

(2025) 11 DEL CK 0001

Delhi HC

Case No: O.M.P. (COMM) No. 480 Of 2019, I.A. 15906 Of 2019 & 22472 Of 2025

M/s Alpro Industries

APPELLANT

Vs

M/s Ambience Pvt.
Limited & Anr

RESPONDENT

Date of Decision: Nov. 14, 2025

Acts Referred:

- Arbitration and Conciliation Act, 1996- Section 2(1)(c), 12(5), 14(2), 16, 31, 34, 34(2)(b), 36, 37

Hon'ble Judges: Amit Bansal, J

Bench: Single Bench

Advocate: Kirtiman Singh, Ajay Singh, Amit Kumar, Vivek Kumar Singh, Animesh Mishra, Mohak Gulati, Maulik Khurana, P. K. Agrawal, Akshay Chitkara, Sanjoli Gupta, Dr. Sudhir Bisla

Final Decision: Disposed Of

Judgement

Amit Bansal, J.

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act') challenging the Interim Award dated 6th September, 2019 (hereinafter referred to as 'Impugned Interim Award') passed by the Arbitral Tribunal comprising of a Sole Arbitrator, dismissing the prayer of the petitioner (the Claimant in the arbitration proceedings) for inclusion/impleadment of respondent no.2 i.e. Alankar Apartments Private Limited.

Factual Background

2. The petitioner, M/s Alpro Industries, a partnership firm registered under the Partnership Act, 1932, is engaged in the promotion of aluminium doors, windows, façade works, under the brand name 'Alpro'.

3. Respondent no. 1, Ambience Private Limited, is a company existing under the laws of India. Respondent no. 2, M/s. Alankar Apartments Private Limited, is also a company existing under the laws of India.

Contract between the parties

4. On 4th April, 2014, respondent no.1 issued a Letter of Intent to the petitioner for supply and installation of a glass façade system at the NH-8 Commercial Tower Project, Ambience Island, Gurgaon. The petitioner's offer dated 7th April, 2014 was accepted through a Letter of Award dated 16th April, 2014, thereby concluding a contract between the parties. ('the Contract').

5. The Contract provided for supply and installation of a façade system, at a total value of ■16,00,00,125/-. Subsequently, Amendment No.1 dated 27th June, 2014 was made to the contract, wherein the scope of work was expanded increasing the Contract value to ■16,33,83,530/-. By Amendment No.2 dated 24th July, 2014, the payment terms were modified. By Amendment dated 5th February, 2015, further additional work worth ■70,20,523/- was added, raising the Contract value to ■17,04,04,053/-.

6. The petitioner, by notice dated 14th August, 2018, invoked arbitration against both the respondents and sought appointment of a Sole Arbitrator. Pursuant to the aforesaid notice, respondent no.1 appointed Justice M.S.Liberhan (Retd.) as a Sole Arbitrator in terms of Clause 23 of the Contract. Proceedings were initiated before the Arbitral Tribunal with the filing of the Statement of Claim on 1st March 2019. Respondent no.1, in its reply dated 9th April, 2019, raised a preliminary objection that respondent no.2, Alankar Apartments Pvt. Ltd., was not a party to the arbitration agreement and hence not a necessary or proper party. The issue before Arbitral Tribunal was whether respondent no.2 is to be impleaded as a party to the arbitration.

7. The Arbitral Tribunal held that the Contract dated 16th April 2014 was confined to the petitioner and respondent no.1, and no arbitration agreement existed between the petitioner and respondent no.2. The Arbitral Tribunal further observed that it lacked jurisdiction to extend the scope of the arbitration clause, and accordingly declined the petitioner's prayer to implead respondent no.2.

8. Hence the present petition has been filed seeking setting aside of the Impugned Interim Award.

Submissions on behalf of the petitioner

9. Mr. Kirtiman Singh, senior advocate for the petitioner, placing reliance on the judgments in *TRF Limited v. Energo Engineering Projects* 2017 8 SCC 377 ('TRF Limited'), *Perkins Eastman Architects v. HSCC (India) Ltd* (2020) 20 SCC 760 ('Perkins'), *Bharat Broadband Network Ltd. v. United Telecoms Ltd.* 2019 5 SCC 755 ('Bharat Broadband'), submits that the appointment of the Sole Arbitrator is a unilateral appointment by the respondent no.1 and is therefore, void ab initio under section 12(5) of the Act. He submits that only an express agreement in writing as waiver can validate such

