



2026:DHC:8252-DB



\$~

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

%

Judgment reserved on: 10.09.2026***Judgment pronounced on: 25.09.2026******Judgment uploaded on: 25.09.2026***# **CNR No. DLHC010430852026**+ **FAO(OS) (COMM) 246/2026, CM APPL. 61809/2026 and CM APPL. 61810/2026****M/S AHLUWALIA CONTRACTS (INDIA) LIMITED (ACIL)**
.....Appellant**Through: Mr. Anil Airi, Sr. Adv. with
Mr. Dhruv Rohatgi, Ms.
Chandrika Sachdev, Mr. Dhruv
Kumar & Mr. Harsh Gautam,
Advs.****versus****AIRPORTS AUTHORITY OF INDIA (AAI)Respondent****Through: Mr. Vaibhav Kalra, Ms. Neha
Bhatnagar & Mr. Deepankar
Singh, Advs.****CORAM:****HON'BLE MR. JUSTICE ANIL KSHETARPAL****HON'BLE MR. JUSTICE VIMAL KUMAR YADAV****J U D G M E N T****ANIL KSHETARPAL, J.:**

1. The present Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as the 'A&C Act'], has been preferred by the Appellant, M/s Ahluwalia Contracts (India) Ltd. ('ACIL'), assailing the judgment dated 20.07.2026 [hereinafter referred to as 'Impugned Judgment'] passed by the learned Single Judge in OMP (COMM.) No.512/2023, whereby the petition preferred



2026:DHC:8252-DB



by the Respondent [hereinafter referred to as ‘Section 34 Petition’], Airports Authority of India (‘AAI’), under Section 34 of the A&C Act was allowed and the arbitral award dated 10.08.2023 [hereinafter referred to as ‘Award’] was set aside.

2. The controversy in the present Appeal is confined to the constitution of the Arbitral Tribunal and, in particular, the appointment of the Sole Arbitrator by AAI. The principal grievance of the Appellant is that the learned Single Judge, while entertaining the challenge under Section 34 of the A&C Act, proceeded to examine the validity of the appointment of the Sole Arbitrator on the basis of the judgment of the Supreme Court in ***Bhadra International (India) Pvt. Ltd. & Ors. v. Airports Authority of India***¹[hereinafter referred to as ‘***Bhadra International***’], although no challenge to the appointment of the Sole Arbitrator had been raised by AAI either during the arbitral proceedings or in its Section 34 Petition.

3. The Appellant contends that the factual premise underlying ***Bhadra International*** was materially different, inasmuch as the challenge therein was raised by the party which had not participated in or made the unilateral appointment of the arbitrator. According to the Appellant, the principle laid down therein cannot be mechanically extended to a case where the very party which had appointed the Sole Arbitrator itself seeks to question the appointment, after having participated in the arbitral proceedings without demur and after the Award had been rendered.

¹ 2026 INSC 6



2026:DHC:8252-DB



FACTUAL MATRIX:

4. The facts, insofar as relevant for adjudication of the present Appeal, may briefly be noticed.

5. AAI awarded the work to ACIL on 21.01.2009, pursuant to which the Contract Agreement was executed between the parties on 02.02.2009. The stipulated date of commencement of the work was 31.01.2009. Disputes subsequently arose between the parties, *inter alia*, in relation to the levy of compensation by AAI. AAI issued a Show Cause Notice dated 18.09.2015 proposing levy of compensation, to which ACIL submitted its reply on 06.10.2015. Thereafter, AAI, *vide* communication dated 29.12.2015, levied compensation of Rs.1,45,50,192/- retrospectively.

6. ACIL thereafter invoked the contractual dispute resolution mechanism and, on 07.05.2016, requested AAI to constitute the Dispute Resolution Board [hereinafter referred to as 'DRB'] in terms of Clause 57(a)(i) of the Contract Agreement. The DRB submitted its recommendations on 05.10.2017. AAI, however, conveyed its decision on 01.03.2019, rejecting the review of the delay analysis and confirming the levy of compensation.

7. Aggrieved by the aforesaid decision, ACIL, *vide* notice dated 16.04.2019, invoked arbitration under Clause 57(b) of the Contract Agreement and requested AAI to appoint an independent arbitrator for adjudication of the disputes between the parties.



