2023:DHC:9087

$~

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

% ***Date of Decision: 18th December, 2023***

\+ O.M.P. (COMM) 180/2022 and I.A. 5632/2022

SMAAASH LEISURE LTD ..... Petitioner

Through: Dr. Amit George, Mr. Rishabh Dheer, Mr. Raya Durgam Bharat and Mr. Arkaneil Bhaumik, Advocates.

versus

AMBIENCE COMMERCIAL DEVELOPERS PVT. LTD. ..... Respondent

Through: Ms. Kittu Bajaj, Advocate.

\+ O.M.P. (COMM) 181/2022 and I.A. 5635/2022

SMAAASH LEISURE LTD. ..... Petitioner

Through: Dr. Amit George, Mr. Rishabh Dheer, Mr. Raya Durgam Bharat and Mr. Arkaneil Bhaumik, Advocates.

versus

AMBIENCE DEVELOPERS AND INFRASTRUCTURE PVT LTD..... Respondent

Through: Ms. Kittu Bajaj, Advocate.

\+ OMP (ENF.) (COMM.) 134/2022 and EX.APPLs.(OS) 3191-92/2022

M/S AMBIENCE DEVELOPERS AND INFRASTRUCTURE PVT. LTD. ..... Decree Holder

Through: Ms. Kittu Bajaj, Advocate.

versus

M/S SMAAASH LEISURE LTD ..... Judgement Debtor

Through: Dr. Amit George, Mr. Rishabh Dheer, Mr. Raya Durgam Bharat and Mr. Arkaneil Bhaumik, Advocates.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

1. O.M.P. (COMM) 180/2022 is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as '1996 Act') read with Section 13(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, challenging the Arbitral Award dated 16.11.2021 passed by the learned Arbitrator in Arbitration Case No.116/2020 titled *'Ambience Commercial Developers Pvt. Ltd. v. M/s SMAAASH Leisure Limited'.* O.M.P. (COMM) 181/2022 has been filed assailing the impugned Arbitral Award dated 23.12.2021 passed by the learned Arbitrator in Arbitration Case No.115/2020 titled *'Ambience Developers & Infrastructure Pvt. Ltd. v. M/s SMAAASH Leisure Limited'.* On account of similitude of facts, same parties and similar questions of law in both these petitions, they were heard together and are being decided by this common judgment.

O.M.P. (COMM) 180/2022

2. Factual matrix to the extent relevant and emerging from the petition is that Petitioner is a company incorporated under the Companies Act, 1956, *inter alia,* involved in the business of gaming and entertainment centres, setting up virtual reality-led entertainment gaming centres, motor and bike racing simulators, twilight bowling zones and the go-karting tracks. Respondent is a Real Estate Group engaged in the business of Integrated Townships, Residential and Commercial Complexes, Retail, IT & SEZ, Hospitality, Facility Management and Education in Delhi/NCR and other parts of the country.

3. Respondent constructed a shopping mall i.e. multi-purpose commercial complex on a commercial plot of land bearing No. 2 ad-measuring 33415 sq. mts. situated at Vasant Kunj, Phase-II, New Delhi comprising of spaces for retail, commercial, entertainment and other purposes such as department stores, retail stores, supermarkets, cinemas, eateries, indoor game courts, food courts, restaurants, etc.

4. A lease deed was executed between the Petitioner and the Respondent dated 01.08.2017 for premises having a super area ad-measuring 48006 sq. ft. at the First Floor, Ambience Mall, Vasant Kunj, Phase-II, New Delhi ('Leased Premises') for operating and managing an entertainment centre comprising bowling alleys and other activities for entertainment of the public. The lease period was 20 years. Rent was payable in accordance with Clause 2 of the lease deed and Clause 4 contemplated a security deposit by the Petitioner. On 01.03.2018, parties executed an Addendum to the lease deed whereby they agreed that the CAM charges payable between 28.10.2017 to 27.10.2018 shall stand deferred to 28.10.2018 to 27.10.2019.

5. It is the case of the Petitioner that in 2018, parent company of the Petitioner, Smaaash Entertainment Pvt. Ltd. was successful in raising private equity funding for expansion and pre-agreed acquisition. Attempt was also made to list itself at the National Association of Securities Dealers Automated Quotations. However, due to unforeseeable circumstances, listing could not be completed and the parent company along with the Petitioner suffered huge losses. Petitioner along with its parent company attempted to procure investments to recover the losses sustained, however, no proposed transaction could be completed due to unfavourable market conditions. This was followed by the Pandemic COVID-19 and all

proposed investments came to a halt.

6. On account of the financial distress, Petitioner was constrained to terminate the lease deed vide termination letter dated 20.02.2020. In the termination letter itself, Petitioner had requested the Respondent to allow the Petitioner to remove its goods and the equipment from the Leased Premises. In response to the termination letter, Respondent vide its letter dated 13.03.2020 granted permission to the Petitioner to remove the goods and equipments within 7 days of receipt of the letter. On account of the Pandemic and rising cases in India in the month of March, 2020, followed by a nationwide lockdown, Petitioner was unable to remove the goods. In the midst of Pandemic COVID-19, Respondent vide its e-mail dated 25.09.2020 invoked the dispute resolution Clause 25, contained in the lease deed and proposed the names of three former Judges of this Court, requesting the Petitioner to nominate one of them as the sole Arbitrator. Vide e-mail dated 06.10.2020, Petitioner communicated its unequivocal non-acceptance of the three names.

