

Invocation of arbitration under Section 21 of Arbitration & Conciliation Act is not consent to appointment, and that subsequent participation in proceedings does not by itself constitute the express written waiver required under the proviso to Section 12(5)

The **Bombay High Court** in the case of **D S Textiles vs IIFL Finance Limited [Arbitration Petition (L) No. 12097 of 2026]** dated **April 30, 2026**, has held that a unilateral appointment of an arbitrator remains invalid even if the appointing party seeks to route that appointment through an “institution” or similar mechanism of its own choice, unless the parties had agreed to such institutional appointment. The Court said that the defect goes to the foundational requirement of independence, impartiality, equal treatment, and neutrality in constitution of the arbitral tribunal.

The Court explained that invocation of arbitration under Section 21 of Arbitration & Conciliation Act is not consent to appointment, and that subsequent participation in proceedings does not by itself constitute the express written waiver required under the proviso to Section 12(5).

Although the Court took note of the statement by IIFL Finance Limited (Respondent) that the arbitration proceedings were being dropped, it directed that the impugned order be quashed and set aside, and further directed that the judgment be placed before the Audit Committee of the Respondent’s Board of Directors by the Chief Compliance Officer so that the governance bodies were made aware of the practice being contrary to law and could frame appropriate policies.

The Court observed that the apparent modus operandi was to conduct arbitration in this manner and hope that most affected parties would not challenge the arbitration but would instead settle, thereby leading to recoveries; and that when a counterparty did challenge the unilateral appointment, the appointing party would simply volunteer to withdraw the arbitration proceedings.

The Court made it clear that appointment through an “institution” chosen unilaterally by one party is only a “veneer” or “fig-leaf” to claim independence, and that the arbitrator would still remain a unilaterally appointed arbitrator. It observed that orders under Section 17 attaching bank accounts were often passed rapidly in such arbitrations, and that such orders commonly contained no mention of the process of appointment of the arbitrator and were often also devoid of material particulars of compliant invocation of arbitration.

The Court stated that there are only two known methods in law to appoint an arbitrator: (i) by consent of the parties, and (ii) by appointment through a Section 11 court having jurisdiction; and that no third mode can be whitewashed as compliant. The Court therefore treated the attempt by finance companies and banks to present institution-based unilateral appointments as independent appointments as wholly untenable, completely illegal, and a colourable and manipulative device to circumvent Supreme Court law.

The Court also observed that a notice under Section 21 is only an expression to set the arbitration agreement in motion and does not by itself operate as consent to any future

appointment. It clarified that participation in proceedings, filing a claim, or participating in Section 29A extension proceedings would still not amount to an express agreement in writing waiving objection to an ineligible arbitrator, and that such objection could still be raised at the Section 34 stage. The Court deprecated the practice and stated that it gives arbitration a bad name and inflicts long-term damage on alternative dispute resolution as a mechanism.

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