



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

% Judgment delivered on: 13.11.2025

+ **FAO (COMM) 107/2024 & CM APPL. 33366/2024 CM APPL.
33369/2024 CM APPL. 11706/2025**

CENTRAL WAREHOUSING CORPORATIONAppellant

versus

M/S DEEN DAYALRespondent

Advocates who appeared in this case

For the Appellant : Mr. Prabhas Bajaj, Mr. Priyanshu
Tyagi and Mr. Rithvik Mathur, Advocates.

For the Respondent : Mr. Ranjeet Kumar, Advocate.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE VINOD KUMAR

JUDGMENT

V. KAMESWAR RAO, J. & VINOD KUMAR, J.

1. This appeal has been filed with the following prayers:

*“a. Allow the present Appeal and set aside the
Impugned Judgment dated 07.02.2024 passed
by the Ld. District Judge (Commercial Court),
South District, Saket Courts, New Delhi in*



OMP (COMM) No.15/2023 as well as the Arbitral Award dt. 01.02.2023 passed by the Ld. Sole Arbitrator; and
b. Pass such other or further orders as deemed fit and proper in the facts and circumstances of the case.”

2. Before delving into the merits of the matter it is pertinent to give a factual background surrounding the present appeal. The impugned judgment dated 07.02.2024 of the learned District Judge (Commercial Court) (Digital -04) South, Saket Courts, New Delhi had dismissed the Section 34 petition under the Arbitration and Conciliation Act, 1996 ('the Act', hereinafter). The appellant had sought setting aside of the arbitral award dated 01.02.2023 whereby, Claim Nos.1, 2 and 5 of the respondent/contractor were allowed and Claim Nos.3, 4 and 6 were rejected. The learned District Judge while considering the appeal had noted that the appeal was filed within the limitation period under Section 34(3) of the Act. Another observation by the learned District Judge was that in the present appeal, the learned Sole Arbitrator was unilaterally appointed by the appellant. The impugned judgment noted that the appellant was the appointing authority and is also the appellant/petitioner and hence, it was concluded by the learned District Judge that even though the arbitrator was unilaterally appointed the appellant should not be allowed to take advantage of its own wrongdoing. It was thereafter that the order reserving the judgment was recalled and the matter was argued and finally decided vide the impugned judgment.

3. The appellant/petitioner invited e-tenders with an estimated cost of Rs.108.44 lacs for carrying out a work for replacement of AC/GS sheet



roofing with pre-coated Galvalume sheets for its godowns at Devangere, Karnataka. The stipulated time for the completion of said work was four months. The respondent was awarded this contract since it had emerged as the L1 bidder for an amount of Rs.1,05,90,400.56/- on 24.04.2019 vide letter of acceptance dated 24.04.2019. Thereafter, the respondent/contractor submitted a performance bank guarantee on 08.05.2019 and the site was handed over to the respondent on 09.05.2019. As per the agreement, the stipulated time for finishing the work was to end on 08.09.2019 i.e., after four months. The work could not be completed within the stipulated time frame and the appellant vide letter dated 19.12.2019 granted a provisional extension upto 28.02.2020 for finishing the said work, while reserving its right to recover liquidated damages from the respondent/contractor as per Clause 2 of the agreement dated 26.06.2019. The work was finished on 25.08.2020 i.e., after a delay of about 352 days. The appellant had given a benefit of 16 days for the execution of extra work and of about 92 days on the account of the Covid-19 pandemic. Thus, leaving a balance of a delay of 244 days which was attributed to the respondent/contractor, thereby the appellant seeking a recovery of Rs. 8,61,352/- from the final bill which was paid to the respondent/contractor. The recovery which was sought to be claimed under Clause 2 of the agreement stipulated that a penalty at the rate of one percent per month may be claimed for the delay in execution of the work. Clause 2 of the agreement is as follows:

“If the contractor fails to maintain the required progress in terms of Clause 5 or to complete the work and clear the site on or before the contract or justified



extended date of completion as per Clause 5 (excluding any extension under Clause 5.5) as well as any extension granted under clauses 12 and 15, he shall, without prejudice to any other right or remedy available under the law to the CWC on account of such breach, pay as compensation the amount calculated at the rates stipulated below as the authority specified in schedule 'F' may decide on the amount of Tendered Value of the work for every completed day/month (as determined) that the progress remains below that specified in Clause 5 or that the work remains incomplete.

