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

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Date of Decision: 14.07.2025+ **FAO(OS) (COMM) 178/2024 & CM APPL. 47202/2024**

M/S CLS CONSTRUCTION PVT LTD

.....Appellant

Through: Mr Manoj Chouhan with Mr Ujjwal
Singh Parmar and Ms Neha Raj
Singh, Advocates.

versus

M/S S K BUILDERS

.....Respondent

Through: Mr Viraj R.Dattar, Sr. Advocate with
Mr Mayank Sharma, Advocate.**CORAM:****HON'BLE MR. JUSTICE VIBHU BAKHRU****HON'BLE MR. JUSTICE TEJAS KARIA****VIBHU BAKHRU, J. (Oral)**

1. The Appellant has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 [A&C Act] impugning a judgement dated 08.08.2024 [**impugned judgment**] passed by the learned Single Judge of this Court in OMP (Comm) No. 297/2023 captioned *M/s S.K. Builders v. M/S CLS Construction Pvt. Ltd.* The learned Single Judge allowed the petition and had set aside the arbitral award dated 18.05.2023 [**impugned award**] on the ground that the sole arbitrator was unilaterally appointed by the Appellant.

2. The dispute between the parties arose in the context of a Memorandum of Understanding dated 20.12.2019 [MoU] entered into in relation to the construction of a railway platform, station building, signal



rooms, gate lodges, staff quarters and other miscellaneous works in connection with doubling of INDARA-PHEPHANA-MAU, Shahganj Section of Varanasi Division of North East Railway.

3. The arbitration agreement (clause 16 of the MoU) reads as under:

“16. That the parties undertake to fully abide by the terms and conditions set out in this MOU and not to dispute / agitate upon the same hereinafter in future in any manner whatsoever, or in case any misunderstanding or dispute arises pertaining to the terms and conditions of this deed the same shall beresolved by the parties themselves and if the dispute still persist the same shall be resolved and decided by the sole arbitrator as per mutually decided both of parties, Advocate in accordance to the rules, regulations and procedures of the of Arbitration and Conciliation Act, whose decision shall be final and binding upon both parties to this deed.”
(Emphasis supplied)

4. In terms of the arbitration agreement (Clause 16 of the MoU), the parties had agreed to appoint the sole arbitrator by mutual agreement. The Appellant invoked the arbitration agreement by issuing a notice dated 21.06.2021. The Appellant also proceeded unilaterally appoint one Sh. M.P.S. Kasana, as the Sole Arbitrator. The Appellant also called upon the Respondent to consent for reference of the disputes to arbitration. The relevant extract of the said notice is set out below:

*“Accordingly, our above named client hereby appoints Sh. M.P .S. Kasana Advocate Enrolment no. D 186/1993 having office at Kasana Place 46, Street No. 16, Wazirabad Delhi-110084, as the Arbitrator who shall commence the Arbitral Proceedings in accordance to the rules and procedures of the Arbitration and Conciliation Act 1996.
Further you are called upon to send your consent for reference of disputes to the Arbitration which will be conducted by the sole Arbitrator named above, within the Statutory period from the date of the receipt of this Present Notice. Take notice that your non-response or silence shall be treated as a consent. This is without prejudice to our Client's rights to seek any other Legal remedy available as per Law.
Take this Notice accordingly.”*

[emphasis added]

5. The Respondent replied to the aforesaid notice on 01.07.2021



disputing the allegations but did not respond to the issue of the appointment of an arbitrator.

6. On 17.07.2021, the Appellant unilaterally issued a letter requesting the arbitrator to commence arbitration of the dispute as referred to in the said letter.

7. On 28.07.2021 and 30.07.2021, the Sole Arbitrator sent letters to the parties for commencement of arbitration proceedings. On 25.09.2021, the Appellant filed its statement of claims. And, on 17.12.2021, the Respondent filed its statement of defence.

8. During the course of the arbitration proceedings, the Respondent preferred an application before the Sole Arbitrator praying for termination of the arbitration proceedings, *inter alia*, on the ground that the Sole Arbitrator was appointed unilaterally by the Respondent. The learned Arbitrator, rejected the said application in terms of an order dated 17.02.2022. He held that since both the parties had joined the proceedings and filed the pleadings without any objection, there was no justification or ground to terminate the arbitration proceedings.

9. Thereafter, the proceedings continued and as the mandate of the Sole Arbitrator was to expire on 20.02.2023, a joint statement on behalf of the parties was recorded on 11.02.2023 extending the time for making the award within an extended period of three months.

