

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.01.2026

CORAM

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

Arbitration Original Petition (Com.Div.) No.503 of 2022

and

Application No.4187 of 2025

RPN Engineers Chennai Private Limited,
represented by its Authorized Signatory,
Mr.P.K.Luqman Basha,
M-60, 9th Street, Anna Nagar East,
Chennai – 600 102.

... Petitioner

vs.

1.The General Manager,
Integral Coach Factory,
Chennai – 600 038.

2.The Deputy Chief Engineer,
Integral Coach Factory,
Chennai – 600 038.

... Respondents

Arbitration Original Petition (Com.Div.) filed under Section 34 of the Arbitration and Conciliation Act, 1996, praying to set aside the Award dated 26.02.2022 passed by the Tribunal to the extent the claims of the petitioner were dismissed in toto and/or in part.

For Petitioner : Mr.J.Srinivasa Mohan
for M/s.TVJ Associates

For Respondents : Mr.K.S.Jeyaganesan
Senior Panel Counsel

ORDER

This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 [for brevity 'the Act'] challenging the award passed by the Arbitral Tribunal dated 26.02.2022.

2. The petitioner participated in the tender process and was awarded the contract by respondents *vide* Letter of Acceptance dated 17.11.2017. The agreement was executed on 08.02.2018 and as per the agreement, the petitioner was required to complete the work within a period of nine months from the date of Letter of Acceptance. The contract period was extended from time to time. The further case of the petitioner is that they were required to execute additional works, which was not initially part of the scope of work made in the agreement and thereby, it increased the magnitude of the work and the value of the contractual work.

3. It is the further case of petitioner that the petitioner completed the entire work assigned as per the terms of the Agreement on 13.03.2021 to the tune of Rs.4,14,54,212/- as against the agreement value of Rs.3,21,24,118/-.

4. The petitioner alleges that outstanding payments were not paid in spite of repeated requests and demands and the respondents also failed to issue the work completion certificate. Thus, disputes arose between the parties and the petitioner invoked the arbitration by letter dated 08.06.2021.

5. The specific case of the petitioner is that the petitioner neither waived their right for the constitution of the Arbitral Tribunal nor consented for the constitution of the Arbitral Tribunal by respondents. The petitioner made nearly 18 claims before the Arbitral Tribunal to the tune of Rs.2,43,37,981/-.

6. The respondents denied the claim made by the petitioner and they made a counter claim to the tune of Rs.20,16,485/-.

7. Based on the pleadings, issues were framed by the Arbitral Tribunal. On completion of trial, the Arbitral Tribunal partly allowed the claim made by the petitioner to the tune of Rs.5,29,277/- and rejected the counter claim made by respondents. Aggrieved by the same, the present petition came to be filed before this Court.

8. When the petition came up for final hearing on 06.01.2026, learned counsel for petitioner raised a preliminary objection on the constitution of the Arbitral Tribunal and on hearing the learned counsel for petitioner and taking note of the judgments relied upon, the following order came to be passed by this Court:

“Learned counsel for petitioner raised a preliminary objection on the constitution of the Arbitral Tribunal by the Southern Railways. Learned counsel submitted that even in the notice dated 08.06.2021 (Ex.C53) through which the petitioner invoked Section 21 of the Arbitration and Conciliation Act, 1996 [for brevity ‘the Act’], it was made clear that the petitioner is not waiving their right under Section 12(5) of the Act. Learned counsel further pointed out to the letter dated 24.07.2021 where the petitioner had specifically not agreed to waive their right under Section 12(5) of the Act. In view of this stand taken by the petitioner, the respondent proceeded further to appoint an Arbitral Tribunal consisting three members and while doing so, the stand taken by the petitioner shall also be taken note of. This document has been marked as Ex.C54.

