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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 37-38 of 2026
[Arising out of Special Leave Petition (C) Nos. 16107-16108 of 2025]

BHADRA INTERNATIONAL (INDIA) PVT. LTD. & ORS. **...APPELLANTS**

VERSUS

AIRPORTS AUTHORITY OF INDIA **...RESPONDENT**

J U D G M E N T

Signature Not Verified
Digitally signed by CHANDRESH
Date: 2026.01.05 16:53:04 IST
Reason:

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J.B. PARDIWALA, J.:

For the convenience of exposition, this judgment is divided into the following parts:-

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1. Leave granted.

2. Since the issues raised in both the captioned appeals are the same, the parties are same, and the challenge is also to the self-same judgment and order passed by the High Court, those were taken up for hearing analogously and are being disposed of by this common judgment and order.

3. These appeals arise from the common judgment and order dated 11.02.2025 passed by a Division Bench of the High Court of Delhi in FAO(OS) (COMM) Nos. 23 and 24 of 2025 respectively (hereinafter, the "**Impugned Judgment**"), by which the appeals filed by the appellants herein under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, the "**Act, 1996**") came to be dismissed thereby affirming the order dated 19.02.2022 passed by a learned Single Judge of the High Court in OMP (COMM) Nos. 414 and 415 of 2018 respectively under Section 34 of the Act, 1996 (hereinafter, the "**Single Judge**") dismissing the preliminary objection raised by the appellants as regards unilateral appointment of a sole arbitrator by the respondent.

I. FACTUAL MATRIX

4. The facts giving rise to the appeals may be summarized as under:-

   i. The appellant no. 1 and appellant no. 2, viz. Bhadra International (India) Pvt. Ltd., and Novia International Consulting Aps,

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respectively executed an agreement to form a joint consortium namely Bhadra International (India) Pvt. Ltd. and Novia International Consulting Aps, for the purposes of undertaking ground handling services at various airports in India. The consortium is the appellant no. 3 before us.

ii. The respondent (Airports Authority of India) floated two tender notices inviting tenders for appointment of an agency for ground handling services at some airports. In response to these notices, the appellant no. 3 emerged as the successful bidder. Pursuant to the two notices, the parties executed two License Agreement dated 29.11.2010 ("**License Agreement**"). As per the License Agreement, the appellant no. 3 was permitted to provide ground handling services at the specified airports.

iii. The aforesaid License Agreement, more particularly, Clause 78 provided that in the event of any dispute or difference arising out of the said license agreement the same would have to be resolved through arbitration. The said clause read as under:-

> "*78. All disputes and differences, arising out of or, in any way, touching or concerning this Agreement, (except those the decision whereof is otherwise hereinbefore 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 may 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*

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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 or some other person to be similarly appointed. It will be no objection to such appointment that the Arbitrator so appointment 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 appointment, 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."

(Emphasis is ours)

iv. On 23.10.2015, the Arbitration and Conciliation (Amendment) Act, 2015 came into effect (for short, "**the Amendment Act, 2015**"), by which sub-section (5) was inserted into Section 12. The provision reads thus:-

"*[(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.]"

v. Sometime, in the year 2015, various disputes cropped up between the appellants and the respondent herein. Accordingly,

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the appellants *vide* notice dated 27.11.2015 invoked the arbitration clause and requested the respondent to appoint an arbitrator in terms of Clause 78 of the aforesaid License Agreement. The relevant part of the notice reads thus:-

> "*We also like to bring out most humbly that it is incumbent upon the Chairman AAI to appoint the Sole Arbitrator within a reasonable time, least 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*."

vi. On 22.03.2016, the sole arbitrator passed the first procedural order recording that none of the parties had any objection to his appointment. The procedural order reads thus:-

> "*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.[…]*"
>
> (Emphasis supplied)

vii. At the joint request of the parties, two applications were filed under Section 29A of the Act, 1966, seeking extension of time for the completion of the proceedings. On both the occasions, the applications were allowed by the High Court.

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viii. Ultimately, the sole arbitrator passed the arbitral awards dated 30.07.2018 whereby the claims and counter-claims of the respective parties were rejected. In effect, the arbitrator passed a 'Nil' award.

ix. Aggrieved by the dismissal of its claim, the appellants challenged the award by filing applications under Section 34 of the Act, 1996, bearing O.M.P. (COMM) Nos. 414 and 415 of 2018 respectively, before the Single Judge of the High Court.

x. Thereafter, by way of applications bearing I.A. Nos. 1834 and 1842 of 2022 respectively, the appellants sought to amend the aforesaid applications to contend that since the arbitrator was appointed unilaterally, the award was liable to be set aside ("**Amendment Application**").

xi. The aforesaid applications filed by the appellants came to be rejected by the Single Judge *vide* order dated 24.12.2024.

xii. Being aggrieved by the aforesaid, the appellants preferred appeals under Section 37 of the Act, 1996, bearing FAO(OS) (COMM) Nos. 23 and 24 of 2025 respectively, seeking to challenge the judgment and order passed by a learned Single

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Judge. The said appeals came to be dismissed *vide* the impugned judgment.

xiii. In such circumstances referred to above, the appellants are here before this Court with the present appeals.

II. JUDGMENT OF THE SINGLE JUDGE ON APPLICATION UNDER SECTION 34 OF THE ACT, 1996

5. Aggrieved by the awards passed by the sole arbitrator, the appellants filed applications under Section 34 of the Act, 1996, raising the preliminary objection that since the appointment of the sole arbitrator was made unilaterally by the respondent, the award was liable to be set aside.

6. The learned Single Judge held that the appointment of the arbitrator was in accordance with the procedure agreed upon by the parties under Clause 78 of the License Agreement. Consequently, it rejected the challenge to the appointment of the sole arbitrator on the following grounds:-

   i. *First*, it observed that the sole arbitrator appointed by the respondent did not suffer from any disqualification under the Fifth or Seventh Schedule read with Section 12(5) of the Act, 1996. The parties themselves had agreed to the procedure of appointment. Moreover, the appellants did not raise any objection regarding the independence and impartiality of the

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arbitrator. Accordingly, the appointment of the arbitrator could not have been belatedly called into question.

ii. *Secondly*, on the issue of waiver, the learned Single Judge observed that the *proviso* to Section 12(5) of the Act, 1996, stipulates the requirement of clear and positive manifestation of waiver in writing. It observed that mere participation in the arbitral proceedings without raising any objection would not constitute an express waiver in writing as per the requirement of the *proviso*. However, it arrived at the conclusion that the first procedural order passed by the sole arbitrator explicitly recorded that parties had no objection to his appointment.

iii. Thus, according to the learned Single Judge, the appellants could be said to have waived the applicability of Section 12(5) by not raising an objection before the sole arbitrator in the first procedural order.

III. IMPUGNED JUDGMENT

7. Feeling aggrieved and dissatisfied with the order passed by the learned Single Judge dismissing the preliminary objection in so far as the appointment of the sole arbitrator, the appellants preferred appeals under Section 37 of the Act, 1996.

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8. The High Court, in its impugned judgment, held that the appointment of the sole arbitrator was not unilateral, as the respondent had proceeded to appoint arbitrator only pursuant to the written request made by the appellants. Therefore, it could not be said that the appellants had not consented to the appointment. The High Court further noted that the sole arbitrator had expressly obtained the consent of the parties, and at no point of time the appellants asserted that their consent was incorrectly recorded or that they had not consented.

9. The High Court observed that the appellants continued to participate in the arbitral proceedings without raising any objection. It also observed that the challenge to the jurisdiction of the arbitrator was not raised in the first instance but rather made belatedly through the Amendment Application.

10. The appellants had argued before the High Court that prior to the insertion of sub-section (5) they had no occasion to challenge the appointment of the sole arbitrator. Such a challenge, according to them, could have been raised only after the introduction of sub-section (5) of Section 12. However, the High Court held that it was immaterial as to when the amendment was introduced. The High Court took the view that, the appellants by their conduct could be said to have submitted to the jurisdiction of the sole arbitrator.

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11. In the aforesaid context, the High Court observed the fact that the appellants had called upon the respondent to appoint an arbitrator, the sole arbitrator was accordingly appointed, and having unequivocally consented to the arbitral proceedings had no bearing on the insertion of the provision through an amendment. It was further observed that even after the introduction of sub-section (5), the arbitral proceedings continued for more than two years, still the appellants did not, at any stage, raise an objection.

12. Lastly, the High Court observed that the case of the appellants cannot be equated with cases in which an objection to the appointment of the arbitrator have been raised throughout the proceedings, or at every stage.

IV. SUBMISSIONS ON BEHALF OF THE APPELLANTS

13. Mr. Navin Pahwa, the learned Senior Counsel appearing for the appellants would argue that the sole arbitrator was ineligible to act as an arbitrator as he was unilaterally appointed by the Chairman of the respondent. Such an appointment was *void ab initio* and *non-est* in law, and therefore, the arbitral awards would be a nullity. He relied on the decision of this Court in ***Bharat Broadband Network Ltd.* v. *United Telecoms Ltd.***, reported in **(2019) 5 SCC 755**, to submit that an appointment made by an ineligible person is *void ab initio*.

