

## Arbitral Award Rendered By Unilaterally Appointed Sole Arbitrator Can Be Put To Challenge Even By The Appointing Party: Delhi High Court

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### Introduction

In a recent decision in *Telecommunication Consultants India Ltd. v. Shivaa Trading*<sup>1</sup>, the High Court of Delhi ("**High Court**") allowed a challenge to an arbitral award on the grounds that the sole arbitrator who heard the matter and rendered the award was unilaterally appointed by the petitioner. The case is particularly interesting since the party which had unilaterally appointed the sole arbitrator itself challenged the award and that too beyond the period of limitation prescribed for filing a petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). In this article, we navigate through the facts and findings of the aforesaid decision.

### Brief Facts

The petitioner filed a petition under Section 34 of the Arbitration Act challenging an arbitral award dated 17.12.2021 ("**Arbitral Award**") rendered by a sole arbitrator in disputes that had arisen between the petitioner and the respondent under a contract for construction of rural roads under the *Pradhan Mantri Gram Sadak Yojana*.

The genesis of the disputes was a contract between the petitioner and the Madhya Pradesh Rural Road Development Authority for construction of roads. Subsequently, in order to execute the contract, the petitioner and the respondent entered into a Memorandum of Understanding dated 10.09.2007 ("**MoU**"), pursuant to which work orders were issued to the respondent for completion of work. However, due to various defaults alleged to have been committed by the respondent, the petitioner terminated its contract with the respondent on 31.01.2013 and completed the balance work at the respondent's risk and cost.

Ultimately, the petitioner issued a notice to the respondent dated 11.10.2017 invoking arbitration in view of the clause contained in the MoU. Simultaneously, the petitioner unilaterally appointed the sole arbitrator to decide the disputes between the parties. Upon completion of the arbitral proceedings, the Arbitral Award came to be rendered.

### Submissions

The petitioner argued that the award was not valid in law on account of the fact that the sole arbitrator came to be appointed unilaterally making him ineligible to act as an arbitrator in terms of Section 12(5) of the Arbitration Act. In support of its contentions, the petitioner referred to the decision of the Supreme Court in *Bharat Broadband Network Ltd. v. United Telecom Limited*.

In *Bharat Broadband*, the Supreme Court was dealing with the unilateral appointment of an arbitrator by the official of the disputing company. The appellant before the Supreme Court

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<sup>1</sup> 2024 DHC 3094.

having unilaterally appointed the sole arbitrator in the matter prayed that since the sole arbitrator was de jure unable to perform his function as arbitrator, he should withdraw from the arbitral proceedings. In this regard, the Supreme Court observed as follows:

"15. Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non-obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes having arisen between them, waive the applicability of this sub-section by an "express agreement in writing". 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."

As would be noted from the above, the Supreme Court in Bharat Broadband held that subsequent to disputes having arisen amongst the parties, unless there is an express agreement in writing between the parties permitting unilateral appointment of a sole arbitrator, the mandate of the sole arbitrator appointed unilaterally would automatically terminate in law. The Supreme Court had also clarified that there is no scope for inferring/ deeming the waiver of the right to object to unilateral appointment by conduct. Therefore, what emerges from a unilateral appointment of a sole arbitrator would also be a nullity.

Addressing the delay in filing the petition under Section 34 of the Arbitration Act, the petitioner submitted that if a Court or any other forum lacked jurisdiction in passing a decree or order, such decree or an order would be without jurisdiction, non-est, and void-ab-initio. Since such a defect goes to the root of the matter, and strikes at the very authority of the Court to pass a decree or make an order, the validity of such decree or order can be challenged at any stage, even in an execution or other collateral proceedings.

The respondent countering the arguments of the petitioner submitted that the petitioner's case was untenable in view of the following aspects:

- (i) The sole arbitrator was appointed by the petitioner itself;
- (ii) The petitioner did not raise a single objection on the unilateral appointment of the sole arbitrator during the arbitral proceedings;
- (iii) The petitioner only chose to challenge the award since it went against it.

## Findings

The High Court observed that the enunciation of the law by the Supreme Court on unilateral appointment of a sole arbitrator is clear and unequivocal. Since an arbitrator so appointed

inherently lacks jurisdiction to act as an arbitrator, the very appointment of the arbitrator and the arbitral proceedings conducted are rendered *void ab-initio*. In this regard, any waiver in terms of the proviso to section 12(5) of the Arbitration Act must be "express" and "in writing" and must have been granted "subsequent" to disputes having arisen between the parties. Admittedly, in the present case, no such waiver was granted by the parties to the unilateral appointment of the sole arbitrator in the present case.

On the delay in filing the petition under Section 34, the High Court opined that there could not be any cavil with the proposition of law that a defect of jurisdiction, which renders a decision void, could be challenged at any stage since such defect strikes at the very foundation of the power of the Court or tribunal to decide upon the matter.

In view of the above, the High Court held that the petition under Section 34 of the Arbitration Act was maintainable and consequently, all proceedings in arbitration including the Arbitral Award dated 17.12.2021 rendered by him, are *void-ab-initio* and of no legal effect.

## Conclusion

The High Court's decision serves as a poignant reminder of the significance of proper drafting of arbitration agreements and understanding the consequences of unilateral arbitrator appointments. Despite having itself appointed the sole arbitrator unilaterally, the petitioner's challenge succeeded due to the fatal flaw of unilateral appointment without the necessary written waiver, as stipulated by Section 12 of the Arbitration Act.

## Contact

For any query, help or assistance, please reach out at [info@trinitychambers.in](mailto:info@trinitychambers.in) or visit us at [www.trinitychambers.in](http://www.trinitychambers.in).

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