**(2019) 04 SC CK 0068**

**Supreme Court Of India**

**Case No:** Civil Appeal No. 3972, 3973 Of 2019

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| Bharat Broadband Network Limited | | APPELLANT |
| | Vs | |
| United Telecoms Limited | | RESPONDENT |

**Date of Decision:** April 16, 2019

**Acts Referred:**

- Arbitration And Conciliation Act, 1996 - Section 4, 7, 11(8), 12, 12(1), 12(2), 12(3), 12(4), 12(5), 13, 13(2), 13(3), 14, 14(1), 14(1)(a), 14(2), 15, 16(2), 34
- Arbitration And Conciliation (Amendment) Act, 2015 - Section 26
- Indian Contract Act, 1872 - Section 9, 63

**Citation:** AIR 2019 SC 2434 : (2019) 5 SCC 755 : (2019) 4 JT 481 : (2019) 6 Scale 491 : (2019) 2 Curcc 257 : (2019) 2 ACJ 484 : (2019) 3 ALT 258 : (2019) 3 ArbLR 1 : (2019) 4 AWC 3549 : (2019) 5 MLJ 212 : (2019) 4 Supreme 705 : (2019) 1 TLR 73 : (2019) 2 WLN 85

**Hon'ble Judges:** R.F. Nariman, J; Vineet Saran, J

**Bench:** Division Bench

**Advocate:** Aniruddha P. Mayee, S.B. Upadhyay, Pawan Upadhyay, Anisha Upadhyay, Sarvjit Pratap Singh, Nishant Kr., Ritik Sharma, Akash Tyagi, Vamsika Gupta

**Final Decision:** Allowed

**Judgement**

R.F. Nariman, J

1. Leave granted.

2. The present appeals raise an interesting question as to the interpretation of Section 12(5) of the Arbitration and Conciliation Act, 1996 [Ã¢â‚¬Å“ActÃ¢â‚¬â€<].

3. The appellant, Bharat Broadband Network Ltd. [Ã¢â‚¬Å“BBNLÃ¢â‚¬], had floated a tender dated 05.08.2013 inviting bids for a turnkey project for supply,

installation, commissioning, and maintenance of GPON equipment and solar power equipment. The respondent was the successful L1 bidder. The

appellant issued an Advance Purchase Order [Ã¢â‚¬Å“APOÃ¢â‚¬] dated 30.09.2014. Clause III.20.1 of the General (Commercial) Conditions of Contract

[Ã¢â‚¬Å“GCCÃ¢â‚¬â€‹] provides for arbitration.

The said clause reads as under:

Ã¢â‚¬Å“III.20 ARBITRATION

III.20.1 In the event of any question, dispute or difference arising under the agreement or in connection therewith (except as to the matters, the

decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the CMD, BBNL or in case his

designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted (whether in

addition to his own duties or otherwise) with the functions of the CMD, BBNL or by whatever designation such an officer may be called (hereinafter

referred to as the said officer), and if the CMD or the said officer is unable or willing to act as such, then to the sole arbitration of some other person

appointed by the CMD or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act

1996. There will be no object to any such appointment on the ground that the arbitrator is a Government Servant or that he has to deal with the matter

to which the agreement relates or that in the course of his duties as a Government Servant/PSU Employee he has expressed his views on all or any of

the matters in dispute. The award of the arbitrator shall be final and binding on both the parties to the agreement. In the event of such an arbitrator to

whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason whatsoever, the CMD, BBNL or

the said officer shall appoint another person to act as an arbitrator in accordance with terms of the agreement and the person so appointed shall be

entitled to proceed from the stage at which it was left out by his predecessors.Ã¢â‚¬â€‹

4. Since disputes and differences arose between the parties, the respondent, by its letter dated 03.01.2017, invoked the aforesaid arbitration clause and

called upon the appellantÃ¢â‚¬â„¢s Chairman and Managing Director to appoint an independent and impartial arbitrator for adjudication of disputes which

arose out of the aforesaid APO dated 30. 09.2014. By a letter dated 17.01.2017, the Chairman and Managing Director of the appellant, in terms of the

arbitration clause contained in the GCC, nominated one Shri K.H. Khan as sole arbitrator to adjudicate and determine disputes that had arisen

between the parties. He also made it clear that the parties would be at liberty to file claims and counter-claims before the aforesaid sole arbitrator.

