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

Date of decision: 19th MARCH, 2025

IN THE MATTER OF:

\+ **O.M.P. (T) (COMM.) 107/2024 & I.A. 42034/2024**

SHAKTI PUMP INDIA LTD .....Petitioner

Through: Mr. Vasanth Rajasekaran and Mr. Harshvardhan Korada, Advocates.

versus

APEX BUILDSYS LTD .....Respondent

Through: Mr. Sohel Sehgal, Mr. Rakesh Kumar, Mr. Ramesh Babu and Mr. Jainendra Maldhir, Advocates.

\+ **O.M.P. (T) (COMM.) 134/2024 & I.A. 44869/2024**

VADERA INTERIORS AND EXTERIORS .....Petitioner

Through: Mr. Mritunjay Kumar Singh, Mr. Rajiv Vijay Mishra, Mr. Rajeev Kumar Gupta, Mr. Prakash Kashyap & Mr. Shaikat Khatua, Advocates.

versus

APEX BUILDSYS LTD. .....Respondent

Through: Mr. Sohel Sehgal, Mr. Rakesh Kumar, Mr. Ramesh Babu and Mr. Jainendra Maldhir, Advocates.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The Petitioners have approached this Court under Section 14(1)(a) read with Section 14(2) & 15(2) of the Arbitration & Conciliation Act, 1996

(hereinafter referred to as the Arbitration Act) seeking termination of the mandate of the learned Sole Arbitrator and for appointment of a substitute Arbitrator.

2. Shorn of unnecessary details, the facts leading to the filing of O.M.P. (T) (COMM.) 107/2024 & I.A. 42034/2024 are as follows:-

i. The Petitioner is a public limited company that is engaged in the manufacturing of energy efficient pumps and motors. The Respondent is primarily engaged in the business of construction, real estate development, manufacture and supply of pre-engineering steel buildings etc.

ii. It is stated that the Petitioner and Respondent entered into a Works Contract for Construction of PEB Project vide Letter of Intent (hereinafter referred to as the Letter of Intent) dated 24.08.2011 (bearing Reference Nos.002 /SPIL /BOOSTER /PROJ /2011). Pursuant to the said LOI the Petitioner issued two Purchase Orders dated 26.08.2011 and 04.11.2011 in favour of the Respondent.

iii. It has been further stated that submitted that after a lapse of more than five years, the Respondent, vide legal notice dated 07.06.2017, invoked arbitration and unilaterally appointed Mr. Achin Goel, Advocate, as the Sole Arbitrator to adjudicate the disputes between the parties, which pertained to allegedly unpaid dues.

iv. It has been submitted that the Respondent *vide* Corrigendum Notice dated 10.07.2017 withdrew the proposed unilateral appointment of Mr. Achin Goel, Advocate, and replaced him by appointing Mr. J S Jangra, Additional District Judge (Retd.), as

the Sole Arbitrator. This appointment was also done unilaterally and the Sole Arbitrator entered into Reference on 17.07.2017. The petitioner has asserted that the learned Arbitrator entered reference without their consent.

v. It is stated that the mandate of the learned Arbitrator came to an end on 17.01.2019, whereafter the Respondent filed a petition under Section 29A of the Arbitration Act before the learned District Judge, Commercial Court-02, South West District, Dwarka Courts on 01.09.2020. It is submitted by the Petitioner that this there was a delay of 593 days in filing the said application.

vi. Vide order dated 17.12.2022 the learned District Judge dismissed the said application for want of jurisdiction. Subsequently. the Respondent approached this Court in O.M.P.(Misc.)(Comm.) 260/2023 under Section 29A(4) of the Arbitration & Conciliation Act on 11.08.2023, seeking an extension of mandate of the Arbitrator.

vii. This Court *vide* Judgment dated 21.08.2024 extended the mandate of the arbitrator by 6 months. Material on record indicates that this Court while disposing of the said application observed that the objections raised by the Petitioner with respect to unilateral appointment could be raised in an appropriate application under Section 14 & 15 of the Arbitration & Conciliation Act.

viii. Pursuant to the said extension the Arbitrator resumed arbitration proceedings on 11.09.2024 and the matter is at the stage of final arguments.

