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

% ***Judgment reserved on: 23.09.2026***
Judgment pronounced on: 30.09.2026
Judgment uploaded on: 30.09.2026

\# **CNR No. DLHC011020552024**

\+ FAO (COMM) 23/2025 & CM APPL. 4055/2025

DELHI METRO RAIL CORPORATION LTD. .....Appellant

Through: Mr. Tarun Johri and Mr. Vishwajeet Tyagi, Advs.

versus

SH. PANKAJ (SINCE DECEASED) THR LRS.....Respondent

Through: Mr. Shashwat Dixit, Mr. Amit Mishra, Mr. Sajal Dutt Dixit, Ms. Gauri Dixit and Mr. Kushagr Tyagi, Advs.

CORAM:
HON'BLE MR. JUSTICE ANIL KSHETARPAL
HON'BLE MR. JUSTICE BHARAT PARASHAR

J U D G M E N T

ANIL KSHETARPAL, J.:

1. The present Appeal under Section 37[1] of the Arbitration and Conciliation Act, 1996[2], assails the judgment dated 23.10.2024[3] passed by the learned District Judge-04, Patiala House Courts, New Delhi in ARBTN No.7418/2017, whereby the Petition[4] under Section 34[5] of the A&C Act preferred by the Respondent was allowed and the Arbitral Award dated 21.07.2017[6] passed by the learned Sole Arbitrator was set aside. The learned District Judge proceeded

[1]Hereinafter referred to as 'Section 37'
[2]Hereinafter referred to as 'A&C Act'
[3]Hereinafter referred to as 'Impugned Judgment'
[4]Hereinafter referred to as 'Section 34 Petition'
[5]Hereinafter referred to as 'Section 34'
[6]Hereinafter referred to as 'Award'

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principally on the ground that the appointment of the learned Sole Arbitrator, who was an employee of the Appellant, was contrary to Section 12(5) of the A&C Act[7], as introduced by the Arbitration and Conciliation (Amendment) Act, 2015[8].

2. The principal controversy which arises for consideration in the present Appeal is whether the provisions introduced by the 2015 Amendment Act, particularly Section 12(5) read with the Seventh Schedule of the A&C Act[9], could be invoked to invalidate the appointment of the learned Sole Arbitrator where the arbitration clause had been invoked on 03.06.2014 and the learned Sole Arbitrator had been appointed on 24.03.2015, both dates being prior to the coming into force of the 2015 Amendment Act on 23.10.2015. A further question which arises for consideration is whether, in the facts of the present case, the appointment of the learned Sole Arbitrator was otherwise contrary to the arbitration agreement or the law governing such appointment at the time when it was made.

FACTUAL MATRIX:

3. The relevant facts, necessary for adjudication of the present Appeal, may be briefly noticed.

4. The Appellant-Delhi Metro Rail Corporation Limited ('DMRC') is engaged in the development and implementation of the Mass Rapid Transit System in the National Capital Territory of Delhi. The Respondent, M/s Pankaj Associates, is a proprietorship concern.

[7]Hereinafter referred to as 'Section 12(5)'
[8]Hereinafter referred to as '2015 Amendment Act'
[9]Hereinafter referred to as 'Seventh Schedule'

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The Respondent was declared the successful bidder for parking sites at Dwarka Sector-21 and Dwarka Sector-11 Metro Stations and was awarded the licence at a monthly licence fee of Rs.5,00,000/- for a period of three (03) years.

5. A Letter of Acceptance dated 28.06.2013 was issued by the Appellant in favour of the Respondent. Possession of the parking sites was thereafter handed over on 16.07.2013. At the Dwarka Sector-21 Metro Station, however, only 3652 sq. mtrs. of the area was initially handed over to the Respondent as against the stipulated area of 6965 sq. mtrs., with the remaining area being under development. Disputes thereafter arose between the parties in relation to the area handed over, collection of parking fee by the previous contractor and the alleged absence of certain infrastructure facilities at the parking sites.

6. The Respondent, *vide* letter dated 03.06.2014, invoked Clause 45 of the Agreement[10] and sought reference of the disputes to arbitration. The said clause is reproduced hereinbelow for ready reference:

> **"*45. Conciliation and Arbitration***
>
> *In the event of any dispute, difference of opinion or dispute or claim arising out of/or relating to this agreement or breach, termination or the invalidity thereof, shall firstly be attempted to be settled by conciliation.*
>
> *All disputes relating to this agreement or on any issue whether arising during the progress of the services or after the completion or abandonment thereof or any matter directly or indirectly connected with this service agreement shall in the first place be referred to* ***a sole conciliator appointed/nominated by GM/Civil on receipt of such requests from either parties****.*
>
> *The conciliator shall make the settlement agreement after the parties*

[10]Hereinafter referred to as 'Clause 45' or 'Arbitration Clause'

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reach agreement and shall give an authenticated copy thereof to each of the parties.

The settlement agreement shall be final and binding on the parties. The settlement agreement shall have the same status and effect of an arbitration award. The views expressed or the suggestions made or the admissions made by either party in the course of conciliation proceedings shall not be introduced as evidence in any arbitration proceedings.

Any dispute that cannot be settled through conciliation procedure shall be referred to arbitration in accordance with the procedure given in Para given below.

The parties agree to comply with the awards resulting from arbitration and waive their rights to any form of appeal insofar as such waiver can validly be made.

Arbitration Procedure

If the efforts to resolve all or any of the disputes through conciliation fail, then such disputes shall be referred within 30 days to ***a sole arbitrator who would be nominated by DMRC Ltd****. The venue of such arbitration shall be at Delhi/New Delhi. The award of the sole arbitrator shall be binding on all parties. The cost of Arbitration shall be borne by respective parties.* ***There will be no objection if conciliator/or sole arbitrator nominated/appointed is an employee of DMRC****.*

Rules governing Arbitration Proceedings

The Arbitration Proceedings shall be governed by Indian Arbitration and Conciliation Act 1996 as amended from time to time including provisions in force at the time the reference is made.*"*

(**Emphasis supplied.**)

7. As is evident, Clause 45 contemplated that disputes which could not be resolved through conciliation would be referred to a Sole Arbitrator nominated by the DMRC. The clause further provided that there would be no objection if the conciliator or Sole Arbitrator nominated or appointed was an employee of the DMRC. The arbitration proceedings were to be governed by the A&C Act "*as amended from time to time including provisions in force at the time the reference is made.*"

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8. On 31.07.2014, the Appellant issued a notice terminating the License Agreement on account of non-payment of outstanding licence fee and other charges. The Respondent thereafter handed over the charge of the parking site to the Appellant.

9. On 24.03.2015, the Appellant appointed Shri Ashu Sharma, Senior Additional General Manager/Financial with the Appellant, as the Sole Arbitrator. The learned Sole Arbitrator thereafter entered upon the reference and commenced the arbitral proceedings.

10. On 27.05.2015, the learned Sole Arbitrator held the first and preliminary meeting and furnished the declaration contemplated under Section 12(i) of the A&C Act, stating that he had no personal interest in the outcome of the proceedings and that there were no circumstances likely to give rise to justifiable doubts as to his independence or impartiality. The Respondent thereafter filed its Statement of Claim seeking an amount of Rs.71,53,025/-, while the Appellant filed its Reply and subsequently raised a Counter Claim of Rs.40,15,083/-. The pleadings were completed and issues were framed on 16.08.2016.

11. The 2015 Amendment Act came into force on 23.10.2015, whereby, *inter alia*, Section 12(5) and the Seventh Schedule were introduced into the A&C Act. The arbitral proceedings, which had commenced pursuant to the invocation dated 03.06.2014 and the appointment dated 24.03.2015, continued thereafter. On 21.07.2017, the learned Sole Arbitrator passed the Award, rejecting the claims of the Respondent and allowing the Counter Claim of the Appellant for

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Rs.40,15,831/- along with interest.

12. Aggrieved by the Arbitral Award, the Respondent instituted proceedings under Section 34. Before the learned District Judge, the Respondent ultimately confined its challenge to the appointment of the learned Sole Arbitrator. It was contended that the Sole Arbitrator was a serving employee of the Appellant and had been unilaterally appointed by the Appellant and that such appointment was hit by Section 12(5) read with the Seventh Schedule. The Respondent relied, *inter alia*, upon the judgments in ***OM 360 Degrees Advertising & Entertainment Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.***[11]; ***Vineet Dujodwala v. Phoenix ARC Pvt. Ltd.***[12]; and ***Ellora Paper Mills Ltd. v. State of Madhya Pradesh***[13]. It was further contended that the arbitration clause itself contemplated that the proceedings would be governed by the A&C Act "*as amended from time to time*" and that the parties had thereby agreed to the applicability of subsequent amendments to the Act.