7. Despite the opposition, Respondent appointed a sole Arbitrator and sent a communication to the Arbitrator on 07.10.2020 in this regard, also requesting the Arbitrator to give a declaration under Section 12 of the 1996 Act. Aggrieved by the unilateral appointment, Petitioner wrote to the Arbitrator on 08.10.2020 apprising that the arbitration clause under both the lease deeds does not contain any provision to deal with a situation where the lessee does not accept the proposal of the appointment of the sole Arbitrator made by the lessor. Petitioner requested the Arbitrator to take on record its objection against the appointment as the Petitioner would be approaching the Respondent for appointment in terms of Section 11(5) of the 1996 Act.

8. On 12.10.2020, Arbitrator submitted the declaration under Section 12(1)(b) and on request received from Petitioner's counsel, rescheduled the preliminary hearing for 27.10.2020 instead of 19.10.2020. On 27.10.2020, Petitioner appeared through video conferencing during the preliminary hearing and without prejudice to its rights and contentions stated that an endeavour shall be made to settle the disputes amicably and this was recorded in the order. Significantly, in the email dated 27.10.2020 Respondent admitted that Petitioner had refused to accept the three names proposed for appointment of a sole Arbitrator. Proceedings were adjourned to 09.11.2020.

9. Order sheet of the hearing on 09.11.2020, records the statement of the counsel for the Petitioner, withdrawing the objection against the appointment of the Arbitrator. Respondent was thus directed to file the Statement of Claim, if no settlement was arrived at between the parties by 10.11.2020. As the disputes could not be settled amicably, Statement of Claim was filed by the Respondent on 17.11.2020 along with an application under Section 17 of the 1996 Act seeking relief of ejectment of the Petitioner from the leased premises and for handing over vacant and peaceful possession. In the Statement of Claim, Respondent claimed a sum of Rs.17,34,34,068.37 under various heads such as outstanding rental, electricity, water charges, etc. with pendente lite and future interest @ 24% per annum till realization along with cost of arbitration and counsel's fee.

10. On 27.11.2020 adjournment was sought on behalf of the Petitioner for taking instructions for vacating the leased premises and the matter was adjourned to 05.12.2020. Thereafter, Petitioner did not join the arbitral proceedings and did not file the Statement of Defence. The possession was

finally handed over to the Respondent on 08.01.2021. Evidence was led by the Respondent by way of affidavits of two witnesses but since the Petitioner was not appearing, the witnesses were not cross-examined. Respondent filed written arguments and finally the impugned award dated 16.11.2021 was passed by the learned Arbitrator awarding a sum of Rs.11,67,73,536/- in favour of the Respondent towards outstanding rent/occupational charges, CAM, electricity, water, LPG and late payment charges. The amount was to be paid within two months from the date of communication of the award failing which Petitioner was liable to pay simple interest @ 9% per annum on the aforesaid amount from the date of award till realization. A sum of Rs.20,00,000/- was awarded towards cost of proceedings and counsel's fee.

O.M.P. (COMM) 181/2022

11. Additional/different facts in the present petition are that lease deed dated 04.08.2017 was executed between the Petitioner and the Respondent in respect of premises having a super area admeasuring 42,500 sq. ft. on Fourth Floor, Ambience Mall Complex, Gurgaon ('Leased Premises') for operating and managing an entertainment centre comprising bowling alleys and other activities. The lease period was 12 years 1 month and 22 days. Rent was payable in accordance with Clause 2 of the lease deed and Clause 4 contemplated a security deposit by the Petitioner. On 01.03.2018, parties executed an Addendum to the lease deed whereby they agreed that the CAM charges payable between 28.10.2017 to 27.10.2018 shall stand deferred to 28.10.2018 to 27.10.2019.

12. On account of the financial distress, Petitioner was constrained to terminate the lease deed vide termination letter dated 20.02.2020. In the termination letter itself, Petitioner had requested the Respondent to allow

the Petitioner to remove its goods and the equipment from the leased premises.

13. In the midst of Pandemic COVID-19, Respondent vide its e-mail dated 25.09.2020 invoked the dispute resolution clause 25 contained in the lease deed and proposed the names of three former Judges of this Court, requesting the Petitioner to nominate one of them as the sole Arbitrator. Vide e-mail dated 06.10.2020, Petitioner communicated its unequivocal non-acceptance of the three names.

