ORDER OD – 3

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

AP-COM/297/2024
[Old Case No.AP/189/2023]
TATA STEEL LIMITED
VS
MSP SPONGE IRON LIMITED

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 7th May2026

Appearance:

Mr. Ratnanko Banerji, Senior Advocate
Mr. Deepan Kumar Sarkar, Advocate
Mr. JaydebGhorai, Advocate
Mr. Saugata Banerjee, Advocate
Mr. DipteshGhorai, Advocate
... for the petitioner.

Mr. AbhrajitMitra, Senior Advocate
Mr. Anirban Ray, Senior Advocate
Mr. ShounakMukhopadhyay, Advocate
Mr. BiswarupAcharyya, Advocate
... forthe respondent.

The Court:-

1. This application has been filed challenging an award dated January 5, 2023 passed by the learned Arbitral Tribunal, upon adjudication of the disputes arising out of an agreement dated October 31, 2014.

2. Mr. Ratnanko Banerji, learned senior advocate for the petitioner submits that the award should be set aside as the arbitrator lacked jurisdiction to make and publish the same.

3. According to Mr. Banerji, Clause 11 of the agreement dated October 31, 2014 provided for resolution of disputes by arbitration. The clause is quoted below:

> *"11. Arbitration: Any Disputes arise in will be settled on consensus basis. If any dispute still persist, the same shall be referred to the arbitrator appointed by the seller or their nominee in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made thereof shall be binding on both the parties. The Disputes will be subject to Kolkata Jurisdiction."*

4. The disputes were subject to Kolkata jurisdiction, as per the clause.

5. It is alleged that the respondent invoked the arbitration clause by a notice dated March 27, 2017, and unilaterally sought to appoint a learned senior advocate of this Court as the sole arbitrator. Apart from denying the factual allegations made by the respondent in the notice invoking arbitration, the learned advocate for the petitioner by letter dated April 17, 2017, also informed the respondent that the appointment of the learned senior advocate as the arbitrator was not tenable in law, inasmuch, as the same was not in consonance with the agreement dated October 31, 2014, and the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'said Act').

6. The learned arbitrator proceeded with the matter and an application under Section 16 of the said Act was filed, raising the question of jurisdiction. The application was dismissed. The parties participated in the proceedings before the learned arbitrator and issues were framed. Parties produced their respective witnesses who were examined in due

course. Upon conclusion of the final arguments, the arbitration proceeding culminated in an award dated January 5, 2023. Accordingly, this application has been filed, primarily on the ground that the award is a nullity as the appointment of the arbitrator was *voidab initio*. The learned arbitrator was *de jure* unable to perform his duties and adjudicate the disputes.The law prohibited unilateral appointment.

7. Mr. Banerji relied on the decision of this Court in ***Y D Transport Company and Another v. Srei Equipment Finance Limited***decided in ***AP No. 430 of 2019***passed on December 2, 2025,***Ellora Paper Mills Limited v. State of Madhya Pradesh*** reported in ***(2022) 3 SCC 1***, ***Jaipur ZilaDugdhUtpadakSahkariSangh Limited and Others v. Ajay Sales & Suppliers*** reported in ***2021 SCC OnLine SC 730*** and ***Bhadra International (India) Pvt. Ltd. and Others v. Airports Authority of India*** reported in ***2026 SCC OnLine SC 7***.

8. According to Mr. Banerji, even if the petitioner did not pray for termination of the mandate of the learned arbitrator in the course of the arbitral proceeding, the jurisdiction of the learned arbitrator to make the award can always be challenged by filling an application under Section 34 of the said Act. Mere participation in the proceeding would not amount to accepting the jurisdiction of the learned arbitrator. More so, the defect in the initial appointment of the arbitrator being bad in law, could not be cured by the conduct of the parties and their participation. There cannot be any estoppel against statute.

