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

% Judgment delivered on: 31.05.2025

\+ **FAO (COMM) 170/2023**

M/s MAHAVIR PRASAD GUPTA AND SONS .....Appellant

versus

GOVT OF NCT OF DELHI .....Respondent

Advocates who appeared in this case

For the Appellant : Mr M.K. Ghosh and Ms Tina Garg, Advocates.

For the Respondent : Mr Tushar Sannu, and Ms Ankita Bhadouriya, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE TEJAS KARIA

JUDGMENT

TEJAS KARIA, J

1. The Appellant has filed the present Appeal under Section 37 of the Arbitration and Conciliation Act, 1996, **(**'**Act**'**)** being aggrieved by the order dated 23.05.2023 passed by learned District Judge (Commercial Court)- 01,

Shahdara, District Courts Karkardooma, Delhi ('**Commercial Court**') in OMP (Comm) No. 6 of 2021 (**'Impugned Order**').

2. The Impugned Order has allowed the application under Section 34 of the Act and set aside the Arbitration Award dated 12.10.2020 ('**Award**'), whereby the learned Arbitral Tribunal had awarded the Appellant a sum of ₹1,76,01,359/- along with interest at the rate of 10% per annum from the date of the Award.

3. The Impugned Order has set aside the Award holding that the Learned Sole Arbitrator was unilaterally appointed by the Respondent and the Award by a person ineligible to be appointed as an arbitrator under Section 12(5) of the Act read with the Seventh Schedule of the Act was against the public policy of India and, thus, liable to be set aside.

FACTUAL BACKGROUND:

4. The dispute had arisen out of the contracts entered into between the Appellant and the Respondent for "strengthening of Road No. 58 (Maharaja Surajmal Marg) from RUB Vivek Vihar to Junction on Road No.72 RD" ('**Project**').

5. The Appellant was the successful bidder under the Notice Inviting Tender ('**NIT**') and accordingly, a work order dated 25.11.2014 was issued to the Appellant for a consideration of ₹5,16,82,612/-. The work commenced with effect from 09.12.2014 and the work which was supposed to be completed in three months was completed on 21.05.2015.

6. In accordance with the terms of the agreement, the Quality Assurance Unit of GNCTD conducted an inspection of the work site and randomly measured the thickness of the layers at different locations. It was found that

the actual thickness of some of the layers was significantly below the required aggregate thickness of 165mm.

7. The Appellant submitted the final bill on 16.11.2015, however, the Respondent withheld the Appellant's payments on the ground that the thickness of the constructed road was allegedly less than the prescribed specifications. In response, a third-party quality audit was conducted by a team comprising officials from IIT Roorkee and the Public Works Department ('**PWD**'). The said team carried out an inspection and submitted its report dated 28.03.2016, wherein it was found that the work executed by the Appellant was acceptable, being within the permissible tolerances.

8. Upon consideration of the said inspection report dated 28.03.2016, the Respondent, vide letter dated 04.10.2016, directed the Appellant to lay an additional layer of 37mm thick Dense Bituminous Concrete ('**DBC**') over a stretch of 20 meters on the carriageway from Road No. 57 to the Road Under Bridge.

9. The Respondent being dissatisfied with the work, did not release the final payment to the Appellant. Consequently, the Appellant invoked the arbitration clause vide letter dated 18.10.2018, and pursuant to the invocation, the Respondent appointed Sh. A. K. Singhal, former Director General (Works), CPWD, as the Sole Arbitrator to adjudicate the disputes between the parties.

10. The learned Sole Arbitrator, arrived at a finding that the report dated 28.03.2016, submitted by the Third Party Quality Audit ('**TPQA**') team comprising senior officials from PWD and IIT Roorkee, was comprehensive, reliable, and impartial. The learned Sole Arbitrator noted

that the measured total average thickness was found to be within the permissible limits and, accordingly, the report recommended acceptance of the work. The learned Sole Arbitrator passed the Award by awarding a sum of ₹1,76,01,359/- to the Appellant in respect of the work executed for the Project.

11. Aggrieved by the Award, the Respondent challenged the Award under Section 34 of the Act. The Impugned Order allowed the application filed by the Respondent under Section 34 of the Act on the ground that the appointment of the learned Sole Arbitrator was in violation of Section 12(5) of the Act read with the Seventh Schedule of the Act and, accordingly, the Award being a nullity was set aside. Being aggrieved by the Impugned Order, the Appellant has preferred the present Appeal.

SUBMISSIONS BY THE APPELLANT:

12. Mr. M. K. Ghosh, the learned counsel appearing for the Appellant has submitted that the learned Sole Arbitrator appointed to adjudicate the disputes between the parties had given disclosure statement as to the impartiality as well as independence.

13. The learned counsel for the Appellant submitted that the Respondent did not contest the appointment of the learned Sole Arbitrator during the arbitration proceedings. On the contrary, the Respondent actively participated in the arbitration and agreed to the extension of the mandate of the learned Sole Arbitrator under Section 29A of the Act. The Respondent did not even plead the ground of unilateral appointment in the application under Section 34 of the Act, and only upon a query from the learned Commercial Court, the challenge to the jurisdiction of the learned Sole

Arbitrator was made by the Respondent for the first time at the stage of proceedings under Section 34 of the Act.

14. The learned counsel for the Appellant relied upon the decision in ***Arjun Mall Retail Holdings (P) Ltd. v. Gunocen Inc.*** (2024) 1 HCC (Del) 755, to submit that when the Respondent had not challenged the jurisdiction of the arbitrator during the arbitration proceedings, it cannot be challenged at the stage of the proceedings under Section 34 of the Act.

15. The learned counsel for the Appellant relied upon the judgment in ***Kanodia Infratech Limited v. Dalmia Cement (Bharat) Limited*** 2021 SCC OnLine Del 4883 to submit that if the Respondent had actively participated in the arbitration and never objected to the jurisdiction of the Learned Sole Arbitrator, at a later stage the ground of unilateral appointment cannot be allowed to be taken. Because of the active participation in the arbitration proceedings, the Respondent has been estopped from contesting the ground of unilateral appointment.

