$~

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

Judgment Reserved on: 10 February 2025
Judgment Pronounced on: 11 February 2025

\+ FAO(OS) (COMM) 23/2025, CM APPLs. 7934/2025 & 7935/2025

BHADRA INTERNATIONAL INDIA
PVT LTD AND ORS. .....Appellants

Through: Mr. Ashish Mohan, Sr. Adv. with Mr. Akshit Mago, Adv.

versus

AIRPORTS AUTHORITY OF INDIA .....Respondent

Through: Mr. Sonal Kumar Singh, Ms. Sukanya Lal, Mr. Shivang Singh, Ms. Shivani Chaudhary and Mr. Anmol Adhrit, Advs.

\+ FAO(OS) (COMM) 24/2025, CM APPLs. 7936/2025 & 7937/2025

BHADRA INTERNATIONAL INDIA
PVT LTD & ORS. .....Appellants

Through: Mr. Ashish Mohan, Sr. Adv. with Mr. Akshit Mago, Adv.

versus

AIRPORTS AUTHORITY OF INDIA .....Respondent

Through: Mr. Sonal Kumar Singh, Ms. Sukanya Lal, Mr. Shivang Singh, Ms. Shivani Chaudhary and Mr. Anmol Adhrit, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR
HON'BLE MR. JUSTICE AJAY DIGPAUL

JUDGMENT
% 11.02.2025

C. HARI SHANKAR, J.

The Issue, and our view

1. The contract between the appellants and respondent Airport Authority of India[1] envisages arbitration of disputes by a Sole Arbitrator to be appointed by the respondent. In terms thereof, the appellants wrote to the AAI, call on the respondent to appoint a Sole Arbitrator. The respondent appointed a learned retired Judge of the Supreme Court. Before learned Arbitrator, both the parties submitted that they had no objection to his arbitrating on the disputes. The Record of Proceedings, so prepared, was communicated to the parties, and neither party objected. An arbitral award was passed. The unsuccessful appellant challenged the award under Section 34 of the Arbitration and Conciliation Act, 1996[2]. No dispute, regarding the legality of appointment of the Arbitrator, was raised in the Section 34 petition. However, during arguments before a learned Single Judge of this Court, a preliminary submission was advanced, by the appellant, that the arbitral award was entirely vitiated as the appointment of the arbitrator was unilateral and, therefore, vitiated in view of Section 12(5)[3] of the 1996 Act. The learned Single Judge has dismissed the

[1] "AAI" hereinafter
[2] "the 1996 Act" hereinafter
[3] [(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

objection. The appellant is in appeal.

2. The question that arises is whether, in such circumstances, the appellants can maintain a successful challenge against the impugned judgment of the learned Single Judge.

3. Cases turn on facts. In deciding the above issue, we have to note that:

(i) the arbitration agreement between the parties envisaged appointment of the arbitrator by AAI,

(ii) in terms of the said Clause, *Appellant 1 wrote to AAI, requesting AAI to appoint the arbitrator*,

(iii) the appointment of the arbitrator by AAI was, thus, effectively *ad invitum*,

(iv) before the learned Arbitrator, the appellant stated, on 22 March 2016, that it had *no objection* to his arbitrating on the dispute,

(v) this submission was reduced to writing by the learned Arbitrator,

(vi) the said order was communicated to both parties, and *the appellant never questioned the correctness of what was recorded therein*,

(vii) rather, *the appellant participated, without demur, in the arbitration, and even preferred applications, before the learned Arbitrator, under Section 17 of the 1996 Act*,

---

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.]

(viii) during the currency of the arbitral proceedings, Section 12 of the 1996 Act was amended to introduce, therein, sub-section (5), which proscribed, unilateral appointment of the arbitrator by one of the parties,

(ix) even thereafter, the appellant never moved any application before the learned Arbitrator, or before this Court, questioning his jurisdiction or competence,

(x) even in the Section 34 petition[4], which came to be filed by the appellant challenging the arbitral award, no contention that the appointment of the learned Arbitrator was unilateral and that, therefore, the arbitral award was vitiated, was taken,

(xi) it was only by a subsequent application[5] that the appellant suddenly found the entire arbitral proceedings to have been conducted in violation of the law, as the appointment of the arbitrator was, as the appellant would seek to contend, "unilateral", and

(xii) even in this application, the appellant, inadvertently or otherwise, never disclosed, to this Court, the Procedural Order dated on 22 March 2016, which records the fact that the parties had no objection to the learned Arbitrator arbitrating on the dispute.

