



IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

COMMERCIAL ARBITRATION APPEAL NO. 8 OF 2023

Mr. R. B. Krishnani, Proprietor of )  
M/s. R. K. Krishnani through its authorised )  
signatory Mr. Subhash Gundukupi, )  
aged 51 years, having its register office at )  
B-10, Shirine Garden, Opp-ITI Road, )  
Aundh, Pune-411007 ) ..Appellant  
(Orig. Claimant)

Versus

M/s. STEM Water Distribution and )  
Infrastructure Com. Pvt. Ltd. )  
a company registered under the Company )  
Act 1956, having its registered office at )  
Vardaman Commercial Complex, 9<sup>th</sup> Floor )  
MIDC, Road No.16, Waghale Industrial )  
Estate, Thane (West), 400604 ) ..Respondent  
(Orig. Respondent)

Mr. Gauraj Shah with Mr. Mangesh Humane for Appellant.  
Mr. Ashish S. Gaikwad with Mr. Anirud R. Rote for Respondent.

CORAM: G. S. KULKARNI &  
ADVAIT M. SETHNA, JJ.  
RESERVED ON: 15 JANUARY 2025.  
PRONOUNCED ON: 21 APRIL 2025.

Judgment (per G. S. Kulkarni, J.):

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, “ACA”) is directed against the judgment and order dated 16 May 2023 passed by the Commercial Court at Thane whereby the respondent’s application under Section 34 of the ACA for setting aside the arbitral award dated 29 September 2020 passed by the learned sole arbitrator is allowed, as a

consequence of which, the arbitral award rendered by the learned sole arbitrator stands quashed and set aside.

2. The only ground on which the arbitral award is set aside by the Commercial Court is to the effect that the learned arbitrator was the Managing Director of the respondent, hence, in view of the provisions of Section 12(5) of the ACA, he was ineligible to act as an arbitrator. Also referring to the provisions of Sections 14 and 15 of the ACA, the Commercial Court felt that on such count the arbitral award suffered a patent illegality so as to set aside the same by applying Section 34(2A) of the ACA.

3. Thus, the issue as urged in the present appeal is a pure question of law, namely: 'when the learned sole arbitrator was appointed by consent of the parties, and who happened to be the Managing Director of the respondent having conducted the arbitral proceedings culminating into an award, whether the arbitral award could be set aside on the ground of ineligibility of the arbitrator in terms of Section 12(5) of the ACA and other relevant provisions'.

4. Relevant to the controversy, the facts many of which are not in dispute can be noted:- An agreement dated 30 October 2013 was entered between the respondent and the appellant under which the appellant was awarded water supply works, namely, rehabilitation of existing components of 'Stem Water Supply System', 'repairing of raw water pump station at Shahad', 'construction of CCT, SUMP, pump house' and back wash water recirculation system' at Temghar Water Treatment Plant. The contract work pertained to two locations.

The appellant executing the work on all items under the contract is not in dispute. The genesis of dispute between the parties and subject matter of arbitration is in relation to extra work ordered by the respondent which, according to the appellant, was outside the scope of contractual work and for its essential completion. In such context, on 01 February 2019, a notice was issued by the appellant to the respondent demanding payment. Respondent disputed the appellant's claim. As the agreement dated 30 October 2013 as entered between the parties contained an arbitration agreement in clause 17b thereof, to provide that in case of disputes between the Contractor (Appellant) and the field officers (of the Respondent) regarding the tender/contract, the "Member Secretary STEM (Respondent)" shall be the sole arbitrator and no external arbitrator shall be appointed.

5. On such premise, the appellant filed an application before this Court under Section 11 of the ACA (Arbitration Petition No. 72 of 2019) however, such application came to be withdrawn, as the appellant had failed to issue a notice under Section 21 of the ACA, invoking arbitration and as per the arbitration agreement. The appellant accordingly issued a notice to the respondent dated 05 July 2019, invoking the arbitration agreement whereby the respondent was called upon to appoint an arbitral tribunal. On 22 July 2019, respondent replied to the appellant's notice through its advocate according consent for the appointment of an arbitrator. The consent of the respondent was in the following terms:-

“2. My client states that, keeping all contentions and averments open for argument as well as denying all the allegation made by your goodself, my client is ready and willing to refer the disputes as raised by your client for arbitration as per clause 17 of the general conditions of contract to appoint Hon’ble Col. Vivekanand Choudhary (retd.), Managing director of Stem Water Dist. & infra co. pvt. Ltd. as the arbitrator for the dispute raised by your goodself as per the arbitration clause.

.....

18. My client states, as your goodself has raised the dispute we hereby confirm and agree to refer the dispute to the Ld. Arbitrator Hon’ble Col. Vivekanand Choudhary (retd.), Managing director of Stem Water Dist. & Infra Co. Pvt. Ltd. to resolve the differences arising the differences amongst the parties.

19. Please note a copy of this notice confirming the appointment of the Ld. Arbitrator Hon’ble Col. Vivekanand Choudhary (retd.), Managing director of Stem Water Dist. & infra co. pvt. Ltd., is also sent to the Ld. Arbitrator Hon’ble Col. Vivekanand Choudhary (retd.), Managing director of Stem Water Dist. & Infra co. pvt. Ltd.

In view of the above submission it is important to initiate arbitration proceedings with immediate effect since both the parties have agreed to common arbitrator. ....”

(emphasis supplied)

6. Thus, in the aforesaid terms, the respondent agreed for appointment of Col. Vivekanand Choudhary (retd.) who was the Managing Director of the respondent to act as a sole arbitrator to adjudicate the disputes between the parties.

7. It may be observed that, quite significantly, prior to the aforesaid letter of the respondent’s advocate consenting for appointment of the sole arbitrator, the respondent had served an ‘affidavit dated 26 June 2019 of Kalpita Patki, Company Secretary’ of the respondent to the Section 11 application filed by the

appellant before this Court, in which a clear stand was taken on behalf of respondent that the Col. Vivekanand Choudhary, Managing Director shall be appointed as the arbitrator to adjudicate the dispute between the parties. The relevant statements as made in the affidavit, which form part of the record of the proceedings, read thus:-

“That it is pertinent to note that earlier STEM i.e. Respondent no.2 was a government organisation and its affairs and operation were headed after by the “Member Secretary” thereafter from year 2009 STEM i.e. Respondent no.1 has been subsequently converted as a private limited company vide Maharashtra Government Resolution no. WSS-2008/CR-28/WS22 dated 27/02/2009 wherein the post of “Member Secretary” of STEM has been replaced by the post of “Managing Director” therefore after the conversion of the STEM from Government organisation to private limited company the post of member secretary is construed to be as of Managing Director. Further it is also pertinent to note that the post of “Member Secretary” earlier (when STEM was Government organization) and the post of “Managing Director” currently (From August 2014) has been held by the same person i.e. Mr. Vivekanand Choudhary and hence by virtue of his office he shall be the rightful authority to be appointed as the Arbitrator as far as the present dispute between the Petitioner and the Respondent no.1 is concerned.”

