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

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*Judgment reserved on: 29.09.2026**Judgment pronounced on: 06.10.2026**Judgment uploaded on: 06.10.2026*# **CNR No. DLHC010060172026**+ **FAO (COMM) 50/2026, CM APPL. 11407/2026, CM APPL. 11408/2026, CM APPL. 11409/2026, CM APPL. 11410/2026, CM APPL. 15817/2026****NEWTON ENGINEERING AND CHEMICALS LIMITED**

.....Appellant

Through: Mr. Akash Nagar, Mr. Samarpit Chauhan, Mr. Tarun Yadav, Mr. Shishir Mehra and Mr. Prateek Tiwari, Advs.

versus

INDIAN OIL CORPORATION LTD.

.....Respondent

Through: Mr. Shikhar Srivastava and Ms. Perna Singh, 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 37¹ of the Arbitration and Conciliation Act, 1996², read with Section 13(1A) of the Commercial Courts Act, 2015, has been preferred by the Appellant, M/s Newton Engineering and Chemicals Ltd., assailing the judgment dated 05.04.2025³ passed by the learned District Judge in OMP (COMM)

¹ Hereinafter referred to as 'Section 37'

² Hereinafter referred to as 'A&C Act'

³ Hereinafter referred to as 'Impugned Judgment'



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No.104/2023, whereby the petition⁴ preferred by the Appellant under Section 34⁵ of the A&C Act was dismissed and the arbitral award dated 17.08.2023⁶ passed by the Sole Arbitrator, Shri A.K. Srivastava, was upheld. The Award had allowed a claim of Rs.6,30,054/- along with Rs.1,13,409/- towards GST, with simple interest at the rate of 9% per annum from the date of the Award till realization, in favour of the Respondent, Indian Oil Corporation Ltd.

2. Although the Appellant had challenged the Award before the learned District Judge primarily on merits, the controversy which arises for consideration before this Court concerns the constitution of the Arbitral Tribunal and, in particular, the manner in which the Sole Arbitrator came to be appointed. The question which falls for consideration is whether the Respondent, having itself furnished a panel of three persons and having required the Appellant to select one of them as the Sole Arbitrator, could constitute the Arbitral Tribunal in that manner, in the absence of an express agreement in writing, subsequent to the disputes having arisen, waiving the applicability of Section 12(5)⁷ of the A&C Act.

3. The Appellant contends that the answer must be in the negative. It is submitted that the fact that the Appellant selected Shri A.K. Srivastava from the three names furnished by the Respondent does not convert the appointment mechanism into a consensual one.

4. The Respondent, on the other hand, seeks to contend that the

⁴ Hereinafter referred to as 'Section 34 Petition'

⁵ Hereinafter referred to as 'Section 34'

⁶ Hereinafter referred to as 'Award'

⁷ Hereinafter referred to as 'Section 12(5)'



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Arbitrator was selected by the Appellant itself and that the communication dated 27.01.2020 constitutes consent to the appointment. Reliance is placed upon the fact that the Appellant thereafter participated in the arbitral proceedings and submitted its Statement of Claim.

FACTUAL MATRIX:

5. The Appellant had submitted its offer dated 03.01.2017 for supply of Heat Exchangers (CS) for the Respondent's VDU-II Revamp Project at its Haldia Refinery. The offer was accepted by the Respondent *vide* Letter of Acceptance⁸ dated 21.09.2017. Thereafter, Purchase Order was issued on 01.03.2018. The Purchase Order contemplated transportation of the Heat Exchangers to the Haldia Project and was governed by the General Purchase Conditions⁹. The Estimated Delivery Date was 20.07.2018, being ten months from the date of the LOA.

6. The contract continued beyond the aforesaid date. Disputes thereafter arose between the parties concerning delay in supply. The Respondent ultimately terminated the contract on 31.01.2019 at the risk and cost of the Appellant. In the meantime, the Respondent had issued a fresh tender for the same Haldia Project on 23.10.2018, issued a LOA in favour of M/s CICB Chemicon Pvt. Ltd. on 26.12.2018 and thereafter issued a Purchase Order to the said new contractor on 04.01.2019.