9. Mr. Abhrajit Mitra, learned senior advocate appears on behalf of the respondent and submits that the petitioner had knowingly participated in the proceeding before the learned arbitrator. Having done so, and having invited an award to be published by the learned arbitrator after conclusion of the proceedings, the petitioner cannot turn around and pray for setting aside of the award on the ground of violation of Section 12(5) of the said Act. It is submitted that, an application under Section 29A of the said Act was filed by the respondent for extension of the mandate of the learned arbitrator before this Court and the said application was disposed of without any objection from the petitioner. The petitioner accepted the extension of the mandate. Although, the petitioner had the opportunity to challenge the mandate of the learned arbitrator at various stages, the petitioner kept silent and also allowed the High Court to extend the mandate. According to Mr. Mitra, the award was passed on correct, just and reasonable appreciation of the pleadings, evidence and arguments made by the parties. The same does not merit any interference.

10. The matter is being heard upon exchange of affidavits.

11. Mr. Mitra, urges that, the petitioner's participation in the proceeding amounts to waiver of the jurisdictional bar under Section 12(5) of the said Act. Reliance is placed on the decision of ***McLeod Russel India Limited and Another v. Aditya Birla Finance Limited and Others*** reported in ***2023 SCC OnLine Cal 330,*** in support of the contention that, as the arbitrator did not fall within the prohibited category of the Seventh Schedule, independence of the arbitrator to

adjudicate the disputes between the parties could not be doubted only because the arbitrator was chosen unilaterally by the respondent and was appointed to perform his duties as the sole arbitrator in the proceeding. The bar under Section 12(5) of the said Act would not be applicable. Moreover, if the petitioner continued to participate in the arbitration proceeding despite having knowledge of the invalidity in the appointment, the petitioner should have prayed for termination of the mandate on the ground of lack of jurisdiction. The arbitrator was an independent person and not connected to either of the parties, in any way.The petitioner failed to demonstrate before this Court that, the arbitrator had thedisposition to act partially towards the respondent. The question of setting aside the award solely on the ground of unilateral appointment does not arise in the facts of this case.

12. Next Mr. Mitra relied on the decision of Madras High Court in ***General Manager, CORE, Allahabad Rep. by Deputy Chief Engineer Railway Electrification Egmore, Chennai v. M/s. JV Engineering Associate Civil Engineering Contractors, 17, Kuttakattu Valasu Elumathur (PO), Modakurichi (via) Eorde 638104 Tamil Nadu Rep. by its Partner S. Jaikumar decided in O.S.A (CAD) No. 119 of 2021***, to support his contention that, the agreement between the parties towards appointment of the learned arbitrator, could be culled out from the conduct of the parties and the continuous participation of the parties in the arbitral proceeding. This being the position, the right to challenge the appointment had been waived. Waiver can also be implied and gathered

from the surrounding circumstances.The petitioner was aware of the legal proposition that appointment of the arbitrator should be on consent, and in the event the parties do not consent, the only other path available in law, was to approach the Court under Section 11(6) of the said Act and pray for appointment of the arbitrator. Such course was not followed by the petitioner. The petitioner raised a question of jurisdiction of the learned arbitrator by filing an application under Section 16 of the said Act, but did not specifically challenge the appointment as being illegal andcontrary to law.

13. Heard the parties. As Mr. Banerji does not address this Court on the factual aspects and restricts his argument only to the illegal constitution of the arbitral tribunal which has rendered the award a nullity, the consideration of this application is also restricted to such point.

