Bhadra International (India) Pvt. Ltd. ... vs Airports Authority Of India on 24 December, 2024

Author: Neena Bansal Krishna

Bench: Neena Bansal Krishna

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Reserved on: 20thMa
Pronounced on: 24th Decembe

+ O.M.P. (COMM) 414/2018 & I.A. 1834/2022

1. BHADRA INTERNATIONAL (INDIA) PVT. LTD.
Through its Director,
Shri Hiyav Bajaj,
42, Rani Jhansi Road,
New Delhi-110055 .....Pe

2. NOVIA INTERNATIONAL CONSULTING APS
Hangar 253, Copenhagen Airport-2,
2791, Denmark .....Pe

3. CONSORTIUM BETWEEN BHADRA INTERNATIONAL
(INDIA) PVT. LTD AND NOVIA INTERNATIONAL
CONSULTING APS
42, Rani Jhansi Road,
New Delhi-110055 .....Petitioner N

Through: Mr. Ashish Mohan, Mr. Akshit Mago,
Mr. Samarth Chowdhary, Ms. Sagrika
Tanwar & Mr. Digvijay Singh,
Advocates with Mr. Hiyav Bajaj.

Versus

AIRPORT AUTHORITY OF INDIA
Rajiv Gandhi Bhawan,
Safdarjung Airport,
New Delhi-110003 ..

Through: Mr. Parag Tripathi, Sr. Ad
Mr. Sonal K. Singh, Ms. Su
Mr. Srinivasan Ramaswamy,
Anmol & Ms. Vasundhara Bak

Advocates.

+ O.M.P. (COMM) 415/2018

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CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J

1. The present Petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act, 1996") have been filed by Bhadra International (India) Pvt. Ltd./Claimants (hereinafter referred to as Petitioners) and Airport Authority of India (hereinafter referred to as Respondent) to challenge the Arbitral Award dated 30.07.2018 passed by the learned Sole Arbitrator.

2. A Preliminary Objection has been taken on behalf of the Petitioner/ Claimant that since appointment of the Ld. Sole Arbitrator was made unilaterally by the Respondent/ Airport Authority of India, the Awards stand vitiated on this ground itself and further grounds need not be considered.

3. The present Order is confined to the Preliminary Objection: "whether the Awards are vitiated on the ground of unilateral Appointment of the Ld. Sole Arbitrator by the Respondent?"

4. Briefly stated, the parties entered into a License Agreement dated 29.11.2010, wherein the Respondent-Airport Authority of India (Licensee) had granted license to the Petitioners (Claimants) for Ground Handling Services on payment of royalty. Certain disputes arose inter se the parties

leading to a Notice of Invocation of Arbitration dated 27.11.2015 being issued by the Petitioner requesting Respondent-Airport Authority of India to O.M.P. (COMM) 414/2018 & Connected matters appoint the Sole Arbitrator. The Respondent consequently, in terms of the Clause 78 of the License Agreement dated 29.11.2010, appointed Mr. Justice Surinder Singh Nijjar, former Judge of Supreme Court of India as the Sole Arbitrator to adjudicate the disputes between the parties.

5. The Petitioners submitted to the jurisdiction of the Tribunal and filed their Statement of Claim on 03.05.2016 and actively participated in the arbitral proceedings. Eventually, the impugned Zero Award dated 30.07.2018, was passed by the learned Sole Arbitrator.

6. Aggrieved by the said Zero Award dated 30.07.2018, the Petitions under Section 34 of the Act, 1996 were filed, wherein the Award has been challenged on several grounds. Additionally, in the Amended Petition under Section 34 of the Act, the challenge has been made to the Award on the ground that the Sole Arbitrator was appointed unilaterally which is contrary to the settled law and the entire Award rendered is illegal and ab initio, being prohibited under Section 12(5) of the Act, 1996. Reliance is placed on Perkins Eastman Architect DPC & Anr. vs. HSCC (India) Ltd., 2019 SCC OnLine SC 1517; and Bharat Broadband Ltd. vs. United Telecoms Ltd., (2019) 5 SCC 755 .

7. It is explained that though the Objection of unilateral appointment had not been taken by the Petitioners initially in their Petition under Section 34 of the Act, 1996, but in the light of the Judgment of State of Chhattisgarh vs. Sal Udyog, 2021 SCC OnLine SC 1027, the petition was amended and an additional ground of unilateral appointment has now been taken on behalf of Petitioners. Further, the legal disqualification is a pure question of jurisdiction that goes to the root of the competence of the Arbitrator and can be raised at any stage of the proceedings, including at the stage of Section O.M.P. (COMM) 414/2018 & Connected matters 34 of the Act, 1996.

8. It is further argued on behalf of the Petitioner that it is no longer res integra that the ineligibility of an Arbitrator can be waived only by an express Agreement in writing under Proviso to Section 12(5) of the Act, 1996 and cannot be inferred from the conduct of the parties as has also settled by the Apex Court in Govind Singh vs. Satya Group Pvt. Ltd. & Ors., (2023) 297 DLT 349. Mere participation in the arbitration proceedings would not amount to waiver to the appointment of the Arbitrator since proviso to Section 12(5) of the Act, 1996 envisages that the waiver has to be an „express agreement in writing . Admittedly, no express waiver was given by the Petitioner to the Respondent-Airport Authority of India in terms of Proviso to Section 12(5) of the Act, 1996. The learned Sole Arbitrator was not competent to enter into the reference and suffered from a de jure inability since beginning and the Award rendered by him, is ex facie a nullity.

9. Further, in Ram Kumar & Anr. vs. Shriram Transport Finance Co. Ltd. (2023) 298 DLT 515, the Coordinate Bench of this Court had held that in addition to the ineligibility under Section 12(5) of the Act, 1996, such ground would also cast justifiable doubt as to the independence and impartiality of the Arbitrator who was required to disclose in writing such circumstances which are likely to give rise to justifiable doubts as to his independence and impartiality, but had failed to make any such disclosure. It was held that since the grounds giving rise to „justifiable doubts as to impartiality exist, failure to make such disclosure vitiates the arbitral proceedings and the impugned Award.