14. Despite the objection, Respondent appointed the sole Arbitrator and vide letter dated 07.10.2020 wrote to the learned Arbitrator intimating the appointment and requesting the Arbitrator to give a declaration under Section 12 of the 1996 Act. Aggrieved by the unilateral appointment, Petitioner wrote to the Arbitrator on 08.10.2020 to take the objections against the appointment on record and also apprised the Arbitrator that it would be approaching the Respondent for appointment under Section 11(5) of the 1996 Act. On 27.10.2020 Respondent wrote to the Petitioner admitting that Petitioner had objected to the three names proposed. Preliminary hearing was held by the Arbitrator on 27.10.2020 through video conferencing, in which the Petitioner participated, without prejudice to its rights and contentions and stated that it would endeavour to settle the disputes amicably. Matter was adjourned to 09.11.2020 and the counsel for the Petitioner stated before the Arbitrator that the Petitioner was not pressing its objection against the appointment of the Arbitrator and accordingly, the objection was permitted to be withdrawn. Thereafter, the Petitioner neither appeared in the proceedings nor filed the Statement of Defence and after the right to file the same was closed, Respondent led evidence and the impugned award dated 23.12.2021 was passed awarding a

sum of Rs.5,69,47,333/- in favour of the Respondent towards outstanding rent, CAM, electricity, water, LPG and late payment charges. The amount was to be paid within two months from the date of communication of the award failing which Petitioner was liable to pay interest @ 9% per annum on the aforesaid amount from the date of award till realisation. A sum of Rs.10,00,000/- was awarded towards cost of arbitral proceedings and counsel's fees.

15. The first and foremost contention raised by learned counsel for the Petitioner, common to both the petitions, is that the impugned Awards are *void-ab-initio* on the ground of ineligibility of the learned Arbitrator since the appointment was a unilateral appointment. From the very inception, Petitioner was opposed to the appointment of the learned Arbitrator. Respondents had invoked arbitration clause 25 in the midst of Pandemic COVID-19 and vide email dated 06.10.2020, Petitioner had communicated its unequivocal non-acceptance of the three names proposed by the Respondents, despite which the Respondents proceeded to appoint the learned Arbitrator on 07.10.2020. Petitioner wrote to the learned Arbitrator also apprising of the *mala fide* conduct of the Respondents in making unilateral appointment and that the Petitioner would be taking recourse to Section 11(5) of the 1996 Act for appointment of the Arbitrator. The contention is that unilateral appointment of an Arbitral Tribunal cannot be sustained in view of the settled position of law in this regard. Reliance was placed on the judgment of the Supreme Court in ***Perkins Eastman Architects DPC and Another v. HSCC (India) Limited, (2020) 20 SCC 760,*** wherein the Supreme Court emphasised on the principle of party autonomy and freedom of the parties to an arbitration agreement to nominate Arbitrators of their choice. Reliance was also placed on the

judgment of this Court in ***Proddatur Cable TV Digi Services v. Siti Cable Network Limited, 2020 SCC OnLine Del 350,*** to support the argument.

16. It was further contended that Respondents had incorrectly informed the Arbitrator that they had complied with all the essential pre-requisites for appointment, concealing the fact that merely a day prior to the communication of the Respondents to the Arbitrator on 07.10.2020, Petitioner had vide letter dated 06.10.2020 clearly communicated its unequivocal non-acceptance of the 3 names proposed by the Respondents vide e-mail dated 25.09.2020. In fact, Respondents in their e-mail dated 27.10.2020 addressed to the Arbitrator admitted that Petitioner had refused to accept the panel of three names proposed by the Respondents for the purpose of nominating the sole Arbitrator. As the Arbitrator was ineligible on account of unilateral appointment, the impugned Awards deserve to be set aside on this ground alone.

17. Respondents have placed overemphasis on the statement made by the counsel for the Petitioner before the Arbitrator and recorded in the order sheet dated 09.11.2020, that the objections against the appointment were being withdrawn, to defend the Awards. However, this position adopted by the Respondents is wholly fallacious. Recordal of a purported waiver to the applicability of Section 12(5) of the 1996 Act by a party during arbitration proceedings, is not sufficient to constitute waiver, since proviso to Section 12(5) mandatorily requires 'an express agreement in writing'. This very issue arose before this Court in ***Score Information Technologies Limited v. GR Infra Projects Limited, 2021 SCC OnLine Del 3547,*** and the Court rejected the argument of waiver in the absence of a written agreement between the parties to waive the applicability of Section 12(5), observing that mere recording by the Arbitrator, cannot be construed as an express

agreement. Court also took note of the fact that Petitioner had immediately on receipt of notice of appointment of the Arbitrator, had objected to such appointment. Reliance was also placed, to further this proposition, on the judgment of this Court in ***Larsen and Toubro Limited v. HLL Lifecare Limited, 2021 SCC OnLine Del 4465,*** amongst other judgments.

18. *Per contra,* counsel for the Respondents strenuously urged that it is not open to the Petitioner to raise a plea that there was no waiver to the applicability of Section 12(5) and/or the appointment was in contravention of the judgment of the Supreme Court in ***Perkins (supra),*** allegedly being a unilateral appointment. The objection qua appointment of the sole Arbitrator was raised by the Petitioner at the initial stage, but was consciously withdrawn during the hearing on 09.11.2020, wherein counsel for the Petitioner had specifically stated that the objection be dismissed as not pressed. The statement was duly recorded in the order sheet dated 09.11.2020 and the objection was dismissed as withdrawn. It is on account of this concession that the sole Arbitrator proceeded with the matter directing the Respondent to file the Statement of Claim and thereafter the Statement of Defence. Even after 09.11.2020, Petitioner participated in the proceedings, *albeit* selectively, but no objection was raised thereafter to the appointment nor was any recourse taken to a legal remedy seeking termination of the mandate. Having taken a calculated chance, the plea of unilateral appointment is not available to the Petitioner, after conclusion of the proceedings and their culmination in arbitral Awards.

