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

Reserved on: 12 January 2026
Pronounced on: 14 January 2026

\+ FAO(OS) (COMM) 110/2024

M/S. M.V. OMNI PROJECTS (INDIA) LTD. .....Appellant

Through: Mr. Raj Shekhar Rao, Sr. Adv. with Mr. Subodh Kr. Pathak, Mr. Amit Sinha, Mr. Abhishek Sandillya, Mr. Pawan Kumar Sharma and Mr. Wamic Wasim, Advs.

versus

UNION OF INDIA THROUGH
EXECUTIVE ENGINEER CPWD .....Respondent

Through: Mr. Ankur Mahindro, Mr. Ruchir Mishra, Mr. Rohan Taneja, Mr. Ankush Satija, Mr. Aditya Kapur, Mr. Mohit Dagar, Mr. Raghav Kalra, Mr. Animesh Dubey, Mr. Raghav Kalra, Ms. Creesha Shashtri, Ms. Jhanak Setia and Ms. Radhika Agrawal, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR
HON'BLE MR. JUSTICE OM PRAKASH SHUKLA

JUDGMENT

% 14.01.2026

C. HARI SHANKAR, J.

The *lis*

1. We are required, in this appeal, to consider the extent to which this case would be covered by the recent judgment of the Supreme Court

in ***Bhadra International (India) (P) Ltd v. Airports Authority of India***[1].

2. Disputes, which emanated out of an agreement dated 12 January 2016, between the appellant and the respondent, were referred to arbitration and culminated in an arbitral award dated 30 May 2023, which was adverse to the respondent. The respondent challenged the said award before this Court under Section 34 of the Arbitration and Conciliation Act, 1996[2] by way of OMP (Comm) 355/2023. By judgment dated 8 May 2024, a learned Single Judge of this Court has allowed OMP (Comm) 355/2023[3] and has set aside the arbitral award.

3. Aggrieved thereby, the present appellant, as the respondent in the OMP, has instituted the present appeal.

4. We have heard Mr. Raj Shekhar Rao, learned Senior Counsel for the appellant and Mr. Ankur Mahindro, learned Counsel for the respondent, at length.

5. The learned Single Judge has, by the impugned judgment, set aside the arbitral award, solely on the ground that the appointment of the arbitrator was in violation of Section 12(5)[4] of the 1996 Act. In so holding, the learned Single Judge has followed the judgments of the

[1] **2026 SCC OnLine SC 7,** referred to, hereinafter, as "**Bhadra**".
[2] "the 1996 Act", hereinafter
[3] **Union of India v M/s. M.V. Omni Projects (India) Ltd.**
[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.

Supreme Court in ***Bharat Broadband Network Ltd. v. United Telecoms Ltd***[5] and ***Perkins Eastman Architects DPC v. HSCC (India) Ltd***[6]**.**

6. The Supreme Court has, very recently, clarified the legal position in its judgment in ***Bhadra.*** Essentially, the arguments before us revolved around the impact of the said decision on the facts of the present case.

Facts

7. Clause 25 of the General Conditions of Contract governing the agreement between the appellant and the respondent provided for reference of disputes to arbitration, and read as under:

> "CLAUSE 25
>
> Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:
>
> (i) …….
>
> (ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the

[5] **(2019) 5 SCC 755**
[6] **(2020) 20 SCC 760**

concerned region of CPWD or if there be no Additional Director General, the Special Director General or the Director Genera/, CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to· proceed with the reference from the stage al which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal. It is also a term of this contract that no person, other than a person appointed by such Chief Engineer CPWD or Additional Director General or Special Director General or Director Genera/, CPWD, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims. The arbitration shall be concluded in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made there under and for the lime being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/-, the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement or claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is

made and published, be paid haul and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and In what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid."

8. Disputes having been arisen between the parties, the appellant issued a notice to the respondent, under Section 21[7] of the 1996 Act, on 11 October 2018, which read thus:

"Date: 11th October, 2018

To
The Chief Engineer
IITD, Project Zone
Hauz Khas,
New Delhi-110016

Work Contract: Agreement No: 1/EE/III DEM MPD/2015-2016 C/o IIIDEM Campus at Plot No.-1, Sector-13, Dwarka, New Delhi.

Sub: Invocation of Arbitration Clause 25 in Contract No. 01/EE/IIIDEMPD/2015-16 dated 12.01.2016 under provision of Arbitration and Conciliation Act 1996.

Sir,

With reference to the aforesaid contract it is stated that the contract has been illegally and arbitrarily terminated by your office vide letter dated 01.10.2018 dispatched on 03.10.2018.