a unilateral appointment; no implied or conduct-based attributes can be inferred as a waiver. Reliance in this regard has been placed by the petitioner on the judgment in *JMC Projects (India) Ltd. v. Indure Pvt. Ltd.* 2020 SCC OnLine Del 1950, wherein this court held that a mere giving of consent for the appointment of the arbitrator does not ipso facto mean that the same is an express waiver in terms of Section 12(5) of the Act. Placing reliance on the judgment of *Mahavir Prasad Gupta v. GNCTD* 2025 SCC OnLine Del 4241 ('Mahavir Prasad'), it is submitted that mere participation in the proceedings in any manner does not amount to waiver as per the statutory requirement.

10. Without prejudice to the aforesaid submissions, it is submitted that the letter dated 25th October, 2018 sent by the petitioner to the respondents only provides for consent subject to certain conditions i.e. the notice should be issued to both the respondents, M/s Ambience, respondent no.1, as well as M/s Alankar, respondent no.2, as respondents in the arbitration proceedings.

11. With respect to the issue whether respondent no.2 is bound by the arbitration agreement under the 'Group of Companies' doctrine, it is submitted by Mr. Kirtiman Singh that the respondent no.2 is wholly owned and controlled by the shareholders of respondent no.1; acted through common management and signatory; executed contract amendment; and received/made payments with statutory deductions. The performance was composite and inseparable. Respondent no.2, by the way of its conduct and active participation, is thus a necessary party bound by the arbitration agreement, despite being a non-signatory.

12. With respect to the issue whether the order dated 6th September, 2019 is an 'interim award' under Section 2(1)(c) of the Act, it is submitted that as per authoritative principles laid down in *Moreshwar Yadaorao Mahajan v. Vyankatesh Sitaram Bhedi* 2022 SCC OnLine SC 1307, the Court distinguished between necessary and proper parties and held that failure to implead a necessary party vitiates proceedings. Placing reliance on the judgment in *IFFCO v. Bhadra Products* (2018) 2 SCC 534, it is submitted that exclusion of necessary party vitiates the proceeding and the impugned award/order made on such a substantive issue would be considered as an interim award.

Submissions on behalf of Respondents

13. Mr. P.K. Agarwal, counsel for respondent no.1, submits that the petition is not maintainable as the impugned award/order refusing to implead respondent no.2 is neither an Award nor an Interim Award under Section 34 of the Act. He contends that an arbitral award, as defined under Section 2(c) of the Act, entails a final adjudication of disputes in whole or in part, whereas the issue of non-impleadment of a third party involves no adjudication of any dispute.

14. He submits that the Arbitral Tribunal rightly declined to implead M/s. Alankar Apartments Pvt. Ltd., holding that no arbitration agreement existed between the Petitioner and the said entity. The Arbitral Tribunal categorically observed that "there is no arbitration agreement between *Ambience Pvt. Ltd.*, *Alpro Industries* and *Alankar*

Apartments Pvt. Ltd.” and was bound not to travel beyond the terms of the arbitration clause in the Contract.

15. Mr. Agrawal placed reliance on the judgment of this Court in *Rhiti Sports Management Pvt. Ltd. v. Power Play Sports & Events Ltd.* 2018 SCC OnLine Del 8678 (Rhiti Sports), wherein it was held that for an order to qualify as an arbitral award, whether final or interim, it must adjudicate a matter in issue between the parties and conform to the form prescribed under Section 31 of the Act. Reliance was also placed on the Division Bench judgment in *Goyal Mg Gases Pvt. Ltd. v. Panama Infrastructure Developers Pvt. Ltd.* 2023 SCC OnLine Del 1894, wherein, following *Rhiti Sports* (supra), it was held that an order rejecting an application for impleadment neither determines any substantive question of law nor affects the merits of the dispute. It is further submitted that the Impugned Interim Award is one passed under Section 16 of the Act, determining the Arbitral Tribunal’s jurisdiction vis-à-vis respondent no.2, and is therefore amenable to challenge only under Section 37 of the Act. Reliance in this regard is placed on *Adavya Projects Pvt. Ltd. v. Vishal Structural Pvt. Ltd.* 2025 SCC OnLine SC 806.

16. With respect to the issue whether the appointment of the Sole Arbitrator is unilateral, Mr. Agrawal submits that the arbitrator’s competence cannot be entertained in the present petition as no such ground has been taken in the present petition and the petitioner cannot be permitted to take any new ground at the time of arguments. He further submits that during the pendency of the Arbitration proceedings, the Arbitrator’s authority can only be challenged under Section 14(2) of the Act. Reliance in this regard is placed on the judgment of *Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)* 2024 SCC OnLine SC 3654.

