

(2026) 07 DEL CK 0231

In the Delhi High Court, Principal Bench, New Delhi

Case No : ARB.P. 579/2026

Kumar Electricals And Refrigeration Works

APPELLANT

Vs

Union Of India & Anrs.

RESPONDENT

Date of Decision : 10-07-2026

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 9, 12, Schedule V, VII, proviso to Section 12 (5), 12(5), 4, Seventh Schedule, 7, 12(4), 13(2), 16(2), 21, 33, IVth Schedule
Contract Act, 1872 — Section 9

Citation : (2026) 07 DEL CK 0231

Hon'ble Judges : Sachin Datta, J

Bench : Single Bench

Advocate : Mr. A.S. Singh, Ms. Pallavi Talwar

Final Decision : Disposed Of

Judgement

SACHIN DATTA, J. (ORAL)

1. The present petition has been filed by the petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred as "the A&C Act") seeking constitution of an arbitral tribunal to adjudicate the disputes between the parties.

2. The petitioner is a proprietorship firm which is registered as Class-II Contractor with the respondents and is stated to have executed various works of the respondents.

3. The background of the matter is that the petitioner participated in a bid process floated by the respondents for "*Strengthening and up-gradation of dangerous declared 124 Nos. M.S. Flats including 02 No. Scooter Garage and 02 No. Community Centre at Peshwa Road, DIZ Area, New Delhi. (SH: 62 Nos. MS Flats in Phase-I)*". Subsequently, vide letter bearing no. 54(2470)/ EE/ H. Division/ A.4/ 18-19/ 145 dated 16.01.2019, the said work came to be awarded

to the petitioner.

4. Consequently, *vide* a letter dated 22.01.2019, the awarded work was quantified to the tune of Rs. 4,32,00,816/- and the entire awarded work was stipulated to be completed by 27.04.2020 i.e., within a period of 16 months, commencing from 28.01.2019.

5. It is submitted that since the very beginning, the petitioner faced several hinderances in execution of work despite duly intimating the same to the respondents' time and again; and proactively making arrangements and readily undertaking necessary steps to complete the work within the period stipulated in the contract. Further, the execution of awarded work continued to get delayed on account of unforeseen circumstances i.e., nationwide lockdown /restrictions imposed by the Government due to pandemic [COVID-19]; ban on construction imposed by the NGT and dearth of construction supplies due to Kisan Andolan.

6. It is further submitted that although the deadline for completion of work was extended time and again by the respondents, the same was being extended without the respondents fulfilling their contractual obligations, making it impossible for the petitioner to complete the awarded work within the stipulated timelines.

7. It is the case of the petitioner that the respondents without taking into consideration the aforesaid circumstances, despite repeated communications and reminders by the petitioner, failed to release milestones, ESI and EPF reimbursements; and bill payments including payment of several RA Bills. Further, without culminating the contract existing with the petitioner, the respondents floated a new tender dated 04.06.2023 for the work which was already awarded to the petitioner.

8. Disputes having arisen between the parties, the petitioner issued a notice dated 30.11.2023 to the respondents for invoking arbitration in terms of Clause 25 of the Contract executed between the parties. The said clause reads as under:-

"Settlement of CLAUSE 25 Disputes & Arbitration

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

(i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer- in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request

the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with the decision of the Chief Engineer, the contractor may within 30 days from the receipt of the Chief Engineer decision, appeal before the Dispute Redressal Committee (DRC) along with a list of disputes with amounts claimed in respect of each such dispute and giving reference to the rejection of his disputes by the Chief Engineer. The Dispute Redressal Committee (DRC) shall give his decision within a period of 90 days from the receipt of Contractor's appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F'. If the Dispute Redressal Committee (DRC) fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC), then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Chief Engineer for appointment of arbitrator on prescribed proforma as per Appendix XV, failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

It is a term of contract that each party invoking arbitration must exhaust the aforesaid mechanism of settlement of claims/disputes prior to invoking arbitration.

(ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Director General, CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person, other than a person appointed by such Chief Engineer CPWD or Additional Director General or Director General, CPWD, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/-, the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid."

9. Pursuant thereto, the respondents appointed a sole arbitrator *vide* letter bearing no.7/5/arb/NDZ 3/FO/2023-24/3219 dated 30.11.2023. However, the said Arbitrator *vide* order dated 03.04.2025 withdrew from the arbitral proceedings. Thereafter, further correspondence ensued between the parties and the *inter se* disputes continued to fester.

10. It transpires that pursuant to the recusal by the concerned Arbitrator on 03.04.2025, a notice dated 29.09.2025 came to be issued against the petitioner by the respondents stating as under: -

[An exhibit is reproduced here in the original judgment.]

11. Aggrieved by the aforesaid, a petition under Section 9 of the A&C Act came to be filed by the petitioner before the Patiala House Court, Central District, New Delhi. During the pendency of the said petition, a fresh notice dated 04.11.2025 was also issued by the petitioner to the respondent for invocation of arbitration along with an updated list of its claim.

