



2026:DHC:1720



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

% **Judgment reserved on: 20.02.2026**
Judgment pronounced on: 26.02.2026

+ O.M.P. (COMM) 475/2024, CAV 546/2024, I.A. 44540/2024,
I.A. 2435/2025, I.A. 4546/2025

RAILWAYS BOARD, MINISTRY OF
RAILWAYS

.....Petitioner

Through: Mr. Shashank Garg, Sr. Adv.
with Mr. Husain Taqvi, Ms.
Nishtah Jain, Ms. Aradhya
Chaturvedi and Ms. Vidhi
Gupta, Advs.

versus

TITAGARH RAIL SYSTEMS LIMITED

.....Respondent

Through: Mr. Akhil Sibbal, Sr. Adv. with
Mr. Rishi Agarwal, Ms.
Aanchal Mullick, Mr. Daksh
Arora, Ms. Shubhi Agarwal,
Mr. Krishneshbapat and Mr.
Manan Bansal, Advs.

CORAM:
HON'BLE MR. JUSTICE AVNEESH JHINGAN

J U D G M E N T

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') is filed aggrieved of the arbitral award dated 05.08.2024 (hereinafter 'the award').



BRIEF FACTS

2. The brief facts are that the petitioner issued a notice inviting tender for 'Manufacture and Supply of BCNAHSM1 Wagons'. The respondent was the successful bidder. On 30.09.2020 a contract valuing Rs.499,56,48,000/- for 1652 wagons was awarded.

2.1 There was a dispute between the parties with regard to re-fixation of the delivery period, the imposition of liquidated damages (for short 'LD') and denial clause. The petitioner on 20.03.2023 short-closed the contract; cancelled the supply of balance 390 wagons and forfeited the bank guarantee.

2.2 On 29.05.2023, the respondent issued a notice under Section 21 of the Act and vide letter dated 11.08.2023 proposed the name of one arbitrator. Petition filed by the respondent under Section 11 of the Act was withdrawn on 03.10.2023. The respondent on 17.10.2023 consented for fast-track arbitration as provided in clause 2905(c)(ii)(a) of the Indian Railway Standard Conditions of Contract (for short 'IRS'). On 16.11.2023, the petitioner proposed four names of its serving employees for appointment as arbitrator and asked the respondent to suggest two names from the proposed list. On 24.01.2024, the respondent shortlisted two names. The petitioner on 30.01.2024 appointed its serving employee to be a sole arbitrator.

2.3 The award was passed allowing the claim of the respondent. The petitioner was directed to refund LD to the extent of Rs.5,19,15,870/- for supply of 272 wagons after 29.03.2022. The respondent was held entitled to price variation upto the date of actual supply with base month as May, 2019. The cancellation of the contract



was set aside and the respondent was to supply the balance 390 wagons with price variation of such supply with the base month as May, 2019. Hence, the present petition.

SUBMISSIONS OF THE PARTIES

3. Learned senior counsel for the petitioner contended that the arbitrator was appointed in contravention of Section 12 (5) of the Act, there was no express waiver in writing by the parties and the award is nullity. The notices issued by the respondent on 29.05.2023 and 11.08.2023 are relied upon to contend that the respondent had categorically stated that the applicability of Section 12(5) of the Act was not waived. Reliance is placed upon the decision of the Supreme Court in **Bhadra International (India) Pvt. Ltd. & Ors. v. Airports Authority of India, 2026 INSC 6** and on the Division Bench of this court in **Mahavir Prasad Gupta and Sons v. Govt. of NCT of Delhi, 2025 SCC OnLine Del 4241**.

4. *Per contra* by proposing four names of its serving employees and proceeding under clause 2905(a) of IRS which is only applicable in cases where Section 12(5) of the Act is waived, the petitioner agreed not to be subjected to rigours of Section 12(5) of the Act. The submission is by short listing two names from the proposed list and by consenting for adoption of the fast-track arbitration, the respondent also waived applicability of Section 12(5) of the Act. It is submitted that there is no prescribed language for waiver. The emphasis is that the petitioner was well-aware of the provisions of Section 12(5) of the Act and after appointing arbitrator under clause 2905(a) of IRS, on



being unsuccessful in the arbitration proceedings is now taking a u-turn.

