



**NIRKA**  
LAW ADVISORY

*Arbitration Newsletter*  
*December 2025*

**M/S Alchemist Hospitals Ltd. v. M/S ICT Health Technology Services India Pvt. Ltd., 2025 SCC OnLine SC 2354 – Supreme Court holds that use of the word “arbitration” is insufficient to constitute a binding arbitration agreement under Section 7 of the Arbitration Act**

**The Court clarified that a multi-tier negotiation or mediation clause cannot be treated as an arbitration clause unless it clearly reflects an unequivocal intent to submit disputes to a binding adjudicatory process.**

The dispute arose from a Software Implementation Agreement entered into between the Appellant, a healthcare institution, and the Respondent, a digital hospital-management solutions provider, for the deployment of a proprietary software system intended to enhance patient-care operations, diagnostics, and billing. After repeated implementation attempts, the Appellant alleged that the Respondent’s software continued to suffer from deficiencies including integration failures and technical malfunctioning. Following the rollback of the system, the Appellant invoked Clause 8.28 of the Agreement and requested the Respondent to participate in a dispute resolution process and concur in the appointment of an arbitrator. When the Respondent did not agree, the Appellant approached the High Court under Section 11(6)

of the Arbitration and Conciliation Act, 1996, seeking appointment of a sole arbitrator.

The High Court dismissed the Section 11 application, holding that Clause 8.28 was not a valid arbitration clause. The clause mandated negotiation between senior executives, followed by what was described as “arbitration” conducted by the Chairmen of the two companies, and then permitted the complaining party to seek remedies before civil courts. The High Court concluded that the mechanism spelled out was essentially negotiation and mediation, rather than arbitration, and lacked the intention or structure required for an enforceable arbitration agreement.

Before the Supreme Court, the Appellant argued that the repeated use of the word “arbitration” in Clause 8.28, combined with the reference to “arbitrators,” demonstrated that the parties had created a binding arbitration process. It was submitted that the clause fulfilled the requirements of Section 7 of the Arbitration Act, and that the High Court erred in treating it as merely a negotiation or mediation provision. The Respondent maintained that the clause was purely an internal dispute resolution mechanism and did not involve reference to a neutral adjudicator, any element of binding decision-making, or any intention to refer disputes to a private tribunal.

The Court began by reiterating the requirements of Section 7: a valid arbitration agreement must reflect a clear and conscious agreement to refer disputes to arbitration; the disputes must arise from a defined legal relationship; and the agreement must be in writing. While the latter two conditions were not in issue, the Court held that the first requirement i.e., intent to arbitrate, lay at the heart of the dispute.

Referring extensively to *K.K. Modi v. K.N. Modi*, *Jagdish Chander v. Ramesh Chander*, and *Mahanadi Coalfields Ltd. v. IVRCL AMR Joint Venture*, the Court emphasised that arbitration requires an agreement to submit disputes to a private tribunal whose decision will be binding. The tribunal must act judicially, follow a fair procedure, and exercise adjudicatory power deriving from party consent or statute. Conversely, where a clause merely contemplates negotiation, internal discussion, mediation, or non-binding consultation, it cannot be elevated to an arbitration clause merely because the term “arbitration” appears in it.

Applying these principles, the Court examined Clause 8.28 as a whole. The clause required the parties first to negotiate disputes through senior management. If unsuccessful, the matter would proceed to “arbitration” between the respective Chairmen of the parties. If the matter remained unresolved within fifteen days, the complaining

party was expressly permitted to seek remedies in court. The Court held that this structure lacked the essential elements of arbitration. The Chairmen were not independent adjudicators but representatives of the parties themselves, and the clause vested them with no decision-making authority. The process did not require the taking of evidence, the rendering of a reasoned decision, or any binding effect. Most importantly, the clause made court litigation the next step if “arbitration” failed, revealing that the parties did not intend the outcome of the process to be final or binding.

On this basis, the Court held that the use of the word “arbitration” was not decisive. Contract interpretation requires examining substance over form. If the clause does not exhibit a clear intention to arbitrate, the mere presence of the word “arbitration” cannot make it one. Relying on *Bangalore Electricity Supply Co. Ltd. v. E.S. Solar Power (P) Ltd.*, the Court emphasised that interpretation must focus on the meaning of the words used in the wider context of the clause and the agreement as a whole.