19. It was also argued that the judgment of the Supreme Court in ***Perkins (supra),*** or other judgments on unilateral appointments, will be of no avail to the Petitioner as both parties consciously and willingly agreed to the appointment of the Arbitrator and subjected themselves to the

jurisdiction. This plea, if entertained at this stage, would be unfair to the Respondents who have gone through the entire proceedings, led evidence and spent time, energy and money. Had the Petitioner not withdrawn its objection on 09.11.2020, Respondents may have considered changing the Arbitrator, but at this late stage any interference will cause prejudice to them. In ***Quippo Construction Equipment Limited v. Janardan Nirman Private Limited, (2020) 18 SCC 277,*** the Supreme Court has held that considering the fact that Respondent failed to participate in the proceedings before the Arbitrator and did not raise any objection that the Arbitrator did not have jurisdiction, Respondent must be deemed to have waived such an objection. Waiver is consensual in nature and implies meeting of the minds requiring two parties, one waiving and the other receiving the benefit of waiver.

20. I may note that parties also addressed arguments on the merits of the claims under the impugned Awards and referred to judgments in that context. However, since an objection has been raised with regard to the appointment of the learned Arbitrator, which goes to the root of the matter, in my view, it is necessary to decide this as a preliminary issue.

21. The primordial question that falls for consideration before this Court is whether the impugned Awards are liable to be set aside on the ground that the learned Arbitrator was appointed unilaterally by the Respondents and was thus ineligible by virtue of Section 12 of the 1996 Act as well as the law laid down by the Supreme Court, to conduct the arbitral proceedings and render the impugned Awards.

22. Arbitration is an alternate dispute resolution mechanism chosen by the parties to a contract incorporating the Arbitration Agreement, wherein a third party is chosen and appointed to resolve the disputes and which is

why Arbitrators are commonly referred to as creatures of a contract. The ethos and first principle on which the arbitration mechanism functions is party autonomy i.e. freedom to choose an Arbitrator acceptable to both parties to the agreement, embedded in the principle of natural justice that 'no man can be a judge of his own cause' i.e. '*Nemo judex in causa sua'.*

23. In its landmark judgment in ***Perkins (supra),*** the Supreme Court crystallized the position in law that unilateral appointment of the Arbitrator will be vitiated under Section 12(5) of the 1996 Act as it hits the principle of autonomy. Relevant paragraph is as follows:-

> *"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."*

24. In this judgment, the Supreme Court had referred to an earlier judgment of the Supreme Court in ***TRF Limited v. Energo Engineering Projects Limited, (2017) 8 SCC 377,*** where the Managing Director himself was a named Arbitrator and the Supreme Court found him ineligible/

incompetent to function as an Arbitrator on account of the interest that he may have in the outcome of the dispute. The principle was reaffirmed by the Supreme Court in ***Bharat Broadband Network Limited v. United Telecoms Limited, (2019) 5 SCC 755,*** and subsequently followed in several judgments of this Court. In order to avoid prolixity, I may refer to some of the judgments where the Courts have held that unilateral appointments of the Arbitrators cannot be countenanced and are untenable in law viz. ***Proddatur Cable TV Digi Services (supra); A.K. Builders v. Delhi State Industrial Infrastructure Development Corporation Ltd., 2022 SCC OnLine Del 627; Osho G.S. and Company v. Wapcos Limited, 2022 SCC OnLine Del 459; HLL Lifecare Limited (HLL) v. Employees State Insurance Corporation (ESIC), 2021 SCC OnLine Del 3505*** and two recent judgments of the Division Bench of this Court in ***Govind Singh v. Satya Group Pvt. Ltd. and Another, 2023 SCC OnLine Del 37*** and ***Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat, 2023 SCC OnLine Del 3148.***

25. Coming to the facts of the present case, it would be first necessary to have a close look at the arbitration clause incorporated in the lease deeds executed between the parties. Clause 25 is extracted hereunder, for ready reference:-

> *"Clause25 –*
>
> *25.1. The parties have agreed to amicably settle and/or resolve all disputes and differences arising out of these presents or otherwise concerning the Lease/Occupation/Use of the Space amongst themselves; but in the event any dispute of whatsoever nature is incapable of being resolved amongst the parties hereto amicably then and in event the parties have agreed to refer and disputes and differences including the construction scope or effect of any of the terms and conditions herein contained or otherwise concerning the Lease/Occupation/Use of the space and/or the determination of any right and/or liability and/or in any way touching or concerning these presents or otherwise concerning the Lease/Occupation/Use of the Space to the sole Arbitration of an*

> *independent arbitrator to be appointed by the LESSOR. The Arbitrator shall not be less than the level of a Retd. High Court Judge. The Lessor shall before appointing the Arbitrator, propose three names to the Lessee and the Lessee shall choose the sole arbitrator from the three names proposed."*

26. Plain reading of Clause 25 shows that it empowered the lessor i.e. Respondents to appoint an independent sole Arbitrator for adjudication of disputes and differences arising out of the present lease agreements. The clause provides that the proposed Arbitrator shall not be less than the level of a retired High Court Judge and the lessor shall before appointing the Arbitrator, propose three names to the lessee, who shall choose from the three names proposed. In the light of the judgments of the Supreme Court in ***Perkins (supra), TRF Limited (supra)*** and ***Bharat Broadband Network Limited (supra),*** the first question that begs an answer is whether the panel of three proposed Arbitrators prepared by the Respondents, from which the Petitioner was to choose one name, was 'broad based', in conformity with the principles laid down in ***Voestalpine Schienen Gmbh v. Delhi Metro Rail Corporation Ltd, (2017) 4 SCC 665.*** The next question is whether the unilateral appointment by the Respondents can be sustained in law, especially when Petitioner had expressed its non-acceptance at the very inception, upon receiving the communication to choose from the 3 proposed names.

