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2026:DHC:9641-DB

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

Reserved on: 27.10.2026
Pronounced on: 31.10.2026
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\# **CNR No. DLHC010321452026**

\+ FAO (COMM) 198/2026, CM APPL. 46848/2026

GOVT OF NCT OF DELHI .....Appellant

Through: Mr. JM Kalia, Mr. Siddhartha Shukla, Mr. Satender Kumar, Mr. Dhruv Kalia, Mr. Sanjay Prabhakar, Advs.

versus

M/S. RAM KRISHAN YUDHISTER PRAKASH .....Respondent

Through: Mr. Kunwar Chandresh, Ms. Poonam Prasad, Mr. Divyansh Singh, Mr. Daleep Kumar Sah, Mr. Raj Tiwari, Advs.

CORAM:
HON'BLE MR. JUSTICE ANIL KSHETARPAL
HON'BLE MR. JUSTICE BHARAT PARASHAR

JUDGMENT

BHARAT PARASHAR, J.

1. The present Appeal under Section 13(1A) of the Commercial Courts Act, 2015 read with Section 37 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as the "A&C Act"], has been preferred by the Appellant, Government of NCT of Delhi [hereinafter referred to as "**GNCTD**"], assailing the judgment dated 08.05.2026 [hereinafter referred to as the "**Impugned Order**"] passed

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by the learned District Judge (Commercial), North-East District, Karkardooma Courts, Delhi, in OMP (COMM.) No. 4/2025. By the Impugned Order, the Petition preferred by GNCTD under Section 34 of the A&C Act was dismissed, leaving the arbitral award dated 20.01.2025 [hereinafter referred to as the "**Award**"] undisturbed.

2. Besides challenging the award and the impugned order dated 08.05.2026 dismissing the Petition under Section 34 of the Arbitration and Conciliation Act, 1996 on various grounds, the primary controversy pertains to appointment of Sole Arbitrator by the Public Works Department (PWD) of GNCTD of his retired employee and thereby attracting the bar under Section 12(5) r/w Seventh Schedule of the A&C Act.

Factual Matrix :

3. The facts insofar as relevant for adjudication of the present Appeal may briefly be noticed:

4. Appellant GNCTD through its department PWD awarded work of construction of Aam Aadmi Mohalla Clinics (Primary Health Centres) at various places under the North-East Circle, PWD, Delhi to the Respondent M/s Ram Krishan Yudhister Prakash [hereinafter referred to as the Contractor]. The letter of acceptance was issued on 17.12.2018 and the amount agreed to be payable was Rs. 2,96,84,753/-. The stipulated date of commencement of work was 27.12.2018 and the stipulated date of completion of work was 26.04.2019. The work was, however, completed on 16.03.2020 i.e. beyond the stipulated date of completion.

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5. The dispute, however, arose between the parties when the contractor claimed charges also on account of escalation, expenditures towards watch and ward, claims against additional work, extra payment for working in foul position, claims against expenses incurred in the extended period of the project besides other off site expenses in the extended period of contract and claim on account of loss of business, claim of interest etc. Accordingly, in terms of arbitration clause-25 of the General Condition of Contract for Central PWD Works, 2014 as was applicable to the contract in question, the Chief Engineer (E) PWD of GNCTD vide reference letter dated 18.10.2023 nominated Sh. Avendra Kumar Garg, Principal Chief Engineer, PWD (Retd.) as the Sole Arbitrator to adjudicate the disputes between the parties. The learned Arbitrator accepted the reference and issued notice to both the parties. The contractor (Respondent herein) filed its claim under various heads vide statement of claim. The Appellant alongwith its statement of defence also filed its counter claim against the Respondent.

6. Learned Arbitrator finally passed the award on 20.01.2025 in favour of the Contractor and against the Department, while disallowing a number of claims of the Contractor but at the same time also allowed the same under various heads.

7. Aggrieved by the Award dated 20.01.2025, the Appellant herein challenged the same by filing a Petition under Section 34 of the A&C Act on various grounds. It was submitted that learned Arbitrator did not adjudicate upon the counter claim filed by the Appellant and even

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failed to mention anything about it in the award and the same itself raised sufficient doubts as to the impartibility of the learned Arbitrator besides reflecting apparent bias on his part.