2026:DHC:8252-DB



8. Pursuant thereto, AAI, *vide* email dated 10.05.2019, intimated the proposed Sole Arbitrator regarding his appointment and called upon him to convey his consent to the appointment. AAI also sought the requisite declaration from the proposed Arbitrator in terms of the Fifth and Sixth Schedules to the A&C Act. The proposed Sole Arbitrator furnished his consent and declaration under Section 12(1)(b) of the A&C Act on 12.05.2019. Thereafter, *vide* letter dated 13.05.2019, AAI formally intimated the appointment of Shri S.C. Gupta, Chief Engineer (Retd.), CPWD, as the Sole Arbitrator to adjudicate the disputes between the parties.

9. The Sole Arbitrator entered upon the reference and conveyed his acceptance of the appointment on 26.05.2019. During the course of the arbitral proceedings, issues also arose regarding reference of additional claims and the counter-claims of AAI. The Sole Arbitrator sought appropriate approval from the competent authority of AAI for reference of such claims. AAI thereafter took steps for reference of Claim No. 5.7 and its counter-claims to the Sole Arbitrator.

10. The arbitral proceedings continued from 2019 to 2023. Both parties participated in the proceedings and, as per the record placed before this Court, no objection was raised by either party to the appointment of the Sole Arbitrator or alleging any bias on his part. The parties thereafter completed their respective pleadings and arguments before the Sole Arbitrator.

11. On 10.08.2023, the Sole Arbitrator rendered the Award. Claim No.1 was allowed and Claim No.4 was partly allowed in favour of



2026:DHC:8252-DB



ACIL, along with interest under Claim No.5. Claim Nos.2, 3 and 6 as well as the counter-claims of AAI were rejected.

12. Aggrieved by the Award, AAI preferred the Section 34 Petition before the learned Single Judge in November 2023. The challenge was founded on the merits of the award, particularly with respect to the consideration of Claim Nos.1, 4 and 5 and the rejection of the counter-claims. Significantly, no ground challenging the appointment of the Sole Arbitrator, including on the basis of Section 12(5) read with the Seventh Schedule to the A&C Act, was raised in the Section 34 proceedings.

13. The Section 34 Petition was thereafter taken up for hearing on 13.07.2026. The arguments advanced on behalf of AAI remained confined to the merits of the claims and counter-claims, and no application or objection was raised by AAI concerning the unilateral appointment or constitution of the Arbitral Tribunal. It was during the course of the hearing that the learned Single Judge, *suomotu*, raised a query regarding the appointment of the Sole Arbitrator and adjourned the matter for further consideration.

14. On 20.07.2026, after hearing the Appellant on the aspect of the appointment of the Sole Arbitrator, the learned Single Judge allowed the Section 34 Petition and set aside the Award. While doing so, the learned Single Judge placed reliance, *inter alia*, upon the judgment of the Supreme Court in **Bhadra International** and the decisions of this Court in **Railways Board, Ministry of Railways v. Titagarh Rail**



2026:DHC:8252-DB



*Systems Ltd.*²; and *Engineering Projects (India) Ltd. v. Allied Construction*³.

15. It is in the aforesaid circumstances that the present Appeal has been preferred. The Appellant principally assails the learned Single Judge's decision to set aside the Award on a ground concerning the appointment of the Sole Arbitrator, notwithstanding that the party which had itself appointed the Sole Arbitrator had not raised any such objection either before the Arbitral Tribunal or in the Section 34 proceedings.

CONTENTIONS OF THE PARTIES:

16. Heard learned senior counsel and learned counsel representing the respective parties, and with their able assistance, perused the paper book.

17. Learned senior counsel representing the Appellant has made the following submissions:

- i. Learned Single Judge erred in applying the judgment in ***Bhadra International*** to the facts of the present case. ***Bhadra International*** concerned a challenge to a unilateral appointment raised by the party which had not itself appointed the Arbitrator and was consequently aggrieved by being denied an equal say in the constitution of the Arbitral Tribunal. The present case, according to the Appellant, stands on a materially different footing, since it was AAI itself which appointed the Sole

² 2026:DHC:1720

³ 2026:DHC:2540



Arbitrator and subsequently participated in the arbitral proceedings without raising any objection to his appointment.