5. On 03.07.2017, this Court, by its judgment in TRF Ltd. v. Energo Engineering Projects Ltd., (2017) 8 SCC 37 7[Ã¢â‚¬Å“TRF Ltd.Ã¢â‚¬], held that since a

Managing Director of a company which was one of the parties to the arbitration, was himself ineligible to act as arbitrator, such ineligible person could

not appoint an arbitrator, and any such appointment would have to be held to be null and void.

6. Given the aforesaid judgment, the appellant itself having appointed the aforesaid sole arbitrator, referred to the aforesaid judgment, and stated that

being a declaration of law, appointments of arbitrators made prior to the judgment are not saved. Thus, the prayer before the sole arbitrator was that

since he is de jure unable to perform his function as arbitrator, he should withdraw from the proceedings to allow the parties to approach the High

Court for appointment of a substitute arbitrator in his place. By an order dated 21.10.2017, Shri Khan rejected the appellantÃ¢â‚¬â„¢s application after

hearing both sides, without giving any reasons therefor. This led to a petition being filed by the appellant before the High Court of Delhi dated

28.10.2017 under Sections 14 and 15 of the Act to state that the arbitrator has become de jure incapable of acting as such and that a substitute

arbitrator be appointed in his place. By the impugned judgment dated 22.11.2017, this petition was rejected, stating that the very person who appointed

the arbitrator is estopped from raising a plea that such arbitrator cannot be appointed after participating in the proceedings. In any event, under the

proviso to Section 12(5) of the Act, inasmuch as the appellant itself has appointed Shri Khan, and the respondent has filed a statement of claim without

any reservation, also in writing, the same would amount to an express agreement in writing, which would, therefore, amount to a waiver of the

applicability of Section 12(5) of the Act.

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

also the judgment in TRF Ltd. (supra), and has argued that the appointment of Shri Khan goes to eligibility to be appointed as an arbitrator, as a result

of which the appointment made is void ab initio. Further, the judgment in TRF Ltd. (supra) is declaratory of the law and would apply to the facts of

this case. Further, since there is no express agreement in writing between the parties subsequent to disputes having arisen between them that Shri

KhanÃ¢â‚¬â„¢s appointment is agreed upon, the proviso will not be applicable in the present case.

8. Shri Sharad Yadav, learned Senior Advocate appearing on behalf of the respondent, has supported the reasoning of the impugned judgment and has

added that Section 12(4) makes it clear that a party may challenge the appointment of an arbitrator appointed by it only for reasons of which it became

aware after the appointment has been made. In the facts of the present case, since Section 12(5) and the Seventh Schedule were on the statute book

since 23.10.2015, the appellant was fully aware that the Managing Director of the appellant would be hit by Item 5 of the Seventh Schedule, and

consequently, any appointment made by him would be null and void. This being so, Section 12(4) acts as a bar to the petition filed under Sections 14

and 15 by the appellant. Further, Section 13(2) makes it clear that a party who intends to challenge the appointment of the arbitrator, shall, within 15

days after becoming aware of circumstances referred to in Section 12(3), send a written statement of reasons for the challenge to the arbitrator.

Admittedly, this has not been done within the time frame stipulated by the said Section, as a result of which, the aforesaid petition filed by the appellant

should be dismissed. Coming to the proviso to Section 12(5), Shri Yadav argued that Ã¢â‚¬Å“express agreement in writingÃ¢â‚¬ in the proviso to Section

12(5) is clearly met in the facts of the present case. This need not be in the form of a formal agreement between the parties, but can be culled out, as

was rightly held by the High Court, from the appointment letter issued by appellant as well as the statement of claim filed by the respondent before the

arbitrator leading, therefore, to a waiver of the applicability of Section 12(5).