⁸ Hereinafter referred to as 'LOA'

⁹ Hereinafter referred to as 'GPC'



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7. The Appellant issued a legal notice dated 26.03.2019. The Respondent, *vide* its communication dated 03.05.2019, suggested a panel of three persons for appointment as Sole Arbitrator. The relevant communication expressly states that it was issued for the limited purpose of enlisting a “panel of independent and impartial arbitrator” and that the three names were being suggested “to enable your Client to select the Sole Arbitrator”. The three names suggested were Shri M.B. Lal, Shri A.K. Srivastava and Shri M.C. Panda.

8. Thereafter, the Appellant addressed the communication dated 27.01.2020. The communication records that the Appellant had selected Shri A.K. Srivastava, Former ED (Legal), ONGC, as the Sole Arbitrator “as per the terms of clause 34.1 of the General Purchase Conditions”. Significantly, the communication further states that it was “solely” issued to inform the Respondent of the name of the Sole Arbitrator selected by the Appellant and requests the Respondent to give its approval.

9. A petition under Section 11(6) of the A&C Act had also been instituted before this Court on 19.10.2019 and was subsequently withdrawn by mutual consent on 28.01.2020. The Sole Arbitrator thereafter entered upon the reference and the arbitral proceedings proceeded. The Appellant filed its Statement of Claim, the Respondent filed its Statement of Defence and counter-claim, evidence was led by both sides and arguments were heard.

10. The Sole Arbitrator thereafter rendered the Award dated 17.08.2023. Aggrieved by the Award, the Appellant preferred a



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Section 34 Petition. The learned District Judge, after noticing the limited scope of interference under Section 34, rejected the objections raised by the Appellant on the merits and upheld the Award. The learned District Judge principally proceeded on the basis that the objections involved re-appreciation of evidence and misinterpretation of facts and contractual terms.

11. It is in the aforesaid circumstances that the present Appeal has been preferred.

CONTENTIONS OF THE PARTIES:

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

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

i. The constitution of the Arbitral Tribunal was not with consent. The Respondent itself prepared and furnished a panel of three persons and required the Appellant to select the Sole Arbitrator from that panel. The Appellant had no reciprocal right to nominate any person of its choice or to participate in preparation of the panel.

ii. The communication dated 27.01.2020 cannot constitute an express agreement in writing waiving Section 12(5). The communication merely conveyed the name selected by the Appellant from the panel furnished by the Respondent and expressly stated that it was issued solely for



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that purpose.

iii. The Supreme Court in ***Bhadra International (India) Pvt. Ltd. & Ors. v. Airports Authority of India***¹⁰, has held that equal treatment extends to the stage of constitution of the Arbitral Tribunal and that waiver under the proviso to Section 12(5) must be by an express agreement in writing subsequent to the disputes having arisen.

iv. The Constitution Bench judgment of the Supreme Court in ***Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)***¹¹ (***'CORE'***), is particularly relevant since it specifically considered the legality of a mechanism under which one party maintains a curated panel and requires the opposite party to select its arbitrator from such panel. ***CORE*** makes it clear that the other party cannot be compelled to select its arbitrator from a panel curated by the opposite party.

v. Reliance is also placed upon the judgment of the Division Bench of this Court in ***Mahavir Prasad Gupta and Sons v. Govt. of NCT of Delhi***¹², as also the judgment of the Coordinate Bench of this Court in ***M/s Ahluwalia Contracts (India) Ltd. (ACIL) v. Airport Authority of India (AAI)***¹³.

14. *Per contra*, learned counsel representing the Respondent has

¹⁰ 2026 INSC 6

¹¹ (2025) 4 SCC 641

¹² 2025 SCC OnLine Del 4241

¹³ 2026:DHC:8252-DB



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submitted that the Appellant itself selected Shri A.K. Srivastava from the panel and thereafter participated in the arbitral proceedings without objection. It is contended that the appointment, therefore, cannot now be described as unilateral. It is further submitted that the Appellant's letter dated 27.01.2020 demonstrates its agreement to the appointment and, in any event, the subsequent participation in the arbitral proceedings constitutes waiver.