27. Coming first to the first question, the observations of the Supreme Court in ***Voestalpine Schienen Gmbh (supra),*** are a clear answer to this question and are as follows:-

> *"29. Some comments are also needed on Clause 9.2(a) of GCC/SCC, as per which DMRC prepares the panel of "serving or retired engineers of government departments or public sector undertakings". It is not understood as to why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is*

imperative that panel should be broad based. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like Judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy, etc. Therefore, it would also be appropriate to include persons from this field as well.

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."

28. The Supreme Court emphasised on need to have a broad-based panel in order to instil confidence in the parties. In this context I may allude to a recent judgment of this Court in ***L&T Hydrocarbon Engineering Limited v. Indian Oil Corporation Limited, 2022 SCC OnLine Del 3587***, the facts of which are closer home, where the arbitration agreement required forwarding three names to the Petitioners, for it to choose one person, who would then be appointed as a sole Arbitrator. The Court declared that the procedure for appointment was not in conformity with the observations of the Supreme Court in ***Voestalpine Schienen Gmbh (supra)*** and the relevant paragraphs are as follows:-

"96. In the present case, the stipulation requires forwarding three names (even if they are retired employees from other organizations and not IOCL) to the petitioners, for it to choose one name amongst them to act as the Sole Arbitrator. It cannot be overlooked that the list of three

names is a restrictive panel limiting the choice of the petitioner to only three options. I have noted that the three persons named in the panel forwarded to the petitioner are retired officers of different organisations like ONGC, SAIL and GAIL. The integrity and impartiality of these officers could not be normally doubted. However, in the absence of a free choice given to the petitioner to choose the arbitrator from a broad and diversified panel, and the power conferred upon the respondent to forward any three names as the panel at its discretion, there is a possibility of apprehension arising on part of the petitioner about the impartiality of the persons in the panel so forwarded. Whether such an apprehension is justified or not, is not for this Court to decide, and is, in any case, immaterial. It is settled law that even an apprehension of bias of an arbitrator in the minds of the parties would defeat the purpose of arbitration, and such a situation must be avoided.

97. Therefore, I declare that the procedure for appointment of the arbitrator (if any) shall necessarily be in terms of the observations of the Supreme Court in ***Voestalpine Schienen GmBH (supra)****."*

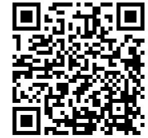
29. In view of the above, there can be no debate that the procedure stipulated in Clause 25 of the lease deeds, for appointment of a sole Arbitrator, where Petitioner is called upon to choose from the restricted panel of 3 names prepared by the Respondents, is not in consonance with the law laid down by the Supreme Court. Hence, the first question is answered in favour of the Petitioner and against the Respondents.

30. Coming to the second question, it is pertinent to mention that the Respondents, exercising their right under Clause 25 invoked the arbitration clause on 25.09.2020 and proposed the names of three former Judges of this Court to the Petitioner, vide letter dated 25.09.2020. Petitioner did not accept the proposal and by a communication dated 06.10.2020 unequivocally and unambiguously conveyed its non-acceptance of the three names proposed. Having been aware or at least ought to have been aware of the law that Respondents were precluded from making a unilateral appointment from a restricted panel and that too in the light of objection by the Petitioner, Respondents in complete contravention of the legal position, proceeded to nominate the sole Arbitrator. Petitioner immediately sent a

communication to the Arbitrator on 08.10.2020, explicitly conveying its non-acceptance to the names proposed and also intimating that Petitioner would be taking recourse to Section 11(5) of the 1996 Act for appointment of the sole Arbitrator. Pertinently, the Respondents in their reply to the objections raised by the Petitioner admitted that Petitioner had declined to accept the proposed names. Once the Petitioner objected to the three names proposed and declined to exercise the choice to nominate any one amongst the three, the remedy available to the Respondents was to approach the Court seeking appointment of the sole Arbitrator by invoking provisions of Section 11(5) and (6) of the 1996 Act. This procedure was admittedly not followed and instead the Respondents treaded on a wrong path and proceeded to appoint the sole Arbitrator unilaterally, in contravention of the provisions of Section 12(5) of the 1996 Act.

31. The primordial argument on behalf of the Respondents is that the appointment of the sole Arbitrator cannot be termed as the unilateral appointment as it was by mutual consent. In order to make good this point, it was urged that on 09.11.2020, counsel for the Petitioner had categorically stated that Petitioner was withdrawing its objection to the appointment of the sole Arbitrator and participated in the proceedings *albeit* selectively. This, according to the learned counsel, amounts to waiver under proviso to Section 12(5) of the 1996 Act.

