

CHIEF JUSTICE'S COURT
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE HRISHIKESH ROY
HON'BLE MR. JUSTICE PADMIDIGHANTAM SRI NARASIMHA
HON'BLE MR. JUSTICE J. B. PARDIWALA
HON'BLE MR. JUSTICE MANOJ MISRA

COURT NO.1
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

CA No. 9486-9487/2019

CENTRAL ORGANISATION FOR RAILWAY ELECTRIFICATION
Petitioner(s)

Versus

M/S ECI SPIC SMO MCML (JV) A JOINT VENTURE COMPANY
Respondent(s)

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CHIEF JUSTICE DY CHANDRACHUD: It's a pleasure to have all the domain experts before us.

NEERAJ KISHAN KAUL: May I please.

TUSHAR MEHTA: May I please, My Lords.

NEERAJ KISHAN KAUL: My Lords, in this, may I summarise for Your Lordships, what the short issue for Your Lordships' kind consideration is...

TUSHAR MEHTA: I am going to say that. I am going to do that.

NEERAJ KISHAN KAUL: I thought no, with Your Lordships...

TUSHAR MEHTA: I am arguing on both sides so, if I point out, both will have to respond.

NEERAJ KISHAN KAUL: My Lords, may I only say, subject to what Your Lordship says, possibly we were to start and sum up the case as it is on the issues which arise, then the SG also, because at some level the Union of India is also an interested party in the matter. It's not that they wouldn't have a stake because after all there are so many public sectors and others. If we could set out the case, I thought that would be the better course to take.

CHIEF JUSTICE DY CHANDRACHUD: The only thing that we would like to say is that you know, the hearings have to conclude by tomorrow.

NEERAJ KISHAN KAUL: Yes, yes.

CHIEF JUSTICE DY CHANDRACHUD: We are not going to go to a third day.

TUSHAR MEHTA: My Lords, I believe...

1 **CHIEF JUSTICE DY CHANDRACHUD:** So the time schedule, which have been given
2 entail that we will go into the next week, which is just not possible. Three benches have broken
3 up.

4

5 **TUSHAR MEHTA:** Yes.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** So everybody has to...

8

9 **TUSHAR MEHTA:** [INAUDIBLE] with my learned friend I have not...

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** I was just sharing with my Ld. colleagues we just
12 completed hearing in the TOLA group of matters. The income tax batch of 700 cases. What
13 happens is that more and more Counsel, it becomes repetitive and almost to suffer from
14 intellectual fatigue at the end of the matter. So it's important that you must... Otherwise
15 everybody tries to say something new.

16

17 **TUSHAR MEHTA:** I can ensure my learned friend that...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Not realising that that's something terrible.

20

21 **NEERAJ KISHAN KAUL:** No, no, I have no doubts about that of the fairness of the SG, My
22 Lords. I have no doubt about that. All that I am saying is at least the Petitioners can open and
23 set up the pace.

24

25 **TUSHAR MEHTA:** I am the Petitioner, Railways is the Petitioner and the reference is
26 around the Railways. Sir, I don't want to...

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Can you not sort this out between yourselves
29 instead of us having to...

30

31 **TUSHAR MEHTA:** I don't wish to join My Lords...

32

33 **JUSTICE HRISHIKESH ROY:** The exercise on who the Petitioner is? Wasn't it?

34

35 **TUSHAR MEHTA:** No, My Lords. There was My Lord a judgement in *Tantia*, and in
36 *Tantia*, Railway was the Petitioner. The Court dismissed the matter on the merits of that case,
37 but said that we do not agree with *CORE, CORE* judgement. And therefore, my learned

1 friend, appeared for the railways, and that is how matter was referred. That's too technical My
2 Lords for me to say that I am the petitioner.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Can we suggest this? Mr. Banerji, suppose you
5 open right now. You conclude by lunch today?

6

7 **GOURAB BANERJI:** Yes, I will do that.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Neeraj, we will give you 1 hour after lunch.

10

11 **NEERAJ KISHAN KAUL:** Very well.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** And then the others must all wrap up by between
14 3:00. and 4:00.

15

16 **NEERAJ KISHAN KAUL:** Right, right.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Alright. So this side is over. Solicitor, we give you
19 between tomorrow morning and lunch. You conclude by lunch. You had said 120 minutes. Say
20 by 12:30 if you can conclude is fine enough.

21

22 **TUSHAR MEHTA:** I won't even take that much.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Alright. Perfect.

25

26 **TUSHAR MEHTA:** He could have called me, My Lord. I would have adjusted my today, My
27 Lord. He has thrown a surprise to me My Lord that he would like to begin because the time
28 sheet...

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** ...Say in the first session say around 12:30 and it
31 is fairly stated that it might be even earlier.

32

33 **TUSHAR MEHTA:** It might be earlier, but if Your Lordship...

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** I get over much earlier and then the rest of this
36 side gets over by 04:00.

37

1 **TUSHAR MEHTA:** For Your Lordship it is too petty to argue, who argues first. Your
2 Lordship may take that call. I can't.

3

4 **GOURAB BANERJI:** May I just My Lords just indicate what is the issue, and I will My Lord
5 deal with some of the points the learned SG has also very fairly stated in his written
6 submissions. My Lord the reference arises...

7

8 **TUSHAR MEHTA:** In that case just for my understanding My Lord, my turn may not come
9 today?