9. Pursuant to the 246th Law Commission Report, important changes were made in the Act. Insofar as the facts of this case are concerned, sub-

section (8) of Section 11 was substituted for the earlier Section 11(8), sub-section (1) of Section 12 was substituted for the earlier Section 12(1)2 and

a new Section 12(5) was added after Section 12(4). The opening lines of Section 14(1) were also substituted.

Subs. by Act 3 of 2016, S. 6(iv) (w.r.e.f. 23.10.2015). Prior to substitution, Section 11(8) read as: Ã¢â‚¬Å“11. Appointment of arbitrators.Ã¢â‚¬

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard toÃ¢â‚¬

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.Ã¢â‚¬â€‹

Subs. by Act 3 of 2016, S. 8(i) (w.r.e.f. 23.10.2015). Prior to substitution, Section 12(1) read as:

Ã¢â‚¬Å“12. Grounds for challenge.Ã¢â‚¬"(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in

writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.Ã¢â‚¬â€‹

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

Subs. by Act 3 of 2016, S. 9 (w.r.e.f. 23.10.2015). Prior to substitution, Section 14(1) read as: Ã¢â‚¬Å“14. Failure or impossibility to act.Ã¢â‚¬"(1) The

mandate of an arbitrator shall terminate ifÃ¢â‚¬"Ã¢â‚¬â€‹

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

Ã¢â‚¬Å“4. Waiver of right to object.Ã¢â‚¬"A party who knows that Ã¢â‚¬

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a

time-limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.Ã¢â‚¬â€‹

Ã¢â‚¬Å“11. Appointment of arbitrators.Ã¢â‚¬

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(8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator,

shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of Section 12, and have due regard toÃ¢â‚¬

(a) any qualifications required for the arbitrator by the agreement of the parties; and

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

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Ã¢â‚¬Å“12. Grounds for challenge.Ã¢â‚¬"(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in

writing any circumstances,Ã¢â‚¬

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-

matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or

impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a

period of twelve months.

Explanation 1.Ã¢â‚¬"The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts

as to the independence or impartiality of an arbitrator.

Explanation 2.Ã¢â‚¬"The disclosure shall be made by such person in the form specified in the Sixth Schedule.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any

circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only ifÃ¢â‚¬

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

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

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

after the appointment has been made.

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the

dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

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

writing.Ã¢â‚¬â€‹

Ã¢â‚¬Å“13. Challenge procedure.Ã¢â‚¬"(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware

of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of Section 12, send a written

statement of the reasons for the challenge to the arbitral tribunal.

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

shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal

shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section

(4) , the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34.

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

challenged is entitled to any fees.Ã¢â‚¬â€‹

Ã¢â‚¬Å“14. Failure or impossibility to act.Ã¢â‚¬"(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, ifÃ¢â‚¬¬

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the

parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of

an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this Section or sub-section (3) of Section 12.Ã¢â‚¬â€‹

11. Section 12(5) has been earlier dealt with in three Supreme Court judgments. In Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd.,

(2017) 4 SCC 665, this Court went into the recommendations of the aforesaid Law Commission Report, and referred in great detail to the law before

the amendment made in Section 12 and then held:

Ã¢â‚¬Å“23. It also cannot be denied that the Seventh Schedule is based on IBA guidelines which are clearly regarded as a representation of international

based practices and are based on statutes, case law and juristic opinion from a cross-section on jurisdiction. It is so mentioned in the guidelines

itself.Ã¢â‚¬â€‹

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Ã¢â‚¬Å“25. Section 12 has been amended with the objective to induce neutrality of arbitrators viz. their independence and impartiality. The amended

provision is enacted to identify the Ã¢â‚¬Å“circumstancesÃ¢â‚¬ which give rise to Ã¢â‚¬Å“justifiable doubtsÃ¢â‚¬ about the independence or impartiality of the

arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act

enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, the Seventh Schedule mentions those circumstances which

would attract the provisions of sub-section (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to

mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered

ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of

the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in

the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list

is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empanelled by the respondent are not covered by any of the items in the said

list.Ã¢â‚¬â€‹

12. In HRD Corporation v. GAIL (India) Ltd., (2018) 12 SCC 47, 1this Court, after setting out the amendments made in Section 12 and the Fifth,

