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

Judgment reserved on: 17.04.2025
Judgment pronounced on:15.05.2025

\+ **O.M.P. (T) (COMM.) 5/2025**

M.V. OMNI PROJECTS (INDIA) LTD. .....Petitioner

Through: Mr. Subodh Kr. Pathak, Mr. Amit Sinha, Mr. Pawan Kumar Sharma, Mr. Niraj Kumar, Advs.

versus

UNION OF INDIA THROUGH DY CHIEF ENGG NORTHERN RAILWAY & ANR. .....Respondent

Through: Mr. Ruchir Mishra, Sr. Panel Counsel with Mr. Rajkumar Maurya, GP with Mr. Sanjiv Kr. Saxena, Mr. Mukesh Shukla, Ms. Poonam Shukla, Ms. Reba Jena Mishra, Ms. Harshita Sharma, Advs.

\+ **O.M.P. (T) (COMM.) 6/2025**

M.V. OMNI PROJECTS (INDIA) LTD. .....Petitioner

Through: Mr. Subodh Kr. Pathak, Mr. Amit Sinha, Mr. Pawan Kumar Sharma, Mr. Niraj Kumar, Advs.

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\+ **O.M.P. (T) (COMM.) 7/2025**

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versus

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CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

1. Since both the parties are common in all the petitions and the reliefs sought are also identical, thepetitions are being decided by this common judgment.

2. These are petitions filed under section 14 of Arbitration and Conciliation Act, 1996 (*"1996 Act"*) seeking termination of the mandate of the present Arbitral Tribunal and appoint a Sole Arbitrator to adjudicate the disputes arising out of the Contract Agreement bearing No. 47-A/CS/Dy.C.E/C-III/LKO dated 17.06.2016, Contract Agreement bearing No. 43-A/CS/Dy.C.E/C-III/LKO dated 17.06.2016 and Contract Agreement bearing No. 42-A/CS/Dy.C.E/C-III/LKO dated 17.06.2016.

FACTUAL BACKGROUND

3. Brief facts are that the petitioner was awarded contractual work of construction. After some negotiations with respect to the rates for the work, the petitioner was awarded Letter of Intent/ Letter of Acceptance and thereafter, the parties entered into a Contract Agreement dated

17.06.2016.

4. Subsequently, on account of various disputes, the respondent terminated the Contract on 26.12.2018 in O.M.P. (T) (COMM.) 5/2025 and O.M.P. (T) (COMM.) 7/2025 and on 19.05.2018 in O.M.P. (T) (COMM.) 6/2025.

5. Thereafter, the petitioner made representation to the respondent in terms of Clause No. 64 of the GCC which is the applicable provision for the dispute resolution. Relevant portion of the said Clause is extracted below:-

> *"**64 (1) (i) - Demand for Arbitration***
> *In the event of any dispute or difference between the parties hereto as tothe construction or operation of this contract, or the respective rightsand liabilities of the parties on any matter in question, dispute ordifference on any account or as to the withholding by the Railway ofany certificate to which the contractor may claim to be entitled to, or ifthe Railway fails to make a decision within 120 days, then and in anysuch case, but except in any of the "excepted matters" referred to inClause 63 of these conditions, the contractor, after 120 days but within180 days of his presenting his final claim on disputed matters shalldemand in writing that the dispute or difference be referred toarbitration.*
> ***64 (1) (ii)** - The demand for arbitration shall specify the matters whichare in question, or subject of the dispute or difference as also theamount of claim item wise. Only such dispute(s) or difference(s) inrespect of which the demand has been made, together with counterclaims or set off, given by the Railway, shall be referred to arbitrationand other matters shall not be included in the reference.*
> ***64 (1) (ii)** - (a) The Arbitration proceedings shall be assumed*

to havecommenced from the day, a written and valid demand for arbitration isreceived by the Railway.