8. The various claims which learned Arbitrator had allowed were also challenged on the ground that the same were not in accordance with the terms and conditions of the agreement between the parties and that learned Arbitrator gave his findings on the basis of presumptions without any evidence in support thereof. It was also stated that learned Arbitrator travelled beyond the purview of the relevant clauses of the said agreement between the parties while allowing certain claims.

9. However, in the written arguments / written submissions filed by the Appellant herein before the Court of Ld. District Judge (Comm.) a specific objection was raised that as the learned Arbitrator who was a retired employee of PWD, GNCTD, was unilaterally appointed by one of the parties so such unilateral appointment was clearly hit by Section 12(5) r/w Seventh Schedule of the A&C Act. It was thus stated that as the very appointment of learned Arbitrator was bad in law so any subsequent proceedings before such an Arbitrator or any award passed thereto was also non-est.

10. Learned District Judge (Comm.), however, dismissed the Petition under Section 34 of the A&C Act primarily on the ground that scope of interference with an award under Section 34 of the A&C Act is very limited and if the view taken by the learned Arbitrator is plausible so the Court cannot substitute its view in its place.

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11. As regard the specific objection with respect to the unilateral appointment of learned Arbitrator, the Court in para-9 merely mentioned that the said contention was devoid of any merits as the Arbitrator was appointed with the concurrence of the Petitioner. In para-10, it was also mentioned that the arbitral proceedings reflects that the Petitioner participated in the proceedings and contested the matter.

12. Being aggrieved with the said order dated 08.05.2026 the present Appeal under Section 37 of the A&C Act has been filed. Besides challenging the award dated 20.01.2025 and the impugned judgment dated 08.05.2026 on the ground that the learned Arbitrator as well as Ld. District Judge (Comm.) while deciding the Petition under Section 34 of the A&C Act failed to consider that the learned Arbitrator travelled beyond the express terms of the agreement between the parties and had also failed to adjudicate upon the counter claim of the Appellant it has also been stated that the appointment of Arbitrator by Department of PWD, GNCTD, from a panel of retired government servants was clearly hit Section 12(5) of A&C Act, being unilateral appointment and consequently, the award passed by such an Arbitral Tribunal was a nullity.

13. Per contra, learned counsel for the Respondent submitted that the Arbitrator was appointed in accordance with the agreement of the parties and by the department itself. It was also submitted that Appellant herein duly participated in the proceedings before learned Arbitrator and in fact in the Petition under Section 34 of the A&C Act no such ground was even raised. It was thus submitted that after the

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award was passed in favour of the Respondent herein and against the Appellant herein and that too after duly considering all the documentary evidence as well as oral submissions made by the parties that the appointment of the Arbitrator is being now challenged.

14. We have heard the arguments and carefully perused the record.

15. The foremost contention raised by learned counsel for the Appellant which arises for consideration is whether after the coming into force of The Arbitration and Conciliation (Amendment) Act, 2015, the appointment of the Arbitral Tribunal by one of the parties in the absence of an express agreement in writing subsequent to the dispute having arisen would amount to waiving off the applicability of Section 12(5) of the A&C Act even though such an appointment is in accordance with the earlier agreement of the parties. In this regard it will be pertinent to mention that the aforesaid issue stands squarely covered by the decision of this Court in FAO(OS)(Comm) No. 246/2026, titled "M/s Ahluwalia Contracts (India) Limited (ACIL) Vs. Airports Authority of India (AAI)", pronounced on 25.09.2026.

16. It will be worthwhile to quote the following observations from the said judgment as the same clearly answers the issue involved herein in paragraphs-22 to 39 as under :

> *"22. The answer to the aforesaid question is no longer res integra. The statutory scheme contained in Section 12(5) of the A&C Act, as also the interpretation placed thereon by the Supreme Court and this Court, makes it clear that the waiver contemplated by the proviso to Section 12(5) is of a particular and specific nature. It cannot be inferred merely from the conduct of the parties, from the fact that a party itself appointed the Arbitrator, or from the participation of the parties in the arbitral proceedings.Waiver, in a general sense, may in an appropriate case be inferred from conduct*

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or from other circumstances. However, where the statute itself prescribes the manner in which a party may waive the applicability of a statutory provision, the Court cannot substitute the statutorily prescribed mode with an implied waiver. The proviso to Section 12(5) expressly requires an agreement in writing, subsequent to the disputes having arisen between the parties.