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14. In the same breath, Mr. Pahwa submitted that since the appointment of the arbitrator was *void*, the proceedings conducted pursuant to such appointment would also be a nullity. As a result, the awards passed by the sole arbitrator would also be contrary to the public policy of India, and thus, liable to be set aside.

15. He further submitted that where the right to appoint a sole arbitrator rests solely with one party, that party's choice would inevitably carry an element of exclusivity in determining the course of the arbitration. To fortify his submission, he relied on the decision of this Court in ***TRF Ltd.* v. *Energo Engineering Projects Ltd.***, reported in **(2017) 8 SCC 377**. He submitted that a Managing Director, ineligible to act as an arbitrator under Section 12(5) read with Seventh Schedule of the Act, 1996, could not have appointed an arbitrator or nominate any other person to be an arbitrator.

16. He highlighted that this Court has affirmed the decision in ***TRF*** (*supra*) in ***Perkins Eastman Architects DPC & Anr.* v. *HSCC (India) Ltd.***, reported in **(2020) 20 SCC 760**. In the present case, the Chairman of the respondent was ineligible to act as an arbitrator by virtue of Items 1, 5, and 12 of the Seventh Schedule respectively. Consequently, any arbitrator appointed by such an ineligible person would be, by operation of law, equally ineligible to act as an arbitrator.

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17. It was further submitted that an objection to the unilateral appointment may be raised at any stage, including for the first time in Section 34 proceedings. He added that the appellants by participating in the proceedings did not waive their right to raise an objection in terms of the *proviso* to Section 12(5) of the Act, 1996. To fortify his submission, he relied on the decision in ***Lion Engineering Consultants* v. *State of Madhya Pradesh***, reported in **(2018) 16 SCC 758**, ***Hindustan Zinc Ltd.* v. *Ajmer Vidyut Vitran Nigam Ltd.***, reported in **(2019) 17 SCC 82**, ***Kotak Mahindra Bank Ltd.* v. *Narendra Kumar Prajapat***, reported in **2023 SCC OnLine Del 3148** respectively.

18. Mr. Pahwa further submitted that the *proviso* to Section 12(5) makes it limpid that ineligibility of an arbitrator could only be waived by an "*express agreement in writing*" between the parties, and such an agreement must be entered into after disputes have arisen. To make good his case, Mr. Pahwa placed reliance on the decisions of this Court in ***Bharat Broadband*** (*supra*) and ***Central Organization for Railway Electrification* v. *ECI SPIR SMO MCML (JV) A Joint Venture Company***, reported in **(2025) 4 SCC 641** ("***CORE II***").

19. He would submit that the law requires a conscious waiver, reduced into writing and signed by both parties. In this regard, he submitted that mere participation in proceedings, filing of statement of claim, silence, or not objecting to the appointment is insufficient to constitute a waiver. In the present case, the notice of invocation of arbitration, or

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not objecting in the first procedural order, or participating in the proceedings, or filing application under Sections 17 or 29A respectively would not amount to an "*express agreement in writing*".

20. In such circumstances referred to above, the learned Senior Counsel appearing for the appellants-claimants would submit that there being merit in his appeals, the same may be allowed and the impugned judgment passed by the High Court may be set aside.

V. SUBMISSIONS ON BEHALF OF THE RESPONDENT

21. Mr. Parag Tripathi, the learned Senior Counsel appearing for the respondent would submit that no error, not to speak of any error of law, could be said to have been committed by the High Court in passing the impugned judgment.

22. Mr. Tripathi submitted that the limited question that falls for the consideration of this Court is whether the present case falls within the *proviso* to Section 12(5) of the Act, 1996. In other words, whether there was a waiver by an "*express agreement in writing*".

23. He submitted that the first procedural order recording the consent of the appellants would constitute an "*express agreement in writing*" as per the *proviso* as it was subsequent to the dispute arising between the parties. Mr. Tripathi emphasized that the provision does not provide a format for an "*express agreement*". He added that in so far as proposal

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or acceptance of any promise is made in words, the promise is said to be express. To make good this submission, he relied on the decision in the case of ***Bharat Broadband*** (*supra*).

24. It was further submitted that no objection/consent of the appellants recorded in the first procedural order acts as an acknowledgment in writing with respect to the qualifications as well as the appointment of the sole arbitrator. The appellants had also filed their statement of claim before the sole arbitrator. This is suggestive of the fact that the appellants in explicit terms had submitted to the jurisdiction of the sole arbitrator, and agreed to get the dispute resolved by the sole arbitrator.

25. Mr. Tripathi relied on ***McLeod Russel India Ltd. & Ors.* v. *Aditya Birla Finance Ltd. & Ors.***, reported in **2023 SCC OnLine Cal 330**, and ***Anuj Kumar v. Franchise India Brands Ltd.***, reported in **2023 SCC OnLine Del 2560**, to submit that the contents of pleadings or communication constitute an express agreement in writing, and the decision in ***Anuj Kumar*** (*supra*) is not in conflict with the decision of this Court in ***Bharat Broadband*** (*supra*).

26. Mr. Tripathi further submitted that although sub-section (5) of Section 12 read with Seventh Schedule of the Act, 1996 was introduced during the pendency of the arbitral proceedings, yet the appellants chose not to raise an objection to the appointment of the sole arbitrator. Accordingly, he submitted that the appellants did not raise any

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objection as to the constitution, appointment, jurisdiction, independence or impartiality of the sole arbitrator under Sections 13, 14, or 16 of the Act, 1996, respectively throughout the proceedings.

27. He added that the appellants raised the objection to the appointment of the sole arbitration only by way of an amendment to the Section 34 application. The appellants did so as an afterthought, more than three years after filing the said application.

28. In such circumstances referred to above, the learned Senior Counsel prayed that there being no merit in the appeals, the same may be dismissed.

VI. ISSUES FOR CONSIDERATION

29. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions fall for our consideration:-

i. Whether the sole arbitrator could be said to have become "*ineligible to be appointed as an arbitrator*" by virtue of sub-section (5) of Section 12 of the Act, 1996?

ii. Whether the parties could be said to have waived the applicability of sub-section (5) of Section 12 of the Act, 1996, by way of their conduct, either expressed or implied?

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iii. Whether the appellants could have raised an objection to the appointment of the sole arbitrator for the first time in an application under Section 34 of the Act, 1996?

VII. ANALYSIS

i. Whether the sole arbitrator could be said to have become "*ineligible to be appointed as an arbitrator*" by virtue of sub-section (5) of Section 12 of the Act, 1996?

30. It was submitted on behalf of the appellants herein that the sole arbitrator appointed by the Chairman of the respondent was ineligible to act as an arbitrator as he was appointed unilaterally. Further, such an appointment was *void ab initio* and *non-est* in law.

31. On the aforesaid issue, the High Court, in its impugned judgment, held that the appointment of the sole arbitrator was not unilateral, as the respondents had proceeded to appoint the arbitrator only pursuant to the written request of the appellants. Therefore, the notice invoking arbitration operated as the appellants' consent to the appointment of the arbitrator.

a. Interplay between Equal Treatment of Parties and Party Autonomy

32. In order to address this issue, we shall first look into Section 18 of the Act, 1996. It reads thus:-

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> *"18. Equal treatment of parties. – The parties shall be treated with equality and each party shall be given a full opportunity to present this case."*

33. Section 18 outlines two principles: *first*, equal treatment of parties; and *secondly*, right to a fair hearing. The principle of equal treatment of parties applies not only to the arbitral proceedings, but also to the procedure for appointment of arbitrators. The section casts a responsibility on the arbitrator to act impartially, objectively, and without bias, and also on the parties to adhere to standards of fairness. The principle of 'equal treatment of the parties' means that the parties must have the possibility of participating in the constitution of the arbitral tribunal on equal terms.

34. Equal participation of the parties in the process of appointment of arbitrators entails that the contracting parties have an equal say in the constitution of the arbitral tribunal. Such participation eliminates the likelihood of challenges to the arbitrator at a later stage. It is needless to say that independence and impartiality in arbitral proceedings would be served only when the parties participate equally at all stages.

