

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
COMMERCIAL DIVISION
Appellate Side**

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Ajay Kumar Gupta

AO-COM 35 of 2025

Amal Krishna Dey

Vs.

Central Warehousing Corporation

For the Appellant	:	Mr. Amitava Ghosh, Adv. Mr. Malay Kumar Das, Adv. Mr. Tapas Kumar Dey, Adv. Mr. Sourav Chatterjee, Adv.
For the Respondent	:	Mr. Samrat Chowdhury, Adv.
Heard on	:	23.07.2026
Judgment on	:	29.07.2026
Judgment uploaded on	:	29.07.2026

Ajay Kumar Gupta, J.:

1. This instant appeal is at the behest of the Appellant/Claimant, who is aggrieved by and dissatisfied with the judgment and order dated 23rd June, 2025 passed by the Commercial Court at Asansol, in Misc.

Arbitration (Com) Case No. 43 of 2024 filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short, 'the Arbitration Act') arising out of Misc. Case (Arb) No. 10 of 2021.

2. By the said judgment and order, the Commercial Court set aside the Award dated 31st January, 2021 passed by the Sole Arbitrator, observing therein that the impugned arbitral award is patently illegal and in contravention of the settled principle of law.
3. The brief facts, essential for the consideration of the instant appeal, are that the Central Warehousing Corporation (in short 'CWC'), Respondent herein, had published a notice inviting tender on 26th April, 2011 for construction of a 2400 MT capacity godown along with RCC drain, internal road and electrical installation at C.W. Santragachi, for an estimated cost of Rs. 65.97 lakhs.
4. The Appellant participated in the tender and was adjudged the lowest bidder, pursuant to which a Letter of Acceptance was issued on 30th July, 2011 and a work order on 13th September, 2011, with the contractual amount standing at Rs. 80,34,247.30/-. The parties entered into a formal agreement on 2nd December, 2011, and though the work was originally to be completed within 6 months, it was ultimately completed only on 24th August, 2013.
5. The Corporation deducted penalties and withheld payments from the final bill, giving rise to a dispute between the parties, following which the Respondent invoked the arbitration clause on 1st January, 2019. In

terms of the contract, the Managing Director of the Respondent/Corporation appointed Mr. Madhuresh Kumar (Retired IRSE), a retired employee of the Corporation, as the Sole Arbitrator, who entered upon reference vide letter dated 29th January, 2019. The Claimant submitted its statement of claim on 20th March, 2019 claiming Rs. 16,37,159/- with interest @ 18% p.a. from 24th August, 2013, while the Corporation submitted its statement of defence on 21st June, 2019 along with a counterclaim of Rs. 47,58,275/- towards loss of business and Rs. 45,60,000/- towards establishment charges.

6. After hearing the parties at length, the learned Arbitrator passed the impugned award granting Rs. 16,15,017/- with interest @ 10% p.a. till realisation to the Appellant/Claimant, while rejecting the Respondent's counterclaim in its entirety, i.e., the award that was assailed by the Respondent in Section 34 proceedings, with the Appellant having filed a written objection, but, not having appeared to argue the matter at the time of hearing.
7. The Respondent/Corporation challenged the award before the learned Single Judge, under Section 34 of the Arbitration Act. The Court, having relied upon several judgments, held that once a person becomes ineligible under Section 12(5) read with the Seventh Schedule of the Arbitration Act, such ineligibility also extinguishes the power to nominate a substitute arbitrator, and that mere participation of a party in the arbitral proceedings does not amount to a waiver of the right to object,

which can only be effected by an "express agreement in writing" entered into after disputes have arisen. Applying this principle, the Court set aside the impugned award, holding the unilateral appointment of the Arbitrator *void ab initio* and the Arbitrator *de jure* incapable of performing his functions for want of inherent jurisdiction.

SUBMISSION ON THE BEHALF OF APPELLANT:

8. Learned counsel appearing on behalf of the Appellant submitted that the Learned Single Judge has erred in facts and law while rejecting the application filed by the Appellant under Section 34 of the Arbitration Act. The learned Single Judge also did not consider that the arbitrator was appointed on the basis of reference made by the Appellant invoking the arbitration agreement as contained in Clause 25 of the Condition of Contract arising out of and in connection with work of 2400 MT capacity godown along with RCC drain, internal road and electrical installation at C.W. Santragachi and, at the time of appointment of arbitrator or even at the time of consideration of the arbitration proceedings by the arbitrator, the Respondent herein did not raise any issue with regard to the appointment of the arbitrator. Furthermore, the arbitrator was a retired employee. Therefore, there is no question of biasness. The arbitrator decided the award in accordance with law without any error or perversity. Therefore, interference by the learned Judge under Section 34 of the Arbitration Act is not called for.