The Appellant argued that the Respondent’s correspondence, which did not deny the existence of an arbitration agreement, indicated a consensus to arbitrate. The Court rejected this contention, holding that subsequent correspondence cannot supply what the underlying agreement does not

contain. While post-dispute conduct may clarify ambiguous clauses where an arbitration agreement exists, it cannot create an arbitration agreement where none exists in the first place. Unlike cases such as *Powertech World Wide Ltd. v. Delvin International General Trading LLC*, the communications here did not demonstrate any agreement to submit disputes to arbitration.

The Court concluded that Clause 8.28 was fundamentally a multi-tier dispute resolution mechanism culminating in the right to litigate, and lacked the hallmarks of an arbitration clause. It did not create a binding adjudicatory forum and therefore could not sustain a Section 11(6) application. The Court affirmed the High Court's decision and dismissed the appeal, reserving liberty to the Appellant to pursue remedies before the appropriate civil court, with the possibility of invoking Section 14 of the Limitation Act where applicable.

Section 7 of the Arbitration and Conciliation Act, 1996 requires a clear and binding intention to submit disputes to arbitration. Clauses that merely outline negotiation or mediation steps, or refer loosely to "arbitration" without creating a neutral adjudicatory process or finality of decision, do not satisfy this statutory threshold. Courts consistently hold that the substance of the clause, not the terminology,

determines whether an arbitration agreement exists.

**M/S Alpro Industries v. M/S Ambience Pvt. Ltd. & Anr., 2025 SCC OnLine Del 8373 – Delhi High Court sets aside interim award on the ground that unilateral appointment of arbitrator was void ab initio under Section 12(5)**

**The Court reaffirmed that an arbitrator appointed exclusively by one party without an express written post-dispute waiver is ineligible, rendering the arbitral proceedings and any award a nullity.**

The dispute arose from a contract for the supply and installation of façade systems in a commercial tower project in Gurgaon. The Petitioner, a façade solutions provider, entered into an agreement with the First Respondent for work valued at over INR 17 crore. Over time, several amendments expanded the scope of work and modified payment terms. When disputes emerged regarding payments and performance, the Petitioner issued a notice invoking arbitration against both Respondents and requested the appointment of a sole arbitrator.

Relying on the arbitration clause, the First Respondent appointed a sole arbitrator unilaterally, and arbitral proceedings commenced. During the proceedings, the

Petitioner sought impleadment of the Second Respondent, arguing that it formed part of the same group of companies, had participated in the project through common management, and had executed amendments and made payments under the contract. The Arbitral Tribunal declined this request by an interim order, holding that no arbitration agreement existed with the Second Respondent and that its jurisdiction was limited to signatories.

Challenging this interim award under Section 34, the Petitioner raised multiple objections, chief among them being that the arbitrator's appointment was invalid under Section 12(5) read with the Seventh Schedule of the Arbitration and Conciliation Act, 1996. It argued that the appointment by the First Respondent alone constituted unilateral appointment, prohibited after the Supreme Court's decisions in *TRF Ltd. v. Energo Engineering Projects Ltd.*, (2017) 8 SCC 377, and *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, (2020) 20 SCC 760. It maintained that mere participation or correspondence could not be treated as an express waiver under the proviso to Section 12(5). Reliance was placed on *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*, (2019) 5 SCC 755, where the Supreme Court highlighted that a valid waiver requires an explicit written agreement after disputes have arisen.

The Respondents opposed the petition, arguing first that the order rejecting impleadment was not an "interim award" amenable to challenge under Section 34. According to them, such an order neither adjudicated substantive claims, nor determined rights of parties. They contended that challenges to jurisdiction under Section 16 were appealable only under Section 37, not Section 34. They also maintained that the Petitioner had waived objections to the appointment by consenting in correspondence, including a letter dated 25 October 2018, and by participating in proceedings. Finally, it was urged that the "group of companies" doctrine could not bind the Second Respondent in the absence of an arbitration agreement.

The Court's analysis opened with the pivotal issue: whether the arbitrator's appointment was void under Section 12(5). It noted that the arbitration clause empowered the First Respondent alone to appoint the sole arbitrator, clearly falling within the mischief addressed by *TRF Ltd.* and *Perkins*, both of which held unilateral appointments impermissible. The Court emphasised that Section 12(5) overrides any prior agreement and renders such appointments automatically ineligible unless the parties expressly waive the disqualification in writing after disputes arise. Reviewing the Petitioner's correspondence, the Court held that the letter relied upon by the Respondent did not amount to

an express waiver. It was conditional, premised on the arbitrator issuing notice to both Respondents, and did not reflect conscious acceptance of an ineligible arbitrator.

