



\$~78

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

% **Date of decision: 06.04.2026**

+ O.M.P. (COMM) 318/2023, I.A. 15318/2023, I.A. 15320/2023
& I.A. 17155/2025

AIRPORTS AUTHORITY OF INDIAPetitioner

Through: Sh. Digvijay Rai, Mr. Archit Mishra, Advs., Mr. Gagan Kochar, Senior Manager, Ms. Pragya Bansal, JE-AAI, Ms. Kashish Singhal, JE-AAI & Mr. Vivek Gupta, DGM- AAI.

versus

SUNEHARI BAGH BUILDERS PVT LTDRespondent

Through: Mr. Avinash Trivedi, Ms. Ritika Trivedi, Mr. Rahul Aggarwal & Mr. Anurag Kaushik, Advs.

CORAM:

HON'BLE MR. JUSTICE AVNEESH JHINGAN

AVNEESH JHINGAN, J. (ORAL)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') is against award dated 15.03.2023 and the order dated 19.04.2023 passed under Section 33.
2. The grievance is that the unilateral appointment of the arbitrator is in violation of the amended Section 12(5) of the Act.
3. The brief facts are that the petitioner was the successful bidder in a tender invited by the respondent for construction of Central Air Traffic Flow Management (CATFM) and associated offices at Vasant



Kunj, New Delhi. The letter of intent to award was issued to the respondent for the value of Rs.11,53,06,853/- and the contract dated 20.01.2016 (hereinafter ‘the contract’) was executed between the parties to the *lis*. The dispute arose between the parties and the respondent under clause 25 of contract approached the petitioner for constitution of Dispute Resolution Committee (for short ‘DRC’). The DRC vide its report dated 22.09.2021 rejected the claims. The respondent on 25.10.2021 invoked arbitration proceedings by issuance of notice under Section 21 of the Act. The petitioner appointed the arbitrator. The arbitration proceedings culminated in the impugned award. The application filed under Section 33 was disposed of *vide* order dated 19.04.2023.

4. Clause 25 of the contract is reproduced below which provides for dispute resolution mechanism and arbitration:-

“CLAUSE 25

Dispute Resolution Mechanism And Arbitration

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



(i) **Through Dispute Resolution Committee:** Any dispute as stated above shall be referred in the first place to the Dispute Resolution Committee (DRC) appointed by the Executive Director / Member (Planning) / Chairman, Airports Authority of India.

It is also a term of contract that fees and other expense if payable to DRC shall be paid equally by both the parties i.e. AAI and Contractor.

Unless the contract has already been repudiated or terminated, the contractor shall, in every case, continue to proceed with the work with all due diligence.

It is also a term of contract that if the contractor does not make any demand for Dispute Resolution Committee in respect of any claim in writing within 90 (Ninty) days of receiving the intimation from the AAI that the bill is ready for payment, **the claim of contracator(s) will be deemed to have been waved and absolutely barred** and the AAI shall be discharged and released of all liabilities under the contract in respect of these claims.

(ii) **Adjudication through Arbitration:-** Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above, disputes or differences shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Member (Planning) / Chairman, AAI. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is also a term of contract that If the contractor does not make any demand for appointment of Arbitrator in respect of any claim in writing within 120 (One hundred Twenty) days of receiving the decision / award from



Dispute Resolution Committee, the claim of contractor(s) will be deemed to have been waived and absolutely barred and the AAI shall be discharged and released of all liabilities under the contract in respect of these claims.

It is term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such disputes alongwith the notice for appointment of arbitrator and giving reference to the rejection of their claims by the Dispute Resolution Committee.

It is also a term of this contract that no person, other than a person appointed by above mentioned appointing authority, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00, 000/-, the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit



their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, If required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.”

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

6. *Per contra*, it is not a case of unilateral appointment. The petitioner vide communication dated 09.11.2021 proposed names of three arbitrators from its panel and sought consent of the respondent to nominate an arbitrator from the proposed names. The respondent by communication dated 12.11.2021 consented to one of the proposed names for appointment. It is contended that the parties participated in the arbitral proceedings and the choice of appointment of the arbitrator was of the respondent and the decision relied upon is not applicable to the facts of the present case.

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

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



following three issues:

“29...i. Whether the sole arbitrator could be said to have become “*ineligible to be appointed as an arbitrator*” by virtue of sub-section (5) of Section 12 of the Act, 1996?

ii. Whether the parties could be said to have waived the applicability of sub-section (5) of Section 12 of the Act, 1996, by way of their conduct, either expressed or implied?

iii. Whether the appellants could have raised an objection to the appointment of the sole arbitrator for the first time in an application under Section 34 of the Act, 1996?”