35. It would be apposite to refer to the following observations of P.S. Narasimha, J., in ***CORE II*** (*supra*):-

> *"Distinct duties of arbitrators and arbitrating parties*
> *231. There are two distinct obligations. The first is the obligation of the parties to the agreement, and the second is the neutrality and objectivity that an arbitrator must maintain. The*

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> *obligations on the parties to the arbitration agreement to constitute an independent and impartial Arbitral Tribunal is distinct from the objectivity and impartiality that an arbitrator(s) must himself maintain. The foundation of the former is within the statutory framework, coupled with certain public policy considerations. The latter is simply the duty to act judicially, it is not superimposed by any statute or public policy, but arises because of the very nature of the calling i.e. to judge what is right and what is wrong.[…]"*
>
> (Emphasis supplied)

36. The principle of equal treatment of parties is not new to the arbitration regime in India. It has long been recognised that equal participation in the constitution of the arbitral tribunal is integral in ensuring impartiality and preserving fairness of the arbitral process. Even prior to the Amendment Act, 2015, this Court in ***Dharma Prathishthanam* v. *Madhok Construction (P) Ltd.***, reported in **(2005) 9 SCC 686**, held that a unilateral appointment, without the consent of the other party is illegal and alien to law. The relevant observations read thus:-

> *"12. On a plain reading of the several provisions referred to hereinabove, we are clearly of the opinion that the procedure followed and the methodology adopted by the respondent is wholly unknown to law and the appointment of the sole arbitrator Shri Swami Dayal, the reference of disputes to such arbitrator and the ex parte proceedings and award given by the arbitrator are all void ab initio and hence nullity, liable to be ignored. In case of arbitration without the intervention of the court, the parties must rigorously stick to the agreement entered into between the two. If the arbitration clause names an arbitrator as the one already agreed upon, the appointment of an arbitrator poses no difficulty. If the arbitration clause does not name an arbitrator but provides for the manner in which the arbitrator is to be chosen and appointed, then the parties are*

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> *bound to act accordingly. If the parties do not agree then arises the complication which has to be resolved by reference to the provisions of the Act. One party cannot usurp the jurisdiction of the court and proceed to act unilaterally. A unilateral appointment and a unilateral reference — both will be illegal. It may make a difference if in respect of a unilateral appointment and reference the other party submits to the jurisdiction of the arbitrator and waives its rights which it has under the agreement, then the arbitrator may proceed with the reference and the party submitting to his jurisdiction and participating in the proceedings before him may later on be precluded and estopped from raising any objection in that regard.[…]*"
>
> (Emphasis supplied)

37. What flows from the aforesaid is that the principle of equal treatment of parties which has always formed part of the Act, 1996, has been articulated with greater clarity and precision by the legislature through the Amendment Act, 2015. The Amendment Act, 2015, just crystallizes what was previously implicit. It makes the statutory guarantee of equal treatment in the process of appointment of the arbitrator explicit.

38. One another good reason to hold the aforesaid is that, although Section 11(2) of the Act, 1996, stipulates that the parties are free to agree on a procedure for appointing the arbitrator or arbitrators, yet this freedom is not unbridled. The exercise of party autonomy must operate within the framework of the Act, 1996. In case of conflict, mandatory provisions of the Act, 1996, prevail over the arbitration agreement.

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39. The principle of party autonomy does not obliterate the principle of equal treatment of the parties, either in the procedure for appointment of arbitrators or in the arbitral proceedings. The exercise of party autonomy has to be in consonance with the principles of equal treatment of parties, which impliedly include the independence and impartiality of arbitrators.

b. Scope and Application of sub-section (5) of Section 12 of the Act, 1996

40. The Amendment Act, 2015, was introduced with the objective of ensuring neutrality of an arbitrator when he is approached in connection with a possible appointment. Therefore, with a view to inculcate the principles of independence and impartiality, the Amendment Act, 2015, brought amendments, *inter alia*, to Section 12 of the Act, 1996. The amended section reads thus:-

> *"12. Grounds for challenge.—4 [(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—*
>
> *(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and*
>
> *(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.*
>
> *Explanation1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which*

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give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.]

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

[(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.]"

41. Sub-section (1) of Section 12 stipulates that when a person is approached to be an arbitrator, he must disclose in writing any circumstance which may fall under clauses (a) and (b) of sub-section (1) respectively. Clause (a) relates to circumstances that may give rise to justifiable doubts as to his independence or impartiality. Whereas, clause (b) relates to disclosures about the person's ability to devote

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sufficient time to the arbitration and to complete the proceedings within the prescribed time period.

42. For disclosure under clause (a), the Fifth Schedule, consisting of 34 items, is of aid. The items enumerated in the Fifth Schedule provides for the circumstances that may give rise to justifiable doubts about an arbitrator's independence or impartiality after appointment.

43. While the information required to be disclosed under clause (b) is personal to the individual and could be disclosed only by him. The disclosure has to be made in the form specified in the Sixth Schedule, and has to be made by all proposed arbitrators. It is noteworthy to mention that sub-section (1) comes into application prior to the appointment of a person as an arbitrator.

44. Sub-section (2) of Section 12 states that from the appointment of the arbitrator and throughout the arbitral proceedings, the arbitrator must, without delay, disclose in writing any circumstance referred to in sub-section (1) that arises after his appointment. However, if the arbitrator has already informed the parties of the said circumstance earlier, he is not required to make a disclosure again.

45. Sub-section (3) of Section 12 lays down two grounds for challenge to appointment of an arbitrator: *first*, if any circumstances exist that give rise to justifiable doubts about an arbitrator's independence or

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impartiality. *Secondly*, if the arbitrator does not possess the qualifications agreed to by the parties. Sub-section (4) prescribes a caution. It states that a challenge to the appointment of an arbitrator could be maintained only on the grounds that were not disclosed during or after the appointment.

46. Sub-section (5) of Section 12 states that any person whose relationship with the parties or counsel, or the subject-matter of the dispute, falls under any of the grounds mentioned in the Seventh Schedule would be ineligible to be appointed as an arbitrator. It invalidates any prior agreement to the contrary, i.e., an agreement providing for appointment of an arbitrator who would become ineligible on the application of sub-section (5). The *proviso* to the sub-section provides that after dispute arises between the parties, they may waive the applicability of this provision by entering into an express agreement in writing.

47. The Seventh Schedule lists 19 items, which also form part of the 34 items of the Fifth Schedule. In other words, the Seventh Schedule is a subset of the Fifth Schedule. It is the duty of an arbitrator to keep in mind the items enlisted in the Fifth Schedule and make a disclosure in accordance with the Sixth Schedule. Out of the said 34 items, the legislature has placed 19 items in the Seventh Schedule which make an arbitrator ineligible for appointment. We clarify with a view to obviate

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any confusion that the Seventh Schedule applies irrespective of whether the appointment has been made unilaterally.

48. If any entry in the Seventh Schedule is attracted, the consequences under Section 12(5) follow. In such circumstances, the disclosure made by the arbitrator does not save the mandate of the arbitrator, and an agreement referred to in the *proviso* assumes importance. We shall discuss the scope and application of the sub-section (5), as well as its *proviso*, in more detail in the latter part of this judgment.

49. We may now proceed to address the aforesaid issue. There have been submissions by the parties on the applicability of the Amendment Act, 2015, to the present case as the parties executed the License Agreement in 2010. Section 26 of the Amendment Act, 2015, makes it limpid that the Amendment Act, 2015, would apply to arbitral proceedings commenced on or after 23.10.2015. It is a well settled position of law that in the absence of any contrary stipulation in the agreement, arbitral proceedings commence when a notice invoking arbitration is received by the respondent. [*See*: ***Board of Control for Cricket in India*** **v.** ***Kochi Cricket Pvt. Ltd. & Ors.*****, (2018) 6 SCC 287**]

50. In the present case, the parties have not agreed to a different commencement date. As a *sequitur*, the date of commencement of the arbitral proceedings was 27.11.2015, i.e., when the notice invoking arbitration was received by the respondent. Thus, the Amendment

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Act, 2015, more particularly, sub-section (5) of Section 12 of the Act, 1996, would apply to the matter at hand.

c. Appointment of the sole arbitrator in light of sub-section (5) of Section 12 of the Act, 1996

51. There is a conspectus of decisions of this Court which lay down that, Section 12 was amended with the objective of ensuring independence and impartiality of arbitrators. By virtue of sub-section (5) of Section 12, any person whose relationship with the parties or counsel, or the dispute, whether direct or indirect, falls within any of the categories specified in the Seventh Schedule is rendered ineligible to be appointed as an arbitrator. We need not discuss all the decisions, but rather intend to refer and rely upon only a few of them.

52. In ***TRF*** (*supra*), the arbitration agreement stated that any dispute or difference between the parties in connection with the agreement shall be referred to the sole arbitration of the Managing Director or his nominee. The issue before this Court was whether the Managing Director, after becoming ineligible by operation of law, is still eligible to *nominate* an arbitrator.

In this context, a three Judge Bench of this Court categorically held that if any person falls under any of the categories mentioned in the Seventh Schedule, he would be ineligible to be appointed as an arbitrator. In the facts of the case, it was held that the Managing Director, by virtue of sub-section (5) of Section 12, acquired the

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disqualification under the Seventh Schedule. Thus, as he became ineligible by operation of law to act as an arbitrator, he could not have nominated another person as an arbitrator. The relevant observations read thus:-

> "54. *In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.*"
>
> (Emphasis supplied)

53. In a similar fact situation wherein the arbitration agreement empowered the Chairman and Managing Director of the respondent to *appoint* a sole arbitrator, the issue before this Court in ***Bharat Broadband*** (*supra*) was whether the CMD, after becoming ineligible by operation of law, is still eligible to appoint an arbitrator.

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The Court held that where a person falls within any of the categories set out in the Seventh Schedule, which could be by virtue of a relationship with the parties, or their counsel, or the subject-matter of the dispute, such a person becomes ineligible to be appointed as an arbitrator. The ineligibility could be removed after dispute has arisen, and only if the parties waive the applicability of the provision by an "*express agreement in writing*". The arbitrator becomes *de jure* unable to perform his function as he falls within the categories mentioned in the Seventh Schedule. The relevant observations read thus:-

> "*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*

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> *have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.*"
>
> (Emphasis supplied)

54. We may also look into the decision of this Court in ***Perkins Eastman*** (*supra*), where the arbitration clause empowered the Chairman and Managing Director of the respondent to *appoint* a sole arbitrator. Following ***TRF*** (*supra*), this Court held that the Managing Director was incompetent to *appoint* the sole arbitrator because he would be deemed to have an interest in the outcome of the dispute. Since, the ineligibility stems from the operation of law, not only is a person having an interest in the dispute or its outcome ineligible to act as an arbitrator, but appointment by such a person would be *ex facie* invalid. The relevant observations read thus:-

> "*20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be*

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present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an arbitrator.