16. The learned counsel for the Appellant relied upon the judgment in ***Select Realty v. Intec Capital Limited*** 2021 SCC OnLine Del 4333, to distinguish the decision in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd*** 2019 SCC OnLine SC 1517 and submitted that the Perkins case did not pertain to a challenge under Section 34 of the Act. It was further submitted that the objection to unilateral appointment of an arbitrator is not a ground under Section 34 of the Act. Hence, an application under Section 34 of the Act cannot be allowed on the ground of unilateral appointment of the arbitrator.

17. The learned counsel for the Appellant has further relied on ***Bhadra International India (P) Ltd. v. Airports Authority of India*** 2025 SCC OnLine Del 698, to submit that once the parties have actively participated in the arbitration proceedings without objecting to the jurisdiction of the arbitrator, the parties cannot be allowed to raise the objection against unilateral appointment for the first time under Section 34 of the Act. Furthermore, Section 12(5) of the Act is not absolute and the rights can be waived off under the proviso to Section 12(5) of the Act.

18. The learned counsel for the Appellant has relied on ***VR Dakshin (P) Ltd. v. Scm Silks (P) Ltd*.** 2024 SCC OnLine Mad 6761, to submit that when a party actively participated in the arbitration and agreed to the extension of the mandate of the arbitrator under Section 29A of the Act, that party at a belated stage during the proceedings under Section 34 of the Act cannot raise an objection as to the jurisdiction of the arbitrator.

19. The learned counsel for the Appellant submitted that as the learned Sole Arbitrator was appointed by the Respondent itself, the Respondent cannot object to the appointment.

20. The learned counsel for the Appellant further submitted that once the arbitrator has decided the matter on merits, the Court cannot revisit the facts in proceedings under Section 34 of the Act as it is not an appeal. Reliance was placed on the decision in ***Navodaya Mass Entertainment Ltd. v. J.M. Combines*** (2015) 5 SCC 698, to further submit that the scope of interference under Section 34 of the Act is very limited and the Courts cannot reappraise the material on record to substitute their own view with that of the arbitrator unless the view of the arbitrator is perverse.

21. Hence, it was submitted that the Impugned Order has erroneously allowed the application under Section 34 of the Act, which ought to be set aside by allowing the present Appeal.

SUBMISSIONS BY THE RESPONDENT:

22. Mr. Tushar Sannu, the learned counsel for the Respondent submitted that the Learned Sole Arbitrator was appointed unilaterally by the Chief Engineer of the Respondent and, accordingly, was ineligible to be appointed as an arbitrator under Section 12(5) of the Act read with the Seventh Schedule of the Act. The express waiver in writing required under the proviso to Section 12(5) of the Act was not given by the Appellant and in absence of such waiver under the proviso to Section 12(5) of the Act, the Award passed by the Learned Sole Arbitrator is null and void and, therefore, unenforceable. The appointment of the learned Sole Arbitrator being contrary to Section 12(5) of the Act and the Seventh Schedule of the Act, is violative of the Public Policy of India and, thus the Award passed by the learned Sole Arbitrator is liable to be set aside under Section 34(2)(b) of the Act.

23. The learned counsel for the Respondent relied upon the decision in ***Perkins*** (*supra*) and ***Osho G. S. & Co. v. Wapcos Ltd***. 2022 SCC OnLine Del 4598 to submit that once a person is ineligible to act as an arbitrator, the same person cannot appoint an arbitrator as well. In order to waive the applicability of Section 12(5) of the Act an express agreement in writing is required for it to be construed as a valid waiver under the proviso to Section 12(5) of the Act.

24. Further, reliance was placed upon the decision in ***Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat*** 2023 SCC OnLine Del 3148, and ***MCD v. Almass India*** 2025 SCC OnLine Del 1940, to submit that an award made by an arbitrator, who is ineligible to act as an arbitrator cannot be considered as a valid award.

25. The learned counsel for the Respondent relied upon the decision in ***Hindustan Zinc Limited v. Ajmer Vidvut Vitran Nigam Limited*** (2019) 17 SCC 82, to submit that an objection with respect to lack of jurisdiction can be made at any stage and even during collateral proceedings. He further relied upon the decision in ***Man Industries (India) Limited v. Indian Oil Corporation Limited*** 2023 SCC OnLine Del 3537, to submit that mere participation in the arbitral proceedings or filing applications under Section 29A of the Act does not amount to an express waiver under the proviso to Section 12(5) of the Act.

26. The learned counsel for the Respondent has relied on the decision of ***Lion Engg. Consultants v. State of M.P.*** (2018) 16 SCC 758, to submit that the challenge to the jurisdiction of the arbitrator can be raised at the stage of the petition under Section 34 of the Act for the first time, even if there was no challenge under Section 16 of the Act before the arbitrator.

27. The learned counsel for the Respondent has relied on the decision of the Constitution Bench of the Supreme Court in ***Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Co.*** 2024 SCC OnLine SC 3219, ('**CORE**') to submit that a clause allowing one of the parties to unilaterally appoint an arbitrator is in violation of the principle of equality. Arbitration is a *quasi-judicial* process and both parties

should be treated equally, and a unilaterally appointed arbitrator is contrary to the purpose of the Act. A clause allowing unilateral appointment of a sole arbitrator gives room to doubt regarding the impartiality and independence of the arbitrator.

28. The learned counsel for the Respondent has submitted that the decisions relied upon by the Appellant in ***Arjun Mall*** (*supra*) and ***Bhadra International*** (*supra*) are *per incuriam* as they have not considered the decisions of the Supreme Court in ***Bharat Broadband Network Ltd. v. United Telecoms Ltd.*** *(2019) 5 SCC 755* and ***CORE*** *(supra)* respectively. Reliance has been placed upon the decision of the Supreme Court in ***Hyder Consulting (UK) Ltd. v. State of Orissa,*** (2015) 2 SCC 189 to submit that a prior decision of the same court or a superior court on identical facts and circumstances should be followed in subsequent judgments. Judgments in contravention to this principle are *per incuriam*.

29. The learned counsel for the Respondent has further relied upon the decision of ***Enforcement Directorate v. Kapil Wadhawan*** (2024) 7 SCC 147, to submit that a *per incuriam* judgment has no precedential value and judgments in contravention to the previously binding judgments cannot be considered as a binding judicial precedent.

