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

Date of Decision: 04th August, 2025

\+ **FAO (COMM) 80/2025**

M/S SATYA PARKASH AND BROTHERS (P) LTD. .....Appellant

Through: Mr. Aseem Mehrotra &Ms. Deeksha Mehrotra, Advs.

versus

UNION OF INDIA .....Respondent

Through: Ms. Avni Singh, Panel Counsel for GNCTD.

CORAM:
JUSTICE PRATHIBA M. SINGH
JUSTICE SHAIL JAIN

JUDGMENT

Prathiba M. Singh, J.

1. This hearing has been done through hybrid mode.

2. The present appeal has been filed by the Appellant under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996, read with Section 13 of the Commercial Courts Act, 2015.

3. The appeal has been filed by the Appellant challenging the judgment and order dated 15th January, 2025 *(hereinafter, the 'impugned judgment')* passed by the Court of District Judge (Commercial Court)-05, South East District, Saket, New Delhi in ***Arb. A. [Comm.] No. 1/2020.***

4. The Commercial Court, *vide* the impugned judgment, has set aside the award dated 21st May, 2020 *(hereinafter, 'the arbitral award')* passed by Sh. K B Rajoria *(hereinafter, 'the Sole Arbitrator')*, on the ground that he was ineligible to be appointed as the Arbitrator in the matter in view of Section

12(5) of the Arbitration and Conciliation Act,1996.

5. Ld. Counsel for the Appellant submits that the Appellant did not object to the appointment of the Sole Arbitrator who was appointed and the arbitral award was thus, subsequently passed by the Sole Arbitrator. Additionally, the Respondent also did not raise any objection in this regard. Thus, it is contended by the Appellant that the award was set aside by the Commercial Court merely on technical grounds and without going into the merits of the case – that too without either side raising any objection to the appointment.

6. Both Mr. Mehrotra and Ms. Avni Singh, ld. Counsels have made their respective submissions today and have cited their respective case laws.

7. Ms. Avni Singh, ld. Counsel has handed over a short affidavit deposed by Mr. Sanjay Kumar, Executive Engineer, PWD Division, South-East Road-2 (M-442), Sukhdev Vihar, New Delhi to the following effect:

> *"I, SANJAY KUMAR, S/o Sh. RAM BACHAN PRASAD SINGH aged about 58 years posted as EXECUTIVE ENGINEER. having its office at PWD DIVISION SOUTH EAST ROAD-2 (M-442), SUKHDEV VIHAR, NEW DELHI- 110025 do hereby solemnly affirm and declare as follows:*
> *1. That the Appellant has filed an appeal under section 37 of the Arbitration and Conciliation Act, 1996 to set aside the Impugned Judgement and Order dated 15.01.2025 passed by the Court of Shri Bhupesh Narula. District Judge (Commercial Court) 05. South East District. Saket. New Delhi in Arb. A. [Comm.] No. 1/2020.*
> ***2. That in the said Impugned Order, the Ld. District Court has set aside the Award dated 21.05.2020 on the ground of illegal appointment of Arbitrator. In this regard. it is submitted that the Arbitrator was appointed by the Answering Respondent with the full consent of the Appellant herein and at no stage, was***

any objection raised by the Appellant.

3. That it is further submitted nonetheless the Award dated 21.05.2020 is liable to be set aside on merits since it suffers from illegality and is in conflict with the public policy of India for the reasons set out in the appeal filed by the Respondent.

4. That it is further submitted that if the present Appeal of the Appellant is allowed and the Impugned Order set aside. then the matter should be remanded back and the section 34 appeal filed by the Respondent ought to be heard on merits."

8. Heard counsel for the parties. The brief factual background of the case is that in the year 2017, percentage-rate tenders were invited by Respondent for the work of strengthening of SA Road from Outer Ring Road to MB Road Point. The estimated cost of the work put to tender was Rs. 14,09,69,619/-.

