REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3972 OF 2019
(Arising out of Special Leave Petition (Civil) No.1550 of 2018)

Bharat Broadband Network Limited … Appellant

Versus

United Telecoms Limited … Respondent

WITH

CIVIL APPEAL NO. 3973 OF 2019
(Arising out of Special Leave Petition (Civil) No.1644 of 2018)

JUDGMENT

R.F. NARIMAN, J.

1. Leave granted.

2. The present appeals raise an interesting question as to the interpretation of Section 12(5) of the Arbitration and Conciliation Act, 1996 ["**Act**"].

3. The appellant, Bharat Broadband Network Ltd. ["**BBNL**"], had floated a tender dated 05.08.2013 inviting bids for a turnkey project for supply, installation, commissioning, and maintenance of GPON equipment and solar power equipment. The respondent was the

successful L1 bidder. The appellant issued an Advance Purchase Order ["**APO**"] dated 30.09.2014. Clause III.20.1 of the General (Commercial) Conditions of Contract ["**GCC**"] provides for arbitration. The said clause reads as under:

> "**III.20 ARBITRATION**
>
> **III.20.1** In the event of any question, dispute or difference arising under the agreement or in connection therewith (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the CMD, BBNL or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CMD, BBNL or by whatever designation such an officer may be called (hereinafter referred to as the said officer), and if the CMD or the said officer is unable or willing to act as such, then to the sole arbitration of some other person appointed by the CMD or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act 1996. There will be no object to any such appointment on the ground that the arbitrator is a Government Servant or that he has to deal with the matter to which the agreement relates or that in the course of his duties as a Government Servant/PSU Employee he has expressed his views on all or any of the matters in dispute. The award of the arbitrator shall be final and binding on both the parties to the agreement. In the event of such an arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason whatsoever, the CMD, BBNL or the said officer shall appoint another person to act as an arbitrator in accordance with terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors."

4. Since disputes and differences arose between the parties, the respondent, by its letter dated 03.01.2017, invoked the aforesaid arbitration clause and called upon the appellant's Chairman and Managing Director to appoint an independent and impartial arbitrator for adjudication of disputes which arose out of the aforesaid APO dated 30.09.2014. By a letter dated 17.01.2017, the Chairman and Managing Director of the appellant, in terms of the arbitration clause contained in the GCC, nominated one Shri K.H. Khan as sole arbitrator to adjudicate and determine disputes that had arisen between the parties. He also made it clear that the parties would be at liberty to file claims and counter-claims before the aforesaid sole arbitrator.

5. On 03.07.2017, this Court, by its judgment in **TRF Ltd. v. Energo Engineering Projects Ltd.**, (2017) 8 SCC 377 ["**TRF Ltd.**"], held that since a Managing Director of a company which was one of the parties to the arbitration, was himself ineligible to act as arbitrator, such ineligible person could not appoint an arbitrator, and any such appointment would have to be held to be null and void.

6. Given the aforesaid judgment, the appellant itself having appointed the aforesaid sole arbitrator, referred to the aforesaid judgment, and stated that being a declaration of law, appointments of

arbitrators made prior to the judgment are not saved. Thus, the prayer before the sole arbitrator was that since he is *de jure* unable to perform his function as arbitrator, he should withdraw from the proceedings to allow the parties to approach the High Court for appointment of a substitute arbitrator in his place. By an order dated 21.10.2017, Shri Khan rejected the appellant's application after hearing both sides, without giving any reasons therefor. This led to a petition being filed by the appellant before the High Court of Delhi dated 28.10.2017 under Sections 14 and 15 of the Act to state that the arbitrator has become *de jure* incapable of acting as such and that a substitute arbitrator be appointed in his place. By the impugned judgment dated 22.11.2017, this petition was rejected, stating that the very person who appointed the arbitrator is estopped from raising a plea that such arbitrator cannot be appointed after participating in the proceedings. In any event, under the proviso to Section 12(5) of the Act, inasmuch as the appellant itself has appointed Shri Khan, and the respondent has filed a statement of claim without any reservation, also in writing, the same would amount to an express agreement in writing, which would, therefore, amount to a waiver of the applicability of Section 12(5) of the Act.

