



2026:DHC:4779



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

Date of decision: 26.05.2026

+ O.M.P. (COMM) 497/2022, I.A. 21446/2022 & I.A. 31600/2025

AIR FORCE NAVAL HOUSING BOARD

.....Petitioner

Through: Mr. Yoginder Handoo, Mr. Ashwin Kataria, Ms. Khushboo Mittal, Mr. Garvit Solanki, Mr. Gaurav Vishwakarma and Mr. Aditya Aggarwal, Advs.

versus

M/S N G CONSTRUCTIONS

.....Respondent

Through: Mr. Bhupesh Narula, Mr. Rinku Narula, Ms. Poonam Nagpal, Mr. Anugrah Ekka & Mr. Kanishk Taneja, Advs. (through VC)

+ O.M.P. (COMM) 116/2023

M/S N.G. CONSTRUCTIONS

.....Petitioner

Through: Mr. Bhupesh Narula, Mr. Rinku Narula, Ms. Poonam Nagpal, Mr. Anugrah Ekka & Mr. Kanishk Taneja, Advs. (through VC)

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**CORAM:
HON'BLE MR. JUSTICE AVNEESH JHINGAN**

AVNEESH JHINGAN, J. (ORAL)

1. These petitions are filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') against the award dated 27.07.2022 (hereinafter 'impugned award').
2. For convenience sake, the facts are being taken from O.M.P. (COMM) 497/2022. The brief facts are that the petitioner issued Notice Inviting Tender dated 05.03.2010 for construction of residential apartment and the respondent/M/s N G Constructions was the successful bidder. The contract was executed between the parties on 10.06.2010 (hereinafter referred to as 'the contract'). The work was completed on 28.11.2017. Clause 18.2 of the contract provided for dispute resolution through arbitration which is reproduced below:

"18.2 ARBITRATION

All disputes or differences arising between the parties hereto arising out of the subject matter of this agreement or the respective rights and duties of the parties under this agreement except those the decision whereof is specifically provided for in the agreement to be final, shall be referred to on the sole arbitration of an arbitrator, to be only nominated by the Chairman, Air Force Naval Housing Board, New Delhi, whose decision thereon shall be final and binding on both the parties provided that if the differences and disputes are claimed by the contractor to have arisen, reference shall only be made if the Contractor has given notice in writing, of the said disputes or differences, within 28 days of cause of action for the same arising to the Chairman, Air Force Naval Housing Board, New Delhi."



2.1 Dispute arose between the parties and arbitration was invoked on 18.11.2019 at the instance of the respondent and the petitioner unilaterally appointed a sole arbitrator. The proceedings culminated in the impugned award.

3. Learned counsel for the petitioner submits that the appointment of the arbitrator is in violation of Section 12(5) of the Act and the impugned award is liable to be set aside. 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 decision of this court in **Railways Board, Ministry of Railways vs. Titagarh Rail Systems Limited**, 2026:DHC:1720.

4. *Per contra*, on a declaration filed by the arbitrator in compliance with Section 12 of the Act no objection was raised by the petitioner and the petitioner participated in the arbitration proceedings. The submission is that petitioner having appointed the arbitrator and on failing is now taking a u-turn. The contention is that the consent of the petitioner is evident having appointed the sole arbitrator.

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

5.1 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.”

5.2 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.”

6. 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 between 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.

7. 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.

8. In view of the law laid down by the Supreme Court in **Bhadra International** (supra) and the decision of this Court in **Mahavir Prasad Gupta** (supra), the appointment of the arbitrator is in violation of the amended provisions of Section 12(5) of the Act.

9. The issue now to be determined is as to whether after the dispute arose was there an express waiver in writing between the parties that the provisions of Section 12(5) of the Act shall not apply.

10. The Supreme Court in **Bhadra International** (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.



11. There is no prescribed format under the proviso to Section 12(5) of the Act for an express agreement in writing but it shall not mean that the waiver can be inferred by implication or through conduct. It would be relevant to quote the following paragraph from **Bhadra International** (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.”

12. The matter needs to be considered from another angle. The express consent in writing under proviso to Section 12(5) of the Act has to be of both the parties. It is not a case set up by the respondent that the petitioner consented for waiver of applicability of Section 12(5) of the Act. The waiver has to be expressed and cannot be construed or inferred through conduct. The Division Bench of this court in **Mahavir Prasad Gupta** (supra) held that an appointment of an ineligible person as an arbitrator is void *ab-initio* and can be challenged by the party making such appointment. The relevant paragraphs of the judgment are:

“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.”

13. 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 nullity.

14. The petition is allowed and the impugned award is set aside. Pending



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application is also disposed of.

15. Since the award has been set aside no separate order is required to be passed in O.M.P. (COMM) 116/2023.

AVNEESH JHINGAN, J

MAY 26, 2026

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Reportable: Yes