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

Date of decision: 13th JANUARY, 2026

IN THE MATTER OF:

+ **O.M.P. (COMM) 259/2024, I.A. 31802/2024, I.A. 31804/2024 & I.A. 31805/2024**

NORTHERN RAILWAYS SENIOR DIVISIONAL COMMERCIAL
MANAGERPetitioner

Through: Mr. Om Prakash along with Ms. Swati Mishra,, Mr. Chandresh Pratap and Ms. Komal Yadav, Advocates.

versus

M/S JAGRAN ENGAGERespondent

Through: Mr. B. K. Mishra, Ms. Poonam Atey, Mr. Siraj malik Ms. Alankrita Shukla, Advocates

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The present Petition under Section 34 of the Arbitration and Conciliation Act, 1996 has been filed by the Petitioner challenging the Award dated 28.02.2019, passed by the learned Sole Arbitrator.
2. The primary ground taken by the Petitioner is that the appointment of Arbitrator was unilateral in nature and, therefore, the award be set aside. The question which therefore, arose before this Court was as to whether a party which appoints the arbitrator can turn around and challenge the Award on the ground of unilateral appointment or not.
3. The facts, in brief, leading to the present Petitions, are that on



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03.02.2017, the Petitioner herein invited tenders for grant of advertisement rights through vinyl wrapping on the exterior of Shatabdi trains running on the New Delhi–Amritsar (Train Nos. 12029/30) and New Delhi–Kalka (Train Nos. 12005/06) routes. It is stated that pursuant thereto, the Petitioner herein entered into two Licence Agreements dated 03.02.2017 with the Respondent herein, granting advertisement rights to the Respondent for a period of three years. It is stated that in terms of the said Agreements, the Respondent deposited security amounts of Rs. 4,50,000/- and Rs. 4,23,000/- respectively, and also paid licence fees for the first half year amounting to Rs. 22,50,000/- and Rs. 21,15,000/-, respectively along with applicable service tax. It is stated that after commencement of the contract, disputes arose between the parties regarding utilisation of the granted advertisement rights. It is stated that on 11.05.2017, the Respondent expressed its unwillingness to continue and requested surrender of the contract before completion of the agreed tenure. Clause 27 of the Agreements contain an Arbitration Clause which reads as under:

“27. Arbitration

In the event of any dispute, claim or difference of opinion arising out of this Agreement or any special condition of contract or in connection with this agreement, the same shall be referred to the arbitration of a Gazetted Railway officer not below the rank of J.A grade appointed by the General Manager/Northern Railway. The Gazetted officer appointed as arbitrator however will not be one of those who had an opportunity to deal with the matter to which the contract relates or who, in the course of their duties as Railway servants, have expressed views on all or any of the aspects of the matter under dispute



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or differences. The award of the arbitrator shall be final and binding on the parties to the contract

Subject to aforesaid, The Arbitration & Conciliation Act, 1996 and the rules made there under or any statutory modification thereof for the time being in force shall be deemed to apply to the arbitration proceeding under this clause. The venue of arbitration shall be the place from which the acceptance note is issued.

"Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is passed."

4. It is stated that the Respondent invoked arbitration and filed Claim Petition No. 7PUB/TN/VINYL WRAPPING/GROUP-D/2018, seeking refund of security deposit and other amounts. It is stated that *vide* letter dated 09.10.2017, the Petitioner herein appointed Shri Indra Ghosh, Retired GM/ECOR, as the Sole Arbitrator to adjudicate on the disputes between the parties. It is stated that the Petitioner herein filed its reply and also raised a counter-claim claiming outstanding licence fees, damages, and other charges.

5. By an award dated 28.02.2019, the learned Sole Arbitrator rejected the counter-claim of the Petitioner, and directed the Petitioner to refund the security deposit of Rs. 8,73,000/- to the Respondent, along with interest.

6. Aggrieved by the said award, Petitioner filed a Petition, being OMP (COMM) No. 119/2019, under Section 34 of the Arbitration and Conciliation Act, 1996 before the District Judge (Commercial Court), Patiala House Courts, New Delhi. *Vide* dated 23.09.2021, the said Petition



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was returned for want of pecuniary jurisdiction, liberty being granted to the Petitioner to file an appropriate Petition before the competent Court. The Petitioner has, thereafter, approached this Court.

7. The short question which arises before this Court is as whether the process adopted by the Petitioner/AAI amounts to unilateral appointment of Arbitrator or not.