23. Section 12(5) of the A&C Act, as introduced by the Arbitration and Conciliation (Amendment) Act, 2015, 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."

24. On a plain reading of the aforesaid provision, it becomes evident that the legislature has consciously prescribed three essential requirements for waiver: (i) the waiver must be subsequent to the disputes having arisen between the parties; (ii) it must be by agreement between the parties; and (iii) such agreement must be express and in writing. Thus, the statutory provision does not contemplate a waiver by implication or by conduct.

25. The aforesaid interpretation has been authoritatively settled by the Supreme Court in Bhadra International. The Supreme Court, after examining the scope and effect of the proviso to Section 12(5) of the A&C Act, has explained the requirements of such waiver in the following terms:

"75. The essentials of the proviso to Section 12(5) are:-

i. The parties can waive their right to object under sub-section (5)
of Section 12;

ii. The right to object under the sub-section can be waived only subsequent to a dispute having arisen between the parties;

iii. The waiver must be in the form of an express agreement in writing.

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> *78. What flows from the aforesaid is when a right exists, i.e., the right to object to the appointment of an ineligible Arbitrator in terms of Section 12(5), such a right cannot be taken away by mere implication. For a party to be deprived of this right by way of waiver, there must be a conscious and unequivocal expression of intent to relinquish it. Needless to say, for a waiver to be valid, it is necessary that the actor demonstrates the intention to act, and for an act to be intentional, the actor must understand the act and its consequences.*
>
> ***
>
> *84. Undoubtedly, the statute does not prescribe a format for the agreement. However, the absence of a prescribed format cannot be construed to mean that the waiver may be inferred impliedly or through conduct. We say so because the legislature has consciously prefaced the term "agreement" with the word "express" and followed it with the phrase "in writing". This semantics denote the intention of the legislature that the waiver under the proviso to Section 12(5) must be made only through an express and written manifestation of intention. "*

26. The significance of the aforesaid decision becomes apparent from the facts of ***Bhadra International*** *itself. In that case, the Arbitrator had, in Procedural Order No.1, specifically recorded that none of the parties had any objection to his appointment as the Sole Arbitrator. Despite such factual position, the correctness of which was not disputed, the Supreme Court held that such an observation recorded in the procedural order could not amount to waiver, particularly when the statute envisages waiver only by an express terms of the agreement in writing subsequent to the disputes having arisen between the parties.*

27. Thus, the mere fact that a party may have proceeded with the arbitration with knowledge of the constitution of the Arbitral Tribunal cannot be elevated to an express agreement in writing as contemplated by the proviso to Section 12(5) of the A&C Act. The statutory requirement is not satisfied by acquiescence, participation or conduct. The requirement is of an agreement, expressed in writing, between the parties after the disputes have arisen.

28. The aforesaid principle has also been applied by the Division Bench of this Court in ***Titagarh Rail Systems****(supra). The Division*

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Bench has specifically rejected the contention that following the contractual procedure for appointment of an Arbitrator, by itself, could result in waiver of the applicability of Section 12(5) of the A&C Act. The relevant observations read as under:

> *"27. While it may be true that the procedure followed by the parties was that which was envisaged, in the contract between them, as applying where there was waiver of Section 12(5), following of the procedure cannot by itself result in such waiver. The argument effectively puts the cart before the horse. There must, in the first instance, be waiver of the applicability of Section 12(5) by written agreement in writing as required by the proviso to the said clause read with the decision in Bhadra International, and, only thereafter, if there exists such express waiver in writing, would the arbitral procedure envisaged in that situation as contained in Clause 2905(a)(ii) apply. The situation cannot be read in reverse. We cannot accept the argument that by invoking the procedure applicable in a case of waiver of Section 12(5), Section 12(5) stands waived, despite the absence of any written agreement in writing to that effect.*
>
> *28. In fact, the situation which exists in the present case is that the very invocation of the procedure, envisaged in the contract between the parties as being applicable in a case in which Section 12(5) stood waived, was itself illegal. That procedure applies only where there is waiver of the applicability of Section 12(5). Inasmuch as there was no such waiver in the present case, the procedure itself would not apply. By erroneously invoking the procedure which applies where Section 12(5) has been waived, waiver of Section 12(5) cannot be implied."*

29. The principle emerging from the aforesaid decisions is, therefore, clear. The fact that a party has acted in accordance with the contractual mechanism for appointment cannot, in the absence of an express agreement in writing subsequent to the disputes, constitute waiver of the applicability of Section 12(5) of the A&C Act. The contractual mechanism cannot be permitted to operate in a manner contrary to the mandatory statutory requirement.