“..... however it is now aptly clear that the petitioner intends to arbitrate the differences amongst the parties and hence as per the arbitration clause Mr. Vivekanand B. Choudhary who is holding the post of Managing Director / member secretary shall be appointed as the arbitrator in the present arbitration proceedings considering the clause 17(b) of the general conditions contract of the tender document.

6. It is therefore, humbly prayed that the Respondent no.1 have no objection to appoint Member Secretary, STEM now referred and considered as the Managing Director of STEM Water Distributions Infrastructure Co. Pvt. Ltd. i.e. Mr. Vivekanand b. Choudhary an Arbitrator as per clause no. 17(b) General Conditions of Contract, for adjudicating the dispute and claim between the parties.”

(emphasis supplied)

8. It is thus clear that the respondent had insisted on the appointment of its Managing Director Col. Vivekanand B. Choudhary as an arbitrator. It may also be observed that at such point of time, it was open to the appellant to take a position that Col. Vivekanand B. Choudhary, being an official of the respondent, he would not be an independent person and/or that there would be a likelihood of bias against the appellant, however, the appellant did not raise such objection, as it appears that the appellant intended not to delay the arbitral process and conceded in the appointment of the said arbitrator. Thus, the situation was in fact of a bias which the appellant would suffer as the arbitrator proposed to be appointed was an officer of the respondent.

9. On the aforesaid backdrop, learned sole arbitrator entered reference. On 04 October 2019, a disclosure was also made by the learned sole arbitrator as per the Fifth Schedule of the ACA. An arbitral hearing was held on 07 November 2019, when both the parties consented on the programme of the arbitral proceedings and minutes in that regard were recorded. Thereafter, at the further hearings of the arbitral proceedings held on 21 November 2019 and 23 November 2019, the respondent participated and filed its statement of defence. On 07 January 2020, the respondent informed the arbitral tribunal that the respondent intended to file a counter-claim. The arbitral proceedings were thereafter held on 15 January 2020, 24 January 2020, 25 February 2020, 12 March 2020, 16 March 2020 and 18 March 2020. Further, as the mandate of the arbitral tribunal to conclude the arbitral proceedings as per the time lines

prescribed under Section 29A of the ACA was expiring, the appellant approached this Court by an application filed under the said provision praying for extension of the mandate of the arbitral tribunal to complete the arbitral proceedings. A learned Single Judge of this Court by an order dated 10 August 2020, passed on Arbitration Petition No. Ld/VC/ARBPL/17/2020 allowed the appellant's application granting extension of time by six months from 22 July 2020, to enable the learned sole arbitrator to pass an award. On such backdrop, learned arbitrator proceeded with the arbitral proceedings and finally published an arbitral award on 29 September 2020.

10. Being aggrieved by the arbitral award, on 01 January 2021, the respondent filed an application under Section 34 along with a stay application before the Commercial Court at Thane. In the Section 34 proceedings, an application was moved by the respondent on 01 February 2023 to file certain additional documents. On such application, on 06 April 2023, an order was passed by the Commercial Court permitting the respondent to file additional documents. The proceedings of the Section 34 application were thereafter taken up for final adjudication. By the impugned order dated 16 May 2023, the Commercial Court set aside the arbitral award on the applicability of Section 12(5) read with Seventh Schedule of the ACA as observed in paragraphs 39 to 45 of the impugned order qua the appointment of the arbitral tribunal. The Commercial Court has *inter alia* observed thus:-

“39] According to learned Advocate for the applicant, in view of

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21 April 2025

amendment of 2015 in Section 12(5) of the Arbitration and Conciliation Act Col. Vivekanand Choudhary (Retired) being Managing director of the applicant company was ineligible to act as an Arbitrator.

40] Sub-section 5 and Section 12 was inserted by Arbitration and Conciliation (Amendment) Act 2015 with effect from 23/10/2015 which reads as under:

“12(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.”

41] The 7<sup>th</sup> Schedule is also added by virtue of Arbitration and Conciliation (Amendment) Act 2015 which is reproduced here:

.....

.....

42] Col. Vivekanand Choudhary (Retd.) falls under category 1 and 5 of the 7<sup>th</sup> Schedule. As per provisions of Sub-section 5, the parties can waive the applicability of this sub-section by express agreement in writing.

43] It is true that the applicant company has not raised such objection in Arbitration Proceeding No.72/2019 before the Hon'ble Bombay High Court. From the perusal of the order dated 26/6/2019 passed by the Hon'ble Bombay High Court in Writ Petition No. 72/2019 it seems that learned Advocate for both the parties present respondents sought leave to withdraw the petition with liberty to file appropriate petition. I think both the parties have not clarified as to why said petition was withdrawn.

44] The order dated 10/8/2020 of Hon'ble Bombay High Court in LD/VC/ARBPL 17/2020 shows that the time for completing the Arbitration Proceeding was extended. It may be noted that in the said proceeding nobody was present on behalf of the present applicant.

45] Moreover, in my view assuming for the sake of argument that present applicant has not raised objection at any time during Arbitral Proceeding, the language of Section 12(5) is very specific. There must be express agreement for waiving of provisions of Section 12(5). No such express agreement was executed between the parties.

.....

47] In the present case, the applicant has placed on record copy of the adjournment application dated 18/3/2020 wherein it is specifically mentioned that the applicant company has no faith on Col. Vivekanand Choudhary (Retd.) and he should not continue the Arbitral Proceeding.

48] In view of above discussion, in my view, in the light of provisions of Section 12(5) of Arbitration and Conciliation Act Col. Vivekanand Choudhary (Retd.) being Managing Director of the applicant company was ineligible to act as an Arbitrator.

.....

51] In view of aforesaid discussion, I hold that Col. Vivekanand Choudhary (Retd.) was ineligible to act as an Arbitrator by virtue of provisions of Section 12(5), 14 and 15 of the Arbitration and Conciliation Act. It can be termed as illegality in the Arbitral Proceedings by virtue of the provisions of Section 34(2A) of Arbitration and Conciliation Act. The Award is required to be set aside. In view of peculiar facts of the case, it would be just and proper to direct both the parties to bear their costs.”