*2. Learned counsel for petitioner, by relying upon the latest judgment of the Delhi High Court in **Daulat Ram Brake Mfg. Co. v. Union of India [2025 SCC OnLine Del 5106]** submitted that where the party has not given any waiver or consent and the respondent has unilaterally appointed an Arbitral Tribunal, the award passed by the Arbitral Tribunal lacks neutrality and therefore, it is liable to be interfered in view of the judgment of the Apex Court in **Perkins Eastman Architects DPC v. HSCC (India) Ltd. [(2020) 20 SCC 760]** and **Voestalpine Schienen GmbH v. DMRC [(2017) 4 SCC 665]**. Learned counsel submitted that this judgment was rendered by the Delhi High Court after taking note of the judgment of the Apex Court in **Central Organization for Railway Electrification [CORE] 2**. It is also relevant to take note of the latest judgment of the Apex Court in **Bhadra International (India) Pvt. Ltd. & Ors. v. Airports Authority of India [Civil Appeal Nos.37-38 of***

2026 dated 05.01.2026] and it was held as follows:

“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.*

- 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.”

3. In view of the fact that the petitioner did not waive their right nor had consented for the constitution of the Arbitral Tribunal by the respondent, it was contended that the award itself is liable to be set aside.

4. Learned Senior Panel Counsel appearing on behalf of the respondent sought some time to answer this preliminary objection raised by learned counsel for petitioner.

Post this petition under the caption ‘for orders’ on 20.01.2026.”

9. Learned Senior Panel Counsel appearing on behalf of respondents submitted that the petitioner had participated during the proceedings conducted by the Arbitral Tribunal without raising any objections and the claims made by the petitioner have also been adjudicated by the Arbitral Tribunal and therefore, by the conduct of the petitioner, they cannot be allowed to turn around and question the authority and jurisdiction of the Arbitral Tribunal at the stage of questioning the same under Section 34 of the Act. Learned Senior Panel Counsel for respondents was not able to produce any material to show that the petitioner had waived their right nor had consented for the constitution of the Arbitral Tribunal.

