



2026:DHC:3076-DB



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

+ **FAO(OS) (COMM) 103/2026, CM APPLs.24033-34/2026**

TITAGARH RAIL SYSTEMS LIMITED

.....Appellant

Through: Ms. Akanksha Mehra, Mr. Tanay Agarwal, Mr. Shivam Bhimsaria, Mr. Abhiraj Choudhary and Ms. Mili Tomar

versus

**RAILWAY BOARD, MINISTRY OF RAILWAYS,
GOVERNMENT OF INDIA**

.....Respondent

Through: Mr. Sandeep Kumar Mahapatra, CGSC, Ms. Mrinmayee Sahu, Mr. Amit Acharya, GP, Mr. Tribhuvan, Mr. Abhimanyu and Ms. Anushka Sarraf, Advocates and Mr Vinay Kaushik Government Pleader

+ **FAO(OS) (COMM) 104/2026, CM APPL. 24043/2026**

TITAGARH RAIL SYSTEMS LIMITED

.....Appellant

Through: Mr. Rajshekhar Rao, Sr. Advocate with Ms. Akanksha Mehra, Mr. Tanay Agarwal, Mr. Shivam Bhimsaria, Mr. Abhiraj Choudhary and Ms. Mili Tomar, Advocates

versus

**RAILWAY BOARD, MINISTRY OF
RAILWAYS**

.....Respondent

Through: Mr. Sandeep Kumar Mahapatra, CGSC, Ms. Mrinmayee Sahu, Mr. Amit Acharya, GP, Mr. Tribhuvan, Mr. Abhimanyu and Ms. Anushka Sarraf,



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Advocates and Mr Vinay Kaushik
Government Pleader

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

HON'BLE MR. JUSTICE OM PRAKASH SHUKLA

JUDGMENT (ORAL)

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13.04.2026

C. HARI SHANKAR, J.

A. The *lis*

1. These appeals, under Section 37 of the Arbitration & Conciliation Act, 1996¹, assail a judgment and an order, both dated 26 February 2026, in OMP (Comm) 475/2024² and OMP (Comm) 503/2024³, rendered by a learned Single Judge of this Court. The principal judgment stands rendered in OMP (Comm) 475/2024, with the order in OMP (Comm) 503/2024 merely recording that the arbitral award, which formed subject matter of challenge in both OMPs, already stood set aside in OMP (Comm) 475/2025 and that, therefore, no separate orders were called for. The impugned judgment and order have, needless to say, been rendered under Section 34 of the 1996 Act.

2. The learned Single Judge has allowed the OMPs filed by the Respondent-Railway Board on the ground that the learned arbitrator, who had rendered the award forming subject matter of challenge, having been a serving employee of the Railway Board, his very

¹ "the 1996 Act" hereinafter

² **Railway Board v. Titagarh Rail Systems Ltd**

³ **Railway Board v. Titagarh Rail Systems Ltd**



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appointment as an arbitrator was in the teeth of Section 12(5)⁴ read with the VII Schedule to the 1996 Act. Resultantly, the award rendered by the learned arbitrator has been held to be unsustainable, as the learned arbitrator was incompetent to arbitrate. In arriving at his conclusion, the learned Single Judge has placed exhaustive reliance on the recent decision of the Supreme Court in *Bhadra International (India) (P) Ltd. v. Airport Authority of India*⁵.

3. Aggrieved by the decision of the learned Single Judge, Titagarh Rail Systems Ltd⁶ has preferred the present appeals under Section 13 of the Commercial Courts Act, 2015 read with Section 37 of the 1996 Act.

4. We have heard Mr. Raj Shekhar Rao, learned Senior Counsel for TRSL and Mr. Sandeep Kumar Mahapatra, learned CGSC, at length.