30. Hence, the Impugned Order correctly set aside the Award and, accordingly, the Appeal deserves to be dismissed.

ANALYSIS AND FINDINGS:

31. The following issues arise for consideration in this case:

A. In view of requirement of express waiver in writing under proviso to Section 12(5) of the Act, can the parties by conduct of participating in arbitration proceedings and not raising objection before the arbitrator, be deemed to have waived the objection against the unilateral appointment?

B. Does the award passed by unilaterally appointed arbitrator is *per se* bad and a nullity, which goes to the root of the jurisdiction of the arbitrator, that entitles any party (including the party that unilaterally appointed the arbitrator itself) to object at any stage during or after the arbitration proceedings including the proceedings for challenge to the award under Section 34 of the Act and/or enforcement of the award under Section 36 of the Act?

Validity of unilateral appointment of the arbitrator:

32. It is a well-settled position in law that unilateral appointment of an arbitrator by one of the parties to the dispute is impermissible and invalid being contrary to the scheme of the Act. Section 12(5) of the Act read with the Seventh Schedule of the Act lays down that appointment of any person as an arbitrator that gives rise to justifiable doubts as their independence or impartiality, is ineligible to act as an arbitrator. When the power to appoint an arbitrator is exercised unilaterally, such an appointment is null and void and an award rendered by an ineligible arbitrator would be unenforceable.

33. The question whether a person, who is ineligible to act as an arbitrator can appoint an arbitrator, is no longer *res integra*. The law on this aspect has been settled by ***TRF Limited v. Energo Engineering Projects Limited*** (2017) 8 SCC 377, wherein it has been categorically held by the Supreme

Court that a person who is ineligible to be an arbitrator cannot nominate any other person as the arbitrator:

> *"54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."*

34. The Supreme Court in ***Perkins*** *(supra)*, relying upon the decision in ***TRF*** *(supra)*, has held that a party who has an interest in the outcome of the decision in an arbitration proceeding must not have the power to appoint a sole arbitrator. In a situation where the right to appoint a sole arbitrator rests solely with one party, that party's selection will inherently carry an exclusive influence in shaping or directing the path of dispute resolution:

> *"20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] where the Managing Director himself is named as an*

arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an arbitrator.

21. But, in our view that has to be the logical deduction from TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Para 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate

> *respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and recognised by the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]"*

35. This Court has in ***Osho G.S.*** *(supra)*, relied upon by the Respondent, has followed the decision in ***Perkins*** *(supra)* to set aside an award with the finding that a request by one party to another for the unilateral appointment cannot be considered a valid waiver under the proviso to Section 12(5) of the Act.

36. The decision of the Constitution Bench of the Supreme Court in ***CORE*** *(supra),* while upholding the judgments of ***TRF*** *(supra)* and ***Perkins*** *(supra)* has conclusively held that a clause allowing unilateral appointment of an arbitrator gives justifiable doubts as to the independence and impartiality of the sole arbitrator. The Supreme Court further held that unilateral appointment clauses in public private contracts are violative of Article 14 of the Constitution of India:

> *"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.

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168. In the present reference, we have upheld the decisions of this Court in TRF (supra) and Perkins (supra) which dealt with situations dealing with sole arbitrators. Thus, TRF (supra) and Perkins (supra) have held the field for years now. However, we have disagreed with Voestalpine (supra) and CORE (supra) which dealt with the appointment of a three-member arbitral tribunal. We are aware of the fact that giving retrospective effect to the law laid down in the present case may possibly lead to the nullification of innumerable completed and ongoing arbitration proceedings involving three-member tribunals. This will disturb the commercial bargains entered into by both the government and private entities. Therefore, we hold that the law laid down in the present reference will apply prospectively to arbitrator appointments to be made after the date of this judgment. This direction only applies to three-member tribunals.

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J. Conclusion

169. *In view of the above discussion, we conclude that:*

a. The principle of equal treatment of parties applies at all stages of arbitration proceedings, including the stage of appointment of arbitrators;

b. The Arbitration Act does not prohibit PSUs from empanelling potential arbitrators. However, an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by PSUs;

c. A clause that allows one party to unilaterally appoint a sole arbitrator gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further, such a unilateral

clause is exclusive and hinders equal participation of the other party in the appointment process of arbitrators;

d. In the appointment of a three-member panel, mandating the other party to select its arbitrator from a curated panel of potential arbitrators is against the principle of equal treatment of parties. In this situation, there is no effective counterbalance because parties do not participate equally in the process of appointing arbitrators. The process of appointing arbitrators in CORE (supra) is unequal and prejudiced in favour of the Railways;

e. Unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution;

f. 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; and

g. The law laid down in the present reference will apply prospectively to arbitrator appointments to be made after the date of this judgment. This direction applies to three-member tribunals."

37. Hence, a unilateral appointment of the sole arbitrator or the presiding arbitrator by a party to 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. Any award passed by the unilaterally appointed Arbitral Tribunal is 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.

Waiver of objection to unilateral appointment:

38. The proviso to Section 12(5) of the Act allows a waiver from the disqualification to act as an arbitrator, however such waiver shall be by an express agreement in writing. The waiver under Section 4 of the Act will be inapplicable to the unilateral appointments as it is governed by Section 12(5) of the Act, which specifically provides for waiver by express agreement in writing. Hence, any waiver to object against the unilateral appointment of the arbitrator by participating in the arbitration proceedings or by not objecting to the disclosure of independence and impartiality by the unilaterally appointed sole arbitrator or the presiding arbitrator, must be agreed in writing in terms of Section 12(5) of the Act. Hence, waiver by conduct of the parties under Section 4 of the Act is not applicable to unilateral appointment of the sole or presiding arbitrator.