13. On the other hand, the Appellant contended that the arbitration proceedings had commenced prior to 23.10.2015 and that the 2015 Amendment Act could not retrospectively be applied to invalidate an appointment which was validly made under the law then prevailing. Reliance was placed upon Section 26 of the 2015 Amendment Act[14] and the judgments of the Supreme Court in ***S.P. Singla Constructions Pvt. Ltd. v. State of Himachal Pradesh& Anr.***[15]; ***BCCI v. Kochi***

[11]2023:DHC:6364
[12]2024 SCC OnLine Del 5940
[13](2022) 3 SCC 1
[14]Hereinafter referred to as 'Section 26'
[15] (2019) 2 SCC 488

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Cricket Pvt. Ltd.[16]; ***Union of India v. Parmar Construction Co.***[17]; and ***Aravali Power Company Pvt. Ltd. v. Era Infra Engineering Ltd.***[18]. It was further contended that the judgment in ***Ellora Paper Mills (****supra)*was distinguishable on facts and that the clause providing for the applicability of the A&C Act "*as amended from time to time*" could not retrospectively invalidate an appointment already made prior to 23.10.2015.

14. The learned District Judge, *vide* the Impugned Judgment dated 23.10.2024, accepted the challenge to the constitution of the Arbitral Tribunal and set aside the Award. The present Appeal has consequently been preferred by the Appellant.

CONTENTIONS OF THE PARTIES:

15. Heard learned counsel representing the parties and with their able assistance, perused the record.

16. Learned counsel representing the Appellant has made the following submissions:

i. The arbitration clause was invoked on 03.06.2014 and the Sole Arbitrator was appointed on 24.03.2015, much prior to the coming into force of the 2015 Amendment Act on 23.10.2015. It is, therefore, submitted that the constitution of the Arbitral Tribunal is required to be examined with reference to the law applicable at the time when the arbitral proceedings commenced

[16](2018) 6 SCC 287
[17](2019) 15 SCC 682
[18](2017) 15 SCC 32

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and the arbitrator was appointed. Reliance is placed upon Section 26 and the judgments of the Supreme Court in ***S.P. Singla*** *(supra)*, ***Kochi Cricket*** *(supra)* and ***Parmar Construction*** *(supra)*.

ii. The judgment in ***Ellora Paper Mills*** *(supra)* is distinguishable on account of the peculiar facts and circumstances in which that case arose and cannot be understood as laying down a general proposition that Section 12(5) operates retrospectively so as to invalidate appointments made prior to 23.10.2015.

iii. Reliance is also placed upon the judgment of the Supreme Court in ***Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company***[19] (‘***CORE***’) to contend that the said judgment was rendered in the context of the constitution of a three-member Arbitral Tribunal and, therefore, does not govern the present case concerning appointment of a Sole Arbitrator under a contractual mechanism which was exercised prior to 23.10.2015.

iv. Further reliance is placed upon ***D.V. Anand v. Hindustan Petroleum Corporation Ltd.***[20] and ***Avneet Soni v. Kavita Agrawal***[21] in support of the submission that the validity of the constitution of the Arbitral Tribunal has to be tested with reference to the statutory and contractual regime applicable at the

[19] (2025) 4 SCC 641
[20] 2026 SCC OnLine Del 4903
[21] 2026 SCC OnLine Del 3236

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relevant time and that a subsequent statutory amendment cannot be retrospectively applied so as to invalidate an appointment which was otherwise valid when made.

v. The stipulation in Clause 45 that the arbitral proceedings would be governed by the A&C Act "*as amended from time to time including provisions in force at the time the reference is made*" does not amount to an agreement to retrospectively apply Section 12(5) and the Seventh Schedule to an arbitration which had already commenced and in which the Arbitrator had already been appointed before 23.10.2015. It is submitted that the clause has to be read as a whole and, in particular, in conjunction with the reference therein to the provisions in force at the time the reference is made.

vi. In any event, the appointment of the Sole Arbitrator was expressly authorised by Clause 45, which contemplated nomination of the Sole Arbitrator by DMRC and further provided that no objection would be raised merely on the ground that the person so nominated or appointed was an employee of DMRC. The appointment was, therefore, in conformity with the agreed contractual mechanism and cannot be invalidated merely by applying the post-2015 statutory regime retrospectively.

17. *Per contra*, learned counsel representing the Respondent has made the following submission:

i. The appointment of the Sole Arbitrator was invalid as the Arbitrator was a serving employee of the Appellant and had been

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unilaterally appointed by the Appellant itself. It is submitted that independence and impartiality are fundamental requirements of an Arbitral Tribunal and that an Arbitrator who is *de jure* ineligible to act cannot validly constitute or continue as the Arbitral Tribunal. Reliance is placed upon Paragraph Nos.60 to 63, 67 to 69, 89 to 91, 109 to 113 and 123 of the judgment of the Supreme Court in ***Bhadra International (India) Pvt. Ltd. v. Airports Authority of India***[22].

ii. The Respondent, relying upon the decision in ***Jagdish Chand Gupta v. Union of India***[23], submits that Section 26 permits the parties to agree to the application of the amended regime even where the arbitral proceedings commenced prior to 23.10.2015. It is contended that where the arbitration agreement itself refers to the Act and its statutory modifications, such language evidences an intention to be governed by subsequent amendments to the Act. It is further contended that, where such contractual language is coupled with the conduct of the parties indicating adoption of the amended Act, Section 12(5) would apply notwithstanding the date on which the arbitration commenced.

iii. Reliance is placed upon the judgment in ***Hanson Agro Ltd. v. GAIL (India) Ltd.***[24] *and other connected matters*, to submit that the present case falls within the third category identified therein, namely, cases where the arbitration agreement

[22]2026 INSC 6
[23]2025 SCC OnLine Del 7278
[24]2026 SCC OnLine Del 6894

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itself contains a stipulation contemplating statutory amendments or modifications. It is contended that, once the present case is placed within that category, the subsequent amendment to the A&C Act is applicable to the arbitration and the appointment of the serving employee of DMRC consequently stood invalidated by operation of Section 12(5) read with the Seventh Schedule.

iv. The Respondent's further contention, relying upon Paragraph No.23 of ***State of Uttar Pradesh & Anr. v. R.K. Pandey & Anr.***[25], is that independence and impartiality of the Arbitral Tribunal are integral to the arbitral process. It is submitted that the requirement of equality and fairness operates even at the stage of constitution of the Arbitral Tribunal, and that unilateral appointment has a direct bearing on the conduct and fairness of the arbitral proceedings. The Respondent therefore submits that an appointment which compromises the independence and impartiality of the Arbitrator cannot be sustained.

v. Reliance is placed upon the judgments in ***OM 360 Degrees*** *(supra)*, ***Vineet Dujodwala*** *(supra)* and ***Ellora Paper Mills*** *(supra)* to submit that the amended law relating to the eligibility and independence of an arbitrator can be invoked even where the arbitral proceedings had commenced prior to 23.10.2015.

18. No other submissions have been made by learned counsel

[25] 2025 SCC OnLine SC 52

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representing the respective parties.

ANALYSIS AND FINDINGS:

19. We have heard the learned counsel representing the parties and perused the material on record. At the cost of repetition, the principal question which arises for consideration is whether the appointment of the Sole Arbitrator by the Appellant/DMRC, *vide* communication dated 24.03.2015, was rendered invalid on account of the subsequent insertion of Section 12(5) read with the Seventh Schedule by the 2015 Amendment Act. The answer to this question requires the legal position concerning appointment of Arbitrators to be considered in its historical sequence, since the legal consequences attached to unilateral appointment underwent a significant change with effect from 23.10.2015.

I. The position after the 2015 Amendment:

20. Prior to the 2015 Amendment Act, the A&C Act did not contain Section 12(5) or the Fifth and Seventh Schedules. However, Section 11(2) of the unamended A&C Act expressly recognised the freedom of parties to agree upon a procedure for appointment of the arbitrator(s). Further, Section 12 of the unamended A&C Act required disclosure of circumstances likely to give rise to justifiable doubts as to independence or impartiality, while Section 18 of the Act required the arbitrator to treat the parties equally and give each party a full opportunity of presenting its case. Thus, independence and impartiality were undoubtedly recognised principles of the arbitral process even under the unamended Act. Pertinently, what was absent

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was a statutory list of relationships which, by operation of law, rendered an individual categorically ineligible to act as an arbitrator.

21. The 2015 Amendment Act introduced a materially different statutory regime. Section 12(5), as introduced by the 2015 Amendment Act, is reproduced hereinbelow for ready reference:

> *"**12. Grounds for challenge-***
>
> *...*
>
> *(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."*

22. From the bare reading of the aforesaid provision, it becomes evident that the said provision, notwithstanding any prior agreement to the contrary, provides that a person whose relationship with the parties, counsel or the subject matter of the dispute falls within any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator. The proviso permits the parties, after disputes have arisen, to waive the applicability of Section 12(5), but only by an express agreement in writing. Thus, the amendment did not merely elaborate upon the existing standard of impartiality. It attached a specific statutory consequence, namely, ineligibility to act as an arbitrator, to the relationships enumerated in the Seventh Schedule.