### **Submissions on behalf of the Appellant:-**

11. Mr. Shah, learned counsel for the appellant has made the following submissions:-

(i) The appointment of the sole arbitrator was by consent of the parties, which was recorded in writing as clearly seen from the letter dated 22 July 2019 of the respondent's advocate, which clearly stated that Col. Vivekanand

Choudhary (retd.) be appointed as a sole arbitrator to adjudicate the disputes and differences between the parties. This was on the backdrop of a prior affidavit of Ms. Kalpita Patki, Company Secretary, served on the appellant which was to be filed in the Section 11 proceedings, wherein the respondent not only suggested but also agreed for appointment of Col. Vivekanand Choudhary (retd.) as a sole arbitrator to adjudicate the disputes and differences between the parties. The express agreement in writing between the parties is clearly found in the letter of the respondent's advocate dated 22 July 2019 (supra) as also the contents of the affidavit of Ms. Kalpita Patki (supra). In view of the clear agreement between the parties, it is deemed that there is a waiver of any requirement of the applicability of Section 12(5) read with the Seventh Schedule of the ACA as such situation would squarely fall within the proviso below sub-section (5) of Section 12 which ordains that "parties may, subsequent to disputes having arisen between them, waive the applicability of sub-section (5) by an express agreement in writing". It was hence not permissible for the respondent to raise any issue and that too challenging the arbitral award on the ground that the learned sole arbitrator had incurred any legal disability in his appointment and in acting as the sole arbitrator. In supporting such contention, reliance is placed on the decisions of the Supreme Court in **Bharat Broadband Network Ltd. vs. Union Telecom Ltd.**<sup>1</sup>, **McLeod Russel India vs. Aditya Birla Finance Ltd.**<sup>2</sup>, **SBI Global Factors Ltd. vs. Prity Tubes Pvt. Ltd. & Ors.**<sup>3</sup>.

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1 (2019) 5 SCC 755

2 2023 SCC OnLine Cal 330

3 2022 SCC OnLine Bom 11444

(ii) The primary requirements of the provisions of law are completely overlooked by the Commercial Court in passing the impugned order allowing Section 34 proceedings. Hence, the impugned order is *ex facie* illegal and contrary to the provisions of the ACA.

(iii) The approach of the Commercial Court in considering the applicability of the provisions of Sections 12 and 15 of the ACA is untenable as the Commercial Court has proceeded on the principle of bias and arbitrary appointment, on the premise that the sole arbitrator could not have been an employee (Managing Director) of the respondent, hence, he lacked competence to adjudicate the disputes between the parties. The Commercial Court thus coming to a conclusion that in the facts of the case, the sole arbitrator being an employee of the respondent suffered disqualification under the provisions of sub-section (5) of Section 12 as also read with the relevant items of the Seventh Schedule of the ACA, is far from legal and valid. Such objection was not raised before the arbitral tribunal at any point of time during the arbitral proceedings, hence, having not raised such objection earlier, it was not permissible for the respondent to raise such objection for the first time in the proceedings of Section 34 of the ACA. In supporting such contention, reliance is placed on the decision of this Court in **Solaris Developers Pvt. Ltd. vs. State Bank of India Supervising Staff Bhagyashree Co-operative Housing Society Ltd.**<sup>4</sup> and on the decision of Delhi High Court in **National Highways Authority of India vs. KCC**

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<sup>4</sup> Arbitration Petition (L) No. 1359 of 2024 decided on 30.01.2024

**Buildcon Pvt. Ltd.<sup>5</sup>.**

(iv) The appointment of the arbitrator in terms of the arbitration clause, who was a person holding the designation at the time of appointment, did not lose his mandate or attain disqualification upon his termination from the services as alleged by the respondent. It is submitted that such contention presupposes that the position which was taken and accepted by the respondent at the initial appointment of the learned sole arbitrator cannot be altered merely because the Managing Director of the respondent, on his retirement, had ceased to remain as a person designated under the Arbitration Agreement, and therefore had no authority to continue as an arbitrator. Thus, the contention is that after the learned arbitrator retired from service of the respondent, he would not be disqualified from continuing as an arbitrator. It is submitted that once the learned sole arbitrator entered reference as per the terms of the arbitration agreement between the parties, and as fully agreed and/or not disputed by the parties, there is no question of him ceasing to be an arbitrator merely because he retires. It is submitted that on such proposition, the position in law is well-settled as seen from the decisions of the Supreme Court in **Himalayan Construction Co. vs. Executive Engineer, Irrigation Division, J & K & Anr.**<sup>6</sup> and **Laxmi Continental Construction Company vs. State of Uttar Pradesh & Anr.**<sup>7</sup>.

(v) The respondent itself having insisted, and having acquiesced and

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<sup>5</sup> 2024 SCC OnLine Del 3077

<sup>6</sup> (2001) 9 SCC 359

<sup>7</sup> (2021) 13 SCC 142

accepting the appointment of the learned sole arbitrator, also falls in a situation which would clearly attract waiver of right to object as Section 4 of the ACA would postulate.

(vi) Lastly, it is submitted that the impugned judgment and order passed by the Commercial Court also requires interference on the ground that an opinion was formed by the Commercial Court, by allowing an application filed by the respondent to bring additional documents on record, which were not part of the arbitral proceedings. It is submitted that no additional evidence could ordinarily be brought on record of the Section 34 proceedings. In supporting such contention, reliance is placed on the decision of the Supreme Court in **Alpine Housing Development Corporation Pvt. Ltd. vs. Ashok S. Dhariwal & Ors.**<sup>8</sup> and on the decision of Delhi High Court in **Jop International Ltd. vs. Multifold Group Contractor and Engineers**<sup>9</sup>.

#### **Submissions on behalf of the Respondent**

12. On the other hand, learned counsel for the respondent would submit that the impugned order passed by the Commercial Court would not require interference on the ground that the appointment of the learned sole arbitrator, although was not objected by the respondent before the arbitral tribunal, was *per se* not in accordance with law. It is submitted that even the Board of Directors of respondent had not granted any approval for appointment of the learned sole arbitrator, as the arbitration proceedings involved a claim of above

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8 2023 SCC OnLine SC 55

9 2023 SCC OnLine Del 3396

Rs.10 crores, which required a decision to be taken by the Board of Directors. On such count, it is submitted that the Managing Director conducting arbitration without prior express consent by majority of Board of Directors was also contrary to the Articles of Association referring to Clause 139(a)(xv) of the respondent company.