3. In O.M.P. (T) (COMM.) 134/2024 & I.A. 44869/2024, the facts leading to the present petition being are as under:-

i. The Petitioner is a company engaged in the business of civil construction, designing etc. The Respondent is primarily into the business of construction, real estate development, manufacture and supply of pre-engineering steel buildings etc.

ii. It has been submitted that the Petitioner was awarded work of Construction of PEB Project work order dated 22.12.2011 bearing no. VIE-7/PO/11 12/API/04/186/A-1 to M/s Era Buildsys Limited (now M/s Apex Buildsys Ltd.) for Design Supply & Erection of Pre-Engineered Building for AC shelter at Maharajpur, Gwalior. It has been submitted on behalf of the Petitioner that the said purchase order did not include any arbitration clause for resolution of disputes between the parties.

iii. It is stated that during the course of the work, the Respondent raised several invoices between 2011 and 2013 to the Petitioner which carried an independent and exclusive jurisdiction clause as well as arbitration clause for resolution of disputes arising out of those invoices.

iv. It has been submitted that on 07.06.2017, the Respondent issued a legal notice to the Petitioner, demanding repayment of outstanding dues. The Respondent *vide* the aforementioned notice unilaterally appointed Mr. Achin Goel, Advocate, as a Sole Arbitrator to adjudicate upon the disputes between the parties.

v. It has been submitted that the Respondent *vide* Corrigendum Notice dated 10.07.2017 rescinded the appointment of Mr. Achin

Goel, Advocate, and appointed Mr. J S Jangra, Additional District Judge (Retd.), as the Sole Arbitrator. This appointment was also done unilaterally.

vi. It is stated that the learned Sole Arbitrator issued notice of arbitration dated 28.08.2017 directing the Petitioner to appear before him. It has been stated by the Petitioner, *vide* letter dated 13.09.2017, raised objections to the appointment of the Sole Arbitrator stating that there is no arbitration agreement between the parties and the appointment of the Arbitrator is unilateral in nature.

vii. It is stated that the Respondent *vide* reply dated 18.09.2017 denied the objections raised by the Petitioner and filed its Statement of Claim before the learned Arbitrator on 28.10.2017.

viii. Further, the Petitioner filed a rejoinder dated 02.01.2018 to its objections dated 13.09.2017 stating that the Purchase Order dated 22.12.2011 was the sole document governing the inter se relationship of the parties, which did not contain the arbitration clause. The Petitioner also stated that the Petitioner *vide* legal notice dated 07.06.2017 had unilaterally appointed Mr. Achin Goel, Advocate, as the Sole Arbitrator and since Mr. Achin Goel, Advocate, has not recused to participate in the proceedings, the unilateral appointment of Mr. J S Jangra, Additional District & Sessions Judge (Retd.) as the Sole Arbitrator is premature.

ix. It is stated that the learned Arbitrator *vide* Order dated 06.02.2018 disposed of the objections raised by the Petitioner and held that the objections raised by the Petitioner involve mixed question of

law and facts which requires to be proved on merits by producing evidence. Pursuant to the said order, it is stated that the Petitioner has filed its reply to the Statement of Claim on 26.03.2018 and also file its Counter Claim dated 17.04.2018 for the sum of Rs. 1,28,84,914.17/- along with 18% interest. Pleadings were completed on 26.03.2018 and proceedings were held on 21.01.2019 whereafter the matter was adjourned for 13.02.2019.

x. It is stated that on 13.02.2019, the proceedings could not take place and no further directions were issued by the Arbitrator in the matter. It is stated that the mandate of the Arbitrator has come to an end on 25.03.2019 by efflux of time.

xi. It is stated that the Respondent filed a petition under Section 29A of the Arbitration & Conciliation Act before before the learned District Judge, Commercial Court-02, South West District, Dwarka Courts on 01.09.2020. The said petition was dismissed by the Dwarka District Court on 17.12.2022.

xii. Pursuant to the dismissal of the petition under Section 29A by the Dwarka District Court for want of jurisdiction, the Respondent approached this Court under Section 29A(4) of the Arbitration & Conciliation Act on 01.08.2023 seeking extension of mandate of the Arbitrator to pass the award.

