



ARBITRATION AND CONCILIATION

Unilateral Appointment of Arbitrators Under Section 12(5) of the Arbitration and Conciliation Act, 1996: A Critical Analysis of Air Force Naval Housing Board v. M/s N G Constructions

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Introduction

The Delhi High Court, in its judgment dated 26th May 2026 (2026:DHC:4779), delivered a landmark ruling in the case of *Air Force Naval Housing Board v. M/s N G Constructions*, adjudicating upon the contentious question of unilateral appointment of arbitrators and its implications under the amended framework of the Arbitration and Conciliation Act, 1996. Justice Avneesh Jhingan presided over this matter, which arose from a construction contract for residential apartments and culminated in a profound examination of Section 12(5) read with the Seventh Schedule of the Act. The judgment provides critical insights into the doctrine of automatic ineligibility, the stringent requirements for waiver under the proviso to Section 12(5), and the permissibility of challenging arbitral awards by the very party that appointed the arbitrator. This ruling reinforces the legislative intent behind the 2015 Amendment to ensure impartiality, equal treatment of parties, and the integrity of the arbitral process in India.

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Factual Background and Genesis of the Dispute

The commercial relationship between the parties commenced when the Air Force Naval Housing Board issued a Notice Inviting Tender dated 5th March 2010 for the construction of residential apartments, pursuant to which M/s N G Constructions emerged as the successful bidder. The contract was formally executed between the parties on 10th June 2010, and the construction work was completed on 28th November 2017. The contract contained a dispute resolution mechanism under Clause 18.2, which provided for arbitration through a sole arbitrator to be nominated exclusively by the Chairman of the Air Force Naval Housing Board, New Delhi. This unilateral appointment clause became the focal point of subsequent litigation. A dispute arose between the parties, and arbitration was invoked on 18th November 2019 at the instance of the respondent, following which the petitioner unilaterally appointed a sole arbitrator in accordance with the contractual stipulation. The arbitration proceedings culminated in an impugned award dated 27th July 2022, which the petitioner subsequently sought to set aside under Section 34 of the Arbitration and Conciliation Act, 1996.

Contentions of the Parties and the Core Legal Dilemma

The petitioner, Air Force Naval Housing Board, contended that the appointment of the arbitrator was in flagrant violation of Section 12(5) of the Act, rendering the impugned award liable to be set aside. The petitioner placed reliance upon the Supreme Court's decision in *Bhadra International (India) Pvt. Ltd. v. Airports Authority of India, 2026 INSC 6*, and the Delhi High Court's decision in *Railways Board, Ministry of Railways v. Titagarh Rail Systems Limited*, to substantiate its position that unilateral appointment by a party-employee constitutes automatic ineligibility under the Seventh Schedule. Conversely, the respondent, M/s N G Constructions, advanced a compelling counter-argument that the Arbitrator filed a declaration in compliance with Section 12 of the Act without raising any objection whatsoever, and had actively participated in the arbitration proceedings throughout their entirety. The respondent characterized the petitioner's challenge as a disingenuous U-turn, asserting that the petitioner's consent was evident from its act of appointing the sole arbitrator and its subsequent conduct in the proceedings. This juxtaposition of positions presented the Court with the fundamental question of whether participation in proceedings and unilateral appointment could cure or waive the statutory ineligibility mandated by Section 12(5).

Judicial Precedents and Their Application

The Court undertook a meticulous examination of two seminal precedents that have shaped the jurisprudence on unilateral arbitrator appointments in India. The Supreme Court in *Bhadra International* addressed three interrelated issues: whether a sole arbitrator could be deemed ineligible under Section 12(5), whether parties could waive such ineligibility through conduct, and

whether an objection to appointment could be raised for the first time under Section 34. The Supreme Court held that Section 18 mandates equal treatment of parties not merely during arbitral proceedings but also in the constitution of the arbitral tribunal, and that ineligibility under Section 12(5) stems from operation of law, rendering any appointment *ex facie* invalid. The Court further held that the phrase express agreement in writing in the proviso to Section 12(5) requires a clear, unequivocal written manifestation of consent, which cannot be inferred through implication or conduct. The Supreme Court also clarified that when an arbitrator is ineligible by virtue of Section 12(5), the mandate is automatically terminated, and an aggrieved party may approach the court under Section 14 read with Section 15 for a substitute arbitrator, or under Section 34 to set aside an award already rendered.

The Division Bench of the Delhi High Court in *Mahavir Prasad Gupta and Sons v. Government of NCT of Delhi, 2025*, extended these principles by holding that any arbitration agreement providing for unilateral appointment of the sole or presiding arbitrator is invalid and strictly prohibited, rendering any proceedings before such a tribunal a nullity. The Division Bench emphatically held that the proviso to Section 12(5) requires an express agreement in writing, and that conduct of the parties, no matter how acquiescent, is inconsequential and cannot constitute valid waiver. The Court further held that an award passed by a unilaterally appointed arbitrator is a nullity as the ineligibility goes to the root of jurisdiction, and that such objection can be taken at any stage during or after the arbitration proceedings, including by the party that made the unilateral appointment itself.

Court's Analysis and Findings

Applying these precedents to the facts at hand, Justice Jhingan held that after the 2015 Amendment, an employee of a party in dispute can neither be appointed as an arbitrator nor can nominate or appoint any other person as an arbitrator. The unilateral appointment by the Chairman of the Air Force Naval Housing Board was void *ab initio* in the absence of an express agreement in writing between the parties to waive the applicability of Section 12(5). The Court rejected the respondent's contention that filing of the statement of claim or participation in the arbitral proceedings could be construed as waiver, holding that the proviso to Section 12(5) is an exception to Section 4 of the Act, and there is no deemed waiver under Section 4 for unilateral appointment by conduct.

The Court further examined whether there existed any express waiver in writing after the dispute arose, and found none. The Court noted that the express consent in writing under the proviso to Section 12(5) must be of both parties, and that it was not the respondent's case that the petitioner had consented to waiver. Citing *Bhadra International*, the Court emphasized that the legislature has consciously prefaced the term agreement with the word express and followed it with the phrase in writing, denoting the legislative intention that waiver must be made only through an express and written manifestation of consent. The Court also relied upon *Mahavir Prasad Gupta* to hold that a party which unilaterally appointed the arbitrator retains the right to object to such appointment, as the act of appointment itself does not constitute express waiver, and when the arbitral tribunal inherently lacked jurisdiction, the proceedings are void *ab initio* irrespective of which party made the appointment.

Conclusion and Directions

In view of the foregoing analysis, the Court allowed the petition and set aside the impugned award dated 27th July 2022, holding that the appointment of the arbitrator was in violation of Section 12(5) read with the Seventh Schedule of the Act, was void *ab initio*, and rendered the impugned award a nullity. The Court disposed of the pending applications and held that since the award had been set aside, no separate order was required to be passed in the connected matter O.M.P.(COMM) 116/2023. This judgment represents a robust affirmation of the legislative intent behind the 2015 Amendment to eliminate unilateral appointments and ensure parity between parties in the constitution of arbitral tribunals. It clarifies that no amount of participation or conduct can cure a fundamental jurisdictional defect arising from statutory ineligibility, and that the requirement of express written agreement for waiver is a mandatory safeguard that preserves the integrity of the arbitration process. The ruling will serve as a critical precedent in India's arbitration jurisprudence, particularly in government contracts where unilateral appointment clauses have historically been prevalent, and underscores that the path to valid arbitration lies in mutual consent and procedural fairness rather than contractual asymmetry.

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