HIGH COURT OF ANDHRA PRADESH

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CIVIL REVISION PETITION Nos. 2345/2022 & 419/2026

CRP No.2345 of 2022:

Between:
Katta Srinivasu

.....PETITIONER

AND
M/s. IKF Finance Limited,
MG Road, Vijayawada,
Represented by its Legal Manager
D. Srinivasa Rao, and 2 others

.....RESPONDENTS

CRP No.419 of 2026:

Between:
Katta Srinivasu and another

.....PETITIONERS

AND
M/s. IKF Finance Limited,
MG Road, Vijayawada,
Represented by its Legal Manager
D. Srinivasa Rao, and another

.....RESPONDENTS

DATE OF JUDGMENT RESERVED : 12.03.2026

DATE OF JUDGMENT PRONOUNCED : 10.04.2026

DATE OF JUDGMENT UPLOADED : 10.04.2026

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE RAVI NATH TILHARI
&
THE HON'BLE SRI JUSTICE BALAJI MEDAMALLI

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? Yes/No

2. Whether the copies of judgment may be marked to Law Reporters/Journals Yes/No

3. Whether Your Lordships wish to see the fair copy of the Judgment? Yes/No

RAVI NATH TILHARI, J

BALAJI MEDAMALLI, J

*** THE HON'BLE SRI JUSTICE RAVI NATH TILHARI**
&
THE HON'BLE SRI JUSTICE BALAJI MEDAMALLI

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! Counsel for the Petitioners : Sri P. V. A. Padmanabham

Counsel for the Respondents : Sri V. V. L. N. Purnesh

< Gist :

> Head Note:

? Cases Referred:

1. (2020) 20 SCC 760
2. (2025) 4 SCC 641
3. 2026 SCC OnLine SC 7
4. 2026 SCC OnLine Bom 218
5. 2017 SCC OnLine SC 1211

THE HON'BLE SRI JUSTICE RAVI NATH TILHARI
&
THE HON'BLE SRI JUSTICE BALAJI MEDAMALLI

CIVIL REVISION PETITION Nos. 2345/2022 & 419/2026

COMMON JUDGMENT: (per Hon'ble Sri Justice Ravi Nath Tilhari)

Heard Sri P. V. A. Padmanabham, learned counsel for the petitioners and Sri V. V. L. N. Purnesh, learned counsel for the respondents.

2. The aforesaid civil revision petitions have been filed under Article 227 of the Constitution of India. In CRP No.2345 of 2022 the challenge is to the Order dated 30.09.2022 passed in Execution Petition No.676 of 2022 in AOP.No.6 of 2020 in the application of the decree holder for attachment of the bank account of the petitioner and in the other CRP No.419 of 2026 the grievance raised for is the non-disposal of the petitioners' application for stay in ARB OP No.02 of 2023 under Section 34 of the Arbitration and Conciliation Act, 1996 (in short 'Act 1996'), pending in the same Court of VIII Additional District Judge, Vijayawada.

I. Facts:

3. Briefly, the facts are, that there exists an arbitration award in favour of M/s.INK Finance Limited, Vijayawada, the Finance Company, dated 20.01.2021 in AOP No.6 of 2020 passed by the sole arbitrator. The Award was against both the petitioners in CRP.No.419 of 2026 and the only petitioner in CRP.No.2345 of 2022. The petitioner in CRP.No.2345 of 2022 is the 1st petitioner in CRP No.419 of 2026. The Award is for recovery of amount under

loan basing on an agreement No.LN148437 in favour of the 1st respondent finance company. The Sole Arbitrator, by name Sri B. Chalapathi Suri, passed an award dated 20.01.2021 which is said to be an *ex parte* award without service of notice on the petitioners. The 1st petitioner is the barrower and the other petitioner is the guarantor. Being aggrieved, the petitioners filed AOP.No.2 of 2023 under Section 34 of the Act 1996 in the Court of the Principal District Judge, Krishna at Mchilipatnam for setting aside the award in Award No.6 of 2020, dated 20.01.2021. The same is pending before the VIII Additional District Judge, Vijayawada.

4. The 1st respondent filed E.P.No.676 of 2022 to execute the Award. In the said EP the Order dated 30.09.2022 was passed to attach the amount lying in the bank account of the 1st petitioner/Judgment Debtor in UCO Bank Athili Branch, West Godavari District directing the Garnishee bank to withhold the said amount and prohibit any transactions until further orders of the Court. This Order is under challenge in CRP No.2345 of 2022.