4. Mr. Ashish Mohan, learned Senior Counsel has, with commendable skill, tried to convince us, by referring to several judgments, including the judgments of the Supreme Court in ***Bharat***

[4] **OMP (Comm) 414/2018** and **OMP (Comm) 415/2018**, in which the presently impugned judgment has been passed

[5] **IA 1842/2022**

Broadband Network Limited v United Telecoms Ltd[6]***, Perkins Eastman Architects DPC v HSCC (India) Ltd***[7] and ***TRF Limited v Energo Engineering Projects Ltd***[8], as well as the judgment of one of us (C. Hari Shankar J) in ***JMC Projects (India) Ltd. v Indure Pvt Ltd***[9], that there can be no compromise on the statutory requirement of a waiver, of Section 12(5) of the 1996 Act, having to be in writing, and that, in fact, no such express written waiver of Section 12(5) was forthcoming on the record.

5. We have to decide cases based on the facts before us. The law cannot be applied academically or mechanically. We are afraid that if we were to permit a party who

(i) first invites the opposite party to appoint the arbitrator, as permitted by the contract, whereupon the opposite party does so,

(ii) thereafter states, before the learned Arbitrator, that it had no objection to his arbitrating on the disputes,

(iii) thereafter participates, without a whisper of any objection to the jurisdiction of the learned Arbitrator, to his jurisdiction or competence, even after Section 12(5) was introduced in the 1996 Act in the interregnum,

(iv) thereafter does not choose to raise any ground of incompetence of the learned Arbitrator in view of his appointment having been "unilateral" (as the appellant would seek to contend) even in the Section 34 petition filed

[6] **(2019) 5 SCC 755**
[7] **(2020) 20 SCC 760**
[8] **(2017) 8 SCC 377**
[9] **(2020) SCC OnLine Del 1950**

challenging the arbitral award that results, and

(v) thereafter, introduces a ground of the learned Arbitrator having been incompetent to arbitrate in a subsequent Miscellaneous Application filed in the Section 34 proceedings,

(vi) suppressing, in the said application, the Procedural Order passed by the learned Arbitrator recording the fact that neither party had any objection to his proceeding with the arbitration,

to have the entire arbitral proceedings set at naught and, thereby, have the arbitral award – which is obviously unpalatable to the appellant – declared a nullity, the entire integrity of the arbitral process would be irremediably eroded. We are, decidedly, not inclined to permit this to happen.

Facts

6. The disputes between the parties emanated out of a Licence Agreement dated 29 November 2010. Under the said Licence Agreement, the AAI had granted licence to the appellants for undertaking ground handling services on payment of royalty. Clause 78 of the Licence Agreement envisaged reference of disputes, arising thereunder, to arbitration and read 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 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."

7. Disputes arose between the appellants and AAI. Appellant 1 addressed a notice to AAI under Section 21[10] of the 1996 Act on 27 November 2015 setting out its claims and seeking reference of the disputes to arbitration. The concluding paragraph of the said communication read thus:

"(9) As AAI has failed to resolve any of the issue since commencement of the above referred two (02) licenses despite various written representations and personal meetings, and is rather unabatedly continuing with financial persecution of Novia-Bhadra Tie Up, we are as a last resort invoking:

(i) Clause 78 of the agreement dated 29.11.2010 appointing Novia-Bhadra Tie Up as the Comprehensive Ground Handling Service Provider at Two (02) Metro Airports of Chennai and Kolkata, and **seek appointment of a "Sole Arbitrator" in accordance with the Arbitration and Reconciliation Act 1996**, so that the disputes which has arisen between the two parties are adjudicated, and substantial financial damages suffered by us are compensated in a lawful manner. **The specific clause of the agreement is an absolute clause and empowers Chairman AAI to appoint the Sole Arbitrator without any subjective conditionality**.