B. The Issue

5. Mr. Raj Shekhar Rao does not dispute the fact that the learned arbitrator was facially ineligible to be appointed as an arbitrator in terms of the main body of Section 12(5) of the 1996 Act. His precise contention is that the facts of the present case attract the proviso to

⁴ (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.

⁵ 2026 SCC OnLine SC 7

⁶ "TRSL" hereinafter



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Section 12(5), as the parties had, subsequent to the disputes arising between them, expressly waived the applicability of Section 12(5). To that extent, he submits that the decision in ***Bhadra International*** does not operate against the arbitral award or its legality. The learned Single Judge has, therefore, according to Mr. Rao, erred in setting aside the arbitral award on the ground that the appointment of the arbitrator was illegal in view of Section 12(5) of the 1996 Act read with the judgment in ***Bhadra International***.

6. The dispute, therefore, actually narrows down to the issue of whether, in the facts of the present case, the proviso to Section 12(5) of the 1996 applies.

C. Facts

7. Given the limited nature of the controversy, it is not necessary to advert to the specifics of the controversy between the parties. Suffice it, therefore, to state that the arbitral proceedings related to a contract dated 30 September 2020, whereby the Railway Board had contracted with TRSL for supply of railway wagons. Clause 18.0 of the contract read as under:

“18.0 TERMS AND CONDITIONS : The contract shall be governed by the General Conditions & Special Conditions of Contract for manufacture of wagons as enclosed (Annexure – I & IA) and Indian Railways Standard (IRS) Conditions of contract.”

Thus, the contract between TRSL and the Railway Board was governed by the Indian Railways General Conditions of Contract for



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the Manufacture and Supply of Wagons⁷. Clause 18.0 of the GCC envisaged settlement of disputes by arbitration, and read thus:

“18.0 Settlement of Disputes (Arbitration) : The contract will be governed by the arbitration clause with amendments as specified in the Railway Board’s Letter No.2018/TF/Civil/Arbitration Policy dated 12.12.2018.”

The letter dated 12 December 2018 of the Railway Board, to which Clause 18.0 of the GCC made reference, set out the arbitration policy of the Railway Board. The relevant clauses thereof, which are pertinent to the dispute before us, maybe reproduced as under:

“2903: Demand for Arbitration:

2903(i): In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account, or if the Railway fails to make a decision within 120 days (as referred in 2902), then and in any such case, but except in any of the “excepted matters” referred to in Clause 2902 of these Conditions, parties to the contract, after 120 days but within 180 days of their presenting their final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration. Provided that where the claim is raised by Railways para 2903(i) shall not apply.

2903(ii)(b): The parties may waive off the applicability of Sub-Section 12(5) of Arbitration and Conciliation Act, 1996 (as amended), if they agree for such waiver in writing, after dispute having arisen between them.

2903(iii)(a): The Arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway.

2905: Appointment of Arbitrator:

⁷ "the GCC" hereinafter



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2905(a): Appointment of Arbitrator where applicability of section 12(5) of Arbitration and Conciliation Act has been waived off :

(i): In cases where the total value of all claims in question added together does not exceed ₹1,00,00,000/- (Rupees One Crore only), the Arbitral Tribunal shall consist of a Sole Arbitrator, who shall be a Gazetted Officer of Railway not below Junior Administrative Grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by General Manager.

(ii): In cases where the total value of all claims in question added together exceeds ₹1,00,00,000 (Rupees One Crore Only), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below Junior Administrative Grade or 2 Railway Gazetted Officers not below Junior Administrative Grade and a retired Railway Officer, retired not below the rank of Senior Administrative Grade Officer, as the arbitrators. For this purpose, the Railway will send a panel of at least four (4) names of Gazetted Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrator to the Contractor within 60 days from the day when a written and valid demand for arbitration is received by the General Manager.

Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as Contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the Contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. General Manager shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of Contractor's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them is from the Accounts Department. An officer of Selection Grade of the Accounts Department may be considered of equal status to the officers in Senior Administrative Grade of other departments of the Railway for the purpose of appointment of arbitrator

iii: The serving railway officer working in arbitral tribunal in the ongoing arbitration cases as per clause 2905(a)(i) and clause



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2905(a)(ii) above, can continue as arbitrator in the tribunal even after his retirement.

2905(b): Appointment of Arbitrator where applicability of Section 12 (5) of Arbitration and Conciliation Act has not been waived off:

(i) In cases where the total value of all claims in question added together does not exceed 50,00,000/- (Rupees Fifty Lakh only), the Arbitral Tribunal shall consist of a Retired Railway Officer, retired not below the rank of Senior Administrative Grade Officer, as the arbitrator. For this purpose, the Railway will send a panel of at least four (4) names of retired Railway Officer(s) empanelled to work as Railway Arbitrator duly indicating their retirement dates to the Contractor within 60 days from the day when a written and valid demand for arbitration is received by the General Manager

Contractor will be asked to suggest so General Manager at least 2 names out of the panel for appointment as arbitrator within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the arbitrator

(ii) In cases where the total value of all claims in question added together exceeds 50,00,000/- (Rupees Fifty Lakh only), the Arbitral Tribunal shall consist of three (3) retired Railway Officers, retired not below the rank of Senior Administrative Grade Officer, For this purpose, the Railway will send a panel of at least four (4) names of retired Railway Officers) empanelled to work as Railway Arbitrators duly indicating their retirement date to the Contractor within 60 days from the day when a written and valid demand for arbitration is received by the General Manager.

Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as Contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the Contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the "Presiding Arbitrator from amongst the 3 arbitrators so appointed. General Manager shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of Contractor's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them has served in the Accounts Department.



2905(c)(ii)(a) Fast Track procedure: Parties to the arbitration agreement may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in Section 29B⁸ of the Arbitration & Conciliation Act, 1996, as amended”

8. The Railway Board short-closed the contract on 20 March 2023, cancelled the contract insofar as it related to the supply of the remaining 390 wagons and forfeited the bank guarantee provided by TRSL.

9. Disputes, thereby, arose between TRSL and the Railway Board.

10. On 29 May 2023, TRSL wrote to the Railway Board, seeking a reference of the disputes which had arisen to arbitration in terms of Clause 18.0 of the GCC read with letter dated 12 December 2018 of the Railway Board. The notice also stated that TRSL was not waving

⁸ 29-B. **Fast track procedure.** –

(1) Notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub-section (3).

(2) The parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.

(3) The arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1):

(a) The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;

(b) The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;

(c) An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;

(d) The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.

(4) The award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.

(5) If the award is not made within the period specified in sub-section (4), the provisions of sub-sections (3) to (9) of Section 29-A shall apply to the proceedings.

(6) The fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties.



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the provisions of Section 12(5) of the 1996 Act. Paras 9 to 12 of the notice dated 29 May 2023 may be reproduced as under:

“9. In light of the above facts and circumstances, it is evident that disputes and differences have arisen and still subsist between the parties out of and/or in relation to the contract.

10. As such, we, hereby invoke the arbitration clause in the contract being clause 18 of the Indian Railways General Conditions of Contract for the Manufacture and Supply of Wagons (read with the Railway Board's letter no. 2018/TF/Civil/Arbitration Policy dated 12th December 2018) and refer all and any disputes arising out of and/or in relation to the contract to arbitration before an arbitral tribunal consisting of 3 arbitrators. We reserve our right to furnish particulars and make appropriate claims in respect of the aforesaid disputes and differences before the arbitral tribunal, once constituted.

11. Titagarh does not waive the provisions of Section 12 (5) of the Arbitration and Conciliation Act, 1996 ('said Act').

12. We are in the process of nominating an arbitrator on our behalf by a separate letter and will call upon you to nominate a nominee on your behalf. The two arbitrators so nominated will appoint a third arbitrator as the presiding arbitrator to adjudicate the disputes and differences between ourselves.”