32. Coming to the argument of the Respondents that Petitioner's participation in the arbitral proceedings constituted waiver by conduct, suffice would it be to state that this issue is no longer *res integra.* The Supreme Court in the case of ***Bharat Broadband Network Limited (supra),*** has held that waiver under Section 12(5) of the 1996 Act would be valid only if it is by an 'express agreement in writing'. Relevant paragraphs of



the decision are as follows:-

> *"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.*
>
> *xxx xxx xxx*
>
> *17. The scheme of Sections 12, 13 and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case i.e. a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e. de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such*

person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them.

xxx xxx xxx

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."*

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 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."

33. Following this judgment of the Supreme Court, Co-ordinate Bench of this Court in ***JMC Projects (India) Ltd. v. Indure Private Limited, 2020 SCC OnLine Del 1950,*** held as follows:-

"28. The import of these decisions is as unequivocal as it is inexorable. An "express agreement in writing", waiving the applicability of Section 12(5), is the statutory sine qua non, for a person, who is otherwise subject to the rigour of Section 12(5), to remain unaffected thereby. Nothing less would suffice; no conduct, howsoever extensive or suggestive, can substitute for the "express agreement in writing". Sans such "express agreement in writing", Section 12(5), by operation of law, invalidates the appointment, of any person whose relationship, with the parties to the disputes, falls under any of the categories specified in the Seventh Schedule of the 1996 Act. The invalidity, which attaches to such a person would also, ipso facto, attach to her, or his, nominee.

29. Mr. N.P. Gupta, who was authorized by the arbitration clause in the present case, to appoint the arbitrator being the Chairman of the respondent, was, therefore, invalidated from either acting as the arbitrator or nominating or appointing any arbitrator.

30. Conscious of the statutory interdict, Mr. Prashant Mehta, learned counsel appearing for the respondent, sought to pitch his case on the proviso to Section 12(5) of the 1996 Act, which excepts the applicability of the said sub-section to cases in which, subsequent to the arising of disputes, the parties waived the applicability of sub-subsection by an express agreement in writing.

31. A reading of the afore-extracted passages from Bharat Broadband Network Ltd.3, however, make it abundantly clear that, unlike Section 4

of the 1996 Act, the agreement in writing, to which the proviso to sub-Section 12(5) refers, has to be express. Agreement, by conduct, is excluded, ipso facto, from the applicability of the said proviso.

32. Mr. Prashant Mehta has invited my attention to the fact that, by seeking extension, twice, for the completion of arbitral proceedings by the existing learned sole arbitrator, as well as by communicating, via e-mails, to the learned sole arbitrator, on 6th January, 2020 and 20th January, 2020, seeking, inter alia, extension of time to file the affidavit by way of evidence of its witnesses, the petitioner has expressly consented, in writing, to the functioning of the learned sole arbitrator, as the arbitrator to adjudicate the disputes between the petitioner and the respondent.

xxx xxx xxx

34. "Express waiver of rights", as a jurisprudential concept, has invoked judicial cogitation, on more than one occasion. In Inderpreet Singh Kahlon v. State of Punjab, it was held thus:

> *"Waiver is the abandonment of a right, and thus is a defence against its subsequent enforcement. Waiver may be express or, where there is knowledge of the right, may be implied from conduct which is inconsistent with the continuance of the right. A mere statement of an intention not to insist on a right does not suffice in the absence of consideration; but a deliberate election not to insist on full rights, although made without first obtaining full disclosure of material facts, and to come to a settlement on that basis, will be binding."*

xxx xxx xxx

36. In the face of the law laid down in the aforesaid decisions, chiefly, in Bharat Broadband Network Ltd., it is not possible to accede to the submissions of Mr. Mehta.

37. The Supreme Court has laid down clearly and unmistakably, that the "express agreement in writing", to which the proviso to Section 12(5) alludes, has to be exactly that, and no less; in other words, the parties must expressly agree in writing to a waiver of Section 12(5) of the 1996 Act.

38. The said agreement in writing must reflect awareness, on the parties, to the applicability of the said provision as well as the resultant invalidation, of the learned arbitrator, to arbitrate on the disputes between them, as well as a conscious intention to waive the applicability of the said provision, in the case of the disputes between them.

39. It is obvious that the filing of applications for extension of time for continuance and completion of the arbitral proceedings, or applications to the arbitrator, for extension of time to file the affidavit of evidence, etc., cannot constitute an "agreement in writing" within the meaning of the proviso to Section 12(5) of the 1996 Act.

40. In view of the aforesaid discussion, it is apparent that, by the operation of Section 12(5) of the 1996 Act, in the light of the decisions of the Supreme Court in TRF Ltd., Perkins Eastman Architects DPC and Bharat Broadband Network Ltd., the learned sole arbitrator, appointed by Mr. N.P. Gupta, before whom the arbitral proceedings have been continuing thus far, has been rendered de jure incapable of continuing to function as arbitrator, within the meaning of Section 14(1)(a) of the 1996 Act.

xxx xxx xxx

42. The learned sole arbitrator has been rendered de jure incapable to continue to function as such, not because of any failing on the part of the learned sole arbitrator, but because of statutory compulsion, enforced by judicial precedents on the issue."

