



2026:AHC-LKO:29090-DB

**HIGH COURT OF JUDICATURE AT ALLAHABAD
LUCKNOW**

Arbitration Appeal No. - 53 of 2023

Laxmi Kant Pandey

.....Appellant(s)

Versus

Hindustan Petroleum
Corporation Ltd. thru. Deputy
General Manager, Lucknow

.....Respondent(s)

Counsel for Appellant(s) : Gaurav Mehrotra, (Sr. Adv) with
Anupam Mishra, Madhur Jhavar
Counsel for Respondent(s) : Aprajita Bansal, Anilesh Tewari,
Ms. Gursimran Kaur, Ms. Shreya
Pahwa

AFR
Reserved on : 19.03.2026
Delivered on : 23.04.2026

Chief Justice Court

**HON'BLE ARUN BHANSALI, CHIEF JUSTICE
HON'BLE JASPREET SINGH, J.**

(Per: Jaspreet Singh, J.)

1. The appellant has preferred the instant appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act of 1996') assailing the judgment and order passed by the Commercial Court-II, Lucknow dated 19.04.2023 in Arbitration Case No. 766 of 2019 whereby his petition under Section 34 of the Act of

1996 was dismissed and the arbitral award dated 26.04.2019 passed by the Sole Arbitrator was affirmed.

Factual Background:-

2. In order to appreciate the controversy involved in the instant appeal, it will be apt to take a brief glance at the facts leading up to this appeal.

3. The appellant was a dealer of the respondent-corporation for retail sales of petrol/diesel and other petroleum products. The said dealership agreement was entered between the parties on 14.01.2013 and in terms whereof the appellant was entitled to run his petrol pump under the name and style of 'Pandey Filling Station' at Village Budawa, Pargana and Tehsil Attaara, District Banda.

4. On 14.06.2017, a Special Team under the supervision of the District Magistrate, Banda inspected the dealership outlet of the petitioner. During inspection, the seal affixed by the Weights and Measures Department relating to Nozzle No. (ii) of Gilbarco Dual Ms. Dispensing Unit with Serial no. 20152000858 was found broken.

5. Based on the aforesaid discrepancy, a show cause notice was issued by the respondent-corporation dated 21.06.2017 calling upon the appellant to show cause within 15 days as to why necessary action may not be taken against him.

6. The appellant submitted his reply dated 15.07.2017 and also by an undated letter, and both were received by the Corporation on 17.07.2017. The appellant stated that the aforesaid nozzle no. (ii) was not functioning properly and the appellant had already raised his complaint regarding the same on 03.06.2017. Despite the said complaint, the Corporation on its online portal indicated that the complaint had been resolved. This was again interjected by the appellant who raised a fresh complaint on 06.06.2017 and the Corporation was also informed of the incorrect functioning of the aforesaid nozzle, however, it was not physically resolved at the site rather the Corporation closed the complaint on its online portal. This was once again brought to the notice of the

respondent-corporation by the appellant that the complaint raised by him had not been resolved.

7. The appellant further stated that even during the inspection upon measuring, no short dispensation of fuel was recorded from any of the dispensing units including from nozzle no. (ii) and moreover all other seals were found intact.

8. The Corporation, however, did not find the reply of the appellant satisfactory and vide its order dated 24.07.2017, the dealership agreement dated 14.01.2013 was terminated.

9. The appellant assailed the cancellation order dated 24.07.2017 by means of a writ petition bearing Writ-C No. 62809 of 2017 which was dismissed by a Division Bench of this Court at Allahabad leaving it open for the appellant to initiate arbitral proceedings in terms of the arbitration Clause No. 66 contained in the agreement.

10. Thereafter, the appellant invoked the arbitration clause by means of an undated letter. In response, the Corporation vide its reply dated 24.01.2018 acknowledged the receipt of the aforesaid undated letter of the appellant and the Corporation informed that as the Arbitration and Conciliation Act, 1996 had undergone an amendment which came in effect from 23.10.2015, hence, in view of the proviso appended to Section 12(5) of the Act of 1996, a written consent was required from the appellant to express his willingness and permit the Corporation to appoint its employee as a Sole Arbitrator.

11. The appellant responded to the aforesaid letter dated 24.01.2018 and informed the Corporation that the appellant had appointed Sri Anil Kumar Gupta, a Chartered Accountant as an Arbitrator and requested the Corporation to concur with the said appointment of the Sole Arbitrator.

12. The Corporation vide its letter dated 26.02.2018 turned down the appellant's request of concurring to the appointment of the appellant's nominated Arbitrator and further reiterated that the appellant must give his consent, as sought in its earlier letter dated 24.10.2018, so that the

Corporation may appoint an Arbitrator, failing which the appellant may invoke the appropriate forum for appointment of an Arbitrator.

13. The appellant vide its letter dated 07.03.2018 addressed the respondent and conveyed his consent for the appointment of an Arbitrator by the Corporation and further requested that as he was differently abled and had difficulties in traveling, hence, an Arbitrator of a nearby place be appointed.

14. In furtherance of the aforesaid letter, the Corporation vide its letter dated 18.04.2018 appointed Sri Sanjay Verghese as a Sole Arbitrator to resolve the disputes between the appellant and the respondent-corporation.

15. The Sole Arbitrator entered into the reference and passed its first procedural order on 21.05.2018 fixing time lines to enable the parties to exchange the pleadings amongst themselves.

16. The appellant on 14.06.2018 furnished its statement of claim. The respondent filed its statement of defence on 05.07.2018. Thereafter the Sole Arbitrator fixed 29.10.2018 as the first effective date of hearing followed by another dated fixing 13.02.2019. Thereafter no further hearing was held and the Sole Arbitrator made his award on 26.04.2019, dismissing the claims of the appellant.

17. This award dated 26.04.2019 was challenged by the appellant before the Commercial Court by filing a petition under Section 34 of the Act of 1996 and the Commercial Court after hearing the parties vide its judgment and order dated 19.04.2023 dismissed the said petition and affirmed the award dated 26.04.2018.

18. In the aforesaid factual backdrop, the appellant has challenged the judgment of the Commercial Court and the award of the Sole Arbitrator by the instant appeal under Section 37 of the Act of 1996.

Submissions on behalf of the Appellant:-

19. Sri Gaurav Mehrotra, learned Senior Counsel assisted by Sri Anupam Mishra and Ms. Madhur Jhawar, learned counsel for the

appellant attacked the award and the judgment of the Commercial Court on two counts.

(i) The first ground urged by the learned Senior Counsel for the appellant was that the appointment of the Sole Arbitrator by the Corporation was directly hit by the legislative embargo contained in Section 12(1) & (5) of the Act of 1996 read with the Fifth/and Seventh Schedule.