23. The distinction between the pre-amendment requirement of impartiality and the post-amendment statutory consequence of ineligibility is important. The Supreme Court in ***Indian Oil***

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Corporation Ltd. v. Raja Transport (P) Ltd.[26], while dealing with the unamended Act, held that the fact that the named arbitrator was an employee of a State instrumentality was not, by itself, sufficient to presume bias or lack of independence. The Court observed:

> *"**2.** Under an agreement dated 28-2-2005, the appellant appointed the respondent as its dealer for retail sale of petroleum products. Clause 69 of the said agreement provided for settlement of disputes by arbitration. The said clause reads thus:*
>
> *"69. Any dispute or a difference of any nature whatsoever or regarding any right, liability, act, omission or account of any of the parties hereto arising out of or in relation to this agreement shall be referred to **the sole arbitration of the Director, Marketing of the Corporation or of some officer of the Corporation who may be nominated by the Director, Marketing.** The dealer will not be entitled to raise any objection to any such arbitrator on the ground that the arbitrator is an officer of the contract relates or that in the course of his duties or differences (sic). In the event of the arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason the Director, Marketing as aforesaid at the time of such transfer, vacation of office or inability to act, shall designate another person to act as the arbitrator in accordance with the terms of the agreement. Such person shall be entitled to proceed with the reference from the point at which it was left by his predecessor**. It is also a term of this contract that no person other than the Director, Marketing or a person nominated by such Director, Marketing of the Corporation as aforesaid shall act as arbitrator hereunder.** The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to the agreement, subject to the provisions of the Arbitration Act, 1940 or any statutory modification of re-enactment thereof and the Rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause."*
>
> *(emphasis supplied)*
>
> ***
>
> ***31.** Section 12(1) requires an arbitrator, when approached in connection with his possible appointment, to disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. Section 12(3) enables the arbitrator being challenged if*

[26](2009) 8 SCC 520

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(i) the circumstances give rise to justifiable doubts as to his independence or impartiality, or

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

32. *Section 18 requires the arbitrator to treat the parties with equality (that is to say without bias) and give each party full opportunity to present his case. Nothing in Sections 11, 12, 18 or other provisions of the Act suggests that any provision in an arbitration agreement, naming the arbitrator will be invalid if such named arbitrator is an employee of one of the parties to the arbitration agreement.*

33. *Sub-section (2) of Section 11 provides that parties are free to agree upon a procedure for appointment of arbitrator(s). Sub-section (6) provides that where a party fails to act, as required under the procedure prescribed, the Chief Justice or his designate can take necessary measures. Sub-section (8) gives the discretion to the Chief Justice/his designate to choose an arbitrator suited to meet the requirements of a particular case. The said power is in no way intended to nullify a specific term of arbitration agreement naming a particular person as arbitrator. The power under sub-section (8) is intended to be used keeping in view the terms of the arbitration agreement.*

34.<u>The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part.</u> *There can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other Department) to the officer whose decision is the subject-matter of the dispute.*

35.<u>Where however the named arbitrator though a senior officer of the Government/statutory body/government company, had nothing to do with the execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence.</u> *Therefore, senior officer(s) (usually Heads of Department or equivalent) of a Government/statutory corporation/public sector undertaking, not associated with the contract, are considered to be independent and impartial and are not barred from functioning as arbitrators merely because their employer is a party to the contract.*

36. *The position may be different where the person named as the arbitrator is an employee of a company or body or individual other than the State and its instrumentalities. For example, if the Director of*

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a private company (which is a party to the arbitration agreement), is named as the arbitrator, there may be a valid and reasonable apprehension of bias in view of his position and interest, and he may be unsuitable to act as an arbitrator in an arbitration involving his company. ***If any circumstance exists to create a reasonable apprehension about the impartiality or independence of the agreed or named arbitrator, then the court has the discretion not to appoint such a person.***

37. *Subject to the said clarifications, we hold that* ***a person being an employee of one of the parties (which is the State or its instrumentality) cannot per se be a bar to his acting as an arbitrator.*** *Accordingly, the answer to the first question is that the learned Chief Justice was not justified in his assumption of bias."*

(**Emphasis supplied.**)

24. As is evident, the Supreme Court, in the aforementioned decision in ***Indian Oil*** *(supra),* nevertheless recognised that the circumstances surrounding the appointment could give rise to a justifiable apprehension regarding independence or impartiality. In particular, the Court drew a distinction where the employee-arbitrator was the controlling or dealing authority in relation to the contract or was directly subordinate to the officer whose decision was under challenge. Conversely, where a senior officer of a Government Department, statutory corporation or public sector undertaking had no association with the execution of the contract, his employment by the contracting entity, in itself, was not regarded as sufficient to disqualify him.

25. The 2015 Amendment Act consequently brought about a substantial change in this position. In ***TRF Ltd. v. Energo Engineering Projects Ltd.***[27], the Supreme Court considered Section 12(5) and the Seventh Schedule and held that the statutory ineligibility

[27](2017) 8 SCC 377

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of the person designated as arbitrator also affected his ability to nominate another arbitrator. The Court also emphasised that the proviso to Section 12(5) contemplated three cumulative requirements:

i. the waiver must be after disputes have arisen;

ii. it must be an agreement between the parties; and

iii. it must be express and in writing.

26. ***TRF*** *(supra)* was further followed and developed in ***Perkins Eastman Architects DPC& Anr. v. HSCC (India) Ltd.***[28]. There, the arbitration clause vested the Chairman and Managing Director of HSCC with an additional power to appoint the Sole Arbitrator. The Supreme Court reasoned that where one party has an exclusive power to appoint the Sole Arbitrator, the party interested in the outcome of the dispute cannot retain such power under the post-amendment regime. The Court described the principle emerging from ***TRF*** as the logical consequence of the statutory ineligibility created by the 2015 Amendment Act. The relevant extracts from ***Perkins*** *(supra)* is reproduced hereinbelow for ready reference:

> *"**18.** The issue was discussed and decided by this Court as under : (TRF case [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , SCC pp. 403-04, paras 50-54)*
>
> > *"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*

[28](2020) 20 SCC 760

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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. In this regard, our attention has been drawn to a two-Judge Bench decision in State of Orissa v. Commr. of Land Records & Settlement [State of Orissa v. Commr. of Land Records & Settlement, (1998) 7 SCC 162] . In the said case, the question arose, can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held : (SCC p. 173, para 25)

> *'25. We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in Roop Chand v. State of Punjab [Roop Chand v. State of Punjab, AIR 1963 SC 1503] . In that case, it was held by the majority that where the State Government had, under Section 41(1) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, delegated its appellate powers vested in it under Section 21(4) to an "officer", an order passed by such an officer was an order passed by the State Government itself and "not an order passed by any officer under this Act" within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revision by the State under Section 42 of that Act, the order sought to be revised must*

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be an order passed by an officer in his own right and not as a delegate of the State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate.'

(emphasis in original)

51. Be it noted in the said case, reference was made to Behari Kunj Sahkari Awas Samiti v. State of U.P. [Behari Kunj Sahkari Awas Samiti v. State of U.P., (1997) 7 SCC 37] , which followed the decision in Roop Chand v. State of Punjab [Roop Chand v. State of Punjab, AIR 1963 SC 1503] . It is seemly to note here that the said principle has been followed in Indore Vikas Pradhikaran [Indore Vikas Pradhikaran v. Pure Industrial Coke & Chemicals Ltd., (2007) 8 SCC 705] .

52. Mr Sundaram has strongly relied on Pratapchand Nopaji [Pratapchand Nopaji v. Kotrike Venkata Setty & Sons, (1975) 2 SCC 208] . In the said case, the three-Judge Bench applied the maxim "qui facit per alium facit per se". We may profitably reproduce the passage : (SCC p. 214, para 9)

'9. ... The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim:"qui facit per alium facit per se" (what one does through another is done by oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to do the illegal act within the prohibited area. It is immaterial whether, for the doing of such an illegal act, the agent employed is given the wider powers or authority of the "pucca adatia", or, as the High Court had held, he is clothed with the powers of an ordinary commission agent only.'

53. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. According to the learned counsel for the appellant, ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee.

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.

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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 [TRF Ltd. v. Energo Engg. Projects Ltd., 2016 SCC OnLine Del 2532] expressed by the High Court is not sustainable and we say so."

19.It was thus held that as the Managing Director became ineligible by operation of law to act as an arbitrator, he could not nominate another person to act as an arbitrator and that once the identity of the Managing Director as the sole arbitrator was lost, the power to nominate someone else as an arbitrator was also obliterated. *The relevant clause in said case had nominated the Managing Director himself to be the sole arbitrator and also empowered said Managing Director to nominate another person to act as an arbitrator. The Managing Director thus had two capacities under said clause, the first as an arbitrator and the second as an appointing authority. In the present case we are concerned with only one capacity of the Chairman and Managing Director and that is as an appointing authority.*

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*

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party or an official or an authority having interest in the dispute would be disentitled to make appointment of an arbitrator.