17. It is further submitted that the petitioner had specifically waived the applicability of Section 12(5) of the Act by an express agreement in writing through a letter dated 25th October, 2018.

ANALYSIS AND FINDINGS

18. The main ground of challenge raised by the petitioner to the Impugned Interim Award is the ground of unilateral appointment of the Arbitrator by the respondent no.1. It is further submitted that in the present case there is no express agreement in writing, waiving the requirement under proviso to Section 12(5) of the Act.

19. It would be apposite to refer to the arbitration clause in the Contract executed between the parties, the same is set out below:

“23. Arbitration: In the event of any dispute or differences between the parties arising from this contract, the same shall, unless amicably settled, be referred to the Arbitrator of M/s Ambience Pvt. Ltd. for final settlement. The arbitration proceedings shall be held in New Delhi and shall be binding on both the parties.”

20. There is no dispute that in terms of the aforesaid arbitration clause, the Arbitrator was to be appointed by respondent no.1, which would amount to unilateral appointment of arbitrator. The issue to be considered is whether there was a waiver on behalf of the

petitioner in terms of the proviso to Section 12(5) of the Act.

21. At this stage, a reference may be made to Section 12(5) of the Act along with the proviso:

“Section 12(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. In *Bharat Broadband Network Ltd. v. United Telecoms Ltd.* (2019) 5 SCC 755, the Supreme Court interpreted the scope of proviso to Section 12(5) of the Act. In paragraph 15 of the said judgment, the Supreme Court observed as under:

“15.Obviously, the “express agreement in writing” has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.”

23. Elaborating further on this aspect, the Supreme Court made the following observation in paragraph 20 of the aforesaid judgment:

*“20.It is thus necessary that there be an “express” agreement in writing. **This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such.** The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court as indicating an express agreement on the facts of the case is dated 17-1-2017. On this date, the Managing Director of the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as an arbitrator. Shri Khan's invalid appointment only became clear after the declaration of the law by the Supreme Court in *TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]* which, as we have seen hereinabove, was only on 3-7-2017....”*

[emphasis supplied]

24. To be noted, in *Bharat Broadband* (supra), the party appointing the Arbitrator had itself challenged the appointment of the Arbitrator on the ground of unilateral appointment.

25. The Supreme Court in *Bharat Broadband* (supra) emphasised that the agreement between the parties must be with the full knowledge that the Arbitrator is ineligible to be appointed as Arbitrator and yet the parties have full faith and confidence in him to continue as an Arbitrator.

26. In *Siddhartha Construction Co. v. India Tourism Development Corporation and Another* 2025 SCC OnLine Del 2159, it was argued before the Division Bench of this Court that an Award would not be rendered void or hit by Section 12(5) of the Act, as the appellant/objector had given a letter acceding to the appointment of the Sole Arbitrator. However, relying upon *Bharat Broadband* (supra), it was held that there was no express waiver in writing in terms of proviso to Section 12(5) of the Act to challenge the appointment of the Sole Arbitrator. Hence, it was held that the Arbitrator was ineligible in terms of Section 12(5) of the Act.

27. A Co-ordinate Bench of this Court in *Smaaash Leisure Ltd. v. Ambience Commercial Developers Pvt. Ltd.* 2025 SCC OnLine Del 4091, held that even a statement given on behalf of the party giving up its objection to the Arbitrator's appointment would not constitute a waiver in terms of Section 12(5) of the Act. Similarly, in *Airports Authority of India v. TDI International India Private* 2024 SCC OnLine Del 4016, a Co-ordinate Bench held that merely because parties have submitted their claims for adjudication before the Arbitral Tribunal and did not raise any objection to the adjudication by the Arbitral Tribunal, would not amount to waiver under proviso to Section 12(5) of the Act.

28. As regards the contention of the respondent that the petitioner has not taken the objection of the appointment being unilateral in the petition under Section 34 and therefore the same cannot be argued at this stage, this objection can no longer survive in view of the observation of the Division Bench of this Court in *Mahavir Prasad* (supra).