5. The 1st respondent in the counter filed in CRP No.419 of 2026 has *inter alia* stated that when the dispute arose due to non-payment of the outstanding loan in spite of the demand notices, the 1st respondent company referred the 2nd respondent in CRP No.419 of 2026 the retired Junior Civil Judge as sole arbitrator to settle the dispute between the petitioners and the 1st respondent. The petitioner did not give reply to the notice and remained silent throughout the arbitration proceedings in AOP.No.6 of 2020 and even in the E.P.No.676 of 2022 filed by the 1st respondent the petitioners never raised their

objections regarding appointment of sole arbitrator which waives the right of the petitioner to object the appointment of sole arbitrator under Section 4 of the Act 1996. The 1st respondent in the counter affidavit has further contended that the sole arbitrator is an individual entity having no direct or indirect relations with the 1st respondent company, and that the arbitrator was not appointed by any person as per the categories prescribed in Seventh Schedule and not barred under the provisions of Section 12 (5) of the Act.

6. The 1st respondent has filed counter in CRP.No.2345 of 2022 as well, and *inter alia*, submitted that the arbitration proceedings and SARFAESI Act proceedings can go together. The two Acts are cumulative remedies to the secured creditor. The SARFAESI proceedings are in the nature of enforcement proceedings. The arbitration proceedings would be in the form of adjudicator process. So, both can go on simulataneously and one is not the bar for the other remedy.

II. Submissions:

i) For petitioners:

7. Sri P. V. A. Padmanabham, learned counsel for the petitioners, submitted that the award dated 20.01.2021 is by the sole arbitrator. The said Arbitrator was appointed unilaterally by the Finance Company-1st respondent. He submitted that the 1st respondent and its authority which appointed the sole arbitrator was ineligible to act as an Arbitrator and so also to nominate an Arbitrator unilaterally in the dispute. He submitted that in view of Section 12 read with Schedule Seven, there was ineligibility to act as an Arbitrator and also

to unilaterally nominate the Arbitrator by the said Finance Company through its authority. The Award, as such, is without jurisdiction. The execution proceedings for the execution of such an invalid award, which is *non est* having been passed an authority, statutorily barred, as also the Order of attachment are without jurisdiction and deserve to be set aside. Learned counsel for the petitioner placed reliance in the following judgments:

1. ***Perkins Eastman Architects DPC v. HSCC (India) Ltd.***[1]
2. ***Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)***[2]
3. ***Bhadra International (India) Pvt. Ltd. v. Airports Authority of India***[3]
4. ***L & T Finance Ltd. v. Sangeeta Bhansali (Borrower)***[4]

8. We place on record that the learned counsel for the petitioner submitted that though a plea has been taken in the grounds of revision that the Finance Company having initiated the steps for realization / recovery of the loan amount under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002, could not resort to the arbitration proceedings, but, he submitted further that, in view of the judgment of the Hon'ble Apex Court on the said aspect settling the law in ***M. D. Frozen Foods Exports Pvt. Ltd. v. Hero Fincorp Ltd.***[5] that

[1] (2020) 20 SCC 760
[2] (2025) 4 SCC 641
[3] 2026 SCC OnLine SC 7
[4] 2026 SCC OnLine Bom 218
[5] 2017 SCC OnLine SC 1211

the SARFAESI proceedings and arbitration proceedings can go hand in hand, he is not pressing that ground of challenge which therefore need be consideration.

ii) <u>For Respondents:</u>

9. Sri V. V. L. N. Purnesh, learned counsel for the respondent Finance Company, submitted that in the appointment of the sole Arbitrator notice was issued to the petitioner, but he did not raise any objection. He submitted that Section 4 of the Act 1996 is attracted. He submitted that there was waiver of right to object on the part of the petitioner. If the petitioner had any objection, he could have raised this plea either objecting to the letter or raising objection before the Arbitral Tribunal which was competent to rule on its jurisdiction under Section 16 of the Act 1996. He submitted that on the said ground it cannot be said that the Award passed by the sole Arbitrator is without jurisdiction or *non est* and incapable of execution.

