

IN THE SUBORDINATE COURT (SENIOR CIVIL JUDGE CADRE), SIRKALI.

Present : Thiru. C.B. Vedagiri, B.Pharm., MS IT (AUS)., LLM.,

Subordinate Judge, Sirkali.

Dated this the 30th Day of July 2026, Thursday.

EP. No.303/2023 in ACP. No.900/2018

M/s. Shriram Transport Finance Co - Ltd.,
Sirkali, Rep. by its, Branch Manager/
Authorized Signatory

... Petitioner /Decree Holder

-Vs-

1. Radhakrishnan
2. Rajendran

... Respondent(s)/J.Ds

EP. No.304/2023 in ACP. No.451/2018

M/s. Shriram Transport Finance Co - Ltd.,
Sirkali, Rep. by its, Branch Manager /
Authorized Signatory

... Petitioner /Decree Holder

-Vs-

1. Yoganathan
2. Anantharaj

... Respondent(s)/J.Ds

EP. No.306/2023 in ACP. No.913/2018

M/s. Shriram Transport Finance Co - Ltd.,
Sirkali, Rep. by its, Branch Manager /
Authorized Signatory

... Petitioner /Decree Holder

-Vs-

1. Dhanasekaran
2. Rajesh

... Respondent(s)/J.Ds

EP. No.332/2023 in ACP. No.212/2019

M/s. Shriram City Union Finance (P) Ltd.,
Thiruvarur, Rep. by its
Authorized Signatory

... Petitioner /Decree Holder

-Vs-

1. Ayishabegam
2. Mohamed Riyazdeen

... Respondent(s)/J.Ds

EP. No.333/2023 in ACP. No.117/2021

M/s. Shriram City Union Finance (P) Ltd.,
Thiruvarur, Rep. by its
Authorized Signatory Subash

... Petitioner /Decree Holder

-Vs-

1. Yuvaraj
2. Govindaraj
3. Dhanalakshmi

... Respondent(s)/J.Ds

EP. No.341/2023 in ACP. No.920/2018

M/s. Shriram Transport Finance Co - Ltd.,
Sirkali, Rep. by its, Branch Manager /

Authorized Signatory

... Petitioner /Decree Holder

-Vs-

1. Jarjath

2. Malik

... Respondent(s)/J.Ds

EP. No.346/2023 in ACP. No.88/2021

M/s. Shriram City Union Finance (P) Ltd.,

Thiruvarur, Rep. by its

Authorized Signatory Subash

... Petitioner /Decree Holder

-Vs-

1. Manikandan

2. Dhinega

... Respondent(s)/J.Ds

EP. No.356/2023 in ACP. No.218/2019

M/s. Shriram City Union Finance (P) Ltd.,

Thiruvarur, Rep. by its

Authorized Signatory Subash

... Petitioner /Decree Holder

-Vs-

1. P. Kabilan (died)

2. K. Jansirani

3. K. Pichai

4. P. Padmavathi

5. M. Kamaludeen

6. K. Jariyabagum

7. Minor Pranesh rep.

by his Mother Jansirani

... Respondent(s)/J.Ds

EP. No.360/2023 in ACP. No.27/2021

M/s. Shriram City Union Finance (P) Ltd.,

Thiruvarur, Rep. by its

Authorized Signatory Subash

... Petitioner /Decree Holder

-Vs-

1. R. Sekar

2. S. Meena

3. S. Vanasri

... Respondent(s)/J.Ds

EP. No.423/2023 in ACP. No.123/2016

M/s. Shriram City Union Finance (P) Ltd.,

Thiruvarur, Rep. by its

Authorized Signatory

... Petitioner /Decree Holder

-Vs-

1. D. Selvakumar

2. S. Ramya

3. E. Sasikala

4. E. Revathi

... Respondent(s)/J.Ds

EP. No. 459/2023 in ACP. No.527/2019

M/s. Shriram Finance Ltd., Formally Known

as Shriram Transport Finance Co Ltd.,
Thiruvavarur Rep. by its Authorized Signatory

... Petitioner /Decree Holder

-Vs-

1. S. Gunasekaran
2. T. Manikandan

... Respondent(s)/J.Ds

EP. No.464/2023 in ACP. No.194/2017

M/s. Shriram City Union Finance (P) Ltd.,
Thiruvavarur, Rep. by its
Authorized Signatory

... Petitioner /Decree Holder

-Vs-

1. Muthukumar
2. Muniyammal

... Respondent(s)/J.Ds

EP. No.470/2023 in ACP. No.62/2021

M/s. Shriram City Union Finance (P) Ltd.,
Thiruvavarur, Rep. by its
Authorized Signatory R. Suresh

... Petitioner /Decree Holder

-Vs-

1. M. Vijayan
2. M. Mangalam
3. G. Shankar
4. M. Ramya

... Respondent(s)/J.Ds

EP. No.472/2023 in ACP. No.924/2018

M/s. Shriram Transport Finance Co - Ltd.,
Sirkali, Rep. by its, Branch Manager /
Authorized Signatory

... Petitioner /Decree Holder

-Vs-

1. Mohanadoss
2. Elayaraja

... Respondent(s)/J.Ds

EP. No.478/2023 in ACP. No.128/2020

M/s. Shriram City Union Finance (P) Ltd.,
Thiruvavarur, Rep. by its
Authorized Signatory Suresh

... Petitioner /Decree Holder

-Vs-

1. K. Gunasekaran
2. G. Selvi
3. G. Guna

... Respondent(s)/J.Ds

For Petitioner Advocate Mr.S. Sarankaranarayan - EP. Nos.303,304,306,332,333,341,
346,356,360,423,459,464,470,472,478 of 2023

For Respondents

EP. Nos.303,304,306,332,333,341,346,356,
360,423,459,464, 470,472,478 of
2023 - No appearance

COMMON ORDER

All the Execution Petitions are filed under XXI Rule 22, 37,38,43,54,55,64,66,72 of CPC, seeking for arrest of the respondents/judgment debtors or attachment of salary or movables / attachment of the immovable property mentioned in the respective petition(s) in order to realize the award amount.

1. The petitioners have obtained an Arbitration award against the respective respondent(s). As the respondent(s) in the respective petitions have not satisfied the award amount, petitioners are before this court for the recovery of the award amount with interest by way of arrest of the respective judgment debtors or attachment of the property mentioned in the respective petitions.
2. It is also from the record that the respondents mostly in the respective Execution Petitions were not turned up before this Court (many applications/petitions being transferred from other courts), which resulted in setting them *exparte* on various dates and in some cases respondents are before this court.
3. It is also a matter of fact that all the arbitration awards, which were under execution by way of these execution petitions were passed by the respective sole arbitrators, who were unilaterally appointed by the petitioners/decreed holders and admittedly it is from the record that all the respective awards were passed after 23.10.2015.
4. It is also from the record that there is no express statutory waiver in writing by the respondent. It was informed by the petitioner counsel that the respondent has never appeared upon notice before and after the constitution of Arbitral tribunal and consequently the award was passed based on the materials on record including the loan agreement of the parties to the *lis*.
5. Admittedly, the present execution petitions are filed by the Decree Holder for execution of award passed by the sole arbitrator. During the pendency, this court has raised the query over maintainability of the execution petition regarding the enforceability of the alleged arbitral award.

6. It is the case of the petitioner that the Decree Holder/ Petitioner is a Non Banking Finance Corporation, incorporated and registered within the meaning of Banking Regulation Act, 1949. It is averred that JD/respondent approached the DH/petitioner for availing a loan and accordingly the loan/hypothecation agreement was executed between parties. After availing the said loan, JD/respondent failed to repayment of loan amount. DH/petitioner issued pre suit notice to JD/respondent, to pay outstanding due towards the loan. Despite notice, JD/respondent did not clear the outstanding dues. Since the parties are bound by terms of the contract, the DH/petitioner has appointed arbitrator as per Section 11(2) of the Arbitration and Conciliation Act,1996 who is a learned arbitrator of his choice. The DH/petitioner filed the present claim before the Sole Arbitrator and the Ld. Sole Arbitrator issued notice of the proceedings to the JD/respondent. In spite of due notice, the respondent/(s) neither objected the claim nor replied.

7. It was contended by the petitioner counsel that in several other instances, notice were returned as “Addressee cannot be located”, but is an deemed service as per Section 3 (1)(b) of the Arbitration Act. As the Act is a self contained code, the JD/respondents could have challenged the proceedings under Section 13(2), but the JD/respondents neither replied nor objected to the same and thus was proceeded ex-parte. Pursuant to which, the Decree Holder lead the evidence and consequently, on conclusion of the proceedings, the present award was passed for which the present execution petition is filed.

8. It is the contention of the Decree Holder /Petitioner that he has acted upon the Loan Agreement and has filed this EP and the court notice was served on the respondents, but they chose not to file petition under Section 47 of CPC and has ignored the notice of this court and the very arbitral award is executable under Section 37 of the Code.

9. It is from the records that there is no dispute/quarrel in the existence of the specific clause pertaining to the Loan Agreement which gives strength for the initiation of the arbitration proceedings and is evident from the case records.

10. From the averments of the petition and perusal of the arbitral award, it is apparent that there was unilateral appointment of arbitrator by the Decree holder. Further, the arbitral proceedings were conducted without participation of the award debtors and consequently, the arbitral award was passed *ex-parte*.