9. Appellant's bid was found to be the lowest by 37.08 percent below the said estimated cost put to tender. Thus, the tendered amount of the Appellant worked out to Rs. 8,86,98,062/-. An agreement was thereafter executed between the parties.

10. The time allowed for completion of the said work was 60 days and the stipulated dates of start and completion of the work were fixed as 14th March, 2017 and 13th May, 2017, respectively. However, the work was finally completed on 27th September, 2017. It is the case of the Petitioner that the delay occurred due to some problems at the site which was beyond the control of the Appellant. Therefore, extension of time for the delayed period was granted by the competent authority without levy of any compensation.

11. Subsequently, upon completion of the work, some disputes arose

between the parties pertaining to the payment of the final bill and the same was referred to the Disputes Redressal Committee under clause 25 of the agreement executed between the parties.

12. Mr. K.B. Rajoria, Chief Engineer, South(M), CPWD, was appointed as the Sole Arbitrator to adjudicate upon the said dispute and *vide* the award dated 21st May, 2020, the Sole Arbitrator partially allowed the claims of the Appellant by awarding a total sum of Rs. 62,22,247/-.

13. The said award was challenged by the Respondent before the Court of District Judge (Commercial Court)-05, South East District, Saket, New Delhi in ***Arb. A. [Comm.] No. 1/2020*** and was set aside on the ground that the Sole Arbitrator was ineligible to be appointed as the Arbitrator in the matter in view of Section 12(5) of the Arbitration and Conciliation Act,1996. Hence, the present Appeal.

14. The question that arises for consideration in this case is a short one as to whether a unilateral appointment of a Sole Arbitrator by one of the parties could have been the basis for setting aside the arbitral award passed by the Sole Arbitrator, especially when the parties have voluntarily participated in the entire arbitration proceedings without any demur whatsoever.

15. This issue has been repeatedly considered and pronounced upon by various Courts. The Supreme Court in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd. [2019 SCC OnLine SC 1517]***, relying upon the decision in ***TRF Limited v. Energo Engineering Projects Limited [(2017) 8 SCC 377*** held that a party having an interest in the outcome of an arbitration proceeding must not be vested with the exclusive power to appoint a sole arbitrator. Where the right to appoint a sole arbitrator lies solely with one party, the appointment is inherently susceptible to unilateral influence, thereby compromising the

neutrality of the arbitral proceedings. The relevant portion of ***Perkins (supra)*** is extracted below:

> *"20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator.* ***If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72], all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an arbitrator.***
>
> *21. But, in our view that has to be the logical deduction from TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Para 50 of*

> *the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator"* ***The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and recognised by the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]"***

16. Further, the Supreme Court, in ***Central Organisation for Railway Electrification (CORE) v. ECI SPIC SMO MCML (JV) A Joint Venture Co. [2024 SCC OnLine SC 3219]*** conclusively held that a clause permitting unilateral appointment of an arbitrator raises justifiable doubts regarding the independence and impartiality of the sole arbitrator. Furthermore, the Court

held that such unilateral appointment clauses, particularly in public-private contracts, are violative of Article 14 of the Constitution of India. Relevant portion of this case is extracted herein:

> ***"129. Equal treatment of parties at the stage of appointment of an arbitrator ensures impartiality during the arbitral proceedings. A clause that allows one party to unilaterally appoint a sole arbitrator is exclusive and hinders equal participation of the other party in the appointment process of arbitrators. Further, arbitration is a quasi judicial and adjudicative process where both parties ought to be treated equally and given an equal opportunity to persuade the decision-maker of the merits of the case. An arbitral process where one party or its proxy has the power to unilaterally decide who will adjudicate on a dispute is fundamentally contrary to the adjudicatory function of arbitral tribunals."***