(b) The claimant shall submit his claim stating the factssupporting the claims along with all the relevant documents and therelief or remedy sought against each claim within a period of 30 daysfrom the date of appointment of the Arbitral Tribunal.

(c) The Railway shall submit its defence statement and counter claim(s), if any, within a period of 60 days of receipt of copy of claims from Tribunal thereafter, unless otherwise extension has been granted by Tribunal.

(d) The place of arbitration would be within the geographicallimits of the Division of the Railway where the cause of action arose or the Headquarters of the concerned Railway or any other place with the written consent of both the parties.

***64 (1) (iii)** - ……..*

***64 (1) (iv)** - If the contractor(s) does/do not prefer his/their specific andfinal claims in writing, within a period of 90 days of receiving theintimation from the Railways that the final bill is ready for payment,he/they will be deemed to have waived his/their claim(s) and theRailway shall be discharged and released of all liabilities under thecontract in respect of these claims.*

***64 (2) - Obligation During Pendency of Arbitration** - Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable bythe Railway shall be withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal to considerand decide whether or not such work should continue during arbitration proceedings.*

***64 (3) (a) (i)** - In cases where the total value of all claims in*

questionadded together does not exceed Rs.10,00,000/- (Rupees ten lakhs only),the Arbitral tribunal shall consist of a sole arbitrator who shall be a gazetted officer of Railway not below JA grade, nominated by theGeneral Manager. The sole arbitrator shall be appointed within 60days from the day when a written and valid demand for arbitration isreceived by GM.

64 (3) (a) (ii)*- In cases not covered by the clause 64 (3) (a) (i), the Arbitral Tribunal shall consist of a Panel of three Gazetted Rly. Officers not below JA grade or 2 Railway Gazatted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Rly. Officer of one or more departments of the Rly. Which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM. Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA grade of*

<u>other departments of the Railway for the purpose of appointment of arbitrator</u>.

***64 (3) (a) (iii)** - If one or more of the arbitrators appointed as aboverefuses to act as arbitrator, withdraws from his office as arbitrator, orvacates his/their office/offices or is/are unable or unwilling toperform his functions as arbitrator for any reason whatsoever or diesor in the opinion of the General Manager fails to act without unduedelay, the General Manager shall appoint new arbitrator/arbitratorsto act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constitutedTribunal may, at its discretion, proceed with the reference from thestage at which it was left by the previous arbitrator (s).''*

(Emphasis added)

6. Pursuant to the aforesaid representation, the respondent appointed three serving railway employees as Arbitrators to adjudicate the disputes between the parties.

7. The petitioner appeared before the Arbitral Tribunal constituted by the respondent on 7 hearings and thereafter, filed the present petition.

8. Before going into the submissions, it is apposite to extract the relevant paragraphs of the orders passed by the Arbitral Tribunal.

*''**<u>Order dated 19.10.2024 i.e. 7th Hearing</u>***

''2.0 During hearing it was brought to the notice of Arbitral Tribunal that though Claimant and Respondent have separately submitted waiver of applicability of section 12(5) of Arbitration & Conciliation Act, an express agreement in writing between Claimant & Respondent is yet to be entered into.

3.0 Arbitral Tribunal brought to the attention of Claimant

and Respondent that certain documents filed by them are not legible and also directed claimant and respondent to re-look such documents filed by them and submit clear and legible copies on next hearing.

4.0 After hearing both the parties, Arbitral Tribunal has directed that following documents are to be submitted by 14.11.2024.

4.1 Agreement for waiver of applicability of Section 12(5) of Arbitration & Conciliation Agreement, duly signed jointly by authorized representatives on behalf of Claimant and Respondent."