15. Learned counsel representing the Respondent has further submitted that the challenge to the constitution of the Arbitral Tribunal cannot be entertained at this stage, particularly when the Appellant had itself selected the Arbitrator and thereafter participated in the proceedings. It is submitted that the Award was rendered after full adjudication of the disputes and the challenge on merits has rightly been rejected by the learned District Judge.

16. No other submission has been advanced by learned counsel representing the parties.

ANALYSIS AND FINDINGS:

17 The controversy requires consideration in the backdrop of Section 12(5), which reads as under:

"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."



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18. The statutory provision is significant for two reasons. First, the legislature has expressly placed the requirement of an agreement between the parties subsequent to the disputes having arisen. Second, such agreement must be express and in writing. Thus, the proviso does not contemplate waiver merely by conduct, acquiescence or participation in the arbitral proceedings.

19. The Supreme Court in ***Bhadra International*** (*supra*) has authoritatively considered the scope of the aforesaid proviso. It has held that equal treatment of parties under Section 18 of the A&C Act extends to the procedure for appointment of arbitrators and that equal treatment necessarily requires the parties to have an equal say in the constitution of the Arbitral Tribunal. The Supreme Court has further held that an “express agreement in writing” must be a clear and unequivocal written agreement and that an objection to the inherent lack of jurisdiction of an Arbitral Tribunal can be raised at a later stage, including in proceedings under Section 34. These principles have also been noticed by this Court in ***Ahluwalia Contracts*** (*supra*).

20. The judgment in ***Bhadra International*** (*supra*) also makes an important distinction between the constitution of a Tribunal and the subsequent conduct of the parties before such Tribunal. Once the statutory ineligibility is established, participation in the proceedings cannot, by itself, confer jurisdiction upon an otherwise ineligible Arbitral Tribunal. The waiver contemplated by the proviso to Section 12(5) has to satisfy the specific statutory requirement of an express agreement in writing.



21. The aforesaid principle has also been recognised by the Division Bench of this Court in ***Mahavir Prasad Gupta*** (*supra*). The Division Bench held that unilateral appointment of a Sole or Presiding Arbitrator is invalid and that such appointment cannot be converted into an express waiver merely because the party concerned itself made the appointment. The Division Bench further held that participation in the arbitral proceedings cannot constitute the express written waiver contemplated by Section 12(5).

22. The judgment in ***Ahluwalia Contracts*** (*supra*) is also instructive. In that case, the contractual clause vested the power of appointment of the Sole Arbitrator in AAI. The contention before the Court was that the party challenging the appointment had itself participated in the arbitral proceedings and had not objected to the appointment. After considering ***Bhadra International*** (*supra*) and ***Mahavir Prasad Gupta*** (*supra*), the Court held that the unilateral constitution of the Arbitral Tribunal could not be validated by participation or conduct in the absence of the express written waiver contemplated by Section 12(5).

23. The present case, however, presents a slightly different factual mechanism from ***Ahluwalia Contracts*** (*supra*) and this distinction makes the decision of the Constitution Bench in ***CORE*** (*supra*) particularly relevant.

24. In the present case, the Respondent did not merely participate in the appointment process. The Respondent itself prepared and furnished a panel consisting of three persons. The communication



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dated 03.05.2019 expressly records that the Respondent was “suggesting names of three person[s] to enable your Client to select the Sole Arbitrator”. Thus, the Respondent retained the exclusive power to determine the persons from whom the Appellant could choose.

25. The Appellant’s role was consequently confined to selecting one person from the three names placed before it by the Respondent. There is nothing on record to suggest that the Appellant had any right to nominate a person of its own choice, to prepare a panel, to add names to the panel, or to require the Respondent to choose from a panel prepared by the Appellant. The element of equality in the constitution of the Arbitral Tribunal was, therefore, absent.

