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PARTY AUTONOMY OR FAIRNESS? RETHINKING UNILATERAL ARBITRATOR APPOINTMENTS

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I. Introduction

Unilateral arbitrator appointment clauses where one party alone selects the sole or the presiding arbitrator are under close scrutiny in India. Various High Courts and different benches of the Supreme Court have taken divergent stances, over the years. The Delhi High Court's recent decision in *M/s Mahavir Prasad Gupta and Sons v. Govt. of NCT of Delhi*[2]("**Mahavir Prasad Gupta**") continues this trend, placing party autonomy and, above all, impartiality at the centre. The case provides a fresh perspective at how these clauses are treated and what that means for drafting and ongoing disputes.

Against this backdrop, this article assesses the legality of such clauses and focuses on three practical questions. *Firstly*, whether a party that has taken active part in the proceedings is estopped from raising objection to a unilateral appointment. *Secondly*, what amounts to a valid waiver post-dispute under the proviso to Section 12(5) of the Arbitration and Conciliation Act, 1996 ("**Act**"). *Thirdly*, at what stage of the proceedings can such objections be raised. At last, it also briefly sets out India's approach alongside other jurisdictions to show where the legal position is heading globally.

II. Legality of Unilateral Appointment Clauses in India

In *Central Organisation for Railway Electrification v. M/s ECI SPIC SMO MCML (JV)*[3]("**CORE-II**"), the Constitutional Bench of the Supreme Court, on a reference from a three-

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[2]*Mahavir Prasad Gupta & Sons v. State (NCT of Delhi)*, 2025 SCC OnLine Del 4241
[3]*Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)*, (2025) 4 SCC 641

judge bench in *Union of India v. Tantia Constructions Limited*[4] *(2021)*, delivered a landmark ruling. The court held that such clauses raise legitimate concerns regarding the independence and neutrality of arbitral tribunals.

While clarifying questions arising from its earlier rulings in *Perkins Eastman Architects DPC v. HSCC (India) Limited*[5] ("**Perkins Eastman**") and *TRF Limited v. Energo Engineering Projects Limited*[6]("**TRF**"), the Supreme Court analysed three important provisions of the Act relevant in this regard. Section 11 pertaining to appointment of arbitrators; Section 12 providing grounds for challenge to arbitrators; and Section 18 emphasing on equal treatment of parties in order to address the question of validity of unilateral appointment clauses.

The majority judgment in this case advanced the principle of equal treatment as provided for in Section 18 of the Act which the parties need to adhere while appointing arbitrators. Appointing arbitrators unilaterally tends to tilt the scales in favour of the appointing party, thereby weakening this principle as observed by the court. The majority then went on to observe that presence of these clauses in public-private contracts entered into by government entities also infringes upon the non-arbitrariness standard enshrined under Article 14 of the Indian Constitution.

Contrary to the majority opinion, the dissenting judges (including Justice Narasimha) opined that since the Act does not expressly prohibit such appointments, all unilateral appointment clauses cannot be deemed as void. If the arbitrator's appointment is not otherwise conflicting with Section 12(5) and the Seventh Schedule of the Act, such appointment should be considered valid, regardless of it being a unilateral appointment. At last, since equal treatment principle under Section 18 conforms to arbitrator's obligations, it cannot be imposed and transgressed as a general equality principle providing parties equal opportunity to determine the tribunal.

The Supreme Court in this landmark judgment sought to balance party autonomy with arbitral impartiality. Section 12(5) and its proviso requiring express waiver act as sufficient safeguards against unilateral appointments, negating the need for a blanket prohibition. Furthermore, while the majority found the clauses contrary to equality, it left unresolved whether they are *void ab*

[4] *Union of India v. Tantia Constructions Ltd.*, (2023) 12 SCC 330
[5] *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, (2020) 20 SCC 760
[6] *TRF Ltd. v. Energo Engg. Projects Ltd.*, (2017) 8 SCC 377

initio or voidable. This question later went on to be addressed by the Delhi High Court in the cases dealt below.

In *Telecommunication Consultants India Limited v. Shivaa Trading*[7](*"***Telecommunication Consultants**"), the Delhi High Court took a stance similar to that of the Supreme Courtholding that a unilaterally appointed arbitrator passing an award can be challenged on the ground of lack of jurisdiction and invalidity of appointment. Reliance was placed on *Bharat Broadband Network Limited v. United Telecoms Limited*[8]to note that these contentions can be raised even by the party who has made such an appointment. Additionally, the court did not shy away from holding that any decision taken by such unilaterally appointed arbitrator is *void ab initio*.

The very next year, the Delhi High Court in *Mahavir Prasad Gupta* dealt with a case revolving around a dispute arising from a road strengthening contract where the Govt. of NCT of Delhi withheld Mahavir Prasad Gupta's final bill citing deficient thickness, though a Third-Party Quality Audit ("**TPQA**") by IIT Roorkee and PWD officials found the work within permissible limits. The Sole arbitrator, appointed unilaterally by the Govt. of NCT of Delhi, upheld the TPQA report and rendered the award in favour of Mahavir Prasad. But the award was later set aside by the learned District Judge under Section 34 on the ground that it violated Section 12(5) and the Seventh Schedule of the Act. This impugned order was challenged and appealed under Section 37 of the Act. The appeal raised multiple questions, one out of which pertained to whether an award by a unilaterally appointed arbitrator is per se bad and a nullity.