21. But, in our view that has to be the logical deduction from TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Para 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought

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> *in by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and recognised by the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]*"
>
> (Emphasis supplied)

55. The Bombay High Court, in ***Lite Bite Foods Pvt. Ltd.* v. *AAI***, reported in **2019 SCC OnLine Bom 5163**, dealt with a submission similar to the one arising from Clause 75 of the License Agreement before us. It was contended that only when an employee of the respondent is the named arbitrator does such person become ineligible to act, and equally ineligible to nominate another arbitrator.

The Court held that the embargo under sub-section (5) of Section 12 is against granting any single party a unilateral or one-sided authority in constituting the arbitral tribunal. We are in complete agreement with the observations of G. S. Patel, J., that, "*The guiding principle is neutrality, independence, fairness and transparency even in the arbitral-forum selection process*". The relevant observations read thus:-

> "*23. The present case may not be within the confines of TRF Ltd., i.e. the tender approving authority is not both arbitrator and, if disqualified, the sole repository of arbitrator-appointing power. He is only the latter. But that now matters at all. Perkins Eastman clearly holds the field and it covers a situation precisely such as the present one where AAI — and only AAI — has the exclusive right of appointed (not merely nominating) an arbitrator. The question is not, as Ms. Munim would have it, the perceived bias or impartiality of the arbitrator. He may well be an unknown entity. The question is of one-sidedness in the arbitral tribunal appointment procedure itself. This is the destination to which Perkins Eastman takes us for it requires*

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> *that there be neutrality in the dispute resolution process throughout. If I might be permitted a license, in my reading of it, what Perkins Eastman says is this : that you cannot have an impartial arbitration free from all justifiable doubt if the manner in which the arbitral tribunal is constituted itself is beset by justifiable doubt*."
>
> *xxx*
>
> 25. *Ms. Munim's last submission is that the only prohibition is against a named person being the arbitrator or empowered to appoint an arbitrator. This is clearly incorrect. The interdiction runs against any one party being given unilateral or one-sided power in the matter of constitution of the arbitral tribunal*."

(Emphasis supplied)

56. The phrase "*operation of law*" mentioned in the aforesaid decisions covers the Act, 1996, as well as the Constitution of India and any other Central of State law. In ***Lombardi Engg. Ltd.* v. *Uttarakhand Jal Vidyut Nigam Ltd.***, reported in **(2024) 4 SCC 341**, where one of us, J.B. Pardiwala, J., speaking for the Bench held that an arbitration agreement has to comply with the requirements of (i) Section 7 of the Act, 1996; (ii) any other provisions of the Act, 1996, and Central/State law; (iii) Constitution of India. We may refer to the following observations for the benefit of exposition:-

> "*79.5. In State of A.P. v. P. Laxmi Devi [State of A.P. v. P. Laxmi Devi, (2008) 4 SCC 720] , this Court observed : (SCC p. 737, paras 33-34)*
>
> > "*33. According to Kelson, in every country there is a hierarchy of legal norms, headed by what he calls as the "grundnorm". If a legal norm in a higher layer of this hierarchy conflicts with a legal norm in a lower layer the former will prevail…*

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> *34. In India the grundnorm is the Indian Constitution,…"*
>
> *80. Thus, in the context of the arbitration agreement, the layers of the Grundnorm as per Kelsen's theory would be in the following hierarchy:*
> *(i) Constitution of India, 1950;*
> *(ii) Arbitration and Conciliation Act, 1996 & any other Central/State law;*
> *(iii) Arbitration agreement entered into by the parties in light of Section 7 of the Arbitration and Conciliation Act, 1996.*
>
> *81. Thus, the arbitration agreement, has to comply with the requirements of the following and cannot fall foul of:*
> *(i) Section 7 of the Arbitration and Conciliation Act;*
> *(ii) any other provisions of the Arbitration and Conciliation Act, 1996 & Central/State Law;*
> *(iii) Constitution of India, 1950."*
>
> (Emphasis supplied)

57. When an arbitration agreement is in violation of sub-section (5) of Section 12 of the Act, 1996, the parties can neither insist on appointment of an arbitrator in terms of the agreement nor would any appointment so made be valid in the eyes of law.

58. Unilateral appointments are not consistent with the basic tenet of arbitration, i.e., mutual confidence in the arbitrator. It would not be unreasonable for a party to apprehend that an arbitrator unilaterally appointed by the opposite party may not act with complete impartiality.

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59. The test to determine bias is not actual proof of bias but reasonable apprehension of bias. The moment this apprehension takes birth in the mind of a party, the trust in the arbitral proceedings dies. A Constitution Bench of this Court in ***CORE II*** (*supra*), wherein one of us, J. B. Pardiwala, J., was a part of the Bench, laid down the test for real likelihood of bias. It reads thus:-

> "*(b) Real likelihood of bias*
> *92. The nemo judex rule may be applicable where a Judge's conduct or circumstances give rise to an apprehension of bias. In such situations, the Judge does not have a financial or cause-based interest in the outcome of the dispute but provides benefit to a party by failing to be neutral and impartial. The determination of bias does not depend upon actual proof of bias but whether there is a real possibility of bias based on the facts and circumstances.*
>
> *xxx*
>
> *(iv) Indian approach to the bias test*
> *103. This Court has consistently adopted the real likelihood test to determine bias. [Rattan Lal Sharma v. Hari Ram (Co-Education) Higher Secondary School, (1993) 4 SCC 10, para 11 : 1993 SCC (L&S) 1106] In Manak Lal v. Prem Chand Singhvi [Manak Lal v. Prem Chand Singhvi, 1957 SCC OnLine SC 10, para 4] , P.B. Gajendragadkar, J. (as the learned Chief Justice then was) observed that the test to determine bias is whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision. In S. Parthasarathi v. State of A.P. [S. Parthasarathi v. State of A.P., (1974) 3 SCC 459, para 14 : 1973 SCC (Cri) 580 : 1973 SCC (L&S) 580] , K.K. Mathew, J. observed that the test of likelihood of bias is based on the reasonable apprehension of a reasonable man fully cognizant of the facts. The learned Judge further observed that the question of whether the real likelihood of bias exists is to be determined on the probabilities to be inferred from the objective*

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> *circumstances by a court or based on impressions that might reasonably be left on the minds of the aggrieved party or the public at large. [S. Parthasarathi, (1974) 3 SCC 459, p. 465, para 16. It was observed:"16. The tests of "real likelihood" and "reasonable suspicion" are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it, whether a reasonable man would in the circumstances infer that there is real likelihood of bias.[…]."*
>
> (Emphasis supplied)

60. It is apposite to understand that Section 12(5) does not prohibit unilateral appointment of an arbitrator. It provides that whenever an appointment of an arbitrator is hit by the bar under Section 12(5), the arbitrator would be ineligible to act, irrespective of whether the appointment was unilateral or with consent of both parties. In such circumstances, the parties may, in the manner provided under the *proviso*, waive the ineligibility. We shall discuss the scope and application of the *proviso* in more detail in the latter part of this judgment.

d. *De Jure* inability of the arbitrator to perform his functions

61. In the aforesaid context, it would be apposite to briefly explain what constitutes as *de jure* ineligibility under Section 12(5). The expression *de jure* denotes a condition rooted in strict compliance with the requirements of law. *De jure* inability refers to a situation in which an arbitrator is *legally* incapable of performing his functions and is, by operation of law, barred from continuing in office. Such inability strikes at the very root of the arbitrator's authority to act, thereby

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affecting his inherent capacity to discharge his functions as an arbitrator. It is this legal incapacity, arising from statutory disqualifications, that results in the termination of the "*mandate of an arbitrator*" under Section 14(1)(a) of the Act, 1996.

62. *De jure* inability referred to under Section 14(1)(a) may arise from the provisions of the Act, 1996, or from any other existing law that renders an arbitrator legally incapable of performing his functions. As regards *de jure* ineligibility, it flows from sub-section (5) of Section 12 read with the Seventh Schedule, which disqualifies certain persons from being appointed or continuing as arbitrators.

63. In other words, the ineligibility under Section 12(5) precedes *de jure* inability under Section 14(1)(a). In other words, *de jure ineligibility* is the specie and *de jure inability* is the genus. To put this in context, *de jure* inability is determined when an aggrieved party is able to indicate that the circumstances under the Seventh Schedule have been met.