Order dated 02.12.2024 i.e. 9th Hearing

2.0 Vide Para 2.0 of Order Sheet of 7th hearing dated 19.10.2024, it was recorded that, "During hearing it was brought to the notice of Arbitral Tribunal that though Claimant and Respondent have separately submitted waiver of applicability of section 12(5) of Arbitration & Conciliation Act an express agreement in writingbetween Claimant & Respondent is yet to be entered into". Vide Para 4.1 of OrderSheet of 7th hearing dated 19.10.2024, ArbitralTribunal has directed that, Agreement for waiver of application of section 12 (5) of Arbitration & Conciliation Act, duly signed by authorized representative of Claimant and Respondent to be submitted by 14.11.2024.

3.0 During 8th hearing dated 22.11.2024, compliances of 7th hearing were pending. Claimant and Respondent were again directed to ensure compliances as discussed and agreed during 7th hearing dated 19.10.2024 & next (9th) hearing was fixed on 02.12.2024.

4.0 During 02.12.2024, agreement duly signed by Respondent for waiver of application of section 12(5) of Arbitration & Conciliation Act was brought by Respondent

representative Shri Rakesh Kumar, AXEN/C/LKO. However, this was not signed by Claimant & during hearing dated 02.12.2024, Claimant Advocatehas verbally informed that a petition under Section 14 of Arbitration & ConciliationAct seeking constitution of new Arbitral Tribunal has been filed by them before Hon'ble High Court of Delhi, adjudication of same is awaited from Hon'ble High Court of Delhi and final order as and when received will be duly intimated to the Ld. Arbitral Tribunal. E-mail confirmation from Claimant on the issue is placed as Annexure-A/1-2."

9. It is the sole contention of Mr. Pathak, learned counsel for the petitioner that the Arbitral Tribunal has been appointed unilaterally by the respondent which is against the settled principles of law and hence, the mandate of the Arbitral Tribunal be terminated and new Arbitral Tribunal be constituted. Reliance is placed on judgments of this Court passed in ***Arb. P. No. 703 of 2023***, ***Arb. P. 1715 of 2024*** and connected matters.

10. *Per Contra*, Mr. Mishra, learned counsel for the respondent states that the petitioner has already waived the applicability of section 12(5) of 1996 Act on 23.02.2024. In this regard, he relied upon the letter of the petitioner which reads as under:-

"23.02.2024

To
Dy. Chief Engineer/Construction/G-1
Office of the Chief Administrative
Officer/Construction
Northern Railway, Head Quarter
Kashmiri Gate, Delhi - 110006
Kind Att. Mr. Puneet Kumar Srivastava, CE/Con/G-1
Subject: ……

Reference: 1.LOA No.-74-W/1/1/WA/Misc./LKO dated 25.05.2016.
2. Agreement No. 47-A/CS/Dy. C.P./C-III/LKO dated 17.06.2016.
3. Your office letter No. 74-W/3/2/Misc./WA/LKO/T-44/Omni/Arb dated 20.02.2024.
Dear Sir,
We received your above (Ref-3) letter, vide which we have been intimidated to submit copy of Annexure-XV for switching over our Arbitration Case according to the provision of Arbitration and Conciliation Act 2015.
We are enclosing the same and request you to kindly proceed at your earliest.

Yours Sincerely
For M.V. Omni Projects (India) Limited

Authorized Signatory
Enclosure- Annexure XV

ANNEXURE- XV
Agreement towards Waiver under Section 12(5) and Section 31-A(5) of Arbitration and Conciliation(Amendment) Act

We M/s M.V. Omni Projects (India) Limited with reference to agreement no. 47-Acs/Dy. CE/C/III/LKO dated 17.06.2016 dated 17.06.2016 raised disputes as to the construction and operation of this Contract, or the respective rights and liabilities, withholding of certificate and demand arbitration in respect of following claims:
List of claims:

Sl. No.	***Claims***	***Amount in Rs/.***

1	*Claim-A*	*On account of outstanding amount*	*Rs. 40,37,847.45/- (Last RA & Final Bill)*
2	*Claim-B*	*Payment under Price Variation Clause with respect to the executed work*	*Rs. 34,58,373.16/-*
3	*Claim C*	*On account of additional tax burden due to GST implications.*	*Rs. 11,54,958.24/- (Against RA Bills 01 to 08) & Rs. 04,15,024.44/- (Against Last RA & Final Bill)*
4	*Claim-D*	*On account of idle charges of Machinery deployed.*	*Rs. 1,69,65,200/-*
5	*Claim-E*	*On account of illegal encashment of B.G.*	*Rs. 30,87,910.00/-*
6	*Claim-F*	*On account of Refund of Security Deposit with EMD*	*Rs. 29,10,725.61/- (Against RA Bills) & Rs. 4,52,370/-(EMD)*
7	*Claim-G(1)*	*On account of delay in execution of work-On account of Overhead for prolonged period.*	*Rs. 98,30,623.49/-*
	Claim-G(2)	*On account of delay in execution of work- On account of Business Loss for prolonged period.*	*Rs. 1,47,45,785.23/-*
8	*Claim-H*	*On account of Loss of Profit*	*Rs. 43,99,305.65/-*
9	*Claim-I*	*Payment of Interest*	*Rs. 4,44,31,625.15/- @ 18% from due date till 31.12.2022*
		Total	*Rs. 10,58,89,648.42/- & Interest @18% from 01.01.2023 till payment realization*

I/We Mr. M.C. Pandey authorized representative of M/s. M.V. Omni Projects (India) Limited with reference to agreement no. 47-Acs/Dy. CE/C/III/LKO dated 17.06.2016 dated 17.06.2016 hereby raise dispute as to the construction and operation of this

contract, or the respective rights and liabilities, withholding of certificate and demand arbitration in respect of the following claims:

We M.V. Omni Projects (India) Limited do agree to waive off applicability of section 12(5) of Arbitration and Conciliation (Amendment) Act.

Signature of Claimant……Signature of Respondent…..

Agreement under Section 31(5)

I/We Mr. M.O. Pandey authorized representative of M/s. M.V. Omni Projects (India) Limited with reference to agreement no. 47-Acs/Dy. CE/C/III/LKO dated 17.06.2016 hereby waive off the applicability of sub section 31-A(4) of the Arbitration and Conciliation (Amendment) Act. We further agree that the cost of arbitration will be shared by the parties as per Clause 64(6) of GCC.

Signature of Claimant....Signature of Respondent…..”

11. He states that the petitioner was very well cognizant with the arbitration clause and the right of the respondent to nominate three Arbitrators who were to be the employees of the Railways. Being fully conscious of the clause, the petitioner on its own accord waived in writing the applicability of section 12(5) of 1996 Act and hence the petition is not maintainable. In this regard, reliance is placed on ***Truly Pest Solution (P) Ltd. v. Railway, 2024 SCC OnLine Bom 3528.***

ANALYSIS AND FINDINGS

12. I have heard the submissions advanced by the learned counsel for the parties.

13. The question which needs consideration is whether the waiver reproduced above is a waiver as contemplated under section 12(5) of 1996 Act.

14. As the legislature enacts the laws, the Courts interprets the same within the contours or framework of the statute. The very object of interpretation of a statute is to understand the intent of the legislature and to achieve the purpose of enactment of the law. Interpretation should not lead to any absurd/inconsistent or unreasonable outcome/conclusions. Proviso to a section sometimes makes an exception, impose conditions or restrict the scope and clarifies the legislative intent. The Hon'ble Supreme Court in ***DMRC v. Tarun Pal Singh, (2018) 14 SCC 161***, after considering various judgments *qua* the interpretation of the proviso, observed as under:-