Since, the contract has already been terminated unilaterally, therefore, It is requested to appoint an independent Arbitrator in terms of the provisions of Arbitration and Conciliation Act 2016 for adjudication of dispute and claim without any delay. This clause is invoked without prejudice to my right to file my claim separately.

Thanking You,

Yours Faithfully,

[7] **21. Commencement of arbitral proceedings**.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

For, M.V.Omni Projects (I) Limited,

Sd/-

Authorized Signatory"

Mr. Rao points out that the Section 21 notice called upon the respondent to appoint an independent arbitrator.

9. As the respondent did not appoint any arbitrator as sought by the Section 21 notice, the appellant instituted ARB P 199/2019[8] under Section 11(6)[9] of the 1996 Act. The prayer clause in the arbitration petition read thus:

> "In view of the facts and circumstances of the present case, it is, therefore, most humbly prayed that this Hon'ble Court may graciously be pleased to:
>
> a) Appoint any person as sole arbitrator to adjudicate the disputes between the parties arisen in respect of the Agreement dated 12.01.2016 between the Petitioner and Respondent; and/or
>
> b) Pass such other or further Order(s)/direction(s) as this Hon'ble Court deems just and proper in the facts and circumstance of the present case."

10. *Vide* order dated 23 August 2019, the learned Single Judge of this Court disposed of the ARB P 199/2019 in the following terms:

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[8] **M/s M.V. Omni Projects (India) Limited v. The Executive Engineer Central Public Works Department**

[9] (6) Where, under an appointment procedure agreed upon by the parties,—
(a) a party fails to act as required under that procedure; or
(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,
the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

> "1. This petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator.
>
> 2. The contract stipulates appointment of an arbitrator by the Chief Engineer. The contract also stipulates dispute resolution mechanism which, according to the learned counsel for the petitioner, has been availed of. He states that the petitioner has made a representation dated May 16, 2019 to the Chief Engineer for appointment of an arbitrator which according to Mr. Mishra, learned counsel for the respondent, was a premature request as on the date of representation the process of Dispute Resolution Committee was not complete.
>
> 3. Mr. Mishra concedes that the Dispute Resolution Committee's decision has now come, rejecting the claims of the petitioner.
>
> 4. If that be so, learned counsel for the petitioner, today, submits before the Court that he would be happy if the respondent considers the appointment of an arbitrator in terms of the contract.
>
> 5. Mr. Mishra states, the respondent shall appoint a contractor within four weeks. The statement is taken on record.
>
> 6. The present petition is disposed of accordingly.
>
> Dasti."

11. Subsequently, by order dated 11 September 2019, in IA 12502/2019, para 5 of the order was corrected to read thus:

> "Mr. Mishra states, respondent shall appoint an Arbitrator within four weeks. The statement is taken on record".

12. In the interregnum, on 6 September 2019, the Additional Director General[10] of the CPWD, *vide* the following office memorandum dated 6 September 2019, appointed an advocate as the sole arbitrator to

[10] "ADG" hereinafter

arbitrate on the disputes between the parties:

"Office Memorandum

Sub: - In the matter of arbitration between M/s M.V. Omni Projects (India) Limited and Union of India, regarding the work C/o IIIDEM Campus at Plot No.1, Sector-13, Dwarka, New Delhi. (SH: Hostel Block with basement, Auditorium, Institutional Block and Boundary Wall including Superstructure, Interior, Water supply, Sanitary installation, Drainage, External Development, Internal Electrical Installation, HVAC, Lifts, Sub-station, DG sets, Fire Alarm & Fire Fighting System, Solar Water Heating, Solar Power Generation, Conducting for Telephone/LAN, etc.). Agreement No. 01/EE/IIIDEMPD/2015-16.

Whereas M/s M. V. Omni Projects (India) Ltd. has written vide letter no MVOPIL/19-20/CPWD-IIIDEM/667 dated 16.05.2019 that certain disputes have arisen between the above noted parties in respect of the above noted work. I, Shashi Kant, ADG(PRD), CPWD by powers conferred on me under clause 25 of the said Agreement hereby appoint Shri Anil Kumar Sharma Arbitrator B-99, Sector-30, Noida, Gautam Budh Nagar, U.P. 201303 as Sole Arbitrator to decide and make his award regarding the claims/disputes by the contractor, if any, as shown in the statements enclosed, subject always, however, to their admissibility under clause 25 of the aforesaid agreement, copy of which is enclosed.

The Arbitrator shall give reasons for the award.

Encl.: List of claims and counter claims.

Sd/-

(Shashi kant)
Addl. Director General
Project Region Delhi"

13. Arbitral proceedings commenced without any protest from either side. The proceedings concluded with the rendition of award dated 30 May 2023, which was adverse to the respondent.