This court while addressing the question held that "*unilateral appointment of an arbitrator by one of the parties to the dispute is impermissible and invalid being contrary to the scheme of the Act…an award rendered by an ineligible arbitrator would be unenforceable*" and is considered to be "*against public policy of India*."

Subsequently, on the aspect of whether such arbitral proceedings, having an arbitrator appointed unilaterally, will be considered void or voidable, the court relied on its earlier decision in Telecommunication Consultants and opined that "*a unilateral appointment of the sole arbitrator*

[7]*Telecommunication Consultants India Ltd. v. Shivaa Trading*, 2024 SCC OnLine Del 2937
[8]*Bharat Broadband Network Ltd. v. United Telecoms Ltd.*, (2019) 5 SCC 755

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."

III. Waiver and the Stage for Raising Objections

In *VR Dakshin Private Limited v. SCM Silks Private Limited*[9]("**VR Dakshin Private Limited**"), VR Dakshin Private Limited argued that SCM Silks Private Limited knowingly participated in arbitration proceedings, affirmed the arbitrator's appointment through a Joint Memo, and never alleged bias or misconduct. The challenge was raised for the first time in the Section 34 petition, despite their awareness of *TRF* and *Perkins Eastman* judgments and prior consent to the appointment and its extension.

The Madras High Court while rendering a decision in favour of VR Dakshin Private Limited, and examining the conduct of the parties, observed that SCM Silks Private Limited had acknowledged executing the Joint Memo, thereby affirming arbitrator's appointment and extending his mandate under Section 29A of the Act. This made it clear that SCM Silks Private Limited did not have any objection to the appointment and by doing so, effectively waived any disqualification, allowing the arbitrator, despite the alleged ineligibility, to lawfully proceed with the arbitration proceedings.

Similar stance was taken in *Mahavir Prasad Gupta* while relying on *Kanodia Infratech Limited v. Dalmia Cement (Bharat) Limited*[10], alleging that because of the active participation in the arbitration proceedings, the Govt. of NCT of Delhi should be estopped from contesting the ground of unilateral appointment. In light of this submission, the court dealt with the following additional issues focusing on whether participation in arbitration proceedings amounts to waiver under the proviso to Section 12(5) and whether an award passed in this case is open to challenge at any stage.

The Delhi High Court while answering the questions conversely to Madras High Court's judgment in *VR Dakshin Private Limited* and affirming *Telecommunication Consultants* observed that even though proviso to Section 12(5) allows a waiver from disqualifications to act as an arbitrator, such waiver shall only be through an express agreement in writing after the dispute

[9] *VR Dakshin (P) Ltd. v. Scm Silks (P) Ltd.*, 2024 SCC OnLine Mad 6761
[10] *Kanodia Infratech Limited v. Dalmia Cement (Bharat) Limited*, 2021 SCC OnLine Del 4883

had arisen. Merely participating in the arbitration proceedings or seeking an extension of the mandate of the arbitrator does not constitute a valid waiver.

Furthermore, deemed waiver by conduct under Section 4 of the Act does not ipso facto satisfy the applicability of proviso to Section 12(5). 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.

Lastly, the court addressed the stage of the proceedings at which an objection can be raised against a unilaterally appointed arbitrator, and concluded that such an objection can be taken at any stage during or post the proceedings even by a party who has made the unilateral appointment of the sole or presiding arbitrator. In fact, such objection can also be raised at the stage of challenging an award under Section 34 of the Act or during enforcement proceedings under Section 36 of the Act.

IV. International Perspective on Unilateral Appointments

The Indian jurisprudence with respect to the legal validity of unilateral appointment clauses in arbitrations is broadly consistent with other international jurisdictions. Section 5 of the Federal Arbitration Act of United States emphasises on adherence to the appointment procedure agreed upon by the parties in the agreement.

Nonetheless, the US Courts have applied the "Doctrine of Unconscionability" under the Uniform Commercial Code to refute unfair or oppressive arbitration agreements aligning with the Supreme Court's majority opinion inCORE-IIjudgment.

Comparably, the legal position in countries like Spain, Netherlands, and Germany provide for necessary safeguards against unilateral arbitrator appointments by allowing courts to intervene when one party is placed at a disadvantage, or by requiring equal participation and treatment in the arbitrator selection process.

V. Analysis & Conclusion

As things stand, the current Indian jurisprudence disfavors unilateral appointments. The Supreme Court placed Section 12(5) and equal treatment at the centre, and the Delhi High Court went further, treating such appointments and the awards they lead to as *void ab initio*.

Only an express post-dispute written waiver can cure the ineligibility, merely taking part in the proceeding or seeking a time extension is not enough. A party has the discretion to object even at the Section 34 or Section 36 stage, including the party that made the unilateral appointment.

In practice, it is important to draft clauses that give both sides an equal say. If the parties fail to agree, a neutral institution should appoint the arbitrator. If even that fails, there should be a clear fall back to Section 11 of the Act, which allows the Supreme Court or the High court to step in and make the appointment. Otherwise, the tribunal and any award rest on weak ground. This approach aligns with the direction of Indian courts and sits well with safeguards seen in other jurisdictions. It also eliminates the risk of later challenges on eligibility or public policy grounds.