21. *But, in our view that has to be the logical deduction from TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Para 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. But,* ***in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015*** *(3 of 2016) and recognised by the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]."*

(**Emphasis supplied.**)

27. The development of the law must also be understood in the context of ***Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd.***[29]. The Supreme Court recognised that independence and impartiality are fundamental attributes of an Arbitral Tribunal and that the principle of party autonomy cannot be stretched to a point where it compromises these requirements. In the context of the panel mechanism then under consideration, the Court therefore required the panel maintained by DMRC to be sufficiently broad-based so as to

[29](2017) 4 SCC 665

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ensure that the constitution of the Arbitral Tribunal did not give rise to an apprehension that the choice of the arbitrator was, in substance, controlled by one of the parties. The same principle was subsequently reiterated in ***Perkins*** *(supra)*, where the Court, referring to the Law Commission's Report No.246 and ***Voestalpine*** *(supra)*, emphasised that minimum standards of independence and impartiality cannot be dispensed with merely on the basis of party autonomy.

28. These principles, however, do not by themselves answer the separate question of the temporal applicability of the statutory disqualifications introduced by the 2015 Amendment Act. ***Voestalpine*** *(supra)* was decided in the context of the amended statutory regime and a panel-based appointment mechanism. It cannot, therefore, be treated as creating, retrospectively, a statutory disqualification in respect of an appointment validly made prior to 23.10.2015. The distinction between the substantive requirement of independence and impartiality, on the one hand, and the statutory ineligibility introduced by the amended Section 12(5), on the other, is therefore material.

29. The Constitution Bench decision in ***CORE*** *(supra)*, further considered the relationship between party autonomy, equal treatment, independence and impartiality in the constitution of an Arbitral Tribunal. The Constitution Bench held that the principle of equal treatment under Section 18 of the A&C Act operates at the stage of appointment as well. It also approved the principles in ***TRF*** *(supra)* and ***Perkins*** *(supra)* concerning sole Arbitrators, while separately considering the legality of a curated panel mechanism for a three-member Tribunal. The Court ultimately directed that the law laid

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down in that reference would operate prospectively in respect of appointments to three-member Tribunals. The relevant paragraphs of the same are extracted hereunder:

> *"**169.** In the present reference, we have upheld the decisions of this Court in TRF [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] and Perkins [Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2020) 20 SCC 760] which dealt with situations dealing with sole arbitrators. Thus, TRF [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] and Perkins [Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2020) 20 SCC 760] have held the field for years now. However, we have disagreed with Voestalpine [Voestalpine Schienen GmbH v. DMRC Ltd., (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] and CORE [Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV), (2020) 14 SCC 712] which dealt with the appointment of a three-member Arbitral Tribunal.* ***We are aware of the fact that giving retrospective effect to the law laid down in the present case may possibly lead to the nullification of innumerable completed and ongoing arbitration proceedings involving three-member tribunals. This will disturb the commercial bargains entered into by both the government and private entities. Therefore, we hold that the law laid down in the present reference will apply prospectively to arbitrator appointments to be made after the date of this judgment. This direction only applies to three-member tribunals.***
>
> ***J. Conclusion***
>
> ***170.** In view of the above discussion, we conclude that:*
>
> ***170.1.** The principle of equal treatment of parties applies at all stages of arbitration proceedings, including the stage of appointment of arbitrators;*
>
> ***170.2.** The Arbitration Act does not prohibit PSUs from empanelling potential arbitrators. However, an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by PSUs;*
>
> ***170.3.** A clause that allows one party to unilaterally appoint a sole arbitrator gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further, such a unilateral clause is exclusive and hinders equal participation of the other party in the appointment process of arbitrators;*
>
> ***170.4.**__In the appointment of a three-member panel, mandating the other party to select its arbitrator from a curated panel of potential arbitrators is against the principle of equal treatment of parties. In this situation, there is no effective counterbalance__*

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because parties do not participate equally in the process of appointing arbitrators. The process of appointing arbitrators in CORE [Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV), (2020) 14 SCC 712] is unequal and prejudiced in favour of the Railways*;*

170.5. *Unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution;*

170.6. *The principle of express waiver contained under the proviso to Section 12(5) also applies to situations where the parties seek to waive the allegation of bias against an arbitrator appointed unilaterally by one of the parties. After the disputes have arisen, the parties can determine whether there is a necessity to waive the nemo judex rule; and*

170.7.The law laid down in the present reference will apply prospectively to arbitrator appointments to be made after the date of this judgment. This direction applies to three-member tribunals.*"*

(**Emphasis supplied.**)

30. The prospective direction in ***CORE*** *(supra)* assumes significance in the present case. The Constitution Bench did not declare that every appointment made before 23.10.2015, which would subsequently fall within a category contemplated by the Seventh Schedule, stood retrospectively invalidated. Indeed, the Court was conscious of the consequences of disturbing completed and ongoing arbitrations and expressly confined the prospective direction to appointments to three-member Tribunals. The fact that ***CORE*** considered the larger principles of neutrality, equality, *nemo judex* and party autonomy does not, therefore, permit the post-2015 statutory regime to be retrospectively superimposed upon an arbitration commenced and a Sole Arbitrator appointed before 23.10.2015.

31. The position was subsequently considered by the Supreme Court in ***Bhadra International*** *(supra)*. In that case, the arbitration clause empowered the Chairman of the Airports Authority of India to

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appoint the Sole Arbitrator. The arbitration was invoked on 27.11.2015, i.e. after the 2015 Amendment had come into force. The Supreme Court held that, once Section 12(5) applied, the Chairman, being himself ineligible, could not exercise the power to appoint another Arbitrator. The Court further held that the objection concerned the jurisdiction of the Tribunal and could be raised at a later stage. The relevant extracts are reproduced hereinbelow:

> *"**60.** It is apposite to understand that Section 12(5) does not prohibit unilateral appointment of an arbitrator. It provides that whenever an appointment of an arbitrator is hit by the bar under Section 12(5), the arbitrator would be ineligible to act, irrespective of whether the appointment was unilateral or with consent of both parties. In such circumstances, the parties may, in the manner provided under the proviso, waive the ineligibility. We shall discuss the scope and application of the proviso in more detail in the latter part of this judgment.*
>
> ***d. De Jure inability of the arbitrator to perform his functions***
>
> ***61.** In the aforesaid context, it would be apposite to briefly explain what constitutes as de jure ineligibility under Section 12(5). The expression de jure denotes a condition rooted in strict compliance with the requirements of law. De jure inability refers to a situation in which an arbitrator is legally incapable of performing his functions and is, by operation of law, barred from continuing in office. Such inability strikes at the very root of the arbitrator's authority to act, thereby affecting his inherent capacity to discharge his functions as an arbitrator. It is this legal incapacity, arising from statutory disqualifications, that results in the termination of the "mandate of an arbitrator" under Section 14(1)(a) of the Act, 1996.*
>
> ***62.**De jure inability referred to under Section 14(1)(a) may arise from the provisions of the Act, 1996, or from any other existing law that renders an arbitrator legally incapable of performing his functions. As regards de jure ineligibility, it flows from sub-section (5) of Section 12 read with the Seventh Schedule, which disqualifies certain persons from being appointed or continuing as arbitrators.*
>
> ***63.** In other words, the ineligibility under Section 12(5) precedes de jure inability under Section 14(1)(a). In other words, de jure ineligibility is the specie and de jure inability is the genus. To put this in context, de jure inability is determined when an aggrieved party is able to indicate that the circumstances under the Seventh Schedule have been met.*

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67. *From the above exposition of law, the Chairman of the respondent was wholly ineligible to appoint an arbitrator. The Items 1, 2, 5, 12, and 13 of the Seventh Schedule respectively, clearly attach to the Chairman of the respondent. Once the Chairman is rendered ineligible by operation of law, he cannot nominate or appoint another person as an arbitrator. To illustrate, one who cannot sit on a chair himself cannot authorise another to sit on it either.*

68. *We are in complete agreement that the present case is squarely covered by the decisions of this Court in Perkins Eastman (supra) and Bharat Broadband (supra) respectively. The unilateral appointment of a sole arbitrator is void ab initio, and the sole arbitrator so appointed is de jure ineligible to act as an arbitrator in terms of Section 12(5) read with the Seventh Schedule of the Act, 1996.*

69. *Thus, we have no hesitation in saying that its High Court, in the impugned judgment, committed an error in holding that the appointment was not unilateral merely because the respondent proceeded to appoint the sole arbitrator pursuant to notice invoking arbitration.*