(ii.) Clause 78 of the agreement dated 29.11.2010

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

appointing Novia-Bhadra Tie Up as the Comprehensive Ground Handling Service Provider at Five (05) Southern Region Airports of Trivandrum, Calicut, Coimbatore, Trichy and Mangalore and **seeks appointment of a "Sole Arbitrator" in accordance with the Arbitration and Reconciliation Act 1996**, so that the disputes which has arisen between the two parties are adjudicated, and damages suffered by us are compensated in a lawful manner. **The specific clause of the agreement is an absolute clause and empowers Chairman AAI to appoint the Sole Arbitrator without any subjective conditionality**.

We also like to bring out most humbly that it is incumbent upon Chairman AAI to appoint the Sole Arbitrator 'Within a reasonable time, lest we might not be left with no recourse, but to seek a relief under **Section 11, Sub Section 6, Chapter III of the Arbitration & Reconciliation Act 1996**.

It is earnestly hoped that the order appointing the "Sole Arbitrator" to adjudicate the disputes which has arisen between parties to the contract is expeditiously communicated to us."

(Emphasis in original)

8. As requested by appellants, AAI proceeded to appoint Hon'ble Mr. Justice S.S. Nijjar, a learned retired Judge of the Supreme Court of India as the Arbitrator, to arbitrate on the disputes between the parties.

9. The first hearing was scheduled by the learned Arbitrator on 22 March 2016 on which date, the following procedural order came to be passed:

"PROCEDURAL ORDER NO.1

With

Minutes of, and the Directions made at, the hearing on 22.03.2016 at 1:00 pm [At D-247 (Basement), Defence Colony, New Delhi-110024]

This preliminary meeting of the Tribunal was held D-247 (Basement), Defence Colony, New Delhi-110024 on 22nd March, 2016 at 1:00 PM. *None of the parties have any objection to my appointment as the Sole Arbitrator*. I declare that I have no interest in any of the Parties, or in the disputes referred to the Sole Arbitrator.

After deliberations with the representatives of the Parties, the following schedule for exchange of pleadings was agreed between the parties:

(i)	Claimant to file Statement of Claim along with all documents in support thereof.	2/5
(ii)	Respondent to file Statement of Defence along with Counter Claims, if any, along with all documents in support thereof.	30/5
(iii)	Rejoinder / Reply to Counter Claim, if any, along with further documents.	13/6
(iv)	Affidavit of Admission and denial of documents relied upon/filed by the parties.	30/6
(v)	Points of determination (Agreement)	28/7

Next meeting shall be held on 1st Aug. at 2 pm. Venue for the next meeting shall be arranged by the Claimant.

Practice Directions under Section 18 of Arbitration & Conciliation Act, 1996:

After discussion, the Learned Counsel and representatives of the parties have agreed on the practice and procedure to be followed and in accordance therewith the following practice directions are issued by the Tribunal:

1. The pleadings will be accompanied by documents in support of the case pleaded by the party.

2. (i) The documents shall be placed in Volume/s separate from the volume of the pleadings.

   (ii) The documents filed by the Claimant shall be assigned numbers as --> CD-1, CD-2 and so on. The documents filed by the Respondent shall be

assigned numbers as --> RD-1, RD-2 and so on. Page number of each volume shall begin from number 1. The volumes of pleading need not be assigned a separate volume number.

(iii) The size of volumes shall be kept confined to about 150-200 pages. If needed, one volume may be split into two or more, consecutively paginated.

(iv) The volumes shall be complied by using A/4 size paper.

3. On or before 23/6 each party may file a memo of denial listing and describing such of the documents as it does not admit, or proposes to dispute, setting out the reasons thereof in brief. In the absence of such memo having been filed, the document shall be available for being read in evidence dispensing with the need of formal proof thereof. However, the question of evidentiary value of the attached to the document shall remain open for consideration at the final hearing.

4. Rejoinder, shall be divided in two parts: Part-A would set out in brief such plea of the other side, as is sought to be dealt with by Rejoinder, stating the reference to paragraph number of the pleading of the other side; Part-B shall set out the plea urged by way of rejoinder.

5. Filing by either party of any pleading, document, application and communication etc. shall be deemed to have been effectively done and completed only on having been delivered to the Tribunal and copy having been previously or simultaneously delivered to the opposite party.