xiii. The said petition under Section 29A(4) was objected by the Petitioner contending that the Arbitrator was unilaterally appointed. The Petitioner, also asserted that the Respondent company was facing liquidation under the Insolvency & Bankruptcy Code (hereinafter referred to as the IBC), 2016 and

that the application could not have been filed in view of the statutory bar contained in Section 33(5) of the IBC. It was also stated that there was no arbitration agreement between the parties and it was only invoices, unilaterally raised by the Respondent, which had arbitration clauses mentioned in it. It was also contended that the Arbitrator had abandoned the proceedings, therefore, he had become *de facto* unable to perform his functions without undue delay.

xiv. This Court *vide* Judgment dated 21.08.2024 in Judgment dated 21.08.2024 in O.M.P.(Misc.) (Comm.) 227/2023 extended the mandate of the arbitrator by 6 months. Material on record indicates that this Court while disposing of the said application observed that the objections raised by the Petitioner with respect to unilateral appointment could be raised in an appropriate application under Section 14 & 15 of the Arbitration & Conciliation Act.

xv. It is stated that pursuant to judgement dated 21.08.2024 passed by this Court extending the mandate of the Arbitrator, the learned Arbitrator had resumed arbitration proceedings on 22.10.2024 and is currently at the stage of cross examination of claimant witnesses.

4. This Court vide a common order dated 14.10.2024 stayed the proceedings and the stay was extended sine die 18.12.20204 till the pronouncement of this judgement.

5. The learned Counsels for the Petitioners have submitted a twofold argument. The first limb of their argument is that the sole arbitrator was

appointed unilaterally by the Director and Group Chairman of the Respondent and, therefore, the appointment is not permissible under Section 12(5) read with Seventh Schedule of the Act. The Arbitrator would be *de-jure* ineligible and the mandate of the Arbitrator is liable to be terminated.

6. The second limb of the argument of the learned counsels for the Petitioners is that the Director and Group Chairman of the Petitioner, who has appointed the sole Arbitrator, has a substantial interest in the outcome of the dispute. Therefore, appointment of an Arbitrator by any person who is statutorily ineligible to himself act as an Arbitrator would fall foul of the dictum laid down by the Hon'ble Apex Court in Perkins Eastman Architects DPC & Anr. v. HSCC (India) Limited, **(2020) 20 SCC 760** as explained by a Bench of Five Judges of the Apex Court in Central Organisation for Railways Electrification (CORE) v. ECI SPIC SMO MCML (JV) A Joint Venture Company, **2024 SCC OnLine 3219**.

7. Additionally, the learned Counsels for the Petitioners have contended that in case of *de jure* inability the legislative scheme of the Arbitration Act, elucidates no challenge procedure under Section 12 and 13, in front of the Arbitrator. Therefore, the only remedy available at the disposal of the aggrieved party is to approach this Court for termination of the mandate of the arbitrator.

8. Learned counsels for the Petitioner in O.M.P. (T) (Comm.) 134/2024 further submits that the Respondent was facing liquidation under the Insolvency & Bankruptcy Code (IBC), 2016 and the application under Section 29(A) could not have been filed in view of the statutory bar contained in Section 33(5) of the IBC.

9. The central argument for the learned Counsel for Respondent is that

the Respondent is that the Petitioners herein, by virtue of their active participation in the arbitral proceedings have impliedly given their consent to the unilateral of the Sole Arbitrator. The learned counsel for the Respondent has relied on the judgements of Kanodia Infratech Limited v. Dalmia Cement (Bharat) Limited, **2021 SCC OnLine Del 4883** and Arjun Mall Retail Holdings (P) Ltd. v. Gunocen Inc., **(2024) 1 HCC (Del) 755**.

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

11. It is trite law that a person's ineligibility to act as an Arbitrator strikes at the very root of the appointment. If the Arbitrator was ineligible to be appointed, anything and everything that flows from such illegal appointment is also *non est* in law.