> *"21. What follows from the aforesaid enunciation is that effect of a proviso is to except all preceding portion of the enactment. It is only occasionally that proviso is unrelated to the subject-matter of the preceding section, it may have to be interpreted as a substantive provision. Ordinarily, a proviso is not interpreted as stating a general rule. Provisos are often added as saving clauses. A proviso must be construed with reference to the preceding parts of the clause to which it is appended. The proviso is ordinarily subordinate to the main section. A construction placed on proviso which brings general harmony to the terms of the section should prevail. A proviso may sometime contain substantive provision. Ordinarily, proviso to a section is intended to take out a part of the main section for special treatment. Normally, a proviso does not travel beyond the main provision to which it is a proviso. A proviso is not interpreted as stating a general rule,*

it is an exception to the main provision to which it is carved out as a proviso. Proviso cannot be construed as enlarging the scope of enactment when it can be fairly and properly constructed without attributing that effect. It is not open to read in the words of enactment which are not to be found there and which would alter its operative effect."

15. A Constitution Bench of the Hon'ble Supreme Court in ***Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Co., 2024 SCC OnLine SC 3219*** held as under:-

"161. By agreeing to arbitrate in a public-private contract, the government or its companies agree to settle their disputes with private contractors through arbitration. Since the activities of the government have a public element, it is incumbent upon the government to ensure that it enters into a contract with the public without adopting any unfair or unreasonable procedure. Every action of a public authority or a person acting in the public interest or any act that gives rise to a public element must be based on principles of fairness and non-arbitrariness. Therefore, government agencies have to consider the principles of equality and non-arbitrariness when crafting arbitration procedures, including the procedure for the appointment of arbitrators. The terms of the arbitration agreement must meet the minimum standards of equality and fairness. In a public-private contract, the government and its instrumentalities must ensure that the arbitral process contemplated by the contract is also fair to the other party to avoid arbitrariness.

162. The possibility of bias is real in situations where an arbitration clause allows a government company to unilaterally appoint a sole arbitrator or control the majority

of the arbitrators. Since the government has control over the arbitral tribunal, it can chart the course of the arbitration proceedings to the prejudice of the other party. Resultantly, unilateral appointment clauses fail to provide an effective substitute for judicial proceedings in India. Further, a unilateral appointment clause is inherently exclusionary and violates the principle of equal treatment of parties and procedural equality.

163. Unilateral appointment clauses in a public-private contract fail to provide the minimum level of integrity required in authorities performing quasi-judicial functions such as arbitral tribunals. Therefore, a unilateral appointment clause is against the principle of arbitration, that is, impartial resolution of disputes between parties. It also violates the nemo judex rule which constitutes the public policy of India in the context of arbitration. Therefore, unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution for being arbitrary in addition to being violative of the equality principle under the Arbitration Act.

……

J. Conclusion

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

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

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

c. A clause that allows one party to unilaterally appoint a sole arbitrator gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further,

such a unilateral clause is exclusive and hinders equal participation of the other party in the appointment process of arbitrators;

d. In the appointment of a three-member panel, mandating the other party to select its arbitrator from a curated panel of potential arbitrators is against the principle of equal treatment of parties. In this situation, there is no effective counterbalance because parties do not participate equally in the process of appointing arbitrators. The process of appointing arbitrators in CORE (supra) is unequal and prejudiced in favour of the Railways;

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

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

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

170. The reference is answered in the above terms.

171. Pending application(s), if any, shall stand disposed of."

16. It has been categorically observed by the Hon'ble Supreme Court that unilateral appointment clauses are against the principles of arbitration and more particularly Article 14 of Constitution. In public private contracts, there is a possibility of bias where a government company unilaterally appoints Arbitrator/s as they have control (actual or pervasive) over the Arbitrators. Hence, unilateral clauses do not

effectively implementor further the objective of a neutral arbitral process.

17. Section 12(5) of 1996 Act reads as under:-

> *"12. Grounds for challenge.*
>
> *……*
>
> *[(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:*
> *Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.]"*

18. The purpose of section 12(5) and proviso has been explained by the Hon'ble Supreme Court in the judgment of ***Bharat Broadband vs. United Telecom (2019) 5 SCC 755*** and more particularly in paragraphs 15, 16 and 17 which read as under:-

> *"15. Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in*

writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.