26. This is precisely the aspect which assumes significance in **CORE** (*supra*). The Constitution Bench considered the legality of a mechanism whereby a PSU maintains a panel of potential arbitrators and the opposite party is required to select an arbitrator from that panel. The Constitution Bench held that the principle of equal treatment under Section 18 of the A&C Act applies at the stage of appointment as well. It held that while a PSU is not prohibited from maintaining a panel, the arbitration mechanism cannot require the opposite party to select its arbitrator from a panel curated by the PSU. The Constitution Bench further held that such a mechanism lacks an effective counterbalance because the parties do not participate equally in the constitution of the Tribunal.



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27. The distinction between a genuine bilateral selection process and the mechanism adopted in the present case is, therefore, material. The fact that the Appellant was given a choice between three persons does not, by itself, establish equality in the appointment process. The choice was necessarily circumscribed by the panel unilaterally curated by the Respondent. The Appellant could choose A, B or C, but it could not choose D. The power to determine the field from which the choice was to be made remained exclusively with the Respondent.

28. **CORE** (*supra*) further makes it clear that the Constitution Bench's prospective direction was confined to its ruling concerning three-member Tribunals and the curated-panel mechanism in that context. The Constitution Bench expressly approved the principles laid down in **TRF Ltd. v Energo Engineering Projects Ltd.**¹⁴ and **Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.**¹⁵ concerning Sole Arbitrators, while separately dealing with the panel mechanism applicable to three-member Tribunals. The present case concerns the appointment of a Sole Arbitrator and, therefore, the prospective direction in **CORE** does not operate so as to validate the appointment mechanism adopted herein.

29. The Respondent's reliance upon the letter dated 27.01.2020 is also misplaced. The said letter does not record that the parties had consciously agreed, subsequent to the disputes having arisen, to waive the applicability of Section 12(5). On the contrary, the language of the

¹⁴ (2017) 8 SCC 377

¹⁵ (2020) 20 SCC 760



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letter demonstrates that the Appellant was merely communicating its selection of one of the three names furnished by the Respondent.

30. The language employed in the communication is particularly significant. The Appellant stated that it had selected Shri A.K. Srivastava “as per the terms of clause 34.1 of the General Purchase Conditions”. It thereafter specifically recorded that the letter had “solely” been issued to inform the Respondent of the name of the Sole Arbitrator selected by the Appellant and requested the Respondent to give its approval.

31. Such a communication cannot be construed as an express agreement by which the Appellant, with full knowledge of the statutory ineligibility or the structural defect in the appointment mechanism, consciously waived its right under Section 12(5). The letter does not even advert to Section 12(5), the Seventh Schedule, waiver, ineligibility, independence or impartiality. More importantly, it does not record any agreement between the parties. It merely communicates the name selected by the Appellant from the panel furnished by the Respondent.

32. The requirement under the proviso to Section 12(5) is not satisfied merely because a party has made a selection from a panel. If such selection were treated as an express waiver, the statutory requirement would effectively be rendered *otiose* in every case where the party subjected to a unilateral appointment mechanism is given a limited choice between names pre-selected by the other party.



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33. The principle stated by the Supreme Court in **Bhadra International** (*supra*) is therefore directly attracted. The waiver contemplated by Section 12(5) is a conscious and unequivocal relinquishment of the statutory right and must be manifested through an express written agreement subsequent to the disputes having arisen. There is no such agreement in the present case.

34. The subsequent participation of the Appellant in the arbitral proceedings also cannot cure the defect. The Appellant did participate in the arbitration, filed its Statement of Claim and contested the Respondent's counter-claim. However, the statutory requirement of waiver cannot be replaced by participation. As held in **Bhadra International** (*supra*), the objection to inherent lack of jurisdiction can be raised even at a later stage. The same principle was reiterated by the Division Bench in **Mahavir Prasad Gupta** (*supra*) and has also been applied in **Ahluwalia Contracts** (*supra*).

