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

% Date of decision: 24.03.2026

\+ O.M.P. (COMM) 243/2018 & I.A. 6662/2023

INNOVATIVE B2B LOGISTICS SOLUTIONS PRIVATE LIMITED .....Petitioner

Through: Mr. Sacchin Puri, Sr. Adv. with Mr. Piyush Sharma, Mr. Rahul Khosla, Mr. Pankaj Prakash, Mr. Sarang Rastogi, Ms. Shweta Singh & Mr. Ramapati Mishra, Advs.

versus

CENTRAL WAREHOUSING CORPORATION .....Respondent

Through: Mr. K.K. Tyagi, Mr. Iftekhar Ahmad & Ms. Garima Tyagi, Advs.

CORAM:
HON'BLE MR. JUSTICE AVNEESH JHINGAN

AVNEESH JHINGAN, J. (ORAL)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') is filed being aggrieved of the arbitral award dated 16.01.2018.

2. The brief facts are that the parties to the *lis* entered into a Memorandum of Understanding dated 05.02.2007 (for brevity 'the MOU'). The parties agreed to identify areas of mutual co-operation by

synergizing their resources for providing efficient logistic solutions through the management of rakes owned by the petitioner.

2.1 Pursuant to execution of the MOU, an agreement dated 16.07.2007 (hereinafter 'the agreement') was executed for the hiring of wagons for container train service. Article 6.1 of the agreement provided for dispute resolution through arbitration. The relevant part is reproduced below:

> "6.1 Dispute resolution- All dispute or differences whatsoever arising between the parties hereto out of or relating to the construction, meaning and operation or effect of this agreement or the breach thereof which cannot be settled by mutual discussion shall be referred to and settled by arbitration under the legislation on arbitration prevailing in India and shall be conducted in accordance with the provision of Arbitration and Conciliation Act 1996 or such other prevailing Act, and the award made in pursuance thereof shall be binding on the parties. The venue for arbitration shall be at Delhi and any litigation arising therefrom shall be subject to the exclusive jurisdiction of courts in Delhi."

2.2 The petitioner issued a notice dated 25.07.2016 to initiate arbitration proceedings. It was stated in the notice that the respondent was called upon to appoint an arbitrator of its choice within fifteen days, failing which the petitioner would proceed in accordance with law. The Managing Director (for short 'the MD') of the respondent vide order dated 05.08.2016 appointed a sole arbitrator unilaterally. The proceedings culminated in the impugned award and the concluding part of the award is reproduced below:

"27. CONCLUSIONS:

In view of the foregoing, I hereby make the following AWARD In these proceedings:

Issues/claims by Claimant

1. The Respondent and the Claimant were directed to reconcile the figure/amount of the claims. As parties could not submit reconciled figures, the Claimant has pleaded/argued its case based on its own figures of claim/supporting documents.

The prayer of the Claimant vide application dated 18th December, 2017-for non-reliance on Respondent's accounts/ striking off of defence is devoid of merits, and hence not admitted.

2(a) claim for refund of Rs 312.30 lakh on account of stabling, siding, shunting charges etc is not admitted. Respondent is entitled to recover 60% of all the charges as paid to Railways on account of stabling, siding and shunting charges on rakes of wagons provided by the Claimant under the agreement.

2(b) claim for refund of Rs 213.48 Lakh on account of VAT is not admitted.

2(c) claim of Rs 41.22 lakh forming part of the 60% of gross margin is admitted. The Respondent is not entitled to deduct 0.72% from the share of Claimant which is 60% of gross margin.

2(d) claim on account of non-recovery of outstanding from customers is admitted. The Respondent is not entitled to recover Rs 36,57,099, or any other amount, on account of non-recovery of dues from its customers.

2(e) claim for release of Rs 26,38,03,492 towards wagon hire/rentals for the period from February 2009 till 3 October, 2015 withheld/set off by the Respondent against SAMO agreement is not admitted.

2. Payment of interest on claims not admitted.

Issue by Respondent

> 3. Claim pertaining to amount withheld/set off towards wagon hire charges/rentals is not barred by principle of res-judicata.
>
> The arbitration fee and expenses incurred by arbitrator shall be shared equally by both the parties. Each party shall bear its own cost and expenses incurred on the case."

2.3 Both the parties being aggrieved of the award have filed petitions under Section 34 of the Act.

3. For the sake of convenience, the present petition i.e., O.M.P. (COMM) 243/2018 is decided as the lead case.

4. Learned counsel for the petitioner submits that the unilateral appointment of the arbitrator is in violation of Section 12(5) of the Act and is void *ab initio*. 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 the Division Bench of this Court in **Mahavir Prasad Gupta and Sons v. Govt. of NCT of Delhi,** 2025 SCC OnLine Del 4241.

5. *Per contra* article 6.1 of the agreement does not provide for unilateral appointment of the arbitrator and the decisions relied upon by learned counsel for the petitioner are not applicable to the facts and circumstances of the present case. The contention is that the arbitrator was appointed by the MD of the respondent at the instance of the petitioner and appointment is not unilateral.

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

6.1 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."

6.2 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."

7. Under article 6.1 of the agreement, the parties agreed to dispute resolution through arbitration. The arbitration was to be conducted as per the provisions of the Act or any other prevailing Act at the relevant time. There was dispute between the parties and a notice was issued by the petitioner invoking arbitration. The legal position is that under Section 12(5) read with Seventh Schedule 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.

8. 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) of the Act is sought to be overcome.

9. 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."

10. The contention of learned counsel for the respondent that article

6.1 of the agreement does not provide for unilateral appointment and the appointment cannot be faulted with lacks merit. The challenge is not to the article being violative of Section 12(5) of the Act but to the unilateral appointment made by the respondent contrary to the provisions of the Act and law laid down by the Supreme Court in **Bhadra International (India) Pvt. Ltd.** (supra).

11. In view of the decision of the Supreme Court in **Bhadra International (India) Pvt. Ltd.** (supra), the waiver under proviso to Section 12(5) of the Act has to be express and in writing. From a reading of the notice dated 25.07.2016 as a whole, there is no express waiver in writing by the petitioner of the applicability of Section 12(5) of the Act. In absence of an express agreement in writing between the parties, the MD of the respondent cannot make a unilateral appointment of the sole arbitrator.

12. The matter needs to be considered from another angle. The statutory requirement under the proviso to Section 12(5) of the Act is that subsequent to the arising of the dispute the parties by an express agreement in writing can waive the applicability of Section 12(5) of the Act. The waiver has to be by both the parties. However, the mention by the petitioner in the notice that the respondent may appoint an arbitrator of its choice read along with the conduct of the respondent in appointing an arbitrator is not sufficient to wriggle out of the rigours of Section 12(5) of the Act. There was no waiver by the respondent.

13. The unilateral appointment made by the MD of the respondent

without compliance with the proviso to Section 12(5) of the Act is in violation of Section 12(5) read with Seventh Schedule of the Act. The appointment is void *ab initio* consequently rendering the impugned award a nullity.

14. The impugned award is set aside. The petition is allowed. Pending application stands disposed of.

AVNEESH JHINGAN, J

MARCH 24, 2026
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Reportable:- **Yes**