20. Elaborating his submissions, learned Senior Counsel for the appellant laid emphasis that after the amendment of 2016 in the Act of 1996, any person who falls within the relationship as mentioned in the Fifth and Seventh Schedule appended to the Act of 1996 becomes ineligible to act as an Arbitrator.

21. It was further submitted that the proviso appended to Section 12(5) of the Act of 1996 is an exception to the general rule and for the said reason, it requires strict compliance. Even though the embargo contained in Section 12(1) & (5) of the Act of 1996 is mandatory yet in case if the parties agree to waive their right of raising an objection emerging from Section 12(5) of the Act of 1996 then the said waiver must be by way of an express agreement in writing and that too it must be done after the disputes had arisen between the parties.

22. It was also urged that in the instant case there was no express agreement in writing and the appellant did not waive his right as required in terms of Section 12(5) of the Act of 1996. In absence of any express waiver as contemplated in law, the Corporation was not justified in appointing an Arbitrator who was within the prohibited relationship in terms of the Fifth Schedule appended and relatable to Section 12 of the Act of 1996.

23. It was further urged that even the Sole Arbitrator did not give a clear declaration regarding his impartiality as required in terms of Section 12(1) of the Act of 1996 read with Fifth and Sixth Schedule.

24. In such circumstances, the appointment of the Sole Arbitrator was against the statutory conditions which rendered the appointment as void. Consequently, the proceedings held by the Sole Arbitrator were also void.

As a *fortiori*, void proceedings could be challenged at any stage and while the appellant had raised this issue before the Commercial Court in its petition under Section 34 of the Act of 1996, but the court concerned turned down the said plea on the premise that the appellant had participated in the process of appointment of Arbitrator and had also given his consent, as indicated in his letter dated 07.03.2018, hence, the appellant was precluded from raising such a plea in proceedings under Section 34 of the Act of 1996.

25. The learned Senior Counsel further urged that there was no worthy consideration of the aforesaid objection rather it was turned down by the Commercial Court in a cursory manner which substantially and adversely affected the valuable rights of the appellant. For the said reason, it was submitted that the entire arbitral proceedings were vitiated so also the award which deserved to be set aside.

26. Sri Mehrotra, in support of his submissions, relied upon the decision of the Apex Court in **Central Organization for Railway Electrification v. ECI SPIC Smo MCML (JV) A Joint Venture Company, (2025) 4 SCC 641** (hereinafter referred to as **Core-II**) and **Bhadra International (India) (P) Ltd. vs. Airports Authority of India: 2026 SCC Online SC 7**.

27. The other ground raised by Sri Mehrotra was **(ii)** that no adequate opportunity was afforded by the Sole Arbitrator. The award impugned was in complete violation of principles of natural justice. The Sole Arbitrator, after the exchange of pleadings, did not permit the contesting parties to record their admission and denial on the documents filed by the respective parties. The Sole Arbitrator did not frame any issues nor an opportunity to cross-examine the witness was allowed which rendered the entire arbitral proceedings, a mere farce.

28. It was further submitted that the entire arbitral proceedings were concluded on two effective dates. This indicated that the Sole Arbitrator decided the arbitral proceedings with undue haste and while doing so it ignored the admitted facts including that no short dispensation of fuel

was found during inspection and though the appellant had demonstrated that one nozzle was malfunctioning much prior to the date of inspection and was also complained of to the Corporation but the Corporation did not rectify it and the appellant had been made a scapegoat for the negligence of the Corporation. In such circumstances, the appellant was denied of a reasonable opportunity to contest.

29. It was lastly submitted that though the aforesaid issues were raised before the Commercial Court, however, the said court did not advert to the aforesaid aspect of the matter and dismissed the petition under Section 34 of the Act of 1996 in a mechanical exercise of jurisdiction which rendered the judgment and order dated 19.04.2023 passed by the Commercial Court-II, Lucknow susceptible and vulnerable to judicial scrutiny under Section 37 of the Act of 1996 and it deserves to be set aside, after allowing the appeal.

Submissions of the learned counsel for the Respondent:-

30. Ms. Aprajita Bansal, learned counsel for the respondent-corporation vehemently opposed the submissions of the learned Senior Counsel for the appellant and urged that the appellant was not justified in attacking the award by invoking the provisions of Section 12 (5) of the Act of 1996 as the appellant had furnished his consent and he had expressly waived his right in writing to object to the appointment of the Sole Arbitrator and that too after the disputes had arisen.

31. It was urged that proviso appended to Section 12(5) of the Act of 1996 was clearly attracted in the instant case and the appellant who had consented to the appointment of the Sole Arbitrator and also participated in the arbitral proceedings, now cannot be permitted to raise a contradictory stand to assail the award.

32. Ms. Bansal while referring to the records endeavoured to demonstrate that as soon as the appellant had made a request for appointment of an Arbitrator, the Corporation vide its letter dated 24.01.2018 expressly referred to the amended Section 12(5) of the Act of

1996 and clearly sought the consent of the appellant in writing before proceeding to appoint any Arbitrator.

33. It was further submitted that the Corporation, on 26.02.2018 specifically informed the appellant that it did not agree to the proposed appointment of an Arbitrator made by the appellant. The Corporation further put the appellant to notice that he was required to furnish his written consent in terms of the earlier letter dated 24.01.2018 to enable the Corporation to appoint an Arbitrator, failing which it was open for the appellant to approach the appropriate forum for getting an Arbitrator appointed.

34. It was further submitted that in this backdrop, the appellant submitted a consent letter dated 07.03.2018 specifically indicating therein that the appellant gives his consent to the Corporation to appoint an Arbitrator. Acting upon the said consent, the Corporation vide its letter dated 18.04.2018 appointed Sri Sanjay Verghese as the Sole Arbitrator. This indicates that the appellant was made fully aware of the legal provisions and the appellant after understanding it, had furnished his consent.

35. In the aforesaid circumstances, where the appellant had given his express consent in writing after the disputes had arisen permitting the respondent-corporation to appoint its employee as an Arbitrator, this was a clear case where the appellant had waived his right in terms of the proviso appended to Section 12(5) of the Act of 1996, hence, the appellant cannot challenge the award of the Arbitrator being in violation of Section 12(1) and (5) of the Act of 1996.

36. Ms. Bansal, further urged that while filing the petition under Section 34 of the Act of 1996, general grounds were raised but no specific ground regarding the appointment of the Arbitrator, being violative of Section 12 (1) and (5) of the Act of 1996, was raised by the appellant. It is only for the first time before this Court specific grounds had been raised in this appeal.