11. Following this, TRSL wrote to the Railway Board on 11 August 2023, invoking the arbitration clause in the agreement between the parties, again stating that it was not waving the provisions of Section 12(5) of the 1996 Act and proposing the name of a learned retired Supreme Court judge as the nominee arbitrator of TRSL. The letter may be reproduced, *in extenso*, thus:

To,
The Executive Director Railway Stores (S)
Railway Board,
Ministry of Railways,
Government of India,
New Delhi.

Date: 11.08.2023



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Sub: 2020/RS(I)/954/130/1863 DATED 30TH SEPTEMBER 2020
AND REFERENCE OF DISPUTES TO
ARBITRATION

Re: Our letter dated 29.05.2023

Sir,

This letter has reference to the subject contract and the disputes arising out of it as well as our letter dated 29.05.2023. The details of the disputes are omitted here for the sake of brevity as we specifically refer to our letter dated 29.05.2023, (a copy of whereof is enclosed herewith for your ready reference) where we accepted your decision to short close the subject Contract No 2020/RS(1)/954/130/1863 dated 20.03.2023, by cancelling the balance quantity of 390 BCNA wagons, and submitted that the following penalties aggregating Rs. 14,68,98,663/- levied by you are grossly unfair, unjust, and hence not legally tenable:

1. Forfeiture, of the Bank Guarantee submitted by us towards the Security Deposit of Rs 5,00,00,000/-
2. Liquidated damages amounting to Rs 5,19,15,870/- and
3. Not allowing us the benefit of price variance resulting in loss of Rs 4,49,82,793/- approx.

We have not received any reply from Indian Railway to the abovementioned letter, and in view of the same we, hereby invoke the arbitration clause in the contract being clause 18 of the Indian Railways General Conditions of Contract for the Manufacture and Supply of Wagons (read with the Railway Board's letter no. 2018/TF/Civil/Arbitration Policy dated 12th December 2018) and refer all and any disputes arising out of and/or in relation to the contract to arbitration before an arbitral tribunal consisting of 3 arbitrators.

Titagarh does not waive the provisions of Section 12 (5) of the Arbitration and Conciliation Act, 1996 ('said Act'). In view thereof we propose the appointment of Mr. Justice Deepak Gupta, (Retd. Judge, Supreme Court of India) as our nominee Arbitrator for adjudicating the disputes between us. We reserve our right to furnish particulars and make appropriate claims in respect of the aforesaid disputes and differences before the arbitral tribunal, once constituted.



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This letter is being issued without prejudice to our lawful rights and contentions.

Yours faithfully,

For Titagarh Rail Systems Limited
(formerly Titagarh Wagons Limited)

(Dinesh Arya)
Company Secretary”

12. As the Railway Board did not respond to the above notice issued by TRSL, TRSL filed Arb P 970/2023 before this Court under Section 11(6) of the 1996 Act, praying that a sole arbitrator be appointed by this Court to arbitrate on the disputes between TRSL and the Railway Board. On 3 October 2023, the Railway Board submitted, to this Court, that the arbitration would be decided by the Fast Track procedure envisaged in the Railway Board Circular dated 12 December 2018. Accordingly, this Court disposed of Arb P 970/2023 as withdrawn.

13. Following this, on 17 October 2023, TRSL addressed the following communication to the Railway Board:

“No.: BCNA/Arbit/23/01

17 October 2023

To, Director, RS(W)
Railway Board
New Delhi

Subject: Arbitration in the matter w.r.t. Contract No. 2020/RS(I)/954/130/1863 dated 30.09.2020 between M/s Titagarh Wagons Limited, Kolkata and Ministry of Railways

Ref: Our letter dated 29.05.2023

Dear Sir,



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With reference to the abovementioned letter the Claimant hereby gives its consent for conduct of arbitration through the Fast Track Procedure as per para 2905(c)(ii)(a) of the IRS Conditions of Contract as revised by circular No.2018/TF/Civil/Arbitration Policy dated 12.12.2018, r.w. Section 298 of the Arbitration and Conciliation Act, 1996, (as amended).