ii. The expression '*aggrieved party*', in the context in which the Supreme Court considered the issue in ***Bhadra International***, necessarily refers to a party aggrieved by the manner in which the Arbitral Tribunal came to be constituted. A distinction must therefore be maintained between a party which is aggrieved by the appointment of an arbitrator and a party which, having accepted the constitution of the Tribunal and participated in the arbitral proceedings, is merely aggrieved by the ultimate award.

iii. AAI had consciously and expressly appointed Shri S.C. Gupta as the Sole Arbitrator. Prior to the appointment, AAI had itself called upon the proposed Arbitrator to furnish the requisite declaration under the amended provisions of the A&C Act. The Arbitrator thereafter furnished his declaration under Section 12(1)(b), and AAI proceeded with the arbitration without raising any objection either to the declaration or to the constitution of the Tribunal.

iv. The arbitration continued for nearly four years, during which both parties participated in the proceedings, including in relation to the reference of additional claims and counter-claims. At no stage during this period was any objection raised by AAI to the appointment of the Sole Arbitrator or any allegation made regarding his independence or impartiality. AAI could not, after having participated in the arbitral proceedings and suffered an



Award adverse to it, seek to invalidate the entire arbitral process on the basis of a defect in the very appointment which it had itself made.

v. Learned Single Judge travelled beyond the scope of the Section 34 proceedings in examining the appointment of the Sole Arbitrator. AAI's Section 34 Petition did not contain any ground under Section 12(5) read with the Seventh Schedule of the A&C Act, and the challenge before the learned Single Judge was confined to the merits of the claims and counter-claims. The issue concerning the appointment was raised by the learned Single Judge *suomotu* during the hearing and was thereafter made the basis for setting aside the Award.

vi. The principle underlying Section 12(5) of the A&C Act is intended to secure the independence and impartiality of the Arbitral Tribunal and, in the context of a unilateral appointment, principally protects the party which has not participated in the appointment.

18. *Per contra*, learned counsel representing AAI, while supporting the Impugned Judgment, has made the following submissions:

i. The mandate contained in Section 12(5) of the A&C Act, as interpreted by the Supreme Court in ***Bhadra International***, cannot be defeated merely on the basis of the subsequent conduct of the parties or their participation in the arbitral proceedings.



ii. Learned Single Judge was, therefore, justified in examining the validity of the appointment of the Sole Arbitrator and in applying the principles laid down by the Supreme Court in ***Bhadra International***. The question of the validity of the constitution of the Arbitral Tribunal is distinct from the merits of the Award and, if the Tribunal itself was not validly constituted, the resulting award could not be sustained.

iii. The fact that the objection to the appointment was not specifically raised in the Section 34 Petition does not preclude the Court from examining the legality of the constitution of the Arbitral Tribunal where the defect goes to the root of the proceedings. Reliance is accordingly placed upon the reasoning adopted by the learned Single Judge in the Impugned Judgment.

19. No other submission has been advanced by learned senior counsel and learned counsel representing the respective parties.

ANALYSIS AND FINDINGS:

20. This Court has considered the submissions advanced by learned senior counsel and learned counsel representing the respective parties and has perused the material placed on record.

21. As already noticed hereinabove, the question which arises for consideration is whether, after the enforcement of the Arbitration and Conciliation (Amendment) Act, 2015, the appointment of the Arbitral Tribunal by one of the parties, in the absence of an express agreement



in writing subsequent to the disputes having arisen, would amount to waiver of the applicability of Section 12(5) of the A&C Act.

22. The answer to the aforesaid question is no longer *res integra*. The statutory scheme contained in Section 12(5) of the A&C Act, as also the interpretation placed thereon by the Supreme Court and this Court, makes it clear that the waiver contemplated by the proviso to Section 12(5) is of a particular and specific nature. It cannot be inferred merely from the conduct of the parties, from the fact that a party itself appointed the arbitrator, or from the participation of the parties in the arbitral proceedings. Waiver, in a general sense, may in an appropriate case be inferred from conduct or from other circumstances. However, where the statute itself prescribes the manner in which a party may waive the applicability of a statutory provision, the Court cannot substitute the statutorily prescribed mode with an implied waiver. The proviso to Section 12(5) expressly requires an agreement in writing, subsequent to the disputes having arisen between the parties.