Held:

“123...i. The principle of equal treatment of parties provided in Section 18 of the Act, 1996, applies not only to the arbitral proceedings but also to the procedure for appointment of arbitrators. Equal treatment of the parties entails that the parties must have an equal say in the constitution of the arbitral tribunal.

ii. Sub-section (5) of Section 12 provides that any person whose relationship with the parties or counsel, or the dispute, whether direct or indirect, falls within any of the categories specified in the Seventh Schedule would be ineligible to be appointed as an arbitrator. Since, the ineligibility stems from the operation of law, not only is a person having an interest in the dispute or its outcome ineligible to act as an arbitrator, but appointment by such a person would be *ex facie* invalid.

iii. The words “an express agreement in writing” in the proviso to Section 12(5) means that the right to object to the appointment of an ineligible arbitrator cannot be taken away by mere implication. The agreement referred to



in the proviso must be a clear, unequivocal written agreement.

iv. When an arbitrator is found to be ineligible by virtue of Section 12(5) read with the Seventh Schedule, his mandate is automatically terminated. In such circumstance, an aggrieved party may approach the court under Section 14 read with Section 15 for appointment of a substitute arbitrator. Whereas, when an award has been passed by such an arbitrator, an aggrieved party may approach the court under Section 34 for setting aside the award.

v. In arbitration, the parties vest jurisdiction in the tribunal by exercising their consent in furtherance of a valid arbitration agreement. An arbitrator who lacks jurisdiction cannot make an award on the merits. Hence, an objection to the inherent lack of jurisdiction can be taken at any stage of the proceedings.”

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

“74...a) When a party itself has unilaterally appointed the arbitrator, whether that party can object to the unilateral appointment of the arbitrator at any stage during or after the arbitration proceedings?

b) If a party has unilaterally appointed an arbitrator, can that party be deemed to have given express waiver in writing under Section 12(5) of the Act while making the appointment itself?”

The court concluded:

“84....a) **Mandatory Requirement:** Any arbitration agreement providing unilateral appointment of the sole or presiding arbitrator is invalid. A unilateral appointment by any party in the arbitrations seated in India is strictly prohibited and considered as null and void since its very



inception. Resultantly, any proceedings conducted before such unilaterally appointed Arbitral Tribunal are also nullity and cannot result into an enforceable award being against Public Policy of India and can be set aside under Section 34 of the Act and/or refused to be enforced under Section 36 of the Act.

b) **Deemed Waiver:** The proviso to Section 12(5) of the Act requires an express agreement in writing. The conduct of the parties, no matter how acquiescent or conducive, is inconsequential and cannot constitute a valid waiver under the proviso to Section 12(5) of the Act. The ineligibility of a unilaterally appointed arbitrator can be waived only by an express agreement in writing between the parties after the dispute has arisen between them. Section 12(5) of the Act is an exception to Section 4 of the Act as there is no deemed waiver under Section 4 of the Act for unilateral appointment by conduct of participation in the proceedings. The proviso to Section 12(5) of the Act requires an ‘express agreement in writing’ and deemed waiver under Section 4 of the Act will not be applicable to the proviso to Section 12(5) of the Act.

c) **Award by an Ineligible Arbitrator is a Nullity:** An award passed by a unilaterally appointed arbitrator is a nullity as the ineligibility goes to the root of the jurisdiction. Hence, the award can be set aside under Section 34(2)(b) of the Act by the Court on its own if it ‘finds that’ an award is passed by unilaterally appointed arbitrator without even raising such objection by either party.

d) **Stage of Challenge:** An objection to the lack of inherent jurisdiction of an arbitrator can be taken at any stage during or after the arbitration proceedings including by a party who has appointed the sole or presiding arbitrator unilaterally as the act of appointment is not an express waiver of the ineligibility under proviso to Section 12(5) of the Act. Such objection can be taken even at stage of challenge to the award under Section 34 of the Act or



during the enforcement proceedings under Section 36 of the Act.”

8. After amendment of Section 12(5) of the Act an employee of a party in dispute can neither be appointed arbitrator nor can nominate or appoint any other person as an arbitrator. The unilateral appointment in absence of an express agreement in writing between the parties to waive applicability of Section 12(5) of the Act is void *ab initio*. The filing of the statement of claim or participation in the arbitral proceedings cannot be construed as waiver under the proviso to Section 12(5) of the Act. The unilateral appointment of the arbitrator can be objected to for the first time under Section 34 of the Act.