37. The learned counsel for the respondent-corporation further urged that the appellant had been put to clear notice and he was given an opportunity to re-consider whether he wanted the Corporation to appoint an Arbitrator. Now, after having given his written consent to the Corporation to appoint its employee as an Arbitrator, the appellant is now prevented from raising such an objection for the first time in appeal.

38. It was further submitted that the appellant participated in the entire arbitral proceedings before the Sole Arbitrator without any demur and with full awareness regarding the consent given to the Corporation. No objections were raised regarding the impartiality of the Arbitrator. Even after the claims were dismissed by means of the award dated 26.04.2019 and the appellant assailed the said award but even then no specific ground challenging the appointment of the Sole Arbitrator was taken in proceedings under Section 34 of the Act of 1996. The said ground of Section 12(5) has been taken in the instant appeal without there being any foundation for such a challenge in the earlier stage of the proceedings and this cannot be countenanced in law, at this stage.

39. The learned counsel for the respondent-corporation further submitted that as far as the principles laid down by the Apex Court in **Core-II (Supra)** judgment is concerned, it is not disputed nor the judgment of the Apex Court in **Bhadra International (Supra)** can be said to aid the appellant for the reason that both the decisions clearly preserve the party-autonomy and the right of the parties to get an Arbitrator appointed even though he may fall in any category enumerated in Fifth & Seventh Schedule provided there was scrupulous compliance of the proviso appended to Section 12(5) of the Act of 1996.

40. In the instant case, once the consent was submitted in writing by the appellant after the disputes had arisen, referring to the letters of the Corporation, thereafter there can be no doubt that the appellant knowingly had consented in the appointment of the Arbitrator and now is precluded to turn around to assail the appointment.

41. In such circumstances, if the appellant is permitted to resile from the consent then it would be against the public policy and it would amount to putting a premium to an unscrupulous act of a party. For the aforesaid reasons, the decisions of the Apex Court cited by the appellant do not come to his aid.

42. The learned counsel for the respondent-corporation also urged that in so far as the claims having been decided in haste is concerned, the same is not tenable as the appellant fully participated in the proceedings and the Sole Arbitrator recorded his statement that he did not wish to adduce any further evidence and it is only thereafter that the Arbitrator made his award.

43. It was further urged that during the entire arbitral proceedings, the appellant did not request nor made any prayer to the Sole Arbitrator to frame issues or to get an endorsement made on the documents for admission and denial. The appellant also did not make any request to cross-examine any witness, now, he is precluded from challenging the award on alleged ground of procedural error which does not touch the roots of the matter. Furthermore, the appellant could not demonstrate any prejudice which may have been caused for such procedural infractions and in absence thereof, the aforesaid ground is not sufficient to set aside an award. Thus, the appeal deserves to be dismissed.

44. In support of her submissions, Ms. Bansal has relied upon a decision of the Bombay High Court in **Arbitration Petition No. 43 of 2023 (M/s Truly Pest Solution Pvt. Ltd. v. Principal Chief Mechanic Engineer (PCME), Chief Railway)**, decided on 11th November, 2024.

Record of Proceedings

45. Before making an analysis, it will be relevant to state that during the course of submissions, the appellant had furnished a supplementary affidavit with an advance copy to the learned counsel for the respondent-corporation. The said supplementary affidavit seeks to bring on record two letters issued by the Corporation dated 26.02.2018 and 18.04.2018.

46. The learned counsel for the respondent-corporation very fairly consented that the same be taken on record as it was part of the arbitral record, however, liberty was sought to refer to those letters during course of her submissions. With the aforesaid understanding, the said supplementary affidavit was taken on record.

Discussions and Analysis:-

47. The Court has heard the learned counsel for the parties and also perused the material available on record.

48. Before dealing with the submissions of the respective parties, it will be pertinent to take a birds eye view of the legislative background of the amending Act No. 3 of 2016 which came into effect from 23.10.2015 by which the Act of 1996 was amended and the leading pronouncement on the subject.

49. The 246th report of the Law Commission was a prelude to the legislative amendment, introduced in the Arbitration and Conciliation Act, 1996. The proposed amendment of 2016 aimed to reduce judicial intervention, ensuring Arbitrator's neutrality and implementing time lines to expedite arbitral proceedings.

50. The said amendment of 2016 came into effect on 23.10.2015 and it *inter-alia* amended Section 12 of the Act of 1996 to disqualify such individuals who had some relationship with the party, counsel, or with the subject matter of dispute, as it could give rise to a direct conflict of interest. The said amendment also endeavoured to prevent a party to a dispute to unilaterally appoint an Arbitrator, often of their own choice or an employee or an affiliated person, who could be inclined to favour such a party who had the right to appoint. The relationship which was considered as offending were identified and it found expression in the Fifth and Seventh Schedule which were incorporated in the Act. For better appreciation, the amended Section 12 of the Act of 1996 is being reproduced hereinafter:-

“12. Grounds for challenge.- [(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.]

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

[(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.”

51. The purpose and rationale behind the Amending Act No. 3 of 2016 which came in force on 23.10.2025 was noticed by the Apex Court in **Voestalpine Schienen GmbH v. DMRC: (2017) 4 SCC 665** and the relevant paragraphs read as under:-

“17. We may put a note of clarification here. Though, the Law Commission discussed the aforesaid aspect under the heading “Neutrality of Arbitrators”, the focus of discussion was on impartiality and independence of the arbitrators which has relation to or bias towards one of the parties. In the field of international arbitration, neutrality is generally related to the nationality of the arbitrator. In international sphere, the “appearance of neutrality” is considered equally important, which means that an arbitrator is neutral if his nationality is different from that of the parties. However, that is not the aspect which is being considered and the term “neutrality” used is relatable to impartiality and independence of the arbitrators, without any bias towards any of the parties. In fact, the term “neutrality of arbitrators” is commonly used in this context as well.

18. Keeping in mind the aforequoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, sub-section (5) of Section 12 lays down 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, he shall be ineligible to be appointed as an arbitrator. In such an eventuality i.e. when the arbitration clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of the arbitration agreement.

* * *

20. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in Hashwani v. Jivraj [Hashwani v. Jivraj, (2011) 1 WLR 1872 : 2011 UKSC 40] in the following words : (WLR p. 1889, para 45)

“45. ... the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.”

52. From a close reading of Section 12 and the Fifth and Seventh Schedule, it would reveal that the Fifth Schedule contains 34 entries while the Seventh Schedule contains 19 entries. Moreover, the first 19 entries in the Fifth Schedule are replicated in the Seventh Schedule. The Fifth Schedule is referable to Section 12(1) (b) while the Seventh Schedule is referable to Section 12(5) of the Act of 1996.