Thanking You.

Yours Sincerely,
For Titagarh Rail Systems Limited
(formerly Titagarh Wagons Limited)

Sd/-
Dinesh Arya
Company Secretary & Chief Compliance Officer”

14. The Railway Board responded, on 16 November 2023, thus:

“No.2020/RS(1)/954/130/1863

New Delhi-110001, Dated: 16.11.2023

M/s. Titagarh Rail Systems Limited,
Titagarh Towers,
756, Anandapur,
E.M. Bypass,
Kolkata-700107.

Dear Sir,

Sub: Arbitration request in the Contract No. 2020/RS(I)/954/130/1863 dated 30.09.2020 between M/s. Titagarh Wagons Limited, Kolkata (Now M/s. Titagarh Rail Systems Ltd.) and Ministry of Railways.

Ref: Your Letter No. BCNA/Arbit/23/01 dated 17.10.2023.

Your above referred letter regarding conducting Arbitration through Fast Track Procedure against the subject contract is under consideration in Board's office.



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In this regard, the names of 04 Railway Officers for appointment of Sole Arbitrator in the subject contract are as under:

- (a) Shri Ajeet Singh Yadav – EDRS/P, Railway Board
- (b) Shri V. Appa Rao – EDRS/RS, Railway Board
- (c) Shri Randhir Sahay – EDF/S, Railway Board
- (d) Shri M.K. Gupta – EDRS/G, Railway Board

It is requested to suggest names of two Railway Officers indicated above for the appointment of Sole Arbitrator in the subject contract. Out of two Railway Officers, one Officer will be appointed as Sole Arbitrator to resolve the dispute against the subject contract.

Yours faithfully

Sd/-
(Vipul Kanaujia)
Director, Railway Stores (W)”

We may note, here, that it is one of Mr. Rao’s principal submissions that, by adopting the Fast Track Procedure envisaged by Clause 2905(c)(ii)(a) of the Circular dated 12 December 2018, the Railway Board had effectively waived the applicability of Section 12(5), as the Fast Track Procedure applied only in such a case.

15. TRSL, vide its reply dated 24 January 2024, shortlisted the names of two of the Railway Board officers named in the afore-extracted communication dated 16 November 2023 of the Railway Board. This communication read as under:

“No.: BCNA/Arbit/23/03

24 January 2024

To,
Director, RS(W)
Railway Board
New Delhi



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Subject: Arbitration in the matter w.r.t. Contract No. 2020/RS(I)/954/130/1863 dated 30.09.2020 between M/s Titagarh Wagons Limited, Kolkata and Ministry of Railways

Ref: 1. Your letter dated 16.11.2023
2. Our letter dated 29.12.2024

Dear Sir,

With reference to the abovementioned letters, we would request you to note our suggestion as follows:-

1. Shri Ajeet Singh Yadav
2. Shri Randhir Sahay

Please treat our letter dated 29.12.2023 as withdrawn.

We await your response on the nomination of the Sole Arbitrator from the aforesaid proposed name,

Thanking You,

Yours Sincerely,

For Titagarh Rail Systems Limited
(formerly Titagarh Wagons Limited)

Sd/-
Dinesh Arya
Company Secretary & Chief Compliance Officer”

16. The Railway Board, vide its response dated 30 January 2024, appointed Shri Randhir Sahay, Executive Director, Finance(S) in the Railway Board, as the sole arbitrator to arbitrate on the disputes between TRSL and the Railway Board.