7. Shri Vikramjit Banerjee, learned Additional Solicitor General appearing on behalf of the appellant, has relied upon Sections 12 to 14

of the Act, as also the judgment in **TRF Ltd.** (supra), and has argued that the appointment of Shri Khan goes to eligibility to be appointed as an arbitrator, as a result of which the appointment made is void *ab initio*. Further, the judgment in **TRF Ltd.** (supra) is declaratory of the law and would apply to the facts of this case. Further, since there is no express agreement in writing between the parties subsequent to disputes having arisen between them that Shri Khan's appointment is agreed upon, the proviso will not be applicable in the present case.

8. Shri Sharad Yadav, learned Senior Advocate appearing on behalf of the respondent, has supported the reasoning of the impugned judgment and has added that Section 12(4) makes it clear that a party may challenge the appointment of an arbitrator appointed by it only for reasons of which it became aware after the appointment has been made. In the facts of the present case, since Section 12(5) and the Seventh Schedule were on the statute book since 23.10.2015, the appellant was fully aware that the Managing Director of the appellant would be hit by Item 5 of the Seventh Schedule, and consequently, any appointment made by him would be null and void. This being so, Section 12(4) acts as a bar to the petition filed under Sections 14 and 15 by the appellant. Further, Section 13(2) makes it clear that a party who intends to challenge the appointment of the arbitrator, shall, within

15 days after becoming aware of circumstances referred to in Section 12(3), send a written statement of reasons for the challenge to the arbitrator. Admittedly, this has not been done within the time frame stipulated by the said Section, as a result of which, the aforesaid petition filed by the appellant should be dismissed. Coming to the proviso to Section 12(5), Shri Yadav argued that "express agreement in writing" in the proviso to Section 12(5) is clearly met in the facts of the present case. This need not be in the form of a formal agreement between the parties, but can be culled out, as was rightly held by the High Court, from the appointment letter issued by appellant as well as the statement of claim filed by the respondent before the arbitrator leading, therefore, to a waiver of the applicability of Section 12(5).

9. Pursuant to the 246th Law Commission Report, important changes were made in the Act. Insofar as the facts of this case are concerned, sub-section (8) of Section 11 was substituted for the earlier Section 11(8)[1], sub-section (1) of Section 12 was substituted for the

[1] *Subs.* by Act 3 of 2016, S. 6(iv) (w.r.e.f. 23.10.2015). Prior to substitution, Section 11(8) read as:
"**11. Appointment of arbitrators**.—
(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to—
(*a*) any qualifications required of the arbitrator by the agreement of the parties; and
(*b*) other considerations as are likely to secure the appointment of an independent and impartial arbitrator."

earlier Section 12(1)[2] and a new Section 12(5)[3] was added after Section 12(4). The opening lines of Section 14(1)[4] were also substituted.

10. Post-amendment, the aforesaid Sections are set out, as also Section 4 of the Act, as follows:

> "**4. Waiver of right to object**.—A party who knows that —
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> (*a*) any provision of this Part from which the parties may derogate, or
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> (*b*) any requirement under the arbitration agreement,
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> has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."

> "**11. Appointment of arbitrators**.—
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> xxx xxx xxx
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> (8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of Section 12, and have due regard to—
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> (*a*) any qualifications required for the arbitrator by the agreement of the parties; and

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[2] *Subs.* by Act 3 of 2016, S. 8(i) (w.r.e.f. 23.10.2015). Prior to substitution, Section 12(1) read as:
"**12. Grounds for challenge**.—(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality."

[3] *Ins.* by Act 3 of 2016, S. 8(ii) (w.r.e.f. 23.10.2015).