34. The aforesaid view was reiterated by this Court in the case of ***Score Information Technologies Limited (supra), Larsen and Toubro Limited (supra), A.K. Builders (supra)*** and ***Saroj Pandey v. Aaryavrat Products India Pvt. Ltd.***, ***2023 SCC OnLine Del 6629.*** Recently, a Division Bench of this Court in ***Govind Singh (supra)*** has held that once the Arbitrator becomes disabled and ineligible to act under Section 12(5) of the 1996 Act, it is not even necessary to examine the question whether the party in disagreement with the appointment had raised an objection to the appointment and even if it is assumed that the said party had participated in the arbitral proceedings, without raising any objection to the appointment, it is not open to hold that it had waived its right under Section 12(5). Relevant paragraphs are as follows:-

"17. Following the aforesaid decision of the Supreme Court in Perkins Eastman Architects DPC v. HSCC (India) Ltd. (supra), a learned Single Judge of this Court in Proddatur Cable TV Digi Services v. Citi Cable Network Limited : (2020) 267 DLT 51 held that it would be impermissible for a party to unilaterally appoint an arbitrator. In terms of Section 12(5) of the A&C Act read with the Seventh Schedule of the A&C Act, an employee would be ineligible to act as an arbitrator by virtue of the law as explained by the Supreme Court in TRF Ltd. v. Energo Engineering Projects Ltd. (supra) and Perkins Eastman Architects DPC v. HSCC (India) Ltd. (supra). Such ineligibility would

also extend to a person appointed by such officials who are otherwise ineligible to act as arbitrators.

18. In view of the law as noted above, the learned Arbitrator unilaterally appointed by the respondent company was ineligible to act as an arbitrator under Section 12(5) of the A&C Act.

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. The relevant extract of the said decision reads as under:—

> *"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."*
>
> *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…"*

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.

xxx xxx xxx

23. We are unable to agree that the decision in Bharat Broadband Network Limited v. United Telecoms Limited (supra) can be distinguished on the aforesaid ground. The said decision had authoritatively held that in terms of the proviso of Section 12(5) of the A&C Act, the ineligibility of an arbitrator under Section 12(5) of the A&C Act could be waived only by an express agreement in writing and cannot be inferred by the conduct of the parties. Thus, the fact that the parties had participated before the arbitral tribunal cannot be construed as a waiver of their rights to object to the ineligibility of the arbitrator(s). We are unable to accept that while such a right could be exercised prior to the delivery of the award, it would cease thereafter. If the arbitrator is ineligible to act as an arbitrator, the arbitral award rendered by the arbitral tribunal would be without jurisdiction."

35. In view of these judgments, the argument of the Respondents that Petitioner has waived its right by conduct, owning to participation in the arbitral proceedings, under proviso to Section 12(5) cannot be countenanced in law. Coming to the next limb of the argument of waiver, heavy reliance was placed by the Respondents on the statement made by the counsel for the Petitioner before the Arbitrator that Petitioner was giving up the objection to the appointment. This very issue came up for consideration before a Bench of this Court in ***Larsen and Toubro Limited (supra),*** wherein Petitioner had filed an application under Section 14 of the 1996 Act seeking termination of the mandate of the Arbitrator on the ground that Respondent had unilaterally appointed the sole Arbitrator and the grievance was predicated on Section 12(5) and the judgments of the Supreme Court in ***Perkins (supra), Bharat Broadband Network Limited (supra)*** and ***Haryana Space Application Centre v. Pan India Consultants Pvt. Ltd., AIR 2021 SC 653.*** Petition was resisted by the Respondent *inter alia* on the consent given by the Petitioner before the Arbitrator, which was

recorded in one of the procedural orders. The contention was that having given consent to the Arbitrator that both parties had no objection to the Arbitral Tribunal, it was not open to take a plea of unilateral appointment. Holding that the learned Arbitrator is *de jure* rendered incapable of continuing with the arbitral proceedings, being a unilateral appointment, the Court observed that this statement made before the Arbitrator in one of the procedural hearings will not operate as an express waiver in writing for the applicability of proviso to Section 12(5) of the 1996 Act. The Court relied on the judgment of the Supreme Court in ***Bharat Broadband Network Limited (supra)*** to come to this conclusion, wherein the Supreme Court held that there must be an 'express agreement in writing', waiving the applicability of Section 12(5). Relevant paragraphs of the judgment in ***Larsen and Toubro Limited (supra)*** are as follows:-

> *"7. Mr. Singh, essentially predicates his opposition, to the petition, on two facts. Firstly, he draws my attention to the procedural order dated 5th August, 2019, passed by the learned arbitral tribunal, Para 5 of which records thus:*
>
> > *"5. The Sole Arbitrator declared under Section 12 of the Arbitration & conciliation Act 1996 that there are no circumstances likely to give rise to any Justifiable doubts as to their independence and impartiality. Both the parties confirmed that they have no objection to the Arbitral Tribunal."*
>
> *8. Secondly, Mr. Singh, relies on a communication, dated 3rd December, 2020, from the petitioner to the learned arbitrator, whereby the petitioner provides its consent for extension of six months for completion of the arbitral proceedings.*
>
> *9. Neither of these considerations can operate as an express waiver in writing, of the applicability of Section 12(5) of the 1996 Act. In fact, similar contentions, including the contention regarding the request for extension of time operate as a waiver to Section 12(5) were advanced before this Court and narrated in JMC Projects (India) Ltd. v. Indure Pvt. Ltd., as is apparent from the paragraphs extracted hereinabove.*
>
> *10. Clearly, therefore, the learned arbitrator is de jure rendered incapable of continuing with the arbitral proceedings."*