(i) Compensation for delay of work @ 1% per month of day to be computed on per day basis”

4. The respondent/contractor aggrieved by this recovery invoked the arbitration clause in the agreement and the appellant appointed a retired Member Engineering, Railway Board as a Sole Arbitrator who rendered the award on 01.02.2023. Clause 25 of the agreement relating to the appointment of Arbitrator reads as under:-

“The Managing Director, CWC, New Delhi shall in such case appoint the sole arbitrator for adjudication of those disputes”

5. The respondent/contractor made six claims before the learned Arbitrator. Whereas, the appellant did not file any counter claims. The learned Arbitrator after adjudication allowed claims No. 1, 2 and 5, and rejected claims No. 3, 4 and 6. The impugned judgment dated 07.02.2024 summarises the claims as under:



Sr. No.	Claim	Amount claimed	Amount Awarded
1.	Claim towards refund of penalty	8,61,352/-	8,61,352/-
2.	Claim towards refund of 18 % GST on penalty amount	1,55,043/-	1,55,043/-
3.	Claim towards refund of 6% GST recovered by the Petitioner CWC @ 18 % instead of 12%	5,83,056/-	Rejected
4.	Claim towards extra cost of covering cotton bales with water proof tarpulin being outside the scope of work.	80,000/-	Rejected
5.	Claim towards GST taken dismantled material by petitioner CWC	1,27,013/-	1,27,013/-
6.	Claim towards expenses due to elongation of contract due to lapses of Petitioner CWC	5,70,000/-	Rejected
Total		23,76,465/-	11,43,409/-

6. It was noted in the impugned judgment that the respondent did not lay challenge to claim Nos. 3, 4 and 6 which were rejected by the learned Arbitrator. Whereas, the appellant challenged the impugned award on the ground that the findings in the arbitral award were against Public Policy of India. Further, they also claimed that the learned Arbitrator only took into consideration the statement of claim filed by the respondent/contractor without looking into the statement of defence filed by the appellant. It was stated before the learned District Judge that the work was completed by the respondent/contractor on 25.08.2020 i.e. after 352 days from the stipulated date of completion which was 08.09.2019 and even though certain relaxations were given by the appellant even then a balance of 244 days remained against which the appellant imposed a penalty on the respondent/contractor. Regarding claim No. 2, it was agitated before the District Judge that the learned Arbitrator failed to take into consideration the GST which is applicable on the construction works



at the rate of 18%, as well as the GST applicable on the construction of godown for agricultural purpose being 12% and it was stated that the work in question was not for the construction of a godown for agricultural purpose but rather for upgrading the roof and therefore the GST applicable is at the rate of 18%. It was the case of the appellant that the learned Arbitrator only allowed claim No. 1 without taking into consideration the legal aspect of GST in this matter.

7. As per the arguments of the respondent/contractor, it was stated that the work could not be completed in the time frame of four months due to various hindrances and lapses due to the appellant. It was their case that the work continued even after the stipulated date of completion and the appellant paid an amount of Rs.1,14,66,775/- to the respondent/contractor as against the tender amount of Rs.1,05,90,400/-. The impugned judgment notes that the appellant admitted that its godowns were occupied and stocked up with cotton bales and the work started after the monsoon period. As per the respondent/contractor, the stocking of these cotton bales created hindrance in the timely execution of the work and according to them, the site was only handed over to them on 19.05.2019. It was their case before the learned District Judge that the delay in execution of the work was attributable only to the appellant whereas the delay of 244 days was held to be the responsibility of the respondent/contractor by the appellant. According to them, the appellant could have forfeited the performance guarantee and earnest money but the same was not done. Although, according to the respondent/contractor, the appellant wrongfully and unilaterally determined the compensation amount, to be recovered from the bill of the respondent/contractor which



was done without any notice or taking into consideration the factors for delay. According to them, the appellant ought to have determined the actual suffered loss but without doing so, the recovery of the compensation amount from the final bill ought to have not been done by the appellant. The learned District Judge noted that for an appeal under Section 34 of the Act to subsist, there must be a patent illegality which goes to the heart of the matter.