9. Learned counsel appearing on behalf of the Appellant has placed reliance on the following judgments to support of his contention that once the arbitration proceedings are initiated and decided without any objection and demur of the parties, the same cannot be said patently illegal or void:

i. Hindustan Construction Company Ltd. through its Authorised Signatory Yogesh Dalal Vs. Bihar Rajya Pul Nirman Nigam Limited and Ors.¹

SUBMISSIONS ON BEHALF OF THE RESPONDENT:

10. Per contra, learned counsel appearing on behalf of the Respondent vehemently opposed the submission made by the learned counsel appearing on behalf of the Appellant and further submitted that after the amendment in Arbitration Act, the Managing Director is not an appropriate authority to appoint the arbitrator. The arbitrator appointed was actually ex-employee. Once a person becomes statutory ineligible for holding a post of arbitrator under Section 12(5) of the Arbitration Act, the arbitrator loses the power of taking proceedings under Arbitration Act as he was nominated by a Managing Director who is not the appointing authority unilaterally. The appointment of the arbitrator must be in accordance with law.
11. It was further submitted that even if the Respondent did not raise any question with regard to the appointment of arbitrator at the time of appointment or even during arbitration proceedings, the same does not

¹ (2026) 3 SCC 264

come within the scope of estoppels or waiver in view of the provision of Section 12(5). Therefore, the learned Judge rightly allowed the application filed under Section 34 of the Arbitration Act and set aside the impugned Award, since it was passed by the Arbitrator, who was not competent as per the law of Arbitration.

12. Learned counsel appearing on behalf of the Respondent has placed reliance on the following judgments to bolster his aforesaid submissions:

i. *Bhadra International (India) Pvt. Ltd. and Ors. Vs. Airports Authority of India*²;

ii. *Perkins Eastman Architects DPC and Anr. Vs. HSCC (India) Ltd.*³;

iii. *Bharat Broadband Network Ltd. Vs. United Telecoms Ltd.*⁴.

DISCUSSION AND FINDINGS: -

13. Having heard the learned counsels for the respective parties, perusal of the judgments relied upon by the parties and legal provisions of the Arbitration Act, this court finds the following issue, as raised by the parties, falls for consideration as under:

- Whether the learned Judge erred in setting aside the award, holding that the unilateral appointment was *void ab initio* and the arbitrator was incapable of performing his functions for want of inherent jurisdiction?

² 2026 SCC OnLine SC 7

³ (2020) 20 SCC 760 : 2019 SCC OnLine SC 1517

⁴ (2019) 5 SCC 755 : 2019 SCC OnLine SC 547.

14. Before deciding this issue, this court would like to look into the relevant legal provisions as applicable for appointment of the Arbitrator upon reference by any of the parties and its inherent jurisdiction.

Section 11 (6), 12, 15 (2) and 29A of the Arbitration and Conciliation Act, 1996 reads as under:

11(6). Where, under an appointment procedure agreed upon by the parties,—

- (a) a party fails to act as required under that procedure; or*
- (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or*
- (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request 1[the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment. 2*

[(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.]

12. Grounds for challenge.—1[(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—

- (a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and*
- (b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.*

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.]

(3) An arbitrator may be challenged only if—

- (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or*
- (b) he does not possess the qualifications agreed to by the parties.*

(4) 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.

[(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.]

15(2). Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

[29A. Time limit for arbitral award.—(1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.

Explanation.—For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter

within a period of sixty days from the date of service of notice on the opposite party.

On 23.10.2015, the Arbitration and Conciliation (Amendment) Act, 2015 came into effect (for short, “**the Amendment Act, 2015**”), by which sub-section (5) was inserted into Section 12. The provision reads thus:—

“[(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.]”