6. Brief applications/communications to the Tribunal may be made by e-mail followed by hard copy sent per courier or speed post. All substantive pleadings, applications and documents shall necessarily be filed as hard copies.

7. (i) The pleadings and documents shall be filed neatly printed on one side of paper, duly indexed and paginated and bound in volumes.

(ii) The size of paper to be used for compiling the volumes of pleadings and documents also for applications and papers in support thereof, shall be

A-4 size paper. Use of legal size papers shall be avoided.

8. Communication by the Tribunal to the parties may be made by e-mail on the e-addresses given as under:-

M/S BHADRA INTERNATIONAL (INDIA) PVT. LTD.

Mr. Ashish Mohan ashishmohanadv@gmail.com

AIRPORTS AUTHORITY OF INDIA

9. The venue for hearing shall be arranged by the parties as per their mutual understanding but it shall primarily be the obligation of the Claimant to arrange for the venue as also to inform the opposite party and Tribunal well in advance of time. The party arranging for the venue shall also take care of Secretarial Assistance as and when needed, in particular, on the dates of recording of evidence or hearing of any application for interim relief. All the expenses shall be shared equally by the parties.

10. The Tribunal shall assemble on 01.08.2016 at 4:30 pm at a venue to be arranged by the parties for issuing directions on further proceedings in the Arbitration. If the parties wish to adduce oral evidence, Learned Counsel should be ready with instructions as to number and names of witnesses proposed to be examined so as to enable the requisite dates being appointed for recording cross examination.

11. **Fee and Expenses of the member of the Tribunal:**

1. The fees of the Sole Arbitrator after discussions and agreement of the parties has been fixed as follows:

   i. Parties directed to deposit Rs.1 L./- (Rupees … and … only) for the meeting held on 22.03.2016. Deposit to be made by 15.04.2016.

   ii. Parties directed to deposit Rs .../- (Rupees only) advance fee of the Sole Arbitrator, at least two weeks before the next meeting.

   iii. The Tribunal shall be paid, in addition to the

fee, an amount calculated @ 10% of fee payable to him for administrative expenses.

2. Reading fee will be fixed after the completion of the Pleadings.

3. All the fee and expenses shall be shared in equal proportion by the parties.

4. The remittance of the aforesaid amount shall be accompanied by a covering letter clearly stating the amount sought to be remitted, the amount of TDS deducted along with rate thereof, particulars of the head (fee deposited as an interim measure). This is very necessary for accounting purposes.

5. Account details of the Tribunal are as under:-

i.	Account Holder:	Justice Surinder Singh Nijjar
ii.	Bank Account No:	0092000101781573
iii.	Bank Name & Branch:	Punjab National Bank, Khan Market, New Delhi
iv.	IFSC Code:	PUNB0014900
v.	MICR Code:	110024055
vi.	Contact Details of Bank:	011-24619181, 43587101
vii.	PAN No.:	AAHPN6038L

6. The parties shall stick to the schedule once appointed. Any prayer for cancellation of date of hearing if not made at least 4 weeks in advance of time may not be entertained. Fee for any date of hearing shall not be adjusted or waived if the date has to be cancelled at less than 4 weeks notice.

(Justice S.S. Nijjar)
Sole Arbitrator"

10. From then on, the learned Arbitrator proceeded with the arbitration. No objection was raised by the appellants at any stage, to

the assumption of jurisdiction by the learned Arbitrator. Rather, the appellants also filed an application before the learned Arbitrator under Section 17 of the 1996 Act. There was, therefore, acquiescence by the appellant to the jurisdiction of the learned Arbitrator throughout the arbitral proceedings.

11. The learned Arbitrator, proceeded, ultimately to render his final Arbitral Award on 30 July 2018 in which all the claims of the appellants were rejected.

12. Challenging the aforesaid arbitral award, the appellants approached this Court under Section 34 of the 1996 Act by way of OMP (Comm) 414/2018. It is worthwhile to note that *in the said OMP, no ground was urged with respect to the jurisdiction of the learned Arbitrator to arbitrate on the dispute or that his appointment was, in any manner, violative of any provisions of the 1996 Act*. At the time of argument before the learned Single Judge, the appellants raised a preliminary ground that the appointment of the learned Arbitrator was unilateral by AAI and was, therefore, violative of Section 12(5) of the 1996 Act. This, according to the appellant, vitiated the arbitral proceedings in their entirety and *ab initio*. No other aspect of the matter was, therefore, required to be considered.