53. The category of relationship which gives justiciable grounds of doubt as to the independence or impartiality of an Arbitrator is in Fifth

Schedule. In so far as the Seventh Schedule is concerned, it relates to situation where a person would be ineligible for being appointed as an Arbitrator, unless the parties to the disputes enter into an agreement in writing, after the disputes have arisen, expressly waiving the right to challenge such appointment.

54. Sections 12 (1) and (2) requires a prospective Arbitrator to disclose in writing any circumstances which is likely to give rise to justifiable doubt as to his independence or impartiality to act as an Arbitrator. Explanation 1 states that the grounds mentioned in the Fifth Schedule shall guide so as to determine what would be such justifiable doubts and Explanation 2 mandates such disclosure by the Arbitrator in the form mentioned in the Sixth Schedule.

55. On the other hand, Section 12(5) provides that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties, counsel or the dispute falls under any of the categories specified in the Seventh Schedule shall make such person ineligible to be appointed as an Arbitrator subject to the post dispute express written waiver as mentioned in the proviso.

56. Illustratively, upon considering the Fifth and the Seventh Schedule, it would reveal that in a given factual scenario such as an Arbitrator being an employee of a party, it will have distinct consequences depending on whether it is invoked for the purposes of the Fifth or the Seventh Schedule.

57. In case if the said disability is invoked for the purposes of the Fifth Schedule then it has to be considered in terms of Section 12(1) and (4) and Section 13 of the Act of 1996. The circumstances, as mentioned in the Fifth Schedule will act as a guide to ascertain justifiable doubts and it would trigger the mandatory disclosure for an Arbitrator in terms of the Sixth Schedule. In case if a party is so aggrieved then it would lead such an aggrieved party to invoke the challenge procedure before the Tribunal under Section 13 of the Act of 1996. In case if the challenge fails then the issue can be raised after the award is made by filing a petition under

Section 34 of the Act of 1996 to set aside the award on the said ground. Needless to say that the disclosure as required in terms of Section 12(1) read with the Sixth Schedule is mandatory.

58. However, in case the said objection is raised for the purposes of the Seventh Schedule then it has to be seen in context with Section 12(5) and Section 14 of the Act of 1996. In such circumstances, where a proposed Arbitrator or an Arbitrator appointed falls within any of the entries mentioned in the Seventh Schedule, he runs the risk of *dejure-ineligibility* and his mandate automatically terminates and a party can directly go to the Court under Section 14 and may not have to first raise a challenge in terms of Section 13 which has been noticed in the preceding paragraph. This disability which is incurred can only be cured by, a post dispute, express written waiver under the proviso to Section 12(5) of the Act of 1996.

59. Considering the aforesaid doctrinal aspect of the matter in light of the report of the Law Commission and noticing the decision of the Apex Court, the rationale for duplication of the entries in the Fifth and the Seventh Schedule can be understood as:-

(a) a single list covering serious conflicts; and

(b) two levels of legal recourse to the same conflict as explained in the preceding paragraphs. In other words disclosure and justifiable doubts arising out of the Fifth Schedule leads to a challenge in terms of Section 13 and later in terms of a ground raised under Section 34 of the Act of 1996 whereas the disability as per the Seventh Schedule is automatic and by replicating entries 1 to 19 of the Fifth Schedule, in the Seventh Schedule, it reflects the legislative intent to elevate such entries to such a degree which makes it a non-derogable ineligibility and the same can only be removed by an express waiver in writing after the disputes have arisen.

60. The Apex Court in **HRD Corpn. v. GAIL (India) Ltd., (2018) 12 SCC 471** explained the scope and purpose of the duplication of the entries in the Fifth and Seventh Schedule with the scheme of challenge to the

appointment of an Arbitrator in terms of Section 12 to 15 of the Act of 1996 and the relevant paras 12 to 15 read as under:-

12. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become “ineligible” to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes “ineligible” to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as “ineligible”. In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal.

13. Confining ourselves to ineligibility, it is important to note that the Law Commission by its 246th Report of August 2014 had this to say in relation to the amendments made to Section 12 and the insertion of the Fifth and Seventh Schedules:

“59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the red and orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a “guide” to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed Section 12(5) of the Act and the Fifth Schedule which incorporates the categories from the red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary. In the event such an ineligible person is purported to be appointed as an

arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed Explanation to Section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the red and orange lists of the IBA Guidelines), the ineligibility to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the red list of the IBA Guidelines).

60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective “justifiable doubts” regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to Section 12(5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all other cases, the general rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1) and in which context the High Court or the designate is to have “due regard” to the contents of such disclosure in appointing the arbitrator.”

(emphasis in original)

14. The enumeration of grounds given in the Fifth and Seventh Schedules have been taken from the IBA Guidelines, particularly from the Red and Orange Lists thereof. The aforesaid guidelines consist of three lists. The Red List, consisting of non-waivable and waivable guidelines, covers situations which are “more serious” and “serious”, the “more serious” objections being non-waivable. The Orange List, on the other hand, is a list of situations that may give rise to doubts as to the arbitrator's impartiality or independence, as a consequence of which the arbitrator has a duty to disclose such situations. The Green List is a list of situations where no actual conflict of interest exists from an objective point of view, as a result of which the arbitrator has no duty of disclosure. These Guidelines were first introduced in the year 2004 and have thereafter been amended, after seeing the experience of arbitration worldwide. In Part 1 thereof, general standards regarding impartiality, independence and disclosure are set out.

15. General Principle 1 reads as follows:

“IBA Guidelines on Conflicts of Interest in International Arbitration:-

(1) General Principle:-

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.”

On “conflicts of interest”, Guidelines laid down are as follows:

“(2) Conflicts of Interest

(a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent.

(b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard 4.

(c) Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

(d) Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence in any of the situations described in the Non-Waivable Red List.”

61. In this very context, the Apex Court in **TRF Ltd. v. Energo Engg. Projects Ltd. (2017) 8 SCC 377** considered the eligibility of appointment of an Arbitrator, taking note of Section 12(1) and (5) of the Act of 1996 along with the Fifth & Seventh Schedule and the relevant paras read, as under:-

“50. First, we shall deal with Clause (d). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the “named sole arbitrator” and he has also been conferred with the power to

nominate one who can be the arbitrator in his place. Thus, there is subtle distinction.....

* * *

53. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. According to the learned counsel for the appellant, ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee.

54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.....

62. The aforesaid issue was again considered by the Apex Court in **Perkins Eastman Architects DPC v. HSCC (India) Ltd. (2020) 20 SCC 760** wherein the Apex Court held as under:-

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

interest in the dispute would be disentitled to make appointment of an arbitrator.