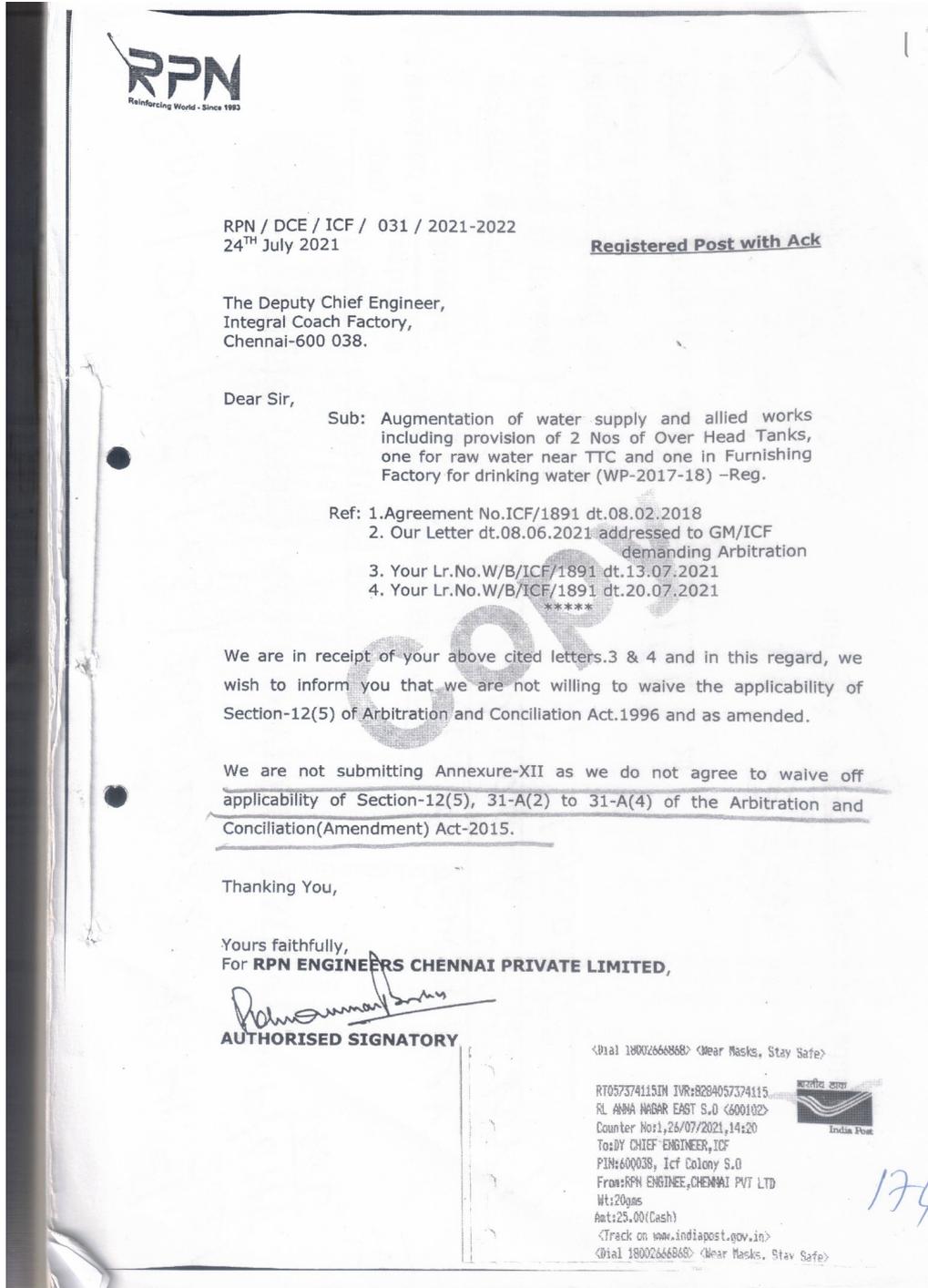
10. There are material documents available before this Court to establish that the petitioner neither waived their right nor consented for the constitution of the Arbitral Tribunal by the respondent. The first document is Ex.C53, which is the notice issued by the petitioner raising the dispute by pointing out to the arbitration clause. Even in this notice, the petitioner has stated as follows:

“29. We further submit that the General Manager is required to constitute the Arbitral Tribunal in terms of Section 11 & 12 read with Fifth & Seventh Schedule of the Arbitration and Conciliation (Amendment) Act, 2015 dated 23.10.2015. It is also submitted that the Railway Officers and Railway ministry controlled Departments of RITES/IRCON/RVNL etc., and Railway officials employed by CMRL etc., are also ineligible for appointment as they are also hit by Fifth and Seventh Schedule of the Arbitration and Conciliation (Amendment) Act, 2015.

30. We would therefore, submit that the General Manager send a panel of Arbitrators within 60 days on receipt of this letter in terms of the Fifth and Seventh Schedule of the Amended Arbitration Act 2015, failing which, we shall have no other option except to approach Hon’ble High Court of Madras for appropriate remedy on expiry of 60 days.”

11. It is also relevant to take note of the letter dated 24.07.2021 addressed to second respondent where once again the petitioner reiterated

that they are not agreeing to waive the applicability of Section 12(5) of the Act. For proper appreciation, the letter is scanned and reproduced hereunder:



12. The above stand has been taken note by the General Manager while constituting the Arbitral Tribunal, which is evident from Ex.C53. It has been specifically mentioned in the said proceedings that the petitioner has not agreed to waive off the applicability of Section 12(5) of the Act.

13. In the light of the above materials available before this Court, which shows that the petitioner neither waived nor consented for the constitution of the Arbitral Tribunal, this Court has to examine as to whether the Arbitral Tribunal lacks jurisdiction to decide the dispute.

14. The Apex Court in the judgment in *Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Company [2024 SCC OnLine SC 3219] [CORE 2]* made it clear that the judgment will only have a prospective effect. In the said judgment, the Apex Court rendered the following conclusions:

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

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

.....