10. Subsequently, in Man Industries (India) Limited vs. Indian Oil O.M.P. (COMM) 414/2018 & Connected matters Corporation, 2023 SCC OnLine Del 3537, the Coordinate Bench of this Court had observed that where the appointment of the Arbitrator is de jure ineligible, then mere participation of the Petitioner in the arbitral proceedings or filing Application under Section 29A of the Act, 1996 seeking extension of the mandate of the learned Arbitrator, cannot be said to be the waiver of the ineligibility of the Arbitrator under Section 12 (5) of the Act, 1996.

11. Ld. Counsel has further placed reliance on the judgements of the Apex Court in the case of Hindustan Zinc Ltd. vs. Ajmer Vidyut Vitran Nigam Ltd. (2019) 17 SCC 82; Lion Engineering Consultants v. State of Madhya Pradesh & Ors. (2018) 16 SCC 758, TRF Limited v. Energo Engineerings Project Limited (2017) 8 SCC 377 and P. Dasa Muni Reddy v. P. Appa Rao (1974) 2 SCC 725 to argue that unilateral Appointment is patently illegal, and the Awards are liable to be set aside.

12. Similar observations have been made by the Coordinate Bench of this Court in the cases of Kotak Mahindra Bank Ltd. vs. Narendra Kumar Prajapat, MANU/DE/3223/2023 and Citicorp Finance India Ltd. vs. Rajesh Jain, decided vide FAO (COMM) 70/2022 on 03.05.2023. Reliance is also placed on JMC Projects vs. Indure Private Limited, 2020 SCC Online Del 1950, Delhi Buildtech v. Satya Developers, decided vide O.M.P (T)(COMM) No. 83 of 2021, Proddatur Cable TV Digi Services vs. Siti Cable Network Ltd., 2020 SCC OnLine Del 350, Smaaash Leisure Ltd. v. Ambience Commercial Developers Ltd. 2023 SCC OnLine Del 8322; and Telecommunication Consultants India Ltd. v. Shiva Trading 2024:DHC:3094-SB. Reference has also been made to the decision of Sarda Mines Pvt. Ltd. and Ors.v. State of Odisha and Ors. AIR 2022 Ori O.M.P. (COMM) 414/2018 & Connected matters

13. Ld. Senior Advocate Sh. Parag Tripathi on behalf of the Respondent-Airport Authority of India has taken an objection to challenge to the Award, on the ground of unilateral appointment of the Sole Arbitrator, on the premise that this objection had not been taken at any stage of Arbitral proceedings including in the unamended Petition under Section 34 of the Act, 1996. Taking this objection at this belated stage, is not merited as Section 34(3) of the Act, 1996 clearly limits the grounds of challenge to those taken in the Petition filed under Section 34 of the Act, 1996 filed within the specified timeframe, which is absolute.

14. It is further argued that amendment of Section 34 Petition is hopelessly barred by limitation and suffers from laches. The Act was amended w.e.f. 13.10.2015; the judgment in TRF Limited (supra) was passed on 03.07.2017 and the Award has been passed on 03.07.2018. Clearly, in view of Section 34 (3) of the Act, Bhadra could raise any objection including this ground of unilateral appointment as explained in the judgment of TRF Limited (supra) at the initial stage, within the prescribed limitation of three months extendable by thirty days. Rather, the Petition under Section 34 of the Act, 1996 was filed on 22.09.2018 to challenge the Award dated 30.07.2018 and the Amendment Application was filed for the first time on 29.01.2022 which was allowed on 24.04.2024. Even if the period from 15.03.2020 till 28.02.2022 on account of Covid Pandemic was to be excluded, the instant ground introduced by way of amendment, is hopelessly barred by the time limit of three months and 30 days, as provided under Section 34 of the Act.

15. Reliance was placed upon decision in Vastu Invest & Holdings Pvt.

O.M.P. (COMM) 414/2018 & Connected matters Ltd. v. Gujarat Lease Financing Limited 2000 SCC OnLine Bom 729 wherein it was held that if a party intends to raise an independent ground of challenge to the arbitral Award, the same cannot be entertained after a period of three months plus the grace period of one month, as provided under sub-section 3 of Section 34 of the Act. However, it has been taken after two years i.e., on 29.01.2022 and is, therefore, barred by limitation. Furthermore, the delay in filing the Application cannot be condoned by this Court as the Petitioners have failed to show any sufficient cause to explain the delay. These observations have been reiterated by the Apex Court in the case of State of Maharastra Vs. Hindustan Construction Company Limited (2010) 4 SCC 518.

16. It is stated that by way of amendment, the Petitioners has introduced new ground of challenge which have no foundation in the original Petition or in the arbitral proceedings and cannot be permitted. Reliance has been placed on the decision in Friends and Friends Shipping Pvt. Ltd. vs. Central Warehousing Corporation, decided vide W.P.(C) 6501/2022 by this Court.

17. Reliance has also been placed on Arjun Mall Retail Holdings Ltd. Vs. Gunocen Inc. 2024:DHC:495-DB decided on 23.01.2024 wherein the Division Bench of this Court, declined to consider this objection at the stage of Appeal under Section 37 of the Act, 1996 on the ground of it not being raised in Section 34 of the Act. It was observed that by not challenging the appointment of Arbitrator and remaining a mute spectator and raising a challenge to the appointment of the Arbitrator in proceedings under Section 34 of the Act, only after suffering the Award, was untenable. The Appeal has been preferred, which is pending in the Apex Court.

18. Ld. Senior Advocate has vehemently argued that that there was an O.M.P. (COMM) 414/2018 & Connected matters express waiver to the appointment of the learned Arbitrator by the Respondent-Airport Authority of India in terms of proviso to Section 12(5) of the Act, 1996.