Sixth, and Seventh Schedules to the Act, held as follows:

Ã¢â‚¬Å“12. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become Ã¢â‚¬Å“ineligibleÃ¢â‚¬â€‹ to be appointed as arbitrators,

and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section

12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he

becomes Ã¢â‚¬Å“ineligibleÃ¢â‚¬ to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1) (a), he then becomes de jure unable to

perform his functions inasmuch as, in law, he is regarded as Ã¢â‚¬Å“ineligibleÃ¢â‚¬. In order to determine whether an arbitrator is de jure unable to perform

his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any

further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this,

in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitratorÃ¢â‚¬â„¢s independence or

impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the

Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the

independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an

award. It is only after such award is made, that the party challenging the arbitratorÃ¢â‚¬â„¢s appointment on grounds contained in the Fifth Schedule may

make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any

challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be

gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which

the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal.Ã¢â‚¬â€‹

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Ã¢â‚¬Å“14. The enumeration of grounds given in the Fifth and Seventh Schedules have been taken from the IBA Guidelines, particularly from the Red and

Orange Lists thereof. The aforesaid guidelines consist of three lists. The Red List, consisting of non-waivable and waivable guidelines, covers

situations which are Ã¢â‚¬Å“more seriousÃ¢â‚¬ and Ã¢â‚¬Å“seriousÃ¢â‚¬, the Ã¢â‚¬Å“more seriousÃ¢â‚¬ objections being non-waivable. The Orange List, on the other

hand, is a list of situations that may give rise to doubts as to the arbitratorÃ¢â‚¬â„¢s impartiality or independence, as a consequence of which the arbitrator

has a duty to disclose such situations. The Green List is a list of situations where no actual conflict of interest exists from an objective point of view, as

a result of which the arbitrator has no duty of disclosure. These Guidelines were first introduced in the year 2004 and have thereafter been amended,

after seeing the experience of arbitration worldwide. In Part 1 thereof, general standards regarding impartiality, independence and disclosure are set

out.Ã¢â‚¬â€‹

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Ã¢â‚¬Å“17. It will be noticed that Items 1 to 19 of the Fifth Schedule are identical with the aforesaid items in the Seventh Schedule. The only reason that

these items also appear in the Fifth Schedule is for purposes of disclosure by the arbitrator, as unless the proposed arbitrator discloses in writing his

involvement in terms of Items 1 to 34 of the Fifth Schedule, such disclosure would be lacking, in which case the parties would be put at a disadvantage

as such information is often within the personal knowledge of the arbitrator only. It is for this reason that it appears that Items 1 to 19 also appear in

the Fifth Schedule.Ã¢â‚¬â€‹

13. In TRF Ltd. (supra), this Court referred to Section 12(5) of the Act in the context of appointment of an arbitrator by a Managing Director of a

corporation, who became ineligible to act as arbitrator under the Seventh Schedule. This Court held:

Ã¢â‚¬Å“50. First, we shall deal with Clause (d ). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the

categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language

employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned

Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it

is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and

more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned

with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing

Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when

there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause

requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be

called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the

Schedules appended thereto. But, here is a case where the Managing Director is the Ã¢â‚¬Å“named sole arbitratorÃ¢â‚¬ and he has also been conferred with

the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinctionÃ¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬â€‹

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Ã¢â‚¬Å“54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who

may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability.