14. With regard to waiver of the applicability of Section 12(5) of the said Act, as was urged by Mr. Mitra, this Court is of the view that there was no express agreement between the parties, agreeing to waive any objection with regard to applicability of Section 12(5) of the said Act. Section 12(5) is applicable to all arbitral proceedings which commenced after October 25, 2015, even if the contract was executed earlier. Reference in this regard is made to ***Bharat Broadband (supra)*** and the relevant paragraphs are quoted below:-

> *"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."*

15. In the decision of ***Ellora Paper Mills***, the Hon'ble Apex Court laid down that there must be an express agreement in writing to satisfy the proviso to Section 12(5). The relevant paragraphs are quoted below:-

***"19.** In the aforesaid decision in Ajay Sales & Suppliers case [Jaipur ZilaDugdhUtpadakSahkariSangh Ltd. v. Ajay Sales & Suppliers, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730] , this Court also negatived the submission that as the contractor participated in the arbitration proceedings before the arbitrator therefore subsequently, he ought not to have approached the High Court for appointment of a fresh arbitrator under Section 11 of the Arbitration Act, 1996. After referring to the decision of this Court in Bharat Broadband Network Ltd. v. United Telecoms Ltd. [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] , it is observed and held in para 18 as under : (Ajay Sales & Suppliers case [Jaipur ZilaDugdhUtpadakSahkariSangh Ltd. v. Ajay Sales & Suppliers, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730])*

"18. Now so far as the submission on behalf of the petitioners that the respondents participated in the arbitration proceedings before the sole arbitrator — Chairman and therefore he ought not to have approached the High Court for appointment of arbitrator under Section 11 is concerned, the same has also no substance. As held by this Court in Bharat Broadband Network [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3

SCC (Civ) 1] there must be an "express agreement" in writing to satisfy the requirements of Section 12(5) proviso. In paras 15 & 20 it is observed and held as under : (SCC pp. 768 & 770-71)

'15. Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.

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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 a proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."*

It is thus necessary that there be an "express" agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court [Bharat Broadband Network Ltd. v. United Telecoms Ltd., 2017 SCC OnLine Del 11905] 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 [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 [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 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.' "

16. In the decision of ***Sohan Minerals and Mining Company Pvt. Limited Vs. Steel Authority of India Limited reported in***

(MANU/WB/0216/2021), the Hon'ble Apex Court held that correspondence exchanged between the parties would not establish that a party had waived its objection by express agreement.

17. Participation in an arbitration proceeding per se doesnot qualify as an express agreement in writing, to waive the objection under Section 12(5) of the said Act. The appointment of an arbitrator being bad in law, the agreement to waive theapplicability of the said section was required to be declared so. The relevant portion of the decision is quoted below:-

> *"15. The correspondence exchanged between the parties do not establish that the petitioner waived its objection by express agreement. Participation in the arbitration proceeding per se does not qualify as an express agreement in writing to waive the objection under Section 12(5) of the Act of 1996 by participating in the arbitration proceeding.*
> *16. The appointment of the Arbitrator being de jure bad, is required to be declared as so. This, however, is not a reflection on the competence or the impartiality of the Arbitrator in any manner whatsoever."*

18. Although the arbitration clause provides that in case of any dispute arising out of the subject agreement, the same shall be referred to an arbitrator to be appointed by the seller or its nominee, in accordance with the rules of arbitration of the Indian Council of Arbitration, the clausepermitting unilateral appointment of the learned arbitrator by a party to the agreement has been declared by the Hon'ble Apex Court to be bad in law and not tenable.

19. Some of the provisions of the said Act are quoted below :-

> *"**12(5)**- Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:*

> *Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.*
> ***18. Equal treatment of parties.—****The parties shall be treated with equality and each party shall be given a full opportunity to present this case."*

20. Unilateral appointment of an arbitrator is contrary to the concept of equal participation of the parties in an arbitral proceeding and it operates from the very stage of the appointment of the arbitrator. The law provides that parties can agree to settlement of dispute through the alternative dispute redressal mechanism and the tribunal which isconstituted as per the agreement should be independent and impartial. Thus, an arbitrator can never be chosen by a particular party to the agreement. There must be consent. The concept of unilateral appointment is totally contrary to party autonomy. Each party has equal right in the matter of appointment and the parties must have confidence that the arbitrator will be independent and free from bias. Thus, the respondent or any of its officers could not have appointed the learned arbitrator. The learned arbitrator was disqualified from acting as such from the very inception. Such appointment being bad in law and void ab initio, all proceedings before the learned arbitrator from the date of appointment and till the publication of the award are nullity.