17. Thereafter, arbitral proceedings commenced before Shri Randhir Sahay, as the learned Sole Arbitrator. These proceedings culminated in arbitral award dated 5 August 2024, whereby the learned arbitrator directed reinstatement of the contract, extended the



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delivery period for the wagons by 4½ months from the date of the award without liquidated damages for delivery of the remaining 390 wagons and also held TRSL to be entitled to refund of liquidated damages to the extent of ₹ 5,19,15,870.

18. The arbitral award was challenged, before the learned Single Judge, by TRSL as well as by the Railway Board.

19. TRSL, vide OMP (Comm) 503/2024, challenged the arbitral award to the extent that it (i) did not grant interest on the amount awarded in favour of TRSL, (ii) granted only 4 ½ months to TRSL for supplying the remaining 390 wagons and (iii) did not direct refund of the security deposit paid by TRSL with interest.

20. The Railway Board, vide OMP (Comm) 475/2024, also challenged the arbitral award on the ground that the appointment of the learned arbitrator was illegal in view of Section 12(5) of the 1996 Act.

D. The Impugned Judgment

21. The learned Single Judge has, in the judgment under challenge, noted, at the outset, the fact that TRSL had, in its notices dated 29 May 2023 and 11 August 2023, specifically stated that it was not waiving Section 12(5) of the 1996 Act. The learned Single Judge notes that there was, in fact, no written waiver either by TRSL or by the Railway Board, of the applicability of Section 12(5). The learned



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Single Judge has found no substance in TRSL's contention that the adoption of the Fast Track Procedure as envisaged in Clause 2905(c)(ii)(a) of the Railway Board Circular dated 12 December 2018, the suggestion of four serving Railway Board employees by the Railway Board to TRSL in order to enable TRSL to choose a name therefrom, and the selection, by TRSL, of one name from the said panel of four names as the arbitrator to arbitrate on the disputes between the parties, constituted waiver of Section 12(5) as envisaged in the proviso thereto. In this context, the learned Single Judge has placed extensive reliance on the judgment of the Supreme Court in ***Bhadra International***.

22. Aggrieved by the said decision, TRSL has filed the present appeal.

E. Submissions of Mr. Rajshekhar Rao

23. Appearing for TRSL, Mr. Rao submits that there is a stark difference between the facts of the present case and those which obtained in ***Bhadra International***. He submits that the contract between TRSL and the Railway Board specifically envisaged a situation in which the parties waived the applicability of Section 12(5) and where the parties did not do so. Different procedures were to be followed, depending on whether Section 12(5) was, or was not, waived. The question of selection of a sole Arbitrator out of a panel of four arbitrators to be provided by the Railway Board, from its serving employees was specifically contemplated, in Clause 2905(a)(ii), only



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where there was waiver of Section 12(5) of the 1996 Act. As such, Mr. Rao's contention is that, by calling upon the Railway Board to suggest a panel of its officers, in response to which the Railway Board suggested a panel of four of its serving officers, from which TRSL selected one as the sole Arbitrator, the parties had consciously adopted and followed the procedure envisaged in a case where Section 12(5) was waived. He submits that, having done so, the Railway Board could not seek to wish away an adverse arbitral award by attempting to invoke Section 12(5) after the award had been rendered. The impugned judgment of the learned Single Judge, he submits, has not holistically taken into account all these factors and has mechanically applied the *ratio decidendi* of ***Bhadra International***, unmindful of the factual and legal differences between this case and that. Ergo, submits Mr. Rao, the impugned judgment cannot sustain in law or on facts.

F. Analysis

24. After ***Bhadra International***, it is not possible for us to accept the line of reasoning canvassed by Mr. Rao. ***Bhadra International***, we may note, arose out of a judgment rendered by one of us (C. Hari Shankar, J.) sitting singly in ***Bhadra International (India) (P) Ltd. v. Airport Authority of India***⁹. In that case, the parties had, in fact, openly stated before the learned Arbitrator that they were agreeable to his arbitrating on the dispute between the parties and that consent had been reduced to writing by the Arbitrator in one of the orders passed in the arbitral proceedings. It was in these circumstances that this

⁹ 2024 SCC OnLine Del 10223



Court adopted the view that there was, in effect, written agreement to the arbitration of the dispute by the Arbitrator in that case.