10. Learned counsel for the respondents raised an objection that the plea of lack of jurisdiction in the arbitrator has not been raised in the revision, challenging the execution proceedings/order of attachment.

iii) <u>Reply submissions:</u>

11. In reply, Sri P. V. A. Padmanabham, learned counsel for the petitioners, submitted that Section 4 of the Act 1996 is not attracted. The present is a case of the sole Arbitrator appointed unilaterally and such an appointment or nomination of Arbitrator has been held by the Hon'ble Apex Court as violative of Article 14 of the Constitution of India. He submitted that the principle of equal treatment of parties applies not only to the arbitral

proceedings, but also to the procedure for appointment of arbitrators. He submitted that the principle of express waiver exists under the proviso to Section 12 (5) of the Act 1996, but for the applicability of such waiver, there should be an express agreement in writing waiving the applicability of Sub-Section (5) of Section 12 of the Act 1996. He submitted that there is no express agreement in writing in the present case between the petitioner and the Finance Company and so, the waiver provision under Section 12 (5) is not attracted and the Award passed by the unilaterally appointed Arbitrator would be void and inexecutable.

12. In response to the objection of the learned counsel for the respondents that plea of lack of jurisdiction in the arbitrator has not been raised in the revision, the learned counsel for the petitioner specifically referred the ground No.2 in CRP No.2345 of 2022, in which the ground taken is that the award itself is invalid and the execution proceedings are not maintainable in the eye of law. Further, in CRP No.419 of 2026 also specific grounds have been taken that the jurisdictional defects can be raised at any stage of the proceedings and even in the collateral proceedings as also that the sole Arbitrator unilaterally appointed is bad in law as ordered by the Hon'ble Apex Court. Consequently, the grounds have been raised and therefore, we proceed to deal with those grounds in the light of the arguments raised by the learned counsels for both the sides and the law laid down on the subject.

III. Points for consideration:

13. In view of the submissions advanced by the learned counsels for the parties, the following points for consideration arise:

(i) Whether the unilateral appointment of the sole Arbitrator by the 1st respondent Company is invalid, and such an Arbitrator had no jurisdiction to arbitrate?

(ii) Whether the Award dated 20.01.2021 is without jurisdiction for lack of inherent jurisdiction in the unilaterally appointed Arbitrator?

(iii) Whether there was waiver on the part of the petitioner under Section 4 of the Act 1996 or/and Section 12 (5) of the Act 1996 to the jurisdiction of the unilaterally appointed Arbitrator?

(iv) Whether the question of lack of inherent jurisdiction in the arbitrator, on the aforesaid grounds, can be raised in the present civil revision petitions?

IV. Analysis:

14. We have considered the aforesaid submissions and perused the material on record.

15. The aforesaid points (i) to (iv) are connected and therefore we proceed to consider simultaneously.

16. We firstly refer to the provisions of Sections 4, 12, 14 and 16 of the Arbitration and Conciliation Act 1996, which read as follows:

"4. **Waiver of right to object**.—A party who knows that—

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement

has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

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.

Explanation1.—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.]

14. Failure or impossibility to act.

(1) [1][The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if]—

(a) he becomes *de jure or de facto* unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause *(a)* of sub-section *(1)*, a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section *(3)* of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section *(3)* of section 12.

16. Competence of arbitral tribunal to rule on its jurisdiction.—(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue
with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

17. Seventh Schedule referred to under Section 12 (5) of the Arbitration and Conciliation Act, 1996 reads as under:

"THE SEVENTH SCHEDULE

[See section 12(5)]

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.
2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties
3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.
4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.
5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.
7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.
8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.
9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.
10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.
11. The arbitrator is a legal representative of an entity that is a party in the arbitration.
12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.
13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.
14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.
16. The arbitrator has previous involvement in the case.

Arbitrator's direct or indirect interest in the dispute

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.
18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.—The term "close family member" refers to a spouse, sibling, child, parent or life partner.

Explanation 2.—The term "affiliate" encompasses all companies in one group of companies including the parent company.

Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.]"

18. The law on the aforesaid points of appointment of an Arbitrator unilaterally and waiver of an objection to such appointment is not *res integra*. The same has been well settled.

19. In ***Perkins Eastman Architects DPC*** (supra), the Hon'ble Apex Court after considering ***TRF Ltd.*** (supra), held as under in paragraph Nos.17 to 21:

"**17.** In *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , the agreement was entered into before the provisions of the Amending Act (3 of 2016) came into force. It was submitted by the appellant that by virtue of the provisions of the Amending Act and insertion of the Fifth and Seventh Schedules in the Act, the Managing Director of the respondent would be a person having direct interest in the dispute and as such could not act as an arbitrator. The extension of the submission was that a person who himself was disqualified and disentitled could also not nominate

any other person to act as an arbitrator. The submission countered by the respondent therein was as under : (SCC p. 385, para 7.1)

"*7.1.* The submission to the effect that since the Managing Director of the respondent has become ineligible to act as an arbitrator subsequent to the amendment in the Act, he could also not have nominated any other person as arbitrator is absolutely unsustainable, for the Fifth and the Seventh Schedules fundamentally guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence and impartiality of the arbitrator. To elaborate, if any person whose relationship with the parties or the counsel or the subject-matter of dispute falls under any of the categories specified in the Seventh Schedule, he is ineligible to be appointed as an arbitrator but not otherwise."