13. At the appellant's insistence, the learned Single Judge has, by judgment dated 24 December 2024, addressed this preliminary submission of the appellant. The Learned Single Judge has held that, as the appointment of the learned Arbitrator was *ad invitum* and the appellants at no stage objected to the assumption of jurisdiction by the

learned Arbitrator, it was not open to the appellants to challenge the arbitral award on the ground that the appointment of the learned Arbitrator was unilateral and, therefore, bad.

14. Having thus rejected the preliminary submissions advanced by the appellants, learned Single Judge has relegated the remaining grounds of challenge to the arbitral award for hearing on a subsequent occasion.

15. Aggrieved by the aforesaid judgment dated 24 December 2024, passed by the learned Single Judge, the appellants are before us.

16. We have heard Mr. Ashish Mohan, learned Senior Counsel for the appellants, and Mr. Sonal Kumar Singh, learned counsel for the AAI at length.

Submissions of the Appellant

17. Mr. Mohan submits that the appointment of the learned Arbitrator was completely violative of Section 12(5) of the 1996 Act, read with the judgments of the Supreme Court in ***Bharat Broadband Network Limited, Perkins Eastman Architects*** and ***TRF Limited.*** Waiver of the application of Section 12(5) of the 1996 Act under the proviso thereto, he submits, can only be by an agreement in writing. He submits that there was no agreement in writing by the appellant at any point of time, waiving the application of Section 12(5) of the 1996 Act.

18. Mr. Mohan draws inspiration from the decision of one of us (C. Hari Shankar J) in ***JMC Projects (India) Ltd.*** as well as the judgment of the Supreme Court in ***Bharat Broadband***. He submits that the facts in ***Bharat Broadband*** are starkly similar to those at the case in hand. In that case too, the appointment of the learned Arbitrator was *ad invitum*. As in this case, the appointment took place prior to insertion in Section 11 of the 1996 Act, of sub-Section (5) by Section 8(ii) of the Arbitration and Conciliation (Amendment) Act, 2016, with effect from 23 October 2015. At the time when the appellants called upon the AAI to appoint the Arbitrator in terms of Clause 78 of the Licence Agreement, therefore, the appellants could not have foreseen the subsequent amendment of Section 12 by insertion of sub-Section (5) therein, which would render the appointment of the learned Arbitrator invalid.

19. In these circumstances, Mr. Mohan has also sought to contend that mere recording in the first Procedural Order dated 22 March 2016, of the fact that the parties had no objection to the learned Sole Arbitrator arbitrating on the dispute, could not constitute an express waiver, in writing, of Section 12(5) of the 1996 Act. He has also relied in this context on para 20 of the judgment of this Court in ***Bharat Broadband Network*** and on para 6 of the judgment of a Division Bench of this Court in ***Kotak Mahindra Bank Ltd. v Narendra Kumar Prajapat***[11], which read thus:

> Extracts of Bharat Broadband Network Ltd.
>
> "20. This then brings us to the applicability of the proviso to

[11] **(2023) SCC OnLine Del 3148**

Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an "express agreement in writing". The expression "express agreement in writing" refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct. Here, Section 9 of the Indian Contract Act, 1872 becomes important. It states:

> "9. Promises, express and implied. — Insofar as the proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."

It is thus necessary that there be an "express" agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court as indicating an express agreement on the facts of the case is dated 17-01-2017. On this date, the Managing Director of the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as an arbitrator. Shri Khan's invalid appointment only became clear after the declaration of the law by the Supreme Court in TRF Ltd. (supra) which, as we have seen hereinabove, was only on 3-07-2017. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an application on 7-10-2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in TRF Ltd. (supra) and asking him to declare that he has become de jure incapable of acting as an arbitrator. Equally, the fact that a

statement of claim may have been filed before the arbitrator, would not mean that there is an express agreement in words which would make it clear that both parties wish Shri Khan to continue as arbitrator despite being ineligible to act as such. This being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2), and Section 16(2) of the Act to the facts of the present case, and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator. The judgment under appeal is also incorrect in stating that there is an express waiver in writing from the fact that an appointment letter has been issued by the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate."