ISSUE

5. The issue involved is whether in the facts and circumstances of the case there was compliance of proviso to Section 12(5) of the Act?

ANALYSIS

6. The Supreme Court in **Bhadra International (India) Pvt. Ltd.** (supra) dealt with the following three issues:

- “29.....i. Whether the sole arbitrator could be said to have become “*ineligible to be appointed as an arbitrator*” by virtue of sub-section (5) of Section 12 of the Act, 1996?
- ii. Whether the parties could be said to have waived the applicability of sub-section (5) of Section 12 of the Act, 1996, by way of their conduct, either expressed or implied?
- iii. Whether the appellants could have raised an objection to the appointment of the sole arbitrator for the first time in an application under Section 34 of the Act, 1996?”

Held:

- “123... i. The principle of equal treatment of parties provided in Section 18 of the Act, 1996, applies not only to the arbitral proceedings but also to the procedure for appointment of arbitrators. Equal treatment of the parties entails that the parties must have an equal say in the constitution of the arbitral tribunal.
- ii. Sub-section (5) of Section 12 provides that any person whose relationship with the parties or counsel, or the dispute, whether direct or indirect, falls within any of the categories



specified in the Seventh Schedule would be ineligible to be appointed as an arbitrator. Since, the ineligibility stems from the operation of law, not only is a person having an interest in the dispute or its outcome ineligible to act as an arbitrator, but appointment by such a person would be *ex facie* invalid.

- iii. The words “*an express agreement in writing*” in the *proviso* to Section 12(5) means that the right to object to the appointment of an ineligible arbitrator cannot be taken away by mere implication. The agreement referred to in the *proviso* must be a clear, unequivocal written agreement.
- iv. When an arbitrator is found to be ineligible by virtue of Section 12(5) read with the Seventh Schedule, his mandate is automatically terminated. In such circumstance, an aggrieved party may approach the court under Section 14 read with Section 15 for appointment of a substitute arbitrator. Whereas, when an award has been passed by such an arbitrator, an aggrieved party may approach the court under Section 34 for setting aside the award.
- v. In arbitration, the parties vest jurisdiction in the tribunal by exercising their consent in furtherance of a valid arbitration agreement. An arbitrator who lacks jurisdiction cannot make an award on the merits. Hence, an objection to the inherent lack of jurisdiction can be taken at any stage of the proceedings.”

7. The Division Bench of this court in **Mahavir Prasad Gupta and Sons** (supra) dealt with the following issues:

- “74.....a) When a party itself has unilaterally appointed the arbitrator, whether that party can object to



the unilateral appointment of the arbitrator at any stage during or after the arbitration proceedings?

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

The court concluded:

“84.....a) **Mandatory Requirement:** Any arbitration agreement providing unilateral appointment of the sole or presiding arbitrator is invalid. A unilateral appointment by any party in the arbitrations seated in India is strictly prohibited and considered as null and void since its very inception. Resultantly, any proceedings conducted before such unilaterally appointed Arbitral Tribunal are also nullity and cannot result into an enforceable award being against Public Policy of India and can be set aside under Section 34 of the Act and/or refused to be enforced under Section 36 of the Act.

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



conduct of participation in the proceedings. The proviso to Section 12(5) of the Act requires an ‘express agreement in writing’ and deemed waiver under Section 4 of the Act will not be applicable to the proviso to Section 12(5) of the Act.

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

d) Stage of Challenge: An objection to the lack of inherent jurisdiction of an arbitrator can be taken at any stage during or after the arbitration proceedings including by a party who has appointed the sole or presiding arbitrator unilaterally as the act of appointment is not an express waiver of the ineligibility under proviso to Section 12(5) of the Act. Such objection can be taken even at stage of challenge to the award under Section 34 of the Act or during the enforcement proceedings under Section 36 of the Act.”

8. The legal position is that under Section 12(5) read with Schedule VII of the Act an employee of the party in dispute is ineligible to be appointed as an arbitrator and cannot nominate or appoint any other person as an arbitrator. The unilateral appointment in absence of express agreement in writing between the parties to waive applicability of Section 12(5) of the Act is void *ab initio*. The



filing of the claim statement or participation in the arbitration proceedings cannot be construed to be waiver under the proviso to Section 12(5) of the Act. The unilateral appointment of the arbitrator can be objected to for the first time under Section 34 of the Act.