30. In the present case, it is not in dispute that AAI appointed the Sole Arbitrator in exercise of the power conferred upon it under Clause 57(c) of the Contract Agreement. It is also not in dispute that the appointment was made after the disputes had arisen between the parties. However, there is admittedly no express agreement in

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writing between the parties, subsequent to the disputes having arisen, whereby the applicability of Section 12(5) of the A&C Act was waived.

31. The Appellant seeks to overcome this statutory requirement by placing reliance upon the fact that AAI itself appointed the Sole Arbitrator, participated in the arbitral proceedings for several years and did not raise any objection to the constitution of the Arbitral Tribunal until after the Award was rendered. However, these circumstances, even taken cumulatively, cannot constitute the express agreement in writing mandated by the proviso to Section 12(5) of the A&C Act.

32. In this regard, reliance placed by the Appellant upon the fact that it was AAI itself which appointed the Sole Arbitrator is of no avail. The precise question whether a party which has itself made the unilateral appointment can subsequently object to the appointment has also been considered by the Division Bench of this Court in ***Mahavir Prasad Gupta and Sons v. Govt. of NCT of Delhi***[1]*. The Division Bench considered the question whether the act of unilateral appointment itself could constitute an express agreement to waive the statutory ineligibility* and held as under:

> *"79. Hence, exercise of power to unilaterally appoint the Arbitrator by a party cannot be termed as express agreement to waive the invalidity*
>
> *of the arbitration agreement providing for unilateral appointment. For waiver under Section 12(5) of the Act after the dispute have arisen, the parties are required to consciously agree in writing to waive the ineligibility of the Arbitrator. Grounds of ineligibility of the Arbitrator under Seventh Schedule are derived from Red List of IBA Rules on Conflict of Interest in International Commercial Arbitration. The Act was as amended in 2015 to provide a detailed framework to address Arbitrator bias. This framework includes the Fifth and Seventh Schedules, which draw from the Orange and Red Lists of the IBA Guidelines, respectively. The Fifth Schedule requires Arbitrators to disclose any circumstances that might reasonably affect their impartiality, including relationships with the parties, counsel, or subject matter of the dispute. The Seventh Schedule reflecting the Red List, outlines scenarios of relationship conflict that would result in de jure ineligibility of an Arbitrator."*

[1] 2025 SCC OnLine Del 4241

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33. *The aforesaid decision is of particular relevance to the submission advanced by learned senior counsel representing the Appellant. The mere fact that the appointment was made by AAI does not amount to an express agreement in writing by both parties to waive the applicability of Section 12(5) of the A&C Act. The act of appointment and the statutory waiver contemplated by the proviso operate in distinct fields and cannot be equated with each other.*

34. Significantly, the Division Bench in ***Mahavir Prasad Gupta*** *(supra)ultimately upheld the setting aside of the award on the ground of unilateral appointment. The Supreme Court thereafter declined to interfere with the judgment of the Division Bench in the Special Leave Petition. The aforesaid position thus lends further consistency to the interpretation adopted by this Court regarding the mandatory nature of the proviso to Section 12(5) of the A&C Act.*

35.The question posed before this Court is also directly answered by the judgment of the Supreme Court in ***Bharat Broadband Network Ltd. v. United Telecoms Ltd.***[2]*. In the said case, the Supreme Court considered the precise question as to whether the appointment of an ineligible Arbitrator by the party having the power of appointment could itself amount to an express waiver under the proviso to Section 12(5) of the A&C Act. The Supreme Court held that it could not.*

36. The Supreme Court, in Paragraph No.20 of ***Bharat Broadband*** *(supra), interpreted the expression "express agreement in writing" occurring in the proviso to Section 12(5) of the A&C Act in the following terms:*

> *"20. This then brings us to the applicability of the proviso to 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*

[2] (2019) 5 SCC 755

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in words as opposed to an agreement which is to be inferred by conduct. Here, Section 9 of the 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 17-1-2017. 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. [TRF Ltd. v. EnergoEngg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] which, as we have seen hereinabove, was only on 3-7-2017. 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. [TRF Ltd. v. EnergoEngg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] 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

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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."