(emphasis supplied)

Extracts of Kotak Mahindra Bank Ltd.

"6. The learned counsel appearing for the appellant does not seriously dispute that the arbitrator unilaterally appointed by the claimant was ineligible to be appointed as an arbitrator by virtue of Section 12(5) of the Act. He has largely focused his contentions on assailing the decision of the learned Commercial Court to award costs. It was also contended that the respondent was aware of the appointment of the arbitrator and had not raised any objection to such appointment; therefore the respondent is now precluded from challenging the impugned award."

20. Mr. Mohan finally submits that "waiver" within the meaning of the proviso of Section 12(5) of the 1996 Act necessarily implies intentional relinquishment of a known right. At the time when Section 21 notice had been addressed by the appellants to AAI, sub-section (5) was yet to be introduced in Section 12 of the 1996 Act. As such, knowledge of the fact that the appointment of the learned Sole Arbitrator in terms of the notice issued by them to AAI would be invalid as unilateral, was unknown to the appellants at that time. This

factor, he submits, also weighed with the Supreme Court while rendering ***Bharat Broadband*** and with this Court while passing judgment in ***JMC Projects***.

Analysis

21. We have considered Mr. Mohan's submissions with the seriousness they deserve.

22. The arbitral atmosphere is changing day by day. The prevailing philosophy of the day, so far as arbitration is concerned, is to foster arbitration and maximize resolution of disputes by the arbitral process. Courts are now advisedly cautious while dealing with technical objections to arbitral awards, and it is only when the objection is *ex facie* fatal, that an arbitral ward ordinarily should be jettisoned. Still less should the Court be inclined to interfere when, in as a case such as this, a party acquiesced to the arbitration proceedings without raising a finger with respect to the authority, jurisdiction or competence of the learned Arbitrator and after suffering an adverse award, belatedly seeks to raise a challenge to the jurisdiction of the Arbitrator to arbitrate.

23. In the present case, it is also worthwhile to note that the Section 34 petition, as originally filed by the appellants, never included any challenge to the jurisdiction of the learned Arbitrator, to arbitrate on the disputes between the parties. It was only thereafter that, belatedly, IA 1842/2022 was filed to amend OMP (Comm) 415/2018 and introduce a challenge to the jurisdiction of the learned Arbitrator,

terming his appointment as unilateral.

24. It is obvious, therefore, that the challenge to the jurisdiction of the learned Arbitrator on the grounds that his appointment was unilateral is a belated afterthought of the appellants, even after the Section 34 petition was filed.

25. There can be no doubt about the fact that if as the law applies, the Arbitrator was incompetent to arbitrate, he cannot be regarded as competent merely on account of acquiescence by the appellants. At the same time, while examining whether in fact the arbitral award is liable to be set aside wholesale on the ground that the appointment of the learned Arbitrator was itself illegal, the Court has to keep in mind all the facts in the backdrop of the prevailing philosophy of fostering arbitration as a preferred mode of dispute resolution.

26. Viewed in this light, we find ourselves unable to agree with Mr. Mohan that the arbitral award was a nullity as the appointment of the Arbitrator was itself illegal being unilateral. In fact, it cannot be said that the appointment of the learned Arbitrator was unilateral at all, as AAI proceeded to appoint the learned Arbitrator *only on the appellant requesting AAI to do so, in writing. There was, therefore, written consent, on the part of the appellant, to the appointment of the learned arbitrator by AAI.*

27. The learned Arbitrator expressly obtained the consent of the parties to his continuing to arbitrate in the matter. This consent *was reduced to writing, as recorded in the Procedural Order dated 22*

March 2016. Mr Ashish Mohan fairly acknowledges that this Procedural Order was in fact communicated to his client by the learned Arbitrator. The appellants never chose to contend that their consent, to the learned Arbitrator continuing to arbitrate in the matter, had been wrongly recorded, or that they – or AAI – had not given any such consent.