23. Section 12(5) of the A&C Act, as introduced by the Arbitration and Conciliation (Amendment) Act, 2015, reads as under:

“12. Grounds for challenge

...

(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.”



24. On a plain reading of the aforesaid provision, it becomes evident that the legislature has consciously prescribed three essential requirements for waiver: (i) the waiver must be subsequent to the disputes having arisen between the parties; (ii) it must be by agreement between the parties; and (iii) such agreement must be express and in writing. Thus, the statutory provision does not contemplate a waiver by implication or by conduct.

25. The aforesaid interpretation has been authoritatively settled by the Supreme Court in **Bhadra International**. The Supreme Court, after examining the scope and effect of the proviso to Section 12(5) of the A&C Act, has explained the requirements of such waiver in the following terms:

“75. The essentials of the proviso to Section 12(5) are:-

- i. The parties can waive their right to object under sub-section (5) of Section 12;*
- ii. The right to object under the sub-section can be waived only subsequent to a dispute having arisen between the parties;*
- iii. The waiver must be in the form of an express agreement in writing.*

78. What flows from the aforesaid is when a right exists, i.e., the right to object to the appointment of an ineligible arbitrator in terms of Section 12(5), such a right cannot be taken away by mere implication. For a party to be deprived of this right by way of waiver, there must be a conscious and unequivocal expression of intent to relinquish it. Needless to say, for a waiver to be valid, it is necessary that the actor demonstrates the intention to act, and for an act to be intentional, the actor must understand the act and its consequences.



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. "

26. The significance of the aforesaid decision becomes apparent from the facts of **Bhadra International** itself. In that case, the Arbitrator had, in Procedural Order No.1, specifically recorded that none of the parties had any objection to his appointment as the Sole Arbitrator. Despite such factual position, the correctness of which was not disputed, the Supreme Court held that such an observation recorded in the procedural order could not amount to waiver, particularly when the statute envisages waiver only by an express agreement in writing subsequent to the disputes having arisen between the parties.

27. Thus, the mere fact that a party may have proceeded with the arbitration with knowledge of the constitution of the Arbitral Tribunal cannot be elevated to an express agreement in writing as contemplated by the proviso to Section 12(5) of the A&C Act. The statutory requirement is not satisfied by acquiescence, participation or conduct. The requirement is of an agreement, expressed in writing, between the parties after the disputes have arisen.



28. The aforesaid principle has also been applied by the Division Bench of this Court in **Titagarh Rail Systems**(*supra*). The Division Bench has specifically rejected the contention that following the contractual procedure for appointment of an arbitrator, by itself, could result in waiver of the applicability of Section 12(5) of the A&C Act. The relevant observations read as under:

“27. While it may be true that the procedure followed by the parties was that which was envisaged, in the contract between them, as applying where there was waiver of Section 12(5), following of the procedure cannot by itself result in such waiver. The argument effectively puts the cart before the horse. There must, in the first instance, be waiver of the applicability of Section 12(5) by written agreement in writing as required by the proviso to the said clause read with the decision in Bhadra International, and, only thereafter, if there exists such express waiver in writing, would the arbitral procedure envisaged in that situation as contained in Clause 2905(a)(ii) apply. The situation cannot be read in reverse. We cannot accept the argument that by invoking the procedure applicable in a case of waiver of Section 12(5), Section 12(5) stands waived, despite the absence of any written agreement in writing to that effect.

28. In fact, the situation which exists in the present case is that the very invocation of the procedure, envisaged in the contract between the parties as being applicable in a case in which Section 12(5) stood waived, was itself illegal. That procedure applies only where there is waiver of the applicability of Section 12(5). Inasmuch as there was no such waiver in the present case, the procedure itself would not apply. By erroneously invoking the procedure which applies where Section 12(5) has been waived, waiver of Section 12(5) cannot be implied.”

29. The principle emerging from the aforesaid decisions is, therefore, clear. The fact that a party has acted in accordance with the contractual mechanism for appointment cannot, in the absence of an express agreement in writing subsequent to the disputes, constitute waiver of the applicability of Section 12(5) of the A&C Act. The contractual mechanism cannot be permitted to operate in a manner contrary to the mandatory statutory requirement.