We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that

once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per

prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to

say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently,

once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore,

the view expressed by the High Court is not sustainable and we say so.Ã¢â‚¬â€‹

14. From a conspectus of the above decisions, it is clear that Section 12(1), as substituted by the Arbitration and Conciliation (Amendment) Act, 2015

[Ã¢â‚¬Å“Amendment Act, 2015Ã¢â‚¬â€], makes it clear that when a person is approached in connection with his possible appointment as an arbitrator, it is his

duty to disclose in writing any circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality. The disclosure is

to be made in the form specified in the Sixth Schedule, and the grounds stated in the Fifth Schedule are to serve as a guide in determining whether

circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Once this is done, the appointment of

the arbitrator may be challenged on the ground that justifiable doubts have arisen under sub-section (3) of Section 12 subject to the caveat entered by

sub- section (4) of Section 12. The challenge procedure is then set out in Section 13, together with the time limit laid down in Section 13(2).

What is important to note is that the arbitral tribunal must first decide on the said challenge, and if it is not successful, the tribunal shall continue the

proceedings and make an award. It is only post award that the party challenging the appointment of an arbitrator may make an application for setting

aside such an award in accordance with Section 34 of the Act.

15. Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any

prior agreement to the contrary is wiped out by the non-obstante clause in Section 12(5) the moment any person whose relationship with the parties or

the counsel or the subject matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be

Ã¢â‚¬Å“ineligibleÃ¢â‚¬ to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special

provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express

agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set

out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be

removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an Ã¢â‚¬Å“express

agreement in writingÃ¢â‚¬. Obviously, the Ã¢â‚¬Å“express agreement in writingÃ¢â‚¬ has reference to a person who is interdicted by the Seventh Schedule, but

who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such

person is interdicted by the Seventh Schedule.

16. The Law Commission Report, which has been extensively referred to in some of our judgments, makes it clear that there are certain minimum

levels of independence and impartiality that should be required of the arbitral process, regardless of the partiesÃ¢â‚¬â„¢ agreement. This being the case,

the Law Commission then found:

Ã¢â‚¬Å“59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment,

regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the

incorporation of the Fourth Schedule, which has drawn from the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International

Arbitration, and which would be treated as a Ã¢â‚¬Å“guideÃ¢â‚¬ to determine whether circumstances exist which give rise to such justifiable doubts. On the

other hand, in terms of the proposed section 12 (5) of the Act and the Fifth Schedule which incorporates the categories from the Red list of the IBA

Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement

to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform

his functions, in terms of the proposed explanation to section 14. Therefore, while the disclosure is required with respect to a broader list of categories

(as set out in the Fourth Schedule, and as based on the Red and Orange lists of the IBA Guidelines), the ineligibility to be appointed as an arbitrator

(and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as

based on the Red list of the IBA Guidelines).

60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to

waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations

where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective Ã¢â‚¬Å“justifiable doubtsÃ¢â‚¬ regarding his

independence and impartiality. To deal with such situations, the Commission has proposed the proviso to section 12 (5), where parties may, subsequent

to disputes having arisen between them, waive the applicability of the proposed section 12 (5) by an express agreement in writing. In all other cases,

the general rule in the proposed section 12 (5) must be followed. In the event the High Court is approached in connection with appointment of an

arbitrator, the Commission has proposed seeking the disclosure in terms of section 12 (1), and in which context the High Court or the designate is to

have Ã¢â‚¬Å“due regardÃ¢â‚¬â€‹ to the contents of such disclosure in appointing the arbitrator.Ã¢â‚¬â€‹

(emphasis in original)

Thus, it will be seen that party autonomy is to be respected only in certain exceptional situations which could be situations which arise in family

arbitrations or other arbitrations where a person subjectively commands blind faith and trust of the parties to the dispute, despite the existence of

objective justifiable doubts regarding his independence and impartiality.

17. The scheme of Sections 12, 13, and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts

as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13.