28. Thereafter, the appellants continued to participate in the proceedings without demur. Mr Ashish Mohan has repeatedly emphasized that, at the time when the above events took place, Section 12(5) had yet to be introduced in the statute. This argument begs the issue as *the fact that the appellants conceded to appointment of the arbitrator by AAI and, in fact, invited AAI to do so, and went on, during the arbitration, to unequivocally consent to arbitration by the learned Arbitrator, are facts, which cannot change depending on whether sub-section (5) had, or had not, been introduced in Section 12 of the 1996 Act.*

29. *Besides, even after sub-section (5) was introduced in Section 12 on 23 October 2015, the arbitral proceedings continued for over 2 years, till the arbitral award came to be rendered on 30 July 2018. At no stage did the appellants seek to invoke Section 12(5), or protest against the jurisdiction of the learned Arbitrator. No application to that effect was moved, either before the learned Arbitrator or before this Court.*

30. *Rather, the appellant participated, without even the whisper of a demur, in the arbitral proceedings throughout, and even filed*

applications under Section 17 of the 1996 Act before the learned Arbitrator

31. Even in the Section 34 petition which was filed by the respondent before this Court, challenging the arbitral award, no objection, to the jurisdiction of the learned Arbitrator, on the ground that his appointment was unilateral, was raised. Clearly, therefore, even at that stage, the appellants had no inherent objection to the competence of the learned Arbitrator to have arbitrated on the disputes.

32. It was only thereafter, that by fortuitous hindsight, that the appellants decided to challenge the very jurisdiction of the learned Arbitrator to arbitrate on the dispute.

33. Consensus *ad* idem is the very *raison d'être* of any arbitral appointment. Till the filing of the IA 1842/2022, to amend OMP (COMM) 415/2018, the appellants never raised a whisper regarding the competence of the learned Arbitrator to arbitrate. This case is, therefore, unique in that respect, and cannot be equated with cases in which, at one stage or the other, an objection to the appointment of the Arbitrator was voiced.

34. The decisions cited by Mr Ashish Mohan are cases in which, at one stage or another, an objection to the jurisdiction of the learned Arbitrator *was* raised. We must be aware that the proscription under Section 12(5) of the 1996 Act is not absolute. It is subject to the proviso thereto, which envisages conscious waiver of Section 12(5).

In the facts of this case, which need not be repeated, but particularly in view of the fact that

(i) the appellants had themselves invited AAI to appoint the arbitrator,

(ii) before the learned Arbitrator, too, the appellants consented to the learned Arbitrator proceeding with the matter,

(iii) even after Section 12(5) was introduced in the statute book, the appellants never chose to move any application before the learned Arbitrator under Section 16 of the 1996 Act, or before this Court under Section 14(1) thereof, challenging the jurisdiction of the learned Arbitrator but, rather, participated in the proceedings without demur,

we are not inclined to interfere with the decision of the learned Single Judge. If, in such circumstances, the appellants is to be permitted to wish away the arbitral award which, for obvious reasons, is not palatable to the appellants, it would do complete disservice to the entire arbitral institution. Such a decision, we are seriously afraid, would erode, to a substantial degree, the faith of the public in the very institution of arbitration.

35. We are unwilling to be party to such a decision.

36. We, therefore, are in agreement with the learned Single Judge that the preliminary submission raised by the appellants to the impugned arbitral award, as being nullity as the appointment of the learned Arbitrator was *ab initio* illegal, is completely devoid of merit. In fact, we are of the considered opinion that the objection constitutes not merely an ingenious, but an ingenuous, method adopted by the

appellants, to wish away an adverse arbitral award, at a grossly belated stage.

37. We were inclined to award costs in these matters, but refrain from doing so as we are dismissing the appeals *in limine*, without issuing notice.

38. Resultantly, the impugned order of the learned Single Judge, insofar as it rejects the preliminary submission of the appellants, questioning the validity of the arbitral award dated 30 July 2018 on the ground that the appointment of the learned Arbitrator was illegal, is sustained.

39. The present appeals are accordingly dismissed *in limine*, with no order as to costs.

C. HARI SHANKAR, J.

AJAY DIGPAUL, J.

FEBRUARY 11, 2025/*yg/aky*

Click here to check corrigendum, if any