra) and the decision of this Court relied upon by the learned counsel for the petitioner, the appointment of the arbitrator is in violation of the amended provisions of Section 12(5) of the Act.

11. The issue now to be determined is as to whether after the dispute arose was there an express waiver in writing by the parties that the provisions of Section 12(5) of the Act will not apply.

12. The Supreme Court in **Bhadra International (India) Pvt. Ltd** (supra) held that waiver involves a conscious decision to abandon the existing legal right and can be made only by a person fully aware of such right. A legal right cannot be taken away by implications. The waiver has to be an unequivocal expression and it cannot be lost sight of that by such waiver the restriction imposed by Section 12(5) of the Act is sought to be overcome.

13. There is no prescribed format under the proviso to section 12(5) of the Act for an express agreement in writing but it shall not mean that the waiver can be inferred by implication or through conduct. It would be relevant to quote the following paragraph from **Bhadra International (India) Pvt. Ltd.** (supra):

“84. Undoubtedly, the statute does not prescribe a format for the agreement. However, the absence of a prescribed format cannot be construed to mean that



the waiver may be inferred impliedly or through conduct. We say so because the legislature has consciously prefaced the term “*agreement*” with the word “*express*” and followed it with the phrase “*in writing*”. This semantics denote the intention of the legislature that the waiver under the *proviso* to Section 12(5) must be made only through an express and written manifestation of intention.”

14. The respondent in the notice dated 03.06.2019 expressly stated that after amendment of Section 12(5) of the Act, serving official of RITES cannot be appointed arbitrator without consent of both the parties and the respondent is not giving this consent. Once there is no express consent in writing given under proviso to Section 12(5) of the Act, the rigours of the amended provisions of Section 12(5) of the Act are applicable. The option given to the respondent to select arbitrator from the panel list of arbitrators being maintained by the petitioner is not enough for wriggling out of the provisions of Section 12(5) of the Act. The Supreme Court in **Central Organisation for Railway Electrification** (supra) held that making the other party to select an arbitrator from a curated panel is against the principle of equal treatment contained in Section 18 of the Act.

15. The matter needs to be considered from another angle. The express consent in writing under proviso to Section 12(5) of the Act has to be of both the parties. It is not a case set up by the respondent that the petitioner consented for waiver of applicability of Section 12(5) of the Act. The waiver has to be expressed and cannot be construed or inferred through conduct. The Division Bench of this court in **Mahavir Prasad Gupta and Sons** (supra) held that an



appointment of an ineligible person as an arbitrator is void *ab-initio* and can be challenged by the party making such appointment. The relevant paragraphs of the judgment are:

“81. Accordingly, the party that unilaterally appointed the arbitrator cannot be deemed to have agreed in writing to waive the ineligibility of the arbitrator by act of appointment. When appointment itself is ineligible under the provisions of Section 12(5) of the Act read with Seventh Schedule of the Act, it does not take away the right of the party to challenge such an appointment merely because that party had made the appointment in absence of express agreement in writing between the parties to waive the applicability of Section 12(5) of the Act.

82. Hence, a party which unilaterally appointed the arbitrator has right to object to such appointment irrespective of fact that that party itself made the appointment of the arbitrator. Mere fact of making appointment in writing will not make the ineligible appointment a valid appointment unless there is express agreement in writing waiving such ineligibility.

83. Although it appears disingenuous, a party appointing an the sole or presiding arbitrator unilaterally can challenge the award on the ground that the award has been rendered in contravention of Section 12(5) of the Act read with Seventh Schedule of the Act notwithstanding that the said party itself made such an appointment. When the Arbitral Tribunal inherently lacked jurisdiction to act, the



arbitration proceedings are *void ab initio*, rendering the award unenforceable irrespective of which party made such unilateral appointment. The arbitral proceedings and an award made by an unilaterally appointed sole or presiding arbitrator, who is *de jure* ineligible to be appointed as an arbitrator by virtue of the Seventh Schedule of the Act are *void ab initio*. The waiver under the proviso to Section 12(5) of the Act must be express and subsequent to the disputes having been arisen between the parties. Hence, the party which appointed the sole or presiding arbitrator unilaterally can also challenge the award under Section 34 of the Act on the ground of such ineligibility.”

16. In the absence of compliance of proviso to Section 12(5) of the Act by the parties, the appointment of the arbitrator by the petitioner is vitiated as it violates Section 12(5) read with Seventh Schedule of the Act. The appointment of the arbitrator is void *ab-initio* and renders the impugned award nullity.

17. The petition is allowed and the impugned award is set aside. Pending application is also disposed of.

AVNEESH JHINGAN, J

MARCH 20, 2026/Pa

Reportable:- Yes