8. According to the learned District Judge, a patent illegality may also constitute an instance where an Arbitrator takes a view which may not be inferred from the facts of the case or interprets a contract clause in such a manner, which no fair minded or reasonable person would do, or in cases where the Arbitrator oversteps the bounds of the contract or goes beyond the scope of the jurisdiction. The impugned judgment also states that only if the conclusion of the Arbitrator are based on no evidence or have been arrived by ignoring vital evidence such findings would render the award liable to be set aside. The learned District Judge noted that the letter dated 19.12.2019, which was issued by the appellant bearing the signatures of the Assistant Engineer, who was an undesignated authority under the contract and therefore, was not entitled to levy liquidated damages. As per the contract, it was the Chief Engineer, who was the designated authority who had the powers to grant such extensions of time as per clause 5 of the agreement.

9. It was argued before the learned District Judge that the provision for granting extension of time and levy liquidated damages under clause 2 of the agreement shows that the time was intended to be extended, therefore, time was not of the essence in this contract. According to the



respondent/contractor, as per clause 2, the breach of contract can be identified in three scenarios; (i) non-maintenance of progress as per clause 5; (ii) failure to complete work as per contract date; and (iii) failing to complete the work on the extended date for such completion. It was the case of the respondent/contractor that under clause 2, firstly, the breach is required to be established which the appellant ought to have done, whereas in the present case, the alleged breach of contract was established much after the occurrence of delay. Further, the compensation for delay under clause 2 has to be read in consonance with clause 5 of the contract, however, in the present case the delay of 108 days from the initial stipulated date of completion i.e., 08.09.2019 was found to be justified but the delay of 244 days was only finalised in February, 2021, which was much after the events which had caused delay and not in terms of the requirement of clause 5.

10. As per the respondent/contractor, the procedure provided under clause 5 of the contract was not followed inasmuch as the letter of intimation under clause 2 read with clause 5 was issued by the appellant after lapse of completion period. As per their case, the work order was issued by the appellant on 17.06.2019 whereas the date for start of work was 08.05.2019, which amounts to a delay of 41 days in the issuance of the work order and according to the respondent/contractor, this delay amounts to one-third of the period for completing the work. The case of the respondent/contractor was that the work started after the monsoons as per mutual agreement, and even after the procurement of the material, the appellant took more time in getting the material tested and providing the site for starting the work. According to them, the scope of work was also



enlarged, which is why the work could only be completed on 25.08.2020. The respondent/contractor relied on a judgment of this Court in **Indian Oil Corporation v. Lloyds Steel Industries decided (2007) 144 DCT 659** on the issue of liquidated damages, according to which, in case of a breach of a contract, the employer can either elect to affirm the breach of contract and claim liquidated damages or ignore the same and grant the continuation of contract. In case, the employer chooses to classify the breach as a repudiatory breach, the employer would have been disentitled to claim liquidated damages. In such circumstances, the employer would have deemed to have waived his right to claim liquidated damages and the right to claim the same will be forfeited.

11. The learned District Judge noted that the award was sought to be set aside on two grounds; firstly, being that it was against the public policy of India and based on no evidence; and secondly, the award being passed beyond the terms of the contract. The learned District Judge referred to the law on the issue and took into account the judgments in the cases of **Kailash Nath Associates v. DDA, 2015 (4) SCC 136, Goa v. Parveen Enterprises, 2012 (12) SCC 581 and ONGC v. SAW Pipes, 2003 (5) SCC 705, Associate Builders v. DDA, 2015 (3) SCC 49**. It was noted that the argument of the award being against the public policy of India and since, the same has not been defined under any statute and the learned District Judge relied on **Continental Construction Co. v. State of MP, 1988 (3) SCC 82, State of Uttar Pradesh v. Satish Chand Shivhare, 2022 SCCOnline SC 2151 and Indian Oil Corporation v. Shree Ganesh Petroleum, 2022 (4) SCC 463**, to come to the conclusion that an award can be said to be against the public policy of India if it is against a



statutory provision, is against principles of natural justice or if it suffers from a patent illegality.