However, where such person becomes Ã¢â‚¬Å“ineligibleÃ¢â‚¬ to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before

such arbitrator. In such a case, i.e., a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator

becomes, as a matter of law (i.e., de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This

being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a

controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide

on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be

availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in

Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated.

Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh

Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the

proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso

to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between

them.

18. On the facts of the present case, it is clear that the Managing Director of the appellant could not have acted as an arbitrator himself, being

rendered ineligible to act as arbitrator under Item 5 of the Seventh Schedule, which reads as under:

Ã¢â‚¬Å“ArbitratorÃ¢â‚¬â„¢s relationship with the parties or counsel

xxx xxx xxx

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the

affiliate is directly involved in the matters in dispute in the arbitrationÃ¢â‚¬â€‹

Whether such ineligible person could himself appoint another arbitrator was only made clear by this CourtÃ¢â‚¬â„¢s judgment in TRF Ltd. (supra) on

03.07.2017, this Court holding that an appointment made by an ineligible person is itself void ab initio. Thus, it was only on 03.07.2017, that it became

clear beyond doubt that the appointment of Shri Khan would be void ab initio. Since such appointment goes to Ã¢â‚¬Å“eligibilityÃ¢â‚¬, i.e., to the root of the

matter, it is obvious that Shri KhanÃ¢â‚¬â„¢s appointment would be void. There is no doubt in this case that disputes arose only after the introduction of

Section 12(5) into the statute book, and Shri Khan was appointed long after 23.10.2015. The judgment in TRF Ltd. (supra) nowhere states that it will

apply only prospectively, i.e., the appointments that have been made of persons such as Shri Khan would be valid if made before the date of the

judgment. Section 26 of the Amendment Act, 2015 makes it clear that the Amendment Act, 2015 shall apply in relation to arbitral proceedings

commenced on or after 23.10.2015. Indeed, the judgment itself set aside the order appointing the arbitrator, which was an order dated 27.01.2016, by

which the Managing Director of the respondent nominated a former Judge of this Court as sole arbitrator in terms of clause 33(d) of the Purchase

Order dated 10.05.2014. It will be noticed that the facts in the present case are somewhat similar. The APO itself is of the year 2014, whereas the

appointment by the Managing Director is after the Amendment Act, 2015, just as in the case of TRF Ltd. (supra). Considering that the appointment in

the case of TRF Ltd. (supra) of a retired Judge of this Court was set aside as being non-est in law, the appointment of Shri Khan in the present case

must follow suit.

19. However, the learned Senior Advocate appearing on behalf of the respondent has argued that Section 12(4) would bar the appellantÃ¢â‚¬â„¢s

application before the Court. Section 12(4) will only apply when a challenge is made to an arbitrator, inter alia, by the same party who has appointed

such arbitrator. This then refers to the challenge procedure set out in Section 13 of the Act. Section 12(4) has no applicability to an application made

to the Court under Section 14(2) to determine whether the mandate of an arbitrator has terminated as he has, in law, become unable to perform his

functions because he is ineligible to be appointed as such under Section 12(5) of the Act.

20. This then brings us to the applicability of the proviso to Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with

deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the

parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing. For this reason, the argument based on

the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that

such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an

Ã¢â‚¬Å“express agreement in writingÃ¢â‚¬. The expression Ã¢â‚¬Å“express agreement in writingÃ¢â‚¬ refers to an agreement made in words as opposed to an

agreement which is to be inferred by conduct. Here, Section 9 of the Indian Contract Act, 1872 becomes important. It states:

Ã¢â‚¬Å“9. Promises, express and implied.Ã¢â‚¬"In so far as a proposal or acceptance of any promise is made in words, the promise is said to be express. In

so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.Ã¢â‚¬â€‹

It is thus necessary that there be an Ã¢â‚¬Å“expressÃ¢â‚¬ agreement in writing. This agreement must be an agreement by which both parties, with full

knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him

to continue as such. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court

as indicating an express agreement on the facts of the case is dated 17.01.2017. On this date, the Managing Director of the appellant was certainly

not aware that Shri Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule only went to the invalidity of the appointment

of the Managing Director himself as an arbitrator. Shri KhanÃ¢â‚¬â„¢s invalid appointment only became clear after the declaration of the law by the