The Court relied extensively on the Division Bench decision in *Mahavir Prasad Gupta v. GNCTD*, which held that unilateral appointment renders the arbitral proceedings a nullity, and that such objections may be raised at any stage, including during Section 34 or enforcement proceedings. Importantly, *Mahavir Prasad* clarified that waiver cannot be inferred from participation; only an unequivocal written waiver satisfies the proviso to Section 12(5). The Court applied these principles to conclude that the arbitrator in the present case was de jure ineligible and that the proceedings stood vitiated ab initio.

Having found the appointment void, the Court held that the resulting interim award could not survive. It rejected the Respondents' argument on maintainability, reasoning that once the Tribunal lacked jurisdiction from inception, any orders passed, including those categorised as interim awards, procedural orders, or jurisdictional rulings, were rendered legally unsustainable. The Court emphasised that it could not permit continuation of proceedings before a tribunal inherently lacking jurisdiction, nor could it compel parties to pursue remedies under Section

37 when the appointment itself violated a mandatory statutory safeguard.

On the impleadment issue, the Court observed that since the arbitrator's appointment was invalid, it was unnecessary to examine whether the Second Respondent could be bound under the "group of companies" doctrine. However, it noted in passing that the Arbitral Tribunal had correctly applied the principle that non-signatories cannot be impleaded absent demonstrable intention to arbitrate, consistent with earlier decisions such as *IFFCO v. Bhadra Products*.

Concluding, the Court set aside the impugned interim award and declared the arbitrator's appointment void ab initio. It held that the proceedings before the Tribunal were a nullity and that the parties were free to initiate fresh arbitration proceedings in accordance with law, ensuring that any appointment complied with the requirements of neutrality and the statutory ineligibility provisions.

Section 12(5) of the Arbitration and Conciliation Act, 1996 renders a unilaterally appointed arbitrator ineligible unless the parties execute an *express post-dispute written waiver*. Participation in proceedings or conditional consent cannot cure this defect. Any award passed by an ineligible arbitrator is treated as a nullity, going to the root of jurisdiction, and

may be set aside under Section 34 or refused enforcement under Section 36.

**M/S Sugesan Transport Pvt. Ltd. v. M/S E.C. Bose & Company Pvt. Ltd., 2025:MHC:2699 – Madras High Court partially sets aside arbitral award for exceeding jurisdiction and awarding damages without legal foundation**

**The Court held that an arbitral tribunal cannot lift the corporate veil to fasten liability on a non-signatory, nor award unproven, unpleaded damages contrary to Sections 73 and 74 of the Contract Act.**

The dispute arose out of a Memorandum of Understanding (MoU) executed between the Petitioner and the Respondent, under which the Petitioner agreed to advance INR 2.5 crore to enable the Respondent to furnish a performance bank guarantee required for a shore-handling contract awarded by the Kolkata Port Trust (KOPT). The MoU described this payment as financial assistance that was to be returned within 30 to 89 days. As security, the Respondent executed a promissory note, issued a post-dated cheque, and pledged collateral. When the Respondent failed to repay the amount and the cheque was dishonoured, the Petitioner invoked the arbitration clause and sought repayment with interest.

The Respondent, however, adopted the position that the relationship between the parties went beyond a pure financial arrangement. It asserted that the parties had agreed to jointly execute the KOPT contract through a proposed special purpose vehicle (SPV) and share profits and losses. According to the Respondent, the Petitioner was also obligated to arrange equipment and machinery necessary for execution of the work. Its counterclaim alleged that the Petitioner failed to fulfil these obligations, leading to the KOPT terminating the contract and forfeiting the performance bank guarantee of INR 3.52 crore. On this basis, it sought damages amounting to INR 75 crore.

The arbitral tribunal held that the Petitioner was entitled to repayment of the INR 2.5 crore advanced, without interest. At the same time, it upheld the Respondent's allegation of breach and awarded INR 3.52 crore in damages, corresponding to the forfeited bank guarantee, together with 18% interest until the date of award. It also imposed 12% post-award interest. The tribunal's conclusion that the Petitioner had breached the MoU rested partly on subsequent MoUs between the Respondent and another entity, Collate Consultants Pvt. Ltd., which had purportedly undertaken to supply equipment. The tribunal treated that entity as the Petitioner's "alter ego," effectively lifting the corporate veil to hold the Petitioner accountable for its failures.