21. But, in our view that has to be the logical deduction from TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Para 50 of the decision shows that this Court was concerned with the issue, “whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator” The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and recognised by the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]”

63. However, The Apex Court expressed a non-conformist view in **Central Organization for Railway Electrification v. ECI-SPIC-SMO-MCML (JV) a Joint Venture Company Core-I (2020) 14 SCC 712** (hereinafter referred to as **Core-I** and held that the decisions in **TRF (supra)** and **Perkins Eastman (supra)** were not applicable and further noticed that Section 12(5) of the Act of 1996 did not bar the retired officers to be appointed as an Arbitrator nor such appointment was hit by Section 12(5) of the Act of 1996.

64. Soon thereafter, In **Union of India v. Tantia Constructions Limited, 2021 SCC OnLine SC 271**, the Apex Court expressed a discordant note and doubted the correctness of the decision in **Core-I (supra)** and referred the matter to a Larger Bench. A Constitution Bench in **Core-II (supra)** was faced with the following questions to be answered, which are being noticed hereinunder:-

“ 14. The following issues fall for the determination of this Court:

14.1. (a) Whether an appointment process which allows a party who has an interest in the dispute to unilaterally appoint a sole arbitrator, or curate a panel of arbitrators and mandate that the other party select their arbitrator from the panel is valid in law;

14.2. (b) Whether the principle of equal treatment of parties applies at the stage of the appointment of arbitrators; and

14.3. (c) Whether an appointment process in a public-private contract which allows a government entity to unilaterally appoint a sole arbitrator or majority of the arbitrators of the Arbitral Tribunal is violative of Article 14 of the Constitution.”

65. The Apex Court in context of the aforesaid questions vide its majority opinion held that all such arbitration agreements which enable one party to unilaterally constitute an Arbitral Tribunal would be void *per se* keeping in mind the principle of equal treatment of parties which apply to all stages of arbitral proceedings including the stage of appointment of Arbitrators. It also held that the Arbitration Act did not prohibit Public Sector Corporation from empaneling potential Arbitrators, however, an arbitration clause could not mandate the other party to select its Arbitrators from the panel created by such Corporations. It is also held that a clause allowing one party to unilaterally appoint an Arbitrator gives rise to justifiable doubts as to the independence and impartiality of such an Arbitrator. After a detailed discussion the Apex Court in **Core-II (Supra)**, went on to record its conclusions, as per the majority opinion, as under:-

“J. Conclusion

170. In view of the above discussion, we conclude that:

170.1. The principle of equal treatment of parties applies at all stages of arbitration proceedings, including the stage of appointment of arbitrators;

170.2. The Arbitration Act does not prohibit PSUs from empanelling potential arbitrators. However, an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by PSUs;

170.3. A clause that allows one party to unilaterally appoint a sole arbitrator gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further, such a unilateral clause is exclusive and hinders equal participation of the other party in the appointment process of arbitrators;

170.4. In the appointment of a three-member panel, mandating the other party to select its arbitrator from a curated panel of potential arbitrators is against the principle of equal treatment of parties. In this situation, there is no effective counterbalance because parties do not participate equally in the process of appointing arbitrators. The process of appointing arbitrators in CORE [Central Organisation for

Railway Electrification v. ECI-SPIC-SMO-MCML (JV), (2020) 14 SCC 712] is unequal and prejudiced in favour of the Railways;

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

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

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

66. The Apex Court recently in **Bhadra International (Supra)**, had the occasion to consider the issue of waiver in context of proviso appended to Section 12(5) of the Act with certain other ancillary questions, which were delineated in para 29 and the conclusions in para 123, as under:-

“i. Whether the sole arbitrator could be said to have become “ineligible to be appointed as an arbitrator” by virtue of sub-section (5) of Section 12 of the Act, 1996?

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?

iii. Whether the appellants could have raised an objection to the appointment of the sole arbitrator for the first time in an application under Section 34 of the Act, 1996?”

*****_*****_*****_*****

“VIII. CONCLUSION

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.”

67. Having waded through the thicket of the exposition of law as adumbrated by the Apex Court in the aforesaid noted decisions, now the stage is set to extract the undisputed facts between the parties, as follows:-

(i) It is not disputed that a dealership agreement was entered between the parties which inter-alia contained an arbitration clause. It is also not disputed that the appellant invoked the arbitration clause and required the respondent-corporation to appoint an Arbitrator.

(ii) It is also not disputed that the respondent-corporation vide its letter dated 24.01.2018 had required the appellant to give his consent in writing for permitting the Corporation to appoint its employee as the Sole Arbitrator. It is also not disputed that the Corporation vide its letter dated 26.02.2018 had turned down the request of the appellant whereby he had appointed a Chartered Accountant as an Arbitrator and required the Corporation to concur to such appointment.

(iii) It is also not disputed that the Corporation informed the appellant that the Corporation did not recognize the appointment suggested by the appellant and further required the appellant to either give his consent as required in terms of the earlier letter dated 24.01.2018 of the Corporation or the appellant may approach the appropriate forum for appointment of an Arbitrator. It is also not disputed that thereafter the appellant gave his consent to the Corporation for appointment of an Arbitrator.

68. In the aforesaid backdrop of undisputed facts and considering the submissions advanced by the learned counsel for the respective parties, two issues arise for consideration of this Court **(i)** whether the consent given by the appellant vide its letter dated 07.03.2018 amounts to an agreement in writing expressly waiving the right to object in terms of Section 12(5) of the Act of 1996; **(ii)** whether an objection regarding the ineligibility of the Arbitrator can be raised in the appeal for the first time or it requires to be taken necessarily first, before the Tribunal and the Court under Section 34 of the Act of 1996.

Issue No. 1

69. The first issue noticed above, would require this Court to consider the Arbitration Clause and the following letters exchanged between the parties i.e. **(i)** dated 24.01.2018 **(ii)** its reply by the appellant dated 15.02.2018, **(iii)** the response of the Corporation dated 26.02.2018 and **(iv)** the letter of the appellant dated 07.03.2018.