**13.** It is next submitted that the appellant's contention referring to the letter dated 22 July 2019 of the respondent's Advocate, informing the appellant to appoint the learned sole arbitrator, as he was a person so designated to act as a sole arbitrator, was addressed without lawful authorization and sanction from the Board of Directors. Hence, the appellant's case of a valid consent of the respondent to the appointment under said letter, ought not to be accepted. It is next submitted that even the learned sole arbitrator expressed his unwillingness to act as an arbitrator when he addressed an email dated 9 August 2019 to the respondent.

**14.** It is submitted that an application on behalf of the respondent was moved before the learned sole arbitrator on 28 February 2019 contending that the respondent had lost confidence in the arbitrator, and after filing of such application, the respondent had not participated in the arbitration proceedings. However, in making such submission, it is conceded that no proceedings either under Section 11(6) or Section 14 of the ACA were resorted to assail the mandate of the learned sole arbitrator.

**15.** It is next contended that the provisions of Section 12(5) are clear and

when the arbitrator himself has taken a position that he was not eligible to continue as an arbitrator, in terms of his email dated 9 August 2019, the arbitrator should not have proceeded with the arbitration proceedings and declared the award.

16. Learned counsel for the respondent has placed reliance on the decisions in (i) **Perkins Eastman Architects DPC v. HSCC (India) Ltd.**<sup>10</sup>, (ii) **Bharat Broadband Network Ltd. v. United Telecoms Ltd.**<sup>11</sup>, (iii) **Union of India v. Girdhari Lal**<sup>12</sup>, (iv) **Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers**<sup>13</sup>, (v) **Dredging & Desiltation Co. Pvt. Ltd. v. Board of Trustees of Paradip Port Trust**<sup>14</sup>, (vi) **Punjab State v. Pritam Singh**<sup>15</sup> and (vii) **Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Company**<sup>16</sup>.

**Reasons and Conclusion:-**

17. At the outset, some of the undisputed facts need to be noted. The arbitration agreement between the parties is not in dispute. Clause 17b of the agreement dated 30 October 2013 is the arbitration agreement between the parties which reads thus:-

**“17. Resolving of dispute:** In case of dispute between the

10 (2020) 20 SCC 760  
 11 (2019) 5 SCC 755  
 12 1998 SCC OnLine Raj 157  
 13 (2021) 17 SCC 248  
 14 2014 SCC OnLine Ori 439  
 15 1999 SCC OnLine P&H 533  
 16 2024 SCC OnLine SC 3219

Contractor and the field officer regarding this tender, the member Secretary (STEM) shall be the sole Arbitrator and no external Arbitrator shall be appointed.”

**18.** On a reading of the aforesaid clause, it is clear that the parties had agreed to appoint the person “designated” in the arbitration agreement as an arbitrator to adjudicate the disputes and differences between the parties under the agreement dated 30 October 2013.

**19.** From the facts as noted hereinabove, it is quite clear that this is a case wherein, in fact quite peculiarly, it was the appellant who was in a position to allege bias against the arbitrator proposed to be appointed being the officer of the respondent. It did not raise such objection. Further, the appellant on the respondent insisting for appointment of the sole arbitrator as per the arbitration clause (supra), agreed for such arbitrator to be appointed. This is clear from the proceedings of Section 11 application as filed by the appellant before this Court praying for appointment of an arbitral tribunal. As noted hereinabove, in the proceedings of the Section 11 application, respondent not only in the affidavit in reply to Section 11 proceedings filed by the appellant, but also in the reply dated 22 July 2019 of its advocate to the appellant’s advocate’s letter invoking arbitration insisted that in terms of the arbitration clause, appointment of Col. Vivekanand Choudhary be made as the sole arbitrator.

**20.** It is also not in dispute that the learned sole arbitrator after having received consent, proceeded to arbitrate the disputes and differences between the parties. Even assuming that the respondent at any given point of time

during the arbitral proceedings, had formed an opinion that the learned sole arbitrator by virtue of his retirement and/or he ceasing to be the Managing Director of the company had lost his mandate to continue as an arbitrator, and for such reason, the arbitral proceedings ought not to be taken forward, the respondent did not take recourse to any proceedings to that effect to substitute the sole arbitrator. Moreover, the day learned sole arbitrator entered reference, there was no such disqualification whatsoever.

**21.** Further the arbitration clause (supra) also does not specify that after the designated sole arbitrator enters reference by the consent of the parties, that is the parties waiving any objections to such appointment, and during the course of the arbitral proceedings, if the sole arbitrator (person designated) ceases to be the Managing Director, he would cease to have jurisdiction to continue to act as an arbitrator. In the absence of any such agreement between the parties, the learned sole arbitrator had jurisdiction to continue with the arbitral proceedings. Even otherwise the position in law is well settled, that once the learned sole arbitrator has entered reference and he is the person of the designation as also whose appointment has been explicitly agreed between the parties in terms of what Section 7 of the ACA would provide, the arbitrator would not lose his mandate or attain any disqualification upon him ceasing to possess the designation.

**22.** Moreover, as seen from the factual narration, the respondent itself had clearly insisted and acquiesced and accepted the appointment of the sole

arbitrator, canvassing that the requirement of the arbitration agreement was to appoint such person as designated. Such position as taken by the respondent clearly falls under the mandate of Section 4 of the ACA providing for waiver of right to object, hence, not attracting the intervention of the Court in terms of Section 5 of the ACA. Sections 4 and 5 read thus:-

**“4. Waiver of right to object.**—A party who knows that—

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

**5. Extent of judicial intervention.**—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.”

**23. In *Himalayan Construction Co. vs. Executive Engineer, Irrigation, J&K*** (supra), the Supreme Court was dealing with an issue as to whether the arbitrator who was appointed by designation, having retired and had ceased to hold his office, would have an authority to pass the impugned award. Although such issue was considered under the 1940 Act, however, the principles would not be different in so far as the 1996 Act is concerned. The Supreme Court observed that the agreement between the parties provided that the disputes would be required to be referred to the arbitration of “Chief Engineer, Irrigation and Flood Control Department, Jammu”. The arbitrator was accordingly

appointed by designation, however the said appointment did not survive further, as the post itself was abolished and a fresh appointment was made by parties, under which it was agreed between the parties to appoint one Shri. D. K. Nargotra, Chief Engineer, Ravi Tavi Irrigation Complex, Jammu, as an arbitrator. He was accordingly appointed as an arbitrator with an understanding that he shall enter reference and submit award within the statutory period. Significantly, the Court observed that the said arbitrator who was then the Chief Engineer, was appointed as an arbitrator as agreed between the parties. It is in such context, the High Court set aside appointment of the learned sole arbitrator. In appeal before the Supreme Court, the appointment of Mr. D. K. Nargotra as the arbitrator was upheld as also the award passed by such arbitrator was approved, while holding that the arbitral award could not have been set aside by the High Court on the ground of any disqualification of the arbitrator being a designated person. The relevant observations of the Court read thus:-