Before the High Court in a petition under Section 34, the Petitioner challenged both the tribunal's finding of breach and the award of damages, arguing that the tribunal had impermissibly expanded its jurisdiction, ignored the written terms of the MoU, and awarded damages without pleading, evidence, or legal basis. It submitted that the MoU did not obligate it to supply equipment, and that the tribunal could not treat a separate company as its alter ego.

The Court accepted the Petitioner's challenge, holding first that the arbitral tribunal had exceeded its jurisdiction in lifting the corporate veil. Referring extensively to the Delhi High Court's decision in *Sudhir Gopi v. Indira Gandhi National Open University*, the Court reiterated that arbitral tribunals derive jurisdiction strictly from Section 7 of the Arbitration Act and the arbitration agreement itself. A tribunal cannot extend proceedings to persons or entities who are not signatories, nor can it apply doctrines such as alter ego or lifting the corporate veil, which lie within the exclusive domain of courts. The tribunal's finding that Collate Consultants was effectively the Petitioner, and that the Petitioner breached the MoU by failing to supply equipment, therefore lacked jurisdictional basis.

The Court also emphasised that the MoU of 11 December 2015 did not contain any clause obligating the Petitioner to provide equipment,

and that subsequent MoUs involving Collate Consultants were separate, independent contracts to which the Petitioner was not a party. In addition, the National Company Law Appellate Tribunal, affirmed by the Supreme Court, had already determined that the MoU constituted an independent financial arrangement de hors other agreements related to the KOPT contract. The arbitral tribunal was bound by this finding and could not treat the MoU as part of the larger contractual structure.

Turning to the award of damages, the Court held that the tribunal's decision to award INR 3.52 crore, equivalent to the forfeited performance bank guarantee, was legally unsustainable. It noted that the Respondent had provided no pleadings or proof of actual loss, save a general assertion that it lost business opportunities. The tribunal itself had acknowledged the speculative nature of the counterclaim. Yet it proceeded to award damages by treating the forfeited bank guarantee as a proxy for loss. The Court held this to be contrary to Section 73 of the Contract Act, under which damages must arise naturally from the breach and be proven. Mere breach without proof of actual loss is not actionable. The tribunal's approach also violated established principles from *Hadley v. Baxendale* and their codification in Section 73, which require courts and tribunals to award only reasonable compensation grounded in evidence.

The Court further held that the MoU did not stipulate liquidated damages, making Section 74 inapplicable. Since the Respondent neither pleaded nor proved loss, the damages award amounted to a windfall and had to be set aside. The tribunal's fixation of INR 3.52 crore, despite the Respondent having initiated separate arbitration against KOPT challenging the bank guarantee's encashment, lacked judicial justification.

In conclusion, the Court held that the Petitioner could not be held liable for breach of obligations not contained in the MoU, nor could it be fastened with liability through doctrines that an arbitral tribunal has no authority to apply. It therefore modified the award, setting aside the damages and interest awarded against the Petitioner while affirming the direction requiring the Respondent to repay the ₹2.5 crore along with 12% interest from 11 December 2015 until realisation.

Under Sections 73 and 74 of the Indian Contract Act, 1872, an arbitral tribunal may award damages only when actual loss is pleaded and proven, or when a contract stipulates a genuine pre-estimate of loss. Arbitration does not permit tribunals to award compensation on equitable notions alone. A breach without demonstrable loss is not actionable, and speculative or unpleaded

damages cannot be sustained under Section 34 of the Arbitration and Conciliation Act, 1996.

**Master Drilling India Pvt. Ltd. v. Sarel Drill & Engineering Equipment India Pvt. Ltd., 2025:BHC-OS:21641 – Bombay High Court declines to interfere with arbitral tribunal's prima facie decision rejecting a challenge to the continuation of arbitral proceedings**

**The Court held that an order refusing to terminate arbitration under Section 32(2)(c) does not constitute an arbitral award and that issues of corporate capacity, board quorum, and ratification must be examined by the tribunal at the appropriate stage.**

The dispute arose out of a Business Transfer Agreement executed between the Petitioner, Master Drilling, and the Respondent, Sarel Drill, for the purchase of Sarel Drill's business and assets. Alleging that Master Drilling breached its obligations and failed to satisfy conditions precedent, the Respondent initiated arbitration seeking compensation for losses, return of equipment, and rental dues. During the arbitral proceedings, Master Drilling filed an application invoking Section 31(6) read with Section 32(2)(c) of the Arbitration and Conciliation Act, 1996, arguing that the entire arbitral process was "non est" because Sarel Drill allegedly lacked a validly

constituted Board of Directors when arbitration was invoked.