64. It would be worthwhile to refer to the observations made by this Court in ***HRD Corpn* v. *GAIL (India) Ltd.***, reported in **(2018) 12 SCC 471**. It was observed thus:-

> *"12. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become "ineligible" to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5)*

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> *read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible".[…]"*
>
> (Emphasis supplied)

65. The Madras High Court in ***Clarke Energy India Pvt. Ltd.* v. *SAS EPC Solution Pvt. Ltd. & Anr.***, reported in **2021 SCC OnLine Mad 6121**, observed thus:-

> "*22. Turning to de jure inability to perform functions, it should be noted at the threshold that the expression is not defined in the Arbitration Act. The word 'de jure' in Latin means "as a matter of law". It has been defined in Black's Law Dictionary, 11 Edition (2019), as "existing by right or according to law". Thus, it appears that the expression de jure applies undoubtedly to legal disability. One illustration of legal disability would be if the arbitrator is ineligible in terms of the Seventh Schedule. This was expressly dealt with by the Hon'ble Supreme Court in HRD Corporation as well as Bharat Broadband.[…] However, ineligibility is only one illustration of de jure inability to function. It is conceivable that an arbitrator may be afflicted by some form of cognitive impairment. If such cognitive impairment is serious enough to lead to an inference that such arbitrator is not of sound mind, whether on account of schizophrenia, Alzheimer's disease or the like, as understood in the Indian Contract Act, 1872, it would result in de jure inability to function even if the arbitrator concerned declines to withdraw. Less serious forms of cognitive impairment, such as bipolar disorder and the like, may, on the other hand, may pose greater challenges. Besides, an arbitrator may be adjudged insolvent after entering upon reference. By relying upon the applicable insolvency statute, it could be*

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contended with a fair measure of justification that he is de jure unable to function."

(Emphasis supplied)

66. It would be apposite to refer to the relevant Items under the head "*Arbitrator's relationship with the parties or counsel*" in the Seventh Schedule of the Act, 1996, for the purpose of matter at hand. It reads thus:-

> "*THE SEVENTH SCHEDULE*
> *[See section 12(5)]*
> *Arbitrator's relationship with the parties or counsel*
> *1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.*
> *2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.*
> *xxx*
> *5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.*
> *xxx*
> *12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.*
> *13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case. […]*"

67. From the above exposition of law, the Chairman of the respondent was wholly ineligible to appoint an arbitrator. The Items 1, 2, 5, 12, and 13 of the Seventh Schedule respectively, clearly attach to the Chairman of the respondent. Once the Chairman is rendered ineligible by operation of law, he cannot nominate or appoint another person as an arbitrator.

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To illustrate, one who cannot sit on a chair himself cannot authorise another to sit on it either.

68. We are in complete agreement that the present case is squarely covered by the decisions of this Court in ***Perkins Eastman*** (*supra*) and ***Bharat Broadband*** (*supra*) respectively. The unilateral appointment of a sole arbitrator is *void ab initio*, and the sole arbitrator so appointed is *de jure* ineligible to act as an arbitrator in terms of Section 12(5) read with the Seventh Schedule of the Act, 1996.

69. Thus, we have no hesitation in saying that its High Court, in the impugned judgment, committed an error in holding that the appointment was not unilateral merely because the respondent proceeded to appoint the sole arbitrator pursuant to notice invoking arbitration.

70. We would like to clarify that a notice under Section 21 of the Act, 1996, is an expression to set the arbitration agreement into motion upon arising of disputes between the parties. The section states that the date of commencement of arbitration would be the date on which the recipient receives the notice from the claimant that the dispute be *referred to arbitration*. The notice acts as a communication that the sender is aggrieved and seeks to invoke the arbitration agreement. It does not, by itself, operate as consent to any appointment to be made in the future.

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ii. Whether the parties could be said to have waived the applicability of sub-section (5) of Section 12 of the Act, 1996, by way of their conduct, either expressed or implied?

71. It was submitted on behalf of the appellants herein that the appellants never waived their right to object in terms of the *proviso* to Section 12(5) of the Act, 1996. The *proviso* to Section 12(5) requires that the ineligibility of an arbitrator could only be waived by an "*express agreement in writing*" between the parties, and such agreement must be entered into after the dispute has arisen. It was further canvassed by the appellants that no agreement was executed, signed, or even contemplated by the parties to this effect after the dispute arose.

72. In this regard, the respondent vociferously submitted that the present case falls within the *proviso* to Section 12(5). To indicate the same, instances like recording of "no objection" in the first procedural order, submission of statement of claim, the joint request to extend the mandate under Section 29A, and continued participation in the proceedings, were highlighted to submit that the appellants had waived their right to object. The procedural order constitutes an "*express agreement in writing*" and satisfies the requirement under the *proviso* to Section 12(5) of the Act, 1996. At the cost of repetition, the procedural order reads thus:-

"PROCEDURAL ORDER NO. 1
With

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> *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.[…]"*
>
> (Emphasis supplied)

73. On the aforesaid issue, the High Court, in its impugned judgment, observed that the sole arbitrator obtained the consent of the parties for the purpose of continuing to arbitrate in the form of the procedural order. What weighed with the High Court was that the appellants participated in the proceedings, which continued for over two years, and did not they invoke Section 12(5), or object against the jurisdiction of the arbitrator at any stage.

a. Meaning and Import of the expression "*express agreement in writing*" used in *proviso* to sub-section (5) of Section 12 of the Act, 1996

74. Sub-section (5) of Section 12 of the Act, 1996, reads thus:-

> *"[(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.]"*

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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.

76. The *proviso* to sub-section (5) of Section 12 stipulates that parties, after disputes have arisen, must expressly agree in writing to waive the ineligibility of the proposed arbitrator. This impliedly means that the parties are waiving their right to object to the arbitrator's ineligibility in terms of Section 12(5) of the Act, 1996.

77. Waiver means the intentional giving up of a right. It involves a conscious decision to abandon an existing legal right, benefit, claim, or privilege that a party would otherwise have been entitled to. It amounts to an agreement not to enforce that right. A waiver can occur only when the person making it is fully aware of the right in question and, with complete knowledge, chooses to give it up. [*See*: ***State of Punjab* v. *Davinder Pal Singh Bhullar*, (2011) 14 SCC 770**]

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

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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.

79. The expression "*express agreement in writing*" demonstrates a deliberate and informed act that although a party is fully aware of the arbitrator's ineligibility, yet it chooses to forego the right to object against the appointment of such an arbitrator. The requirement of an express agreement in writing has been introduced as it reflects awareness and a conscious intention to waive the right to object under sub-section (5) of Section 12. A clear manifestation of the expression of waiver assumes greater importance in light of the fact that the parties are overcoming a restriction imposed by law.

80. It is in the same breath we say that appointment of an arbitrator with the consent of both parties is the general rule, while unilateral appointment is an exception. When one party appoints an arbitrator unilaterally, even if its own consent is implicit, the consent of the opposite party stands compromised, and the choice of the former is effectively imposed upon the latter.

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81. It is **only** through an express agreement in writing, waiving the bar under sub-section (5) of Section 12, that the other party can be said to have voluntarily consented to the unilateral appointment of such an arbitrator. The *proviso* conveys that the arbitrator, although ineligible to be appointed, yet can continue to perform his functions, as it is oriented towards facilitating party autonomy. Thus, the *proviso* reinforces party autonomy and equal treatment of parties in arbitration.

82. In other words, even though the appointment had been made by one of the parties, by the act of entering into an agreement in writing, the other party expresses its consent. The manner of the agreement prescribed by the statute demonstrates voluntariness by the parties.

83. In a case of unilateral appointment, the waiver mentioned in the *proviso* is an indication of party autonomy in two ways: *first*, that the parties, by entering into an agreement, are waiving the bar under Section 12(5). *Secondly*, by the act of entering into an agreement, the parties, more particularly, the non-consenting party, are expressing their consent for appointment of the proposed arbitrator.

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

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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.

85. The conscious use of the prefatory expression also serves to differentiate such waiver from 'deemed waiver' as stipulated under Section 4 of the Act, 1996. We must be mindful of the fact that if the legislature intended that waiver under Section 12(5) could similarly arise by implication or conduct as mentioned under Section 4, it would have refrained from introducing a heightened and mandatory requirement, more particularly, in light of the rigours of the Seventh Schedule. The statutory design therefore makes it evident that the bar under Section 12(5) can be removed only by a clear, unequivocal, and written agreement executed after the dispute has arisen, and not by any form of tacit acceptance or procedural participation.

86. The mandate of an express agreement in writing in the present case may looked at from one another angle. The unilateral appointment of an arbitrator is assessed from the viewpoint of the parties. However, when the parties later execute an express written agreement waiving the ineligibility of the proposed arbitrator, the position gets altered. Such written waiver supplies the very consent that was previously missing, thereby placing the appointment on the same footing as a

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mutually agreed appointment and addresses concerns regarding neutrality and fairness.