18. The issue was discussed and decided by this Court as under : (*TRF case* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , SCC pp. 403-04, paras 50-54)

"*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. In this regard, our attention has been drawn to a two-Judge Bench decision in *State of Orissa* v. *Commr. of Land Records & Settlement* [*State of Orissa* v. *Commr. of Land Records & Settlement*, (1998) 7 SCC 162] . In the said case, the question arose, can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held : (SCC p. 173, para 25)

'*25.* We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in *Roop Chand* v. *State of Punjab* [*Roop Chand* v. *State of Punjab*, AIR 1963 SC 1503] . In that case, it was held by the majority that where the State Government had, under Section 41(1) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, delegated its appellate powers vested in it under Section 21(4) to an "officer", an order passed by such an officer was an order passed by the *State Government* itself and "not an order passed by any *officer* under this Act" within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revision by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer *in his own right* and *not as a delegate* of the State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate.'

(emphasis in original)

51. Be it noted in the said case, reference was made to *Behari Kunj Sahkari Awas Samiti* v. *State of U.P.* [*Behari Kunj Sahkari Awas Samiti* v. *State of U.P.*, (1997) 7 SCC 37] , which followed the decision in *Roop Chand* v. *State of Punjab* [*Roop Chand* v. *State of Punjab*, AIR 1963 SC 1503] . It is seemly to note here that the said principle has been followed in *Indore Vikas Pradhikaran* [*Indore Vikas Pradhikaran* v. *Pure Industrial Coke & Chemicals Ltd.*, (2007) 8 SCC 705] .

52. Mr Sundaram has strongly relied on *Pratapchand Nopaji* [*Pratapchand Nopaji* v. *Kotrike Venkata Setty & Sons*, (1975) 2 SCC 208] . In the said case, the three-Judge Bench applied the maxim "*qui facit per alium facit per se*". We may profitably reproduce the passage : (SCC p. 214, para 9)

'*9.* … The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim:"*qui facit per alium facit per se*" (what one does through another is done by oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to do the illegal act within the prohibited area. It is immaterial whether, for the doing of such an illegal act, the agent employed is given the wider powers or authority of the "pucca adatia", or, as the High Court had held, he is clothed with the powers of an ordinary commission agent only.'

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 [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, 2016 SCC OnLine Del 2532] expressed by the High Court is not sustainable and we say so."

19. It was thus held that as the Managing Director became ineligible by operation of law to act as an arbitrator, he could not nominate another person to act as an arbitrator and that once the identity of the Managing Director as the sole arbitrator was lost, the power to nominate someone else as an arbitrator was also obliterated. The relevant clause in said case had nominated the Managing Director himself to be the sole arbitrator and also empowered said Managing Director to nominate another person to act as an arbitrator. The Managing Director thus had two capacities under said clause, the first as an arbitrator and the second as an appointing authority. In the present case we are concerned with only one capacity of the Chairman and Managing Director and that is as an appointing authority.

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]."

20. In ***Perkins Eastman Architects DPC*** (supra), the Hon'ble Apex Court thus held that the Managing Director of the respondent has become ineligible to act as an arbitrator, he could also not have nominated any other person to act as arbitrator and that once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. The Hon'ble Apex Court clearly observed that there are two categories of cases. The first, similar to the one dealt with in ***TRF Ltd***.(supra) 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 authorized to appoint any other person of his choice or discretion as an arbitrator. The Hon'ble Apex Court laid down that 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 and the same 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. It was held that the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator and that has to be taken as the essence of the

amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 and recognized by the decision of the Apex Court in ***TRF Ltd***.(supra)

21. In ***Central Organisation for Railway Electrification*** (supra), the Constitution Bench of the Hon'ble Apex Court, by majority, held *inter alia* that the principle of equal treatment of parties applies at all stages of arbitration proceedings, including the stage of appointment of arbitrators. It was held that 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. Such a unilateral clause is exclusive and hinders equal participation of the other party in the appointment process of arbitrators. Unilateral appointment clauses in public private contracts are violative of Article 14 of the Constitution. With respect to the principle of waiver, the Hon'ble Apex Court held that 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 was a necessity to waive the *nemo judex* rule, which is based on the precept that justice should not only be done but manifestly and undoubtedly be seen to be done.