9. Clause 25(i) of the contract mandates that all disputes shall be referred to the DRC, constituted by the Executive Director / Member (Planning) / Chairman, Airports Authority of India (AAI). The contractor is obligated to continue work during the pendency of disputes unless the contract stands terminated. The clause prescribes a ninety days limitation period from the date of intimation by AAI of bill readiness for raising a demand for DRC in respect of any claim, failing which the contractor shall be deemed to have waived the claim.

9.1 Clause 25(ii) of the contract states that except for the decisions having attained finality under clause 25(i) of the contract, the dispute shall be referred to arbitration by a sole arbitrator appointed by the Member (Planning) / Chairman. There is a limitation period of hundred and twenty days for the contractor to invoke arbitration from the date of the DRC decision, failing which the claims shall be



deemed waived and barred.

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

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

133. Many PSUs are regularly involved in arbitration



disputes and constantly need the services of arbitrators. Such institutions often maintain a pool of potential arbitrators with the sole object of having a ready pool of qualified professionals who have committed their time and consented to act as arbitrators for fixed fees. The Arbitration Act does not prohibit parties to an arbitration agreement from maintaining a curated panel of potential arbitrators. However, the problem arises when the PSUs make it mandatory for other parties to select their nominees from the curated panel of arbitrators. When a PSU exercises its discretion to curate a panel, the very factor that the PSU is choosing only a certain number of persons as potential arbitrators and not others will raise a reasonable doubt in the mind of a fair-minded person. The PSUs may conceivably have nominated a person on the panel of potential arbitrators because they have a certain predisposition in favour of the former. This doubt is reinforced when the other party is given no choice but to select its arbitrator from the curated panel.

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

135. Such an arbitrator-appointment clause is likely to give rise to justifiable doubts as to the independence and impartiality of arbitrators for two reasons: (i) the contractor is restricted to choosing its arbitrator from the panel of four arbitrators nominated by the party who is a



disputant; and (ii) the contractor's choice is further constrained because it is made subject to the decision of the General Manager who will choose one among the two persons suggested by the party. Since the contractor has to select its arbitrator from a curated panel, the arbitration clause does not allow the contractor equal participation in the appointment of their arbitrator. Moreover, the clause allows the General Manager to appoint the balance arbitrators from either the panel or outside the panel. Thus, the process of appointing the arbitrators is unequal because the General Manager can go beyond the panel of four potential arbitrators, while the contractor is bound by the names enlisted in the panel.”

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

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

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

14. There is no prescribed format under the proviso to section 12(5) of the Act for an express agreement in writing but it shall not mean that the waiver can be inferred by implication or through conduct. It



would be relevant to quote the following paragraph from **Bhadra International** (supra):

“84. Undoubtedly, the statute does not prescribe a format for the agreement. However, the absence of a prescribed format cannot be construed to mean that the waiver may be inferred impliedly or through conduct. We say so because the legislature has consciously prefaced the term “*agreement*” with the word “*express*” and followed it with the phrase “*in writing*”. This semantics denote the intention of the legislature that the waiver under the *proviso* to Section 12(5) must be made only through an express and written manifestation of intention.”

15. The communication dated 09.11.2021 of the petitioner seeking consent to nominate an arbitrator from the panel maintained by the petitioner out of the three names mentioned therein read with the letter of respondent dated 12.11.2021 consenting to the appointment of the arbitrator is not an express waiver in writing in consonance with the proviso to Section 12(5) of the Act. The option given to the respondent to select an arbitrator from the curated panel maintained by the petitioner is violation of Section 18 of the Act.

16. The Supreme Court in **Central Organisation for Railway Electrification** (supra) held that making the other party to select an arbitrator from a curated panel is against the principles of equal treatment contained in Section 18 of the Act.

17. The matter needs to be considered from another angle. The express consent in writing under proviso to Section 12(5) of the Act has to be of both the parties. It is not a case set up that the petitioner by express written agreement waived of applicability of Section 12(5) of the Act. The waiver has to be expressed and cannot be construed or



inferred through conduct. The Division Bench of this court in **Mahavir Prasad Gupta and Sons** (supra) held that an appointment of an ineligible person as an arbitrator is void *ab-initio* and can be challenged by the party making such appointment. The relevant paragraphs of the judgment are:

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

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

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



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

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

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

AVNEESH JHINGAN, J

APRIL 06, 2026/ 'JK'

Reportable:- Yes