9. Clause 2905 of IRS deals with the appointment of the arbitrator. Sub-clause (a)(i) lays down the procedure for appointment of arbitrator where the applicability of Section 12(5) of the Act is waived. In cases of claim upto rupees one crore, a Gazetted Officer of Railways not below the rank of Junior Administrative Grade (for short 'JAG') is to be nominated by the General Manager (for short 'GM') as sole arbitrator.

9.1 Sub-clause (a)(ii) deals with the cases of claim exceeding rupees one crore. The tribunal shall consist of three Gazetted Railway Officers not below the rank of JAG or of two Gazette Railway Officers and a Retired Officer of the Railway having served not below the rank of Senior Administrative Grade Officer (for short 'SAG'). The Railways within sixty days of the demand for the arbitration shall send to contractor the names of at least four Gazetted Railways Officer which may include name(s) of Retired Officer(s). The contractor had to within thirty days shortlist at least two names out of the panel. The GM was obligated to appoint at least one of the nominee of the contractor, the balance arbitrators were to be appointed either from the panel or outside the panel and the presiding arbitrator was to be indicated. The exercise was to be completed within thirty days of the receipt of the names from the contractor.

9.2 Sub-Clause (b) lays down the procedure for appointment of



arbitrator in case the applicability of Section 12(5) of the Act is not waived. In cases involving claim upto Rs. 50 lakhs, the tribunal shall consist of a Retired Officer of the Railways not below the rank of SAG. The Railway within sixty days of receipt of the demand for arbitration has to propose to contractor at least four names of Retired Railway Officers for appointment as arbitrators. Within thirty days contractor has to suggest two names from proposed names and GM is to appoint at least one arbitrator out of nominees of the contractor. In cases involving claim of more than Rs.50 lakhs the tribunal shall consist of at least three retired Railways Officers not below the rank of SAG and a similar procedure as in clause 2905(b)(i) of IRS of sending four names and nomination by contractor was to be followed.

9.3 Clause 2905 (c)(ii)(a) provides that the parties by agreement in writing either before or at the time of the appointment of the arbitrator can agree for fast-track procedure of arbitration to be adopted for dispute resolution.

10. It is an admitted position of the parties that the serving employee of the Railways appointed as arbitrator was ineligible under Section 12(5) read with Schedule VII of the Act for appointment except by an express written agreement between the parties.

11. The respondent issued a notice dated 29.05.2023 for appointment of the arbitrator and stated that “Titagarh does not waive the provisions of Section 12(5) of the Arbitration and Conciliation Act, 1996”. While proposing the name of one arbitrator vide communication dated 11.08.2023, it was reiterated that “Titagarh does not waive the provisions of Section 12 (5) of the Arbitration and



Conciliation Act, 1996”. The petition under Section 11 of the Act filed by respondent was withdrawn on 03.10.2023. The respondent by letter dated 17.10.2023 consented for fast-track arbitration as provided under clause 2905(c)(ii)(a) of IRS. In none of the documents relied upon there is an express agreement in writing waiving the rigours of Section 12(5). There is no requirement under clause 2905(c)(ii)(a) of IRS that for fast-track arbitration, there has to be unilateral appointment of the arbitrator. The short-listing of two names from the four names proposed by the petitioner cannot be considered to be compliance of proviso to Section 12(5) of the Act, the waiver has to be specific and not to be implied from conduct.

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

13. The contention of learned senior counsel for the respondent that by short-listing of two names by the respondent out of the list proposed by the petitioner there was an express agreement for waiver of Section 12(5) of the Act, is ill-founded. In the letter dated 24.01.2024, wherein two names were short-listed, there is no statement that the applicability of Section 12(5) of the Act is waived. It is mentioned therein that the respondent withdraws the letter dated 29.12.2023. This letter has not been produced by either party and its



contents are not known. On a specific query during the hearing, learned senior counsel for the parties on instructions submitted that this letter is not available with either of the parties.