10. The impugned award was pronounced on 18.05.2023 and the same was challenged before this Court under Section 34 of the A&C Act. In the impugned judgment, this Court had set aside the impugned award on the ground that the Sole Arbitrator had no jurisdiction to arbitrate as his appointment was unilateral and void *ab initio*. Therefore, the arbitration proceedings were a nullity.



11. Being aggrieved by the impugned judgment, the Appellant has preferred the present Appeal.

12. By an order dated 10.07.2025, this Court observed that, *prima facie*, the issue involved in the present Appeal is covered by the decision of this Court in ***M/s Mahavir Prasad Gupta and Sons v. Govt. of NCT of Delhi: Neutral Citation No.2025:DHC:4781-DB***. The learned counsel appearing for the Appellant requested for some time to go through the said decision and the matter was listed on 14.07.2025.

13. The learned counsel for the Appellant submitted that since the Respondent had not objected to the appointment of the Sole Arbitrator in the reply to the notice invoking arbitration, the arbitration was commenced by the Sole Arbitrator and the impugned award was passed. He contended that the Respondent preferred an application challenging the jurisdiction of the Sole Arbitrator on the ground of unilateral appointment, which was rightly rejected by the learned Sole Arbitrator.

14. As regards the decision of this Court in ***Mahavir Prasad Gupta (supra)***, the learned counsel for the Appellant has submitted that the said decision is not applicable in the facts of the present case. The learned counsel for the Appellant relied upon the decision of the Supreme Court in ***Gayatri Project Limited v. Madhya Pradesh Road Development Corporation: 2025 SCC OnLine SC 1136*** and submitted that the decision of ***Mahavir Prasad Gupta (supra)*** does not consider the decision of ***Gayatri Project (supra)***.

15. It was submitted that in ***Gayatri Project (supra)***, the Supreme Court has held that:

“36. What emerges from the foregoing is that although Lion Engineering (supra) affirms that a plea of lack of jurisdiction, being a question of law, may be raised for the first time under Section 34 of the



Act, 1996, yet such a plea is nevertheless subject to the waiver as held in *Pam Development (supra)*. Furthermore, as per *Gas Authority of India (supra)*, such a plea may only be entertained if the party demonstrates a strong and sufficient reason for not raising it before the arbitral tribunal. However, *L.G. Chaudhary (II) (supra)* makes it clear that a failure to raise the issue of applicability of the MP Act, 1983 at the appropriate stage cannot be regarded as a sufficient reason, and therefore the plea cannot be permitted at the stage of Section 34 proceedings.

37. *L.G. Chaudhary (II) (supra)* carved out the aforesaid limited exception to the general rule laid down in *Lion Engineering (supra)* that a plea of lack of jurisdiction, being a pure question of law, may be raised for the first time under Section 34 of the Act, 1996. The failure of *L.G. Chaudhary (II) (supra)* to take into consideration the decision of this Court in *Lion Engineering (supra)* does not render the former *per incuriam*, as there exists no direct conflict between the two. While *Lion Engineering (supra)* permits a jurisdictional plea to be raised under Section 34 of the Act, 1996 even if not urged under Section 16, *L.G. Chaudhary (II) (supra)* merely clarifies that an arbitral award will not be annulled solely on that ground, particularly where the issue was not raised before the tribunal. On the contrary, the aforesaid observations of *L.G. Chaudhary (II) (supra)* had been consciously made by this Court keeping in mind the ratio of *Lion Engineering (supra)*, even though the latter was never explicitly referred to. *L.G. Chaudhary (II) (supra)* cannot be termed to be *per incuriam*, as the very factum that the aforesaid observations were made by *L.G. Chaudhary (II) (supra)* in paras 16, 17 and 19 respectively shows that this Court was well aware of the decision of this Court in *Lion Engineering (supra)*, and accordingly chose to carve out an exception to the ratio of *Lion Engineering (supra)* keeping in mind the cleavage of judicial view that was prevailing earlier.