12. On the issue of the appellant being entitled to recover the penalty amount from the final bill is concerned, the learned Arbitrator came to the conclusion that there were delays on both sides and went on to note the factors, which led to the delay in execution of the work. In such a scenario, the revised date of completion should have been decided mutually and in case, where this was not done, the delay of 244 days attributed to the respondent/contractor was unreasonable. As per the award, the learned Arbitrator also noted that the agreement lacked a provision for granting a 'provisional extension'. In a case where the respondent/contractor had not been able to complete the work within the extended period of time, the appellant could have terminated the sub-contract invoking the doctrine of time being of the essence and the appellant could have intimated the respondent/contractor after a particular date on the levy of liquidated damages. The arbitral award mentions that the after the completion of the work, the appellant levied the maximum possible liquidated damages from the final bill, without prior notice to the respondent/contractor. It was also noted that the charge of liquidated damages was done on the recommendation of the Superintending Engineer, who was at the time looking after the duties of the Chief Engineer. In other words, the Superintending Engineer himself approved his own recommendations. It was also noted that in such a scenario, as per the principles of natural justice, the Superintending Engineer ought to have placed his recommendations before the next higher authority for a decision.



13. The learned District Judge was of the opinion that the learned Arbitrator did not commit any illegality when the claim of the respondent/contractor towards deduction of Rs. 8,61,352/-, was allowed along with Rs. 1,55,043/- being the GST on the said amount. The learned District Judge concurred with the findings of the learned Arbitrator and found them just and reasonable. On the issue of the delay of 244 days, which was attributed to the respondent/contractor by the appellant, the learned Arbitrator noted that the delay was attributable to both the parties equally, since the delay of 16 days was attributed to extra work and 92 days' delay was attributed to Covid-19 restrictions. Although the entire decision to impose the penalty on the respondent/contractor was a unilateral one and made behind the back of the respondent/contractor. Since the appellant was also a party to the contract, therefore, a decision on the issue of delay could not have been decided by the appellant, more so, in a situation where the Superintending Engineer, who took such a decision was himself party to the agreement. The learned District Judge while relying on the judgments in the cases of ***State of Karnataka v. Shree Rameshwara Rice Mills, (1987) 2 SCC 160*** and ***J.G. Engineers (P) Ltd. v. Union of India, (2011) 5 SCC 758*** stated that the Engineer who himself is a party to such an agreement is incompetent to take a decision on this issue. The learned District Judge held that the Superintending Engineer, who was a party to the agreement himself could not unilaterally decide whether there was a delay of 244 days solely attributable to the respondent/contractor and thereby, levy a penalty of 1% per month on the respondent/contractor without putting the respondent/contractor to prior notice. As such a decision is liable to be set



aside being in violation of the principles of natural justice alone where the Superintending Engineer acted as a judge in his own cause and no opportunity to be heard was given to the respondent/contractor.

14. Mr. Prabhas Bajaj, learned counsel appearing on behalf of the appellant has argued that the present appeal has been filed under Section 37(1)(b) of the Act on the following grounds:-

- a. The learned District Judge has not decided the appeal as per the settled principles of law related to Section 34 and Section 28(3) of the Act and also that the learned Arbitrator decided in favour of the respondent/contractor contrary to the provisions of the contract.
- b. As per Mr. Bajaj, there was a gross delay by the respondent/contractor in completing the work, which was supposed to be completed within a period of four months i.e., from 09.05.2019 to 08.09.2019. According to him, the appellant sent a communication dated 03.12.2019 to the respondent/contractor reiterating that the respondent/contractor had not commenced work even till the end of December, 2019. It was only after the request of the respondent/contractor that the appellant had granted a provisional extension (as per clause 5.5 of the contract) to complete the work up till 28.02.2020 vide letter dated 19.12.2019 and that such extension is without prejudice to the rights of the appellant as per clause 2 of the contract to recover liquidated damages.
- c. Mr. Bajaj has argued that the respondent/contractor did not complete the work even during the extended period up to 28.02.2020 after which the appellant was constrained to issue another communication dated 27.02.2020 to state that the



respondent/contractor had not completed the work within the extended period and further, directed the respondent/contractor to finish the work within one week thereafter. According to him, even during such period, the respondent/contractor did not finish the work and it was in the month of March, 2020 that the COVID-19 pandemic had taken hold and the lockdown restrictions had come into force, which meant that the respondent/contractor could not finish the work even during that time. Vide communication dated 17.07.2020, a final opportunity was given to finish the work within a period of seven days and the respondent/contractor would be responsible for the consequences/non-compliance of the contract.