[4] *Subs.* by Act 3 of 2016, S. 9 (w.r.e.f. 23.10.2015). Prior to substitution, Section 14(1) read as:
"**14. Failure or impossibility to act**.—(1) The mandate of an arbitrator shall terminate if—"

(*b*) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

xxx xxx xxx ”

“**12. Grounds for challenge**.—(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—

(*a*) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(*b*) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(*a*) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(*b*) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for

reasons of which he becomes aware after the appointment has been made.

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

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

"**13. Challenge procedure**.—(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees."

> "**14. Failure or impossibility to act**.—(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if—
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> (*a*) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and
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> (*b*) he withdraws from his office or the parties agree to the termination of his mandate.
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> (2) If a controversy remains concerning any of the grounds referred to in clause (*a*) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.
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> (3) If, under this section or sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this Section or sub-section (3) of Section 12."

11. Section 12(5) has been earlier dealt with in three Supreme Court judgments. In **Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd.**, (2017) 4 SCC 665, this Court went into the recommendations of the aforesaid Law Commission Report, and referred in great detail to the law before the amendment made in Section 12 and then held:

> "**23.** It also cannot be denied that the Seventh Schedule is based on IBA guidelines which are clearly regarded as a representation of international based practices and are based on statutes, case law and juristic opinion from a cross-section on jurisdiction. It is so mentioned in the guidelines itself."
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> "**25.** Section 12 has been amended with the objective to induce neutrality of arbitrators viz. their independence

> and impartiality. The amended provision is enacted to identify the "circumstances" which give rise to "justifiable doubts" about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, the Seventh Schedule mentions those circumstances which would attract the provisions of sub-section (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empanelled by the respondent are not covered by any of the items in the said list."

12. In **HRD Corporation v. GAIL (India) Ltd.**, (2018) 12 SCC 471, this Court, after setting out the amendments made in Section 12 and the Fifth, Sixth, and Seventh Schedules to the Act, held as follows:

> "**12.** After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become "ineligible" to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he

becomes ineligible, it is clear that, under Section 14(1)(*a*), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible". In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal."

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"**14.** The enumeration of grounds given in the Fifth and Seventh Schedules have been taken from the IBA Guidelines, particularly from the Red and Orange Lists thereof. The aforesaid guidelines consist of three lists. The Red List, consisting of non-waivable and waivable guidelines, covers situations which are "more serious"

> and "serious", the "more serious" objections being non-waivable. The Orange List, on the other hand, is a list of situations that may give rise to doubts as to the arbitrator's impartiality or independence, as a consequence of which the arbitrator has a duty to disclose such situations. The Green List is a list of situations where no actual conflict of interest exists from an objective point of view, as a result of which the arbitrator has no duty of disclosure. These Guidelines were first introduced in the year 2004 and have thereafter been amended, after seeing the experience of arbitration worldwide. In Part 1 thereof, general standards regarding impartiality, independence and disclosure are set out."
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> "**17.** It will be noticed that Items 1 to 19 of the Fifth Schedule are identical with the aforesaid items in the Seventh Schedule. The only reason that these items also appear in the Fifth Schedule is for purposes of disclosure by the arbitrator, as unless the proposed arbitrator discloses in writing his involvement in terms of Items 1 to 34 of the Fifth Schedule, such disclosure would be lacking, in which case the parties would be put at a disadvantage as such information is often within the personal knowledge of the arbitrator only. It is for this reason that it appears that Items 1 to 19 also appear in the Fifth Schedule."

13. In **TRF Ltd.** (supra), this Court referred to Section 12(5) of the Act in the context of appointment of an arbitrator by a Managing Director of a corporation, who became ineligible to act as arbitrator under the Seventh Schedule. This Court held:

> "**50.** First, we shall deal with Clause (*d*). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the

language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the “named sole arbitrator” and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction……”

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“**54.** In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The

> arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."