11. The petitioner counsel contended that the present EP is maintainable on the following grounds:

1. The petitioner has entered into a Loan agreement which is a valid written agreement as contemplated under Section 7 of The A and C Act.
2. As per Section 11(2), this petitioner has issued notice to the respondent before the appointed a sole arbitrator by the petitioner.
3. After the appointment of the Arbitrator, the Arbitral Tribunal has sent notice to the respondent to participate in the arbitral proceedings.
4. The respondent ought to have filed objection to the appointment within 15 days from the receipt of notice of the arbitral tribunal, which the respondent failed to do so. This court refers to the decision of the **Hon'ble Madras High Court in V.R.Dakshin Pvt Ltd Vs SCM Silks Pvt Ltd and Ors** in this regard.
5. This court refers to Section 3 of The A and C Act, as mere sending of notice is a deemed service.
6. The learned counsel for the petitioner urged that due to the non appearance of the respondents/JD, the arbitrator has passed award based on the available documents and this petitioner send copy of the order to the respondent through RPAD. The petitioner used to wait for 90 days, the time period for any appeal under Section 34 of the A and C Act and that the petitioner used to not to file EP till the disposal of the appeal.
7. This court refers to Section 25(b), wherein if the respondent/ JD did not object, and if no defence statement is filed, the right to file written statement is forfeited.
8. The EP has been filed after 90 days after the award, the award becomes absolute, if not appealed.
9. The only recourse available to the respondent is to challenge the award under Section 34(2) and cannot question the validity award at the stage of execution.

10. The respondent has not preferred appeal and has not raised objections/plea such as that there was non service on the respondent, that the appointment of arbitrator is biased and not intended.

11. Since the respondents has not preferred any appeal, they have given consent to the award (Section 24 and 12 of A and C Act).

12. Executing court has wide power to execute the decree and cannot go behind the decree and question the validity of the award passed by the arbitrator.

13. In some cases, the respondent(s) are even paying the amount and has not questioned the award.

14. The petitioner being an NBFC, is dealing with public fund and get interest from the deposits and that there is public interest involved.

15. The respondents in many cases have not filed counter stating that the arbitrator has been unilaterally appointed.

16. The arbitrators are generally retired judges and senior advocates and there cannot be any apprehension regarding bias.

12. The position of law on unilateral appointment of an arbitrator is no more res integra and has been settled by the Hon'ble Supreme Court and Hon'ble High Courts through various judicial pronouncements.

13. The learned petitioner counsel has invited this court's attention to the five judge Bench decision of the **Hon'ble Supreme Court in Central Organization for Railway Electrification (CORE) v. ECI-SPIC-SMO-MCML (JV) (CORE II)** to bring home the point that:

1. The decision is applicable only for Public – Private Arbitration and is not applicable to the present case.

2. Act of State and violation of Article 14 cannot be pressed in to service.

3. Learned counsel for the petitioner referred to paras 155 and 157 of the CORE II decision, wherein it was held that:

“155. Although arbitration law is an autonomous legal field, it functions within the boundaries prescribed by the state. For instance, adjudication of certain

proceedings is reserved by the legislature exclusively for the courts as a matter of public policy. The non-arbitrable proceedings generally include disputes relating to rights and liabilities that give rise to or arise out of criminal offences, matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody, and guardianship matters. The safeguards of public policy ensure that arbitration proceedings, which are effective substitutes for civil courts, are conducted within a framework in the broader public interest.

157. Section 34(2)(b) specifically provides that an arbitral award may be set aside if the court finds that the arbitral award conflicts with the public policy of India. The provision further clarifies “public policy of India” to only mean that:

- (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81;
- (ii) it is in contravention with the fundamental policy of Indian law; or
- (iii) it is in conflict with the most basic notions of morality or justice.”

14. The petitioner counsel argued that the Respondents having been signatory to the alleged Loan agreement has consented for the appointment of the sole arbitrator by the petitioner and the very appointment of arbitrator could be questioned only under Section 14(2) of the A and C Act.

15. The petitioner counsel emphasized Minimal interference by the court over the arbitral process and arbitral award:

“7. Article 5 of the UNCITRAL Model Law(for short ‘Model law’) and Section 5 of the Arbitration Act is extracted below:

“ **Article 5. Extent of Court intervention-** *In matters governed by this Law, no court shall intervene except where so provided in this Law.*”

“**Section 5. Extent of judicial intervention.**— *Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.*” ”

16. It was emphasized by the petitioner counsel that the Statement of Objects and Reasons of the Arbitration Act read along with Section 5 of the Act makes it clear that the legislative intent behind the Arbitration Act was to, inter alia, minimise the

intervention of the Courts and provide for timely resolution of disputes. It is also crucial to note that the Parliament in Section 5, made a significant departure from Article 5 of Model law by adding a **non-obstante** clause, ‘Notwithstanding anything contained in any other law’, emphasizing that the Courts should exercise restraint and other laws should not be made the basis for court’s intervention with the agreed arbitral process.

17. It is open to the parties to challenge and/or apply for the enforcement of the award and that Chapter VII and Chapter VIII deals with the recourse available to parties after the arbitral award, for it to be set aside by the courts under Section 34, the finality and enforceability of the award under Section 35 and 36, appeals under Section 37, and miscellaneous provisions under Section 38 to 43.

18. The petitioner counsel urged that consequent to the decision of the **Hon’ble Apex Court in CORE II decision**, the **Hon’ble Madras High Court in Sundaram Finance Limited Vs S.M.Thangaraj** decided on 27.01.2025 has held that:

“20. It is also further to be noted that to set aside an arbitral award, an application under Section 34 of the Arbitration and Conciliation Act, 1996 is must. The very wording employed in Section 34 of the Arbitration and Conciliation Act, 1996, reads as follows:

“Recourse to a Court against an arbitral award may be made only by an application for setting such award in accordance with sub-section (2) and sub-section (3)”

Therefore, the words employed in Section 34 “recourse to a court against an arbitral award may be made only by an application for setting aside the award” make it clear that an award has to be set aside only in the manner known to law as provided under Section 34 of the Arbitration and Conciliation Act, 1996. As long as an aggrieved party to the award did not challenge the award passed against him in the manner known to law, the arbitral award shall be final and binding on the parties and the persons claiming under them respectively. When a party to the award had not chosen to challenge the award within the time prescribed, such award shall be enforced in accordance with the provisions of the Code of Civil Procedure in the same manner as if it was a decree passed by the Civil Court. Therefore, as no objection was raised and

the respondent has waived the objection and also did not choose to file any application under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the award, such award has to be executed. Therefore, the executing court cannot go into the validity of the arbitral award. The issue of ineligibility of the arbitrator cannot be raised during the pendency of the execution proceedings. Thus, this court is of the view that order passed by the executing court *suo motu* dismissing the execution petition filed by the revision petitioner to get executed the arbitral award cannot be sustained in the eye of law. This revision petition succeeds accordingly.”

19. The petitioner counsel thus canvassed that the present execution petition(s) are maintainable.

20. This court also refers to the recent decision of the **Hon'ble Madras High Court** in **M/s.Shriram Transport Finance Company Limited Vs Prabu** decided on 09.02.2026 wherein it was held that:

“I find force in the submission of the learned counsel for the petitioner. Even though it was a case of unilateral appointment of Arbitrator, it is a ground for challenge by the aggrieved respondents by preferring a petition under Section 34 of the Arbitration and Conciliation Act, 1996 or by invoking Section 47 of Civil Procedure Code. Neither has been done in the present case and therefore, the executing court was bound to proceed to execute the decree as it stood. Unfortunately, the court has dismissed the execution petition on the sole ground that the appointment of Arbitrator was unilateral in nature. The executing court, therefore, clearly fell in error in law in dismissing the execution petition and the order passed is liable to be set aside by invoking of Article 227 of Constitution of India. Therefore, I am inclined to allow the revision and set aside the order dismissal of EP No.49 of 2022 on the file of Principal Subordinate Court, Kancheepuram and EP No.49 of 2022 is restored to file.”

21. This court refers to the recent decision of the **Hon'ble Supreme Court** in **Bhadra International (India) Pvt. Ltd. & Ors. Vs. Airports Authority of India (Civil Appeal Nos. 37-38 of 2026 arising out of SLP (C) Nos. 16107-16108 of 2025)** wherein it was held that:

“60. It is apposite to understand that Section 12(5) does not prohibit unilateral appointment of an arbitrator. It provides that whenever an appointment of an arbitrator is hit by the bar under Section 12(5), the arbitrator would be ineligible to act, irrespective of whether the appointment was unilateral or with consent of both parties. In such circumstances, the parties may, in the manner provided under the proviso, waive the ineligibility. We shall discuss the scope and application of the proviso in more detail in the latter part of this judgment.

93. Recently, in **Hindustan Construction Co. Ltd. v. Bihar Rajya Pul Nirman Nigam Ltd.**, reported in **2025 SCC OnLine SC 2578**, wherein one of us, J. B. Pardiwala, J., was a part of the Bench, held that Section 29A amounts to a valid waiver under Section 4, save in cases of statutory ineligibility under Section 12(5) of the Act, 1996. The relevant observations read thus:-

"13.8. In the present case, the respondents had ample opportunity to object. Instead, both parties jointly moved for extension under Section 29A, not once but thrice. This leads directly to the interplay between Sections 4, 12(5) and 29A.