According to Master Drilling, following the resignation of one director and the subsequent death of another, Sarel Drill had only a single director. It argued that under Section 174 of the Companies Act, 2013, a Board comprising fewer than two directors cannot act for any corporate purpose except appointing additional directors. As the decision to initiate arbitration, issue the Section 21 notice, and file the Section 11 petition were all undertaken during this period, Master Drilling contended that the very initiation of arbitration was void ab initio and incapable of ratification. The Petitioner therefore sought termination of the proceedings, asserting that continuation was legally impossible.

The arbitral tribunal rejected this contention, holding that the objection raised mixed questions of fact and law requiring fuller examination during the evidentiary stage. It found no basis to terminate the proceedings at the threshold, and left all issues, including the validity of board resolutions, the status of directors, and the question of retrospective ratification, open for final adjudication. Treating this decision as an “interim award,” Master Drilling approached the High Court under Section 34 of the Arbitration Act.

The Court framed the central issue as whether the impugned order could constitute an “arbitral award” within the meaning of Section 2(1)(c), thereby attracting Section 34 jurisdiction. It reiterated that under Section 5 of the Act, judicial intervention is limited strictly to the situations provided for in Part I and that arbitral tribunals, under Section 19, are masters of their own procedure, empowered to determine the admissibility and relevance of evidence and conduct proceedings as they deem fit. The Court noted that an arbitral award, whether interim or final, must determine substantive rights or conclusively adjudicate an issue. The impugned order, however, merely declined to terminate the arbitration and expressly preserved Master Drilling’s objections for future determination.

On this basis, the Court held that the order lacked the “trappings of an award.” It did not finally decide any issue submitted to arbitration, nor did it foreclose the tribunal’s ability to examine the questions raised. The Court emphasised that Section 37 provides an appellate remedy only in limited circumstances, such as when the tribunal rules that it lacks jurisdiction under Section 16. A refusal to terminate proceedings under Section 32(2)(c) does not fall within that category. Permitting a Section 34 challenge in such circumstances would expand judicial oversight far beyond statutory limits and undermine the objective of minimising court interference.

The Court also highlighted that the objections raised by Master Drilling, relating to the validity of board actions, the absence of a quorum, and whether subsequent directors could ratify earlier steps, were complex issues requiring evidence. It distinguished between decisions foundationally void and those involving procedural irregularities, noting that the Companies Act does not stipulate that all actions undertaken without a full board are nullities. Instead, it referred to the doctrine of necessity, which allows companies to function even under irregular conditions to avoid paralysis in governance.

The Court observed that corporate incapacity, as argued by Master Drilling, had far-reaching consequences. Accepting that a company cannot act at all without a quorate board would effectively prevent it from filing tax returns, paying employees, entering contracts, or taking routine decisions. Such an interpretation, the Court noted, would defeat the very purpose of the Companies Act, which aims to ensure continuity of corporate functioning. Questions of whether a director without a valid DIN could act, or whether a board meeting was necessary to initiate arbitration, or whether subsequent ratification cured the defect, were all matters best suited for examination by the tribunal in the arbitral proceeding itself.

Reaffirming the “hands-off” principle underlying Section 5 and the autonomy granted to tribunals under Section 19, the Court concluded that the petition was misconceived. The tribunal’s decision was neither implausible nor perverse; it was a cautious and appropriate exercise of arbitral discretion, determining that the objections raised should be adjudicated at the final hearing. As such, no interference was warranted.

Section 5 of the Arbitration and Conciliation Act, 1996 establishes a strict “minimal judicial intervention” rule, ensuring that courts may not interfere with arbitral proceedings except where expressly permitted. Interlocutory or procedural orders, such as a tribunal’s decision to continue proceedings or defer jurisdictional objections, are generally non-appealable and cannot be challenged under Section 34 unless they finally determine rights. This preserves arbitral autonomy and prevents premature disruption of the arbitral process.