14. Aggrieved by the aforesaid award, the respondent instituted OMP (Comm) 355/2023 before this Court, which stands allowed by the

impugned judgment dated 8 May 2024 passed by a learned Single Judge. The learned Single Judge has held that the appointment of the learned arbitrator was in the teeth of Section 12(5) of the 1996 Act and that, therefore, the proceedings stood vitiated *ab initio*.

Analysis

15. Having heard Mr. Rao, we are of the opinion that, in view of the presently extant legal position, essentially following the recent decision of the Supreme Court in ***Bhadra,*** the learned Single Judge is correct in the view that he has taken**.**

16. Section 12(5) of the 1996 Act proscribes any person, whose relationship with the parties, their Counsel or the subject matter of dispute, falls under any of categories specified in the Seventh Schedule to the 1996 Act, from being appointed as an arbitrator. This principle was extended by the Supreme Court, in ***TRF Ltd v. Energo Engg. Projects Ltd***[11], ***Bharat Broadband***, ***Perkins*** and ***Haryana Space Application Centre v. Pan India Consultants (P) Ltd***[12] to hold that a person who was not entitled to act as an arbitrator was equally not entitled to appoint an arbitrator.

17. As a result, arbitration clauses which allow either one of the parties to appoint the arbitrator have been held, in the said decisions, to be illegal and incapable of being enforced in law. In all such cases, therefore, it is the Court who has to appoint the arbitrator.

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[11] **(2017) 8 SCC 377**
[12] **(2021) 3 SCC 103**

18. The rigour of this stipulation is relaxed only in the proviso to Section 12(5). The proviso entitles either party to waive the applicability of Section 12(5) *by an express agreement in writing*.

19. ***Bhadra*** clearly explains the scope of the proviso to Section 12(5). In that case, which arose from a judgment rendered by one of us (C. Hari Shankar, J.), sitting singly in this Court, both parties consented, before the arbitrator, to the assumption of jurisdiction by the said arbitrator in that case. The said consent was reduced to writing by an order issued by the arbitrator. This Court adopted the view that the reduction, to writing, of the consent of both parties to the arbitrator, amounted to a waiver of the applicability of Section 12(5) by express agreement in writing. As such, this Court held that the arbitral award could not be challenged on the ground that the appointment of the arbitrator was unilateral.

20. The Supreme Court has, however, reversed the decision of this Court and has held that an express agreement in writing has to be exactly that and nothing less. No amount of consent, therefore, can substitute the requirement of an express agreement in writing. The parties have, therefore, in writing to expressly waive the applicability of Section 12(5), in order for the proviso to Section 12(5) to apply. Else, if the arbitrator has been appointed by one of the parties, the proceedings stand vitiated *ab initio* and the resultant arbitral award can be challenged even on that sole ground. We may reproduce, to advantage, the relevant paragraphs from ***Bhadra***, thus:

"48. If any entry in the Seventh Schedule is attracted, the consequences under Section 12(5) follow. In such circumstances, the disclosure made by the arbitrator does not save the mandate of the arbitrator, and an agreement referred to in the *proviso* assumes importance. We shall discuss the scope and application of the sub-section (5), as well as its *proviso*, in more detail in the latter part of this judgment.

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57. When an arbitration agreement is in violation of sub-section (5) of Section 12 of the Act, 1996, the parties can neither insist on appointment of an arbitrator in terms of the agreement nor would any appointment so made be valid in the eyes of law.

58. Unilateral appointments are not consistent with the basic tenet of arbitration, i.e., mutual confidence in the arbitrator. It would not be unreasonable for a party to apprehend that an arbitrator unilaterally appointed by the opposite party may not act with complete impartiality.

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60. It is apposite to understand that Section 12(5) does not prohibit unilateral appointment of an arbitrator. It provides that whenever an appointment of an arbitrator is hit by the bar under Section 12(5), the arbitrator would be ineligible to act, irrespective of whether the appointment was unilateral or with consent of both parties. In such circumstances, the parties may, in the manner provided under the *proviso*, waive the ineligibility. We shall discuss the scope and application of the *proviso* in more detail in the latter part of this judgment.

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68. We are in complete agreement that the present case is squarely covered by the decisions of this Court in *Perkins Eastman (supra)* and *Bharat Broadband (supra)* respectively. The unilateral appointment of a sole arbitrator is *void ab initio*, and the sole arbitrator so appointed is *de jure* ineligible to act as an arbitrator in terms of Section 12(5) read with the Seventh Schedule of the Act, 1996.