25. Even in such a case, the Supreme Court has held, while reversing the judgment of this Court, that Section 12(5) of the 1996 Act requires a written agreement in writing, waiving the applicability of Section 12(5) and nothing less than that. There cannot be any implied waiver of Section 12(5). We may reproduce, to advantage the following passages from *Bhadra International*, which evocatively lay down the law:

“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.

77. Waiver means the intentional giving up of a right. It involves a conscious decision to abandon an existing legal right, benefit, claim, or privilege that a party would otherwise have been entitled to. It amounts to an agreement not to enforce that right. A waiver can occur only when the person making it is fully aware of the right in question and, with complete knowledge, chooses to give it up. [See: *State of Punjab v. Davinder Pal Singh Bhullar*¹⁰]

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

¹⁰ (2011) 14 SCC 770



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.

79. The expression “*express agreement in writing*” demonstrates a deliberate and informed act that although a party is fully aware of the arbitrator's ineligibility, yet it chooses to forego the right to object against the appointment of such an arbitrator. The requirement of an express agreement in writing has been introduced as it reflects awareness and a conscious intention to waive the right to object under sub-section (5) of Section 12. A clear manifestation of the expression of waiver assumes greater importance in light of the fact that the parties are overcoming a restriction imposed by law.

81. It is **only** through an express agreement in writing, waiving the bar under sub-section (5) of Section 12, that the other party can be said to have voluntarily consented to the unilateral appointment of such an arbitrator. The proviso conveys that the arbitrator, although ineligible to be appointed, yet can continue to perform his functions, as it is oriented towards facilitating party autonomy. Thus, the proviso reinforces party autonomy and equal treatment of parties in arbitration.

82. In other words, even though the appointment had been made by one of the parties, by the act of entering into an agreement in writing, the other party expresses its consent. The manner of the agreement prescribed by the statute demonstrates voluntariness by the parties.

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.

85. The conscious use of the prefatory expression also serves to differentiate such waiver from ‘deemed waiver’ as stipulated under Section 4 of the Act, 1996. We must be mindful of the fact that if



the legislature intended that waiver under Section 12(5) could similarly arise by implication or conduct as mentioned under Section 4, it would have refrained from introducing a heightened and mandatory requirement, more particularly, in light of the rigours of the Seventh Schedule. The statutory design therefore makes it evident that the bar under Section 12(5) can be removed only by a clear, unequivocal, and written agreement executed after the dispute has arisen, and not by any form of tacit acceptance or procedural participation.

86. The mandate of an express agreement in writing in the present case may looked at from one another angle. The unilateral appointment of an arbitrator is assessed from the viewpoint of the parties. However, when the parties later execute an express written agreement waiving the ineligibility of the proposed arbitrator, the position gets altered. Such written waiver supplies the very consent that was previously missing, thereby placing the appointment on the same footing as a mutually agreed appointment and addresses concerns regarding neutrality and fairness.

87. In **Bharat Broadband (supra)**¹¹, this Court categorically held that the expression “*express agreement in writing*” refers to an agreement made in words and cannot be inferred by conduct. The word “express” denotes that the agreement must be entered into with complete knowledge that although the proposed arbitrator is ineligible to be appointed as an arbitrator, yet they express their confidence in him to continue as the arbitrator. The relevant observations read thus:—

“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

¹¹ **Bharat Broadband Network Ltd v. United Telecoms Ltd**, (2019) 5 SCC 755



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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 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. Energo Engg. Projects Ltd.¹²] 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. 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

¹² (2017) 8 SCC 377



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.”