19. Reliance has been placed on the decision in Kotak Mahindra Bank Ltd. (supra), wherein this Court had laid down the procedure to ensure that the party had waived its right to object to the ineligibility of an Arbitrator under Section 12(5) of the Act, 1996. It was observed that firstly, waiver must be done by an express Agreement in writing and secondly, such Agreement is entered into after the disputes have arisen. Both these conditions have been satisfied in the present case.

20. To substantiate this contention, Ld. Senior Advocate has made a reference to Notice invoking Arbitration sent by the Petitioner in requesting the Respondent for appointment of the Arbitrator.

21. Further, in in Paragraph 25 of the Statement of Claim dated 03.05.2016, it was specifically mentioned that "as the parties have agreed to refer all their disputes to adjudication by this Hon ble Tribunal". It is further argued that the Respondent is not basing the deemed waiver merely because the Statement of Claims was filed, but on the specific assertion in Paragraph 25 of the Statement of Claims that Tribunal has the jurisdiction to adjudicate the issues.

22. It is further contended that the Petitioners had always agreed to the jurisdiction of the learned Sole Arbitrator to adjudicate the disputes between the parties, which is also evident from the Minutes of the Meeting of the first arbitral proceedings dated 22.03.2016, wherein it was expressly recorded by the Ld. Arbitrator that "none of the parties have any objection to my appointment as the Sole Arbitrator" and this statement cannot be O.M.P. (COMM) 414/2018 & Connected matters considered in isolation.

23. In the case of Telecommunication Consultant India vs. Shiva Trading, OMP (COMM) No. 311/2022 dated 09.04.2024 on which reliance has been placed by the Petitioner, the entire argument was on the „deemed wavier since the Petitioner did not raise any objection during the course of the arbitral proceedings. It was categorically noted that admittedly no waiver was granted within the meaning of Section 12(5) of the Act. The judgment is based on different factual matrix and is not applicable to the present facts.

24. Ld. Senior Advocate has vociferously argued that it is not a case of deemed waiver, but an express Agreement in writing for appointment of the Arbitrator. The reliance has been placed on the judgement of Calcutta High Court in McLeod Russel India Limited and Ors. vs. Aditya Birla Finance Limited and Ors., 2023 SCC OnLine Cal 330 wherein the term „express Agreement has been explained by to mean to be in the nature of an express „promise as contemplated in Section 9 of the Indian Contract Act, 1872 where the acceptance of any promise made in words, is deemed to be express while those made otherwise than in words, is deemed to be implied. It was held that the exchange of respective Statement of Claim and Statement of Defence, amounts to an Arbitration Agreement. This Court in Anuj Kumar v. Franchise India Brands Limited 2023 SCC OnLine Del 2560 has relied upon the Judgment of the Calcutta High Court in McLeod Russel India Limited and Ors. (Supra), to similarly observe that mere unilateral appointment cannot nullify the appointment of the arbitrator, where one of the party unilaterally appoints the arbitrator, the irregularity can be waived by way of an express agreement as per the proviso under Section 12 (5) of the Act and therefore, it has to be seen as per the facts and circumstances of O.M.P. (COMM) 414/2018 & Connected matters the case.

25. It is thus, argued by Ld. Senior Advocate on behalf of the Respondent (Airport Authority of India) that the affirmative statements contained in the pleadings filed by the Petitioners before the learned Sole Arbitrator, amounts to an express Agreement in writing as provided in proviso to Section 12(5) of the Act, 1996.

26. The Petitioner s submission to the jurisdiction of the Tribunal in its Statement of Claims and Reply to the Application under Section 33 of the Act; has to be considered together to determine whether there was any waiver under proviso to Section 12(5) of the Act.

27. Further, the participation of the Petitioner in the arbitral proceedings was not a „one off act; rather it was a conscious and informed decision. During the course of arbitral proceedings, the Petitioner had filed an Application under Section 17 of the Act, 1996 seeking interim relief of payment of Royalty @13% on actual turnover though the License Agreement required and sought payment of Royalty @32.5% to the Petitioner. The Application was allowed by the learned Arbitrator

vide Order dated 27.01.2017 whereby the respondent was directed to pay royalty @13% on the actual turnover. The Petitioner thus, enjoyed the interim relief during the pendency of the arbitral proceedings till passing of the Award by the learned Arbitrator.

28. The Application bearing O.M.P.(MISC.)(COMM.) 2/2017 was filed under Section 29A of the Act, wherein joint request had been made by both the parties for extension of time, which was extended by six months.

29. Similarly, another Application bearing No. OMP (MISC.)(Comm.) 2/2018 under Section 29A of the Act was filed in the year 2018 and at the O.M.P. (COMM) 414/2018 & Connected matters joint request of the parties, further extension was granted till 31.07.2018.

30. The Application bearing No. O.M.P.(I) (COMM) 378/2018 under Section 9 of the Act, 1996 was filed by the Petitioners seeking payment of Royalty @ 13% on actual turnover till the end of Licence Agreement, which vide Order dated 28.09.2018 was permitted to be paid in the further meantime. After enjoying all the reliefs granted by the learned Sole Arbitrator, the present Objection has been raised which is not tenable in law.

31. Also, the Petitioners on 25.09.2018 filed a Reply to the Application under Section 33 of the Act of the Respondent-Airport Authority of India Application wherein it was stated that "consequently the jurisdiction of this Hon ble Tribunal is only limited to correcting any computation errors, any clerical, typographical errors or any other errors of a similar nature occurring in the Arbitral Award".

32. The second reference of arbitration proceedings is pending before Mr. Justice G.S. Sistani, wherein a Counter Claim has been filed by the Respondent-Airport Authority of India seeking royalty @ 32.5% from August, 2016. The Petitioners in their Reply have asserted that there exists no dues on the part of the Claimants against the royalty which in terms of directions of the previous Arbitral Tribunal and thereafter, by the directions of this Court, is payable @ 13% on actual turnover. The Petitioners cannot be allowed to blow hot and cold at the same time. It is a settled principle that a person who knows that if he objects to an Instrument, he will not get the benefit he wants, cannot be allowed to do so while enjoying the fruits.