69. Thus, we have no hesitation in saying that its High Court, in the impugned judgment, committed an error in holding that the appointment was not unilateral merely because the respondent proceeded to appoint the sole arbitrator pursuant to notice invoking arbitration.

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ii. Whether the parties could be said to have waived the applicability of sub-section (5) of Section 12 of the Act, 1996, by way of their conduct, either expressed or implied?

71. It was submitted on behalf of the appellants herein that the appellants never waived their right to object in terms of the proviso to Section 12(5) of the Act, 1996. The proviso to Section 12(5) requires that the ineligibility of an arbitrator could only be waived by an "*express agreement in writing*" between the parties, and such agreement must be entered into after the dispute has arisen. It was further canvassed by the appellants that no agreement was executed, signed, or even contemplated by the parties to this effect after the dispute arose.

72. In this regard, the respondent vociferously submitted that the present case falls within the *proviso* to Section 12(5). To indicate the same, instances like recording of "no objection" in the first procedural order, submission of statement of claim, the joint request to extend the mandate under Section 29A, and continued participation in the proceedings, were highlighted to submit that the appellants had waived their right to object. The procedural order constitutes an "*express agreement in writing*" and satisfies the requirement under the *proviso* to Section 12(5) of the Act, 1996. At the cost of repetition, the procedural order reads thus:—

"PROCEDURAL ORDER NO. 1
With
Minutes of, and the Directions made at, the hearing on 22.03.2016 at 1 : 00 pm
[AT D-247 (Basement), Defence Colony, New Delhi-110024]
This preliminary meeting of the Tribunal was held D-247 (Basement), Defence Colony, New Delhi-110024 on 22nd March, 2016 at 1 : 00 PM. None of the parties have any objection to my appointment as the Sole Arbitrator. I declare that I have no interest in any of the Parties, or in the disputes referred to the Sole Arbitrator.[…]"

(Emphasis supplied)

73. On the aforesaid issue, the High Court, in its impugned judgment, observed that the sole arbitrator obtained the consent of the parties for the purpose of continuing to arbitrate in the form of the procedural order. What weighed with the High Court was that the appellants participated in the proceedings, which continued for over two years, and did not they invoke Section 12(5), or object against the jurisdiction of the arbitrator at any stage.

a. Meaning and Import of the expression "*express agreement in writing*" used in *proviso* to sub-section (5) of Section 12 of the Act, 1996

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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.

76. The proviso to sub-section (5) of Section 12 stipulates that parties, after disputes have arisen, must expressly agree in writing to waive the ineligibility of the proposed arbitrator. This impliedly means that the parties are waiving their right to object to the arbitrator's ineligibility in terms of Section 12(5) of the Act, 1996.

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***[13]]

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 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

[13] **(2011) 14 SCC 770**

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.

80. It is in the same breath we say that appointment of an arbitrator with the consent of both parties is the general rule, while unilateral appointment is an exception. When one party appoints an arbitrator unilaterally, even if its own consent is implicit, the consent of the opposite party stands compromised, and the choice of the former is effectively imposed upon the latter.

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.

83. In a case of unilateral appointment, the waiver mentioned in the proviso is an indication of party autonomy in two ways : *first*, that the parties, by entering into an agreement, are waiving the bar under Section 12(5). *Secondly*, by the act of entering into an agreement, the parties, more particularly, the non-consenting party, are expressing their consent for appointment of the proposed arbitrator.

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)***, 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 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.*** *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 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)***[14], 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***[15]***]***. *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***[16]***].*** *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.

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.

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96. The net effect of the aforesaid is that a notice invoking the arbitration clause under Section 21 of the Act, 1996, a procedural

[14] **Central Organization for Railway Electrification v. ECI SPIR SMO MCML (JV) A Joint Venture Company, (2025) 4 SCC 641**
[15] **(2016) 5 SCC 808**
[16] **(2011) 14 SCC 770**

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.

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123. A conspectus of the aforesaid detailed discussion on the position of law as regards Section 12 of the Act, 1996, is as follows:—

i. The principle of equal treatment of parties provided in Section 18 of the Act, 1996, applies not only to the arbitral proceedings but also to the procedure for appointment of arbitrators. Equal treatment of the parties entails that the parties must have an equal say in the constitution of the arbitral tribunal.

ii. Sub-section (5) of Section 12 provides that any person whose relationship with the parties or counsel, or the dispute, whether direct or indirect, falls within any of the categories specified in the Seventh Schedule would be ineligible to be appointed as an arbitrator. Since, the ineligibility stems from the operation of law, not only is a person having an interest in the dispute or its outcome ineligible to act as an arbitrator, but appointment by such a person would be *ex facie* invalid.