39. As Section 12(5) of the Act is subsequent to Section 4 in the Act sequentially, it would override the general waiver by requirement of waiver by express agreement in writing under Section 12(5) of the Act. The express agreement in writing under Section 12(5) of the Act is an exception to the general rule of waiver under Section 4 of the Act. In the case of ***Bharat Broadband*** *(supra)*, the Supreme Court held that when a person is rendered ineligible to be appointed as an arbitrator under Section 12(5) of the Act read with the Seventh Schedule of the Act, such ineligibility operates *de jure*, and the arbitrator's mandate terminates automatically by virtue of Section 14(1)(a) of the Act. The Supreme Court clarified that where a controversy arises about whether the arbitrator has become *de jure* incapable

of acting, a party may approach the Court to decide on the termination of the mandate, unless otherwise agreed.

40. The Supreme Court further held that the proviso to Section 12(5) of the Act refers to an "express agreement in writing", which clearly indicates that the requirement under the proviso is to have an agreement written in words that the parties have agreed to waive their right to object to the jurisdiction of the arbitrator and such waiver cannot be inferred from the conduct of the parties:

> *"17. The scheme of Sections 12, 13 and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case i.e. a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e. de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section*

> *12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them.*
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> *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."*

41. In ***Telecommunication Consultants India Ltd. v. Shivaa Trading***, 2024 SCC OnLine Del 2937 this Court has affirmed the view in ***Bharat Broadband*** *(supra)* that:

> *"13. The court has further held, that the concept of deemed waiver of the right to object by conduct under section 4 of the A&C Act does not apply to a situation under section 12(5), which requires express waiver in writing subsequent to the disputes having arisen between the parties."*

42. In ***CORE*** *(supra)*, the Supreme Court has laid down twin conditions for a valid waiver under the proviso to Section 12(5) of the Act. These conditions are: (i) the express agreement in writing shall be made 'after' the

dispute has arisen; and (ii) the parties must consciously abandon their existing legal right through an 'express agreement'. It was held that:

> *"121. An objection to the bias of an adjudicator can be waived. A waiver is an intentional relinquishment of a right by a party or an agreement not to assert a right. 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."*

43. Consenting to the extension of the mandate of the arbitrator under Section 29A(3) of the Act does not constitute a valid express waiver in writing as required under the proviso to Section 12(5) of the Act. The view of the learned Single Judge of the Court in ***Man Industries (India) Ltd.*** *(supra)* is the correct as participation in the arbitral proceedings or seeking

an extension of the mandate of the arbitrator does not constitute a valid waiver. It is held that:

> *"22. In view of the above authorities, there can be no doubt that the learned Arbitrator appointed by the respondent was de jure ineligible to act as such. The petitioner by its participation in the arbitration proceedings or by its filing of applications under Section 29A of the Act seeking extension of the mandate of the learned Arbitrator, cannot be said to have waived the ineligibility of the learned Arbitrator under Section 12(5) of the Act, and, therefore, the Arbitral Award passed by the learned Arbitrator is invalid.*
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> *27. Applying the above principles to the facts of the present case, the plea of the Arbitrator being de jure ineligible to act as such is a plea of lack of jurisdiction. This plea can be allowed to be raised by way of an amendment and even without the same.*
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> *30. In view of the above, it has to be held that the learned Arbitrator was de jure ineligible to act as such and the Award passed by the learned Arbitrator is void and unenforceable. The same is, therefore, set aside."*

Objection for the first time during setting aside or enforcement proceedings:

44. This issue requires analysis of decisions divided into two categories - *first,* cases holding that the ground of unilateral appointment can be raised and considered for the first time at the stage of proceedings under Section 34 or Section 36 of the Act and *second,* the cases that hold to the contrary - to come to conclusion regarding the correct position of law.

A. Judgments that allow the ground of Unilateral Appointment to be raised for the first time after the Arbitral Award has been rendered -

45. In ***Lion Engg. Consultants*** *(supra)*, it is held that the plea of jurisdiction of the arbitrator can be raised at the stage of Section 34 of the Act even though there was no challenge to the jurisdiction under Section 16 of the Act. It was held as under:

> *"4. We find merit in the contentions raised on behalf of the State. We proceed on the footing that the amendment being beyond limitation is not to be allowed as the amendment is not pressed. We do not see any bar to plea of jurisdiction being raised by way of an objection under Section 34 of the Act even if no such objection was raised under Section 16."*

46. In ***Hindustan Zinc*** (*supra*), the Supreme Court has held that the plea of inherent lack of jurisdiction can be taken at any stage of the proceedings, and also in collateral proceedings. An award made by an arbitrator who was ineligible to be an arbitrator is a *non-est* award. It was held as under:

> *"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.*
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> xxxxxx
>
> *23. This being the case, the High Court is right in stating that the arbitrator could not, in law, have been appointed by the State Commission under Section 86 of the Electricity Act. The award based on such appointment would be non est in law."*

47. In ***Govind Singh v. Satya Group (P) Ltd.*** 2023 SCC OnLine Del 37, Division Bench of this Court has held that it is not essential to determine whether objection to the appointment of the Arbitrator was raised before the

during the arbitration proceedings. Even if it is presumed that a party has participated in the arbitration proceedings without raising any such objection, it cannot be concluded that he waived his right under Section 12(5) of the Act. In the said judgment, it was held as under:

> *"18. In view of the law as noted above, the learned Arbitrator unilaterally appointed by the respondent company was ineligible to act as an arbitrator under Section 12(5) of the A&C Act.*
>
> *19. The contention that the appellant by its conduct has waived its right to object to the appointment of the learned Arbitrator is also without merit. The question whether a party can, by its conduct, waive its right under Section 12(5) of the A&C Act is no longer res integra. The Supreme Court in the case of Bharat Broadband Network Limited v. United Telecoms Limited : (2019) 5 SCC 755 had explained that any waiver under Section 12(5) of the A&C Act would be valid only if it is by an express agreement in writing. There is no scope for imputing any implied waiver of the rights under Section 12(5) of the A&C Act by conduct or otherwise."*

48. In ***Kotak Mahindra Bank*** (*supra*) the Coordinate Bench of this Court has held that a person who is ineligible to act as an arbitrator lacks the jurisdiction to render an award. An award made by an authority without inherent jurisdiction cannot be deemed a valid award. Consequently, it is concluded that an arbitral award rendered by an arbitral tribunal that is ineligible to act as an arbitrator is unenforceable. The relevant extract of ***Kotak Mahindra Bank*** *(supra)* it is reproduced as under:

> *"13. The Learned Commercial Court has held that an award rendered by a person who is ineligible to act as an Arbitrator by virtue of the provisions of Section 12(5) of the A & C Act is a nullity and, therefore, cannot be enforced. It has accordingly dismissed the enforcement petition under Section 36 of the A&C Act with the cost quantified as Rs. 25,000/-.*

> *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."*

49. A Special Leave Petition [being SLP (C), Diary No. 47322/2023] preferred against the decision of this Court in ***Kotak Mahindra Bank** (supra)* was dismissed by an order dated 12.12.2023, which is reproduced below:

> *"Delay condoned.*
> *From paragraph 6 of the impugned order, it appears to be an admitted position that the Arbitrator unilaterally appointed by the petitioner was ineligible to be appointed as an arbitrator by virtue of Section 12(5) of the Arbitration and Conciliation Act, 1996. Hence, in view of this particular factual position, no case for interference is made out in exercise of our jurisdiction under Article 136 of the Constitution of India. The Special Leave Petition is accordingly dismissed.*
> *Pending application also stands disposed of."*

50. In ***Smaash Leisure Ltd. v. Ambience Commercial Developers (P) Ltd.,*** 2023 SCC OnLine Del 8322 the Single Judge of this Court has held that the conduct of the parties no matter how extensive or suggestive cannot be construed as a waiver under the proviso to Section 12(5) of the Act, which only allows an express waiver in writing. The relevant extract is reproduced as under:

> *"35. In view of these judgments, the argument of the Respondents that Petitioner has waived its right by conduct, owning to participation in the arbitral proceedings, under*

proviso to Section 12(5) cannot be countenanced in law. Coming to the next limb of the argument of waiver, heavy reliance was placed by the Respondents on the statement made by the counsel for the Petitioner before the Arbitrator that Petitioner was giving up the objection to the appointment. This very issue came up for consideration before a Bench of this Court in Larsen and Toubro Limited (supra), wherein Petitioner had filed an application under Section 14 of the 1996 Act seeking termination of the mandate of the Arbitrator on the ground that Respondent had unilaterally appointed the sole Arbitrator and the grievance was predicated on Section 12(5) and the judgments of the Supreme Court in Perkins (supra), Bharat Broadband Network Limited (supra) and Haryana Space Application Centre v. Pan India Consultants Pvt. Ltd., (2021) 3 SCC 103 : AIR 2021 SC 653. Petition was resisted by the Respondent inter alia on the consent given by the Petitioner before the Arbitrator, which was recorded in one of the procedural orders. The contention was that having given consent to the Arbitrator that both parties had no objection to the Arbitral Tribunal, it was not open to take a plea of unilateral appointment. Holding that the learned Arbitrator is de jure rendered incapable of continuing with the arbitral proceedings, being a unilateral appointment, the Court observed that this statement made before the Arbitrator in one of the procedural hearings will not operate as an express waiver in writing for the applicability of proviso to Section 12(5) of the 1996 Act. The Court relied on the judgment of the Supreme Court in Bharat Broadband Network Limited (supra) to come to this conclusion, wherein the Supreme Court held that there must be an 'express agreement in writing', waiving the applicability of Section 12(5).

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39. From the aforesaid judgment, it is clear that the ineligibility of the Arbitrator goes to the root of the jurisdiction and vitiates the award. Such is the threshold of this disability that in a recent judgment in Kotak Mahindra Bank Ltd. (supra), the Division Bench of this Court had interfered at the stage of execution of the arbitral award and upheld the order of the learned Commercial Court, holding

that an award rendered by a person who is ineligible to act as an Arbitrator by virtue of Section 12(5) is a nullity and cannot be enforced. In view of these judgments, in my considered view, the impugned awards cannot be sustained in law, solely on the ground of ineligibility of the learned Arbitrator and are accordingly set aside."

51. In ***Airports Authority of India v. TDI International India (P) Ltd.*** 2024 SCC OnLine Del 4016, the Single Judge of this Court has categorically held that an objection against the jurisdiction of the unilaterally appointed arbitrator, can be raised at the stage of proceedings under Section 34 of the Act. The relevant extract is reproduced as under:

"23. The question as to whether this ground can be raised for the first time in the course of oral arguments in a petition under Section 34 of the Act, has been decided in AAI's favour, specifically in the judgment of a coordinate bench in Man Industries In paragraph 27 of the judgment, the Court held that the question was one of jurisdiction and de jure ineligibility to act, which can be raised "by way of an amendment and even without the same." In reaching this conclusion, this Court relied inter alia upon the judgments of the Supreme Court in Lion Engineering Consultants v. State of M.P. and Hindustan Zinc Ltd. v. Ajmer Vidyut Vitran Nigam Ltd., which emphasise that challenges to the jurisdiction of an arbitrator can be raised for the first time in Section 34 proceedings, and even in collateral proceedings.

24. As noted above, this Court has thus developed a line of authority with regard to the strict requirements to establish waiver within the meaning of the proviso to Section 12(5) of the Act, and the effect of ineligibility of the arbitrator upon the validity of the award. These include four judgments of the Division Bench - Ram Kumar Govind Singh Kotak Mahindra and Babu Lal.

> *25. Mr. Mohan, however, draws my attention to a judgment in Arjun Mall, wherein the Division Bench has taken the view that this ground cannot be raised for the first time in a petition under Section 34 of the Act, if it was not raised in arbitral proceedings. It may first be noticed that the prior judgments of the Division Bench of this Court in Govind Singh, Ram Kumar, Kotak Mahindra, and Babu Lal do not appear to have been brought to the attention of the Bench in Arjun Mall. It may also be noticed that the Division Bench relied upon the decision of the Supreme Court in Delhi Airport Metro Express (P) Ltd. v. DMRC, which has specifically been set aside by the Supreme Court in Curative Petition Nos. 108-109/2022."*

52. This Bench in ***MCD*** *(supra)* dismissed an appeal for enforcement of an arbitral award on the ground that a unilaterally appointed arbitrator lacks inherent jurisdiction and an award rendered by a unilaterally appointed arbitrator cannot be enforced. The relevant extract of the judgment is reproduced below:

> *"12. Concededly, the Arbitral Tribunal was appointed unilaterally by the Commissioner, MCD in terms of the aforesaid Clause. It is also not disputed that the Commissioner being an Officer of the MCD was ineligible to act as an arbitrator by virtue of the Seventh Schedule to the A&C Act. The question whether a person, who is ineligible to act as an arbitrator can appoint an arbitrator, is no longer res integra.*
>
> xxxxxx
>
> *14. Since in the present case, the Commissioner MCD was ineligible to act as an arbitrator in terms of Section 12(5) of the A&C Act, he was also ineligible to appoint an arbitrator in his place."*

53. In view of the above analysis, in absence of any express waiver in writing by the party objecting to the unilateral appointment can raise the issue at any time even at the stage of Section 34 proceedings or during the

enforcement under Section 36 of the Act.