33. Petitioner after the passing of Awards, has filed OMP(COMM) 378/2018, Application under Section 9 of the Act, 1996 requesting for payment of Royalty @13% on actual payment till the end of License O.M.P. (COMM) 414/2018 & Connected matters Agreement by relying upon the Orders dated 28.05.2016 and 17.01.2017, passed by the learned Sole Arbitrator. This Court vide Order dated 28.09.2018, in the meantime, has permitted the payment of royalty @13% on actual turnover to the Petitioner. The Petitioner has cleverly opted to file the Amendment Application after the License Agreement came to an end in 2020 and after enjoying the Interim Reliefs granted by the learned Sole Arbitrator.

34. Further, reliance has been placed by the Respondents on the decisions in P.S. Sathappan (Dead) by LRs v. Andhra Bank Ltd & Ors. AIR 2004 SC 5152; Vrindavan Advisory Services LLP v. Deep

Shambhulal [SLP 24489/2023 dated 06.11.2023]; Rohan Builders (India) Pvt. Ltd. v. Berger Paints India Ltd. [SLP (C) No. 23320/2023 Order dated 12.09.2024]; and ATS v. Rasbehari [SLP (C) 26990-26991/2023 Order dated 12.12.2023].

35. Learned counsel for the Respondent has further argued that the decision in Smaaash Leisure Ltd. (Supra) is distinguishable from the facts of present case. The Petitioner therein had not challenged the veracity of the Order of the Arbitral Tribunal wherein it was recorded that the Petitioner had not submitted to the jurisdiction of the Tribunal and had also submitted that it was represented by the counsel during hearing of the dispute before the Tribunal.

36. It is argued that this objection had not even been taken in the Petition under Section 34 of the Act, 1996 that was filed and no objection ever has been raised in regard to the independence, impartiality and biasness of the learned Sole Arbitrator and the same cannot be permitted to be taken at a subsequent stage.

37. It is argued that the reliance placed on the decision in Govind Singh, O.M.P. (COMM) 414/2018 & Connected matters (supra) is grossly misplaced, as in the said case, the Managing Director of Satya Group was appointed as the Sole Arbitrator in 2018, after the judgment of TRF Limited (supra) was delivered by the Apex Court in 2017.

38. In the end, it is submitted that the learned Sole Arbitrator was appointed on 11.01.2016, which was much prior to the judgments in Perkins (supra) and TRF Limited (supra), which are not applicable to the facts of the present case as the above cases relate to pre-arbitration stage under Section 11(6) of the Act, 1996, whereas the present Petition is under Section 34 of the Act, 1996. Therefore, it is submitted that the ground of unilateral appointment is without merit.

39. Learned counsel on behalf of the Petitioner in his Rejoinder Arguments has relied upon decision in Airport Authority of India Vs. TDI International India Pvt. Ltd. OMP (COMM) 573/2020 dated 28.05.2024, 2024:DHC:4469 and Smaaash (supra) wherein the similar contention were raised about waiver under Section 29A, while seeking extension of the mandate of the Ld. Arbitrator, but in both the cases this contention was specifically overturned and it was held that the same did not amount to express waiver as contemplated under proviso to Section 12(5) of the Act. In the present case as well, the Respondent cannot rely upon submission made during the arbitral proceedings or under Section 29A seeking extension, to assert that there was a waiver under proviso to Section 12(5) of the Act.

40. Submissions heard and record as well as the Written Submissions perused.

Whether Plea of Unilateral Appointment taken by way of Amendment is barred by Limitation?

O.M.P. (COMM) 414/2018 & Connected matters

41. The preliminary objection raised on behalf of the respondent is that neither the plea of unilateral appointment had not been taken during the proceedings before the learned Arbitrator nor was it

impleaded initially in the Petition filed on 22.09.2018 under Section 34 of the Act. The limitation for filing the petition under Section 34 (3) of the Arbitration and Conciliation Act, 1996 is three months, which can be extended by another 30 days, if the Court is satisfied that there was sufficient cause and not thereafter. This objection of unilateral appointment has been taken by way of the Amendment Application filed in 2022 and allowed on 24.04.2024, which is clearly barred under Section 34 (3) of the Act, and it cannot be now agitated and considered. Reference has been made to TRF (supra), Perkins (supra); Vastu (supra) and Arjun Mall Retail Holdings Ltd (supra).

42. This aspect was considered in the case of Hindustan Construction Company Limited (supra), wherein the Supreme Court has observed that there is no doubt that the Application for setting aside an arbitral Award under Section 34 of the Act, 1996 has to be made within the prescribed time under Sub-Section (3) of the Act and not thereafter. It was further observed that incorporation of additional grounds by way of amendment does not tantamount to filing a fresh Petition under Section 34 of the Act in all situation and circumstances. If that were to be treated so, it would follow that no amendment in the Petition for setting aside the Award, howsoever material or relevant it may be for consideration by the Court, could neither be added nor existing ground amended after the prescribed period of limitation has expired, although Petition for setting aside the arbitral Award has been made in time. It was concluded that "this is not and could not have been the intention of Legislature while enacting Section 34. Moreso, Section O.M.P. (COMM) 414/2018 & Connected matters 34(2)(b) enables the Court to set aside the arbitral award if it finds that the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or the arbitral award is in conflict with the public policy of India. The words in Clause (b) "the Court finds that" do enable the Court, where the Application under Section 34 has been made within prescribed time, to grant leave to amend such Application if the very peculiar circumstances of the case so warrant and it is so required in the interest of justice. "

43. In Lion Engineering Consultants (supra) the Supreme Court held that even without an amendment in the Petition, the plea of lack of jurisdiction of the Arbitrator can be raised even if no such objection under Section 16 of the Act has been taken.

44. Similarly, in Hindustan Zinc Limited (supra), the Supreme Court held that where there is lack of inherent jurisdiction of the Arbitrator, the plea can be raised at any stage and also in collateral pleadings. Such plea can be taken even where a party has consented to the appointment of an Arbitrator.