87. In ***Bharat Broadband*** (*supra*), this Court categorically held that the expression "*express agreement in writing*" refers to an agreement made in words and cannot be inferred by conduct. The word "express" denotes that the agreement must be entered into with complete knowledge that although the proposed arbitrator is ineligible to be appointed as an arbitrator, yet they express their confidence in him to continue as the arbitrator. The relevant observations read thus:-

> "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 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."*

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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. Energo Engg. 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. Energo Engg. 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 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

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> *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)

88. In ***CORE II*** (*supra*), this Court underscored the rationale behind the first two essentials of the *proviso*. It reads thus:-

> "*121. An objection to the bias of an adjudicator can be waived. [Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 808, para 30 : (2016) 3 SCC (Civ) 492 : (2016) 3 SCC (Cri) 173 : (2016) 2 SCC (L&S) 253]* <u>*A waiver is an intentional relinquishment of a right by a party or an agreement not to assert a right.*</u> *[State of Punjab v. Davinder Pal Singh Bhullar, (2011) 14 SCC 770, para 41 : (2012) 4 SCC (Civ) 1034 : (2012) 4 SCC (Cri) 496 : (2014) 1 SCC (L&S) 208]* <u>*The Arbitration Act allows parties to waive the application of Section 12(5) by an express agreement after the disputes have arisen. However, the waiver is subject to two factors. First, the parties can only waive the applicability of Section 12(5) after the dispute has arisen. This allows parties to determine whether they will be required or necessitated to draw upon the services of specific individuals as arbitrators to decide upon specific issues. To this effect, Explanation 3 to the Seventh Schedule recognises that certain kinds of arbitration such as maritime or commodities arbitration may require the parties to draw upon a small, specialised pool.*</u> *["Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently, to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above."]* <u>*The second requirement of the proviso to Section 12(5) is that parties must consciously abandon their*</u>

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> *existing legal right through an express agreement. Thus, the Arbitration Act reinforces the autonomy of parties by allowing them to override the limitations of independence and impartiality by an express agreement in that regard.*"
>
> (Emphasis supplied)

89. What can be discerned from the above discussion is that the ineligibility of an arbitrator can be waived only by an express agreement in writing. In the present case, there is no agreement in writing, after the disputes arose, waiving the ineligibility of the sole arbitrator or the right to object under Section 12(5) of the Act, 1996.

90. The conduct of the parties is inconsequential and does not constitute a valid waiver under the *proviso*. The requirement of the waiver to be made expressly in the form of agreement in writing ensures that parties are not divested of their right to object inadvertently or by procedural happenstance.

91. We are not impressed by the aforesaid submission of the respondent for all the reasons stated above. The following decisions of this Court and the High Court of Delhi respectively deal with the all the factual submissions made by the respondent to submit that the present case falls within the *proviso* to Section 12(5) of the Act, 1996.

b. "Statement of Claim" as a parameter of waiver

92. One another submission that was canvassed on behalf of the respondent herein is that the appellants participated in the arbitral

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proceedings by submitting their statement of claim wherein it was stated that they submit to the jurisdiction of the arbitrator. The observations of this Court in paragraph 20 of ***Bharat Broadband*** (*supra*) squarely cover this issue. It was held that filing a statement of claim cannot be equated to an "*express agreement in writing*" in terms of *proviso* to Section 12(5).

c. "Extension of Time" under Section 29A of the Act, 1996 as a parameter of waiver

93. Recently, in ***Hindustan Construction Co. Ltd.* v. *Bihar Rajya Pul Nirman Nigam Ltd.***, reported in **2025 SCC OnLine SC 2578**, wherein one of us, J. B. Pardiwala, J., was a part of the Bench, held that Section 29A amounts to a valid waiver under Section 4, save in cases of statutory ineligibility under Section 12(5) of the Act, 1996. The relevant observations read thus:-

> "*13.8. In the present case, the respondents had ample opportunity to object. Instead, both parties jointly moved for extension under Section 29A, not once but thrice. This leads directly to the interplay between Sections 4, 12(5) and 29A.*
>
> *13.9. Section 29A empowers courts to extend the mandate of an arbitral tribunal, either on a party's application or upon sufficient cause. Its object is to prevent termination of proceedings by efflux of time and to ensure continuity. A joint application under Section 29A stands on a distinct footing from ordinary acts of participation such as filing pleadings. When both parties jointly seek an extension, they signify continued consent and confidence in the tribunal. Under Section 29A(5), even a single party may apply; the other is free to oppose. The*

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> *Court may, in its discretion, extend the mandate with or without substituting the arbitrator.*
>
> *13.10. Thus, when a party joins in seeking extension under Section 29A despite having the opportunity to object or seek termination, it signifies a higher degree of consent. However, such consent cannot be equated with an express written waiver under Section 12(5). The statutory language is categorical: only an express written post-dispute waiver can cure Seventh Schedule ineligibility.*"
>
> (Emphasis supplied)

94. In ***Man Industries (India) Ltd.* v. *Indian Oil Corporation Ltd.***, reported in **2023 SCC OnLine Del 3537**, the petitioner had filed two applications under Section 29A of the Act, 1996, seeking an extension of time for completion of the arbitral proceedings. The respondent therein had contended that filing of an application under Section 29A would satisfy the requirement of the *proviso* to Section 12(5), and that the ineligibility attached to the sole arbitrator would thereby stand removed. The Court observed thus:-

> "*11. He submits that in the present case, the petitioner has never challenged the eligibility of the learned Sole Arbitrator to adjudicate on the disputes between the parties. He submits that, in fact, the learned Arbitrator was appointed at the request of the petitioner. The learned Arbitrator before entering upon the reference submitted his disclosure as required under Section 12 of the Act. The petitioner never raised any objection to the eligibility of the learned Sole Arbitrator. Thereafter, the petitioner, in fact, twice filed applications under Section 29A of the Act seeking extension of the mandate of the learned Arbitrator. He submits that the filing of the application under*

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> *Section 29A of the Act by the petitioner would, in fact, satisfy the Proviso to Section 12(5) of the Act and the ineligibility, if at all, attached to the learned Sole Arbitrator would be waived.*
>
> *xxx*
>
> *22. In view of the above authorities, there can be no doubt that the learned Arbitrator appointed by the respondent was de jure ineligible to act as such. The petitioner by its participation in the arbitration proceedings or by its filing of applications under Section 29A of the Act seeking extension of the mandate of the learned Arbitrator, cannot be said to have waived the ineligibility of the learned Arbitrator under Section 12(5) of the Act, and, therefore, the Arbitral Award passed by the learned Arbitrator is invalid.*"
>
> (Emphasis supplied)

d. "Continued Participation" as a parameter of waiver

95. In ***Govind Singh* v. *Satya Group Pvt. Ltd.***, reported in **2023 SCC OnLine Del 37**, the contention before the Delhi High Court was that the appellant therein by its conduct had waived its right to object to the unilateral appointment of the sole arbitrator. The Court categorically held that it is not necessary to even examine whether the appellant had raised an objection. Even if the appellant had participated in the proceedings without raising any objection, it cannot be said that he had waived his right under Section 12(5) of the Act, 1996. The relevant observations read thus:-

> "*19. The contention that the appellant by its conduct has waived its right to object to the appointment of the learned Arbitrator is also without merit. The question whether a party can, by its conduct, waive its right under Section 12(5) of the A&C Act is no longer res integra. The Supreme Court in the case of Bharat Broadband Network Limited v. United*

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> *Telecoms Limited : (2019) 5 SCC 755 had explained that any waiver under Section 12(5) of the A&C Act would be valid only if it is by an express agreement in writing. There is no scope for imputing any implied waiver of the rights under Section 12(5) of the A&C Act by conduct or otherwise.[…]*
>
> *20. Thus, it is not necessary to examine the question whether the appellant had raised an objection to the appointment of the learned Arbitrator. Even if it is assumed that the appellant had participated in the arbitral proceedings without raising any objection to the appointment of the learned Arbitrator, it is not open to hold that he had waived his right under Section 12(5) of the A&C Act. Although it is not material, the record does indicate that the appellant had objected to the appointment of respondent no. 2 as an arbitrator.*"
>
> (Emphasis supplied)

96. The net effect of the aforesaid is that a notice invoking the arbitration clause under Section 21 of the Act, 1996, a procedural order, submission of statement of claim by the appellants, the filing an application seeking interim relief, or a reply to an application under Section 33 of the Act, 1996, cannot be countenanced to mean "*an express agreement in writing*" within the meaning of the *proviso* to sub-section (5) of Section 12 of the Act, 1996.

97. One could argue that a miscreant party may participate in the arbitral proceedings up to the passing of the award, despite having full knowledge of the arbitrator's ineligibility. While after an adverse award is rendered, such a party may then seek to challenge it with a view to having it set aside. Such an apprehension is reasonable,

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however, to obviate the possibility of such misuse, the party making unilateral appointment must endeavour to enter into an express written agreement as stipulated in the *proviso* to Section 12(5), so as to safeguard the proceedings from being rendered futile.

98. Thus, all the High Court decisions taking a contrary view to the present judgment would stand overruled.

iii. Whether the appellants could have raised an objection to the appointment of the sole arbitrator for the first time in an application under Section 34 of the Act, 1996?

99. It was submitted by the appellants that an objection in relation to *de jure* ineligibility of the sole arbitrator could be raised at any stage, including for the first time in proceedings under Section 34 of the Act, 1996. In this regard reliance was placed on Section 34(2)(b) which empowers the court to set aside an award if "*the Court finds that*" it is in conflict with the public policy of India. Therefore, even if the objection to unilateral appointment is not raised by a party, the Court may itself declare an award to be null and void due to unilateral appointment of the arbitrator in terms of Section 34(2)(b).

100. On the contrary, the respondent submitted that since the appellants did not raise any objection to the constitution, appointment or jurisdiction of the sole arbitrator under Sections 13 or 14 of the Act,

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1996, respectively, during the pendency of the arbitration, they are barred from raising it under an application under Section 34.