***

123. *A conspectus of the aforesaid detailed discussion on the position of law as regards Section 12 of the Act, 1996, is as follows:—*

i.<u>The principle of equal treatment of parties provided in Section 18 of the Act, 1996, applies not only to the arbitral proceedings but also to the procedure for appointment of arbitrators.</u> *Equal treatment of the parties entails that the parties must have an equal say in the constitution of the arbitral tribunal.*

ii.<u>Sub-section (5) of Section 12 provides that any person whose relationship with the parties or counsel, or the dispute, whether direct or indirect, falls within any of the categories specified in the Seventh Schedule would be ineligible to be appointed as an arbitrator</u>*. Since, the ineligibility stems from the operation of law, not only is a person having an interest in the dispute or its outcome ineligible to act as an arbitrator, but appointment by such a person would be ex facie invalid.*

iii.<u>The words "an express agreement in writing" in the proviso to Section 12(5) means that the right to object to the appointment of an ineligible arbitrator cannot be taken away by mere implication.</u> *The agreement referred to in the proviso must be a clear, unequivocal written agreement.*

iv.<u>When an arbitrator is found to be ineligible by virtue of Section 12(5) read with the Seventh Schedule, his mandate is automatically terminated.</u> *In such circumstance, an aggrieved party may approach the court under Section 14 read with Section 15 for appointment of a*

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substitute arbitrator. Whereas, when an award has been passed by such an arbitrator, an aggrieved party may approach the court under Section 34 for setting aside the award.

v. *In arbitration, the parties vest jurisdiction in the tribunal by exercising their consent in furtherance of a valid arbitration agreement. An arbitrator who lacks jurisdiction cannot make an award on the merits. Hence,* ***an objection to the inherent lack of jurisdiction can be taken at any stage of the proceedings.****"*

(**Emphasis supplied.**)

32. ***Bhadra International*** *(supra)* also makes clear the significance of the proviso to Section 12(5). Mere participation in the arbitration, filing of pleadings, or the absence of an objection at the initial stage does not, by itself, constitute the "express agreement in writing" contemplated by the proviso. The decision does not, however, answer the anterior question in the present case, namely, whether Section 12(5) was applicable at all to an arbitration which had already commenced in 2014 and in which the Arbitrator had been appointed in March 2015.

II. The position prior to 23.10.2015:

33. Prior to 23.10.2015, the A&C Act accorded considerable weight to party autonomy in matters relating to the constitution of the Arbitral Tribunal. Section 11(2) of the A&C Act expressly recognised the parties' freedom to agree upon a procedure for the appointment of arbitrators. At that stage, the Act did not contain the statutory prohibition subsequently introduced by Section 12(5), read with the Seventh Schedule. Consequently, the mere fact that one party was contractually entrusted with a role in the appointment of the arbitrator did not, by itself, render such appointment statutorily impermissible under the law then in force.

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34. This does not mean that every unilateral appointment was valid under the pre-2015 regime. The distinction is between a unilateral appointment which was not authorised by the arbitration agreement and a unilateral appointment which was expressly contemplated by the arbitration agreement but is subsequently challenged merely because the appointee was an employee of one of the parties**.**

35. The first situation is governed by the principle stated in ***Dharma Prathishthanam v. Madhok Construction (P) Ltd.***[30]. The Supreme Court emphasised that where the arbitration agreement prescribes the manner in which the Arbitrator is to be appointed, the parties are bound by that agreed procedure. A party cannot, therefore, unilaterally constitute the Arbitral Tribunal in a manner which is not contemplated by the arbitration agreement. The defect in such a case lies in the absence of contractual authority for the appointment and reference, and not in any statutory disqualification of the Arbitrator on account of his relationship with either party. The latter concept, in its present statutory form, was introduced only subsequently through Section 12(5) read with the Seventh Schedule. It is pertinent to refer to the relevant extracts of the said decision, which are as under:

> *"**11.** In the background of the abovesaid provisions, the question which arises for consideration is whether, in the light of a general provision as in clause 35, the respondent could have unilaterally appointed an arbitrator without the consent of the appellant and could have made a reference to such arbitrator again without the reference of disputes having been consented to by the appellant.*
>
> ***12.** On a plain reading of the several provisions referred to hereinabove, we are clearly of the opinion that the procedure followed and the methodology adopted by the respondent is wholly unknown to law and the appointment of the sole arbitrator Shri Swami Dayal, the*

[30](2005) 9 SCC 686

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reference of disputes to such arbitrator and the ex parte proceedings and award given by the arbitrator are all void ab initio and hence nullity, liable to be ignored. ***In case of arbitration without the intervention of the court, the parties must rigorously stick to the agreement entered into between the two. If the arbitration clause names an arbitrator as the one already agreed upon, the appointment of an arbitrator poses no difficulty. If the arbitration clause does not name an arbitrator but provides for the manner in which the arbitrator is to be chosen and appointed, then the parties are bound to act accordingly. If the parties do not agree then arises the complication which has to be resolved by reference to the provisions of the Act.*** *One party cannot usurp the jurisdiction of the court and proceed to act unilaterally. A unilateral appointment and a unilateral reference — both will be illegal. It may make a difference if in respect of a unilateral appointment and reference the other party submits to the jurisdiction of the arbitrator and waives its rights which it has under the agreement, then the arbitrator may proceed with the reference and the party submitting to his jurisdiction and participating in the proceedings before him may later on be precluded and estopped from raising any objection in that regard. According to Russell (Arbitration, 20th Edn., p. 104)—*

> *"An arbitrator is neither more nor less than a private judge of a private court (called an Arbitral Tribunal) who gives a private judgment (called an award). He is a judge in that a dispute is submitted to him; ... He is private insofar as (1) he is chosen and paid by the disputants, (2) he does not sit in public, (3) he acts in accordance with privately chosen procedure so far as that is not repugnant to public policy, (4) so far as the law allows he is set up to the exclusion of the State courts, (5) his authority and powers are only whatsoever he is given by the disputants' agreement, (6) the effectiveness of his powers derives wholly from the private law of contract and accordingly the nature and exercise of these powers must not be contrary to the proper law of the contract or the public policy of England, bearing in mind that the paramount public policy is that freedom of contract is not lightly to be interfered with."*

***

31. *Three types of situations may emerge between the parties and then before the court. Firstly, an arbitration agreement, under examination from the point of view of its enforceability, may be one which expresses the parties' intention to have their disputes settled by arbitration by using clear and unambiguous language, then the parties and the court have no other choice but to treat the contract as binding and enforce it. Or, there may be an agreement suffering from such vagueness or uncertainty as is not capable of being construed at all by culling out the intention of the parties with certainty, even by reference*

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to the provisions of the Arbitration Act, then it shall have to be held that there was no agreement between the parties in the eye of the law and the question of appointing an arbitrator or making a reference or disputes by reference to Sections 8, 9 and 20 shall not arise. ***Secondly, there may be an arbitrator or arbitrators named, or the authority may be named who shall appoint an arbitrator, then the parties have already been ad idem on the real identity of the arbitrator as appointed by them beforehand; the consent is already spelled out and binds the parties and the court. All that may remain to be done in the event of an occasion arising for the purpose, is to have the agreement filed in the court and seek an order of reference to the arbitrator appointed by the parties.*** *Thirdly, if the arbitrator is not named and the authority who would appoint the arbitrator is also not specified, the appointment and reference shall be to a sole arbitrator unless a different intention is expressly spelt out. The appointment and reference — both shall be by the consent of the parties. Where the parties do not agree, the court steps in and assumes jurisdiction to make an appointment, also to make a reference, subject to the jurisdiction of the court being invoked in that regard. We hasten to add that mere inaction by a party called upon by the other one to act does not lead to an inference as to implied consent or acquiescence being drawn. The appellant not responding to the respondent's proposal for joining in the appointment of a sole arbitrator named by him could not be construed as consent and the only option open to the respondent was to have invoked the jurisdiction of court for appointment of an arbitrator and an order of reference of disputes to him. It is the court which only could have compelled the appellant to join in the proceedings."*

(**Emphasis supplied.**)

36. The present case, however, stands on a materially different footing from ***Dharma Prathishthanam*** *(supra)*. Clause 45 did not merely provide for arbitration in the event of disputes. It specifically contemplated reference to a Sole Arbitrator nominated by DMRC. More significantly, the clause expressly stipulated that no objection would be raised if the Conciliator or Sole Arbitrator so nominated or appointed was an employee of DMRC. The appointment of a DMRC employee was, therefore, not an act undertaken contrary to the agreed contractual mechanism. It was an eventuality expressly contemplated and accepted by the parties when they entered into the agreement.

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37. The second situation is more directly addressed by ***Indian Oil*** *(supra)*. Under the law as it stood prior to the 2015 Amendment, the Supreme Court did not treat the employment of an Arbitrator by a State instrumentality as, by itself, a bar to his appointment. The Court recognised the freedom of parties under Section 11(2) of the A&C Act to agree upon the procedure for appointment and held that the mere fact that the named Arbitrator was an employee of one of the parties did not, *ipso facto*, establish bias or render the appointment invalid.