“7. Once this conclusion is reached it becomes obvious that the objection by the respondent-authorities to the award that it was passed by a person who had, on retirement, ceased to hold office which he earlier held at the time of reference cannot survive as Mr. D.K. Nargotra himself passed the award. Not only that but after his retirement and before he completed the proceedings he applied to the Court for extension of time and that extension was granted after hearing the parties and no such objection was raised at that time by the respondents. Consequently, it must be held that the Division Bench had erroneously set aside the award decrees only on this ground.”

24. Similarly, **Laxmi Continental Construction Company vs. State of Uttar Pradesh & Anr.** (supra) was a case where the qualification for appointment as an arbitrator was as agreed under clause 52 (the arbitration agreement) which was

to the effect that the person to be appointed as an arbitrator should be an officer of the rank of the Superintending Engineer or higher. The Court held that once such an officer was appointed as an Arbitrator, he continued to be the Sole Arbitrator till the arbitration proceedings are concluded unless he incurs any disqualification under the law. It was held that even after his retirement, the arbitration proceedings were required to be continued by the same Arbitrator, as the arbitration agreement (Clause 52 therein) did not provide at all that on the retirement of such an officer, who was appointed as a Sole Arbitrator, shall not continue as an arbitrator and/or the mandate to continue with the arbitration proceedings will come to an end. The Supreme Court further held that once the learned Sole Arbitrator had continued with the arbitration proceedings and passed the award within the extended period of time, it could not be said that, when he continued with the arbitration proceedings, he had misconducted himself for acting without jurisdiction.

**25.** In the present case also, there was an extension of the mandate of the learned sole arbitrator as granted by this Court by an order dated 10 August 2020 passed on the proceedings filed under Section 29A of the ACA. It is of utmost significance that the respondent did not, in any manner whatsoever, assail the jurisdiction of the sole arbitrator after the arbitrator consensually entered reference by taking recourse to the provisions of sub-sections (2) and (3) of Section 16, nor the respondent resorted to the provisions of Section 14 of the ACA to contend that the mandate of the arbitrator was required to be

terminated as he had incurred a *de jure* or *de facto* disqualification. Such conduct on the part of the respondent clearly brings about a situation of the respondent having fully conceded, acquiesced and having accepted the designated sole arbitrator to arbitrate the disputes between the parties and hence, it was not permissible for the respondent to take a contrary position to contend that the arbitrator had lost his authority to arbitrate on the ground that he has ceased to be a Managing Director on his retirement.

**26.** We may also observe that the respondent's contention of alleging defect in the appointment and/or the manner in which the appointment of learned sole arbitrator is untenable as the respondent conceded in the reply affidavit of Ms. Kalpita Patki, which was sought to be filed in the Section 11 proceedings and which was served on the appellant, as also in the letter of the respondent's advocate dated 22 July 2019, the contents of which we have extracted in detail hereinabove when the respondent suggested and called upon the appellant to appoint Col. Vivekanand Choudhary, Managing Director of the respondent as the arbitrator. This also for the reason that such plea, firstly is a plea which is destructive and/or contrary to the specific arbitration agreement between the parties as the arbitration agreement does not contemplate inclusion of any matters which are internal to the respondent's working. As also there is a presumption that after such arbitration agreement of the nature as entered between the parties, all considerations of any internal issues ultimately culminated into the arbitration agreement. Therefore, a plea which is alien or

contradictory to the terms and conditions of the arbitration agreement would be wholly unacceptable in challenging the authority of the arbitrator.

**27.** In any event a plea that although the arbitration agreement between the parties was clear, however, on some internal procedures pertaining to the respondent's functioning, before the Managing Director could enter reference, namely of an approval of the Board of Director was required to be taken, was an issue wholly internal to the respondent and not part of any procedure as agreed between the parties in appointing the arbitrator. This also amount to reading something into the arbitration agreement not provided for. A party to an arbitration agreement in such situation cannot be permitted in law to take a position contrary to the arbitration agreement, and if at all such a plea is intended to be asserted, it was required to be asserted in the manner known to law i.e. at the appropriate time and in appropriate proceedings questioning the appointment of the arbitrator and more particularly in the present case before the sole arbitrator was appointed by consent. Thus, in the fact situation, any alleged ineligibility or disqualification of the arbitrator could not have been set up as a plea to challenge the arbitral award as the respondent had not only acquiesced in the appointment of the learned sole arbitrator, but also by the application of the principles of estoppel was prevented from taking such a plea.

**28.** The aforesaid observations in our opinion would clearly find acceptance even when tested on the touchstone of the requirement of the provisions of Section 12(5) of the ACA and the proviso below it. Section 12 provides for the

grounds for challenge in regard to the appointment of an arbitrator. Sub-section (5) begins with a non-obstante clause to ordain “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. The proviso below it however makes an exception which is to the effect that “the parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing”.

We extract Section 12 hereunder which reads thus:-

**“12. Grounds for challenge.—**

(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.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(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.”**

(emphasis supplied)

**29.** In our opinion, the present case would be required to be regarded as falling within the proviso to sub-section (5) of Section 12, inasmuch as the affidavit of Ms. Kalpita Patki as also the letter of the respondent’s advocate addressed to the appellant dated 22 July 2019 insisting for appointment of Col. Vivekanand Choudhary, Managing Director of the respondent as the sole arbitrator, would be required to be an agreement in writing as the proviso below sub-section (5) would envisage. There cannot be any other meaning to both these documents by which the respondent in terms proposed the designated arbitrator Col. Vivekanand Choudhary to act as an arbitrator, but also the fact that such insistence and/or appointment was accepted by the appellant without demur. Further, such appointment was not only accepted but acted upon with the arbitrator entering reference and the arbitral proceedings having proceeded for an award to be delivered. All this also included an order passed in the proceedings before this Court for extension of the mandate of the arbitral