101. On the aforesaid issue, the High Court held that the present case cannot be equated with cases in which an objection to the appointment of the arbitrator has been raised throughout the proceedings, or at every stage. Further, even after sub-section (5) of Section 12 was introduced in the statute, the appellants did not approach the court under Section 14 of the Act, 1996, challenging the jurisdiction of the arbitrator. Thus, the challenge to the appointment of the sole arbitrator was clearly an "*afterthought*".

a. Challenge to the ineligibility of the arbitrator *during* the proceedings

102. The law in this regard is fairly settled. Where a party is aggrieved by the ineligibility of an arbitrator under Section 12(5), it may directly approach the court under Section 14 of the Act, 1996. There is no doubt that when an arbitrator is ineligible under Section 12(5), i.e., he lacks inherent jurisdiction to hold the position, his mandate stands automatically terminated, and it is not necessary for the parties to challenge his appointment under Section 12 read with Section 13. When such a challenge is made, the court is required to determine whether the arbitrator suffers from *de jure* inability under Section 14(1)(a) of the Act, 1996.

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103. An application under Section 14 is made for the purpose of terminating the mandate of the arbitrator, and, consequently, a substitute arbitrator is appointed in terms of Section 15(2). As regards where the mandate of the arbitrator has been terminated with the consent of both the parties under Section 15(1)(b), it is not required for the parties to approach the court to seek termination of the mandate of the arbitrator, because it has been terminated by the parties themselves.

104. It is apposite to understand that in a case of ineligibility of the arbitrator, the substitution of the arbitrator is sought because the termination of mandate of the arbitrator does not result in the termination of arbitral proceedings. The proceedings remain intact, only the composition of the arbitral tribunal changes. The termination of mandate of the arbitrator is distinguishable from the termination of the arbitral proceedings and of the arbitral tribunal as well. By substitution of the arbitrator, the proceedings would commence from thereon and save the parties from initiating fresh proceedings.

105. In ***HRD*** (*supra*), it was held that once an arbitrator becomes ineligible to act as an arbitrator, he is rendered *de jure* incapable of performing his functions. In such circumstances, it is not necessary for the parties to approach the arbitral tribunal under Section 13, for an arbitrator who is *de jure* ineligible lacks the inherent jurisdiction to proceed any further. In such a case, an application under Section 14(2) must be filed

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before the court for termination of the mandate of the arbitrator. The relevant observations read thus:-

> *"12. […] Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible". In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds.[…]."*
>
> (Emphasis supplied)

106. We may refer with profit to the decision of this Court in ***Bharat Broadband*** (*supra*), wherein it was observed that when a person becomes "ineligible" to be appointed as an arbitrator, the challenge to such appointment does not lie before the arbitrator himself. It was further observed that an appointment hit by Section 12(5) attracts

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Section 14(1)(a), as the arbitrator becomes *de jure* unable to perform his functions. As a result, the mandate of the arbitrator stands terminated. The relevant observations read thus:-

> *"17. […] 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.[…]."*
>
> (Emphasis supplied)

107. In ***Chennai Metro Rail Ltd.* v. *Transtonnelstroy Afcons (JV)***, reported in **(2024) 6 SCC 211**, this Court held that a party aggrieved by the ineligibility of an arbitrator may approach the court under Section 14(1)(a) of the Act, 1996. The relevant observations read thus:-

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> *"29. At this stage it would be crucial to notice that the Court made a differentiation. It stated, firstly, that a disclosure in writing about circumstances likely to give justifiable doubts is to be made, at the stage of appointment, and then stated that the disclosure can be challenged under Sections 12(1) to 12(4) read with Section 13. The Court however underlined that in the next category where the person became ineligible to be appointed as arbitrator, there was no need for a challenge to be laid before the arbitrator. In such circumstances outlined in Section 12(5), the party aggrieved could directly approach the court under Section 14(1)(a). It was further underlined that in all cases under Section 12(5), there is no challenge procedure to be availed of and that if the arbitrator continues at such, the ground of being unable to perform his function since he falls in any of the categories enumerated in the Seventh Schedule, the party concerned may apply to the court.*
>
> *xxx*
>
> *33. The decisions in HRD [HRD Corpn. v. GAIL, (2018) 12 SCC 471 : (2018) 5 SCC (Civ) 401] and Bharat Broadband [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] are unequivocal and to the effect that the issue of bias should be raised before the same Tribunal at the earliest opportunity. The advertence of the time-limit of 15 days is nothing but a statutory incorporation of that idea. However, when the grounds enumerated in the Seventh Schedule occur or are brought to the notice of one party unless such party expressly waives its objections, it is ipso facto sufficient for that party, to say that the Tribunal's mandate is automatically terminated. The party aggrieved then can go ahead and challenge the Tribunal's continuation with the proceedings under Section 14."*

(Emphasis supplied)

108. The Constitution Bench in ***CORE II*** (*supra*) affirmed the aforementioned decisions and reiterated that the ineligibility of a

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person to act as an arbitrator is a matter of law and goes to the root of the appointment. Thus, when an arbitrator is *de jure* unable to perform his function, his mandate would be automatically terminated under Section 14(1)(a), and the parties would be within their rights to apply to the court under Section 14(2) for termination of the arbitrator's mandate and appointment of a substituted arbitrator.

b. Challenge to the ineligibility of the arbitrator *after* arbitral award has been passed

109. When an award has been passed, the proceedings before the arbitral tribunal conclude, leaving no possibility of substituting the arbitrator at this stage. In other words, once an award is passed, the mandate of the arbitral tribunal also arrives at a conclusion. In such circumstances, a party aggrieved by the arbitrator's ineligibility may challenge the award by filing an application under Section 34 of the 1996 Act, as an award passed by an ineligible arbitrator is nullity, *non-est*, or *void ab initio*, and against the public policy of India.

110. Even where an interim award has been passed, it is liable to be set aside, as it is not capable of being enforced. The fate of an interim award and that of an arbitral award, in this regard, is identical. In either circumstance, the parties would be required to initiate fresh arbitration proceedings as per law. In ***Alpro Industries* v. *Ambience (P) Ltd.***, reported in **2025 SCC OnLine Del 8373**, the petitioner assailed an

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interim award under Section 34 on the primary ground of unilateral appointment. The Court observed thus:-

> "*41. In light of the findings in Mahavir Prasad (supra) and my findings that the unilateral appointment of the Sole Arbitrator in the present case is invalid and there has been no express waiver in writing in terms of the proviso to clause 12(5) of the Act, the Impugned Interim Award is liable to be set aside. Consequently, the issue raised by the respondents as to whether the Impugned Interim Award constitutes an 'interim award' or not would not be relevant. The Court cannot permit continuation of arbitral proceedings before an Arbitral Tribunal which would be a nullity and cannot result into an enforceable award. Hence, I do not deem it necessary to go into the merits of the challenge to the Impugned Interim Award.*"
>
> (Emphasis supplied)

111. An award passed by an arbitrator who is found to be ineligible cannot be enforced. In ***CORE II*** (*supra*), a Constitution Bench of this Court held that the concept of "*public policy of India*" and "*fundamental policy of Indian law*" means complying with statues and judicial precedents, and principles of natural justice. It was categorically held that "*the most basic notions of morality and justice*" mentioned in the *Explanation 1* to Section 34(b) includes bias. The observations of this Court in paragraphs 163 and 164 respectively reproduced hereinbelow squarely apply to the facts of the present case. The relevant extract has been reproduced thus:-

> "*158. Section 34(2)(b) specifically provides that an arbitral award may be set aside if the court finds that the arbitral award conflicts with the public policy of India. The provision further*

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clarifies "public policy of India" to only mean that : (i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

159. This Court has construed the expression "public policy of India" appearing under Section 34 to mean the "fundamental policy of Indian law". [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131, para 34 : (2020) 2 SCC (Civ) 213; NHAI v. P. Nagaraju, (2022) 15 SCC 1 : (2024) 2 SCC (Civ) 414, para 39] The concept of "fundamental policy of Indian law" has been held to cover compliance with statutes and judicial precedents, adopting a judicial approach, and compliance with the principles of natural justice. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163, para 11 : (2019) 2 SCC (Civ) 293] In OPG Power Generation (India) (P) Ltd. v. Enexio Power Cooling Solutions (India) (P) Ltd. [OPG Power Generation (India) (P) Ltd. v. Enexio Power Cooling Solutions (India) (P) Ltd., (2025) 2 SCC 417 : (2025) 1 SCC (Civ) 54] , this Court explained the concept of "fundamental policy of Indian law" thus : (SCC pp. 467-68, paras 55-56)

> *"55. … The expression "in contravention with the fundamental policy of Indian law" by use of the word "fundamental" before the phrase "policy of Indian law" makes the expression narrower in its application than the phrase "in contravention with the policy of Indian law", which means mere contravention of law is not enough to make an award vulnerable. To bring the contravention within the fold of fundamental policy of Indian law, the award must contravene all or any of such fundamental principles that provide a basis for administration of justice and enforcement of law in this country.*
>
> *56. Without intending to exhaustively enumerate instances of such contravention, by way of illustration, it could be said that*

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(a) violation of the principles of natural justice;
(b) disregarding orders of superior courts in India or the binding effect of the judgment of a superior court; and
(c) violating law of India linked to public good or public interest, are considered contravention of the fundamental policy of Indian law."

160. In Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd. [Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2024) 7 SCC 197, para 34 : (2024) 3 SCC (Civ) 780] , this Court held that the most basic notions of morality and justice under the concept of "public policy" will include bias.