45. The Apex Court, in the case of Ellora Paper Mills Limited vs The State Of Madhya Pradesh 2020 (3) SCC 1, laid down the test for permitting the amendment in the Petition under Section 34 of the Act and observed that where by way of the proposed amendment, grounds are sought to be inserted which have absolutely no foundation in the petitioner s Petition preferred under Section 34 of the Act, then such objections cannot be permitted to be introduced by way of amendment.

46. The Coordinate Bench of this Court in the case of Man Industries (India) Limited (Supra), made a reference to the decisions in the aforesaid cases and concluded that the plea of Arbitrator being de jure ineligible to act O.M.P. (COMM) 414/2018 & Connected matters an Arbitrator, is a plea of lack

of jurisdiction which can be allowed to be raised by way of an amendment or even without there being any amendment.

47. The distinction between the inherent lack of jurisdiction and the specific pleas on the grounds as specified under Section 34 of the Act, is demonstrated from the case of Friends & Friends Shipping Pvt. Ltd (supra), wherein by way of amendment, a challenge to the neutrality of the Arbitrator was sought to be inserted. It was held to be inadmissible because it was not taken originally in the Petition under Section 34 of the Act and was intended to put an absolutely new challenge, which was not permissible.

48. It can therefore, be concluded from the aforesaid judgments that those amendments which strike at the jurisdiction of the Court and are purely legal objections and can be agitated at any point of time, at the stage of challenge to the Award under Section 34 of the Act and even at the stage of Execution. However, those objections such as neutrality or bias which have factual foundation cannot be introduced subsequently, by way of amendment.

49. The decision of the Division bench of this Court in Arjun Mall Retail Holdings Ltd. (supra) on which reliance has been placed by the Respondent was in the context and facts of its own case, as the plea of unilateral appointment though taken, but was not pressed. Moreover observations made therein did not lay down any proposition of law. In the light of the afore-discussed Judgments of the Apex Court, it is well settled that the objections going to the root of the matter, can be taken at any stage.

50. The objection of unilateral appointment which is being agitated by the Petitioner, is the legal objection in regard to the appointment of the Arbitrator, which strikes at the very competence of the Arbitrator to O.M.P. (COMM) 414/2018 & Connected matters adjudicate. Being a purely legal objection, it can be considered at any stage whether pleaded or not, in the grounds of challenge under Section 34 of the Act, as held by the Apex Court in Lion Engineering Consultants (supra). Therefore, to assert that it has been raised highly belatedly by way of amendment beyond the prescribed period under Section 34(3) of the Act,1996 or is barred by Limitation, has no merit.

Unilateral Appointment of the Arbitrator:

51. Now coming to the merits of the Objection about the unilateral Appointment of the Arbitrator, this needs to be appreciated in the backdrop of the Act.

52. The Arbitration and Conciliation Act, 1996 expressly minimises the Court s intervention in the arbitral proceedings and the decisions. Section 5 of the Act, 1996 restricts and limits the judicial intervention except to the extent provided under the Act.

53. There are two fundamental principles which underline the entire Arbitration Act, 1996. The first fundamental principle is Party Autonomy which recognizes the freedom of the parties by virtue of the contract, to decide the number of the Arbitrators, names of the Arbitrators and the prescribed procedure to be followed for appointment of the Arbitrator. These are provisions which are

derogable and subject to the mutual decision of the parties. Party Autonomy is said to be a brooding and guiding spirit in arbitration by the Apex Court in the case of Bharat Aluminium Company Vs. Kaiser Aluminium Technical Services Inc. (2016) 4 SCC 126.

54. Section 11 (2) of the Act, 1996 in recognition of the principle of Party Autonomy, gives right to the parties to agree on a procedure for appointment O.M.P. (COMM) 414/2018 & Connected matters of Arbitrator. Section (1) of Section 11 provides that person of any nationality can be appointed as an Arbitrator unless otherwise agreed by the parties. In case the parties are unable to agree on the procedure or the name or to arrive at an agreement for appointment of an Arbitrator, then they may approach the Court under Clause (5) or (6) of Section 11 of the Act, 1996 for appointment of an Arbitrator by the Court. Section 11 gives recognition to initial autonomy of the parties to appoint the Arbitrator; the intervention of the court is limited to such situation where the parties are unable to agree on the procedure or the name of the Arbitrator.

55. The second fundamental principle of equal significance is that the parties must constitute an independent and impartial arbitral Tribunal. The independence and impartiality are two distinct terms as has been explained by the Apex Court in Voestalpine (supra), which reads as under: -

> "22. Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings."

56. This principle is encompassed in Section 12 of the Act, 1996 which reads as under:

> "Section 12: Grounds for challenge. [(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in O.M.P. (COMM) 414/2018 & Connected matters 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 O.M.P. (COMM) 414/2018 & Connected matters 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.]"

57. Section 12 thus, envisages challenge to the appointment of the Arbitrator on the ground of impartiality and independence. Explanation 1 to Section 12(1) has been added by way of Amendment, to provide that the grounds stated in the Fifth Schedule shall be a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

58. The Fifth Schedule contains thirty four entries that have been drawn from the Red and Orange list of International Bar Association („IBA) Guidelines, which may be classified as follows : (i) the relationship of the arbitrator with the parties or counsel; (ii) the relationship of the arbitrator to the dispute; (iii) the arbitrator's direct or indirect interest in the dispute; (iv) previous services rendered by the arbitrator to one of the parties or other involvement in the case; (v) relationship between an arbitrator and another arbitrator or counsel; (vi) relationship between arbitrator and party and others involved in the arbitration, and (vii) and other circumstances. A written disclosure on these grounds must be made in the Form provided in Sixth Schedule.

59. The Arbitrator may have been independent at the time of his appointment, but his conduct during the arbitral proceedings may disclose leniency towards one party to the disadvantage of the other party, leaving to reasonable apprehension of bias and partiality. Section 12(3) of the Act O.M.P. (COMM) 414/2018 & Connected matters provides for challenge to the Arbitrator if circumstances exist to give rise to the justifiable doubts as to the independence and impartiality for which the procedure under Section 13 of the Act may be followed. Where the Arbitrator suffers from such disqualifications, the challenge can be made under Sections 13, 14 and 15 of the Act.