38. This, however, does not mean that ***Indian Oil*** *(supra)* treated contractual authorisation as conclusive in every case. The Court recognised that circumstances surrounding an appointment could nevertheless give rise to a justifiable apprehension regarding the independence or impartiality of the Arbitrator. The pre-2015 position was thus not that an interested person could invariably act as an Arbitrator, but that the mere fact of his employment by one of the parties did not, without more, constitute a statutory bar. The enquiry was consequently directed to the terms of the arbitration agreement and the circumstances of the particular appointment, including whether those circumstances gave rise to a reasonable apprehension of bias or lack of independence.

39. The distinction between the two statutory regimes is, therefore, material. Under the law prevailing prior to 23.10.2015, the employment of an Arbitrator with one of the parties, including a State instrumentality, did not, by itself, constitute a statutory disqualification. The post-2015 regime, however, introduced an express statutory bar through Section 12(5), read with the Seventh

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Schedule. That statutory consequence cannot be retrospectively imported into an appointment made under the earlier regime merely because the factual circumstance which now attracts statutory ineligibility was already present at the time of such appointment. The validity of the appointment in the present case must, therefore, be examined in accordance with the legal framework applicable when the arbitration was commenced and the Arbitrator was appointed, subject to the specific provision contained in Section 26.

III. Section 26 and the temporal applicability of the 2015 Amendment:

40. At this stage, it is also pertinent to refer to Section 26. The same is reproduced hereinbelow:

> *"26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."*

41. The aforesaid provision provides that the 2015 Amendment Act shall not apply to Arbitral proceedings commenced, in accordance with Section 21 of the A&C Act, before the commencement of the 2015 Amendment Act, unless the parties otherwise agree. The second part of Section 26 separately provides for application of the 2015 Amendment Act to arbitral proceedings commenced on or after its commencement.

42. The Supreme Court in ***Kochi Cricket*** *(supra)* examined the temporal operation of Section 26 and held that the first part of the provision operates with reference to arbitral proceedings commenced

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before the coming into force of the 2015 Amendment Act, while the amended provisions may apply to proceedings before the Court commenced after the Amendment Act came into force, in accordance with the statutory scheme. For the present controversy, the material aspect of the decision is that the applicability of the amended provisions to arbitral proceedings is determined with reference to the date of commencement of such proceedings under Section 21 of the A&C Act, subject to the qualification contained in Section 26 itself that the parties may otherwise agree. This principle was subsequently reiterated by the Supreme Court in ***S.P. Singla*** *(supra)*.

43. In ***S.P. Singla*** *(supra)*, the Supreme Court considered whether a general contractual stipulation providing for the application of statutory modifications and re-enactments could, by itself, constitute an agreement within the meaning of Section 26 so as to attract the amended provisions. While the Delhi High Court in ***Ratna Infrastructure Projects (P) Ltd. v. Meja Urja Nigam (P) Ltd.***[31] had taken the view that such a clause was sufficient to satisfy Section 26, the Supreme Court, without expressing any opinion on the correctness of that decision, held that the clause relied upon in the case before it could not be treated as an agreement between the parties for applying the amended Act. Since the arbitral proceedings had commenced in 2013, the Court held that the amended provisions could not be invoked. The relevant observations of the Supreme Court are reproduced hereunder:

> *"**15.** Drawing our attention to the **wordings in Clause (65) 'that the agreement is subject to any statutory modification or re-***

[31] 2017 SCC OnLine Del 7808

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enactment thereof and the rules made thereunder and for the time being shall apply to the arbitration proceeding under this clause' *the learned Senior Counsel contended that these words would certainly attract Section 12(5) of the Act as amended with effect from 23-10-2015. In this regard, the learned Senior Counsel placed reliance upon the Delhi High Court judgment in Ratna Infrastructure Projects (P) Ltd. v. Meja Urja Nigam (P) Ltd. [Ratna Infrastructure Projects (P) Ltd. v. Meja Urja Nigam (P) Ltd., 2017 SCC OnLine Del 7808] wherein interpreting the similar words in a contract, the Delhi High Court held that those words satisfy the requirement of Section 26 (amended Act of 2015) of there being an agreement between the parties that the Act as amended with effect from 23-10-2015 will apply and held as under : (SCC OnLine Del paras 22-23)*

> *"22. ...* ***The words 'any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration…' satisfies the requirement of Section 26 of there being an agreement between the parties that the Act as amended with effect from 23-10-2015 will apply. The Court is not prepared to draw the fine distinction between 'agree' and 'agreed'. Once the amendment to the clause clearly stated that all statutory modifications and re-enactments would apply, then there is no need for further agreement in that respect after 23-10-2015****. The plea of the respondent in this regard is rejected.*
>
> *23. The net result is that Section 12(5) as amended with effect from 23-10-2015 would apply. Section 12(5) clearly prohibits the employee of one of the parties from being an arbitrator. This would straightway disqualify Mr Kher who happens to be a serving GM of the respondent. Therefore, it is to no avail that the respondent has by its letter dated 21-8-2016 appointed Mr Kher as an arbitrator to adjudicate Arbitration Cases Nos. 1 of 2013 and 1 of 2014. His mandate stands terminated."*

16. *Considering the facts and circumstances of the present case, we are not inclined to go into the merits of this contention of the appellant nor examine the correctness or otherwise of the above view taken by the Delhi High Court in Ratna Infrastructure Projects case [Ratna Infrastructure Projects (P) Ltd. v. Meja Urja Nigam (P) Ltd., 2017 SCC OnLine Del 7808] ; suffice it to note that* ***as per Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015, the provisions of the amended 2015 Act shall not apply to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the principal Act before the commencement of the Amendment Act unless the parties otherwise agree. In the facts and circumstances of the present case, the proviso in Clause (65) of the general conditions of the contract cannot be taken to be the agreement between the parties so as to apply the provisions of the***

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amended Act. As per Section 26 of the Act, the provisions of the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after the date of commencement of the Amendment Act, 2015 (w.e.f. 23-10-2015). In the present case, arbitration proceedings commenced way back in 2013, much prior to coming into force of the amended Act and therefore, provisions of the amended Act cannot be invoked.

(**Emphasis supplied.**)

44. Section 26 thus assumes significance in determining the statutory framework against which the constitution of the Arbitral Tribunal is to be examined. Where the arbitral proceedings had commenced before 23.10.2015, the amended provisions cannot be applied merely on the ground that the circumstances attracting those provisions continued thereafter. Such proceedings remain governed by the pre-amendment regime unless the parties have otherwise agreed to the application of the amended Act within the meaning of Section 26.In the present case, therefore, the legality of the appointment made in March 2015 has to be examined under the law then in force. The statutory disqualification introduced by Section 12(5), read with the Seventh Schedule, cannot be retrospectively applied to that appointment in the absence of such an agreement.

IV. ***Hanson Agro* and the three categories:**

45. Learned counsel representing the Respondent has placed a reliance upon the recent judgment of this Court in ***Hanson Agro*** *(supra)*, decided on 01.09.2026, which provides for a comprehensive framework for addressing precisely this transitional question. The petitions before the Court were classified into three categories depending upon the dates of commencement of arbitration, constitution of the Tribunal, the Award and the subsequent Section 34

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proceedings.

i. Category A consisted of arbitrations commenced and Awards rendered before 23.10.2015, with Section 34 proceedings instituted thereafter.

ii. Category B consisted of arbitrations commenced before 23.10.2015, but where the Awards and Section 34 proceedings took place after the 2015 Amendment.

iii. Category C concerned cases where the arbitration agreement itself contained a stipulation contemplating subsequent statutory modification or re-enactment of the arbitration law.

46. ***Hanson Agro*** *(supra)* makes the central proposition clear: in Categories A and B, the fact that the Award or the Section 34 proceedings occurred after 23.10.2015 does not retrospectively subject the constitution of the Tribunal to Section 12(5) and the Seventh Schedule. The legality of the constitution of the Tribunal is to be examined with reference to the legal regime applicable when the Arbitral proceedings commenced and the Tribunal was constituted. The Court specifically observed that the subsequent insertion of Section 12(5) cannot, by itself, convert an appointment which was legally permissible when made into one which was statutorily prohibited.

47. ***Hanson Agro*** *(supra)* also considered and distinguished the argument founded upon ***Bhadra International*** *(supra)*. The Court recognised that ***Bhadra International*** *(supra)* affirms the fundamental

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requirements of independence, impartiality and fairness and treats a Section 12(5) ineligibility objection as going to the jurisdiction of the Tribunal. However, ***Bhadra International*** *(supra)* did not decide that every Tribunal constituted prior to 23.10.2015, which would subsequently fall within the Seventh Schedule, stood retrospectively invalidated. As ***Hanson Agro*** *(supra)* explains, the statutory consequence introduced by Section 12(5) cannot be retrospectively substituted for the legal position which prevailed when the appointment was made.

48. The present case, however, requires a further inquiry because Clause 45 contains the words that the arbitration proceedings shall be governed by the A&C Act "*as amended from time to time including provisions in force at the time the reference is made*". The case, therefore, cannot be disposed of merely by placing it within Category B. It raises the precise question addressed by ***Hanson Agro*** *(supra)* under Category C, namely whether the parties had otherwise agreed, through the arbitration agreement, to subject an arbitration commenced before 23.10.2015 to subsequent amendments in the arbitration law.