13.9. Section 29A empowers courts to extend the mandate of an arbitral tribunal, either on a party's application or upon sufficient cause. Its object is to prevent termination of proceedings by efflux of time and to ensure continuity. A joint application under Section 29A stands on a distinct footing from ordinary acts of participation such as filing pleadings. When both parties jointly seek an extension, they signify continued consent and confidence in the tribunal. Under Section 29A(5), even a single party may apply; the other is free to oppose. The Court may, in its discretion, extend the mandate with or without substituting the arbitrator.

13.10. Thus, when a party joins in seeking extension under Section 29A despite having the opportunity to object or seek termination, it signifies a higher degree of

consent. However, such consent cannot be equated with an express written waiver under Section 12(5). The statutory language is categorical: only an express written post-dispute waiver can cure Seventh Schedule ineligibility."

d. **"Continued Participation" as a parameter of waiver**

95. In **Govind Singh v. Satya Group Pvt. Ltd.**, reported in **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."

iii. Whether the appellants could have raised an objection to the appointment of the sole arbitrator for the first time in an application under Section 34 of the Act, 1996?

101. On the aforesaid issue, the High Court held that the present case cannot be equated with cases in which an objection to the appointment of the arbitrator has been raised throughout the proceedings, or at every stage. Further, even after sub-section (5) of Section 12 was introduced in the statute, the appellants did not approach the court under Section 14 of the Act, 1996, challenging the jurisdiction of the arbitrator. Thus, the challenge to the appointment of the sole arbitrator was clearly an "afterthought".

a. Challenge to the ineligibility of the arbitrator during the proceedings

102. The law in this regard is fairly settled. Where a party is aggrieved by the ineligibility of an arbitrator under Section 12(5), it may directly approach the court under Section 14 of the Act, 1996. There is no doubt that when an arbitrator is ineligible under Section 12(5), i.e., he lacks inherent jurisdiction to hold the position, his mandate stands automatically terminated, and it is not necessary for the parties to challenge his appointment under Section 12 read with Section 13. When such a challenge is made, the court is required to determine whether the arbitrator suffers from de jure inability under Section 14(1)(a) of the Act, 1996.

108. The Constitution Bench in CORE II (supra) affirmed the aforementioned decisions and reiterated that the ineligibility of a person to act as an arbitrator is a matter of law and goes to the root of the appointment. Thus, when an arbitrator is de jure unable to perform his function, his mandate would be automatically terminated under Section 14(1)(a), and the parties would be within their rights to apply to the court under Section 14(2) for termination of the arbitrator's mandate and appointment of a substituted arbitrator.

b. Challenge to the ineligibility of the arbitrator after arbitral award has been passed

109. When an award has been passed, the proceedings before the arbitral tribunal conclude, leaving no possibility of substituting the arbitrator at this stage. In other words, once an award is passed, the mandate of the arbitral tribunal also arrives at a conclusion. In such circumstances, a party aggrieved by the arbitrator's ineligibility

may challenge the award by filing an application under Section 34 of the 1996 Act, as an award passed by an ineligible arbitrator is nullity, non-est, or void ab initio, and against the public policy of India.

111. An award passed by an arbitrator who is found to be ineligible cannot be enforced. In *CORE II* (supra), a Constitution Bench of this Court held that the concept of "public policy of India" and "fundamental policy of Indian law" means complying with statutes and judicial precedents, and principles of natural justice. It was categorically held that "the most basic notions of morality and justice" mentioned in the Explanation 1 to Section 34(b) includes bias.

112. What emerges from the foregoing is that the appellants were well within their right to challenge the ineligibility of the sole arbitrator in an application under Section 34 of the Act, 1996.

c. Challenge to the ineligibility of the arbitrator at any stage of the proceedings

113. A challenge to an arbitrator's ineligibility could be raised at any stage because an award passed in such circumstance is non-est, i.e., it carries no enforceability or recognition in law. We say so because an arbitrator does not possess the jurisdiction to pass an award. In arbitration, the parties vest the jurisdiction in the tribunal by virtue of a valid arbitration agreement and an appointment made in accordance with the provisions of the Act, 1996. This jurisdiction is grounded in the consent of the parties as explained in the foregoing paragraphs of this judgment.

114. In this context, jurisdiction means the authority of an arbitral tribunal to render a decision affecting the merits of the case. An arbitrator who lacks jurisdiction cannot make an award on the merits. With a view to dispel any doubt and lend clarity, we deem it appropriate to observe that the jurisdiction of the arbitral tribunal is distinct from the admissibility of the dispute, i.e., the arbitrability of the claims.

115. A question pertaining to the jurisdiction of the arbitral tribunal arises when the tribunal is fundamentally incompetent to render any decision at all. In other words, a question of jurisdiction pertains to the ability of the tribunal to hear a case, whereas

questions of admissibility presuppose that the tribunal has jurisdiction. An award passed by an arbitrator who does not have jurisdiction strikes at the very authority of the arbitrator.

116. This Court, in catena of decisions, has held that the validity of a decree can be challenged even in execution proceedings if the court passing such decree lacked subject-matter jurisdiction over the dispute. As a decree passed by a court without jurisdiction goes to the root of the matter. Any decision passed by a court lacking jurisdiction would be coram non judice, since a court cannot give itself jurisdiction. No act of the parties can cure an inherent lack of jurisdiction.

117. In **Hira Lal Patni v. Kali Nath**, reported in **1961 SCC OnLine SC 42**, this Court held that competence of a court to decide a case goes to the root of the matter, and incompetency results in inherent lack of jurisdiction. As a result, a decision rendered by a court that lacks jurisdiction is a nullity. The relevant observations read thus:-

“4. The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it.

122. Further, in such circumstances referred to above, if any party does not appear despite receipt of notice, the arbitrator shall not proceed further and shall immediately withdraw from the arbitral proceedings. The arbitrator must, along with the waiver agreement, record the minutes even when the parties are cooperating. This would certainly save time and avoid multiplicity of proceedings.”

22. Points for Consideration:

23. The points for consideration before this court are:

Whether the parties could be said to have waived the applicability of sub-section (5) of Section 12 of the Act, by way of their conduct, either expressed or implied?

Whether the respondents could have raised an objection to the appointment of the sole arbitrator for the first time in an application under Section 34 of the Act, 1996?

Whether this court could look into the unilateral appointment of sole arbitrator in a petition for execution of the arbitral award under Section 47?

whether the sole arbitrator could be said to have become “ineligible to be appointed as an arbitrator” by virtue of sub-section (5) of Section 12 of the Act, 1996 being appointed unilaterally?

Whether the arbitration award passed by the sole arbitrator unilaterally appointed by the petitioners in all these cases are executable?

24. Heard the submissions made by the learned counsels for the petitioners in all these execution petitions and perused the records.

25. This court has received number of execution petition (being transferred from other court) based upon the arbitral award passed on the same footing (unilateral appointment without waiver by parties post the dispute) and this court thought it fit to dispose the petition which stand in the same reasoning, leaving out the specific details in each case with respect to date of agreement, appointment of arbitrator, date of respondent being set *ex parte* in the arbitration proceedings, date of award, claim amount, number of respondents, petitioner/Decree Holder organization etc.,.

26. Scope of Section 47 CPC:

This court is refers to Section 47 of the CPC which emphasizes that all questions regarding the execution, discharge or satisfaction of a decree must be decided by the court executing the said decree. Section 36 of the Arbitration and Conciliation Act, 1996 deems an arbitral award enforceable “as if” it were a decree. That deeming fiction does not import into execution the power to reopen merits or validity.

27. It is well settled that challenges to the validity of an arbitral award must travel under Section 34 of the Act and within time. Thus after the expiry of the statutory time limit for challenging the arbitral award in question is over, the award has to be enforced through the same process and procedure meant for a court decree under the CPC. The arbitral award is treated at par with a decree because it has all the trappings of a decree, but not a decree passed under the CPC in the strict sense. Thus the hyper-technicalities of the Civil Procedure Code cannot be allowed to dilute the special law. Enforceability of arbitral awards with limited judicial interference is a fundamental principle under Section 5 of the Act, which restricts courts from substantively intervening post-award, save for specific grounds in Section 34.

28. This court is aware of the settled proposition that allowing the executing court to consider objections under Section 47 while enforcing awards threatens to open a backdoor for merits-based challenges, which the statute explicitly prohibits during execution. Various High Courts have also applied this logic in execution. The Hon'ble Delhi High Court in **Amit Malik v. Kamlesh Malik (2006 SCC Online Del 536)**, rejected the belated objections during execution, calling Section 34 a “complete code”; once time lapses, validity objections cannot be smuggled in via Section 47.

29. This court refers to the decision of the Hon'ble High Court of Allahabad, in **Sanjay Agarwal v. Rahul Agarwal**, wherein it was emphasized that any judgment debtor aggrieved by an arbitral award is barred in law from challenging the validity or legality of the award at the stage of execution, even by resorting to the remedies enshrined under Sections 34 and 36 of the Act of 1996. While the executing court's power under Section 47 remains circumscribed, it is not altogether non-existent.