22. The Hon'ble Apex Court held that the law as laid down in ***Central Organisation for Railway Electrification*** (supra) will apply prospectively to arbitrator appointments to be made after the date of the judgment, but this direction was made applicable to three-member arbitral tribunals.

23. The law is well settled that the judgment of the Court laying down the law applies retrospectively unless expressly given a prospective effect. The judgment in ***Central Organisation for Railway Electrification*** (supra) was made specifically prospective for the arbitrator appointments, as the direction only applies to three-member arbitral tribunals. So far as the appointment of the sole Arbitrator unilaterally is concerned, the law laid down has not been made prospective. Consequently, the principles of law as laid down in ***Central Organisation for Railway Electrification*** (supra) shall apply retrospectively to the appointment of the sole arbitrator unilaterally.

24. Paragraphs No.169 and 170 of ***Central Organisation for Railway Electrification*** (supra) read as under:

> "**169.** In the present reference, we have upheld the decisions of this Court in *TRF* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] and *Perkins* [*Perkins Eastman Architects DPC* v. *HSCC (India) Ltd.*, (2020) 20 SCC 760] which dealt with situations dealing with sole arbitrators. Thus, *TRF* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] and *Perkins* [*Perkins Eastman Architects DPC* v. *HSCC (India) Ltd.*, (2020) 20 SCC 760] have held the field for years now. However, we have disagreed with *Voestalpine* [*Voestalpine Schienen GmbH* v. *DMRC Ltd.*, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] and *CORE* [*Central Organisation for Railway Electrification* v. *ECI-SPIC-SMO-MCML (JV)*, (2020) 14 SCC 712] which dealt with the appointment of a three-member Arbitral Tribunal. We are aware of the fact that giving retrospective effect to the law laid down in the present case may possibly lead to the nullification of innumerable completed and ongoing arbitration proceedings involving three-member tribunals. This will disturb the commercial bargains entered into by both the government and private entities. Therefore, we hold that 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 only applies to three-member tribunals.

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;

1**70.2.** 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."

25. In ***Bhadra International (India) Pvt. Ltd.*** (supra), the Hon'ble Apex Court held that Section 12 (5) of the Act 1996 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. The Hon'ble Apex Court held that 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. The Hon'ble Apex Court further held that 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.

26. In ***Bhadra International (India) Pvt. Ltd.*** (supra) the Hon'ble Apex Court further observed and held that where 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.

27. The aforesaid law as laid down in para-123 (iv) of ***Bhadra International (India) Pvt. Ltd.*** (supra) is that even where the award has

already been passed by a sole arbitrator appointed unilaterally, the aggrieved person can challenge under Section 34 of the Act 1996. The Hon'ble Apex Court further held that an Arbitrator who lacks the jurisdiction cannot make an award on the merits and an objection of inherent jurisdiction can be taken at any stage of the proceedings.

28. Paragraph No.123 of ***Bhadra International (India) Pvt. Ltd.*** (supra) reads as under:

> "**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."

29. In ***L & T Finance Ltd.*** (supra), on consideration of the aforesaid judgments in ***Bhadra International (India) Pvt. Ltd.*** (supra), ***TRF Ltd.*** (supra), ***Perkins Eastman*** (supra), the Bombay High Court reached to a conclusion that the award by the unilaterally appointed sole Arbitrator deserved to be set aside, which was accordingly set aside and the Commercial Execution Application was dismissed, however, it was kept open to initiate fresh arbitration proceedings, in accordance with law.

30. There is no dispute that the sole Arbitrator was appointed unilaterally by the Finance Company pursuant to the arbitration clause in the Arbitration Agreement.

31. Learned counsel for the petitioners submitted that the person appointing the sole arbitrator is the Legal Manager of the 1st respondent Company. He submitted that the Legal Manager who has appointed the sole arbitrator vide the said letter certainly falls under the categories specified in the Seventh Schedule. He referred to in particular Category-1 the arbitrator as an employee, consultant, Advisor or has any other past or present business relationship with a party, Category-2, the Arbitrator currently represents or advises one of the parties or affiliate of one of the parties, as also the Category-

3, the arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties, Category-5, the arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration, as also category-12, The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

32. Learned counsel for the petitioners submitted that the Legal Manager of the Finance Company 1st respondent, cannot act as an Arbitrator. He is ineligible under the Seventh Schedule to be appointed as an arbitrator and consequently, in view of the judgment of the Hon'ble Apex Court in ***Perkins Eastman Architects DPC*** (supra), the Legal Manager could also not nominate or appoint any other person as a sole Arbitrator. Consequently, the submission is that on the admitted fact that the sole arbitrator was appointed unilaterally by the Legal Manager of the 1st respondent and in view of the legal provisions, the Legal Manager himself being ineligible to be appointed as an Arbitrator could also not nominate or appoint the 2nd respondent as an Arbitrator by virtue of the provisions of Section 12 (5) read with Seventh Schedule, the sole arbitrator had no jurisdiction or authority to pass the Award.