21. The Hon'ble Apex Court in ***Central Organization for Railway Electrification (supra),*** held thus:-

> *"73. The 2015 amendment has introduced concrete standards of impartiality and independence of arbitrators. One of the facets of impartiality is procedural impartiality. Procedural impartiality implies*

that the rules constitutive of the decision-making process must favour neither party to the dispute or favour or inhibit both parties equally.137 Further, a procedurally impartial adjudication entails equal participation of parties in all aspects of adjudication for the process to approach legitimacy.138 Participation in the adjudicatory process is meaningless for a party against whom the arbitrator is already prejudiced.139 Equal participation of parties in the process of appointment of arbitrators ensures that both sides have an equal say in the establishment of a genuinely independent and impartial arbitral process.

74. Under Sections 12(1) and 12(5), the Arbitration Act recognises certain mandatory standards of independent and impartial tribunals. The parties have to challenge the independence or impartiality of the arbitrator or arbitrators in terms of Section 12(3) before the same arbitral tribunal under Section 13.140 If the tribunal rejects the challenge, it has to continue with the arbitral proceedings and make an award. Such an award can always be challenged under Section 34. However, considerable time and expenses are incurred by the parties by the time the award is set aside by the courts. Equal participation of parties at the stage of the appointment of arbitrators can thus obviate later challenges to arbitrators.

75. Independence and impartiality of arbitral proceedings and equality of parties are concomitant principles. The independence and impartiality of arbitral proceedings can be effectively enforced only if the parties can participate equally at all stages of an arbitral process. Therefore, the principle of equal treatment of parties applies at all stages of arbitral proceedings, including the stage of the appointment of arbitrators.

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124. The doctrine of bias as evolved in English and Indian law emphasizes independence and impartiality in the process of adjudication to inspire the confidence of the public in the adjudicatory

processes. Although Section 12 deals with the quality of independence and impartiality inherent in the arbitrators, the provision's emphasis is to ensure an independent and impartial arbitral process."

22. In ***Perkins Eastman (supra),*** the Hon'ble Apex Court held 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 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 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]

…

24. *In Voestalpine [Voestalpine Schienen GmbH v. DMRC, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , this Court dealt with independence and impartiality of the arbitrator as under : (SCC pp. 687-88 & 690-91, paras 20 to 22 & 30)*

"20. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in Hashwani v. Jivraj [Hashwani v. Jivraj, (2011) 1 WLR 1872 : 2011 UKSC 40] in the following words : (WLR p. 1889, para 45)

'45. … the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.'

21. Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in Consorts Ury [Fouchard, Gaillard, Goldman on International Commercial Arbitration, 562 [Emmanuel Gaillard & John Savage (Eds.) 1999] {quoting Cour de cassation [Cass.] [Supreme Court for judicial matters] Consorts Ury v. S.A. des Galeries Lafayette, Cass.2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France)}.] , underlined that:

'an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator'.

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

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30. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by DMRC. It, therefore, becomes imperative to have a much broad based panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. We, therefore, direct that DMRC shall prepare a broad based panel on the aforesaid lines, within a period of two months from today…"

23. In***TRF Ltd. v. Energo Engineering Projects Ltd.,***reported in ***(2017) 8 SCC 377***, the Apex Court held thus:-

"50. First, we shall deal with Clause (d). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the "named sole arbitrator" and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction……

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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."

24. As the arbitrator was de jure unable to perform his duties, he did not have the mandate. The participation of the petitioner before a forum which was not constituted as per law and did not have the jurisdiction to decide the dispute is inconsequential. A party who cannot act as an arbitrator, cannot also choose an arbitrator.

25. Under such circumstances, nothing prevents the petitioner from challenging the award passed by a unilaterally appointed arbitrator, by filing an application under Section 34 of the said Act. The constitution of the arbitral tribunal was itself invalid.