30. This court refers to the recent decision of the Hon'ble Supreme Court in **The State of Uttar Pradesh vs R.K.Pandey 2025 INSC 48** Wherein the application of Section 47 of C.P.C. in Arbitral proceedings was dealt and it was held that:

“We have made our observations in the context of Section 47 of the Code of Civil Procedure, 1908, which even at the stage of execution, permits a party to object to the decree, both on the grounds of fraud, as well as lack of subject matter jurisdiction. It is apparent that the arbitration proceedings were a mere sham and a fraud played by

Respondent No.1, R.K. Pandey, by self-appointing/nominating arbitrators, who have passed ex-parte and invalid awards. To reiterate, Respondent No. 1, R.K. Pandey, is not a signatory to the purported arbitration agreement. Moreover, the parties thereto, DNPBID Hospital and the Governor of Uttar Pradesh, do not endorse any such agreement. From the cumulative facts and reasons elucidated above, this is a clear case of lack of subject matter jurisdiction.”

31. Reliance is also placed on the decision of the Hon’ble Supreme Court in **MMTC Ltd., Vs Anglo American Metallurgical Coal Pvt. Ltd., 2025 LiveLaw (SC) 1060** regarding the issue of maintainability of objection under Section 47 of C.P.C. during the execution of Arbitral Award, wherein it was held that:

“21. In answering the issue about the maintainability of the objection under Section 47, this Court held that the High Court was correct insofar as it stated that plea of nullity qua an Arbitral award can be raised in a proceeding under Section 47 of CPC, but such a challenge would lie within a very narrow compass. This Court further held that in terms of Section 36 of the A&C Act, an Award can be enforced in accordance with the provisions of the CPC, in the same manner as if it were a decree of the Civil Court. This Court further held as under:

“48. Execution of decrees and orders is provided for in Order XXI CPC. The law is well settled that at the stage of execution, an objection as to executability of the decree can be raised but such objection is limited to the ground of jurisdictional infirmity or voidness. The law laid down by this Court in **Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman, (1970) 1 SCC 670**, is that only a decree which is a nullity can be the subject matter of objection under Section 47 CPC and not one which is erroneous either in law or on facts. The aforesaid proposition of law continues to hold the field.”

32. In conclusion, this Court on the said issue, held that objection to execution of an award under Section 47 was not dependent or contingent upon filing a petition under Section 34. Ultimately insofar as **Electrosteel (supra)** was concerned, the appeal of Electrosteel was allowed in view of the provisions of the IBC, particularly, Section 30

and 31. It was found that the Facilitation Council did not have jurisdiction to arbitrate the claim after approval of the plan.

33. *Electrosteel (supra)* held that any challenge under Section 47 would lie within a narrow compass. It has also been held that at the stage of execution, an objection as to executability of the decree can be raised, limited to the ground of jurisdictional infirmity or voidness. It has been further held that errors of facts and law cannot be the subject matter of objection under Section 47.”

34. Thus based on precedents and decisions cited *supra*, the issues that a court can examine under section 47 are:

(a) Patent Illegality, Void Ab Initio: Is there any patent illegality appearing on the face of the record? Does this patent illegality go to the root of the matter?

In **Subhash Projects (supra)**, the court emphasized that objections must appear on the face of the record; anything requiring evidentiary enquiry or re-appreciation of merits is out of bounds in execution.

(b) Preliminary Questions around jurisdiction and identity of parties:

This would also cover the inherent jurisdiction and constitution of the arbitral tribunal issuing the alleged arbitral award.

(c) Satisfaction and discharge:

Whether there has there been payment, set-off, or adjustment satisfying the decree?

The executing court's role is limited to a narrow perimeter to prevent null or non-existent awards from being enforced, maintaining a balance between arbitration finality and judicial oversight.

35. Thus taking into consideration of the settled proposition of law, this court finds that Section 47 of C.P.C. is applicable in the Execution Proceedings preferred in enforcement of an Arbitral Award.

The mode of appointment of Arbitrator in the present Arbitral Proceedings:-

The Act provides liberty for the parties to agree on procedure for appointment of Arbitrator as per Section 11(2) of the Arbitration and Conciliation Act. In case if there is no agreement between the parties, the parties are mandated to apply to the Hon'ble

Supreme Court or Hon'ble High Court or other designated institution for appointment of Arbitrator. When the parties have agreed for appointment of arbitrator by way of procedure and a party fails to act as required under the said procedures, the party aggrieved may request the Hon'ble Supreme Court or Hon'ble High Court or any designated institution for appointment of Arbitrator unless the Arbitration agreement provides for appointment of Arbitrator by other means.

36. In the present context, the alleged loan agreement has clause for appointment of Sole Arbitrator by the petitioner company, who is the claimant in the arbitral proceedings and admittedly the Arbitrator has been appointed in the present Arbitral proceedings by the claimant alone. It is also an admitted fact that the respondent has not participated in the process of appointment of Arbitrator and that the mode of appointment of Arbitrator is unilateral.

Proviso to Section 12 (5) of the Arbitration and Conciliation Act :-

Even in the above circumstances proviso to Section 12 (5) of Arbitration and Conciliation Act provides for the procedure to make a person who is ineligible to be appointed as Arbitrator under the Seventh Schedule to be a eligible person for appointing as Arbitrator, in case the procedure contemplated in the Proviso to Section 12 (5) is complied. The Proviso to Section 12 (5) of the Arbitration and Conciliation Act provides that subsequent to the dispute have arisen the parties were even liberty to waive the applicability of Section 12 (5) of Arbitration and Conciliation Act and the same shall be by way of express agreement in writing. In the present case, it is also admitted that there is non compliance to the Proviso to Section 12 (5) of the Arbitration and Conciliation Act, which this court finds that there exist an ineligibility of appointment of Arbitrator.

37. It is to be noted that the Act was amended in the year 2015 and sub-section (5) was added under Section 12 with effect from 23.10.2015.

Section 12 read thus:

“12. Grounds for challenge. (5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

(i) From the above provision of law, it is very clear that the appointment of a sole arbitrator can be made only if the nominator satisfies the conditions adumbrated under Section 12(5) of the Act, provided it is not disqualified or ineligible as per Schedule VII of the Act. If the sole arbitrator appointed by the party fits into any one of the disqualification, he/she is ineligible to be appointed as per Schedule VII of the Act. But the said ineligibility can be waived by way of an express agreement in writing as per proviso to Section 12 (5) of the Act.

38. It is a matter of admitted fact that the appointment of sole arbitrator in all these petitions / cases were made by the petitioners/decreed holders after 2015, i.e., after the amendment Act came into force. Since the employee or any staff of the decree holder company is ineligible to be appointed as an arbitrator as per Schedule VII of the Act, they cannot also appoint or nominate any person to act as an arbitrator to arbitrate the dispute.

39. Reliance is placed on the decision of the **Hon’ble Apex Court in TRF Limited Vs Energo Engineering Projects and Limited 2017 8 SCC 377** wherein while interpreting Section 12 (5) of the Act along with Schedule VII of the Act, it was held that:

“Once the Arbitrator had become ineligible by operation of law, he could not nominate another as an Arbitrator.”

40. Following the decision of **TRF Limited**, the Hon’ble Supreme Court in **Perkins Eastman Architects DPC and another Vs H.S.C.C (India) Limited 2020 (20) SCC 760** has held that:

“Chairman cum Managing Director of a party was ineligible to appoint an arbitrator”.

Thus it is clear that it is not permissible for a party who is ineligible to act as an arbitrator to unilaterally appoint any other person as an arbitrator without the consent of the other party.

It could also be safely inferred that a party can waive his right to object to the ineligibility of an arbitrator subject to two conditions:

the first being that the waiver is required to be done by way of an express agreement in writing; and

secondly that such agreement shall be entered into after arising of a dispute between the parties.

Unless, these two conditions are fulfilled, there can be no waiver of ineligibility of an arbitrator.

41. This court also places reliance on the decision of the **Hon’ble Madras High Court** in **M/s.Prime Store and Another Vs Sugam Vanijya Holdings Private Limited and Another** where it was held that:

“the proviso to Section 12(5) of the Act’s proviso prohibiting the unilateral appointment of a sole arbitrator without the express written consent of the parties was unconstitutional. He added that anyone who served as an advisor or offered an opinion in the dispute would undoubtedly fall under this category. Furthermore, he argued that it is important to remember that Section 12(5) of the Act, when read with the Act’s Seventh Schedule, deals with a person’s ineligibility to be appointed as an arbitrator. This provision of the Act is mandatory and non-derogable, and it identifies the ineligible people to be appointed as arbitrators as a result of being disqualified under the Seventh Schedule. Therefore, everyone, including the retired Judge, would be subject to disqualification under the Seventh Schedule.

The Court stated that pursuant to the **Supreme Court’s** decision in **Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd** interested parties to a dispute would not only be ineligible to act as an arbitrator but also be prohibited from appointing an

arbitrator to adjudicate the dispute. The Court noted that the petitioners waived their right to object to the unilateral appointment.

The decision further emphasized that section 12(5) read with schedule seven of the act does grant retired judges privileges and that they would appoint sole arbitrators to serve as advisors. Given the approved legislation, it is unacceptable for the learned Senior Counsel to assert that the learned Arbitrator, a retired judge, is impartial. Thus, the Court overturned the contested arbitral award and challenge a retired judge to serve as the new arbitrator in the dispute.”