16. The Law Commission Report, which has been extensively referred to in some of our judgments, makes it clear that there are certain minimum levels of independence and impartiality that should be required of the arbitral process, regardless of the parties' agreement. This being the case, the Law Commission then found:

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

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

……..

Thus, it will be seen that party autonomy is to be respected only in certain exceptional situations which could be situations which arise in family arbitrations or other arbitrations where a person subjectively commands blind faith and trust of the parties to the dispute, despite the existence of objective justifiable doubts regarding his independence and impartiality.

17. The scheme of Sections 12, 13 and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case i.e. a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as

a matter of law (i.e. de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them."

19. Section 12(5) of 1996 Act aims to bring an element of neutrality and impartiality in the arbitral process. The aforesaid judgment categorically states that any Arbitrator who falls within the seventh schedule of 1996 Act becomes ineligible for appointment as an Arbitrator. It is only in cases where a party categorically waives off the applicability of section 12(5) of 1996 Act in writing that despite the

person on account of being in one of the categories in the seventh schedule, becomes eligible to proceed with the arbitration proceedings.

20. What is the stage when this waiver as contemplated under proviso of section 12 (5) of 1996 Act is to be given so as to be considered as a waiver?

21. I am unable to agree with the submissions advanced by the learned counsel for the respondent as the waiver contemplated in the proviso ofsection 12(5) of 1996 Act applies not to the manner or the mechanism under which the Arbitral Tribunal is to be constituted but to the constitution/individual members of the Arbitral Tribunal. As per ***Bharat Broadband (supra),*** it has already been clarified that "express agreement in writing" to waive refers to a "person" who is interdicted by the seventh schedule. If an individual falls within any of the categories as mentioned in seventh schedule, then the said person/sare ineligible to be appointed as Arbitrator and only to remove the ineligibility, the party may waive by an express agreement the said ineligibility in writing qua the "person/s" who are ineligible to be appointed.

22. It is possible that the parties to an arbitration agreement may agree to a mechanism for appointment of an Arbitrator/Arbitral Tribunal under which one of the parties to the arbitration agreement may appoint an Arbitrator/Arbitral Tribunal. The opposing party may not have an objection to the mechanism of appointment of an Arbitrator/Arbitral Tribunaland may waive off its applicability of Section 12(5) of 1996 Act to the appointment process. However, once the Arbitrator is appointed, the party which had given a no-objection under the proviso

may have an objection to the Arbitrator or to the members of the Arbitral Tribunal so appointed on the ground that the Arbitrator or members of the Arbitral Tribunal fall within the 7th schedule. In that scenario, "no objection" given to the applicability of section 12(5) of 1996 Act to the mechanism of appointment/formation of Arbitral Tribunal cannot be held to be binding upon the party qua the members of the Arbitral Tribunal. The waiver in writing has to be against the Arbitrator/members of the Arbitral Tribunal.

23. Even assuming for the sake of argument that the petitioner has waived off the applicability of section 12(5) of 1996 Act, in order to achieve the purpose of impartiality, neutrality and independence, the no-objection to the applicability of section 12(5) of 1996 Act has to be given after the constitution of the Arbitral Tribunal. It is only after the appointment of Arbitrator/Arbitral Tribunal, the party would know whether the Arbitrator/members of the Arbitral Tribunal fall within the seventh schedule and despite being ineligible under the seventh schedule, the party wishes to waive off the ineligibility, then only the "express agreement in writing" contemplated under the proviso to section 12(5) would be meaningful and procedurally correct.

24. In the present case, the petitioner had waived off the applicability of section 12(5) before the constitution of the Arbitral Tribunal and not to the members of the Arbitral Tribunal. The Arbitral Tribunal was constituted on 21.03.2024 and the petitioner had waived off the applicability of section 12(5) on 23.02.2024 i.e. before the constitution of the Arbitral Tribunal. The members of the Arbitral Tribunal were the serving employees of the respondent and are clearly barred by under S.