29. The Division Bench of this Court in *Mahavir Prasad* (supra) was dealing with the interpretation of Section 12(5) of the Act along with its proviso. The issues considered by the Division Bench were set out in paragraph 31 of the judgment, which is reproduced below:-

"31. The following issues arise for consideration in this case:

A. In view of requirement of express waiver in writing under proviso to Section 12(5) of the Act, can the parties by conduct of participating in arbitration proceedings and not raising objection before the arbitrator, be deemed to have waived the objection against the unilateral appointment? B. Does the award passed by unilaterally appointed arbitrator is per se bad and a nullity, which goes to the root of the jurisdiction of the arbitrator, that entitles any party (including the party that unilaterally appointed the arbitrator itself) to object at any stage during or after the arbitration proceedings including the proceedings for challenge to the award under Section 34 of the Act and/or enforcement of the award under Section 36 of the Act?"

30. Relevant observations of the Division Bench on the aforesaid issues are set out below:

"53. In view of the above analysis, in absence of any express waiver in writing by the party objecting to the unilateral appointment can raise the issue at any time even at the stage of Section 34 proceedings or during the enforcement under Section 36 of the Act.

54. In any event, Section 34(2)(b) of the Act empowers the Court to set aside the award if ‘the Court finds that’, which means that it is an obligation of the Court to ensure that that award is not against the Public Policy of India. Hence, even if any of the parties have not raised an objection regarding the unilateral appointment, if the Court while considering the application under Section 34 of the Act finds that the Award is null and void due to the unilateral appointment of the arbitrator, has power to set aside the award without any objection by any of the parties. The concept of Public Policy of India is explained and clarified in Explanation 1 to Section 34(2)(b) of the Act that the award must not be in contravention with the fundamental policy of Indian law or in conflict with the most basic notions of morality or justice. Right to equality is part of the basic structure of the Constitution of India and integral to the fundamental policy of India law.”

[emphasis supplied]

31. The conclusion of the Division Bench as set out in paragraph 84 of the said judgment is set out below:-

“CONCLUSION:

84. In view of the above discussion, the legal position on the unilateral appointment of the Sole and Presiding Arbitrator is summarized as under:

a) Mandatory Requirement: Any arbitration agreement providing unilateral appointment of the sole or presiding arbitrator is invalid. A unilateral appointment by any party in the arbitrations seated in India is strictly prohibited and considered as null and void since its very inception. Resultantly, any proceedings conducted before such unilaterally appointed Arbitral Tribunal are also nullity and cannot result into an enforceable award being against Public Policy of India and can be set aside under Section 34 of the Act and/or refused to be enforced under Section 36 of the Act. (very important)

b) Deemed Waiver: The proviso to Section 12(5) of the Act requires an express agreement in writing. The conduct of the parties, no matter how acquiescent or conducive, is inconsequential and cannot constitute a valid waiver under the proviso to Section 12(5) of the Act. The ineligibility of a unilaterally appointed arbitrator can be waived only by an express agreement in writing between the parties after the dispute has arisen between them. Section 12(5) of the Act is an exception to Section 4 of the Act as there is no deemed waiver under Section 4 of the Act for unilateral appointment by conduct of participation in the proceedings. The proviso to Section 12(5) of the Act requires an ‘express agreement in writing’ and deemed waiver under Section 4 of the Act will not be applicable to the proviso to Section 12(5) of the Act.

(c) Award by an Ineligible Arbitrator is a Nullity: An award passed by a unilaterally appointed arbitrator is a nullity as the ineligibility goes to the root of the jurisdiction. Hence, the award can be set aside under Section 34(2)(b) of the Act by the Court on its own if it ‘finds that’ an award is passed by unilaterally appointed arbitrator without even raising such objection by either party.

[emphasis supplied]

The Division Bench in *Mahavir Prasad (supra)* observed that a statement or conduct before the Arbitral Tribunal does not satisfy the statutory requirement of waiver, as the agreement must reflect awareness, emphasising the strictness of the proviso which has

raised the threshold for express agreement in writing as a waiver.

32. Now, I proceed to apply the ratio of the aforesaid judgment to the facts of the present case. Admittedly, the petitioner sent a communication dated 24th August, 2018 invoking the arbitration clause and calling upon the respondent to appoint an Arbitrator. Pursuant to the aforesaid invocation, the respondent proceeded to appoint the Sole Arbitrator in terms of the arbitration clause in the Contract. Subsequently, the petitioner sent a communication dated 25th October, 2018, consenting to the appointment of the Sole Arbitrator. The relevant extracts from the said letter are set out below:-

"By this letter, on behalf of our Client. M/s Alpro Industries, we give our concurrence to your appointment as sole arbitrator for adjudication of disputes between M/s Ambience Pvt. Ltd and M/s Alankar Apartments Pvt. Ltd on one side and our Client M/s Alpro Industries on the other side as per the terms of agreement dated 16.04.2014 and its subsequent amendments dated 27.06.2014 24.07.2014 and 05.02.2015.