Essentially, these grounds can be raised by the aggrieved party by moving an Application under Section 16 of the Act, 1996 before the Arbitrator himself, though it is a ground also available at the subsequent stage of challenge of the Award under Section 34 of the Act.

60. In contradistinction, Section 12(5) has been introduced by way of Amendment in 23.10.2015 which provides for inherent disqualification of the Arbitrator who falls under any of the categories specified in the Seventh Schedule. This Schedule enlists three categories: (i) arbitrator's relationship with the parties or counsel; (ii) the relationship of the arbitrator to the dispute; and (iii) arbitrator's direct or indirect interest in the dispute.

61. Section 12(5) along with Schedule VII, attaches inherent de jure disqualification of the Arbitrator and declares certain persons ineligible to be appointed as Arbitrators, notwithstanding any prior agreement to the contrary. The ineligibility of the person as an Arbitrator is a matter of law and goes to the root of their appointment. The reason for the same is that relationship of the Arbitrator featuring in Schedule VII with the party appointing him which inevitably would give a presumption of tilt of interest of the Arbitrator in favour of such person appointing him, irrespective of whether it in fact exists or not and de hors their conduct during the arbitration proceedings.

62. It is a known fact, especially when one party is a Government O.M.P. (COMM) 414/2018 & Connected matters Agency, that there may be an imbalance in negotiation power and because of the dominant position of one party, the other party may be compelled by circumstances to agree, even though reluctantly, to the name(s) of the Arbitrator(s) as suggested by the dominant Party. The legislature, in its wisdom thus, introduced Section 12(5) whereby the persons mentioned in the Schedule are perse, disqualified. This is sought to address the power imbalance in the contracting parties.

63. There is de jure ineligibility to perform their functions and their mandate terminates automatically under Section 14 (1)(a) of the Act and the appointment need not be challenged before the learned Tribunal under Section 13 of the Act. The only question before the Court under Section 14 is to ascertain whether the Arbitrator falls in any of the categories specified in Schedule Seven and if so, whether there is a waiver to his appointment in terms of proviso to Section 12(5) of the Act.

64. The Scheme of the Act, 1996 displays a well-balanced interplay of the two fundamental principles of Party Autonomy by leaving it to the parties under Section 11 to determine the procedure for appointment of Arbitrator; while Section 12 incorporates the non derogable principle of Impartiality and Independence by providing the persons who are disqualified from being an arbitrator and the circumstances in which their appointment can be challenged.

65. Significantly, here also party autonomy is not absolutely jettisoned, but finds recognition in Proviso to Section 12(5) which enables the party to waive this objection of appointment, in writing. The supremacy of Party Autonomy is writ large in various Sections of the Act, 1996, which needs to be the benchmark for determination of any objection to the arbitration O.M.P. (COMM) 414/2018 & Connected matters proceedings or to the Award.

Disqualification of the Ld. Arbitrator under Section 12 of the Act, 1996:

66. In this backdrop, the vexed question for determination in the present case is whether the appointment of the learned Sole Arbitrator Justice S. S. Nijjhar (retd.) is bad in law. This involves the consideration from two aspects; one being his inherent disqualification and second, is the process followed for his appointment.

67. The parties in terms of Section 11, agreed to the procedure for appointment of the Arbitrator. Clause 78 provides for referral of Disputes to Arbitration. It reads thus:

> "78. All disputes and differences, arising out of or, in any way, touching or concerning this Agreement, (except those the decision whereof is otherwise hereinabove expressly provided for or to which the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and the rules framed hereunder which are now in force or which if hereafter come in to force, are applicable) shall be referred to the sole arbitration of a person, to be appointed by the Chairman of the Authority or, in case the designation of Chairman is changed or his office is abolished, by the person, for the time being entrusted, whether or not, in addition to other functions, with the functions of the Chairman, Airports Authority of India, by whatever designation such person may be called, and, if the Arbitrator, so appointed, is unable or unwilling to act, to the sole arbitrations of some other person to be similarly appointed. It will be no objection to such appointment that the Arbitrator so appointed is a servant of the Authority, that he O.M.P. (COMM) 414/2018 & Connected matters had to deal with the matters to which this Agreement relates and that in the course of his duties, as such servant of the Authority, he had expressed views on all or any of the matters in dispute or differences. The award of the arbitrator, so appointed, shall be final and binding on the Parties. The Arbitrator may, with the consent of the parties, enlarge, from time to time, the time for making and publishing the award. The venue of the arbitration shall be at New Delhi."

68. In consonance with this Clause, Petitioner had given a Notice of Invocation dated 27.11.2015 for invoking the arbitration and had requested the Respondent for appointment of the Sole Arbitrator in terms of Clause-78 of the Agreement. This Clause itself stipulated that the arbitrator shall be appointed by the Chairman or equivalent person, who may be its employee and "it will be no objection to such appointment that the Arbitrator so appointed is a servant of the Authority, that he had to deal with the matters to which this Agreement relates and that in the course of his duties, as such servant of the Authority, he had expressed views on all or any of the matters in dispute or differences. The award of the arbitrator, so appointed, shall be final and binding on the Parties."

69. This clause itself contemplated the appointment of the employee of the Respondent as the arbitrator, to which no objection could be taken by the petitioner. This part of the Clause is in the teeth of Section 12(5) and any such arbitrator so appointed by the respondent, would necessarily have to be struck down. Evidently, the disqualification is to the Person so appointed and not to the procedure for appointment of the Arbitrator. It is apparent that the disqualification attached to the

Managing Director is transmitted to the O.M.P. (COMM) 414/2018 & Connected matters employee so appointed by him, as his interest in the Appointing Authority can neither be over looked or ignored. There is an element of perceived bias and may be justifiably so in the given circumstances, as his inclination to decide in favour of the person (party) who has appointed him is essentially manifest and strikes at his Independence and Impartiality.