No. 1 of seventh schedule of 1996 Act. The judgment of ***Central Organisation for Railway Electrification (supra)*** clearly states that the clauses appointing unilateral Arbitrators raises doubt to the independent and impartiality of the Arbitrators and is unequal. To my mind, such clauses strike at the core of the neutrality contemplated under the1996 Act. Further and most importantly, even if a party agrees to waive off the applicability of section 12(5) of 1996 Act, the same has to be done once the Arbitrator are appointed with the names and details. Any waiver under proviso of section 12(5) of 1996 Act before the details of the Arbitrators/Arbitral Tribunal is known to the party waiving the applicability of section 12(5) of 1996 Act is no waiver in the eyes of law. Hence, for the reasons noted above, the members of the Arbitral Tribunal are clearly ineligible to act as the Arbitrators by virtue of S. No. 1 of seventh schedule of 1996 Act and the waiver was to the constitution of the Arbitral Tribunal not to the members of the Arbitral Tribunal.

25. Learned counsel for the respondent placed reliance on ***Truly Pest Solution (P) Ltd. (supra)*** passed by the Bombay High Court. Relevant paragraphs of the said judgment are extracted below:-

> *"16. It is the case of the petitioner/claimant that the Arbitral Tribunal consisting of sole arbitrator who was an employee of the respondent (Railways), hence, he could not have being adjudicating the issue between the claimant and the respondent. It is the case of the claimant that after the amendment to the Arbitration Act, in the year 2015, there were major changes made in Section 12 of the said Act. Section 12 of the Arbitration Act mentions about the grounds*

for challenge. One of such ground of challenge is sub-clause (5) which mentions that any person whose relationship with the parties or the subject-matter of the dispute which falls under the Seventh Schedule shall not be eligible to be appointed as an arbitrator. The Seventh Schedule refers to about 19 sub-clauses under which, if the arbitrator has relationship with the parties or the counsel, he would be ineligible to be appointed as an arbitrator. The first of such clause mentions about an arbitrator being an employee, consultant or advisor in past or present with one of the parties, then he would be ineligible to be appointed as an arbitrator.

17. In the present proceedings, the petitioner/claimant invoked the Arbitration clause by its Letter dated 7-12-2020.

……..

Therefore, the claimants have themselves invoked arbitration clause, wherein it is specifically mentioned that the sole arbitrator, would be employee of Railways. Being aware of this fact they have chose to go ahead with the arbitration. The claimant had invoked the arbitration clause by their Letter dated 7-12-2020. The said letter was addressed by the claimant through their advocates hence, the claimant cannot now take a defence that they were not aware about the legal implications while they issued the letter of invocation of arbitration.

In my opinion, even at that stage, if the claimant desired to appoint sole arbitrator by mutual consent, the claimant could have filed an application under Section 11 of the Arbitration Act, whereby they could have sought for appointment of the sole arbitrator to decide the dispute between the parties. Admittedly, the claimants have not taken any such steps.

……..

18.3. Though Section 12(5) specifically mentions that the

arbitrator should disclose his relationship with the parties, however, proviso to Section 12(5) mentions about waiver in writing. In the present proceedings, the claimant by express agreement in writing had waived the applicability of sub-section (5) of Section 12. Therefore, according to me, the claimant at the stage of Section 34 is bared from taking up a ground under Section 12(5) for challenging the award.

……..

20. Subsequently, when the arbitration proceedings commenced, the claimant had an option to file an application before the Arbitral Tribunal under Section 16 read with Section 13(2) of the Arbitration Act. However, the claimant has not taken up any such steps as contemplated under Section 16 of the said Act. Section 16 of the Arbitration Act, envisages the jurisdiction of the Arbitral Tribunal wherein if a party has to take an objection about the jurisdiction of the Arbitral Tribunal, the same can be made before the Arbitral Tribunal, and the Arbitral Tribunal can decide the same. If the said application is allowed, the Arbitral Tribunal proceedings come to an end. However, if such an application is not allowed, the same can be taken as a ground along with the other grounds while challenging to the arbitral award, if it is against the said party. In the present proceeding, no such steps were taken up by the claimant, as contemplated under Section 13(2).