14. There being no prescribed format for express agreement in writing shall not mean that the waiver can be inferred by implication or through conduct. It would be relevant to quote following paragraph from **Bhadra International (India) Pvt. Ltd.** (supra).

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

15. The argument of the respondent that the petitioner by proceeding under clause 2905(a) of IRS which was applicable only in cases where Section 12(5) of the Act has been waived off had exercised waiver under proviso to Section 12(5) of the Act, lacks merit. For accepting the plea that clause 2905(a) of IRS was applicable, it is to be seen that there was an express written agreement between the parties for waiver of rigours of Section 12(5) of the Act or not. The contention that the petitioner waived the right to object to the applicability of Section 12(5) of the Act cannot be accepted, relying upon the fact that the petitioner proposed the names of four serving employees for appointment of the arbitral tribunal. The right to object to the ineligibility of the arbitrator cannot be taken away from the



party appointing the arbitrator for having appointed the arbitrator. The phrase used in proviso to Section 12(5) of the Act has a clear mandate of an express agreement in writing. It would be fruitful to quote the following paragraphs from **Mahavir Prasad Gupta and Sons** (supra):

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

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

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



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

15.1 Another aspect to be considered is that under clause 2905(a) of IRS in cases involving claim above one crore, an arbitral tribunal consisting of three members was to be constituted but in this case the sole arbitrator was appointed contrary to the clause.

16. The issue canvassed that the petitioner after making the appointment of the arbitrator and upon failure in the arbitration proceedings has taken a u-turn was taken note of by the Supreme Court in **Bhadra International (India) Pvt. Ltd.** (supra). It was observed that to avoid such a situation the parties must make an endeavour to enter into an express written agreement as per proviso to Section 12(5) of the Act so as to prevent such a misuse. The following paragraph is reproduced below from the judgment:

“97. One could argue that a miscreant party may participate in the arbitral proceedings up to the passing of the award, despite having full knowledge of the arbitrator's ineligibility. While after an adverse award is rendered, such a party may then seek to challenge it with a view to having it set aside. Such an apprehension is



reasonable, however, to obviate the possibility of such misuse, the party making unilateral appointment must endeavour to enter into an express written agreement as stipulated in the *proviso* to Section 12(5), so as to safeguard the proceedings from being rendered futile.”

17. There cannot be any doubt that the Railway Board inspite the amendment to Section 12(5) of the Act in the year 2016 continues with clauses providing for appointment of its serving employees or ex-employees as arbitrators. Despite the two communications on record that the respondent was not waving the applicability of Section 12(5) of the Act the petitioner not only proceeded to appoint a serving employee of the Railways as the arbitrator but waited for outcome of arbitration and thereafter raised this objection in the petition under Section 34 of the Act. Be that as it may, the law has to take its own course irrespective of the conduct adopted by the Railways.

18. The reliance of the learned senior counsel for the respondent on the decision of the Bombay High Court in **R.B. Krishnani v. STEM Water Distribution and Infrastructure Com. Pvt. Ltd.** 2025 SCC OnLine Bom 1518 is of no help. The decision of the Bombay High Court is prior to the decision of the Supreme Court in **Bhadra International (India) Pvt. Ltd.** (supra). The Bombay High Court to conclude that proviso to Section 12(5) of the Act was complied with relied upon the participation of objecting party in the arbitration proceedings, not taking recourse to challenge the appointment under Section 14 of the Act and giving acquiescence to the extension of the mandate of the arbitrator. The Supreme Court in **Bhadra International (India) Pvt. Ltd.** (supra) held that the objection can be



raised for the first time under Section 34 of the Act, the participation in the arbitration proceedings cannot be considered as a waiver of the right to object to the appointment of the arbitrator and that there has to be an express agreement in writing. The waiver cannot be by implication or by conduct of the parties. Moreover, all earlier decisions of the High Courts contrary to the issues decided by the Apex Court were overruled.

19. The appointment of a serving employee as an arbitrator falls within the teeth of Section 12(5) read with schedule VII of the Act. The appointment being void *ab initio* rendered impugned award nullity. The petition is allowed and the award is set aside. Pending applications stand disposed of.

AVNEESH JHINGAN, J.

FEBRUARY 26, 2026/Pa

Reportable:- **Yes**