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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% **Date of decision: 25.03.2026**+ **O.M.P. (COMM) 515/2018, I.A. 12102/2019, I.A. 19729/2023****ENGINEERING PROJECTS INDIA LIMITEDPetitioner**

Through: Mr. Ratik Sharma, Mr.
Yashvardhan Singh Gohil, Mr.
Parth Sindhwani & Mr. Sonal
Kumar Singh, Advs.

versus

ALLIED CONSTRUCTIONRespondent

Through: Ms. Pooja Dhar & Ms. Maryam
Junaid, 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 filed against the arbitral award dated 06.07.2018.

2. The brief facts are that the petitioner/Engineering Projects India Limited (for short 'EPIL') on 15.11.2007 entered into a Memorandum of Understanding (for brevity 'MOU') with the Department of Agriculture, Government of Tripura (hereinafter 'DOA') to construct a college of agriculture building at Agartala. The Notice Inviting Tender (for short 'NIT') was issued by EPIL and the respondent was awarded the work vide Letter of Intent (LOI) dated 10.03.2008. Subsequently, an agreement dated 23.04.2008 was entered into between the parties to the *lis*.



2.1 Clause 76 of the General Conditions of Contract (for short 'GCC') provides for dispute resolution by arbitration. As per the said clause, disputes shall be referred to the sole arbitration of the Chairman and Managing Director of EPIL (for short 'CMD') or any person discharging the functions of the CMD and in case the CMD or such person is unable to act as the sole arbitrator then to a person appointed by the CMD. It is further stipulated that no objection will lie if the appointed arbitrator is an employee of EPIL.

2.2 The arbitration was invoked at the instance of the respondent by issuing a notice under section 21 of the Act on 14.03.2016. The CMD unilaterally appointed the arbitrator vide letter dated 10.01.2017. The proceedings culminated in the impugned award whereby the claims of the respondent were allowed. Hence, the present petition.

3. Learned counsel for EPIL submits that the unilateral appointment of the arbitrator by the CMD is in violation of the amended Section 12(5) read with Seventh Schedule of the Act. Reliance is placed upon the decision of the Supreme Court in **Bhadra International (India) Pvt. Ltd. & Ors. v. Airports Authority of India**, 2026 INSC 6 and of the Division Bench of this Court in **Mahavir Prasad Gupta and Sons v. Govt. of NCT of Delhi**, 2025 SCC OnLine Del 4241.

4. Learned counsel for the respondent contends that EPIL having appointed the arbitrator, participated in the arbitral proceedings, awaited for the outcome and having failed therein cannot challenge the appointment. It is submitted that this objection was never pressed





before the arbitrator and the award was passed prior to the decision of the Supreme Court in **Bhadra International (India) Pvt. Ltd.** (supra).

5. Before proceeding further, it would be apposite to refer to the following decisions:

5.1 The Supreme Court in **Bhadra International (India) Pvt. Ltd.** (supra) 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.”

5.2 The Division Bench of this court in **Mahavir Prasad Gupta and Sons** (supra) 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."

6. The legal position is that under Section 12(5) read with Seventh Schedule of the Act an employee of the party in dispute is ineligible to be appointed as an arbitrator and cannot nominate or appoint any other person as an arbitrator. The unilateral appointment in absence of express agreement in writing between the parties to waive the applicability of Section 12(5) of the Act is void *ab initio*. The 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.

7. 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.

8. There being no prescribed format for express agreement in writing shall not mean that the waiver can be inferred by implication or through conduct. It would be relevant to quote 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.”

9. The contention of learned counsel for the respondent that the award was passed prior to the decision of the Supreme Court in **Bhadra International (India) Pvt. Ltd.** (supra) is ill-founded. The law laid down by the Supreme Court is always the law and shall not



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operate prospectively.

10. The challenge is to the arbitration clause being violative of Section 12(5) of the Act and to the unilateral appointment made contrary to the provisions of the Act and law laid down by the Supreme Court in **Bhadra International (India) Pvt. Ltd.** (supra). The waiver under proviso to Section 12(5) of the Act has to be express and in writing. There is no express waiver in writing by the parties to waive the applicability of Section 12(5) of the Act. In absence of an express agreement in writing between the parties, the CMD cannot make a unilateral appointment of the sole arbitrator. Moreover, the waiver has to be by both the parties. The conduct of EPIL in appointing an arbitrator is not sufficient to wriggle out of the rigours of Section 12(5) of the Act.

11. The unilateral appointment made by the CMD without compliance with the proviso to Section 12(5) of the Act is in violation of Section 12(5) read with Seventh Schedule of the Act. The appointment is void *ab initio* consequently rendering the impugned award a nullity.

12. The impugned award is set aside. The petition is allowed. Pending applications stand disposed of.

AVNEESH JHINGAN, J

MARCH 25, 2026/‘ha’

Reportable:- Yes