17. Thereafter, in ***Civil Appeal No. 3972 of 2019*** titled ***Bharat Broadband Network Limited v. United Telecoms Limited*** the Supreme Court further clarified that the proviso to Section 12(5) of the Arbitration and Conciliation Act, 1996, mandates an "express agreement in writing," signifying that the parties must explicitly record their intention to waive their right to object to the arbitrator's jurisdiction. Such a waiver cannot be implied or presumed from the conduct of the parties:

> *"17. The scheme of Sections 12, 13 and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12 (1) to 12(4) read with Section 13. However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator,*

before such arbitrator. ***In such a case i.e. a case which falls under Section 12(5), Section 14 (1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e. de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator.*** *This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14 (1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them.*

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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."***

18. One of the most recent decisions pertaining to this issue is of a Co-ordinate Bench of this Court being ***FAO (COMM) 170/2023*** titled ***M/s Mahavir Prasad Gupta and Sons v. Government of NCT Delhi*** dated 31st May, 2025 where the following two issues were raised for consideration:

> *"31. The following issues arise for consideration in this case:*
> *A. In view of requirement of express waiver in writing under proviso to Section 12(5) of the Act, can the parties by conduct of participating in arbitration proceedings and not raising objection before the arbitrator, be deemed to have waived the objection against the unilateral appointment?*
>
> *B. Does the award passed by unilaterally appointed arbitrator is per se bad and a nullity, which goes to the root of the jurisdiction of the arbitrator, that entitles any party (including the party that unilaterally appointed the arbitrator itself) to object at any stage during or after the arbitration proceedings including the proceedings for challenge to the award under Section 34 of the Act and/or enforcement of the award under Section 36 of the Act?"*

19. The Court, considered and discussed various decisions of the Supreme Court in ***Perkins Eastman (supra), TRF Limited (supra)*** and ***Central Organisation for Railway Electrification (CORE) (supra).***

20. After analysing the said judgments of the Supreme Court, the Court, in ***Mahavir Prasad Gupta (Supra)*** observed as under:

> *"36. The decision of the Constitution Bench of the Supreme Court in CORE (supra), while upholding the judgments of TRF (supra) and Perkins (supra) has conclusively held that clause allowing unilateral appointment of an arbitrator gives justifiable doubts as to the independence and impartiality of the sole arbitrator. The Supreme Court further held that unilateral appointment clauses in public private contracts are violative of Article 14 of the Constitution of India:*
>
> *xxx xxx xxx*
>
> ***J. Conclusion***
>
> ***169. In view of the above discussion, we conclude that:***
>
> ***a. The principle of equal treatment of parties applies at all stages of arbitration proceedings, including the stage of appointment of arbitrators;***
>
> ***b. The Arbitration Act does not prohibit PSUs from empanelling potential arbitrators. However, an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by PSUs;***
>
> ***c. A clause that allows one party to unilaterally appoint a sole arbitrator gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further, such a unilateral clause is exclusive and hinders equal***

participation of the other party in the appointment process of arbitrators;

d. In the appointment of a three-member panel, mandating the other party to select its arbitrator from a curated panel of potential arbitrators is against the principle of equal treatment of parties. In this situation, there is no effective counterbalance because parties do not participate equally in the process of appointing arbitrators. *The process of appointing arbitrators in CORE (supra) is unequal and prejudiced in favour of the Railways;*

e. Unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution;

f. The principle of express waiver contained under the proviso to Section 12(5) also applies to situations where the parties seek to waive the allegation of bias against an arbitrator appointed unilaterally by one of the parties. After the disputes have arisen, the parties can determine whether there is a necessity to waive the nemo judex rule; and

g. The law laid down in the present reference will apply prospectively to arbitrator appointments to be made after the date of this judgment. This direction applies to three-member tribunals."

37. Hence, a unilateral appointment of the sole arbitrator or the presiding arbitrator by a party to 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.

Any award passed by the unilaterally appointed Arbitral Tribunal is 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."