33. The aforesaid categories in Seventh Schedule, clearly show that the legal manager of the 1st respondent Finance Company would be covered under more than one category. So, legally ineligible to be arbitrator and for that reason also ineligible to appoint/nominate 2nd respondent as arbitrator, in view of the law laid down in ***Perkins Eastman Architects DPC*** (supra). The

submission of the learned counsel for the petitioners has the force and the 2nd respondent arbitrator has no jurisdiction to arbitrate or pass an Award.

34. At this stage we may reproduce at the cost of repetition from ***Perkins Eastman Architects DPC*** (supra):

> "20…..**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……."

35. Learned counsel for the 1st respondent referred to the letter/notice dated 23.11.2019 by the 1st respondent Finance Company to the petitioners as also the letter/notice dated 18.12.2019 of the 1st respondent Finance Company appointing the sole arbitrator (annexed as P2 to the counter affidavit) and

submitted that the petitioners never raised objection to such appointment nor replied the notices and so there was waiver under Section 4 of the Act 1996.

36. So far as the arguments of the learned counsel for the respondent Finance Company is concerned that there was waiver under Section 4 of the Act 1996, the same deserves rejection. The reason is firstly that the waiver with respect to the appointment of the sole Arbitrator unilaterally has been specifically dealt with in Section 12 (5) of the Act 1996. So, the waiver on the part of the party/petitioner could only be as per those provisions. There is no dispute raised that, there was no express agreement in writing as contemplated under the proviso to Section 12 (5). Consequently, the conditions under the proviso not being attracted, there would be no waiver.

37. Secondly, Section 4 deals with different kind of waiver i.e., waiver of right to object. According to the Section 4, a party who knows that, (a) any provision of Part-I of the Act 1996 from which the parties may derogate, or (b) any requirement under the arbitration agreement has not been applied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that the objection, within that period of time, shall be deemed to have waived his right to so object.

38. The Hon'ble Apex Court in ***Central Organisation for Railway Electrification*** (supra) also held on Section 4 that, it implies a waiver of this right under certain conditions based on principle of waiver or estoppel that a party to arbitration has a right to object to any non-compliance with procedural

requirements. The procedural default at issue must be stipulated either in the arbitration agreement or in non-mandatory provision in part-1 of the Arbitration Act. If the arbitration agreement is silent on a procedural point, the provisions of the Arbitration Act take effect.

39. Paragraph Nos.26 to 28 of ***Central Organisation for Railway Electrification*** (supra) are reproduced as under:

> "**(*ii*) *Mandatory provisions***
>
> **26.** Part I of the Arbitration Act applies where the place of arbitration is in India. [Section 2(2), Arbitration Act.] Section 4 deals with a waiver of the right of a party to object in the following terms:
>
> "**4. *Waiver of right to object***.—A party who knows that—
>
> (*a*) any provision of this Part from which the parties may derogate, or
>
> (*b*) any requirement under the arbitration agreement,
>
> has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."
>
> **27.** Section 4 is a deeming provision. [*Shree Subhlaxmi Fabrics (P) Ltd.* v. *Chand Mal Baradia*, (2005) 10 SCC 704 : (2005) 124 Comp Cas 811, para 9] It deems that a party has waived its right to object if it proceeds with the arbitration without stating its objection to non-compliance of any provisions from which the parties may derogate or of any requirement under the arbitration agreement. [*BSNL* v. *Motorola India (P) Ltd.*, (2009) 2 SCC 337, p. 349, para 39 : (2009) 1 SCC (Civ) 524"*39*. Pursuant to Section 4 of the Arbitration and Conciliation Act, 1996, a party which knows that a requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives their right to object."] Importantly, Section 4 distinguishes between derogable (non-mandatory) and mandatory provisions. [A/CN.9/246 (44)]