70. Pertinently, the Ld. Arbitrator though appointed by the Respondent, was a retired Judge of the Supreme Court. The disqualification ex facie being appointed by the Respondent cannot be attributed to the Arbitrator so appointed, as he had no relationship with the Respondent and suffered no disqualification under Schedule V or VII to Section 12(5) of the Act. Pertinently, there is also not a whisper by the Petitioners that he was not independent or not impartial or had any kind of bias in conducting the arbitral proceedings or in delivering the Award, which is recognized as a ground of challenge of the Award under Section 34 of the Act. Further, in the given facts, there can also be no perception that the learned Arbitrator had any tilt or interest towards the Respondent/Appointing party. Process of Unilateral Appointment:

71. The second aspect which comes under scrutiny is the process followed for his appointment. It can undeniable be said that on the request of the Petitioner, he was appointed by the Respondent, which has technically been termed as unilateral appointment in various judgments referred above. The term unilateral appointment does not feature in the Act, but is a concept which has evolved through judgements. The underlying logic is that the process may impact the Impartiality and Independence of the parties insomuch as being a person appointed by the party or having any relationship may again raise questions about the impartiality, thus bringing O.M.P. (COMM) 414/2018 & Connected matters the process of nominating an Arbitrator, under the scanner.

72. The judgements in regard to the process of appointment may now be considered wherein in the facts of each case, it was found that such unilateral appointment were directly resulting in appointment of employees/ representatives of the Appointing Party suffering from disqualification under Schedule V and Schedule VII and were consequently breaching the principle of impartiality and independence.

73. In the case of Voestalpine Schienen GmbH (supra), the issue before the bench of two judges of Apex Court was whether the Panel of Arbitrators prepared by DMRC violated Section 12 of the Arbitration Act. It was held that Section 12(5) read with the Seventh Schedule does not bar retired government employees, from serving as arbitrators. It was however, held that in the case of a government contract where the authority to appoint arbitrators rests with a government entity, it is imperative to have a „broad- based panel to secure the principle of impartiality and independence of the Arbitrator.

74. It is relevant to note that the basis on which such a Panel was upheld, was that the persons who have been nominated are subject to the rigours of Section 12 of the Act, 1996.

75. In Perkins (supra), the question before the 3-Judge Bench was whether the Managing Director of the Respondent, who is ineligible to be appointed as an arbitrator under Section 12(5) read with

Seventh Schedule, can nominate the sole arbitrator. Therefore, concern was only with the authority or power of the Managing Director and not about the unilateral appointments. Since the managing Director himself was disqualified, his nominee being in the category of Schedule V and VII, was held to be also O.M.P. (COMM) 414/2018 & Connected matters disqualified. The distinction between „ineligibility under Section 12 and „unilateral appointments as a factor for apparent partiality, must not be overlooked.

76. Likewise, in TRF (supra) it has been explained that though the Arbitrator may apparently be independent, but because he is appointed by one party, there is reasonable apprehension that he will have an inclination or an obligation towards the person who has appointed, thereby compromising the independence and impartiality of the arbitral Tribunal. Again, the challenge was in the context of the ineligibility of the arbitrator and not on the impermissibility of unilateral appointments.

77. In all these aforesaid cases, the procedure of appointment of Arbitrator by the Government Agency was scorned, the Arbitrator so appointed was either an employee or person known to the party appointing the Arbitrator. The procedure of unilateral appointment was scrutinised essentially in the context of the Arbitrator so appointed with a perceived notion that such appointment would compromise impartiality and not as a stand-alone principle. The person who had been appointed as an Arbitrator, suffered from an inherent disqualification being the Managing Director or an employee/nominee of one party or a person having some relationship, as specified in Schedule V or VII to Section 12(5) of the Act, 1996. Thus, the issue was more in regard to the disqualification of the person rather than the procedure; it is in this context that the appointment of such person as arbitrator by one party, has been consistently struct down, in terms of Section 12(5) of the Act.

78. It is significant to observe that Section 11 of the Act, in reverence to the party autonomy, recognizes the right of the parties to agree to the O.M.P. (COMM) 414/2018 & Connected matters procedure for appointment of the Arbitrator. The parties herein also agreed to the procedure, which was duly followed resulting in appointment of the ld. Arbitrator. Neither his conduct as arbitrator is under question nor does he suffer from the disqualification under Schedule V &VII of the Act. The objection to his unilateral appointment, therefore cannot be questioned, nor can it be said that merely because the appointment has been made by the respondent, it is bad in law.

Waiver under Proviso to Section 12(5) of the Act, 1996:

79. The contention of unilateral appointment may also be considered from the perspective of Section 12(5) read with its proviso. As already observed above, Section 12(5) of the Act is non-derogable in the sense that if a person is inherently disqualified, his disqualification cannot be cured. However, here also the "party autonomy" takes supremacy insomuch as the proviso to Section 12(5) itself admits to a waiver of such appointment in its Proviso which states "that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing." From the express language used in the proviso, it is evident that it does not envisage a formal agreement duly signed by both the parties. However, what it contemplates is that a person who may have an objection to such unilateral appointment, must agree expressly in writing about such appointment.

80. In the case of Bharat Broadband Network Ltd. (supra) the Apex Court held that the proviso to Section 12(5) requires an express agreement in writing, that is, an agreement made in words as opposed to an agreement that can be inferred by conduct of the parties. It was further explained that such a waiver in writing must be made by parties with full knowledge of the O.M.P. (COMM) 414/2018 & Connected matters fact that although a particular person is ineligible to be appointed as an arbitrator, the parties still have confidence in them to continue as an arbitrator.

81. What thus, needs consideration is even if the learned Arbitrator is considered as de jure ineligible to act as an Arbitrator whether by virtue of the proviso was such disqualification waived by the Petitioner by giving an express consent in writing.

82. Ld. Senior Advocate on behalf of the respondent has argued vociferously that the appointment of the learned Sole Arbitrator by the Respondent, was made only on receiving the Notice of Invocation of arbitration dated 27.11.2015; filing Statement of Claims by the Petitioner and participation in the Arbitral proceedings, followed by filing Application under Section 29A of the Act seeking extension of time, amounts to waiver as contemplated under proviso to Section 12(5) of the Act.

