



ARBITRATION AND CONCILIATION

Delhi High Court Rules Unilateral Arbitrator Appointment Invalid Without Post-Dispute Written Waiver

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Introduction

In a recent judgment, the Delhi High Court reaffirmed the principles of impartiality and procedural fairness in arbitration, holding that a party cannot invoke the protections of Section 12(5) of the [Arbitration and Conciliation Act, 1996](#), if it has unilaterally appointed an arbitrator without securing the express written waiver of the other party after the dispute has arisen. The decision in *M/s Mahavir Prasad Gupta and Sons v. Govt. of NCT of Delhi* (FAO (COMM) 170/2023) marks yet another significant intervention in India's evolving arbitration jurisprudence, which continues to strike a balance between promoting efficiency and upholding fundamental safeguards.

Factual Background

The dispute arose from a public works contract between M/s Mahavir Prasad Gupta and Sons and the Government of NCT of Delhi, relating to the strengthening of Road No. 58 in Delhi. After the work was completed, the Government withheld the final payment, citing alleged defects. When the dispute was referred to arbitration, the Government unilaterally appointed Shri A.K. Singhal, a former CPWD official, as the sole arbitrator.

The arbitrator passed an award in favor of the contractor, granting over ₹1.76 crore along with 10% interest. However, the Commercial Court, upon challenge under Section 34 of the Arbitration and Conciliation Act, 1996, set aside the award on the ground that the appointment of the arbitrator was in contravention of Section 12(5) read with the Seventh Schedule of the Act.

The Legal Issue

The central question before the Delhi High Court was whether the arbitral award, passed by a unilaterally appointed arbitrator, could stand when the respondent had not objected to the appointment during the arbitration proceedings.

Challenge by the Appointing Party Itself

A notable aspect of the judgment is the Court's confirmation that even the party that unilaterally appointed the arbitrator can challenge the award under Section 34 on grounds of ineligibility under Section 12(5). In this case, the Government of NCT of Delhi, despite having appointed the sole arbitrator, successfully argued that the appointment violated the neutrality requirement.

The Court held that ineligibility under Section 12(5) is a jurisdictional defect and cannot be cured by conduct or participation. Such objections remain valid even if raised by the appointing party. This reasoning aligns with the Supreme Court's decision in *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*¹, which confirmed that jurisdictional bars must be expressly waived in writing and cannot be overridden by silence or acquiescence.

The Court's Reasoning

The Division Bench, comprising Justices Vibhu Bakhru and Tejas Karia, reiterated that the unilateral appointment of a sole arbitrator is impermissible under Indian arbitration law. Citing *TRF Ltd. v. Energo Engineering Projects Ltd.*² The Court held that once a person is rendered ineligible under Section 12(5), they cannot even nominate another arbitrator. This reasoning was extended by the Supreme Court in *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*³ which clarified that exclusive power with one party to appoint the sole arbitrator is itself invalid.

The Court also relied on the Constitution Bench judgment in *CORE v. ECI SPIC SMO MCML (JV)*⁴, which confirmed that unilateral appointments, particularly in public-sector contracts, violate the principle of equality and require an express written waiver after the dispute arises to be valid.

Accordingly, the Court held:

- A sole arbitrator appointed unilaterally is ineligible under Section 12(5) read with the Seventh Schedule;
- Participation in the proceedings or seeking extension of mandate under Section 29A does not amount to a valid waiver;
- An award rendered by such an arbitrator is a nullity and can be set aside under Section 34 or refused enforcement under Section 36, even if the objection is raised for the first time.

Additionally, the Court rejected the argument that the respondent's consent to extend the arbitrator's mandate under Section 29A amounted to an implied waiver of ineligibility. It clarified that Section 12(5) requires an express written waiver made after the dispute arises, and procedural steps like consenting to an extension cannot substitute for such a waiver. This reaffirmed that neutrality and eligibility requirements are not subject to dilution by conduct or convenience.

On Waiver by Conduct

The Court firmly rejected the appellant's contention that the respondent, having participated in the arbitral proceedings without objection, was estopped from challenging the arbitrator's appointment. It held that Section 4 of the Arbitration and Conciliation Act, 1996, which deals with waiver by conduct, does not apply in cases governed by Section 12(5). The latter provision mandates that any waiver of ineligibility must be made through an express agreement in writing, entered into after the dispute has arisen.

This interpretation is consistent with the Supreme Court's ruling in *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*, where it was held that mere participation in proceedings or failure to object does not amount to a valid waiver under Section 12(5). The Court in *Bharat Broadband* clearly distinguished between deemed waiver under Section 4 and the stricter requirement of express written consent under the proviso to Section 12(5).

Judicial Duty Under Section 34

The Court emphasized that under Section 34(2)(b) of the [Arbitration and Conciliation](#) Act, 1996, it has a mandatory duty to set aside an arbitral award that is contrary to the public policy of India, even if no party has objected. It reiterated that principles such as equality before the law and impartial adjudication form part of the "fundamental policy of Indian law" and cannot be waived by silence or participation. An award that violates these core principles is a nullity, incapable of enforcement.

Implications

This decision affirms a clear legal position: unilateral appointments of sole arbitrators, especially by government authorities or public sector entities, are impermissible unless expressly waived in writing after the dispute has arisen. Even the party making the unilateral appointment cannot rely on such an award for enforcement if it contravenes the safeguards under Section 12(5).

The ruling also serves as a reminder to contracting authorities, particularly in the public sector, to review and revise standard arbitration clauses to ensure compliance with the prevailing statutory framework. Outdated clauses granting unilateral appointment powers not only expose parties to annulment risks but also undermine confidence in the arbitral process.

Conclusion

The Delhi High Court's ruling in *Mahavir Prasad Gupta and Sons* continues the judiciary's consistent and strict approach toward ensuring procedural fairness in arbitration. It serves as a cautionary tale for those who assume that procedural lapses can be overlooked in pursuit of finality. As arbitration continues to gain prominence, the judiciary remains vigilant in ensuring that it does not compromise on principles of neutrality and equality.

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