54. In any event, Section 34(2)(b) of the Act empowers the Court to set aside the award if 'the Court finds that', which means that it is an obligation of the Court to ensure that that award is not against the Public Policy of India. Hence, even if any of the parties have not raised an objection regarding the unilateral appointment, if the Court while considering the application under Section 34 of the Act finds that the Award is null and void due to the unilateral appointment of the arbitrator, has power to set aside the award without any objection by any of the parties. The concept of Public Policy of India is explained and clarified in Explanation 1 to Section 34(2)(b) of the Act that the award must not be in contravention with the fundamental policy of Indian law or in conflict with the most basic notions of morality or justice. Right to equality is part of the basic structure of the Constitution of India and integral to the fundamental policy of India law. The judgment in ***CORE*** *(supra)* has held 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."

55. Any unilateral appointment of the sole or presiding arbitrator militates against the most basic notion of justice. Hence, any unilateral appointment will take away the equal treatment of the parties enshrined under Section 18 of the Act, which is a complete code in itself as held by the Supreme Court in ***Kandla Export Corpn. V. OCI Corpn*** (2018) 14 SCC 715.

56. Hence, the objection with regard to award being nullity due to unilateral appointment can be raised for the first time at the stage of Section 34 of the Act and even in absence of the objection, if the Court while deciding the application under Section 34 of the Act finds that the award is vitiated by unilateral appointment can on its own set aside the award.

57. Similarly, the Court executing the award under Section 36 of the Act read with Order XXI of the Code of Civil Procedure, 1908 ('**CPC**') can refuse to enforce the award, which is deemed to be a decree passed by the Indian Court at the stage of enforcement proceedings. Under CPC, a decree is said to be nullity if it passed by a Court having lack of inherent jurisdiction. The decree is called nullity if it is *ultra vires* the powers of the Court passing the decree and not merely voidable decree. Applying the same principles to the awards that are considered as decree under Section 36 of the Act, the Court enforcing the awards must refuse to enforce the awards that are passed by unilaterally appointed arbitrator, being a nullity having lack of inherent jurisdiction to pass the award.

58. The Supreme Court in ***Sushil Kumar Mehta v. Gobind Ram Bohra***, (1990) 1 SCC 193 and ***Harshad Chiman Lal Modi v. DLF Universal Ltd.***, (2005) 7 SCC 791, has held that a decree passed by a Court without the

jurisdiction to try a suit is a nullity. It is not necessary that the objection to the jurisdiction should be made at the first instance. The objection can be raised even in the execution proceedings.

59. The Supreme Court in ***Dharma Pratishthanam v. Madhok Constructions (P) Ltd.*** (2005) 9 SCC 686 held that in the event of the appointment of an arbitrator and reference of disputes to him being *void ab initio*, the award shall be liable to be set aside in any appropriate proceedings when sought to be enforced or acted upon.

60. Hence, the objection with regard to unilateral appointment can be taken at any stage even during the proceedings under Section 34 of the Act and during enforcement of the Award under Section 36 of the Act for the first time and even without raising such an objection by any of the parties, the Court has power to set aside or refuse to enforce the Award if the Court finds that the same is passed by a sole or presiding arbitrator that is unilaterally appointed as the Award passed by such an Arbitral Tribunal would be a nullity.

B. Judgments that do not allow the ground of Unilateral Appointment to be raised for the first time at the stage of proceedings under Section 34 or Section 36 of the Act

61. The Single Judge of this Court in ***Select Realty*** *(supra),* where the ground of unilateral appointment was raised for the first time in the petition under Section 34 of the Act, has held that an arbitrator appointed from a panel of arbitrators suggested unilaterally by one of the parties was not an invalid appointment and that the said ground was not made out. However,

this case is distinguishable as a panel of six persons was provided to the petitioner to choose an arbitrator. With the subsequent judicial pronouncements in ***CORE*** (*supra*), ***Smaash Leisure*** (*supra*), even a clause that allows one party to suggest a panel of arbitrators has been held to be invalid. It is apposite to refer to the relevant extract of ***Select Realty*** *(supra)* to show that the view was taken on facts of that case, which are inapplicable to the present case:

> *"17. The submission, of Mr. Chaudhary, that the ground on which he is seeking to found his challenge come within Section 34(2)(a)(ii) needs only to be urged to be rejected.*
>
> xxxxxx
>
> *19. Besides, as already noted earlier, these were not decisions in which the award was sought to be challenged under Section 34. The rigours of Section 34(1), therefore, did not apply to these cases.*
>
> *20. On facts, too, the said decisions are clearly distinguishable. In* ***Perkins Eastman****, sole and complete authority to appoint the arbitrator was conferred on the Managing Director of one the parties. This, held the Supreme Court, was unconscionable, as the Managing Director was a party interested in the outcome of the dispute. Alike situation obtained in Proddatur Cable TV Digi Services, Lite Bite Foods and Central Organisation for Railway Electrification, in fact, rejected the challenge, by the respondent in that, case, holding that the contractual stipulation, providing for appointment of the arbitrator from a panel maintained by the appellant, was valid. (Be it noted, the petitioner has not sought to question the impartiality of any of the persons, named in the panel in the Schedule annexed to the Arbitration Agreement.)"*

62. The decision of Single Judge of this Court in ***Kanodia Infratech Limited*** (*supra*) the challenge to the award was rejected as the petitioner had

not objected to the jurisdiction of the arbitrator during the arbitration proceedings and actively participated in the arbitration proceedings. The learned Single Judge held as under:

> *"35. Now, even if at this belated stage this Court tests the case of petitioner applying the ratio of law laid down in Perkins Eastman (Supra) and TRF Limited (Supra), it finds that in those cases the Hon'ble Court had dealt with petition filed under the provisions of Section 11 (6) of the Act, whereas the present petition has been filed under Section 34 of the Act, provisions whereof prescribe the ground on which an arbitral award can be challenged and set aside and not the mandate of appointment of Arbitral Tribunal. Hence, reliance placed upon decision in Perkins Eastman (Supra) is of no help to the case of petitioner.*
>
> xxxxxx
>
> 37. *Similarly, reliance is placed by petitioner's counsel upon decision in Bharat Broadband Network Limited (Supra). In the said case, after dismissal of unilateral appointment of Arbitrator by the Arbitral Tribunal itself, petition under Sections 14 and 15 of the Act was filed before the Court and applicability of Section 12(5) of the Act was considered, whereas in the instant case the arbitral Award is challenged under Section 34 of the Act."*

63. While the learned Single Judge in ***Kanodia Infratech Limited*** (*supra*) considered the Supreme Court's decision in ***Bharat Broadband*** (*supra*), the law laid down by the Supreme Court therein that the waiver under the proviso to Section 12(5) of the Act has to be an express agreement in writing was not considered. The learned Single Judge construed the active participation of the appellant therein in the arbitration proceedings as waiver of his right to object to the unilateral appointment of the arbitrator. Hence, the decision in ***Kanodia Infratech Limited*** (*supra*) is contrary to the express

law laid down in ***Bharat Broadband*** (*supra*) and is not helpful to the Appellant.

64. The decision of the Coordinate Bench of this Court in ***Arjun Mall*** *(supra)*, it is held that when the party had not objected to the jurisdiction of the unilaterally appointed arbitrator during the arbitration proceedings, they cannot be allowed to raise the objection against the jurisdiction of the arbitrator after an award has been rendered against them. It was held as under:

> *"33. We find that under Section 34 of the Act, 1996 scope of interference by the court is limited to the extent that the arbitral award is not vitiated on the basis of pleadings raised by the parties. The learned District Judge has rightly observed that if a party fails to raise a plea in arbitral proceedings, it cannot take a fresh ground to seek relief before the appellate authority and any such plea, deserves to be rejected.*
>
> *34. The Supreme Court in Delhi Airport Metro Express (P) Ltd. v. DMRC Ltd. [Delhi Airport Metro Express (P) Ltd. v. DMRC Ltd.(2022) 1 SCC 131 : (2022) 1 SCC (Civ) 330] has observed that in several judgments scope of Section 34 of the Act has been interpreted to stress on the restrain upon the court to examine the validity of the arbitral awards, after dissecting or reassessing the factual aspects of the cases.*
>
> *35. The aforesaid dictum in Delhi Airport Metro Express (P) Ltd. case [Delhi Airport Metro Express (P) Ltd. v. DMRC Ltd.(2022) 1 SCC 131 : (2022) 1 SCC (Civ) 330] makes it clear that under Section 34 of the Act, scope of interference by the courts is very limited and only if there is any patent illegality in the arbitral award, then only it is required to be touched upon. In the present case, even if it is accepted that the appellants had raised objection to the appointment of learned arbitrator by sending a letter to him but the fact remains that the appointment was never challenged under the provisions of Section 11(6) of the Act, 1996 nor did the appellants participate in arbitral proceedings, despite having knowledge of the same. Instead of*

> *contesting the respondent's claim before the learned arbitrator, the appellants remained mute spectator and only after losing the battle in arbitral proceedings, the appellants preferred appeal under Section 34 of the Act, challenging the appointment of arbitrator as well as the arbitral award."*

65. The above decision in ***Arjun Mall*** *(supra)*, does not take into consideration prior judgments of the Division Bench of this Court in ***Govind Singh*** *(supra)* and ***Kotak Mahindra*** *(supra)*. Even the judgment of the Supreme Court in ***Bharat Broadband*** *(supra)*, wherein, it was held that for a waiver under the proviso to Section 12(5) of the Act to be valid, it should be an express agreement in writing, was also not considered. As rightly held in ***Airports Authority of India*** *(supra)*, the decision in ***Arjun Mall*** *(supra)* only relied upon the Supreme Court in Delhi Airport Metro Express (P) Ltd. v. DMRC, which has specifically been set aside by the Supreme Court in Curative Petition Nos. 108-109/2022.

66. A Review Petition [being Review Pet. 82/2024] was filed for the review of the decision in ***Arjun Mall*** (*supra*), however, the same was dismissed *vide* below order:

> *"3.The present review petition has been preferred by the appellants under Section 114 and Order 47 Rule 1 of CPC seeking review of order dated 23.01.2024 passed by this Court.*
>
> *4. The present review petition amounts to re-argue the appeal. Finding no merit in the present review petition, the same is hereby dismissed."*

67. A Special Leave Petition [being SLP (C) 12978-12979/2024] was preferred against the decision of this Court in ***Arjun Mall*** *(supra)* and the dismissal of the Review Petition before the Supreme Court. However, the same was dismissed, while leaving the question of law open as under:

"Special Leave Petitions are dismissed.
Pending applications shall also stand dismissed.
Question of law, if any, is left open."