12. Subsequently, pursuant to an order dated 01.11.2025 passed by the District Judge-01, Patiala House Court in proceedings under Section 9 of the A&C Act, a letter dated 21.11.2025 came to be issued whereby, Mr. Akhilesh Kumar came to be appointed as the Sole Arbitrator by the respondents [the said letter has been annexed as Document-11 in the present petition].

13. In view of the aforesaid, the petition under Section 9 of the A&C Act was disposed of (*vide* order dated 09.12.2025), with liberty to the petitioner to avail its legal remedies/contentions before the newly constituted Arbitral Tribunal.

14. It is the case of the respondent that the petitioner has accepted the aforesaid appointment of the Arbitrator *vide* the communication dated 27.11.2025. It is

pointed out that the said Arbitrator has also furnished a declaration dated 02.12.2025 as required under Section 12 of the A&C Act during the course of arbitral proceedings and that the proceedings before the said Arbitrator were held on 09.01.2026.

15. On the other hand, learned counsel for the petitioner contends that the appointment of the Arbitrator is in pursuance of the unilateral appointment mechanism in the arbitration agreement. Furthermore, the appointed Sole Arbitrator is a former employee of the respondent and is thus not qualified to act as an arbitrator in terms of Section 12 read with Schedule V and Schedule VII of the A&C Act. It is also contended that such a mechanism is not in consonance with law and is in derogation of the A&C Act. In this regard reliance is placed on judgment rendered by a Coordinate Bench of this Court in **Sunehari Bagh Builders Pvt. Ltd vs Airports Authority of India**, 2022 SCC OnLine Del 3946.

16. There can be no quarrel with the proposition that the contractually prescribed mechanism for appointment of an arbitrator in the present matter is not in consonance with the dicta laid down by the Supreme Court in **Bhadra International (India) Pvt. Ltd and Ors., vs the Airports Authority of India**, 2026 SCC OnLine SC 7; **Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) [CORE]** 2024 SCC OnLine SC 321; **Perkins Eastman Architects DPC v. HSCC (India) Ltd.** (2020) 20 SCC 760; **TRF Limited v. Energo Engineering Projects Ltd**, (2017) 8 SCC 377; and **Bharat Broadband Network Limited v. United Telecoms Limited.**, 2019 SCC OnLine SC 547. The legal position is well settled that in such a situation it is incumbent on the concerned court to appoint an independent Sole Arbitrator.

17. Further, the fact that the petitioner has participated in some hearings before the Arbitrator is of no consequence as it is admitted that no express waiver in terms of proviso to Section 12 (5) of the A&C Act has been given by the petitioner. It is trite law that in the absence of an express waiver, the unilaterally appointed arbitrator has no jurisdiction to proceed in the matter and the said appointment is *void ab initio* and/or *non-est*.

18. The Supreme Court in **Bhadra International (India) Pvt. Ltd and Ors.** (supra) held that continued participation in arbitration proceedings cannot be construed as an "express waiver" given by the party in terms of proviso to Section 12(5) of the A&C Act and ineligibility of an arbitrator can be waived only by an express agreement in writing. The relevant portion of the said judgment reads as under: -

"84. Undoubtedly, the statute does not prescribe a format for the agreement. However, the absence of a prescribed format cannot be construed to mean that the waiver may be inferred impliedly or through conduct. We say so because the legislature has consciously prefaced the term "agreement" with the word "express" and followed it with the phrase "in writing". This semantics denote the intention of the legislature that the waiver under the proviso to Section 12(5) must be made only through an express and written manifestation of intention.

85. The conscious use of the prefatory expression also serves to differentiate such waiver from 'deemed waiver' as stipulated under Section 4 of the Act, 1996. We must be mindful of the fact that if the legislature intended that waiver under Section 12(5) could similarly arise by implication or conduct as mentioned under Section 4, it would have refrained from introducing a heightened and mandatory requirement, more particularly, in light of the rigours of the Seventh Schedule. The statutory design therefore makes it evident that the bar under Section 12(5) can be removed only by a clear, unequivocal, and written agreement executed after the dispute has arisen, and not by any form of tacit acceptance or procedural participation.

86. The mandate of an express agreement in writing in the present case may be looked at from one another angle. The unilateral appointment of an arbitrator is assessed from the viewpoint of the parties. However, when the parties later execute an express written agreement waiving the ineligibility of the proposed arbitrator, the position gets altered. Such written waiver supplies the very consent that was previously missing, thereby placing the appointment on the same footing as a mutually agreed appointment and addresses concerns regarding neutrality and fairness.

87. In *Bharat Broadband (supra)*, this Court categorically held that the expression "express agreement in writing" refers to an agreement made in words and cannot be inferred by conduct. The word "express" denotes that the agreement must be entered into with complete knowledge that although the proposed arbitrator is ineligible to be appointed as an arbitrator, yet they express their confidence in him to continue as the arbitrator. The relevant observations read thus:—

"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

"express agreement in writing". The expression "express agreement in writing" refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct. Here, Section 9 of the Contract Act, 1872 becomes important. It states:

"9. Promises, express and implied.—Insofar as the proposal or

acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."