- c. *A clause that allows one party to unilaterally appoint a sole arbitrator gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further, such a unilateral clause is exclusive and hinders equal participation of the other party in the appointment process of arbitrators;*
- d. *In the appointment of a three-member panel, mandating the other party to select its arbitrator from a curated panel of potential arbitrators is against the principle of equal treatment of parties. In this situation, there is no effective counterbalance because parties do not participate equally in the process of appointing arbitrators. The process of appointing arbitrators in CORE (supra) is unequal and prejudiced in favour of the Railways;*
- e. *Unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution;*
- f. *The principle of express waiver contained under the proviso to Section 12(5) also applies to situations where the parties seek to waive the allegation of bias against an arbitrator appointed unilaterally by one of the parties. After the disputes have arisen, the parties can determine whether there is a necessity to waive the nemo judex rule; and*
- g. *The law laid down in the present reference will apply prospectively to arbitrator appointments to be made after the date of this judgment. This direction applies to three-member tribunals.”*

15. For the purposes of this case, the conclusion in paragraph No.169 (d) assumes a lot of significance. It was held that in the appointment of a three-member panel, mandating the other party to select its arbitrator from a curated panel of potential arbitrators, goes against the principal of equal treatment of parties. It was, therefore, held that the

process of appointing arbitrators in this fashion is unequal and prejudiced in favour of the Railways. In the case in hand, this Court has already recorded the fact that the curated panel of potential arbitrators was supplied to the petitioner and the petitioner neither waived their right nor consented for appointment of any arbitrator on their side from among the panel of arbitrators provided by the respondents.

16. At this juncture, in the latest judgment of the Apex Court in ***Bhadra International (India) Pvt. Ltd. & Ors. v. Airports Authority of India*** [*Civil Appeal Nos.37-38 of 2026 dated 05.01.2026*], it was made abundantly clear that Section 12(5) of the Act is mandatory and it was pointed out that the ineligibility of any of the categories specified in the Seventh Schedule stems from the operation of law and hence, the very appointment will be rendered *ex facie* invalid. In such an event, when an award is passed by such a Tribunal, the same can be raised as an issue by the aggrieved party while filing the petition under Section 34 of the Act. It was further held that where the Arbitral Tribunal lacks jurisdiction, passing the award on merits does not wipe away the inherent lack of jurisdiction and hence, this ground can be taken at any stage of the proceedings.

17. It is also relevant to take note of the judgment of the Delhi High Court in *Daulat Ram Brake Mfg. Co. v. Union of India* [2025 SCC OnLine Del 5106]. The Delhi High Court has taken into consideration all the earlier judgments, more particularly, the law laid down in *Perkins Eastman Architects DPC v. HSCC (India) Ltd.* [(2020) 20 SCC 760] and *Voestalpine Schienen GmbH v. DMRC* [(2017) 4 SCC 665] and concluded that these judgments read along with *CORE 2* judgment of the Apex Court crystallise the law of neutrality. Adding to that, this Court also takes into consideration the judgment of the Apex Court in *Bhadra's* case [supra]. In such a scenario, the Delhi High Court has held that where the party has not waived the right or given consent for the constitution of the Arbitral Tribunal and the same has been unilaterally appointed by the respondent, such an Arbitral Tribunal lacks inherent jurisdiction and therefore, all these judgments can be cumulatively applied to set aside the award passed by such an Arbitral Tribunal. I am in complete agreement with the above judgment rendered by the Delhi High Court.

18. In the light of the above discussion, this Court agrees with the preliminary objection raised by learned counsel for petitioner and holds that the award passed by the Arbitral Tribunal dated 26.02.2022

stands vitiated due to lack of jurisdiction and hence, the same is hereby set aside.

19. It is left open to the parties to file an appropriate petition seeking appointment of an Arbitral Tribunal to make their respective claims and counter claims and this order will not stand in their way.

In the result, this petition is allowed. No costs. Consequently, connected application is closed.

20.01.2026

NCC:Yes
Index:Yes

gm

To

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