15. In the year 2017, the Appellant vide notice dated 01.01.2017 invoked the arbitration clause and requested the Managing Director to appoint an Arbitrator in terms of clause 25 of the conditions of contract arising out of and in connection with the work “Construction of 2400 MTC godown along with internal roads & electrical installation at CWC Santragachi”. The Managing Director of the Respondent/Corporation vide his letter dated 25.01.2019, appointed Mr. Madhuresh Kumar (Retired IRSE), a retired employee of the Corporation, as the Sole Arbitrator, who entered upon reference vide letter dated 29th January, 2019 and decided the Arbitration proceedings in favour of the Appellant and passed an Award directing the payment of Rs. 16,15,017/- including release of full amount of the SD withheld, to be paid by the Corporation to the Claimant. In addition, future interest @ 10% per annum simple interest shall be payable on the awarded amount from the date of Award to the date of actual payment. It was further directed that no future interest shall be payable if the Arbitral Award amount is paid within 90 days of the publication of the Award.

- 16.** The impugned Award was challenged under Section 34 of the Arbitration Act, before the learned Judge, Commercial Court, who in turn set aside the Award as aforesaid only on the ground that the Award was passed by the Arbitrator, which is patently illegal and in contravention of the settled principle of law.
- 17.** On the aforesaid issue, the learned Judge, Commercial Court, in its impugned judgment, held that the appointment for the sole arbitrator was unilateral, as the Managing Director had proceeded to appoint the arbitrator only pursuant to the written request of the Appellant and considering the clause 25 of the General Conditions of Contract that is contrary to law relying on following judgments:
- **TRF Ltd. v. Energo Engineering Projects Ltd. (2017) 8 SCC 377:** *It was held that once a person becomes statutorily ineligible under Section 12(5), they also lose the power to nominate a substitute arbitrator ("once the infrastructure collapses, the superstructure is bound to collapse").*
 - **Perkins Eastman Architects DPC v. HSCC (India) Ltd. (2020) 20 SCC 760:** *This judgment extended such disqualification to unilateral appointments by an interested Managing Director.*
 - **Bharat Broadband Network Ltd. v. United Telecoms Ltd. (2019) 5 SCC 755:** *The learned Judge relied upon this judgment on the limited scope of waiver under the proviso to Section 12(5).*
 - **Cholamandalam Investment v. Amrapali Enterprises 2023 SCC OnLine Cal 605:** *This judgment was relied upon holding that unilateral arbitrator appointments are void ab initio, and any award there from a de jure ineligible/unilaterally appointed arbitrator is without jurisdiction.*

- 18.** The clause 25 of the General Conditions of Contract is stipulated, *inter alia*, in verbatim as follows:

“CLAUSE 25. Except where otherwise provided in the contract all arising out of or relating to the contract, designs, drawing, questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship of materials used on the work or as to any other question, claim, right, matter or thing whatsoever, in any way specifications, estimates, instructions orders or these conditions or otherwise concerning the works, 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 referred to the sole arbitration of the person appointed by the Managing Director, Central Warehousing Corporation at the time of dispute or if there be no Managing Director, Central Warehousing Corporation, the Administrative Head of the said Central Warehousing Corporation at the time of such appointment.

There will be no objection to any such appointment that the arbitrator so appointed is an employee/ retired employee of the Corporation that he had to deal with the matters to which the contract relates and that in course of his duties as Corporation employee, he had expressed views on all or any of the matters in the dispute or difference.

If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever or is heavenly abode, 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 this contract that no person other than a person appointed by the Managing Director or Administrative Head of the Central Warehousing Corporation as aforesaid should act as an arbitrator and if for any reason that is not possible, the matter is not to be referred to arbitration at all.

It is a term of this contract that the party invoking arbitration shall give a list of disputes, with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator.”

19. Clause 25 of the General Conditions of Contract vests the power of appointing the Sole Arbitrator exclusively in the Managing Director of CWC, a serving officer of one of the parties to the dispute, and, failing him, in the Corporation's Administrative Head. The clause further stipulates, as a pre-dispute term, that there shall be no objection to the appointee being an employee or retired employee of the Corporation, who had dealt with the very matters in dispute, and it forecloses arbitration altogether if a person so appointed by the Managing Director/Administrative Head is, for any reason, unable to act, the matter is not to be referred to arbitration at all.
20. The Appellant may seek to press the specific stipulation in Clause 25, that there shall be no objection to the arbitrator being an employee or retired employee of the Corporation, who had dealt with the disputed matters, as a standing, contractually consented and agreed waiver. That submission cannot be accepted, for two independent reasons.
21. **First**, Section 12(5) opens with the words “notwithstanding any prior agreement to the contrary”. Clause 25 can precisely be identified as a prior agreement of such nature, incorporated into the contract at the time it was executed, long before any dispute arose. The non-obstante clause was designed for exactly this situation, to prevent standard-form contractual terms of this kind, agreed at arm's length before any dispute

crystallised, from insulating an appointment mechanism that the 2015 Amendment intended to render impermissible.