Supreme Court in TRF Ltd. (supra) which, as we have seen hereinabove, was only on 03.07.2017. After this date, far from there being an express

agreement between the parties as to the validity of Shri KhanÃ¢â‚¬â„¢s appointment, the appellant filed an application on 07.10.2017 before the sole

arbitrator, bringing the arbitratorÃ¢â‚¬â„¢s attention to the judgment in TRF Ltd. (supra) and asking him to declare that he has become de jure incapable of

acting as an arbitrator. Equally, the fact that a statement of claim may have been filed before the arbitrator, would not mean that there is an express

agreement in words which would make it clear that both parties wish Shri Khan to continue as arbitrator despite being ineligible to act as such. This

being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2), and Section 16(2) of the Act to

the facts of the present case, and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself

appointed the arbitrator. The judgment under appeal is also incorrect in stating that there is an express waiver in writing from the fact that an

appointment letter has been issued by the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the

appellant came to know that Shri KhanÃ¢â‚¬â„¢s appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his

mandate.

21. The learned Additional Solicitor General appearing on behalf of the appellant has relied upon All India Power Engineer Federation v. Sasan Power

Ltd., (2017) 1 SCC 487, and referred to paragraph 21 thereof, which reads as follows:

Ã¢â‚¬Å“21. Regard being had to the aforesaid decisions, it is clear that when waiver is spoken of in the realm of contract, Section 63 of the Contract Act,

1872 governs. But it is important to note that waiver is an intentional relinquishment of a known right, and that, therefore, unless there is a clear

intention to relinquish a right that is fully known to a party, a party cannot be said to waive it. But the matter does not end here. It is also clear that if

any element of public interest is involved and a waiver takes place by one of the parties to an agreement, such waiver will not be given effect to if it is

contrary to such public interest. This is clear from a reading of the following authorities.Ã¢â‚¬â€‹

This judgment cannot possibly apply as the present case is governed by the express language of the proviso to Section 12(5) of the Act. Similarly, the

judgments relied upon by the learned Senior Advocate appearing on behalf of the respondent, namely, Vasu P. Shetty v. Hotel Vandana Palace,

(2014) 5 SCC 660, and BSNL v. Motorola India (P) Ltd., (2009) 2 SCC 33 7[Ã¢â‚¬Å“BSNLÃ¢â‚¬], for the same reason, cannot be said to have any

application to the express language of the proviso to Section 12(5). It may be noted that BSNL (supra) deals with Section 4 of the Act which, as has

been stated hereinabove, has no application, and must be contrasted with the language of the proviso to Section 12(5).

22. We thus allow the appeals and set aside the impugned judgment. The mandate of Shri Khan having terminated, as he has become de jure unable to

perform his function as an arbitrator, the High Court may appoint a substitute arbitrator with the consent of both the parties.

23. Vide order dated 25.01.2018, we had issued notice in the Special Leave Petition as well as notice on the interim relief prayed for by the appellant.

Since there was no order of stay, the arbitral proceedings continued even after the date of the impugned judgment, i.e.,

22. 11.2017, and culminated in two awards dated 11.07.2018 and 12. 07.2018. We have been informed that the aforesaid awards have been

challenged by the appellant by applications under Section 34 of the Act, in which certain interim orders have been passed by the Single Judge of the

High Court of Delhi. These awards, being subject to the result of this petition, are set aside. Consequently, the appellantÃ¢â‚¬â„¢s Section 34 proceedings

have been rendered infructuous. It will be open to the appellant to approach the High Court of Delhi to reclaim the deposit amounts that have been

made in pursuance of the interim orders passed in the Section 34 petition filed in the High Court of Delhi.