- d. He stated that the respondent/contractor only finished the work on 25.08.2020 i.e., with a gross delay of 352 days and this delay was a material breach of the contract. Mr. Bajaj has submitted the following table showing the timeline and the delay of works:-

1)	Stipulated date for commencement of work.	09.05.2019
2)	Stipulated date for completion of contract works as per the contract.	08.09.2019
3)	Actual date of completion of work by the Respondent.	25.08.2020
4)	i. Delay in completion of work. ii. Delay not attributable to contractor: a) Due to the extra works b) Due to the restrictions in COVID lockdown period iii. Total Delay Attributable to the contractor.	352 days -16 days -92 days 244 days

- e. It is the case of Mr. Bajaj that the learned Sole Arbitrator has attributed delay to the respondent/contractor and has not taken into



account the mandatory consequences under the provision of clause 2 of the agreement and even then decided against the appellant thereafter directing that the liquidated damages be recovered from the respondent/contractor.

f. In support of his arguments, Mr. Bajaj has relied upon the following judgments:

- i. ***Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum, (2022) 4 SCC 463;***
- ii. ***PSA SICAL Terminals Pvt. Ltd. Vs. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin & Ors., 2021 SCC Online SC 508;***
- iii. ***J.G. Engineers (P) Ltd. v. Union of India, (2011) 5 SCC 758;***
- iv. ***Punjab National Bank v. Prime Engineers Consultants, 2018, SCC OnLine Del 10516;***
- v. ***M.S.T.C. Ltd. v. Jain Traders, 2011 SCC OnLine Del 3304;***
- vi. ***Union of India v. V. Pundarikakshudu & Sons, (2003) 8 SCC 168;***
- vii. ***M/s Metal Engineering & Forging Company Vs. Central Warehousing Corporation & Anr., 2023 SCC Online Del 7375;***
- viii. ***Kailash Nath Assosicates v. Delhi Developmnet Authority and Another, (2015) 4 SCC 136;***
- ix. ***Keshav Lallubhai Patel v. Lalbhai Trikumal Mills Ltd., AIR 1958 SC 512;***
- x. ***Shree Rameshwara Rice Mills (Supra).***



- xi. ***Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755.***
- xii. ***Mahavir Prasad Gupta & Sons v. State (NCT of Delhi), 2025 SCC Online Del 4241.***
- xiii. ***Telecommunications Consultants India Ltd. v. Shivaa Trading, 2024 SCC Online Del 2937.***

15. Mr. Ranjeet Kumar, learned counsel appearing on behalf of the respondent/contractor has contended that the learned Arbitrator has rightly allowed claim nos. 1 and 2 wherein the learned Arbitrator awarded refund of penalty (Rs. 8,61,352/-), refund of 18% GST on penalty amount (Rs. 1,55,043/-).

16. It is his case that the learned District Judge has also rightly upheld the arbitral award by refusing to interfere with it by dismissing the appeal under Section 34 of the Act. According to him, this appeal under Section 37(1)(b) of the Act ought to also be dismissed on the following grounds:-

- a) That the scope of judicial interference in an appeal under Section 37 of the Act is very limited. Since, the appellant seeks that this Court re-appreciate the facts, the same ought not to be looked into.
- b) According to him, the Superintending Engineer, who levied penalty due to delay was the same authority, who approved the said penalty while acting in place of the Chief Engineer. Thus, acting in contravention to the principles of natural justice.
- c) He has also argued that no opportunity was given to the respondent/contractor to put forth their case before the penalty was imposed by the appellant upon the respondent/contractor. Hence, this factum alone also satisfies the dismissal of the present appeal.



17. Having heard the learned counsel for the parties and perused the records, what needs to be decided is whether the learned District Judge was justified in dismissing the petition under Section 34 of the Act and also rejecting the plea of the issue of unilateral appointment of the learned Arbitrator.