83. The proviso clearly provides for an express waiver in writing. The terms "express" implies that there must be a positive manifestation of the consent of the parties.

84. Merely because a party participated throughout in the arbitration proceedings without a demur and has not raised any objection to such unilateral appointment of the Arbitrator, would not amount to an express waiver in writing, as held in the case of Man Industries (supra); Smaaash Leisure Ltd. (supra), and in Govind Singh (supra).

85. Even if no objection is taken to the appointment of the Arbitrator during the proceedings under Section 17 of the Act, is also would not meet the requirement of proviso of Section 12(5) of the Act. Likewise, merely because Application for interim relief were made under Section 9 or Section O.M.P. (COMM) 414/2018 & Connected matters 17 of the Act and the interim benefits are enjoyed by a party, would not deem to be an express waiver in terms of proviso to Section 12 of the Act.

86. Similarly, mere filing joint Petitions under Section 29A seeking extension of time, would not be sufficient, as held by the Coordinate Bench of this Court in the case of Man Industries (supra).

87. Likewise, in the case of Kotak Mahindra Bank Limited (supra) the Division bench of this Court interfered at the stage of execution of the Arbitral Award by holding that an Award rendered by a person who is ineligible to act as an arbitrator by virtue of Section 12(5), is a nullity and cannot be enforced.

88. It may thus, be concluded that the law is no longer res integra that mere participation in the arbitral proceedings by the parties, cannot be held sufficient to meet the requirement of Express Waiver in terms of Proviso to Section 12(5) of the Act.

89. A reference be also made to McLeod Russel India Limited (supra), by the Calcutta High Court which in the similar facts as under consideration, has taken a view otherwise. It has been observed that such expression of submitting to the appointment of Arbitrator under Section 11 of the Act, or to the jurisdiction of the Arbitrator in the Statement of Claims, was an express consent in writing. Reference was made to Section 9 of the Indian Contract Act, 1872 which contemplates that the acceptance made any promise, if made in words, is said to be an express consent. It was further observed that the parties had exchanged their respective Statement of Claim and Statement of Defence/Affidavit in Arbitration proceedings and had filed various Applications and Replies thereto, which is sufficient to constitute an express agreement in writing to the appointment of an Arbitrator.

O.M.P. (COMM) 414/2018 & Connected matters

90. It is apposite to mention that in the recent judgment by the Five-Judge Constitution Bench of the Apex Court in the case of Central Organisation for Railway Electrification Vs. M/S ECI SPIC SMO MCML (JV) A Joint Venture Company, SLP No. 9486-87 of 2019, decided on 08.11.2024, 2024 SCC OnLine SC 3219 considered the issue of appointment of arbitrator from a Panel of Arbitrators and examined fundamental facets of impartiality and neutrality of arbitrators. On the aspect of unilateral appointment Chandrachud J., held in the context of Panel of Arbitrators that unilateral appointment is ipso facto barred by law. However, Narsimha J. and Hrishikesh Roy J., in line with principle of party autonomy, held that an advance ruling cannot be given declaring all arbitration clauses enabling unilateral appointment as null and void. It was an issue to be considered in the context of the facts of each case.

91. Pertinently, the present judgement was reserved prior to the judgement of the Apex Court. Also, it has been further held that the judgement of the Apex Court shall be applicable prospectively. Moreover, the facts in the present case are distinguishable in so much as it has been held that there was an express waiver under proviso to Section 12(5) of the Act, 1996.

92. In the present case, admittedly in the Minutes of the First Arbitral Meeting it was specifically recorded that "none of the parties have any objection to my appointment as the sole Arbitrator". It is a clear acknowledgement in writing by the Petitioner that neither was there an objection to the qualification of the Ld. Arbitrator nor to the appointment by the respondent. There can no more explicit waiver than in the present case. The consent has been expressly given in writing and to interpret it O.M.P. (COMM) 414/2018 & Connected matters otherwise, would be taking a hyper technical view, which is against the spirit of the entire Arbitration Act which recognizes and gives high pedestal to the party autonomy.

93. Thereafter, the Petitioner had participated in the arbitral proceedings by submitting its Statement of Claims, wherein also it is noted that they submit to the jurisdiction of the learned Arbitrator. All throughout the arbitral proceedings and even thereafter, there was no objection taken about the Impartiality or Independence of the learned Arbitrator. There was no allegation whatsoever made that he was biased in any manner towards the other party. Pertinently, even in the objections that were filed under Section 34 of the Act, no challenge to the impartiality or bias of the

learned Arbitrator has been made. Therefore, it is held that in the particular facts of this case, it has to be held that the expressed waiver by the Petitioner also prevents any challenge to the appointment of the learned Arbitrator. Conclusion:

> 94. In the light of the above discussion, it can be fairly concluded that there is not an iota of challenge either to his qualification or to the independence and impartiality of the learned Arbitrator, which the court is under the bounden duty to ensure being an inviolable part of Public Policy.

The sole challenge rests on the process of appointment claiming it to be unilateral, which in the circumstances of the present case, does not stand invalidated. Moreover, there is an express waiver by the Petitioner under Proviso to Section 12 (5) of the Act, 1996, which is again an expression of party autonomy, again a component of Public Policy.

95. It is therefore, held that the appointment of the Sole Arbitrator was made in accordance with the procedure agreed by the parties in Clause-78 of O.M.P. (COMM) 414/2018 & Connected matters the Contract. This ground of challenge to the arbitration award of unilateral Appointment of Ld. Arbitrator is without merit and is accordingly rejected.

96. The matter be placed before the Roster Bench on 10.01.2025 for consideration of the Petition under Section 34 of the Act, 1996, on merits.

NEENA BANSAL KRISHNA (JUDGE) DECEMBER 24, 2024 S.Sharma/r O.M.P. (COMM) 414/2018 & Connected matters