26. The decision cited by Mr. Mitra on the contention that the participation of the petitioner before the learned arbitrator amounts to implied waiver of the provisions of Section 12(5) of the said Act cannot be accepted, in view of the legal proposition discussed hereinabove.

27. Mr. Mitra has relied on the decision of the Delhi High Court in ***Bhadra International (India)Pvt. Ltd. vs. Airport Authority of India*** reported in ***2024 SCC OnLine Del 9493*** to contend that challenge to the unilateral appointment of the arbitrator at a belated stage cannot be a ground for setting aside the award. The decision of the Delhi High Court has been overruled by the Hon'ble Apex Court in ***Bhadra International*** (supra). The Hon'ble Apex Court held that unilateral appointment was not consistent with the basic tenetsof arbitration. It would not be unreasonable for a party to apprehend that an arbitrator, who was unilaterally appointed by one partymay not be completely impartial. The

test to determine impartiality was not actual proof of bias, but reasonable apprehension of bias.

28. The contention of Mr. Mitra that,when the petitioner failed to object to the extension of the mandate of the learned arbitrator by the High Court,the objection to jurisdiction had been waived, is also not tenable in law. Hon'ble Apex Court in ***Bhadra International*** (supra) held as follows :-

> *"92. One another submission that was canvassed on behalf of the respondent herein is that the appellants participated in the arbitral 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).*
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> c. ***"Extension of Time" under Section 29A of the Act, 1996 as a parameter of waiver***
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> *93. Recently, in Hindustan Construction Co. Ltd. v. Bihar Rajya Pul Nirman Nigam Ltd., 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 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 Oll Corporation Ltd., 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 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.

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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 observationsread 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 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, 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.

29. The issue as to whether the petitioner could have raised the objection as to the jurisdiction of the learned arbitrator for the first time under Section 34 of the said Act, has also been answered by the Hon'ble Apex Court ashereunder:-

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, 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), l.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 apportionment 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.

a 103. An application under Section 14 is made for the purpose of terminating the mandate of the arbitrator, and, consequently, 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 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 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 (l.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.[...]."*
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> *(Emphasis supplied)*

107. In Chennai Metro Rail Ltd. v. Transtonnelstroy Afcons (JV), (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:-

> *"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 avalled 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.*
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> *XXX*
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> *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 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 arbitralaward 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 flable 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., 2025 SCC OnLine Del 8373, the petitioner assailed an 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 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; (il) 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", [SsangyongEngg. & 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

(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 expressiv 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."]

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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 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."

30. In such circumstances, this Court is unable to accept the submissions of Mr. Mitra and holds that the award is liable to be set aside on the ground that the same was made by an arbitrator who was de jure unable to perform his duties and is thus a nullity.

31. The application is accordingly allowed, upon setting aside the award.

32. The deposit of 50% of the award by cash deposit and the remaining by furnishing a bank guarantee, which were made before the Registrar, Original Side pursuant to the order dated September 4, 2023, shall be returned to the petitioner along with any interest that may have accrued on the cash deposit.

33. The petitioner shall approach the learned Registrar, Original Side within a week and the direction to return the money along with accumulated interest as also the bank guarantee, shall be complied with by the learned Registrar within 15th June, 2026. As the bank guarantee

has to be returned to the petitioner, the Registrar, Original Side will issue the necessary discharge letter to the concerned bank.

34. The bank details of the petitioner to which the cash deposit with interest shall be returned by the Registrar, Original Side is as follows :

Account Holder Name : Tata Steel Limited (erstwhile Tata Steel Long Products Limited.

Bank Name : State Bank of India

Branch Name :Joda (07149)

Account No. : 00000011291749498

IFSC Code : SBIN0007149.

35. Urgent photostat certified copies of this order, be supplied to the parties, upon fulfilment of requisite formalities.

(SHAMPA SARKAR, J.)

S. Kumar / TR