V. <u>Clause 45 and the Category C inquiry</u>:

49. The mere presence of a contractual reference to statutory amendments does not, by itself, resolve the question of applicability of the amended regime. The contractual language has to be examined in its entirety to ascertain the intention of the parties, having regard to the nature and scope of the reference to future statutory changes. The

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subsequent conduct of the parties may also be relevant where it sheds light on whether they, in fact, proceeded on the basis that the amended statutory regime governed their arbitration.

50. In this context, ***Hanson Agro*** *(supra)* considers the decisions in ***Ratnam Sudesh Iyer v. Jackie Shroff***[32] and ***Jagdish Chand Gupta*** *(supra)*. In ***Ratnam Sudesh Iyer*** *(supra)*, the reference to the A&C Act "*or any amendment thereto*" was not regarded, by itself, as sufficient to establish an agreement under Section 26 to apply the 2015 Amendment Act to an arbitration which had already commenced. On the other hand, ***Jagdish Chand Gupta*** *(supra)* involved contractual language referring to "statutory modification", coupled with subsequent conduct which was considered relevant in determining the parties' understanding of the applicable regime. The significance of these decisions, as explained in ***Hanson Agro*** *(supra)*, lies in examining the particular contractual language and the surrounding conduct, rather than treating every reference to future amendments as having the same legal effect.

51. Clause 45 must, therefore, be examined as a whole. It does contain the expression "*as amended from time to time*", which lends some support to the Respondent's submission that the parties contemplated that subsequent amendments to the A&C Act could govern their arbitration. The Respondent can accordingly contend that the clause was intended to keep the contractual reference to the A&C Act aligned with subsequent statutory amendments, including Section 12(5) when it was introduced.

[32]2021 SCC OnLine SC 1032

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52. At the same time, Clause 45 contains a further stipulation referring to the "*provisions in force at the time the reference is made*". That stipulation cannot be disregarded while determining the temporal operation of the clause. In the present case, the reference was made on 03.06.2014, and the arbitral proceedings had consequently commenced before the 2015 Amendment came into force. At that point, Section 12(5) and the Seventh Schedule did not form part of the A&C Act.

53. The two expressions in Clause 45 therefore have to be read together. The words "*as amended from time to time*" indicate that the parties did not intend their contractual reference to be confined permanently to the text of the A&C Act as it stood on the date of execution of the agreement. However, the reference to the "*provisions in force at the time the reference is made*" provides a specific temporal reference for determining the provisions applicable to the arbitration. The clause can accordingly not be read as an unqualified agreement that every subsequent amendment to the A&C Act would automatically govern an arbitration which had already commenced.

54. This reading also accords with the scheme of Section 26. The statutory position is that the 2015 Amendment does not apply to arbitral proceedings commenced before 23.10.2015, unless the parties otherwise agree. Where reliance is placed upon a contractual provision as constituting such an agreement, the intention to depart from the statutory rule must emerge from the terms of that provision read in their proper context. A clause which, on a fair reading, also identifies the applicable provisions by reference to the law in force when the

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reference is made cannot readily be construed as an unequivocal agreement to subject an already commenced arbitration to a subsequent substantive disqualification.

55. The distinction drawn in ***Hanson Agro*** *(supra)* between the contractual language considered in ***Ratnam Sudesh Iyer*** *(supra)* and that considered in ***Jagdish Chand Gupta*** *(supra)* is therefore relevant, but not determinative by the mere use of particular words. What has to be ascertained is whether, on a reading of the particular clause and the conduct of the parties, there is a sufficiently clear indication that the parties intended the amended statutory regime to govern an arbitration which had already commenced. The inquiry is thus one of contractual intention in the context of Section 26, rather than an automatic consequence flowing from the words "*as amended from time to time*".

56. In the present case, the subsequent conduct of the parties does not materially alter the position emerging from the language of Clause 45. The Arbitrator was appointed on 24.03.2015 and the first/preliminary meeting was held on 27.05.2015. The proceedings thereafter continued, pleadings were filed, issues were framed on 16.08.2016 and the arbitration ultimately culminated in the Award dated 21.07.2017. However, no material has been brought to the notice of this Court showing that, after 23.10.2015, the parties expressly treated the 2015 Amendment as applicable to the constitution of the Tribunal or otherwise proceeded on the basis that Section 12(5) governed the Arbitrator's eligibility.

57. The mere continuation of proceedings after 23.10.2015 cannot,

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without more, be regarded as an agreement to apply the amended Act. Such an approach would result in the amended regime becoming applicable to every arbitration which commenced before 23.10.2015 but continued thereafter, notwithstanding the express qualification contained in Section 26. Continuation of an arbitration is, therefore, not by itself sufficient to establish the requisite agreement. There must be some material indicating that the parties intended to subject the pending arbitration to the amended statutory regime.

58. The present case also does not involve any subsequent written agreement by which the parties expressly adopted the amended Act, nor is there any material indicating that, after 23.10.2015, the parties invoked Section 12(5) or otherwise sought to alter the constitution of the Tribunal on the basis of the amended provisions. The subsequent conduct, therefore, does not provide any independent basis for reading Clause 45 as an agreement under Section 26 to apply the 2015 Amendment to the present arbitration.

59. The reliance placed by the Respondent on ***S.P. Singla*** *(supra)* must also be considered in this context. The Supreme Court in that case approached the question by reference to Section 26 and declined to treat the contractual provision relied upon before it as sufficient to apply the amended Act to an arbitration commenced prior to 23.10.2015. Clause 45 in the present case is undoubtedly more elaborate and contains the additional expression "*as amended from time to time*". That expression cannot, however, be considered in isolation. When the clause is read as a whole, including its reference to the "*provisions in force at the time the reference is made*", and in

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the absence of subsequent conduct demonstrating that the parties intended to adopt the amended regime, it does not, in the view of this Court, evince a sufficiently clear agreement to displace the rule contained in Section 26 and retrospectively subject the present arbitration to the statutory disqualification introduced by Section 12(5).

60. The reliance placed by the Appellant upon ***D.V. Anand*** *(supra)* and ***Avneet Soni*** *(supra)* also has to be understood in the context of the question of temporal applicability of the 2015 Amendment Act. Those decisions recognise that the validity of the constitution of an Arbitral Tribunal has to be examined with reference to the statutory regime governing the arbitration and the circumstances in which the Tribunal came to be constituted. They do not, however, dispense with the requirement of examining the terms of the particular arbitration agreement where Section 26 permits the parties to agree to the application of the amended regime.

61. In the present case, that inquiry has already been undertaken in the context of Clause 45. The clause does not, when read as a whole, furnish a sufficiently clear basis for concluding that the parties intended to subject an arbitration already commenced in 2014, and a Tribunal constituted in March 2015, to the statutory disqualification subsequently introduced by Section 12(5). These authorities, therefore, do not alter the conclusion reached above on the applicability of the amended provisions.

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VI. Whether the appointment was nevertheless invalid under the pre-2015 law:

62. Having held that Section 12(5) and the Seventh Schedule cannot be retrospectively applied to the present arbitration, the inquiry does not end. The Respondent's challenge must still be examined under the law which governed the arbitration at the relevant time.

63. As noticed hereinabove, ***Dharma Pratishthanam*** *(supra)* establishes that a party cannot depart from the appointment mechanism prescribed by the arbitration agreement. That principle, however, assists the Respondent only if the appointment made by DMRC was outside the authority conferred by Clause 45. In the present case, the contractual position is to the contrary. Clause 45 specifically contemplated that unresolved disputes would be referred to a Sole Arbitrator nominated by DMRC. The contractual mechanism thus expressly conferred upon DMRC the power which it subsequently exercised.

64. The Respondent may contend that, notwithstanding the contractual language, a party interested in the outcome of a dispute could not appoint the person who was to adjudicate that dispute. Such an argument derives considerable force from the subsequent jurisprudence in ***TRF*** *(supra)*, ***Perkins*** *(supra)*, ***CORE*** *(supra)* and ***Bhadra*** *(supra)*. However, those authorities operate within, and give effect to, the statutory and jurisprudential developments which culminated in the post-2015 regime. They cannot be used to retrospectively supply a statutory prohibition which did not exist on 24.03.2015.

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65. The pre-2015 position stated in ***Indian Oil*** *(supra)* is directly relevant on this aspect. The Supreme Court was conscious of the fact that the Arbitrator could be an employee of the State or a statutory corporation which was itself a party to the contract. Yet it held that such employment did not, by itself, establish bias or lack of independence. The Court instead required examination of the circumstances of the particular appointment.

66. In the present case, the contractual provision goes even further. It expressly records that there would be no objection to the Conciliator or Sole Arbitrator being an employee of DMRC. Thus, this is not a case where an employee was selected contrary to an agreed qualification or appointment mechanism. The parties, at the time of entering into the agreement, consciously contemplated the possibility of appointment of a DMRC employee.