18. According to the learned District Judge who went on to *suo moto* consider the issue of unilateral appointment; we refer to the relevant findings of the learned District Judge on this aspect are as under:-

“4. Before considering the rival contentions of the parties, this Court would like to clarify one aspect i.e. daily order dt. 11.10.2023 passed during the progress of this Petition. This Court had been, and continue to do so, even now, dealing with Execution Petitions filed by Banks and Financial Institutions seeking enforcement of Awards, passed by the unilaterally appointed Arbitrators. Similarly, Section 34 Petitions are being filed by individuals against the Awards passed by unilaterally appointed Arbitrators by Banks, Financial Institutions and other legal entities. In this backdrop, when this Petition came up for hearing on 11.10.2023, finding that the Award has been passed in this case as well by a unilaterally appointed Arbitrator, it was verbally announced that the Award is set aside, being passed by a unilaterally appointed Arbitrator and the case was reserved for Judgment at 4 pm on that date. However, after a few minutes only, this Court realized that it was the Petitioner CWC itself which had appointed the Arbitrator and it would be travesty of justice if the Award passed by such an Arbitrator is set aside only on the ground that it was passed by a unilaterally appointed Arbitrator. In the meantime, the Respondent, who was appearing in person, also requested for an opportunity to enable him to engage a counsel for getting the matter argued. Immediately, Sh. Varun Chugh, the Counsel for the Petitioner was contacted and was requested to come back to the Court. However, instead of coming back to Court, the Counsel for the



Petitioner Sh. Varun Chugh, joined through VC and the situation was explained to him. For ready-reference, the order dated 11.10.2023 is reproduced below:-

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At this stage, Respondent who is appearing in person has prayed for an adjournment to enable him to engage a counsel for getting the matter argued.

In the interest of justice, the case is released from the stage of 'Orders' and be now listed for further arguments on 07.11.2023.

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5. In this view of the matter, the order reserving the judgment was recalled and the matter was posted for arguments. It is trite that one cannot seek advantage of one's own wrongs and hence the Award would not be liable to be set aside only on the ground that it was passed by an Arbitrator unilaterally appointed by Petitioner CWC itself. Subsequently, Sh. Prashant Kumar Mishra, addressed arguments on behalf of the Petitioner on 03.02.2024."

19. The arbitration clause in respect of appointment of an Arbitrator stipulates that the same be done by the Managing Director. We have also reproduced the said clause in paragraph 4 of this order. The law in respect of the power of the Managing Director to appoint an Arbitrator or to himself act as an Arbitrator has been well settled by the Supreme Court as well as by this Court.

20. Reliance has been placed by the learned Counsel for the appellant, on the judgments in the cases of **Bharat Broadband Network Ltd. (supra)** and **Mahavir Prasad Gupta & Sons (supra)** to state that the law is settled.

21. We refer to paragraphs nos. 17 and 18 of the judgment in the case of **Bharat Broadband Network Ltd. (supra)**, which reads as under:-

"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.

18. On the facts of the present case, it is clear that the Managing Director of the appellant could not have acted as an arbitrator himself, being rendered ineligible to act as arbitrator under Item 5 of the Seventh Schedule, which reads as under:



“Arbitrator's relationship with the parties or counsel

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.”

Whether such ineligible person could himself appoint another arbitrator was only made clear by this Court's judgment in TRF Ltd. on 3-7-2017, this Court holding that an appointment made by an ineligible person is itself void ab initio. Thus, it was only on 3-7-2017, that it became clear beyond doubt that the appointment of Shri Khan would be void ab initio. Since such appointment goes to “eligibility” i.e. to the root of the matter, it is obvious that Shri Khan's appointment would be void. There is no doubt in this case that disputes arose only after the introduction of Section 12(5) into the statute book, and Shri Khan was appointed long after 23-10-2015. The judgment in TRF Ltd. nowhere states that it will apply only prospectively i.e. the appointments that have been made of persons such as Shri Khan would be valid if made before the date of the judgment. Section 26 of the Amendment Act, 2015 makes it clear that the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after 23-10-2015. Indeed, the judgment itself set aside the order appointing the arbitrator, which was an order dated 27-1-2016, by which the Managing Director of the respondent nominated a former Judge of this Court as sole arbitrator in terms of Clause 33(d) of the purchase order dated 10-5-2014. It will be noticed that the facts in the present case are somewhat similar. The APO itself is of the year 2014, whereas the appointment by the Managing Director is after the Amendment Act, 2015, just as in TRF Ltd. Considering that the appointment in TRF Ltd. of a retired Judge of this Court was set aside as being non est in law, the appointment of Shri Khan in the present case must follow suit.”