70. The arbitration clause No. 66 of the agreement reads as under:-

“66. ANY DISPUTE OR DIFFERENCE OF ANY NATURE WHATSOEVER REGARDING ANY RIGHT, LIABILITY, ACT, OMISSION OR ACCOUNT OF ANY OF THE PARTIES HERETO ARISING OUT OF OR IN RELATION TO THIS AGREEMENT (OTHER THAN THOSE IN RESPECT OF WHICH THE DECISION OF ANY PERSON, IS BY THE AGREEMENT EXPRESSED TO BE FINAL AND BINDING) SHALL BE REFERRED TO THE SOLE ARBITRATION OF THE CHAIRMAN AND MANAGING DIRECTOR OF THE CORPORATION OR OF SOME OFFICER/RETIRED OFFICER OF THE CORPORATION OR RETIRED OFFICER OF OTHER OIL PSUS OR RETIRED SENIOR CENTRAL GOVT. OFFICER WHO MAY BE NOMINATED BY THE CHAIRMAN AND MANAGING DIRECTOR. THE DEALER WILL NOT BE ENTITLED TO RAISE ANY OBJECTION TO ANY SUCH ARBITRATOR ON THE GROUND THAT THE ARBITRATOR IS OR WAS AN OFFICER AND/OR SHARE HOLDER OF THE CORPORATION OR THAT HE HAS TO DEAL WITH OR DEALT WITH THE MATTERS TO WHICH THE CONTRACT RELATES OR THAT IN THE COURSE OF HIS DUTIES AS AN OFFICER OF THE CORPORATION HE HAD EXPRESSED VIEWS ON ALL OR ANY OF THE MATTERS IN DISPUTE OR DIFFERENCE. IN THE EVENT OF THE ARBITRATOR TO WHOM THE MATTER IS ORIGINALLY REFERRED VACATING HIS OFFICE OR BEING UNABLE TO ACT FOR ANY REASON THE CHAIRMAN AND MANAGING DIRECTOR AS AFORESAID AT THE TIME OF SUCH VACATION

OF OFFICE OR INABILITY TO ACT, SHALL DESIGNATE ANOTHER PERSON TO ACT AS ARBITRATOR. IN ACCORDANCE WITH THE TERMS OF THE AGREEMENT SUCH PERSON SHALL BE ENTITLED TO PROCEED WITH THE REFERENCE FROM THE POINT AT WHICH IT WAS LEFT BY HIS PREDECESSOR. IT IS ALSO A TERM OF THIS CONTRACT THAT NO PERSON OTHER THAN THE CHAIRMAN AND MANAGING DIRECTOR OR A PERSON NOMINATED BY SUCH CHAIRMAN AND MANAGING DIRECTOR OF THE CORPORATION AS AFORESAID SHALL ACT AS ARBITRATOR HEREUNDER THE COST OF ARBITRATION SHALL BE SHARED EQUALLY BY THE PARTIES THE AWARD OF THE ARBITRATOR SO APPOINTED SHALL BE FINAL, CONCLUSIVE AND BINDING ON ALL PARTIES TO THE AGREEMENT, SUBJECT TO THE PROVISIONS OF THE ARBITRATION AND CONCILIATION ACT, 1996 OR ANY STATUTORY MODIFICATION OF OR RE-ENACTMENT THEREOF AND RULES MADE THEREUNDER AND FOR THE TIME BEING IN FORCE SHALL APPLY TO THE ARBITRATION PROCEEDINGS UNDER THIS CLAUSE.

THE AWARD SHALL BE MADE IN WRITING WITHIN SIX MONTHS AFTER ENTERING UPON THE REFERENCE OR WITHIN SUCH EXTENDED TIME NOT EXCEEDING FURTHER FOUR MONTHS AS SOLE ARBITRATOR SHALL BY A WRITING UNDER HIS OWN HANDS APPOINT.”

71. The letter dated 24.01.2018 of the Corporation reads as under:-

“Ref: KRR/RET/Arbi

Date: 24.01.2018

To,
Laxmikant Pandey

20,21/7, Bajpai Ka Purwa,
Badausa Road Attara,
District-Banda, U.P. 210201

Sub: Appointment of Sole Arbitrator in respect of disputes and differences pertaining to Petrol/Diesel Agreement dated 14.01.2013

Dear Sir,

This is in reference to your communication dated Nil addressed to Corporation wherein you have given reference of clause 66 of the terminated Dealership Agreement dated 14.01.2013 which provides for appointment of arbitrator.

However, before considering your request for appointment of Arbitrator, with the coming into force of the Arbitration and Conciliation (Amendment) Act, 2015 with effect from 23.10.2015, your prior written consent is required for appointment of Arbitrator by Corporation in view of Section 12(5) as inserted by the Amendment, which states that:-

"Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of 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..."

In view of the above change in law, we would like your confirmation as to whether you are ready and willing to waive the applicability of the aforementioned section 12 (5) as inserted by the recent amendment in 2015 and whether you are willing to give your consent for appointment of an employee of Hindustan Petroleum Corporation Limited as a Sole Arbitrator to adjudicate the difference and disputes between yourself and HPCL.

Kindly convey your written response (i.e. giving consent or not giving consent) within 15 days from the date of this letter to enable us to take further necessary action in the matter.

Thanking you.

Very truly yours,
Awadhesh Kumar Pandey
Deputy General Manager"

72. This was responded by the appellant by means of its letter dated 15.02.2018 and the contents of the said letter is being reproduced hereinafter:-

“सेवा में,
श्री अवधेश कुमार पाण्डेय
उप सामान्य प्रबंधक
हिन्दुस्तान पेट्रोलियम कार्पोरेशन लि०
भूतल 88 ए गोवर्धन पुरवा,
साकेतनगर हमीरपुर रोड, कानपुर।
विषय-आर्बीट्रेटर नियुक्त करने के सम्बन्ध में।
महोदय,
आपके पत्र पत्रांक KRR/RFT/Arbi दिनांक 24.01.2018 का संदर्भ लें। पाण्डेय फिलिंग स्टेशन बदौसा बाँदा उ०प्र० के डीजल /पेट्रोल एग्रीमेन्ट के निरस्त होने से उत्पन्न विवाद के निपटारा हेतु हम श्री अनिल कुमार गुप्ता चार्टर्ड एकाउन्टेन्ट पार्टनर गुप्ता अनिल शिवांग एण्ड कम्पनी 37/110 हाउस नं० 17 कृष्णा ऑयल कम्पाउण्ड बनाना पुरवा संगीत सिनेमा के पास कानपुर उ०प्र० को अपनी तरफ से सोल आर्बीट्रेटर नियुक्त करते हैं।
श्री गुप्ता हमारे कभी भी सलाहकार अथवा चार्टर्ड एकाउन्टेन्ट नहीं रहे, न ही किसी प्रकार के सम्बन्ध हैं तदनुसार कार्यवाही प्रारम्भ करना सुनिश्चित करें।
दिनांक-15.02.2018
भवदीय,

(लक्ष्मीकान्त पाण्डेय)
पुत्र श्री रामकिशोर पाण्डेय
नि० बाजपेई पुरवा बदौसा रोड

पेट्रोल पम्प के सामने, अतर्रा
(बाँदा) उ०प्र०
मो०-9415556326”

73. The Corporation further by its letter dated 26.02.2018 gave its response as under:-

“ संदर्भ कान/नीरज-एसपी/रिटेल दिनांक 26.02.2018

"सेवा में.
श्री लक्ष्मीकान्त पाण्डेय पुत्र रामकिशोर पाण्डेय
निवासी बाजपेयी पुरवा, बदौसा रोड,
पेट्रोल पंप के सामने, अतर्रा,
(बाँदा) उ. प्र.