12. This Court is unable to accept the arguments on behalf of the learned counsel for the Respondent that the Petitioner's participation in arbitral proceeding tantamounts to their waiver of the unilateral appointment of the Arbitrator in terms of proviso to Section 12(5) of the Arbitration Act. Section 12(5) of the Arbitration Act reads as under:

> *12. Grounds for challenge.-*
>
> *xxx*
>
> *(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."

13. The essence of Section 12(5) and the proviso thereto is that there must be an explicit agreement in writing which should be obtained after the dispute has arisen. For the proviso to apply, in this case there has been no such waiver on the part of either of the petitioners. On the contrary, material on record indicates that the Petitioner in O.M.P. (T) (COMM.) 134/2024 & I.A. 44869/2024 had written an application whereby they had objected to the appointment of the Sole Arbitrator. The Hon'ble Supreme Court in Ellora Paper Mills Ltd. v. State of M.P., **(2022) 3 SCC 1** has categorically held that mere participation in arbitral proceedings would not amount to waiver of objections in terms of the proviso to Section 12. The relevant para is as follows

> *"**19**. In the aforesaid decision in Ajay Sales & Suppliers case [Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730] , this Court also negatived the submission that as the contractor participated in the arbitration proceedings before the arbitrator therefore subsequently, he ought not to have approached the High Court for appointment of a fresh arbitrator under Section 11 of the Arbitration Act, 1996. After referring to the decision of this Court in Bharat Broadband Network Ltd. v. United Telecoms Ltd. [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] , it is observed and held in para 18 as under : (Ajay Sales & Suppliers case [Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730])*
>
> ***"18. Now so far as the submission on behalf of the petitioners that the respondents participated in the***

arbitration ***proceedings before the sole arbitrator — Chairman and therefore he ought not to have approached the High Court for appointment of arbitrator under Section 11 is concerned, the same has also no substance. As held by this Court in Bharat Broadband Network [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] there must be an "express agreement" in writing to satisfy the requirements of Section 12(5) proviso. In paras 15 & 20 it is observed and held as under : (SCC pp. 768 & 770-71)***

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

agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.

20. This then brings us to the applicability of the proviso to Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an "express agreement in writing". 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. Here, Section 9 of the Contract Act, 1872 becomes important. It states:

> ***"9. Promises, express and implied.—Insofar as a proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."***
>
> ***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 facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court [Bharat Broadband Network Ltd. v. United Telecoms Ltd., 2017 SCC OnLine Del 11905] as indicating an express agreement on the facts of the case is dated 17-1-2017. On this date, the Managing Director of the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as an arbitrator. Shri Khan's invalid appointment only became clear after the declaration of the law by the Supreme Court in TRF [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] which, as we have seen hereinabove, was only on 3-7-2017. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an application on 7-10-2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in TRF [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] and asking him to declare that he has become de jure incapable of acting as an arbitrator. Equally, the fact that a statement of claim may have been filed before the arbitrator, would not mean that there is an express agreement in words which would make it clear that both parties wish Shri Khan to continue as arbitrator despite being ineligible to act as such. This being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2), and Section 16(2) of the Act to

> ***the facts of the present case, and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator. The judgment under appeal is also incorrect in stating that there is an express waiver in writing from the fact that an appointment letter has been issued by the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate.***"
>
> (emphasis supplied)

14. The Hon'ble Supreme Court has held that independence and impartiality of the arbitrator are cardinal principles of the arbitration framework of India. Unilateral appointment of arbitrator cuts at the very root of these principles and is antithetical to the idea of equal treatment of parties by the Arbitrator. The Hon'ble Supreme Court in the case of Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd., **(2017) 4 SCC 665**, has held as under:

> *"20. **Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him***

ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. *After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in Hashwani v. Jivraj [Hashwani v. Jivraj, (2011) 1 WLR 1872 : 2011 UKSC 40] in the following words : (WLR p. 1889, para 45)*

> ***"45. … the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties."***

21. *Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in Consorts Ury [Fouchard, Gaillard, Goldman on International Commercial Arbitration 562 (Emmanuel Gaillard & John Savage eds., 1999) {quoting Cour de cassation [Cass.] [Supreme Court for judicial matters] Consorts Ury v. S.A. des Galeries Lafayette, Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France)}.] , underlined that:*

> ***"an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator."***

> ***22***. *Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings."*
>
> (emphasis supplied)

15. The Hon'ble Supreme Court in Bharat Broadband Network Ltd. v. United Telecoms Ltd., **(2019) 5 SCC 755**, has clarified the position vis-à-vis unilateral appointment and held as under:-

> ***"20. This then brings us to the applicability of the proviso to Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an "express agreement in writing". 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.*** *Here, Section 9 of the Contract Act, 1872 becomes important. It states:*
>
> *"9. Promises, express and implied.—Insofar as the*

proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."