14. From a conspectus of the above decisions, it is clear that Section 12(1), as substituted by the Arbitration and Conciliation (Amendment) Act, 2015 ["**Amendment Act, 2015**"], makes it clear that when a person is approached in connection with his possible appointment as an arbitrator, it is his duty to disclose in writing any circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality. The disclosure is to be made in the form specified in the Sixth Schedule, and the grounds stated in the Fifth Schedule are to serve as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Once this is done, the appointment of the arbitrator may be challenged on the ground that justifiable doubts have arisen under sub-section (3) of Section 12 subject to the caveat entered by sub-section (4) of Section 12. The challenge procedure is then set out in Section 13, together with the time limit laid down in Section 13(2).

What is important to note is that the arbitral tribunal must first decide on the said challenge, and if it is not successful, the tribunal shall continue the proceedings and make an award. It is only post award that the party challenging the appointment of an arbitrator may make an application for setting aside such an award in accordance with Section 34 of the Act.

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.

16. The Law Commission Report, which has been extensively referred to in some of our judgments, makes it clear that there are certain minimum levels of independence and impartiality that should be required of the arbitral process, regardless of the parties' agreement. This being the case, the Law Commission then found:

> "**59.** The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his *possible* appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed section 12 (5) of the Act and the Fifth Schedule which incorporates the categories from the Red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be *ineligible* to be so appointed, *notwithstanding any prior agreement* to the contrary. In the event such an ineligible person is purported

> to be appointed as an arbitrator, he shall be *de jure* deemed to be unable to perform his functions, in terms of the proposed explanation to section 14. Therefore, while the *disclosure* is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the Red and Orange lists of the IBA Guidelines), the *ineligibility* to be appointed as an arbitrator (and the consequent *de jure* inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the Red list of the IBA Guidelines).
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> **60.** The Commission, however, feels that *real* and *genuine* party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to section 12 (5), where parties may, *subsequent to disputes having arisen between them*, waive the applicability of the proposed section 12 (5) by an express agreement in writing. In all other cases, the general rule in the proposed section 12 (5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of section 12 (1), and in which context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator."
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> (emphasis in original)

Thus, it will be seen that party autonomy is to be respected only in certain exceptional situations which could be situations which arise in family arbitrations or other arbitrations where a person subjectively commands blind faith and trust of the parties to the dispute, despite the

existence of objective justifiable doubts regarding his independence and impartiality.

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.

18. On the facts of the present case, it is clear that the Managing Director of the appellant could not have acted as an arbitrator himself, being rendered ineligible to act as arbitrator under Item 5 of the Seventh Schedule, which reads as under:

> "**Arbitrator's relationship with the parties or counsel**
> xxx xxx xxx
> **5.** The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration"

Whether such ineligible person could himself appoint another arbitrator was only made clear by this Court's judgment in **TRF Ltd.** (supra) on 03.07.2017, this Court holding that an appointment made by an ineligible person is itself void *ab initio*. Thus, it was only on 03.07.2017, that it became clear beyond doubt that the appointment of Shri Khan would be void *ab initio*. Since such appointment goes to "eligibility", i.e., to the root of the matter, it is obvious that Shri Khan's appointment would be void. There is no doubt in this case that disputes arose only after the introduction of Section 12(5) into the statute book, and Shri Khan was appointed long after 23.10.2015. The judgment in **TRF Ltd.** (supra) nowhere states that it will apply only prospectively, i.e., the appointments that have been made of persons such as Shri Khan would be valid if made before the date of the judgment. Section 26 of the Amendment Act, 2015 makes it clear that the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after 23.10.2015. Indeed, the judgment itself set aside the order appointing the arbitrator, which was an order dated 27.01.2016, by which the Managing Director of the respondent nominated a former Judge of this Court as sole arbitrator in terms of clause 33(d) of the Purchase Order dated 10.05.2014. It will be noticed that the facts in the present case are somewhat similar. The APO itself is of the year

2014, whereas the appointment by the Managing Director is after the Amendment Act, 2015, just as in the case of **TRF Ltd.** (supra). Considering that the appointment in the case of **TRF Ltd.** (supra) of a retired Judge of this Court was set aside as being non-est in law, the appointment of Shri Khan in the present case must follow suit.