68. Rendering a decision without consideration of the binding prior decisions of the Supreme Court and the Division Bench of this Court on the same set of facts and issue, makes the decision *per incurium*. The said law has been laid down in the decisions of ***Hyder Consulting (UK) Ltd.*** *(supra)*, and ***Enforcement Directorate*** *(supra)*. The relevant extract of ***Hyder Consulting (UK) Ltd.*** *(supra)* is reproduced as under:

> *"46. Before I consider the correctness of the aforementioned decisions, it would be necessary to elaborate upon the concept of "per incuriam". The Latin expression "per incuriam" literally means "through inadvertence". A decision can be said to be given per incuriam when the court of record has acted in ignorance of any previous decision of its own, or a subordinate court has acted in ignorance of a decision of the court of record. As regards the judgments of this Court rendered per incuriam, it cannot be said that this Court has "declared the law" on a given subject-matter, if the relevant law was not duly considered by this Court in its decision.*
>
> *47. Therefore, I am of the considered view that a prior decision of this Court on identical facts and law binds the Court on the same points of law in a later case. In exceptional circumstances, where owing to obvious inadvertence or oversight, a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, the principle of per incuriam may apply. The said principle was also noticed in Fuerst Day Lawson Ltd. v. Jindal Exports Ltd. [(2001) 6 SCC 356 : AIR 2001 SC 2293]"*

The relevant extract of the ***Enforcement Directorate*** *(supra)* is reproduced as under:

> *"33. The law of binding precedent provides that the rule*

> *of per incuriam is an exception to the doctrine of judicial precedent. Quite literally, it provides that when a judgment is passed in ignorance of a relevant precedent or any other binding authority, the same is said to be postulating incorrect law. It becomes pertinent to resolve the conflict arising from diverging opinions by taking recourse to the ratio decidendi of the earliest opinion"*

69. Hence, the decision in ***Arjun Mall*** *(supra)* is clearly *per incurim* as it has been rendered while ignoring the prior binding precedents on the same issue. In any event, the Supreme Court as left the question of law open to be considered in an appropriate case in SLP arising out of ***Arjun Mall*** *(supra)*. Hence, the view expressed in ***Arjun Mall*** *(supra)* is not binding on this Bench and not followed.

70. The judgment of ***VR Dakshin (P) Ltd.*** *(supra)*, relied upon by the Appellant held that when the arbitrator did not have any relationship with the parties or counsel or the subject matter, Section 12(5) of the Act was not applicable and there was no requirement of waiver under the proviso to Section 12(5) of the Act. The relevant extract is reproduced as under:

> *"20. The admitted position is the sole arbitrator did not have any relationship with the parties or counsel or the subject-matter and did not fall under any of the categories specified in the Seventh Schedule to become ineligible to be appointed as an arbitrator. Therefore, the proviso also will not be applicable, because the question of waiver will apply only when Section 12(5) of the Act is applicable. If Section 12(5) of the Act is not applicable at all, the question of waiving the applicability by an express agreement in writing also would not arise."*

71. However, the judgement in ***VR Dakshin (P) Ltd.*** *(supra)* has incorrectly distinguished the decisions in ***TRF*** (*supra*), ***Perkins*** (*supra*), and ***Bharat Boardband*** (*supra*) on facts and retrospective applicability. The

view expressed in ***VR Dakshin (P) Ltd.*** *(supra)* only has persuasive value and not binding on this Bench. For the reasons recorded herein above, we respectfully disagree with the view taken by Division Bench in ***VR Dakshin (P) Ltd.*** *(supra).*

72. The decision of the Coordinate Bench of this Court in ***Bhadra International*** *(supra)* holds that the proscription under Section 12(5) of the Act is not absolute and subject to the proviso thereto. It holds that in view of the factual circumstances in which the appellant therein had invited the respondent therein to appoint an arbitrator, the appellant having consented to the jurisdiction of the arbitrator before the arbitrator and the appellant not having objected to the jurisdiction of the arbitrator after the introduction of Section 12(5) to the Act, either through an application before the arbitrator under Section 16 of the Act or before the court under Section 14(1) of the Act, the parties had consented to the jurisdiction of the sole arbitrator and this Court had refused to set aside the arbitral award. The relevant extract is reproduced as under:

> *"34. The decisions cited by Mr. Ashish Mohan are cases in which, at one stage or another, an objection to the jurisdiction of the learned Arbitrator was raised. We must be aware that the proscription under Section 12(5) of the 1996 Act is not absolute. It is subject to the proviso thereto, which envisages conscious waiver of Section 12(5). In the facts of this case, which need not be repeated, but particularly in view of the fact that*
>
> *(i) the appellants had themselves invited AAI to appoint the arbitrator,*
>
> *(ii) before the learned Arbitrator, too, the appellants consented to the learned Arbitrator proceeding with the matter,*

> *(iii) even after Section 12(5) was introduced in the statute book, the appellants never chose to move any application before the learned Arbitrator under Section 16 of the 1996 Act, or before this Court under Section 14(1) thereof, challenging the jurisdiction of the learned Arbitrator but, rather, participated in the proceedings without demur, we are not inclined to interfere with the decision of the learned Single Judge. If, in such circumstances, the appellants is to be permitted to wish away the arbitral award which, for obvious reasons, is not palatable to the appellants, it would do complete disservice to the entire arbitral institution. Such a decision, we are seriously afraid, would erode, to a substantial degree, the faith of the public in the very institution of arbitration."*

73. However, the decision in ***Bhadra International*** *(supra)* does not consider the prior decision of the Constitutional Bench of the Supreme Court in ***CORE*** (*supra*) wherein, it is held that a unilateral appointment clause is invalid without an express agreement in writing as envisaged under the proviso to Section 12(5) of the Act. Hence, we agree with the Respondent that ***Bhadra International*** *(supra)* is also *per incurium*.

Objection by the party that made the unilateral appointment itself:

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 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.

CONCLUSION:

84. In view of the above discussion, the legal position on the unilateral appointment of the Sole and Presiding Arbitrator is summarized as under:

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.

85. In the present case, admittedly, the Learned Sole Arbitrator was appointed unilaterally by the Chief Engineer of the Respondent in terms of the arbitration clause being the Clause 25 of the contract executed between the parties. It is also not disputed that the Chief Engineer, being an officer of the Respondent was ineligible to act as an arbitrator by virtue of Section 12(5) of the Act and the Seventh Schedule of the Act.

86. As the Chief Engineer was ineligible to be appointed as an arbitrator in terms of Section 12(5) of the Act, he was also ineligible to appoint an arbitrator. The express waiver as envisaged under the Proviso to Section 12(5) of the Act has also not been obtained.

87. In view of the above, the Impugned Order has rightly set aside the Award. Accordingly, the appeal is hereby dismissed as there is no infirmity with the impugned judgment. There shall be no orders as to the cost.

TEJAS KARIA, J

VIBHU BAKHRU, J

MAY 31, 2025
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