28. Section 4 is based on Article 4 of the Model Law. [Article 4, Model Law. It reads:"**4. *Waiver of right to object***.—A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object."] The purpose of incorporating Section 4 is to inform the arbitrators of the principle of waiver. [Howard Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, p. 196.] Peter Binder suggests that Article 4 aims to prohibit the adoption of delay tactics by parties and contribute to the fluency of the proceedings. [Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdiction*, (2nd Edn., 2005) p. 49.] A party to arbitration has a right to object to any non-compliance with procedural requirements. Section 4 implies a waiver of this right under certain conditions based on the principle of waiver or estoppel. [A/CN.9/264 (17)] The procedural default at issue must be stipulated either in the arbitration agreement or a non-mandatory provision under Part I of the Arbitration Act. If the arbitration agreement is silent on a procedural point, the provisions of the Arbitration Act take effect. According to Section 4, a party cannot insist on compliance with non-mandatory provisions of the Arbitration Act if it fails to make a timely objection. [Howard Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, (Kluwer Law) p. 197.] Section 4 of the Arbitration Act necessarily implies that the parties cannot proceed with arbitration in derogation of a mandatory provision."

40. In the aforesaid case, ***Central Organisation for Railway Electrification*** (supra), on the aspect of Section 12, *inter alia,* the paragraphs No.42, 47 and 48 deal which are also reproduced as under:

"(***iv) Independence and impartiality of arbitrators***

42. Section 12 provides the grounds to challenge the appointment of arbitrators. [Section 12, Arbitration Act. It reads:"**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."] Section 12(1) mandates that a person who has been approached to be appointed as an arbitrator must disclose in writing any circumstances that are likely to give rise to "justifiable doubts as to his independence or impartiality". The Fifth Schedule to the Arbitration Act

specifies circumstances that give rise to justifiable doubts as to the independence or impartiality of arbitrators. Section 12(1) also mandates an arbitrator to disclose in writing any circumstances that are likely to affect the ability to devote sufficient time to the arbitration and in particular the ability to complete the entire arbitration within twelve months. The duty of disclosure is a continuing duty. Section 12(3) provides that an arbitrator may be challenged only if : (*i*) circumstances exist that give rise to justifiable doubts as to independence or impartiality; or (*ii*) the arbitrator does not possess the qualifications agreed to by the parties.

47. Section 12(5) overrides any prior procedure for appointing the arbitrators agreed upon between the parties under Section 11(2) due to the non obstante clause. However, the proviso to Section 12(5) allows parties to waive the applicability of that provision after the dispute has arisen. The proviso secures "real and genuine party autonomy" by allowing parties to waive the applicability of Section 12(5). [Law Commission of India, Amendments to the Arbitration and Conciliation Act 1996, Report No. 246 (August 2014)"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."(emphasis in original)]

48. Section 12(5) does not prescribe a method to challenge the appointment of an ineligible person. Section 14 deals with the termination of the mandate of an arbitrator who is unable to perform their functions. [Section 14, Arbitration Act. It reads:"**14. *Failure or impossibility to act*.**—(1) The mandate of an arbitrator shall terminate and he shall be substituted by

another arbitrator, if—(*a*) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and(*b*) he withdraws from his office or the parties agree to the termination of his mandate.(2) If a controversy remains concerning any of the grounds referred to in clause (*a*) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.(3) If, under this section or sub-section of (3) of Section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of Section 12."] **A person who is ineligible to be appointed as an arbitrator in terms of Section 12(5) becomes de jure unable to perform functions according to Section 14. Resultantly, the mandate of such an ineligible person gets automatically terminated and they are liable to be substituted by another arbitrator under Section 14**. [*Bharat Broadband Network Ltd.* v. *United Telecoms Ltd.*, (2019) 5 SCC 755, p. 769, para 17 : (2019) 3 SCC (Civ) 1"*17*. The scheme of Sections 12, 13 and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. **However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case i.e. a case which falls under Section 12(5), Section 14(1)(*a*) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e. *de jure*), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself."]"**

41. Therefore, in our view, the waiver under Section 4 of the Act 1996 is different than the waiver contemplated by Section 12. We are of the view that

the objection or the plea of waiver in terms of Section 4 of the Act 1996 cannot be connected to the provisions under Section 12 (5). The waiver with respect to the unilateral appointment of the sole Arbitrator attracting Seventh Schedule, is dealt by specific provision under sub-section (5) of Section 12 of the Act 1996. It is only on fulfillment of the conditions under sub-section (5) of Section 12, proviso, that a party can be said to have waived the right to object to the appointment of the sole Arbitrator made unilaterally attracting Schedule Seven for his ineligibility. Such ineligibility is a matter of law which automatically terminates the mandate of an arbitrator, and there is no question of challenge to such arbitrator before such arbitrator under Section 16 of the Act 1996.