42. This court is being conscious of the law that in the post 2015 (as amended), that there are only two modes of appointment of sole arbitrator.

(i) by express agreement in writing between the parties, post the disputes, agreeing to waive the applicability of section 12 of the Act or

(ii) by order of appointment by High Court under section 11 of the Act.

43. Thus if the appointment is made other than by the aforementioned two methods, the said appointment is *ex-facie* bad and is in contravention of the Act. The arbitrator become *dejure* ineligible to act as an arbitrator by operation of law.

44. This court refers to the decision of the **Hon’ble Delhi High Court** in **M/S. Mahavir Prasad Gupta And Sons vs Govt Of Nct Of Delhi** wherein it was held that:

“72. The decision of the Coordinate Bench of this Court in **Bhadra International (supra)** holds that the proscription under Section 12(5) of the Act is not absolute and subject to the proviso thereto. It holds that in view of the factual circumstances in which the appellant therein had invited the respondent therein to appoint an arbitrator, the appellant having consented to the jurisdiction of the arbitrator before the arbitrator and the appellant not having objected to the jurisdiction of the arbitrator after the introduction of Section 12(5) to the Act, either through an application before the arbitrator under Section 16 of the Act or before the court under Section 14(1) of the Act, the parties had consented to the jurisdiction of the sole arbitrator and this Court had refused to set aside the arbitral award.

The relevant extract is reproduced as under:

34. The decisions cited by Mr. Ashish Mohan are cases in which, at one stage or another, an objection to the jurisdiction of the learned Arbitrator was raised. We must be aware that the proscription under Section 12(5) of the 1996 Act is not absolute. It is subject to the proviso thereto, which envisages conscious waiver of Section 12(5). In the facts of this case, which need not be repeated, but particularly in view of the fact that

(i) the appellants had themselves invited AAI to appoint the arbitrator,
(ii) before the learned Arbitrator, too, the appellants consented to the learned Arbitrator proceeding with the matter,
(iii) even after Section 12(5) was introduced in the statute book, the appellants never chose to move any application before the learned Arbitrator under Section 16 of the 1996 Act, or before this Court under Section 14(1) thereof, challenging the jurisdiction of the learned Arbitrator but, rather, participated in the proceedings without demur, we are not inclined to interfere with the decision of the learned Single Judge. If, in such circumstances, the appellants is to be permitted to wish away the arbitral award which, for obvious reasons, is not palatable to the appellants, it would do complete disservice to the entire arbitral institution. Such a decision, we are seriously afraid, would erode, to a substantial degree, the faith of the public in the very institution of arbitration.”

73. However, the decision in **Bhadra International** (supra) does not consider the prior decision of the Constitutional Bench of the Supreme Court in **CORE** (supra) wherein, it is held that a unilateral appointment clause is invalid without an express agreement in writing as envisaged under the proviso to Section 12(5) of the Act. Hence, we agree with the Respondent that **Bhadra International** (supra) is also per incurium.

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.

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.

d) Stage of Challenge: An objection to the lack of inherent jurisdiction of an arbitrator can be taken at any stage during or after the arbitration proceedings including by a party who has appointed the sole or presiding arbitrator unilaterally as the act of appointment is not an express waiver of the ineligibility under proviso to Section 12(5) of the Act. Such objection can be taken even at stage of challenge to the award under Section 34 of the Act or during the enforcement proceedings under Section 36 of the Act.”

45. In all the present petitions, it is from the record that after the dispute, there is no express agreement in writing between the parties to waive the applicability of section 12 (5). The consent envisaged for waiver is express agreement of waiver and has not been obtained in the case on hand. In all these execution petitions, dispute had arisen only after 23.10.2015, which is after the amendment Act of Arbitration and Conciliation Act, 1995, that too after incorporation of sub-Section (5) and its proviso under Section 12 of the Act. The disputes were referred to the sole arbitrator very much later after 23.10.2015. Therefore, the waiver in writing as mandated ought to be given by the respondents after 23.10.2015. The contention of the learned counsel for the petitioners that the judgment debtors have agreed for appointment of the sole arbitrator in the loan agreement itself, cannot be considered as a waiver as envisaged under the proviso to Section 12(5) of the Act. As already noted above, the petitioners have not produced any documents to show that the respondents have waived their right to object to the ineligibility of the sole arbitrator appointed in these cases by way of a written agreement after the dispute arose. Therefore, this Court is of the considered view that the respondents have not waived their right towards ineligibility of the sole arbitrator.

46. Applicability of Section 4 of Arbitration and Conciliation Act:-

Section 4 of Arbitration and Conciliation Act provides for waiver of right to object. Though there is no express agreement in writing by the respondent, it is the stand of the petitioner that the respondent has full knowledge of the arbitral proceedings and the same amounts to waiver.

47. Deemed waiver under Section 4 Vs Waiver by express writing under Section 12(5)

This court refers to the decision of the **Hon'ble Apex Court** in **Ellora Paper Mills Ltd., vs State of Madhya Pradesh 2022 (3) SCC 1**, wherein it the decision in **Ajay Sales and Suppliers case 2021 17 SCC 248** was referred and it was held that:

“18. Keeping in mind the aforequoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is

manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, sub section (5) of Section 12 lays down that 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, he shall be ineligible to be appointed as an arbitrator. In such an eventuality i.e. when the arbitration clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement."

48. The petitioner counsel contended that the respondent / JD has not challenged the appointment of the arbitrator as per Section 12 and 13 of the Act and that the respondent/ JD has to approach the appropriate forum to challenge the same which is not done so.

49. It is the contention of the petitioner counsel that the respondents have not raised any objections regarding the ineligibility of the arbitrator and hence it has to be treated as waiver also cannot be countenanced.

50. Reliance is placed on the decision of the **Hon'ble Supreme Court in Bharath Broadband Network Limited versus United Telecoms Limited 2019 (5) SCC 755** wherein it was held that:

"the waiver of a right to object to ineligibility of an arbitrator u/S.12 (5) of the Act cannot be inferred by the conduct of a party but such waiver can only be by an express agreement in writing."

51. Reliance is also placed on the decision of the **Ellora Paper Mills Case**, wherein reference is made to the decision in **Bharat Broadband Network Ltd., vs United Telecom Ltd., - 2019 (5) SCC 755** regarding Section 12 (5) and it was held that:

“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 Indian Contract Act, 1872 becomes important. It states:

“9. Promises, express and implied.—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.”

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 17.01.2017. 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 Khan'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 Khan's

appointment, the appellant filed an application on 07.10.2017 before the sole arbitrator, bringing the arbitrator'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 in correct 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.”

52. This court also places reliance on the decision of the **Hon’ble Calcutta High Court in Yashovardhan Sinha and Ors. Vs Satyatej Vyapaar Pvt. Ltd. 2022(3) CHN (CAL) 305**, it was laid down as under:

"8.....Therefore, the dicta laid down in these judgments makes it crystal clear that there cannot be unilateral appointment of a sole arbitrator by the respondent as per Clause 19 of the loan agreement as the same is illegal and defeats the very purpose of unbiased and impartial adjudication of the dispute between the parties. The guiding principle is transparency, fairness, neutrality and independence in the selection process and hence, appointment of a sole arbitrator can either be with mutual consent of parties or by an order of the competent court. There can be no third way."

53. Reliance was also placed on the decision of the Hon'ble Madras High Court in **JV Engineering Associate, Civil Engineering Contractors -vs- General Manager, CORE 2020 SCC OnLine Mad 4829** regarding the validity of an arbitral award passed by an ineligible arbitrator and it was held thus:

“31. In the above circumstances the Award in question having been passed by an Arbitrator who is ineligible to be an Arbitrator deserves to be set aside more particularly since there is no express waiver in writing as contemplated under the proviso to Section 12(5).”

54. It is axiomatic to state that the three concepts in the Arbitration Act that facilitate and emphasize the continuing presence of an independent and impartial arbitral tribunal are:

1. Ineligibility of arbitrators - Section 12(5) of the Arbitration Act,
2. Disclosure by arbitrators - Sections 12 (1) and 12 (2) of the Arbitration Act,
3. Challenge to arbitrators - Sections 12(3), 12 (4) and 13 of the Arbitration Act.

55. In light and consonance to the Proviso to Section 12(5) of the 1996 Act, parties may waive the applicability of Section 12(5) by an express agreement in writing post the dispute having arisen. This condition of the agreement being expressly in writing is the statutory *sine qua non*, without which an otherwise ineligible person cannot be free from the effect of Section 12(5). Nothing less of an express agreement in writing would suffice for the waiver of the application of Section 12(5). Such a waiver precluding the application of Section 12(5) cannot be compelled from a party.

56. The validity of the Unilateral appointment of arbitrator without waiver in writing post the dispute in question is no more *res integra*. The Decree Holder / Claimant, having appointed the Arbitrator unilaterally without waiver in writing post the dispute in question is ex-facie bad and not sustainable and is in contravention to the provisions of the Arbitration and Conciliation Act post 2015 amendment, which goes to the very root of the matter in dispute, and thus the arbitrator become *de jure* ineligible to act as an arbitrator by operation of law.

