



2026:DHC:3390



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% **Date of decision: 23.04.2026**+ O.M.P. (COMM) 273/2018 & I.A. 8624/2018
BHARAT HEAVY ELECTRICALS LIMITEDPetitionerThrough: Ms. Mani Gupta & Ms. Sonali
Jain, Advs.

versus

OFFSHORE INFRASTRUCTURE LIMITEDRespondent

Through: Mr. Gaurav Dudeja, Adv.

CORAM:**HON'BLE MR. JUSTICE AVNEESH JHINGAN****AVNEESH JHINGAN, J. (ORAL)**

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') seeking setting aside of arbitral award dated 21.12.2017.
2. The short issue is that whether the unilateral appointment of the sole arbitrator is in violation of amended Section 12(5) of the Act.
3. The brief facts are that the petitioner was awarded a work contract by M/s HPCL Mittal Energy Limited, valuing Rs.15,97,99,800/-. The petitioner further gave a sub contract to the respondent vide Letter of Intent dated 28.05.2010. Dispute arose between the parties to the *lis*. Clause 33 of the General Conditions of Contract (for short 'GCC') reproduced below provides for dispute resolution through arbitration.

“33.0 ARBITRATION: All disputes between the parties to the contract arising out of or in relation to the contract, other than those for which the decision of the Engineer or any other person is by the contract expressed to be final



and conclusive, shall after written notice by either party to the contract to the other party, be referred to sole arbitration of the General Manager or his nominee. The arbitration shall be conducted in accordance with the provisions of the Arbitration and Reconciliation Act, 1996. The parties to the contract understand and agree that it will be no objection that the General Manager or the person nominated as Arbitrator had earlier in his official capacity to deal directly or indirectly with the matters to which the contract relates or that in the course of his official duties had expressed views on all or any of the matters in dispute or difference. The award of the Arbitrator shall be final and binding on the parties to this contract. In the event of the Arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason or his award being set aside by the Court for any reason, it shall be lawful for the General Manager or his successor, as the case may be, either to act himself as the Arbitrator or to appoint another Arbitrator in place of the outgoing Arbitrator in the manner aforesaid. The Arbitrator may, from time to time, with the consent of both the parties to the contract, enlarge the time for making the award. Work under the contract shall be continued during the arbitration proceedings. The venue of the arbitration shall be the place from which the contract is issued or such other place as the Arbitrator at his discretion may determine.”

3.1 The respondent issued a notice invoking arbitration on 28.12.2013 and the petitioner vide letter dated 10.02.2014 appointed the nominee of the General Manager as the sole arbitrator. The arbitral proceedings culminated in award dated 11.01.2016. The award was challenged by both parties before this court under Section 34 of the Act and was set aside on 19.10.2016 but liberty was granted to the parties to proceed with fresh arbitration. A notice dated 10.11.2016 under Section 21 of Act was issued by the respondent and the



petitioner vide communication dated 13.12.2016 in pursuance of Clause 33 appointed the nominee of the General Manager as the sole arbitrator. Aggrieved of the impugned award, the present petition is filed.

4. Learned counsel for the petitioner contends that the unilateral appointment of the arbitrator falls in the teeth of the amended Section 12(5) of the Act. The decision rendered by the Supreme Court in **Bhadra International (India) Pvt. Ltd. & Ors. v. Airports Authority of India**, 2026 INSC 6 is relied upon.

5. *Per contra*, the major part of the award has not been challenged by the petitioner, the payments in pursuance thereto have been made and therefore, the impugned award should be set aside only to the extent of the issues under challenge. It is submitted that during the pendency of the petition under Section 11 of the Act filed by the respondent, an arbitrator was appointed by the petitioner pursuant to which the petition was disposed of thereby confirming the said appointment by this Court. It is contended that the issue of violation of Section 12(5) of the Act was neither raised before the arbitrator nor in this petition.

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

6.1 The Supreme Court in **Bhadra International** (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.”

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

- “74...a) When a party itself has unilaterally appointed the arbitrator, whether that party can object to the unilateral appointment of the arbitrator at any stage during or after the arbitration proceedings?
- b) If a party has unilaterally appointed an arbitrator, can that party be deemed to have given express waiver in writing under Section 12(5) of the Act while making the appointment itself?”