20.1. The Supreme Court in HRD Corpn. v. GAIL (India) Ltd.7 has held that if the arbitrator fails to file disclosure in terms of Section 12(1) read with Fifth Schedule of the Arbitration and Conciliation Act, 1996, the remedy of the party in that event would be to apply under Section 14(2) of the Arbitration and Conciliation Act, 1996 to the court to decide about the termination of the mandate of the Arbitral Tribunal on that ground.

20.2. Under Section 16, the Arbitral Tribunal is empowered to rule on its own jurisdiction including ruling on any objection with respect to the existence or validity of arbitration agreement. Such plea shall be raised not later than the submission of the statement of defence. If such plea is rejected by the Arbitral Tribunal, it has to proceed with the arbitral proceedings and declare an award. If plea of jurisdiction is accepted by the Arbitral Tribunal, the respondent may file an appeal under Section 37. If plea of jurisdiction is not accepted, the respondent may challenge such ruling along with award under Section 34.

21. For the first time in the present proceedings which is filed under Section 34, the claimants have raised an issue about sub-section (5) of Section 12. According to me, as discussed in earlier paragraphs, the claimants at least had three occasions before challenging the award under Section 34, to raise the issue of arbitrator not been qualified/eligible to conduct the proceedings. The petitioner claimant chose not to take any such steps. Again, I would like to mention here that the claimants themselves had invoked arbitration clause, knowing fully well that as per Clause 64(3)(a)(i) the sole arbitrator would be a railway employee. Only after the award is passed, in the present proceedings such an issue has been raised by the claimant. According to me, the same is a complete afterthought, hence is rejected."

26. The Bombay High Court, in similar arbitration clause, upheld the waiver given by the claimant therein. The said judgment is distinguishable as the petitioner therein challenge the jurisdiction of the Arbitrator at section 34 stage and did not file any application under section 11 seeking appointment of Arbitrator, section 14 seeking termination of the mandate of the Arbitrator or section 16 before the

Arbitrator stating that the Arbitrator was ineligible. Hence, the High Court therein dismissed the petition. The same is not in the present case. Soon after the Arbitral Tribunal was constituted, the petitioner has filed the present petition seeking termination of mandate of the Arbitral Tribunal. Additionally, the AT also has asked the petitioner to submit waiver in writing in the 7th and 9th hearing dated 19.10.2024 and 02.12.2024 respectively which the petitioner has refused to give.

27. A Co-ordinate bench in ***M/s M.V. Omni Projects (India) Ltd. v. Union of India, through Dy. Chief Engineer/Const.II/Northern Railway***, ***2024:DHC:7874***, in a similar arbitration clause, appointed the Sole Arbitrator and observed that the appointment procedure is invalid, any proceedings before the same are non-est. Also in ***Arb. P. 1715/2024*** and connected matters, in a similar arbitration clause, this Court appointed Sole Arbitrator.

28. For the reasons noted above, the petition is allowed and the letter dated 23.02.2024 is no waiver in the eyes of law. Consequently, the Arbitral Tribunal appointed by the respondent is set aside.

29. Learned counsels for the petitioner and respondent are granted one week to agree to a name of a Sole Arbitrator or nominate their respective Arbitrators. In case, the parties are unable to nominate their arbitrator or agree to a Sole Arbitrator, this Court will be constrained to appoint the Sole Arbitrator/ Arbitral Tribunal.

30. List for further hearing on 22.05.2025.

JASMEET SINGH, J

MAY 15th, 2025/(MSQ)