57. From the above decisions stated *supra*, this Court is of the view that mere knowledge of Arbitral proceedings could not be equated to express agreement in writing by the respondents as referred under Section 12(5) of the Arbitration and Conciliation Act. Hence, the waiver clause specified under Section 4 of the Arbitration and Conciliation Act without an express agreement in writing regarding the appointment of Arbitrator subsequent to the commencement of the Arbitral

proceedings could not be made applicable and thus Section 4 cannot validate the appointment of Arbitrator without compliance under Section 12 (5) of the Arbitration and Conciliation Act which mandates express agreement for waiver in writing.

Termination and Mandate of Arbitrator and Substitution of Another Arbitrator:

58. Section 14 (1) and 14(2) of Arbitration and Conciliation Act read as under:-

“14. Failure or impossibility to act.—

(1) [The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if] —

(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.”

59. This court in this regard refers to the decision of the **Ellora Paper Mills case** (*supra*), wherein it was held that:-

“15. In the case of **Bharat Broadband Network Limited (Supra)**, it is observed that Sub-section (5) of Section 12 read with Seventh Schedule made it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes ‘ineligible’ to act as an arbitrator. It is further observed that once he becomes ‘ineligible’, it is clear that he then become de jure unable to perform his functions inasmuch as in law, he is regarded as ‘ineligible’. It further is observed in the said decision that where a person becomes ineligible 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 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 and this being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator.”

60. This court place reliance on the decision of the **Hon’ble Supreme Court in HRD Corporation Vs GAIL(India) Limited 2018 12 SCC 471** wherein it was held that once a person specified, in the 7th schedule becomes ineligible to be appointed as an Arbitrator, then, he would become unable to perform his function, in view of Section 14(1)(a) of the Act and the ineligibility goes to the root of the appointment.

61. From the above decision referred *supra*, it is clear that the mandate of the Arbitrator who is ineligible to be appointed as Arbitrator gets terminated automatically and the proper course in such circumstances is substitution of Arbitrator. Admittedly, there is no substitution of arbitrator happened in the present Arbitral Proceedings and thus the present Arbitral proceedings is conducted by the Arbitrator who is ineligible to be appointed as Arbitrator.

Jurisdiction of the Arbitrator:-

62. Reliance is placed on the decision of the **Hon’ble Supreme Court in Foreshore Cooperative Housing Society Ltd., vs Praveen D. Desai (D) through Lrs** wherein it was held that:

"40. From reading of the aims and object of the Bill whereby Section 9A was inserted, the term ‘jurisdiction’ is used in a wider sense and is not restricted to the conventional definition either pecuniary jurisdiction or territorial jurisdiction as submitted by Mr. Nariman, learned senior counsel appearing for the appellant.

41. The term ‘jurisdiction’ is a term of art; it is an expression used in a variety of senses and draws colour from its context. Therefore, to confine the term ‘jurisdiction’ to its conventional and narrow meaning would be contrary to the well settled interpretation of the term.

The expression ‘**jurisdiction**’, as stated in **Halsbury’s Laws of England, Volume 10, paragraph 314**, is as follows:

“314. Meaning of ‘jurisdiction’: By ‘jurisdiction’ is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by similar means.

If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the claims and matters of which the particular court has cognizance, or as to the area over which the jurisdiction extends, or it may partake of both these characteristics.”

42. In American Jurisprudence, Volume 32A, paragraph 581, it is said that “Jurisdiction is the authority to decide a given case one way or the other. Without jurisdiction, a court cannot proceed at all in any case; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause.”

43. It is well settled that essentially the jurisdiction is an authority to decide a given case one way or the other. Further, even though no party has raised objection with regard to jurisdiction of the court, the court has power to determine its own jurisdiction. In other words, in a case where the Court has no jurisdiction; it cannot confer upon it by consent or waiver of the parties”

63. The Hon’ble Supreme Court in Kiran Singh vs Chaman Paswan AIR 1954 SC 340 has held that:

“It is a fundamental principle well established that a decree passed by the court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strike at the very authority of the court to pass any decree and such a defect cannot be cured even by the consent of parties.”

64. Thus it is clear that lack of jurisdiction cannot be waived, consented to, or overcome by agreement of the parties. Although the respondents have not raised the question about legality of the award, this Court can very well go into the question of executability of the arbitral award passed by the sole arbitrator unilaterally appointed by the decree holder, as the very award under execution herein has touched the root of the matter.

65. In this regard this court refers to the decision of the **Hon'ble Delhi High Court** in **M/s.Mercedes Benz Financial Services India Pvt. Ltd. versus M/s.Khokher Enterprises** decided on 16.01.2024 wherein it was held that even if no objection is filed by judgment debtor, Court shall not execute the award passed by unilaterally appointed Arbitrator.

66. This court finds it pertinent and very relevant to refer to the recent decision of the **Hon'ble Supreme Court** in **Kotak Mahindra Bank Limited Vs Narendra Kumar Prajapat** decided on **12.12.2023**, wherein it was held that:

“From paragraph 6 of the impugned order, it appears to be an admitted position that the Arbitrator unilaterally appointed by the petitioner was ineligible to be appointed as an arbitrator by virtue of Section 12(5) of the Arbitration and Conciliation Act, 1996. Hence, in view of this peculiar factual position, no case for interference is made out in exercise of our jurisdiction under Article 136 of the Constitution of India. The Special Leave Petition is accordingly dismissed. Pending application also stands disposed of.”

67. In view of the above decisions, this Court is of the view that this Executing Court can very well decide about the executability of the award passed in these petitions. In the present cases, the Arbitrator appointed to conduct the Arbitral proceedings was himself ineligible to arbitrate. As per Section 14 (1) of Arbitration and Conciliation Act the termination of mandate of Arbitrator was incidental to his appointment. This Court is of the view that Arbitrator has lacked jurisdiction to conduct the Arbitral proceedings and that the award passed by the Arbitrator who has lacked jurisdiction could only be treated as a nullity in the eye of law.

68. Reliance is placed on the decision of the **Hon'ble Apex Court in Urban Improvement Trust, Jodhpur vs Gokul Narain and another AIR 1996 SC 1819**, wherein it was held that:

“ A decree passed by a Court without jurisdiction over the subject matter or on any other ground which goes to the root of its exercise of jurisdiction or inherent jurisdiction is a nullity. A decree passed by such court is a nullity and is non-est. Its invalidity can be setup whenever it is sought to be enforced or is relied upon, even at the stage of execution or in collateral proceedings. A defect of jurisdiction whether it is pecuniary or territorial , or whether it is in respect of the subject matter of the action, strikes at the very authority of the court to pass a decree which cannot be cured by consent or waiver of parties.”

69. The contention put forth by the learned counsels for the petitioners' that the arbitration award has not been challenged by the respondents and hence it has become enforceable cannot be accepted in view of the decisions stated *supra*.

70. This Court has power to refuse to execute the decree or award which is 'non-est' or a nullity due to lack of jurisdiction of the Court or authority which passed it. Reliance is placed on the decision of the **Hon'ble High Court of Kerala in India Cements Capital versus William 2015 SCC Online Kerala 24805** wherein it was emphasized that there is no necessity to get the award declared as nullity under Section 34 of the Act and the executing court can very well refuse to execute the said award on the basis that it is a nullity.

71. This court places reliance on the decision of the **Hon'ble Supreme Court of India in Central Organisation For Railway Electrification versus M/s.ECI SPIC SMO MCML (JV) A Joint Venture Company reported in 2024 INSC 857** regarding unilateral appointment of arbitrators, wherein it was held that:

“127. Reference of disputes to a sole arbitrator has various advantages, including easy arrangements of meetings or hearings, reduced expenses since the parties will only have to bear the expense of one arbitrator, and speedy decision-making. In the case of the appointment of a sole arbitrator, the decision-making vests in the hands of

one person. This poses a greater risk of bias against the weaker party, especially if the arbitrator is unilaterally appointed by the other party.

128. If a person having a financial interest in the outcome of the arbitral proceedings unilaterally nominates a sole arbitrator, it is bound to give rise to justifiable doubts on the independence and impartiality of the arbitrator. The possibility of bias by the arbitrator is real because the person who has an interest in the subject matter of the dispute can chart out the course of the entire arbitration proceeding by unilaterally appointing a sole arbitrator. A party may select a particular person to be appointed as a sole arbitrator because of a quid pro quo arrangement between them. Moreover, the fact that the sole arbitrator owes the appointment to one party may make it difficult to decide against that party for fear of displeasure. It is not possible to determine whether the sole arbitrator will be prejudiced, but the circumstances of the appointment give rise to the real possibility of bias. 129. Equal treatment of parties at the stage of appointment of an arbitrator ensures impartiality during the arbitral proceedings. A clause that allows one party to unilaterally appoint a sole arbitrator is exclusive and hinders equal participation of the other party in the appointment process of arbitrators. Further, arbitration is a quasi-judicial and adjudicative process where both parties ought to be treated equally and given an equal opportunity to persuade the decision-maker of the merits of the case. An arbitral process where one party or its proxy has the power to unilaterally decide who will adjudicate on a dispute is fundamentally contrary to the adjudicatory function of arbitral tribunals.

162. The possibility of bias is real in situations where an arbitration clause allows a government company to unilaterally appoint a sole arbitrator or control the majority of the arbitrators. Since the government has control over the arbitral tribunal, it can chart the course of the arbitration proceedings to the prejudice of the other party. Resultantly, unilateral appointment clauses fail to provide an effective substitute for judicial proceedings in India. Further, a unilateral appointment clause is inherently exclusionary and violates the principle of equal treatment of parties and procedural equality.