21. The Court, thereafter, went on to consider the question as to whether there can be a waiver of the objection to unilateral appointment and if so, in what manner. Again, after considering the relevant decisions of the Supreme Court as also the High Courts, the Court came to the conclusion that any waiver has to be expressly in writing and the same has to be waived after the dispute arises between the parties. The observations in this regard are set out below:

"42. In CORE (supra), the Supreme Court has laid down twin conditions for a valid waiver under the proviso to Section 12(5) of the Act. These conditions are: (i) the express agreement in writing shall be made "after" the dispute has arisen; and (ii) the parties must consciously abandon their existing legal right through an "express agreement". *It was held that:*

> *"121. An objection to the bias of an adjudicator can be waived. A waiver is an intentional relinquishment of a right by a party or an agreement not to assert a right. 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. ["Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently, to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above."] 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."***
>
> *43. Consenting to the extension of the mandate of the arbitrator under Section 29A(3) of the Act does not constitute a valid express waiver in writing as required under the proviso to Section 12(5) of the Act……"*

22. The Co-ordinate Bench of this Court, in ***Mahavir Prasad Gupta (Supra)*** also considered another decision of an earlier Co-ordinate Bench in ***FAO(OS) (COMM) 23/2025*** titled ***Bhadra International India Pvt. Ltd. and Ors. v Airports Authority of India*** wherein the Court had taken an opposing view and had held that the conduct of the parties in participating in the arbitration proceedings would show that the arbitral award was not a nullity and it was held that there was also a written consent with respect to the appointment of arbitrator. This decision in ***Bhadra International (supra)*** was also held to be *per incurium*. The relevant paragraph of the said judgment i.e. ***Mahavir Prasad***

Gupta (Supra)is extracted below:

> *"73. However, the decision in Bhadra International (supra) does not consider the prior decision of the Constitutional Bench of the Supreme Court in CORE (supra) wherein, it is held that a unilateral appointment clause is invalid without an express agreement in writing as envisaged under the proviso to Section 12(5) of the Act. Hence, we agree with the Respondent that Bhadra International (supra) is also per incurium."*

23. With the background of the applicable judicial precedents, the impugned judgement deserves to be considered. In the present appeal, the Commercial Court has held that the Engineer-in-Chief, PWD was not eligible for appointment of an Arbitrator in view of Section 12(5) of the Arbitration & Conciliation Act, 1996. Though no objection was raised by either party to the said appointment, the Court itself set aside the award on the ground that this was a unilateral appointment. The observations of the Commercial Court are set out below:

> ***"7. Reverting to the present matter, Engineer-in-Chief of the petitioner i.e. PWD/Union of India was not eligible for appointment of arbitrator in view of provision of Section 12(5) of Arbitration & Conciliation Act. Hence, it is found that the appointment of Ld. Arbitrator in this matter was not as per settled provisions, hence, cannot be sustained in law. In the light of above discussion, and in view of settled legal position, the petition stands allowed and accordingly the impugned award dated 21.05.2020 is set aside."***

24. The clear legal position that has emerged is that any award passed by a unilaterally appointed Arbitral Tribunal who is conflicted under Section 12(5)

of the Arbitration and Conciliation Act, 1996, would be against public policy. Under such circumstances, the approach of the Commercial Court cannot be faulted with.

25. In the opinion of this Court, even the affidavit filed on behalf of the PWD would not constitute express waiver in writing as required in ***CORE (supra)*** and ***M/s Mahavir Prasad Gupta and Sons (supra)*** and hence, the present appeal is liable to be dismissed. The impugned judgment does not warrant any interference of this Court.

26. Accordingly, the present appeal is dismissed. All pending applications are disposed of. Ordered accordingly.

27. Parties are left to avail of their remedies in accordance with law, in respect of their disputes.

PRATHIBA M. SINGH
JUDGE

SHAIL JAIN
JUDGE

AUGUST 4, 2025/*Rahul/ss*