19. However, the learned Senior Advocate appearing on behalf of the respondent has argued that Section 12(4) would bar the appellant's application before the Court. Section 12(4) will only apply when a challenge is made to an arbitrator, *inter alia*, by the same party who has appointed such arbitrator. This then refers to the challenge procedure set out in Section 13 of the Act. Section 12(4) has no applicability to an application made to the Court under Section 14(2) to determine whether the mandate of an arbitrator has terminated as he has, in law, become unable to perform his functions because he is ineligible to be appointed as such under Section 12(5) of the Act.

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 Indian Contract Act, 1872 becomes important. It states:

> "**9. Promises, express and implied**.—In so far as a proposal or acceptance of any promise is made in words, the promise is said to be express. In so far 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 17.01.2017. 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.** (supra) which, as we have seen hereinabove, was only on 03.07.2017. 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 07.10.2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in **TRF Ltd.** (supra) 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.

21. The learned Additional Solicitor General appearing on behalf of the appellant has relied upon **All India Power Engineer Federation v. Sasan Power Ltd.**, (2017) 1 SCC 487, and referred to paragraph 21 thereof, which reads as follows:

> "**21.** Regard being had to the aforesaid decisions, it is clear that when waiver is spoken of in the realm of contract, Section 63 of the Contract Act, 1872 governs. But it is important to note that waiver is an intentional relinquishment of a known right, and that, therefore, unless there is a clear intention to relinquish a right that is fully known to a party, a party cannot be said to waive it. But the matter does not end here. It is also clear that if any element of public interest is involved and a waiver takes place by one of the parties to an agreement, such waiver will not be given effect to if it is contrary to such public interest. This is clear from a reading of the following authorities."

This judgment cannot possibly apply as the present case is governed by the express language of the proviso to Section 12(5) of the Act. Similarly, the judgments relied upon by the learned Senior Advocate appearing on behalf of the respondent, namely, **Vasu P. Shetty v.**

Hotel Vandana Palace, (2014) 5 SCC 660, and **BSNL v. Motorola India (P) Ltd.**, (2009) 2 SCC 337 ["**BSNL**"], for the same reason, cannot be said to have any application to the express language of the proviso to Section 12(5). It may be noted that **BSNL** (supra) deals with Section 4 of the Act which, as has been stated hereinabove, has no application, and must be contrasted with the language of the proviso to Section 12(5).

22. We thus allow the appeals and set aside the impugned judgment. The mandate of Shri Khan having terminated, as he has become *de jure* unable to perform his function as an arbitrator, the High Court may appoint a substitute arbitrator with the consent of both the parties.

23. *Vide* order dated 25.01.2018, we had issued notice in the Special Leave Petition as well as notice on the interim relief prayed for by the appellant. Since there was no order of stay, the arbitral proceedings continued even after the date of the impugned judgment, i.e., 22.11.2017, and culminated in two awards dated 11.07.2018 and 12.07.2018. We have been informed that the aforesaid awards have been challenged by the appellant by applications under Section 34 of the Act, in which certain interim orders have been passed by the Single Judge of the High Court of Delhi. These awards, being subject to the

result of this petition, are set aside. Consequently, the appellant's Section 34 proceedings have been rendered infructuous. It will be open to the appellant to approach the High Court of Delhi to reclaim the deposit amounts that have been made in pursuance of the interim orders passed in the Section 34 petition filed in the High Court of Delhi.

…….. J.
(R.F. NARIMAN)

…….. J.
(VINEET SARAN)

New Delhi;
April 16, 2019.