67. This aspect also distinguishes the present case from ***Dharma Pratishthanam*** *(supra)*. In ***Dharma Pratishthanam*** *(supra)*, the unilateral appointment was challenged because the contractual mechanism did not authorise the manner in which the Arbitrator had been appointed. Here, the authority to nominate the Sole Arbitrator is expressly found in the contract. Consequently, the principle that parties must adhere to the agreed procedure does not invalidate the appointment, rather, it supports the appointment made in conformity with that procedure.

68. The Respondent may nevertheless rely upon the principle of *nemo judex in causa sua* and submit that the requirements of

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independence and impartiality, as reflected in Section 12 and Section 18 of the A&C Act, existed even prior to the 2015 Amendment. There can be no dispute with the broader proposition that an Arbitrator was required to act independently and impartially under the unamended Act as well. The significance of the 2015 Amendment Act, however, was that it attached a specific statutory consequence of ineligibility to the relationships enumerated in the Seventh Schedule.

69. The distinction, therefore, is not between a pre-2015 regime in which independence and impartiality were irrelevant and a post-2015 regime in which they became relevant. The distinction is between the general requirement of independence and impartiality which existed under the unamended Act and the specific statutory disqualification subsequently introduced by Section 12(5), read with the Seventh Schedule. Consequently, if the Respondent had established circumstances demonstrating actual bias or giving rise to justifiable doubts as to the independence or impartiality of the particular Arbitrator, such a challenge could have been examined under the pre-amendment law. The mere fact, however, that the Arbitrator was an employee of DMRC did not, by itself, constitute such a statutory bar under the law then prevailing.

70. There is also no material before this Court demonstrating that the learned Sole Arbitrator was the officer who had taken the decision which was the subject matter of the arbitration, that he had himself dealt with the underlying contractual dispute in a manner giving rise to a reasonable apprehension of bias, or that he was the direct subordinate of an officer whose decision was under challenge. The

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declaration furnished by the learned Sole Arbitrator at the commencement of the proceedings, stating that he had no personal interest in the outcome and that there were no circumstances giving rise to justifiable doubts regarding his independence or impartiality, is also a relevant circumstance, though not by itself determinative of the question.

71. The Respondent's challenge, as advanced before the learned District Judge and before this Court, is principally founded upon the proposition that a serving employee of DMRC was statutorily ineligible to act as an Arbitrator. That proposition is correct for an arbitration to which Section 12(5) applies. It does not, however, establish that the same appointment was prohibited under the law applicable on 24.03.2015.

VII. Effect of the subsequent judgments relied upon by the Respondent:

72. The reliance placed by the Respondent upon ***TRF*** *(supra)*, ***Perkins*** *(supra)*, ***Voestalpine*** *(supra)*, ***CORE*** *(supra)* and ***Bhadra International*** *(supra)* must consequently be understood in the proper temporal context. ***TRF*** *(supra)* and ***Perkins*** *(supra)* establish the consequences of Section 12(5) in the post-2015 regime. ***Voestalpine*** *(supra)* deals with the requirements of independence and impartiality under the amended Act in the context of a panel mechanism. ***CORE*** *(supra)* considers equality at the appointment stage and the constitutional dimensions of unilateral appointment, while ***Bhadra International*** *(supra)* concerns an appointment made in 2016, when Section 12(5) was already in force.

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73. None of these decisions holds that Section 12(5) operates retrospectively so as to invalidate every appointment made before 23.10.2015. On the contrary, ***Hanson Agro*** *(supra)*, after considering this entire line of authority, has expressly held that a post-amendment statutory disqualification cannot retrospectively be substituted for the law applicable when the Tribunal was constituted.

74. The reliance upon ***Bhadra International*** *(supra)* does not advance the Respondent's case on the question of the temporal applicability of Section 12(5). In ***Bhadra International*** *(supra)*, the arbitration was invoked on 27.11.2015, after Section 12(5) had come into force. The Supreme Court accordingly examined the appointment within the statutory regime introduced by the 2015 Amendment Act and held that the Chairman, being ineligible under Section 12(5) read with the Seventh Schedule, could not exercise the contractual power of appointment. The temporal foundation of that decision is materially different from the present case, where the arbitration had commenced in 2014 and the Sole Arbitrator was appointed in March 2015.

75. The reliance placed by the Respondent upon ***Ellora Paper Mills*** *(supra)* also has to be considered in the factual and statutory context of that decision. Although the Arbitral Tribunal in that case had been constituted in 2001, the Supreme Court examined whether the arbitral proceedings could, in law, be said to have commenced before the coming into force of the 2015 Amendment Act, having regard to the fact that no further steps had been taken in the arbitration after the constitution of the Tribunal. The decision thus turned upon the question of commencement of the arbitral proceedings within the

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meaning of Section 21 and Section 26. It cannot be read as laying down a general rule that an arbitration which had actually commenced before 23.10.2015 would nevertheless become subject to Section 12(5) merely because the Award was rendered thereafter.

76. The present case stands on a materially different footing. Here, the Respondent invoked arbitration on 03.06.2014, the Sole Arbitrator was appointed on 24.03.2015, he entered upon the reference and held the first and preliminary meeting on 27.05.2015, and the parties thereafter filed their respective pleadings before the 2015 Amendment came into force. The arbitral proceedings had thus commenced and were being conducted prior to 23.10.2015. ***Ellora Paper Mills*** *(supra)*, therefore, does not displace the application of Section 26 to the present arbitration.

77. The reliance placed by the Respondent upon ***R.K. Pandey*** *(supra)* is likewise distinguishable. In ***R.K. Pandey*** *(supra)*, the Supreme Court was dealing with a fundamentally different factual and jurisdictional situation. The Court found that the very existence of the arbitration agreement was not established, that Respondent No. 1 was not a signatory to the purported agreement, and, importantly, that the unilateral appointment of the arbitrators was contrary to the appointment mechanism contained in the alleged arbitration agreement. The observations in Paragraph No.23 regarding equality, independence, impartiality and the effect of unilateral appointment were made in that factual context and with reference to the absence of a valid contractual foundation for the arbitration itself. The Supreme Court ultimately held that the awards suffered from a fundamental

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lack of subject-matter jurisdiction and were null and unenforceable.

78. ***CORE*** *(supra)* also does not govern the validity of the present appointment. The Constitution Bench reaffirmed the principles laid down in ***TRF*** *(supra)* and ***Perkins*** *(supra)* in relation to sole Arbitrators, while separately considering the validity of panel-based appointment mechanisms for three-member Tribunals. The prospective direction issued by the Constitution Bench was expressly confined to appointments to three-member Tribunals. In the present case, however, the Arbitrator was appointed as a Sole Arbitrator in March 2015, prior to the coming into force of Section 12(5). The question here is consequently not whether the post-2015 principles governing sole Arbitrators are legally correct, but whether those principles can be applied to retrospectively invalidate an appointment made under the pre-amendment regime.

VIII. Effect of the Respondent's participation in the arbitration:

79. The Respondent's participation in the arbitral proceedings also does not require separate consideration as constituting a waiver of Section 12(5). The present conclusion does not rest upon any waiver of a statutory disqualification. Since Section 12(5) is not applicable to the appointment in question by virtue of Section 26, the requirements governing a post-dispute written waiver under the proviso to Section 12(5) do not arise. The participation of the Respondent in the proceedings may, at most, be relevant to any independent objection founded upon the pre-amendment law relating to bias or impartiality. No such objection has been established on the material before this

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Court.

CONCLUSION:

80. For the foregoing reasons, the appointment of the Sole Arbitrator on 24.03.2015 cannot be invalidated by retrospectively applying Section 12(5) read with the Seventh Schedule. The arbitration proceedings had commenced prior to 23.10.2015 and the parties have not otherwise agreed, within the meaning of Section 26, to subject the present arbitration to the amended statutory regime. The appointment was, moreover, expressly authorised by Clause 45 and the mere fact that the person appointed was an employee of DMRC did not, under the law then prevailing, constitute a statutory bar to his appointment. No separate circumstance demonstrating actual bias or giving rise to justifiable doubts as to his independence or impartiality has been established.

81. The learned District Judge, having proceeded on the basis that the appointment of the Sole Arbitrator was rendered impermissible by Section 12(5) read with the Seventh Schedule, therefore erred in applying the post-2015 statutory regime to an arbitration which had commenced and in which the Arbitral Tribunal had been constituted prior to 23.10.2015.

82. The Impugned Judgment dated 23.10.2024 is, accordingly, set aside insofar as it sets aside the Arbitral Award dated 21.07.2017 on the aforesaid ground. The challenge to the constitution of the Arbitral Tribunal is rejected.

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83. The present Appeal is allowed in the above terms. The pending application stands closed.

ANIL KSHETARPAL, J.

BHARAT PARASHAR, J.

SEPTEMBER 30, 2026
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