8. In the opinion of this Court, the issue as to whether asking a party to select an arbitrator from a truncated panel of arbitrators to adjudicate on the disputes is valid or not is no longer *res integra* and is squarely covered by the Judgment of the Apex Court in Voestalpine Schienen GmbH v. DMRC, (2017) 4 SCC 665, has held as under:

“28. Before we part with, we deem it necessary to make certain comments on the procedure contained in the arbitration agreement for constituting the Arbitral Tribunal. Even when there are a number of persons empanelled, discretion is with DMRC to pick five persons therefrom and forward their names to the other side which is to select one of these five persons as its nominee (though in this case, it is now done away with). Not only this, DMRC is also to nominate its arbitrator from the said list. Above all, the two arbitrators have also limited choice of picking upon the third arbitrator from the very same list i.e. from remaining three persons. This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by DMRC. Secondly, with the discretion given to DMRC to choose five persons, a room for suspicion is created in the mind of the other side that DMRC may have picked up its own favourites. Such a situation has to



be countenanced. We are, therefore, of the opinion that sub-clauses (b) & (c) of Clause 9.2 of SCC need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator from the whole panel.

29. Some comments are also needed on Clause 9.2(a) of GCC/SCC, as per which DMRC prepares the panel of “serving or retired engineers of government departments or public sector undertakings”. It is not understood as to why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is imperative that panel should be broadbased. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like Judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy, etc. Therefore, it would also be appropriate to include persons from this field as well.

30. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the



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Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by DMRC. It, therefore, becomes imperative to have a much broadbased panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. We, therefore, direct that DMRC shall prepare a broadbased panel on the aforesaid lines, within a period of two months from today.” (emphasis supplied)

9. The abovementioned Judgment has been referred to and quoted with approval in a Judgment delivered by a Bench of five Judges of the Apex Court in Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV), (2025) 4 SCC 641, wherein the Apex Court held as under:

“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.” (emphasis supplied)

10. Applying the procedure for appointment of an Arbitrator, as detailed in the foregoing judgments, shows that the Petitioner herein *vide* letter dated 09.10.2017 had appointed Sh. Indra Ghosh as the Sole Arbitrator. Such an appointment has been held to be bad in law by the Apex Court in Core (supra).

11. The second issue that arises for consideration is as to whether the Petitioner, who appointed the Arbitrator, can turn around and challenge the award on the ground of unilateral appointment. This issue is also no longer



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res integra and has been decided by the Division Bench of this Court in Mahavir Prasad Gupta & Sons v. Govt. of NCT of Delhi, **2025 SCC OnLine Del 4241**, wherein the Division Bench has held as under:

“74. This issue requires consideration of following questions:

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?

75. The analysis of the above questions would require consideration of the act of appointment of the arbitrator by a party and nature of such exercise of right. Section 12(4) of the Act provide that a party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

76. Accordingly, if the party that has the power to make unilateral appointments exercises the right by making the appointment of the arbitrator, that party can challenge the appointment made by him only for reasons that he comes to know after the appointment is made. In cases of unilateral appointment, it is presumed that the party is aware of the disqualification of the arbitrator at the time of the appointment itself.

77. Further, Section 12(5) of the Act provides that 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 of the Act shall be ineligible to be appointed as an arbitrator. The proviso to Section 12(5) of the Act provides that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) of the Act by an express agreement in writing.

78. A conjoint reading of Sections 12(4) and 12(5) of the Act would make clear that even if there is an agreement for the appointment of unilateral appointment, such clause would be invalid except when both parties mutually agree to waive the same in writing.

79. Hence, exercise of power to unilaterally appoint the arbitrator by a party cannot be termed as express agreement to waive the invalidity of the arbitration agreement providing for unilateral appointment. For waiver under Section 12(5) of the Act after the dispute have arisen, the parties are required to consciously agree in writing to waive the ineligibility of the arbitrator. Grounds of ineligibility of the arbitrator under Seventh Schedule are derived from Red List of IBA Rules on Conflict of Interest in International Commercial Arbitration. The Act was as amended in 2015 to provide a detailed framework to address arbitrator bias. This framework includes the Fifth and Seventh Schedules, which draw from the Orange and Red Lists of the IBA Guidelines, respectively. The Fifth Schedule requires arbitrators to disclose any circumstances that might reasonably affect their impartiality, including relationships with the parties, counsel, or subject matter of the dispute. The Seventh Schedule reflecting the Red List, outlines scenarios of relationship conflict that would result in de jure ineligibility of an arbitrator.



80. The Sixth Schedule complements this by prescribing the format and content of such disclosures. In HRD Corpn. v. GAIL (India) Ltd., (2018) 12 SCC 471, the Supreme Court observed that the categories listed under the Fifth and Seventh Schedules must be construed by taking a “broad commonsensical approach”, without restricting or enlarging the words.

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



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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.”

12. In view of the above, the Award dated 31.07.2023 is set aside.

13. The Petition is disposed of. Pending applications, if any, also stands disposed of.

SUBRAMONIUM PRASAD, J

JANUARY 13, 2026

Rahul