168. In the present reference, we have upheld the decisions of this Court in **TRF (supra)** and **Perkins (supra)** which dealt with situations dealing with sole arbitrators. Thus, **TRF (supra)** and **Perkins (supra)** have held the field for years now. However, we have disagreed with **Voestalpine (supra)** and **CORE (supra)** which dealt with the appointment of a three-member arbitral tribunal. We are aware of the fact that giving retrospective effect to the law laid down in the present case may possibly lead to the nullification of innumerable completed and ongoing arbitration proceedings involving three-member tribunals. This will disturb the commercial bargains entered into by both the government and private entities. Therefore, we hold that the law laid down in the present reference will apply prospectively to arbitrator appointments to be made after the date of this judgment. This direction only applies to three member tribunals.

169. In view of the above discussion, we conclude that:

- a. The principle of equal treatment of parties applies at all stages of arbitration proceedings, including the stage of appointment of arbitrators;
- b. The Arbitration Act does not prohibit PSUs from empanelling potential arbitrators. However, an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by PSUs;
- c. A clause that allows one party to unilaterally appoint a sole arbitrator gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further, such a unilateral clause is exclusive and hinders equal participation of the other party in the appointment process of arbitrators;
- d. In the appointment of a three-member panel, mandating the other party to select its arbitrator from a curated panel of potential arbitrators is against the principle of equal treatment of parties. In this situation, there is no effective counterbalance because parties do not participate equally in the process of appointing arbitrators. The process of appointing arbitrators in **CORE (supra)** is unequal and prejudiced in favour of the Railways;

e. Unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution;

f. The principle of express waiver contained under the proviso to Section 12(5) also applies to situations where the parties seek to waive the allegation of bias against an arbitrator appointed unilaterally by one of the parties. After the disputes have arisen, the parties can determine whether there is a necessity to waive the *nemo iudex* rule; and

g. The law laid down in the present reference will apply prospectively to arbitrator appointments to be made after the date of this judgment. This direction applies to three member tribunals.”

72. From the extensive discussion and deliberation made in the above **CORE II, five judge decision** stated *supra*, this court finds that the Act establishes strict ineligibility criteria for arbitrator appointments. The Arbitration and Conciliation Act 1996 employs several mechanisms to ensure the independence and impartiality of arbitrators **before** their appointment.

The Two Main Principles Mandating Arbitration Proceedings in India

The Act mandates two key principles to govern arbitration proceedings: **equality of parties and independence and impartiality of the arbitral tribunal.**

1. Equality of Parties

The principle of equality is enshrined in **Section 18** of the Act, which states that "parties shall be treated with equality" and each party shall be given a "full opportunity" to present their case and needs a mandatory adherence in all fairness.

2. Independence and Impartiality of the Arbitral Tribunal

It ensures that the arbitral tribunal is free from bias and can act fairly in adjudicating the dispute. The various provisions in the Act which touch upon these lines are culled out hereunder:

Disclosure requirements (Section 12): Prospective arbitrators must disclose any circumstances that could raise doubts about their independence or impartiality. This

includes relationships with parties, financial interests, or any other relevant connections.

Grounds for challenge (Sections 12 and 13): Parties could challenge an arbitrator's appointment based on justifiable doubts about their impartiality.

Mandatory Disclosure: Section 12(1) of the Arbitration Act places a legal duty on any person approached for appointment as an arbitrator to **disclose in writing** any circumstances that could raise justifiable doubts about their independence or impartiality. This proactive disclosure requirement is crucial for transparency and allows parties to assess potential conflicts of interest early in the process.

Ineligibility criteria (Section 12(5) and Seventh Schedule): The Act sets out specific relationships that automatically disqualify an individual from serving as an arbitrator.

Automatic Disqualification: Section 12(5) goes beyond disclosure and establishes strict ineligibility criteria. It **prohibits** certain individuals from serving as arbitrators, **regardless of any prior agreement**, if their relationship with the parties, counsel, or the subject matter falls under the Seventh Schedule. This provision ensures objective independence by precluding individuals with clear conflicts of interest.

Seventh Schedule Categories: The Seventh Schedule, based on the IBA Guidelines' Red List, outlines relationships that result in automatic disqualification. These relationships typically involve close financial, business, professional, or familial ties with a party to the dispute.

Waiver by Express Agreement: The proviso to Section 12(5) allows parties to **waive** these ineligibility criteria **after** the dispute has arisen. This exception, grounded in the doctrine of necessity, recognizes that parties may prioritize specific expertise over strict impartiality in certain situations. However, this waiver must be through an **express written agreement**.

Ineligibility Criteria (Section 12(5) & Seventh Schedule):-

Section 12(5) prohibits certain individuals from serving as arbitrators, regardless of any prior agreement. This provision aims to maintain objective independence by precluding individuals with clear conflicts of interest during appointment.

The Seventh Schedule, based on the IBA Guidelines' Red List, details the relationships that automatically disqualify an individual from serving as an arbitrator. These relationships typically involve close financial, business, professional, or familial ties with one of the parties.

The very Act has a **proviso** allowing parties to waive these ineligibility criteria through an express written agreement after the dispute has arisen. This waiver mechanism acknowledges the doctrine of necessity and allows parties to prioritize specific expertise or other considerations over strict impartiality in certain cases.

Judicial Intervention (Sections 11 and 14): Courts can intervene to appoint arbitrators if the agreed-upon procedure fails or if necessary to ensure impartiality.

Section 11 empowers courts to appoint arbitrators in situations where the agreed-upon procedure fails or if necessary to ensure impartiality. This provision underscores the court's role as a guardian of the arbitral process.

Section 11(8) mandates that courts, when appointing arbitrators, must consider disclosures and other factors to secure the appointment of an independent and impartial arbitrator. This highlights the court's proactive duty to safeguard impartiality.

Section 14 addresses situations where an arbitrator becomes unable or fails to act. It provides a mechanism for removing and replacing an arbitrator, including cases where the arbitrator is ineligible under Section 12(5).

Dealing with Unilateral Appointment Clauses:

These clauses, which grant one party sole power to appoint the arbitrator, raise inherent concerns about fairness. While not outrightly prohibited, the "real likelihood of bias" test is used to determine if such clauses compromise the impartiality of the tribunal.

Application of the "Real Likelihood of Bias" Test: The Supreme Court uses the "real likelihood of bias" test to assess potential bias, examining whether a reasonable person would apprehend bias in the given circumstances and *hemo judex in causa sua* principle.

Emphasis on Party Autonomy:

While safeguarding impartiality, the Act also recognizes party autonomy as a guiding principle. The parties have significant freedom in shaping their arbitration agreement, including the appointment procedure. Thus the principles of equality and impartiality are intertwined, working together to ensure a fair and unbiased arbitral process.

73. In the above CORE II decision cited *supra*, it was emphasized that unilateral appointments of arbitrator without the respondent being a participant or in the absence of express waiver, is violative of Article 14 of the Constitution of India and is invalid.

74. The Act underscores and emphasize the importance of equality between parties and the independence and impartiality of the arbitral tribunal. These principles form the bedrock of a fair and effective arbitration process, ensuring that disputes are resolved justly, timely and inspire confidence in the system and aims at promoting ADR as a means to ensure speedy and effective redressal.

75. This court place reliance on the decision of the **Hon'ble Supreme Court in HRD Corporation Vs GAIL(India) Limited 2018 12 SCC 471** wherein it was emphasized that once a person specified, in the 7th schedule becomes ineligible to be appointed as an Arbitrator, then, he would become unable to perform his function, in view of Section 14(1)(a) of the Act and the ineligibility goes to the root of the appointment.

76. This court is being conscious of the law that in the post 2015 (as amended), there are only two modes of appointment of sole arbitrator.

(i) by express agreement in writing between the parties, post the disputes, agreeing to waive the applicability of section 12 of the Act or

(ii) by order of appointment by High Court under section 11 of the Act.

77. Thus if the appointment is made other than by the aforementioned two methods, the said appointment is ex-facie bad and is in contravention of the Act. The arbitrator become *dejure* ineligible to act as an arbitrator by operation of law.

78. The above line of discussion squarely applies to the fact of the case before this court. Here the Arbitrator is appointed by the Claimant/Decree Holder as a sole Arbitrator to adjudicate the disputes arose between the parties. The Claimant/Decree

Holder is very much interested in the outcome of Award, in its favour and this court feels that the Sole Arbitrator lacked inherent jurisdiction to adjudicate the alleged dispute. In present case, it is from the record that after the dispute there is no express agreement in writing between the parties to waive the applicability of section 12 (5). The consent envisaged for waiver is express agreement of waiver and has not been obtained in the case on hand.

79. It is also from the record, that there are no documents filed to show that the parties have waived the applicability of Section 12(5) of the Act, by an agreement in writing subsequent to the disputes having arisen between the parties. In light of the enunciated principles elicited above, the decree holder cannot nominate another to act as an Arbitrator which directly affect the independence and impartiality of the Arbitrator being appointed. Hence, the Arbitrator is ineligible to be appointed as such. As a natural corollary, the Award passed by him is void and not enforceable.