22. We find it apposite to refer to the relevant paragraphs of the Judgment of a Coordinate Bench of this Court in the case of **Mahavir**



Prasad Gupta & Sons (*supra*), which reads as under:-

“77. Further, Section 12(5) of the Act provides that 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 of the Act shall be ineligible to be appointed as an arbitrator. The proviso to Section 12(5) of the Act provides that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) of the Act by an express agreement in writing.

78. A conjoint reading of Sections 12(4) and 12(5) of the Act would make clear that even if there is an agreement for the appointment of unilateral appointment, such clause would be invalid except when both parties mutually agree to waive the same in writing.

79. Hence, exercise of power to unilaterally appoint the arbitrator by a party cannot be termed as express agreement to waive the invalidity of the arbitration agreement providing for unilateral appointment. For waiver under Section 12(5) of the Act after the dispute have arisen, the parties are required to consciously agree in writing to waive the ineligibility of the arbitrator. Grounds of ineligibility of the arbitrator under Seventh Schedule are derived from Red List of IBA Rules on Conflict of Interest in International Commercial Arbitration. The Act was as amended in 2015 to provide a detailed framework to address arbitrator bias. This framework includes the Fifth and Seventh Schedules, which draw from the Orange and Red Lists of the IBA Guidelines, respectively. The Fifth Schedule requires arbitrators to disclose any circumstances that might reasonably affect their impartiality, including relationships with the parties, counsel, or subject matter of the dispute. The Seventh Schedule reflecting the Red List, outlines scenarios of relationship conflict that would result in *de jure* ineligibility of an arbitrator.

80. The Sixth Schedule complements this by prescribing the format and content of such disclosures. In *HRD Corpn. v. GAIL (India) Ltd.*, (2018) 12 SCC 471, the Supreme Court observed that the categories listed under the Fifth and Seventh



Schedules must be construed by taking a “broad commonsensical approach”, without restricting or enlarging the words.

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.



CONCLUSION:

84. In view of the above discussion, the legal position on the unilateral appointment of the Sole and Presiding Arbitrator is summarized as under:

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.”

[emphasis supplied]

23. In ***Mahavir Prasad Gupta & Sons (supra)*** this Court has held that the unilateral appointment of an Arbitrator is not justified, and a such plea can be put forth at any point, even at the stage of petitions filed under Section 34 and Section 36 of the Act. If that be so, these proceedings being under Section 37 of the Act as were the proceedings in ***Mahavir Prasad Gupta & Sons (supra)***, though the appellant has not taken a specific plea in this appeal, but in view of the oral submissions made during the hearing, and the issue is a pure question of law, the submission need to be accepted. As such, the appointment of the Arbitrator is barred under Section 12(5) of the Act also on the ground of impartiality and independence of the Arbitrator.

24. Though no plea with regard to ineligibility of the Arbitrator has been taken by the appellant in the petition filed under Section 34 of the Act but the learned District Judge has considered the issue on his own and has decided the same against the appellant.

25. In ***Mahavir Prasad Gupta & Sons (supra)***, which has been decided by this Court, the Court has referred to the judgments in the cases of ***Perkins Eastman Architects DPC v. HSCC (India) Ltd., 2019 SCC Online SC 1517, TRF Limited v. Energo Engineering Projects Limited, (2017) 8 SCC 377*** and ***Bharat Broadband Network Ltd. (supra)***.



26. In view of the position of law, as stated above, we hold, that, the Arbitrator could not have been appointed by the Managing Director of the appellant Corporation as he himself was ineligible to act as an Arbitrator. It follows, the award passed by such an Arbitrator is *non-est*/nullity in the eye of law, and needs to be set aside. We order accordingly.

27. The appeal is allowed and the impugned order is set aside.

28. The pending applications are dismissed as infructuous.

V. KAMESWAR RAO, J

VINOD KUMAR, J

NOVEMBER 13, 2025

Rt/rk