37. *The aforesaid decision is directly relevant to the facts of the present case. The Supreme Court has expressly rejected the proposition that the party which itself appoints the Arbitrator is thereby precluded from questioning the validity of such appointment. More importantly, the Supreme Court has made it clear that the appointment letter itself cannot be treated as an express agreement in writing under the proviso to Section 12(5) of the A&C Act.*

38. The submission of learned senior counsel representing the Appellant that the decision in ***Bhadra International*** *ought to be confined to a case where the objection is raised by the party which did not make the appointment, therefore, cannot be accepted. The subsequent decision of the Division Bench in* ***Mahavir Prasad Gupta*** *(supra) has expressly examined this very issue, and the principle has thereafter received further support from the Supreme Court. The statutory requirement of an express agreement in writing does not depend upon which of the parties made the appointment.*

39. Equally, the participation of AAI in the arbitral proceedings cannot result in a different conclusion. The Supreme Court in ***Bhadra International*** *has specifically recognised that even conduct which may otherwise appear to demonstrate acceptance of the Arbitral Tribunal cannot substitute the express written agreement contemplated by the proviso. The reason is apparent from the statutory language itself. Section 12(5) of the A&C Act constitutes a specific statutory departure from the general principle of waiver by conduct.*

17. In the present case also the record discloses that the learned Arbitrator who was a retired Principal Chief Engineer of PWD itself was appointed by one of the parties i.e. PWD of GNCTD and the department did participate in the proceedings before the learned

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Arbitrator and besides filing its statement of defence, it also filed its counter claim before the learned Arbitrator. However, there is nothing on record to show that subsequent to the disputes having arisen, the parties entered into any express agreement in writing whereby they consciously waived off the applicability of Section 12(5) of the A&C Act. Thus, participation in the arbitration proceedings or filing of statement of defence or counter claim or failure to raise an objection before learned Arbitrator in this regard cannot be treated as a substitute for such statutory waiver.

18. It is true that in the Petition under Section 34 of the A&C Act filed by the Appellant herein no such ground was taken but in the written arguments / written submissions filed a specific ground was mentioned along with the relevant case law but learned Trial Court failed to address the said issue and discarded the said submission merely on the ground that Petitioner therein had participated in the proceedings. Thus, it is even not a case where before adjudication of the Petition under Section 34 of the A&C Act, the objection as regard the unilateral appointment of the learned Arbitrator was not raised. However, as discussed above, merely because the Appellant had participated in the arbitral proceedings or had failed to raise such an objection at any earlier stage of the proceedings cannot make such an appointment to be valid.

19. Hon'ble Supreme Court in "***Bhadra International (India) Pvt. Ltd. & Ors. Vs. Airports Authority of India***" has specifically recognised that an objection going to the inherent jurisdiction of the

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Arbitral Tribunal may be raised at any stage of challenge to the award.

20. Thus, in the overall facts and circumstances of the case as discussed above, since the very appointment of Arbitrator being unilateral and without there being any express agreement in writing subsequent to arising of disputes and thereby waiving the applicability of Section 12(5) of the A&C Act cannot be held to be valid in the eyes of law and accordingly, any subsequent proceedings before such an Arbitral Tribunal or any award emanating thereto can also be not sustained.

21. In these circumstances, there is no requirement to deal with other contentions raised by learned counsel for the Appellant challenging the award or the impugned order. Accordingly, the impugned order dated 08.05.2026 and the award dated 20.01.2025 are hereby set aside. The present Appeal is allowed.

22. In the facts and circumstances of the case, there shall be no order as to costs.

BHARAT PARASHAR, J.

ANIL KSHETARPAL, J.

OCTOBER 31st, 2026/DH