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 facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court as indicating an express agreement on the facts of the case is dated 17-1-2017. On this date, the Managing Director of the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as an arbitrator. Shri Khan's invalid appointment only became clear after the declaration of the law by the Supreme Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] which, as we have seen hereinabove, was only on 3-7-2017. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an application on 7-10-2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] and asking him to declare that he has become de jure incapable of acting as an arbitrator. Equally, the fact that a statement of claim may have been filed before the arbitrator, would not mean that there is an express agreement in words which would make it clear that both parties wish Shri Khan to continue as arbitrator*

despite being ineligible to act as such. This being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2) and Section 16(2) of the Act to the facts of the present case, and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator. The judgment under appeal is also incorrect in stating that there is an express waiver in writing from the fact that an appointment letter has been issued by the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate."

(emphasis supplied)

16. The law on unilateral appointments has further been consolidated by the Hon'ble Supreme Court in Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Co., **2024 SCC OnLine SC 3219**. The relevant paras from the aforementioned judgement are as follows.

*"**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. 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."** In Union of India v. Madras Bar Association,134 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.

***71**. Arbitration is an adversarial system. It relies on the parties to produce facts and evidence before the arbitral tribunal to render a decision. Procedural equality is generally considered to contain the following indicia : (i) equal capability of parties to produce facts and legal arguments; (ii) equal opportunities to parties to present their case; and (iii) neutrality of the adjudicator.135 In an adversarial process, formal equality is important because it helps secure legitimate adjudicative outcomes and create a level playing field between parties.136*

72. The defining characteristic of arbitration law (particularly ad hoc arbitration) is that it allows freedom to the parties to select their arbitrators. This is unlike domestic courts or tribunals where the parties have to litigate their claims before a pre-selected and randomly allocated Bench of judges. Section 11(2) of the Arbitration Act allows parties to agree on a procedure for appointing the arbitrators. The "procedure" contemplated under Section 11(2) is a set of actions which parties undertake in their endeavour to appoint arbitrators to adjudicate their dispute independently and impartially. Without formal equality at the stage of appointment of arbitrators, a party may not have an equal say in facilitating the appointment of an unbiased arbitral tribunal. In a quasi-judicial process such as arbitration, the appointment of an independent and impartial arbitrator ensures procedural equality between parties during the arbitral proceedings. This is also recognised under Section 11(8) which requires the appointing authority to appoint independent and

impartial arbitrators.

> *73. The 2015 amendment has introduced concrete standards of impartiality and independence of arbitrators. One of the facets of impartiality is procedural impartiality. Procedural impartiality implies that the rules constitutive of the decision-making process must favour neither party to the dispute or favour or inhibit both parties equally. Further, a procedurally impartial adjudication entails equal participation of parties in all aspects of adjudication for the process to approach legitimacy. Participation in the adjudicatory process is meaningless for a party against whom the arbitrator is already prejudiced.* ***Equal participation of parties in the process of appointment of arbitrators ensures that both sides have an equal say in the establishment of a genuinely independent and impartial arbitral process."***
>
> (emphasis supplied)

17. To conclude this Court is of the view that in light of the law laid down by the Hon'ble Supreme Court in the aforementioned judgements, mere participation of the parties without an unequivocal, written waiver after the dispute has arisen would not tantamount to acceptance of a unilateral appointment and the unilateral appointment of Arbitrator by the Respondent in this case being *void ab intitio,* as held by the Apex Court, is liable to be terminated.

18. In view of the above, the petitions are allowed. Pending application(s), if any, stand disposed of.

SUBRAMONIUM PRASAD, J

MARCH 19, 2025/hsk/vr