(Emphasis supplied)

88. In **CORE II (supra)**¹³, this Court underscored the rationale behind the first two essentials of the proviso. It reads thus:—

“121. An objection to the bias of an adjudicator can be waived. [**Supreme Court Advocates-on-Record Assn. v. Union of India**¹⁴] A waiver is an intentional relinquishment of a right by a party or an agreement not to assert a right. [**State of Punjab v. Davinder Pal Singh Bhullar**¹⁵] The Arbitration Act allows parties to waive the application of Section 12(5) by an express agreement after the disputes have arisen. However, the waiver is subject to two factors. First, the parties can only waive the applicability of Section 12(5) after the dispute has arisen. This allows parties to determine whether they will be required or necessitated to draw upon the services of specific individuals as arbitrators to decide upon specific issues. To this effect, Explanation 3 to the Seventh Schedule recognises that certain kinds of arbitration such as maritime or commodities arbitration may require the parties to draw upon a small, specialised pool. The second requirement of the proviso to Section 12(5) is that parties must consciously abandon their existing legal right through an express agreement. Thus, the Arbitration Act reinforces the autonomy of parties by allowing them to override the limitations of independence and impartiality by an express agreement in that regard.”

(Emphasis supplied)

89. What can be discerned from the above discussion is that the ineligibility of an arbitrator can be waived only by an express agreement in writing. In the present case, there is no agreement in writing, after the disputes arose, waiving the ineligibility of the sole arbitrator or the right to object under Section 12(5) of the Act, 1996.

¹³ **Central Organization for Railway Electrification v. ECI SPIR SMO MCML (JV) A Joint Venture Company**, (2025) 4 SCC 641

¹⁴ (2016) 5 SCC 808

¹⁵ (2011) 14 SCC 770



90. The conduct of the parties is inconsequential and does not constitute a valid waiver under the *proviso*. The requirement of the waiver to be made expressly in the form of agreement in writing ensures that parties are not divested of their right to object inadvertently or by procedural happenstance.

96. The net effect of the aforesaid is that a notice invoking the arbitration clause under Section 21 of the Act, 1996, a procedural order, submission of statement of claim by the appellants, the filing an application seeking interim relief, or a reply to an application under Section 33 of the Act, 1996, cannot be countenanced to mean “*an express agreement in writing*” within the meaning of the *proviso* to sub-section (5) of Section 12 of the Act, 1996.

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.

98. Thus, all the High Court decisions taking a contrary view to the present judgment would stand overruled.”

(Emphasis in the original)

26. There is no contest even by Mr. Rao to the finding of the learned Single Judge that in the present case, there is, in fact no written communication much less a written agreement, inter parties to that effect, by either side waiving the applicability of Section 12(5).

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



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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. Besides, we find this argument, emerging from TRSL, surprising, as TRSL had initially, in its communication dated 29 May 2023 and 11 August 2023, expressly stated that it was not waiving Section 12(5) of the 1996 Act. We have not been shown any communication thereafter by which this earlier communication was revoked. Nor have we been shown any communication by which



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TRSL – or the Railway Board – stated that it was waiving the applicability of Section 12(5) of the 1996 Act.

30. Mr. Rao’s submission that the selection of the learned Arbitrator was from a panel which was discussed between the parties cannot aid his case. ***Bhadra International*** has specifically held that consensual appointment of the arbitrator, absent any written waiver of Section 12(5), would be insufficient to render the proviso to Section 12(5) applicable.

31. In that view of the matter, the learned Single Judge is correct in his view that Section 12(5) of the Act never stood waived between the parties by express agreement in writing as required by the proviso thereto and the law as it stands declared in ***Bhadra International***. The learned Single Judge was also, therefore, right in setting aside the arbitral award on that ground.

32. There is, therefore, no cause for us to interfere in the present appeals which are accordingly dismissed *in limine* with no orders as to costs.

C. HARI SHANKAR, J.

OM PRAKASH SHUKLA, J.

APRIL 13, 2026/yg/aky