36. The same view was taken by another Bench of this Court in ***Score Information Technologies Limited (supra)*** and relevant paragraphs are as follows:-

> *"**29**. In terms of the proviso to Sub-section 12(5) of the A&C Act, the parties may waive the applicability of Section 12(5) of the Act. However, the said waiver has to be (i) subsequent to the disputes having arisen; and (ii) made by way of "an express agreement in writing".*
>
> ***30**. Concededly, in this case, there is no written agreement between the parties, whereby the petitioner has agreed to waive the applicability of Section 12(5) of the A&C Act.*
>
> ***31**. This Court is also unable to accept that the proceedings recorded by the Arbitrator would constitute such an express agreement in the facts of this case. The petitioner had pointed out that on that date, its representatives were not assisted by any counsel. It is also averred by the petitioner that the proceedings of the day, which are not signed by the parties, incorrectly record that the petitioner had no objection for the appointment of the learned Arbitrator. The petitioner had immediately on receipt of the notice of appointment of the learned Arbitrator, had objected to such appointment."*

37. Therefore, the import of all the aforesaid judgments is unequivocally and unambiguously that an express agreement in writing, waiving the applicability of Section 12(5) is the statutory *sine qua non* to exit from the rigours of Section 12(5) and nothing less would suffice. As held in the aforesaid judgments, no conduct, howsoever extensive or suggestive or even a statement before the Arbitrator can substitute an 'express written agreement' and *sans* a written agreement envisaged under Section 12(5), operation of law will invalidate a unilateral appointment. Therefore, this Court cannot subscribe to the argument of the Respondent that the statement made by the counsel for the Petitioner giving up its objection to the Arbitrator's appointment would constitute a waiver. This would also require to be seen in light of the fact that as soon as the Petitioner received the communication suggesting a panel of three names, it had responded in writing, stating unequivocally that the proposed panel was not

acceptable and this was followed by a similar communication to the Arbitrator.

38. This gets me to the next plank of argument of the Respondents that challenge to the impugned Awards should not be entertained in a petition under Section 34 of the 1996 Act, on the ground of alleged ineligibility attached to the appointment of the sole Arbitrator. It is no longer *res integra* that an arbitral award rendered by an Arbitrator, who is ineligible to act as an Arbitrator cannot be termed as an arbitral award and thus not binding on the parties. In ***Govind Singh (supra),*** the Division Bench answered this question, as follows:-

> *"21. In view of the above, the remaining question to be addressed is whether an arbitral award rendered by a person who is ineligible to act as an arbitrator is valid or binding on the parties. Clearly, the answer must be in the negative. The arbitral award rendered by a person who is ineligible to act as an arbitrator cannot be considered as an arbitral award. The ineligibility of the arbitrator goes to the root of his jurisdiction. Plainly an arbitral award rendered by the arbitral tribunal which lacks the inherent jurisdiction cannot be considered as valid. In the aforesaid view, the impugned award is liable to be set aside as being wholly without jurisdiction.*
>
> *xxx xxx xxx*
>
> *23. We are unable to agree that the decision in Bharat Broadband Network Limited v. United Telecoms Limited (supra) can be distinguished on the aforesaid ground. The said decision had authoritatively held that in terms of the proviso of Section 12(5) of the A&C Act, the ineligibility of an arbitrator under Section 12(5) of the A&C Act could be waived only by an express agreement in writing and cannot be inferred by the conduct of the parties. Thus, the fact that the parties had participated before the arbitral tribunal cannot be construed as a waiver of their rights to object to the ineligibility of the arbitrator(s). We are unable to accept that while such a right could be exercised prior to the delivery of the award, it would cease thereafter. If the arbitrator is ineligible to act as an arbitrator, the arbitral award rendered by the arbitral tribunal would be without jurisdiction."*

39. From the aforesaid judgment, it is clear that the ineligibility of the Arbitrator goes to the root of the jurisdiction and vitiates the award. Such is the threshold of this disability that in a recent judgment in ***Kotak Mahindra***

Bank Ltd. (supra), the Division Bench of this Court had interfered at the stage of execution of the arbitral award and upheld the order of the learned Commercial Court, holding that an award rendered by a person who is ineligible to act as an Arbitrator by virtue of Section 12(5) is a nullity and cannot be enforced. In view of these judgments, in my considered view, the impugned awards cannot be sustained in law, solely on the ground of ineligibility of the learned Arbitrator and are accordingly set aside.

40. It is however made clear that since the impugned awards are being set aside on the ground of ineligibility of the learned Arbitrator to act as an Arbitrator, parties are not precluded from reagitating their claims/counter claims afresh, before another Arbitral Tribunal. It is further clarified that this Court has not expressed any opinion on the merits of the disputes between the parties.

41. Both petitions are allowed and disposed of along with pending applications.

OMP (ENF.) (COMM.) 134/2022 and EX.APPLs.(OS) 3191-92/2022

42. Since the impugned Awards have been set aside, no further order is required to be passed in the present enforcement petition and the same is dismissed. Pending applications also stand disposed of.

JYOTI SINGH, J

DECEMBER 18, 2023/kks/shivam