tribunal by passing an order under Section 29A of the ACA. We would not accept the proposition that the proviso below sub-section (5) of Section 12 would not accept the present position, as arrived in writing between the parties, in conceding to the appointment of the sole arbitrator. Such position as taken by the parties necessarily brings about the intention of the parties to overcome any legal disability which could be inferred under the provisions of Section 12 read with Seventh Schedule to the ACA. This also for the reason that it cannot be countenanced that the parties having agreed for resolution of the disputes by arbitration which would recognize all facets of party autonomy, could be oblivious to the provisions of the ACA on such issues. Applying such principles, it was too far-fetched for the respondent to contend that the arbitral award was rendered illegal on pure application of sub-section (5) of section 12 *de hors* the respondent's conduct of conceding in the appointment of the learned sole arbitrator and participation in the arbitral proceedings which include the respondent not raising an objection to the jurisdiction of the learned sole arbitrator either under any proceedings under Section 16 or Section 14 of the ACA. The respondent also could not have been oblivious that the specific writings as referred above and as accepted by the appellant accorded a complete sanctity to the arbitrator proceeding to the arbitral reference by virtue of proviso below sub-section (5) of Section 12. The Commercial Court has clearly overlooked/disregarded such requirements as the law would postulate. We discuss the principles of law in such context.

30. In **Bharat Broadband Network Ltd. vs. Union Telecom Ltd.** (supra), disputes and differences had arisen between the parties under the purchase order which provided for an arbitration agreement in terms of clause 20.1 under which the parties agreed that the dispute shall be referred to the sole arbitration of the CMD of the appellant-Bharat Broadband Network Ltd. or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted with the functions of the CMD or by whatever designation such an officer may be called. It was a case wherein the CMD, instead of himself entering reference, appointed a person who would be not eligible under the arbitration agreement. An objection was raised before the arbitrator that the arbitrator was *de jure* unable to perform his functions as an arbitrator, hence, he should have withdrawn from the proceedings so as to allow the parties to approach the High Court for appointment of a substitute arbitrator in his place. Such objection was rejected by the sole arbitrator which led to a petition being filed before the Delhi High Court under Sections 14 and 15 of the ACA, contending that the arbitrator had become *de jure* incapable of acting as such. The High Court in its judgment dated 22 November 2017, as assailed before the Supreme Court, rejected the said proceedings, observing that the very person who appointed the arbitrator is estopped from raising a plea that such arbitrator cannot be appointed, after participating in the proceedings. It was observed that under the proviso to Section 12(5) of the ACA, the appellant itself had appointed the learned sole arbitrator (Shri K.H. Khan), and the respondent had filed a statement of claim

without any reservation also in writing, the same would amount to an express agreement in writing, which would, therefore, amount to a waiver of the applicability of Section 12(5) of the ACA. However, considering the fact that the High Court had proceeded to rely on the appointment letter, which indicated an express agreement on the facts of the case, which was dated 17 January 2017, on which date, the Managing Director of the appellant was certainly not aware that Shri K.H. Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule, only went to the invalidity of the appointment of the Managing Director himself as an arbitrator and that Shri K.H. Khan's appointment being invalid became clear only after the declaration of law by the Supreme Court in **TRF Ltd. v. Energo Engineering Projects Ltd.**<sup>17</sup> which was rendered on 03 July 2017. It was observed that after the said judgment, there was no express agreement between the parties as to the validity of Shri K.H. Khan's appointment and it is in these circumstances, an application was moved before the learned sole arbitrator relying on the decision in **TRF Ltd. vs. Energo Engineering Projects Ltd.** (supra) pointing out the ineligibility of the arbitrator of being *de jure* incapable of acting as an arbitrator. It is in these circumstances, the Supreme Court interfered with the orders of the High Court in holding that the arbitrator in such case was *de jure* ineligible to continue as an arbitrator. However, the observations of the Supreme Court which are relevant to the present case in the context of the legal position of an acquiescence, waiver and estoppel need to be noted when the Court recognizes such principles in

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<sup>17</sup> (2017) 8 SCC 377

analysing legislative scheme as Sections 12, 13 and 14 of the ACA would envisage, so as to attract the principles of acquiescence, waiver and estoppel.

The relevant observations read thus:-

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

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.

.....

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

“9. Promises, express and implied.—In so far as a proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.”

It is thus necessary that there be an “express” agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such. The facts of the present case disclose no such express agreement. ....”

(emphasis supplied)

**31.** In the facts of the present case, it is not in dispute that in writing as noted above, the parties had expressly agreed to the appointment of the learned sole arbitrator, although such appointment could have been labelled as prejudicial to the appellant, and least to the respondent as the learned sole arbitrator was the officer of the respondent.

**32.** In **Mcleod Russel India vs. Aditya Birla Finance Ltd.** (supra) the proceeding before the Court was an application under Section 14 of the ACA, which was challenging the appointment of the arbitrator. In such context, the Court observed that Section 12(5) was certainly not context indifferent where a party's continuous, repeated and unequivocal acceptance of the arbitrator's appointment and subsequent participation in the arbitration was wiped out simply on an application being filed for termination of the arbitrator's mandate. It was observed that all unilateral appointments of arbitrators cannot automatically be nullified on the application of Section 12(5) and that the perceived disqualification was required to be assessed only on the mandate of Section 12(5) which is within the guard-rails of the Seventh Schedule. This was the case where the petitioners had participated in the arbitration for almost 2 years before lodging such challenge and had also not disclosed any facts which came to the petitioners' knowledge after the appointment warranting termination of the Arbitrator's mandate. The petitioners were also aware of the disclosures/declarations made by the Arbitrators in May, 2019 and June, 2020. They were also not oblivious of the position in law and nonetheless a challenge

was raised to the appointment of arbitrator, after full participation in the arbitration which was held to be foul of section 12(4) of the Act. It is in such context, the Supreme Court made the following observations:-

“38. The provisions of The Arbitration and Conciliation Act, 1996, including section 12(5) read with the proviso are not fact-neutral. The statutory leeway given to parties is for a purpose; which is to facilitate the speed and ease of the arbitration procedure. The Act aims to aid parties who are ready to flow with the momentum built into the statute and not parties who change their positions consequent to adverse orders in the arbitration. Section 12(5) is certainly not context-indifferent where a party's continuous, repeated and unequivocal acceptance of the arbitrator's appointment and subsequent participation in the arbitration is wiped out simply on an application being filed for termination of the arbitrator's mandate.

.....

65. After discussing the import of section 12(5) read with the proviso, this Court finds and accordingly holds that section 12(5) is not applicable to this case since the alleged disqualification does not breach any one or more of the conflict-protections in the Entries of the Seventh Schedule. Even if it is assumed that the Arbitrator became ineligible by reason of the Seventh Schedule, the petitioners waived such disqualification by their express writings, conduct and agreement as envisaged under the proviso to section 12(5) of the Act.”