22. The proviso to Section 12(5) permits only one route out: an express agreement in writing entered into after the disputes have arisen. A pre-dispute clause of general application, drafted into the standard conditions of contract, does not meet that description, however, clearly worded.
23. **Second**, independently, even if Clause 25 were treated as bearing on waiver, mere participation in the reference, i.e., filing pleadings, contesting the claim on merits, or seeking extensions, does not itself amount to the express written waiver the proviso requires, as the Hon'ble Supreme Court has reaffirmed in ***Bharat Broadband Network Ltd. v. United Telecoms Ltd. (Supra)***, and again in ***Bhadra International (India) Pvt. Ltd. v. Airports Authority of India (Supra)***. Nothing on this record suggests any distinct, post-dispute written instrument between the parties recording an informed waiver by the Appellant of the objection to the Managing Director's unilateral power of appointment.
24. The reliance placed by the Appellant on ***Hindustan Construction Company Ltd. v. Bihar Rajya Pul Nirman Nigam Ltd. (Supra)*** is not of great assistance. The said decision was concerned with the finality of an appointment order under Section 11 of the Arbitration Act, and with waiver by conduct under the general provision of Section 4 read with Section 16. The ineligibility contemplated under Section 12(5) read with

the Seventh Schedule stands on a different footing. It opens with its own non-obstante clause and is curable only in the manner prescribed by its proviso, i.e., by an express agreement in writing entered into after disputes have arisen. A general waiver-by-conduct principle applicable to procedural objections cannot override this specific statutory mode of waiver.

25. That apart, this Court considers it necessary to clarify the true basis on which the present appointment falls foul of Section 12(5). It is not the fact that Mr. Madhuresh Kumar was a *retired* employee of the Respondent/Corporation, by itself, that renders him ineligible. The Seventh Schedule of the Arbitration Act disqualifies any person who is “an employee, consultant, advisor or has any other past or present relationship with a party”.
26. However, the issue in the present case lies in the appointing authority, and not merely in the identity of the appointed arbitrator. At the risk of repetition, clause 25 of the General Conditions of Contract vests the power to appoint the Sole Arbitrator exclusively in the Managing Director of the Respondent/Corporation, who is a serving officer of one of the parties to the dispute, and, failing him, in the Corporation's Administrative Head, again an officer of the Respondent. The Managing Director, being a person interested in the outcome of the dispute by virtue of his very office, is himself rendered ineligible under Section 12(5) read with the Seventh Schedule. It is by now well settled, commencing

with ***TRF Ltd. v. Energo Engineering Projects Ltd. (Supra)***, and thereafter in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd. (Supra)***, that once the appointing authority is himself ineligible to act as an arbitrator, he is equally incompetent to nominate any other person as arbitrator, "once the infrastructure collapses, the superstructure is bound to collapse" with it. Therefore it does not matter whether the appointee happened to be a serving or a retired employee of the Corporation: the appointment stands vitiated at its very source, in the unilateral exercise of power by an interested Managing Director, a vice this Court's own precedent in ***Cholamandalam Investment and Finance Co. Ltd. v. Amrapali Enterprises (Supra)*** has held, renders the resultant award, and the Arbitrator's very jurisdiction to render it, a nullity, incapable of being cured.

- 27.** For the reasons aforesaid, this Court finds no infirmity in the view taken by the learned Judge, Commercial Court, that the appointment of the Sole Arbitrator was unilateral and *void ab initio*, and that the Arbitrator was rendered *de jure* incapable of performing his functions for want of inherent jurisdiction.
- 28.** Accordingly, **AO-COM 35 of 2025** is **dismissed**.
- 29.** There shall be no order as to costs.

- 30.** Urgent photostat certified copy of this Judgment, if applied for, is to be given to the parties on priority basis on compliance of all legal formalities.

I Agree.

(Debangsu Basak, J.)

(Ajay Kumar Gupta, J.)