30. In the present case, it is not in dispute that AAI appointed the Sole Arbitrator in exercise of the power conferred upon it under Clause 57(c) of the Contract Agreement. It is also not in dispute that the appointment was made after the disputes had arisen between the parties. However, there is admittedly no express agreement in writing between the parties, subsequent to the disputes having arisen, whereby the applicability of Section 12(5) of the A&C Act was waived.

31. The Appellant seeks to overcome this statutory requirement by placing reliance upon the fact that AAI itself appointed the Sole Arbitrator, participated in the arbitral proceedings for several years and did not raise any objection to the constitution of the Arbitral Tribunal until after the Award was rendered. However, these circumstances, even taken cumulatively, cannot constitute the express agreement in writing mandated by the proviso to Section 12(5) of the A&C Act.

32. In this regard, reliance placed by the Appellant upon the fact that it was AAI itself which appointed the Sole Arbitrator is of no avail. The precise question whether a party which has itself made the unilateral appointment can subsequently object to the appointment has also been considered by the Division Bench of this Court in ***Mahavir Prasad Gupta and Sons v. Govt. of NCT of Delhi***⁴. The Division Bench considered the question whether the act of unilateral appointment itself could constitute an express agreement to waive the statutory ineligibility and held as under:

“79. Hence, exercise of power to unilaterally appoint the arbitrator by a party cannot be termed as express agreement to waive the invalidity

⁴ 2025 SCC OnLine Del 4241



of the arbitration agreement providing for unilateral appointment. For waiver under Section 12(5) of the Act after the dispute have arisen, the parties are required to consciously agree in writing to waive the ineligibility of the arbitrator. Grounds of ineligibility of the arbitrator under Seventh Schedule are derived from Red List of IBA Rules on Conflict of Interest in International Commercial Arbitration. The Act was as amended in 2015 to provide a detailed framework to address arbitrator bias. This framework includes the Fifth and Seventh Schedules, which draw from the Orange and Red Lists of the IBA Guidelines, respectively. The Fifth Schedule requires arbitrators to disclose any circumstances that might reasonably affect their impartiality, including relationships with the parties, counsel, or subject matter of the dispute. The Seventh Schedule reflecting the Red List, outlines scenarios of relationship conflict that would result in de jure ineligibility of an arbitrator.”

33. The aforesaid decision is of particular relevance to the submission advanced by learned senior counsel representing the Appellant. The mere fact that the appointment was made by AAI does not amount to an express agreement in writing by both parties to waive the applicability of Section 12(5) of the A&C Act. The act of appointment and the statutory waiver contemplated by the proviso operate in distinct fields and cannot be equated with each other.

34. Significantly, the Division Bench in ***Mahavir Prasad Gupta*** (*supra*) ultimately upheld the setting aside of the award on the ground of unilateral appointment. The Supreme Court thereafter declined to interfere with the judgment of the Division Bench in the Special Leave Petition. The aforesaid position thus lends further consistency to the interpretation adopted by this Court regarding the mandatory nature of the proviso to Section 12(5) of the A&C Act.

35. The question posed before this Court is also directly answered by the judgment of the Supreme Court in ***Bharat Broadband Network***



Ltd. v. United Telecoms Ltd.⁵. In the said case, the Supreme Court considered the precise question as to whether the appointment of an ineligible arbitrator by the party having the power of appointment could itself amount to an express waiver under the proviso to Section 12(5) of the A&C Act. The Supreme Court held that it could not.

36. The Supreme Court, in Paragraph No.20 of **Bharat Broadband** (*supra*), interpreted the expression “express agreement in writing” occurring in the proviso to Section 12(5) of the A&C Act in the following terms:

“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 Contract Act, 1872 becomes important. It states:

“9. Promises, express and implied.—Insofar as the proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar 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. The appointment letter which is relied upon by the High Court as indicating an express agreement on the facts of the case is dated 17-1-2017. On this date, the Managing

⁵ (2019) 5 SCC 755



Director of the appellant was certainly not aware that Shri 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. Shri Khan's invalid appointment only became clear after the declaration of the law by the Supreme Court in TRF Ltd. [TRF Ltd. v. EnergoEngg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] which, as we have seen hereinabove, was only on 3-7-2017. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an application on 7-10-2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in TRF Ltd. [TRF Ltd. v. EnergoEngg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] and asking him to declare that he has become de jure incapable of acting as an arbitrator. Equally, the fact that a statement of claim may have been filed before the arbitrator, would not mean that there is an express agreement in words which would make it clear that both parties wish Shri Khan to continue as arbitrator despite being ineligible to act as such. This being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2) and Section 16(2) of the Act to the facts of the present case, and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator. The judgment under appeal is also incorrect in stating that there is an express waiver in writing from the fact that an appointment letter has been issued by the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate.”