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. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an application on 7-10-2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] 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 Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate."

(Emphasis supplied)

88. In CORE II (supra), this Court underscored the rationale behind the first two essentials of the proviso. It reads thus:—

"121. An objection to the bias of an adjudicator can be waived. [Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 808, para 30 : (2016) 3 SCC (Civ) 492 : (2016) 3 SCC (Cri) 173 : (2016) 2 SCC (L&S) 253] A waiver is an intentional relinquishment of a right by a party or an agreement not to assert a right. [State of Punjab v. Davinder Pal Singh Bhullar, (2011) 14 SCC 770, para 41 : (2012) 4 SCC (Civ) 1034 : (2012) 4 SCC (Cri) 496 : (2014) 1 SCC (L&S) 208] The Arbitration Act allows parties to waive the application of Section 12(5) by an express agreement after the disputes have arisen. However, the waiver is subject to two factors. First, the parties can only waive the applicability of Section 12(5) after the dispute has arisen. This allows parties to determine whether they will be required or necessitated to draw upon the services of specific individuals as arbitrators to decide upon specific issues. To this effect, Explanation 3 to the Seventh Schedule recognises that certain kinds of arbitration such as maritime or commodities arbitration may require the parties to draw upon a small, specialised pool. ["Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently, to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above."] The second requirement of the proviso to Section 12(5) is that parties must consciously abandon their existing legal right through an express agreement. Thus, the Arbitration Act reinforces the autonomy of parties by allowing them to override the limitations of independence and impartiality by an express agreement in that regard."

(Emphasis supplied)

89. What can be discerned from the above discussion is that the ineligibility of an arbitrator can be waived only by an express agreement in writing. In the present case, there is no agreement in writing, after the disputes arose, waiving the ineligibility of the

sole arbitrator or the right to object under Section 12(5) of the Act, 1996.

90. *The conduct of the parties is inconsequential and does not constitute a valid waiver under the proviso. The requirement of the waiver to be made expressly in the form of agreement in writing ensures that parties are not divested of their right to object inadvertently or by procedural happenstance.*

xxx xxx xxx

d. “Continued Participation” as a parameter of waiver

95. *In Govind Singh v. Satya Group Pvt. Ltd., 2023 SCC OnLine Del 37, the contention before the Delhi High Court was that the appellant therein by its conduct had waived its right to object to the unilateral appointment of the sole arbitrator. The Court categorically held that it is not necessary to even examine whether the appellant had raised an objection. Even if the appellant had participated in the proceedings without raising any objection, it cannot be said that he had waived his right under Section 12(5) of the Act, 1996. The relevant observations read thus:—*

“19. The contention that the appellant by its conduct has waived its right to object to the appointment of the learned Arbitrator is also without merit. The question whether a party can, by its conduct, waive its right under Section 12(5) of the A&C Act is no longer res integra. The Supreme Court in the case of Bharat Broadband Network Limited v. United Telecoms Limited : (2019) 5 SCC 755 had explained that any waiver under Section 12(5) of the A&C Act would be valid only if it is by an express agreement in writing. There is no scope for imputing any implied waiver of the rights under Section 12(5) of the A&C Act by conduct or otherwise.[...]

20. Thus, it is not necessary to examine the question whether the appellant had raised an objection to the appointment of the learned Arbitrator. Even if it is assumed that the appellant had participated in the arbitral proceedings without raising any objection to the appointment of the learned Arbitrator, it is not open to hold that he had waived his right under Section 12(5) of the A&C Act. Although it is not material, the record does indicate that the appellant had objected to the appointment of respondent no. 2 as an arbitrator.”

(Emphasis supplied)

96. *The net effect of the aforesaid is that a notice invoking the arbitration clause under Section 21 of the Act, 1996, a procedural order, submission of statement of claim by the appellants, the filing an application seeking interim relief, or a reply to an application under Section 33 of the Act, 1996, cannot be countenanced to mean “an express agreement in writing” within the meaning of the proviso to sub-section (5) of Section 12 of the Act, 1996. (emphasis supplied)*

19. In the circumstances, in terms of the legal position enunciated in the aforesaid judgments it is incumbent upon this Court to appoint an independent sole Arbitrator for adjudication of disputes between the parties.

20. Accordingly, Mr. Davinder Singh, Senior Advocate (Mobile No. +91 9810039326), is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

21. The respondent shall be entitled to raise preliminary objections as regards jurisdiction/ arbitrability, which shall be decided by the learned arbitrator, in accordance with law.

22. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as required under Section 12 of the A&C Act.

23. The learned Sole Arbitrator shall be entitled to fee in accordance with IVth Schedule of the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

24. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.

25. Needless to say, nothing in this order shall be construed as an expression of opinion of this Court on merits of the case.

26. The petition is disposed of in the above terms.