The court concluded:

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



- b) **Deemed Waiver:** The proviso to Section 12(5) of the Act requires an express agreement in writing. The conduct of the parties, no matter how acquiescent or conducive, is inconsequential and cannot constitute a valid waiver under the proviso to Section 12(5) of the Act. The ineligibility of a unilaterally appointed arbitrator can be waived only by an express agreement in writing between the parties after the dispute has arisen between them. Section 12(5) of the Act is an exception to Section 4 of the Act as there is no deemed waiver under Section 4 of the Act for unilateral appointment by conduct of participation in the proceedings. The proviso to Section 12(5) of the Act requires an ‘express agreement in writing’ and deemed waiver under Section 4 of the Act will not be applicable to the proviso to Section 12(5) of the Act.
- c) **Award by an Ineligible Arbitrator is a Nullity:** An award passed by a unilaterally appointed arbitrator is a nullity as the ineligibility goes to the root of the jurisdiction. Hence, the award can be set aside under Section 34(2)(b) of the Act by the Court on its own if it ‘finds that’ an award is passed by unilaterally appointed arbitrator without even raising such objection by either party.
- d) **Stage of Challenge:** An objection to the lack of inherent jurisdiction of an arbitrator can be taken at any stage during or after the arbitration proceedings including by a party who has appointed the sole or presiding arbitrator unilaterally as the act of appointment is not an express waiver of the ineligibility under proviso to Section 12(5) of the Act. Such objection can be taken even at stage of challenge to the award under Section 34 of the Act or during the enforcement proceedings under Section 36 of the Act.”

7. After amendment of Section 12(5) of the Act an employee of a party in dispute can neither be appointed arbitrator nor can nominate



or appoint any other person as an arbitrator. The unilateral appointment in absence of an express agreement in writing by the parties to waive applicability of Section 12(5) of the Act is void *ab initio*. The filing of the statement of claim or participation in the arbitral proceedings cannot be construed as waiver under the proviso to Section 12(5) of the Act. The unilateral appointment of the arbitrator can be objected to for the first time under Section 34 of the Act.

8. Clause 33 of GCC provides that in case of a dispute between the parties the matter shall be referred for arbitration of the General Manager or a nominee appointed by it. The law is well settled that the official of a party to the dispute can neither be appointed as an arbitrator nor can appoint an arbitrator. In the case in hand, the arbitrator was appointed by the petitioner.

9. The respondent in the notice dated 10.11.2016 expressly stated the amendment of Section 12(5) of the Act and the effects thereof. Once there is no express consent in writing given under the proviso to Section 12(5) of the Act, the rigours of the amended provision of Section 12(5) of the Act are applicable. The appointment of the arbitrator is in violation of the amended provisions of Section 12(5) of the Act render the impugned award to be a nullity.

10. The prayer made by the respondent for partial setting aside of the impugned award cannot be accepted in view of the fact that the appointment of the arbitrator itself is void and the impugned award passed in pursuance to such appointment is a nullity and cannot be sustained in parts.



11. The submission that the issue was not raised before the arbitrator lacks merit. The Supreme Court in **Bhadra International** (supra) has held that the issue goes to the root of jurisdiction and can be raised for the first time under Section 34 of the Act. Moreover, the issue of jurisdiction can be raised at any stage.

12. The argument that since a petition under Section 11(6) of the Act was pending before this court when the appointment was made by the petitioner which was confirmed by this court is ill-founded. It would be relevant to reproduce the concluding paragraph of the decision of this court in ARB. P.19/2017 titled **Offshore Infrastructures Limited v. Bharat Heavy Electrical Limited** dated 09.01.2017 dismissing the petition filed under Section 11(6) of the Act. The court had not gone into the issue of the unilateral appointment. It was only considered that the petitioner acted as per the clause by making an appointment within thirty days and the appointment by this court was not necessitated. The issue of appointment was not dealt with on merits.

“12. As stated earlier, in the present case there has been no delay on the part of the respondent and it has acted within the period of thirty days from the date of invocation of the arbitration clause. Thus, in the facts and circumstances of this case, it is not necessary to appoint Arbitrator as the Arbitral Tribunal has already been constituted.

13. The petition is, accordingly, dismissed.”

13. The further contention of learned counsel for the respondent that the petitioner after making the appointment of the arbitrator and upon failure in the arbitration proceedings has taken a u-turn deserves



to be rejected. This issue was noted by the Supreme Court in **Bhadra International** (supra) and 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.”

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

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

16. Needless to say that the parties shall be at liberty to avail remedies in accordance with law.

AVNEESH JHINGAN, J

APRIL 23, 2026

Ch

Reportable:- Yes