iii. The words "*an express agreement in writing*" in the *proviso* to Section 12(5) means that the right to object to the appointment of an ineligible arbitrator cannot be taken away by mere implication. The agreement referred to in the *proviso* must be a clear, unequivocal written agreement.

iv. When an arbitrator is found to be ineligible by virtue of Section 12(5) read with the Seventh Schedule, his mandate is automatically terminated. In such circumstance, an aggrieved party may approach the court under Section 14 read with Section 15 for appointment of a substitute arbitrator. Whereas, when an award has been passed by such an arbitrator, an aggrieved party may approach the court under Section 34 for setting aside the award.

v. In arbitration, the parties vest jurisdiction in the tribunal by exercising their consent in furtherance of a valid arbitration agreement. An arbitrator who lacks jurisdiction cannot make an award on the merits. Hence, an objection to the inherent lack of jurisdiction can be taken at any stage of the proceedings."

21. Mr. Rao sought to distinguish the decision in ***Bhadra*** on the ground that the proceedings in that case did not traverse the Section 11 route. He submits that once an application was filed by either of the parties under Section 11(6), the other party lost its right to appoint the Arbitrator. The appellant had to move this Court in ARB.P. 199/2019 under Section 11(6) of the 1996 Act, only because the respondent did not appoint an arbitrator in response to the Section 21 notice dated 11 October 2018 issued by the appellant. Once the appellant had thus galvanised this Court under Section 11(6), the respondent lost its right to appoint the Arbitrator. The appointment of the arbitrator by the respondent, thereafter, he submits cannot be treated as an appointment in terms of the agreement between the parties. It was as good as an appointment by the Court under Section 11(6). The order dated 23 August 2019, passed by the learned Single Judge of this Court, disposing of ARB.P. 199/2019 was never challenged and attained finality. In these circumstances, Mr. Rao submits that the respondent could not seek to contend that the appointment of the arbitrator was unilateral.

22. We are compelled to acknowledge that the submission of Mr. Rao is undoubtedly attractive. Law, however, is law, and we are powerless to modify it. Once the Supreme Court has spoken on an issue, it is the duty of every Court, both under Article 141 and Article 144 of the Constitution of India, to follow the law declared by the Supreme Court.

23. The emphasis, by Mr. Rao, on the fact that the appointment of the arbitrator in the present case followed the filing of ARB.P. 199/2019 by the appellant and the order dated 23 August 2019 passed by the learned Single Judge therein, really cuts no ice. A bare reading of the Office Memorandum dated 6 September 2019 issued by the ADG clearly discloses that the arbitrator was appointed by the ADG unilaterally. Even though one of the endorsements below the said letter purports to state that the appointment was in terms of the order dated 23 August 2019 passed by the learned Single Judge, that does not materially alter the legal position. Had the learned Single Judge appointed the arbitrator on 23 August 2019, exercising jurisdiction under Section 11(6) of the 1996 Act, things might have been different. The position might also had been different, had the parties submitted in writing to this Court, prior to the passing of the order dated 23 August 2019, that they were waiving the applicability of Section 12(5) of the 1996 Act.

24. Nothing of that sort, however, happened.

25. A reading of the order dated 23 August 2019, disposing of

ARB.P. 199/2019, makes it clear that this Court has only recorded the submission of the respondent that it was appointing the arbitrator. The appointment was, even as per the order dated 23 August 2019, in terms of the contract between the parties. As such, this is not a case in which this Court appointed the arbitrator under Section 11(6) of the 1996 Act. The Court only disposed of the Section 11(6) petition on the statement of the respondent that the respondent was appointing the arbitrator in terms of the contract between the parties.

26. The appointment of the arbitrator in terms of the contract between the parties was *ex facie* illegal, in view of the law declared by the Supreme Court in ***Bharat Broadband***, ***Haryana Space Application Centre*** and, most recently, in ***Bhadra***.

27. There being no express waiver of Section 12(5) in writing by either of the parties, Section 12(5) applies with full vigour.

28. Resultantly, we are of the opinion that the learned Single Judge was correct in holding that the appointment of the learned arbitrator was illegal, being in the teeth of Section 12(5) read with the decision of the Supreme Court in ***Bharat Broadband*** and ***Perkins***.

29. We, therefore, find no cause to interfere with the impugned judgment of the learned Single Judge, which is, accordingly affirmed in its entirety.

30. The appeal is, accordingly, dismissed with no orders as to costs.

C. HARI SHANKAR, J.

OM PRAKASH SHUKLA, J.

JANUARY 14, 2026*/aky/yg*