विषय: आर्बिटेटर नियुक्त करने के संबंध में।

प्रिय महोदय,
उपरोक्त सम्बंध में आप अपने पत्रांक शून्य दिनांक 15.02.2018 का संदर्भ लें।
अपने इस संदर्भित पत्र में आपने स्वतः ही सोल आर्बिटेटर नियुक्त करके कार्यवाही
प्रारम्भ करने का अनुरोध किया है।
हमारा आपसे अनुरोध है कि हमारे पत्रांक KRR/RET/Arbi दिनांक 24.10.2018
का संदर्भ लें, जिसमें आपसे कॉर्पोरेशन के किसी कर्मचारी को सोल आर्बिटेटर
नियुक्त करने के संबंध में सहमति मांगी गई थी। इसी पत्र में आपसे यह भी कहा
गया था कि इस संबंध में अपनी लिखित सहमति / असहमति से 15 दिन के अंदर
सूचित करें।
हम आपको यह भी अवगत कराना चाहते हैं कि कोर्पोरेशन आप द्वारा नियुक्त किए
गए किसी भी आर्बिटेटर को स्वीकार नहीं करती है। आप, आर्बिटेटर को नियुक्त
करने के लिए या तो कॉर्पोरेशन को सहमति प्रदान करें या फिर आर्बिटेटर की
नियुक्ति हेतु समुचित सक्षम प्राधिकारी को एप्रोच करें।

भवदीय
अवधेश कुमार पांडेय
उप महाप्रबंधक"

74. Lastly, the appellant vide his reply dated 07.03.2018 gave his consent and the contents of the said reply is being reproduced hereinafter:-

“अवधेश कुमार पांडेय
उप महाप्रबंधक
हिन्दुस्तान पेट्रोलियम कॉर्पोरेशन लि०
भूतल 88 ए गोवर्धन पुरवा, साकेत नगर,
हमीरपुर रोड, कानपुर- 208014
विषय-आर्बिटेटर नियुक्त करने के सम्बन्ध में।
महोदय,

कृपया अपने पत्र दिनांक 24.10.2018 KRR/RET/Arbi व पत्र दिनांक 26.02.2018 का संदर्भ ले, जिसके द्वारा आर्कीटेटर नियुक्ति की सहमति चाही गई है।

मैं कॉर्पोरेशन को आर्कीटेटर नियुक्त करने की सहमति देता हूँ। साथ ही अनुरोध है कि मैं विकलांग हूँ ज्यादा दूर आने-जाने में दिक्कत है इसलिए उ०प्र० के किन्ती नजदीक शहर का आर्कीटेटर ही नियुक्त किया जाय।

दिनांक-07.03.2018

प्रार्थी

(लक्ष्मीकान्त पाण्डेय)
पुत्र रामकिशोर पाण्डेय
निवासी बाजपेयी पुरवा, बदौसा रोड,
पेट्रोल पम्प के सामने, अतर्रा
जिला-बाँदा (उ०प्र०)
मो0-9415556326

75. In the instant case, from the perusal of the arbitration clause as reproduced hereinabove, it reveals that the arbitration clause contemplated the disputes to be referred to the Sole Arbitration of the Chairman and Managing Director of the Corporation who had an additional power to appoint some other person as an Arbitrator. Apparently, the Chairman and the Managing Director of the Corporation clearly falls within the category mentioned in the Fifth and the Seventh Schedule appended to the Act of 1996. Thus, post the amendment in the Act i.e. w.e.f. 23.10.2015 the Chairman and the Managing Director of the Corporation was ineligible to act as an Arbitrator.

76. It is not a case where the Corporation had prepared a panel of potential Arbitrators and the appellant was required to select from amongst the said curated panel. Here, in the case at hand, the Chairman and the Managing Director of the Corporation was named as the Arbitrator with additional power to appoint some other person as Arbitrator. Once the Chairman and the Managing Director of the Corporation was ineligible to act as an Arbitrator then for the very same reason, he was not competent to appoint any other person to arbitrate. Thus, on this count, it is clear that the appointment of the Arbitrator made by the Chairman and the Managing Director of the Corporation was squarely hit by the decision of the Apex Court in **TRF (Supra)** and

Core-II (Supra) and such a person was not eligible to act as an Arbitrator as he lacked inherent jurisdiction and could not have made the award.

77. Additionally, the Arbitrator so appointed by the Chairman and Managing Director of the Corporation also did not furnish a declaration as required in terms of Section 12(1) read with Fifth and Sixth Schedule appended to the Act of 1996. This assumes significance for the reason that the exchange of letters between the parties would indicate that the letter of the appellant dated 07.03.2018 which has been quoted above, at best can be treated as consent only permitting the Corporation to appoint an Arbitrator and not a waiver of his right in terms of provisions to Section 12 (5) of the Act of 1996.

78. The letters quoted above would clearly indicate that by the first letter issued by the Corporation it sought consent of the appellant for appointment of a serving officer of the Corporation to act as an Arbitrator which was turned down by the appellant by his letter dated 15.02.2018. Now, if the letter of the Corporation dated 26.02.2018 is seen, then it will reveal that the appellant was required to furnish his consent to enable the Chairman and the Managing Director of the Corporation to appoint an Arbitrator and it did not say that the Chairman and the Managing Director of the Corporation would appoint only a serving officer of the Corporation.

79. Section 12(5) and its proviso uses the words “by an express agreement in writing” whereas an agreement postulates manifestation of mutual assent by two or more persons to one another. In other words it is meeting of minds with a common intention made through offer and acceptance.

80. In this background, it would be seen that the letter of the Corporation dated 24.01.2018 was an offer made by the Corporation requiring the appellant to give his consent.

81. The appellant by his reply dated 15.02.2018 appointed a Chartered Accountant as the Arbitrator and required the concurrence of the Corporation. This clearly was not an acceptance of the offer of the Corporation made in its letter dated 24.01.2018, rather this was a counter offer by the appellant.