We request you to issue notices to M/s Alankar Apartments Pvt. Ltd. as well, with intimation regarding initiation of the present Arbitration proceedings, as our Client has joint and several claims against both M/s Ambience Pvt. Ltd. and M/s Alankar Apartments Pvt. Ltd. the present proceedings. In this regard Notice invoking Arbitration clause dated 24.8.2018 issued by us on behalf of our Client M/s Alpro Industries is enclosed herewith for clarity of matter."

33. In my considered view, the aforesaid letter cannot be taken to be an express agreement in writing waiving the requirement under Section 12(5) of the Act for the reasons that follow.

34. It is submitted by the counsel for the respondent no.1 that since the aforesaid letter was issued after the judgment of the Supreme Court in *TRF Limited (supra)*, which clarified the legal position with regard to unilateral appointment of arbitrator, the aforesaid letter would amount to a waiver.

35. In *TRF Limited (supra)*, it was held that the unilateral appointment of an arbitrator by a person who is de jure ineligible is void ab initio. In *Perkins (supra)*, the Supreme Court extended the principle laid down in *TRF Limited (supra)* to cases where the appointing authority, though not to act as an arbitrator himself, was nonetheless empowered to appoint an arbitrator of his choice. The distinction, therefore, lies in the fact that while *TRF Limited (supra)* dealt with a situation where the named arbitrator himself was ineligible to act and hence incapable of nominating another, *Perkins (supra)* clarified that in cases 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.

36. Applying the aforesaid principles to the present case, since respondent no.1 was vested with the exclusive power to appoint the sole arbitrator, such appointment would fall foul of the ratio laid down in *Perkins (supra)*. Admittedly, the said letter was issued by the petitioner before the judgment in *Perkins (supra)* and hence it would not amount to a

waiver as per the judgment in *Bharat Broadband (supra)*.

37. Even otherwise, the letter cannot be said to be an express waiver as it gives consent to the appointment of the Sole Arbitrator for adjudication of disputes between the petitioner and respondents no.1 and 2. Therefore, at best, it was a conditional acceptance of the appointment of a Sole Arbitrator. The condition being that the Sole Arbitrator would adjudicate the disputes between the petitioner and both the respondents.

38. Hence, in my view there has been no express waiver to the appointment of the Sole Arbitrator in terms of the proviso to Section 12(5) of the Act.

39. On behalf of the respondent no.1, it is been vehemently argued that the present petition under Section 34 of the Act is not maintainable as there is no interim award. It is further submitted on behalf of the respondents that even unilateral appointment of an Arbitrator cannot be challenged in a petition that is not maintainable.

40. I am unable to agree with the aforesaid submission. In light of the findings of the Division Bench in *Mahavir Prasad (supra)*, the issue of unilateral appointment of an Arbitrator is a fundamental issue which goes to the root of the matter. The Division Bench in *Mahavir Prasad (supra)* has categorically held such an appointment to be null and void from its very inception and therefore, any proceedings before such an Arbitral Tribunal are also a nullity. The Division Bench also goes on to hold that the Court can examine this issue of unilateral appointment suo moto at any stage, even if such an objection has not been raised by any of the parties.

41. In light of the findings in *Mahavir Prasad (supra)* and my findings that the unilateral appointment of the Sole Arbitrator in the present case is invalid and there has been no express waiver in writing in terms of the proviso to clause 12(5) of the Act, the Impugned Interim Award is liable to be set aside. Consequently, the issue raised by the respondents as to whether the Impugned Interim Award constitutes an 'interim award' or not would not be relevant. The Court cannot permit continuation of arbitral proceedings before an Arbitral Tribunal which would be a nullity and cannot result into an enforceable award. Hence, I do not deem it necessary to go into the merits of the challenge to the Impugned Interim Award.

42. Accordingly, in view of my findings above, the appointment of the Sole Arbitrator, Justice M.S. Liberhan (Retd.), is held to be void ab initio. Consequently, the Impugned Interim Award is set aside.

43. It would be open to the parties to initiate fresh arbitration proceedings as per law.

44. All pending applications stand disposed of.