**33.** In **SBI Global Factors Ltd. vs. Prity Tubes Pvt. Ltd. & Ors.** (supra), in the proceedings of Sections 14 and 15 of the ACA in a dispute between the parties under a ‘Factory Facility Agreement’, learned arbitrator proceeded in the arbitral proceedings and when the final arguments in the arbitral proceedings were in progress namely when the petitioner was to make submissions in rejoinder to the respondent’s argument, the respondent peculiarly at such stage of the arbitral proceedings, raised an objection that the appointment of the learned

arbitral tribunal was unilateral. The learned arbitrator, considering such objection, passed an order recording that he was rendered *de jure* incapable to act as a sole arbitrator. In such context, the Court observed that it was clear that the respondent throughout had participated in the arbitral proceedings, which were in progress, as also the mandate of the arbitral tribunal was extended by the order passed by the High Court under Section 29A of the ACA (as in the present case). It was held that such proceedings were not maintainable, for the reason of the respondent having participated in the arbitral proceedings, as also having acquiesced in the extension of the mandate. It is in such context, not accepting the contentions for any substitution, the Court made the following observations:-

“5. It is clear from the above indisputed facts that the respondents have participated in the arbitral proceedings, as also they conceded before this Court in extending the mandate of the arbitral tribunal. If this be the situation, in my opinion, the respondents have certainly waived the applicability of the provisions of Part I of the Act, and prima facie in my opinion they have also lost their entitlement to raise any objection on the ground that the appointment of the learned sole arbitrator was unilateral and not in accordance with the provisions of Part I of the Act. Prima-facie no other inference can be drawn from the conduct of the respondents.

6. For the above reasons, in my opinion, in the facts of the present case, the above order has been passed by the learned sole arbitrator not considering the legal effect and consequence as created by the provisions of Section 4 of the Act which provide for “Waiver of right to object”.”

**34. A Constitution Bench of the Supreme Court in *Central Organisation for Railway Electrification vs. M/s. ECI SPIC SMO MCML (JV) a Joint Venture***

**Company** (supra) in its majority judgment recognized the principle of minimum judicial interference, supplementing the autonomy of parties by prohibiting courts from interfering in arbitral proceedings unless mandated by the law. It was held that such principle respects the autonomy of the parties to mutually chart the course of the arbitral proceedings, while holding that party autonomy is the governing feature of the constitution of the arbitral tribunal. On the process of selecting the arbitral tribunal, it was observed that it allows the parties to choose arbitrators with particular experience or expertise and that the parties are free to agree either on a specified individual or individuals as arbitrators or on a procedure for the selection of arbitrators. The Supreme Court held that Section 12(5) overrides any prior procedure for appointing the arbitrators agreed upon between the parties, under Section 11(2) due to the non-obstante clause. However, it was observed that the proviso to Section 12(5) allows parties to waive the applicability of that provision after the dispute had arisen. It was further held that the proviso secures “real and genuine party autonomy” by allowing parties to waive the applicability of Section 12(5). It was reiterated that the Arbitration Act is a self-contained code and that the legal framework contained under the Arbitration Act and the Contract Act recognizes and enforces the contractual intention of parties to entrust an arbitral tribunal with the authority to settle their disputes. In regard to the Seventh Schedule of the Act, it was observed that the categories mentioned under the Seventh Schedule are such that it is difficult to distinguish the interests of an arbitrator from those of a party to which an arbitrator is connected and in such cases, the issue would

be whether the outcome of the arbitration would realistically affect the arbitrator's interest. It was held that once it is established that an arbitrator falls under any of the categories mentioned in the Seventh Schedule, they are automatically disqualified without any investigation whether or not there is any likelihood of bias. However, the Court categorically held that an objection to the bias of an adjudicator can be waived. It was held that a waiver is an intentional relinquishment of a right by a party or an agreement not to assert a right and that the Arbitration Act allows parties to waive the application of Section 12(5) by an express agreement after the disputes have arisen. The Court also held that the waiver was subject to two factors, firstly, the parties can only waive the applicability of Section 12(5) after the dispute had arisen, which allowed the 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. It was observed that secondly the requirement of the proviso to Section 12(5) was to the effect that parties must consciously abandon their existing legal right through an express agreement, which reinforces the autonomy of parties by allowing them to override the limitations of independence and impartiality by an express agreement in that regard. The relevant observations in this context are required to be noted, which reads thus:

**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

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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 recognizes that certain kinds of arbitration such as maritime or commodities arbitration may require the parties to draw upon a small, specialized pool. 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.

.....

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

.....

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;"

**35.** Applying the aforesaid principles of law and more particularly the provisions of Sections 4 and 12(5) of the ACA, in our opinion, in passing the impugned order the Commercial Court, in the facts of the present case, was not correct to hold that the arbitral award was required to be set aside, purely applying the provisions of Section 12(5) of the ACA without considering the clear facts on record, which we have discussed hereinabove of firstly a complete waiver of the applicability of Section 12(5) between the parties in writing as noted hereinabove, and thereafter, in the complete participation of the respondent in the arbitral proceedings without, at any time, assailing the jurisdiction of the arbitral tribunal thereby having waived its right to object to the appointment of the learned sole arbitrator and/or having acquiesced in such appointment.

36. We also find substance in the contention as urged on behalf of the appellant that under Section 34, no additional evidence could have been ordinarily led. In the present case, the Commercial Court accepted the application as moved on behalf of the respondent for producing additional evidence. Such approach in the first place was in the teeth of the provisions of Section 34 which are restricted in its application to challenge the validity of the award on the ground as permissible under Section 34. Certainly such proceedings are not original proceedings so as to permit a party to urge a contention on materials, which were not on the record of the arbitral proceedings. This was certainly not an acceptable approach of the Commercial Court as Section 34 would not permit the Commercial Court to accept additional material. Learned counsel for the appellant in this regard is correct in placing reliance on the decision in **Alpine Housing Development Corporation Pvt. Ltd. vs. Ashok S. Dhariwal & Ors.** (supra) wherein the Supreme Court held that Section 34 applications are summary proceedings, and that, an award can be set aside only on the grounds set out in Section 34(2)(a) and Section 34(2)(b). It was observed that an application for setting aside the arbitral award ordinarily does not require anything beyond the record which was before the arbitrator. The only exception being that if there are matters not containing such records, and the relevant determination to the issues arising under Section 34(2)(a), they may be brought to the notice of the Court by way of affidavits filed by both the parties. The observations of the Court in such context read thus:-