82. Again the Corporation turned down the counter offer of the appellant vide its reply dated 26.02.2018. This was then followed by making another offer which was replied by the appellant on 07.03.2018 and this would reveal that as far as the issue of seeking waiver in terms of Section 12(5) Proviso is concerned, there was no visible meeting of minds (consensus ad idem) between the appellant and the respondent.

83. In this context at best, the appellant's consent can only be treated for the purposes of appointment of an Arbitrator who even could be a retired officer of the Corporation or of some other Oil Company or some retired Senior Central Government employee and the consent was not for the purposes of appointing a serving officer of the Corporation and certainly it was not a waiver of his right to raise objections in terms of the proviso appended to Section 12(5) of the Act of 1996.

84. In order to ascertain what could be construed as an 'express waiver' and its facets, was considered by the Apex Court in **Bhadra International (Supra)** and in paragraph 77 to 86, 89 to 90 and paragraphs 96 to 98, it held as under:-

“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, (2011) 14 SCC 770]

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 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 be 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.

* * *

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.”

* * *

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

97. One could argue that a miscreant party may participate in the arbitral proceedings up to the passing of the award, despite having full knowledge of the arbitrator's ineligibility. While after an adverse award is rendered, such a party may then seek to challenge it with a view to having it set aside. Such an apprehension is reasonable, however, to obviate the possibility of such misuse, the party making unilateral appointment must endeavour to enter into an express written agreement as stipulated in the proviso to Section 12(5), so as to safeguard the proceedings from being rendered futile.

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

85. In light of the aforesaid discussions, this Court finds that the appellant did not expressly waive his right to object in writing in terms of Section 12(5) of the Act of 1996 and its proviso. Thus, the first issue is answered accordingly.

Issue No. II

86. Now, whether the appellant could have raised this objection for the first time in an appeal under Section 37 of the Act of 1996. This issue was considered by the Apex Court in **Bhadra International (Supra)** and in paragraph nos. 112, 113, 120, it held as under:-

“112. What emerges from the foregoing is that the appellants were well within their right to challenge the ineligibility of the sole arbitrator in an application under Section 34 of the Act, 1996.

c. Challenge to the ineligibility of the arbitrator at any stage of the proceedings

113. A challenge to an arbitrator's ineligibility could be raised at any stage because an award passed in such circumstance is non-est, i.e., it carries no enforceability or recognition in law. We say so because an arbitrator does not possess the jurisdiction to pass an award. In arbitration, the parties vest the jurisdiction in the tribunal by virtue of a valid arbitration agreement and an appointment made in accordance with the provisions of the Act, 1996. This jurisdiction is grounded in the consent of the parties as explained in the foregoing paragraphs of this judgment.

* * *

120. All that we are trying to convey is that, in civil law, the law itself confers subject-matter jurisdiction on specific courts. For instance, a suit seeking a declaration on the validity of marriage before the Civil Court is not maintainable, as such disputes fall within the exclusive jurisdiction of the Family Court. Similarly, in arbitration, the consent of parties confers subject-matter jurisdiction, i.e., the authority to decide the dispute. When an arbitral tribunal is unilaterally constituted, such consent is absent, thereby divesting the tribunal of subject-matter jurisdiction. The Act, 1996, does not recognize the conferral of jurisdiction on an arbitral tribunal without the consent of the parties. By entering into an express agreement in writing as per the proviso to Section 12(5), the parties not only waive the ineligibility of the proposed arbitrator but also consent to his appointment.

121. Before we part, we deem it fit to observe that an arbitrator is better equipped with the position of law on appointments, more particularly, unilateral appointments. Therefore, it becomes incumbent upon the arbitrator that upon entering reference and at the very first hearing, to ensure from the parties that they are willing to participate in the proceedings and to insist upon a written agreement waiving the requirement of Section 12(5) of the Act, 1996.”

87. In light of the observations made by the Apex Court as noticed above, it would be clear that such objections can be taken at any stage of the proceedings. In the case at hand, the appellant did raise an objection in his petition under Section 34 of the Act of 1996, though not very

precisely but nevertheless it was an issue which was dealt with by the Commercial Court by holding that the appellant gave his consent in the appointment of the Arbitrator. This finding is also under challenge in this appeal and clear grounds have been taken in the memo of appeal. Hence, the appellant cannot be non-suited for not taking a precise ground in its petition under Section 34 of the Act of 1996 as the ground of illegibility could be raised at any stage and having done so and examined by this Court, it is found that the appointment of the Arbitrator was not valid nor the waiver as per Section 12(5) of the Act was express, thus rendering the appointment legally invalid and even the award made by such an Arbitrator is rendered invalid. Thus, the second issue is answered accordingly.

88. Since the appointment of the Arbitrator is found to be without jurisdiction and for the said reason, the award cannot be sustained, hence, there is no need for this Court to enter into the second question raised by the appellant to challenge the award on grounds of procedural infractions.

89. As far as the dictum of the Bombay High Court in **Truly Pest Solution (Supra)** is concerned, it does not help the respondent as the Apex Court in para 98 of **Bhadra International (Supra)** has overruled the said decision and it loses its binding substratum.

Conclusion:-

90. In light of detailed discussions, this Court concludes:-

(i) The appointment of the Sole Arbitrator by the Chairman and Managing Director of the Corporation was violative of the principles of equal treatment of parties;

(ii) The appointment of the Sole Arbitrator by the Chairman & Managing Director of the Corporation was bad since as per the Clause 66 of the Agreement, the disputes were to be referred to the Chairman & Managing Director of the Corporation who was ineligible to act as an Arbitrator, hence, he could not even appoint an Arbitrator;

(iii) The letter exchanged between the parties, does not indicate that the appellant had agreed to expressly waive his right in writing to raise objections after the disputes had occurred, in terms of the proviso appended to Section 12 (5) of the Act of 1996. Thus, in absence of an express waiver, the Sole Arbitrator incurred de jure ineligibility and he could not act as an Arbitrator nor could he make the award.

(iv) The appellant had a right to raise an objection regarding the legality of the appointment of the Arbitrator even in an appeal under Section 37 of the Arbitration and Conciliation Act, 1996, as it is a matter which goes to the roots of the jurisdiction of the Arbitrator to make an award.

91. For the reasons aforesaid, the present appeal is **allowed**. The judgment passed by the Commercial Court-II, Lucknow dated 19.04.2023 passed in Arbitration Case No. 766 of 2019 is set aside, so also the award dated 26.04.2019 is set aside. It will be open for the parties to get a fresh Arbitrator appointed in accordance with law for settlement of their disputes. In the facts and circumstances, there shall be no order as to costs.

(Jaspreet Singh, J)

(Arun Bhansali, CJ)

April 23, 2026

Asheesh