38. In view of the above exposition of law, what has been conveyed by this Court in *L.G. Chaudhary (II) (supra)* in so many words is that:—

- i. Where the arbitration proceedings are still underway, but no statement of defence has been filed, there it would be open for the parties to raise an objection of lack of jurisdiction in view of the applicability of MP Act, 1983. The parties will also be at liberty to approach the High Court by way of a petition under Article 227 of the Constitution for seeking a transfer of the arbitration proceedings to the M.P. State Arbitration Tribunal under the MP Act, 1983.
- ii. Where the arbitration proceedings are still underway, but statement of defence has already been filed i.e., the relevant stage for raising an issue of jurisdiction is already crossed, there it would not be open for the parties to raise an objection of lack of jurisdiction in view of the applicability of MP Act, 1983. Furthermore, in such scenarios since the arbitration proceedings have already commenced and made



- substantial progress, it would not be appropriate to transfer such proceedings to the M.P. State Arbitration Tribunal under the MP Act, 1983, and the better course of action would be to let the arbitration proceedings conclude.*
- iii. As per L.G. Chaudhary (II) (supra) where the arbitration proceedings have concluded and an award has been passed, and if no objection to the jurisdiction in view of the applicability of MP Act, 1983 was taken at the relevant stage then such an award cannot be annulled only on the ground of lack of jurisdiction.*
 - iv. Any award passed by an arbitral tribunal under the Act, 1996, where otherwise the MP Act, 1983 was applicable, such an award may be challenged or assailed in terms of Section 34 and thereafter Section 37 of the Act, 1996 and other relevant provisions thereunder.*
 - v. Any award passed by an arbitral tribunal under the Act, 1996, where otherwise the MP Act, 1983 was applicable, such an award must be executed in terms of the MP Act, 1983 and the relevant provisions thereunder.*
 - vi. Where the objection based on applicability of the MP Act, 1983 had been raised in the written statement or statement of defence, but the parties never took steps towards challenging the jurisdiction of the arbitral tribunal under Section 16 of the Act, 1996 or where such plea of jurisdiction was turned down in view of the position of law that was prevailing prior to L.G. Chaudhary (II) (supra) i.e., such challenge to the jurisdiction was decided prior to the date of pronouncement of L.G. Chaudhary (II) (supra), then even in such cases, as per the decision of this Court in Modern Builders (supra), the award should not be disturbed or set-aside only on the ground of lack of jurisdiction.”*

16. In view of the above, the learned counsel for the Appellant submitted that the decision ***Lion Engg. Consultants v. State of M.P.: (2018) 16 SCC 758*** which held that a plea of lack of jurisdiction, being a question of law, may be raised for the first time under Section 34 of the A&C Act was not applicable. He also submitted that in ***M.P. Rural Road Development Authority v. L.G. Chaudhary Engineers and Contractors: (2018) 10 SCC 826***, the court held that the arbitral award will not be annulled solely on the ground of lack of jurisdiction where the issue of jurisdiction was not raised before the arbitral tribunal. He emphasised that in view of ***L.G. Chaudhary (supra)***, the issue of jurisdiction cannot be raised before the arbitral tribunal



after filing of the statement of defence. And, if no such objection was raised before the arbitral tribunal in the first instance, such an award cannot be annulled only on the ground of lack of jurisdiction.

17. On the strength of the aforesaid discussion, the learned counsel for the Appellant submitted that the decision in *Mahavir Prasad Gupta (supra)* cannot be relied upon to decide this Appeal as the decision of *L.G. Chaudhary (supra)* was not considered in *Mahavir Prasad Gupta (supra)*.

18. We do not find any merit in the said contention. First of all this is not a case where the arbitration agreement entitled the Appellant to unilaterally appoint an arbitrator. The arbitrator was required to be appointed by mutual agreement. It cannot be inferred that the Respondent had agreed to appointment of Sh. M.P.S. Kasana as a sole arbitrator.

19. In view of the above, we find no infirmity with the decision of the learned Single Judge finding that Sh. M.P.S. Kasana was appointed unilaterally by the Appellant. In *L.G. Chaudhary (supra)*, there was no issue regarding the ineligibility of an arbitrator. An arbitrator who is by virtue of Section 12(5) of the A&C Act is ineligible to act as an arbitrator, lacks the inherent jurisdiction to render an award. It is well settled that if a court or tribunal lacks inherent jurisdiction, the award or decree would be a nullity. In the case of *L.G. Chaudhary (supra)*, both the parties had proceeded for arbitration under the A&C Act and no such issue had arisen. It is also important to bear in mind the distinction between an error in exercise of jurisdiction and an inherent lack of jurisdiction.

20. It is also relevant to note that the Respondent had raised an objection as to the jurisdiction of the arbitrator during the course of the arbitral proceedings.

21. The right under Section 12(5) of the A&C Act cannot be waived



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except by an expressed agreement. It is also well settled that the provisions of Section 12(5) are in exception to Section 4 of the A&C Act which provide for its deemed waiver.

22. In view of the above, the present Appeal is dismissed with costs quantified at ₹5,000/-. The costs shall be paid to the Respondent within a period of two weeks from date.

VIBHU BAKHRU, J

TEJAS KARIA, J

JULY 14, 2025

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