35. There is another aspect which cannot be overlooked. Section 12(5) begins with a *non-obstante* clause and expressly overrides any prior agreement to the contrary. The statutory prohibition is, therefore, not merely a contractual stipulation which can be displaced by the very mechanism contained in the contract. Once the statutory prohibition operates, the contractual appointment mechanism must yield unless the statutory conditions for waiver are independently satisfied.

36. The Respondent cannot, therefore, derive assistance from Clause 34.1 of the GPC merely because the Appellant selected one of



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the names furnished under that clause. The contractual mechanism itself cannot be used to establish the waiver which the statute requires to be separately and expressly made after the disputes have arisen.

37. The position is also consistent with the broader principle recognised in **CORE** (*supra*) that the constitution of an Arbitral Tribunal must preserve equal participation of the parties. A mechanism under which one party determines the entire panel and the other party is confined to selecting one name from that panel does not provide the latter with an equal say in the constitution of the Tribunal. The subsequent act of selection cannot retrospectively transform an unequal appointment process into an equal one.

38. This Court is conscious that the Award in the present case was rendered after participation of both parties and that the Appellant had itself selected Shri A.K. Srivastava from the three names suggested by the Respondent. However, the question before this Court is not whether the Appellant had knowledge of the identity of the Arbitrator. The question is whether there was an express agreement in writing, subsequent to the disputes having arisen, whereby the Appellant consciously waived the statutory requirement embodied in Section 12(5). The record does not disclose any such agreement. The answer to that question must consequently be in the negative.

39. Once the constitution of the Arbitral Tribunal is found to be contrary to the mandatory statutory requirement and no valid waiver is established, the Award rendered by such Tribunal cannot be sustained. The issue goes to the root of the jurisdiction of the Arbitral Tribunal



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and is not a matter concerning the appreciation of evidence or the merits of the claims adjudicated by the Arbitrator.

40. In this regard, it is also relevant to notice that Section 34 permits the Court to examine whether the composition of the Arbitral Tribunal was in accordance with the agreement of the parties, subject, however, to the statutory provisions from which the parties cannot derogate. The contractual appointment mechanism in the present case cannot prevail over the mandatory requirements of Section 12(5).

41. The learned District Judge, while considering the Section 34 Petition, proceeded principally on the limited scope of interference with an arbitral award and the impermissibility of re-appreciation of evidence. Those principles are undoubtedly well settled. However, where the constitution of the Arbitral Tribunal itself is under challenge on the ground of a mandatory statutory prohibition, the Court is not called upon to re-appreciate the merits of the Award. The question is anterior to the merits of the dispute and concerns the jurisdiction of the forum which rendered the Award.

42. Consequently, the reasoning adopted by the learned District Judge in examining the Appellant's objections only from the perspective of re-appreciation of evidence and patent illegality on the merits does not answer the issue concerning the validity of the constitution of the Arbitral Tribunal.

43. In view of the aforesaid discussion, this Court is of the considered view that the selection by the Appellant of one of the three persons from the panel furnished by the Respondent cannot constitute



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an express agreement in writing waiving the applicability of Section 12(5).

CONCLUSION:

44. Consequently, the present Appeal is allowed. The judgment dated 05.04.2025 passed by the learned District Judge (Commercial)-02, South-East, Saket Courts, New Delhi in OMP (COMM) No.104/2023 is set aside.

45. The arbitral Award dated 17.08.2023 passed by the Sole Arbitrator, Shri A.K. Srivastava, is also set aside on the ground that the Arbitral Tribunal was not validly constituted in accordance with the mandatory requirements of the A&C Act.

46. The parties shall be at liberty to commence fresh arbitral proceedings in accordance with law. Needless to state, the merits of the disputes between the parties have not been examined by this Court and shall remain open for adjudication in accordance with law.

47. The pending applications also stand closed.

ANIL KSHETARPAL, J.

BHARAT PARASHAR, J.

OCTOBER 06, 2026

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Signature Not Verified

Signed By: JAI
NARAYAN
Signing Date: 06.10.2026
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