Executing court cannot go behind the decree:

80. The Award of the Arbitrator is to be enforced in accordance with the provisions of the CPC, in the same manner, as if it is a decree of court. Normally, the executing court cannot go beyond (or) behind the Award. But, when an Award is passed by a person, who is ineligible to be appointed as an Arbitrator, then the executing court can very well decide the authority of such Arbitrator to pass such an Award and its enforcement by the Civil Court. In the above referred reported cases, it is held the subject Award is null and void. With respect to the proposition that the executing court cannot go behind the decree, this court refers to the decision of the **Hon'ble Supreme Court in ONGC Ltd Vs M/s.Modern Constructions and Company 2014 1 SCC 648 and Shivshankar Gujar Vs Dilip 2014 2 SCC 465.**

81. The contention of the learned petitioner counsel that in the absence of Judgment Debtor appearing before this court and in the absence of any challenge to the validity of Award already passed, this court cannot go into the question of validity of Award *suomoto*, does not merit acceptance and hold waters. Even in the absence of Section 47 application and even in the case of JD remaining exparte in execution

proceedings, this court being an executing court must satisfy its conscience about the validity and the executability of the Award passed. It is in this light that the Section 47 of CPC, can be made applicable to the Award passed by the Arbitral Tribunals, that are lacking inherent Jurisdiction, in as much as the impugned Award cannot be accorded the privileged status of Award and it is non-executable as the Award does not exist.

82. This court also places reliance on the recent decision of the **Hon'ble Madras High Court in P. Sivaramakrishnan Vs Kotak Mahindra Prime Limited, Represented by its Authorised Signatory P. Balaji, 2023 SCC OnlineMAD 2608** wherein it was held that:

“the unilateral appointment of the Arbitrator made by the Creditor, in violation of the Proviso of Section 12(5) of the Act and when an unqualified person commences the Arbitration Proceedings, there is no requirement (or) compulsion for the borrower to participate in that Arbitration Proceedings and even if the borrower participates in such Arbitral Proceedings, he can raise the plea of validity of the appointment of unilateral Arbitrator in the subsequent proceedings. It is further held that when an authority exercises its Jurisdiction which it does not possess, then, its decision amounts to nullity in law and the decision of such authority is non-est in law and its invalidity can be set up whenever it is sought to be acted upon and the validity of the appointment of the such Arbitrator can be setup at any stage of the Arbitral Proceedings including the stage of execution of his Award.”

79. This court places heavy reliance on the celebrated decision of the **Hon'ble Apex Court in Sunder Dass Vs Ram Prakash 1977 AIR 1201** wherein it was held regarding the decrees passed by bodies lacking inherent jurisdiction in the following words:

“3. Now, the law is well settled that an executing court cannot go behind the decree nor can it question its legality or correctness. But there is one exception to this general rule and that is that where the decree sought to be executed is a nullity for lack of inherent jurisdiction in the court passing it, its invalidity can be set up in an

execution proceeding. Where there is lack of inherent jurisdiction, it goes to the root of the competence of the court to try the case and a decree which is a nullity is void and can be declared to be void by any court in which it is presented. Its nullity can be set up whenever and wherever it is sought to be enforced or relied upon and even at the stage of execution or even in collateral proceedings. The executing court can, therefore, entertain an objection that the decree is a nullity and can refuse to execute the decree. By doing so, the executing court would not incur the reproach that it is going behind the decree, because the decree being null and void, there would really be no decree at all. It is, therefore, obvious that in the present case, it was competent to the executing court to examine whether the decree for eviction was a nullity on the ground that the civil court had no inherent jurisdiction to entertain the suit in which the decree for eviction was passed. If the decree for eviction was a nullity, the executing court could declare it to be such and decline to execute it against the respondent.”

72. In the above stated **P. Sivaramakrishnan decision** cited supra, the **Hon'ble Madras High Court** has referred to the decision of the **Hon'ble Supreme Court** in **Kiran Singh Vs Chaman Paswan AIR 1954 SC 340** wherein it was held that:

" It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strike at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties."

79. In **Balvant N. Viswamitra and Ors. V. Yadav Sadashiv Mule (Dead) Through Lrs. and Ors (2004) 8 SCC 706**, the Honorable Supreme Court has held as that:

“The main question which arises for our consideration is whether the decree passed by the trial court can be said to be " Null" and " Void" . In our opinion, the law on the point is well settled. The distinction between a decree which is void and a decree which is wrong, incorrect, irregular or not in accordance with law cannot be

overlooked or ignored. Where a court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such court would be without jurisdiction, *non est* and *void ab initio*. A defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and a decree or order passed by a court or an authority having no jurisdiction is a nullity. Validity of such decree or order can be challenged at any stage, even in execution or collateral proceedings.”

83. In light and consonance to the Proviso to Section 12(5) of the 1996 Act, parties may waive the applicability of Section 12(5) by an express agreement in writing post the dispute having arisen. This condition of the agreement being expressly in writing is the statutory *sine qua non*, without which an otherwise ineligible person cannot be free from the effect of Section 12(5). Nothing less of an express agreement in writing would suffice for the waiver of the application of Section 12(5). Such a waiver precluding the application of Section 12(5) cannot be compelled from a party.

84. The validity of the Unilateral appointment of arbitrator without waiver in writing post the dispute in question is no more *res integra*. The Decree Holder / Claimant, having appointed the Arbitrator unilaterally without waiver in writing post the dispute in question is ex-facie bad and not sustainable and is in contravention to the provisions of the Arbitration and Conciliation Act post 2015 amendment, which goes to the very root of the matter in dispute, and thus the arbitrator become *de jure* ineligible to act as an arbitrator by operation of law.

85. Thus the unilateral appointment of the sole arbitrator by the petitioner, who was ineligible under Section 12(5) read with the Seventh Schedule, was void ab initio. No express agreement in writing waiving such ineligibility was executed after the dispute arose. Mere participation or procedural acts do not amount to waiver. The objection to ineligibility could be raised at any stage, including under Section 34 of The A and C Act and under Section 47 of CPC during execution.

86. The Act provides for the procedure for mode of appointment of Arbitrator and also describes the persons who are ineligible to be appointed as Arbitrator. There is

also provisions in the Act for automatic termination of mandate of Arbitrator when the Arbitrator is *de jure* ineligible to be appointed as Arbitrator. The Arbitrator appointed in the Arbitral proceedings against which this enforcement petition filed was ineligible to act as Arbitrator. The Arbitrator has lacked jurisdiction to conduct the Arbitral proceedings, and thus the Award passed by the arbitrator is without jurisdiction and is not valid and cannot be enforced.

87. Hence, a unilateral appointment of the sole arbitrator or the presiding arbitrator by a party to 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. Any award passed by the unilaterally appointed Arbitral Tribunal is 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.

88. Thus it could be deduced that appointment of arbitrator by an ineligible person is void and that objection to unilateral appointment can be raised at any stage, including under Section 34 and mere participation does not amount to waiver under the proviso to Section 12(5). The Waiver requires an express agreement in writing after the dispute has arisen, admittedly no such agreement exists in the present case. In view of decision in **Bharat Broadband Network Ltd. v. United Telecoms Ltd., TRF Ltd. v. Energo Engineering Projects Ltd., Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd. and CORE II**, it is clear that the unilateral appointment of sole arbitrator by the petitioners in all the above mentioned petitions are against the provisions of Section 12 (5) of the Act and violative of Article 14 and consequently the award passed by the sole arbitrators are non-est in the eye of law, and is nullity.

89. The sole arbitrator was ineligible as he was unilaterally appointed by the petitioner contrary to Section 12(5) and the Seventh Schedule; such appointment is *void ab initio* and the award is nullity in the eye of law.

90. Having said that, in line to the decisions of the Hon'ble Supreme Court and various High Court referred *supra*, this court comes to an irresistible conclusion that

unilateral appointment of an arbitrator by a party who has some interest in the final decision of the dispute is not permissible. Time and again the need and importance of the arbitral tribunal to be independent and neutral has been emphasized and stressed by Hon'ble Supreme Court and various Hon'ble High Courts. Thus in order to ensure arbitration as a means for an alternative dispute resolution as envisaged in Section 89 CPC, independence of the arbitration process, integrity in appointing arbitrator is to be mandatorily followed.

91. In the light of the narrative, discussion and dispositive reasoning thus far, the inevitable sequitur that follows is that the present execution petition for executing the arbitral award passed by the Learned Arbitrator of the petitioner side (based on the unilateral appointment) cannot be executed as they are *void ab initio* and *non-est* in the eye of law as the same is passed by the ineligible arbitrator. The award sought to be enforced is not a legal decree and thus cannot be enforced and is non executable. Thence, the awards which are under execution herein are nullity and therefore it cannot be executed by this Court. It is open to the parties to re-agitate the dispute before the arbitration tribunal constituted in accordance with law.

In the RESULT, the present execution petition(s) are dismissed and that the petitioner(s) shall bear their own costs.

The Order is directly typed in computer by Steno Typist, corrected and pronounced by me in this Open Court on this 30th Day of July, 2026.

Sub Judge,
Sirkali.

List of Documents:-

List of Documents the side of the Petitioners: Nil

List of Documents the side of the Respondents: Nil

Sub Judge,
Sirkali.

Fair Order.

Common Order

***EP.Nos.303,304,306,332,333,341,
346,356,360,423,459,464,
470,472,478 of 2023***

Date:30.07.2026.