161. […] As a corollary, Section 34 places a responsibility on the Arbitral Tribunals to ensure that the arbitral proceedings are consistent with the fundamental policy of Indian law. [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, pp. 69-70, para 70:"70. Arbitrators, like the courts, are equally bound to resolve and decide disputes in accordance with the public policy of the law. Possibility of failure to abide by public policy consideration in a legislation, which otherwise does not expressly or by necessary implication exclude arbitration, cannot form the basis to overwrite and nullify the arbitration agreement. This would be contrary to and defeat the legislative intent reflected in the public policy objective behind the Arbitration Act. Arbitration has considerable advantages as it gives freedom to the parties to choose an arbitrator of their choice, and it is informal,flexible and quick. Simplicity, informality and expedition are hallmarks of arbitration. Arbitrators are required to be impartial and independent, adhere to natural justice, and follow a fair and just procedure. Arbitrators are normally experts in the subject and perform their tasks by referring to facts, evidence, and relevant case law."]

xxx

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> *163. 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.*
>
> *164. 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."*
>
> (Emphasis supplied)

112. What emerges from the foregoing is that the appellants were well within their right to challenge the ineligibility of the sole arbitrator in an application under Section 34 of the Act, 1996.

c. Challenge to the ineligibility of the arbitrator *at any stage* of the proceedings

113. A challenge to an arbitrator's ineligibility could be raised at any stage because an award passed in such circumstance is *non-est*, i.e., it carries no enforceability or recognition in law. We say so because an arbitrator

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does not possess the jurisdiction to pass an award. In arbitration, the parties vest the jurisdiction in the tribunal by virtue of a valid arbitration agreement and an appointment made in accordance with the provisions of the Act, 1996. This jurisdiction is grounded in the consent of the parties as explained in the foregoing paragraphs of this judgment.

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

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

116. This Court, in catena of decisions, has held that the validity of a decree can be challenged even in execution proceedings if the court passing such decree lacked subject-matter jurisdiction over the dispute. As a

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decree passed by a court without jurisdiction goes to the root of the matter. Any decision passed by a court lacking jurisdiction would be *coram non judice*, since a court cannot give itself jurisdiction. No act of the parties can cure an inherent lack of jurisdiction.

117. In ***Hira Lal Patni* v. *Kali Nath***, reported in **1961 SCC OnLine SC 42**, this Court held that competence of a court to decide a case goes to the root of the matter, and incompetency results in inherent lack of jurisdiction. As a result, a decision rendered by a court that lacks jurisdiction is a nullity. The relevant observations read thus:-

> *"4. […] The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it. But in the instant case there was no such inherent lack of jurisdiction. The decision of the Privy Council in the case of Ledgard v. Bull [13 Indian Appeals 134] is an authority for the proposition that consent or waiver can cure defect of jurisdiction but cannot cure inherent lack of jurisdiction. In that case, the suit had been instituted in the Court of the Subordinate Judge, who was incompetent to try it. By consent of the parties, the case was transferred to the Court of the District Judge for convenience of trial. It was laid down by the Privy Council that as the court in which the suit had been originally instituted was entirely lacking in jurisdiction, in the sense that it was incompetent to try it, whatever happened subsequently was null and void because consent of parties could not operate to confer jurisdiction on a*

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> *court which was incompetent to try the suit. […] It is well settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like Section 21 of the Code of Civil Procedure.[…]"*
>
> (Emphasis supplied)

118. We may look into the decision of this Court in ***Hindustan Zinc Ltd.* v. *Ajmer Vidyut Vitran Nigam Ltd.***, reported in **(2019) 17 SCC 82**. The submission canvassed before this Court was that an objection to jurisdiction could not have been raised in a proceeding under Section 37 of the Act, 1996, once the parties had consented to arbitration. In the said decision it was held that an objection to the inherent lack of jurisdiction can be taken at any stage and also in collateral proceedings. Furthermore, that a decree passed without jurisdiction is a nullity. The relevant observations read thus:-

> *"17. We are of the view that it is settled law that if there is an inherent lack of jurisdiction, the plea can be taken up at any stage and also in collateral proceedings. This was held by this Court in Kiran Singh v. Chaman Paswan [Kiran Singh v. Chaman Paswan, (1955) 1 SCR 117 : AIR 1954 SC 340] as follows : (SCR p. 121 : AIR p. 342, para 6)*
>
> > *"6. … It is a fundamental principle well-established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A*

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> *defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was coram non judice, and that its judgment and decree would be nullities."*
>
> *18. Therefore, it is a little difficult to countenance Shri Vaidyanathan's argument that having consented, the respondent cannot now turn around and challenge the very appointment of the arbitrator as being invalid and without jurisdiction."*
>
> (Emphasis supplied)

119. In ***Bhim Bahadur* v. *Vikram Singh***, reported in **2015 SCC OnLine Utt 1563**, when the issue before the High Court was whether the subject land therein was agricultural or *abadi* in nature. The Court held that the matter had to be referred to a revenue court under the Uttar Pradesh Zamindari Abolition & Land Reforms Act. The relevant observations read thus:-

> *"11. In this regard, the law is well established to the effect that competency of the jurisdiction or the lack of the same in a particular Court cannot be determined by either of the parties through their pleadings, viz., the Court having jurisdiction under the law to decide a particular issue cannot be kept away from deciding the same on the basis of averments made by the parties and, in the same manner, the jurisdiction cannot be conferred on a particular Court on the basis of pleadings and admission thereof to decide a particular issue wherefor the law does not confer jurisdiction to the Court."*

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(Emphasis supplied)

120. All that we are trying to convey is that, in civil law, the law itself confers subject-matter jurisdiction on specific courts. For instance, a suit seeking a declaration on the validity of marriage before the Civil Court is not maintainable, as such disputes fall within the exclusive jurisdiction of the Family Court. Similarly, in arbitration, the consent of parties confers subject-matter jurisdiction, i.e., the authority to decide the dispute. When an arbitral tribunal is unilaterally constituted, such consent is absent, thereby divesting the tribunal of subject-matter jurisdiction. The Act, 1996, does not recognize the conferral of jurisdiction on an arbitral tribunal without the consent of the parties. By entering into an express agreement in writing as per the *proviso* to Section 12(5), the parties not only waive the ineligibility of the proposed arbitrator but also consent to his appointment.

121. Before we part, we deem it fit to observe that an arbitrator is better equipped with the position of law on appointments, more particularly, unilateral appointments. Therefore, it becomes incumbent upon the arbitrator that upon entering reference and at the very first hearing, to ensure from the parties that they are willing to participate in the proceedings and to insist upon a written agreement waiving the requirement of Section 12(5) of the Act, 1996.

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122. Further, in such circumstances referred to above, if any party does not appear despite receipt of notice, the arbitrator shall not proceed further and shall immediately withdraw from the arbitral proceedings. The arbitrator must, along with the waiver agreement, record the minutes even when the parties are cooperating. This would certainly save time and avoid multiplicity of proceedings.

VIII. CONCLUSION

123. A conspectus of the aforesaid detailed discussion on the position of law as regards Section 12 of the Act, 1996, is as follows:-

i. The principle of equal treatment of parties provided in Section 18 of the Act, 1996, applies not only to the arbitral proceedings but also to the procedure for appointment of arbitrators. Equal treatment of the parties entails that the parties must have an equal say in the constitution of the arbitral tribunal.

ii. Sub-section (5) of Section 12 provides that any person whose relationship with the parties or counsel, or the dispute, whether direct or indirect, falls within any of the categories specified in the Seventh Schedule would be ineligible to be appointed as an arbitrator. Since, the ineligibility stems from the operation of law, not only is a person having an interest in the dispute or its outcome ineligible to act as an arbitrator, but appointment by such a person would be *ex facie* invalid.

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iii. The words "*an express agreement in writing*" in the *proviso* to Section 12(5) means that the right to object to the appointment of an ineligible arbitrator cannot be taken away by mere implication. The agreement referred to in the *proviso* must be a clear, unequivocal written agreement.

iv. When an arbitrator is found to be ineligible by virtue of Section 12(5) read with the Seventh Schedule, his mandate is automatically terminated. In such circumstance, an aggrieved party may approach the court under Section 14 read with Section 15 for appointment of a substitute arbitrator. Whereas, when an award has been passed by such an arbitrator, an aggrieved party may approach the court under Section 34 for setting aside the award.

v. In arbitration, the parties vest jurisdiction in the tribunal by exercising their consent in furtherance of a valid arbitration agreement. An arbitrator who lacks jurisdiction cannot make an award on the merits. Hence, an objection to the inherent lack of jurisdiction can be taken at any stage of the proceedings.

124. For all the foregoing reasons, we have reached the conclusion that the High Court committed an egregious error in passing the impugned judgment. We are left with no other option but to set aside the

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impugned judgment. As a result, the arbitral awards dated 30.07.2018 passed by the sole arbitrator are also set aside.

125. It would be open to the parties to initiate fresh arbitration proceedings in accordance with law.

126. In the result, the appeals succeed and are hereby allowed. Pending applications, if any, shall stand disposed of.

…….……J.
(J. B. PARDIWALA)

……..……..J.
(K. V. VISWANATHAN)

New Delhi
5th January, 2026