42. In the present case, there is no such written agreement as contemplated under Section 12 (5) proviso. The conditions under the proviso are not satisfied and consequently, the plea of waiver raised by the learned counsel for the respondents has no legs to stand. The mandate of the arbitrator in the present case automatically terminated as a matter of law.

V. Conclusions:

43. In view of the aforesaid consideration, we reach to the conclusion that the appointment of the sole Arbitrator unilaterally appointed by the Finance Company is violative of Article 14 of the Constitution of India. It was invalid. The Arbitrator had no jurisdiction, it lacked inherent jurisdiction to pass the Award. The ineligibility under law under Section 12 read with Seventh Schedule, was attracted with respect to the person legal Manager of the 1st respondent Finance Company was attracted. So, he could also not

appoint/nominate 2nd respondent as the sole arbitrator. There was no express waiver by any agreement in writing in terms of proviso to Sub-Section (5) of Section 12 of the Act 1996. Consequently, there was no such waiver to such appointment on the part of the petitioner. The mandate of the Arbitrator stood automatically terminated in law and as per the law laid down in the ***Central Organisation for Railway Electrification*** (supra). The law laid down in ***Central Organisation for Railway Electrification*** (supra) is not prospective to the appointment of the sole Arbitrator appointed unilaterally. It is prospective only with respect to the appointment of the Arbitral Tribunal consisting of three Members. So, the Award put to execution is not a valid arbitration award; it is passed without jurisdiction. The plea of lack of inherent jurisdiction in the Arbitrator could be raised at any stage and even in collateral proceedings is also the settled legal position. Reference in this respect can be made to the following paragraphs 113 to 116, under the consideration head "C. Challenge to the ineligibility of the arbitrator at any stage of the proceedings, from ***Bhadra International (India) Pvt. Ltd.*** (supra).

> "**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.

114. In this context, jurisdiction means the authority of an arbitral tribunal to render a decision affecting the merits of the case. An arbitrator who lacks jurisdiction cannot make an award on the merits. With a view to dispel any doubt and lend clarity, we deem it appropriate to observe that the jurisdiction of the arbitral tribunal is distinct from the admissibility of the dispute, i.e., the arbitrability of the claims.

115. A question pertaining to the jurisdiction of the arbitral tribunal arises when the tribunal is fundamentally incompetent to render any decision at all. In other words, a question of jurisdiction pertains to the ability of the tribunal to hear a case, whereas questions of admissibility presuppose that the tribunal has jurisdiction. An award passed by an arbitrator who does not have jurisdiction strikes at the very authority of the arbitrator.

116. This Court, in catena of decisions, has held that the validity of a decree can be challenged even in execution proceedings if the court passing such decree lacked subject-matter jurisdiction over the dispute. As a decree passed by a court without jurisdiction goes to the root of the matter. Any decision passed by a court lacking jurisdiction would be *coram non judice*, since a court cannot give itself jurisdiction. No act of the parties can cure an inherent lack of jurisdiction."

We also refer to the clause No.v in para 123 of ***Bhadra International (India) Pvt. Ltd.*** (supra), already reproduced (supra).

The Points for consideration (i) to (iv), as framed, are answered as per paragraph No.43.

VI. Result:

44. The impugned Order dated 30.09.2022 passed in Execution Proceedings is hereby set aside. Since we have held that the Award itself is without jurisdiction the arbitrator's mandate came to an automatic end by virtue of Section 12 read with Seventh Schedule, the Award passed by it, is without

jurisdiction which cannot be executed. Any direction to the learned VIII Additional District Judge, Vijayawada in the pending proceedings under Section 34 of the Act 1996, to decide those proceedings, would be a futile exercise and shall unnecessarily prolong and multiply the litigation. The proceedings under Section 34 of the Act 1996 pending before the learned VIII Additional District Judge, Vijayawada therefore also stand closed.

45. We allow both the civil revision petitions in the aforesaid terms. However, it shall be open to the parties to initiate fresh arbitration proceedings, in accordance with law. No order as to costs.

Pending miscellaneous petitions, if any, including I.A.No.3 of 2026, shall stand closed in consequence.

RAVI NATH TILHARI, J

BALAJI MEDAMALLI, J

Date: 10.04.2026
Dsr

Note:
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