“24. The ratio of the aforesaid three decisions on the scope and ambit of section 34(2)(a) pre-amendment would be that applications under sections 34 of the Act are summary proceedings; an award can be set aside only on the grounds set out in section 34(2)(a) and section 34(2) (b); speedy resolution of the arbitral disputes has been the reason for enactment of 1996 Act and continues to be a reason for adding amendments to the said Act to strengthen the aforesaid object; therefore in the proceedings under section 34 of the Arbitration Act, the issues are not required to be framed, otherwise if the issues are to be framed and oral evidence is taken in a summary proceedings, the said object will be defeated; an application for setting aside the arbitral award will not ordinarily require anything beyond the record that was before the arbitrator, however, if there are matters not containing such records and the relevant determination to the issues arising under section 34(2)(a), they may be brought to the notice of the Court by way of affidavits filed by both the parties’ the cross-examination of the persons swearing in to the affidavits should not be allowed unless absolutely necessary as the truth will emerge on the reading of the affidavits filed by both the parties. Therefore, in an exceptional case being made out and if it is brought to the court on the matters not containing the record of the arbitrator that certain things are relevant to the determination of the issues arising under section 34(2)(a), then the party who has assailed the award on the grounds set out in section 34(2)(a) can be permitted to file affidavit in the form of evidence. However, the same shall be allowed unless absolutely necessary.”

**37.** Further, from the impugned judgment and order rendered by the Commercial Court, we find that the sole point for consideration as framed by the Commercial Court was whether the learned arbitrator was competent to act as an arbitrator. It was observed that there is no dispute that Col. Vivekanand Choudhary (Retd.) was appointed as Managing Director from 06 August 2014 for a period of five years which expired on 05 August 2019 and that as per clause 150(b) of the Articles of Association, Col. Vivekanand Choudhary was eligible for reappointment. However, considering the fact that there was a dispute in regard to the learned arbitrator being reappointed as the Managing

Director, the Commercial Court observed that as Col. Vivekanand Choudhary ceased to be the Managing Director during the progress of the arbitration, hence, as per clause 17(b) of the agreement, as the Managing Director of the respondent company by designation was appointed as an arbitrator and considering the provisions of Section 14(1)(a), learned arbitrator was *de jure* unable to perform his functions including on the applicability of Section 12(5) of the ACA. The Commercial Court has held that such appointment of the sole arbitrator also fell within the disqualification in category 1 and 5 of the Seventh Schedule and as per the provisions of sub-section (5) of Section 12, he was hence ineligible to be appointed as an arbitrator, except for the parties waiving the applicability of the said provision by express agreement in writing. In our opinion, to this effect the observations as made by the Commercial Court in paragraphs 42 to 51 of the impugned order (*supra*) completely overlook the mandate of law as applicable in the facts of the present case. Such observations cannot be sustained for the reasons which we have discussed hereinabove, which are to the effect: of the respondent with open eyes not only insisting but clearly accepting the appointment of the learned sole arbitrator; also having participated in the arbitration proceedings and having not taken recourse to the provisions of Section 14 to challenge any ineligibility of the arbitrator; further having fully acquiesced in the orders passed by the High Court for the extension of the mandate of the learned sole arbitrator being continued under Section 29A of the ACA; and on such backdrop, only after the arbitral award being rendered, raising an objection to the ineligibility of the arbitrator in challenging

the award in the Section 34 proceedings. Such approach on the part of the respondent was clearly in the teeth of the mandate of the provisions of Section 12(5) read with the proviso as applicable in the present case, as also contrary to the provisions of Section 4 of the ACA.

**38.** We now refer to the decisions as relied on behalf of the respondent. Insofar as the reliance on the decisions in **Perkins Eastman Architects DPC v. HSCC (India) Ltd.** (supra) and **Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers** (supra) are concerned, there cannot be two opinions on the principles of law the decisions enunciate, however, considering the factual matrix and our aforesaid discussion, these decisions would certainly not apply to the facts of the case. Insofar as the decision of the learned Single Judge of Rajasthan High Court in **Union of India v. Girdhari Lal** (supra) is concerned, the same would also not assist the respondent, as in the present case, there was a clear intention spelt out between the parties that the learned sole arbitrator, as agreed to be appointed by the parties and who rendered the arbitral award, would act as an arbitrator. The arbitrator accordingly pronounced the arbitral award.

**39.** As we have referred to several decisions of the Supreme Court on the position in law, we do not intend to burden the position by discussing the decision of Orissa High Court in **Dredging & Desiltation Co. Pvt. Ltd. v. Board of Trustees of Paradip Port Trust** (supra) which was delivered in 2014 and the decision of the learned Single Judge of Punjab and Haryana High Court in

**Punjab State v. Pritam Singh** (supra) which was rendered in the year 1999 at the time when the Arbitration and Conciliation Act was yet to be amended by the Act No. 3 of 2016 with effect from 23 October 2015. Also, the principles of law in regard to the applicability of Section 12(5) and the Seventh Schedule which fell for consideration of the Supreme Court in several decisions as discussed hereinabove also arise under the provisions of the amended Act.

**40.** Before parting, we find from the memo of the Section 34 application as filed on behalf of the respondent before the Commercial Court that the arbitral award in question was assailed essentially only on the ineligibility of the learned sole arbitrator in terms of Section 12(5) read with the Seventh Schedule of the ACA. We also find that there is no specific challenge to the findings rendered by the arbitral tribunal on any other grounds available under Section 34 of the ACA. Thus, necessarily the adjudication before the Commercial Court confined only to the issue of ineligibility of the learned sole arbitrator, being the only ground in that regard as canvassed on behalf of the respondent. It is in such context, the arbitral award was set aside by the impugned order passed by the Commercial Court. As a corollary, the adjudication of the present appeal remains confined on the issue of ineligibility of the learned sole arbitrator, as urged before us. It is in such context, we have rendered our observations in the foregoing paragraphs, in reaching to the conclusion in disposing of this appeal.

**41.** In the light of the above discussion, none of the contentions as urged by the respondent in supporting the impugned order passed by the Commercial

Court can be accepted. The impugned judgment and order is contrary to law. The challenge to the judgment and order dated 16 May 2023 passed by the Commercial Court in Civil M.A. No.8 of 2021 is quashed and set aside. The appeal accordingly stands allowed. No costs.

(ADVAIT M. SETHNA, J.)

(G. S. KULKARNI, J.)