37. The aforesaid decision is directly relevant to the facts of the present case. The Supreme Court has expressly rejected the proposition that the party which itself appoints the arbitrator is thereby precluded from questioning the validity of such appointment. More importantly, the Supreme Court has made it clear that the appointment letter itself cannot be treated as an express agreement in writing under the proviso to Section 12(5) of the A&C Act.

38. The submission of learned senior counsel representing the Appellant that the decision in ***Bhadra International*** ought to be



confined to a case where the objection is raised by the party which did not make the appointment, therefore, cannot be accepted. The subsequent decision of the Division Bench in ***Mahavir Prasad Gupta (supra)*** has expressly examined this very issue, and the principle has thereafter received further support from the Supreme Court. The statutory requirement of an express agreement in writing does not depend upon which of the parties made the appointment.

39. Equally, the participation of AAI in the arbitral proceedings cannot result in a different conclusion. The Supreme Court in ***Bhadra International*** has specifically recognised that even conduct which may otherwise appear to demonstrate acceptance of the Arbitral Tribunal cannot substitute the express written agreement contemplated by the proviso. The reason is apparent from the statutory language itself. Section 12(5) of the A&C Act constitutes a specific statutory departure from the general principle of waiver by conduct.

40. In the present case, the record discloses participation by AAI in the arbitral proceedings from 2019 until the passing of the Award in 2023. However, there is no material to demonstrate that, subsequent to the disputes having arisen, the parties entered into any express agreement in writing whereby they consciously waived the applicability of Section 12(5) of the A&C Act. Participation in the arbitral proceedings, submission of pleadings, consideration of claims and counter-claims, or failure to raise an objection before the Arbitral Tribunal cannot be treated as a substitute for such statutory waiver.



2026:DHC:8252-DB



41. The contention that the objection was not raised in the Section 34 Petition also does not assist the Appellant. An objection founded upon the inherent lack of jurisdiction of an Arbitral Tribunal, where the statutory conditions rendering the arbitrator ineligible are attracted, is not converted into a valid appointment merely because the objection was not raised at an earlier stage. The Supreme Court in ***Bhadra International*** has specifically recognised that an objection going to the inherent jurisdiction of the Arbitral Tribunal may be raised at the stage of a challenge to the Award under Section 34.

42. In the present case, therefore, the learned Single Judge was justified in examining the validity of the constitution of the Arbitral Tribunal. Once the appointment of the Sole Arbitrator was found to be contrary to the mandatory provisions of Section 12(5) read with the Seventh Schedule of the A&C Act, and there was no express agreement in writing subsequent to the disputes waiving the applicability of Section 12(5), the resulting Award could not be sustained.

43. It is also relevant to note that the learned Single Judge has set aside the Award only on the issue which forms the subject matter of the present Appeal, namely, the validity of the unilateral appointment of the Sole Arbitrator. The learned Single Judge has not proceeded to examine or determine the merits of the claims adjudicated by the Arbitral Tribunal.

44. Having regard to the statutory mandate contained in Section 12(5) of the A&C Act, the authoritative interpretation placed upon the



2026:DHC:8252-DB



proviso by the Supreme Court in ***Bharat Broadband (supra)*** and ***Bhadra International***, and the consistent view taken by the Division Bench of this Court in ***Mahavir Prasad Gupta (supra)*** and ***Titagarh Rail Systems (supra)***, this Court finds no merit in the submissions advanced on behalf of the Appellant.

CONCLUSION:

45. Consequently, this Court finds no error in the conclusion reached by the learned Single Judge in setting aside the Award on the aforesaid ground.

46. Finding no merit in the present Appeal, the same is dismissed. The pending applications also stand closed.

ANIL KSHETARPAL, J.

VIMAL KUMAR YADAV, J.

SEPTEMBER 25, 2026

sp/shah