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** We take it that this side will completely be done
12 today. Whoever remains...

13

14 **TUSHAR MEHTA:** I am not talking of any side My Lords, just wanted to confirm.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** So that we will request you to open the case at
17 10:30 tomorrow morning?

18

19 **TUSHAR MEHTA:** Whichever, Your Lordships are the final My Lord.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** 10:30. Whether they have finished or not 10:30
22 tomorrow morning...

23

24 **TUSHAR MEHTA:** We will. In that case like in school days we used to have sudden holiday
25 being declared and today it's declared holiday for me. My learned friend... I don't see whether
26 surprises. I found the tradition was always starting. A temperance issue arises.

27

28 **GOURAB BANERJI:** In this fashion the reference is a very narrow one. It is only to the
29 extent that there was a judgment of Your Lordships in a case called *Central Organization*
30 *for Rural Electrification versus ECI* and the ratio of that is in Your Lordships' bundle.
31 My Lord, the citation...

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Volume III?

34

35 **GOURAB BANERJI:**...(2019) 16 SCR 1234. My Lord, it is Serial Number 52.

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** At page?

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GOURAB BANERJI: 1284. Essentially, I just want to indicate how I intend to proceed. First, what is the issue.

CHIEF JUSTICE DY CHANDRACHUD: Certainly.

GOURAB BANERJI: What is the narrow issue before My Lords. Secondly, I will show Your Lordships the 246 Law Commission Report from which all these disputes began. Thirdly, there are actually only four judgments which are in play. *TRF Energo, Perkins Eastman, CORE* and *Voestalpine*, these are the four judgements. I'll place those judgements and then I'll make my submissions. The issue is this. The other side says that one of the main aspects of arbitration is party autonomy and least intervention. They say that an agreement has been concluded with a particular procedure. They say the Court should not interfere. This is broadly the submission on the basis of party autonomy. The issue is, whether a panel which is unilaterally appointed by one party, whether such a clause is valid in law, where one party unilaterally, and I'm using the language on one of these foreign judgments, unilaterally controls the pool of potential Arbitrators. Is such a clause valid under our law? Our submission will be; no doubt party autonomy is very important, no doubt there should be least court intervention, but there is a higher principle, namely, arbitration is really a substitute. It is nothing, so fancy. You need a fair, independent and impartial Tribunal. Because ultimately, the way the act operates, the challenge is limited. If you do not have a fair, independent and impartial Tribunal, then the consequences, whichever way it goes, are problematic.

CHIEF JUSTICE DY CHANDRACHUD: Now, if a clause which gives unilateral right to one party to control the appointment of an Arbitrator is invalid...

GOURAB BANERJI: Is concluded.

CHIEF JUSTICE DY CHANDRACHUD: Right. And there is a clause to that effect, then does the Court have the jurisdiction to then re-tailor the clause to say that, well, the appointment process should be so modified so as to make it equitable or consistent with the broader principles of arbitration, or does the Court has to then accept it or reject it as its stands?

GOURAB BANERJI: The answer lines straight away, in 11(8) as amended. What the Court then does is, it can deviate from the agreed procedure. In fact, *Lombardi* uses the word, ignore. It can deviate from the procedure and ensure that there is an impartial Tribunal. So,

1 in all these cases, what has happened is, instead of the Court tweaking the procedure, the Court
2 appoints an independent Arbitrator. Rather than trying to play around with the panel and
3 tweak it, our submission is, that because of 11(8) read with 12(5), and the... in fact, the language
4 used in some of the judgments is, the main purpose of 11(8) is to ensure an impartial Tribunal.
5 So, where the Court finds that the clause is My Lord, tilted, one-sided, imbalanced, then the
6 Court will step in under 11(8)...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Now, if there is no Arbitration Agreement, the
9 Court cannot foist an arbitration on a party.

10

11 **GOURAB BANERJI:** No.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Right?

14

15 **GOURAB BANERJI:** Right. Correct.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** However, much that might be in the accordance
18 with their... but the move for ADR etc.

19

20 **GOURAB BANERJI:** Correct.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** If there's no Arbitration Agreement you cannot
23 foist an arbitration. Can a party which has then framed a clause, which obviously is completely
24 biased in favour of one party, says that, look, but for this clause I would not have agreed to
25 arbitration.

26

27 **GOURAB BANERJI:** Then the principle there...

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Then that argument be heard from such a party.

30

31 **GOURAB BANERJI:** Right. My Lord, there the principle of severability will apply. There is
32 also law to that effect, to saying that you, in fact, actually did agree to arbitration, only that
33 portion of the clause which has an unbalanced Tribunal will be My Lord, blue lined out. That
34 would be our submission. So, I would submit, these are all larger questions, so far as **CORE**
35 is concerned, because that clause Your Lordships will see. That clause is so tilted...

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** And what if that party has said in the Arbitration
2 Agreement, we agree to arbitration only on the condition that I will appoint an Arbitrator.

3

4 **GOURAB BANERJI:** There is a grey area there. There are such clauses. Our Court has held
5 that despite such clauses, you can go ahead, but there is a grey area there. My Lord, I may not
6 be able to go that far. There are clauses which say, unless this procedure is followed...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** There will be no arbitration.

9

10 **GOURAB BANERJI:** ...I will not agree to arbitration. Then Your Lordships will... may have
11 to respect party autonomy to that extent. But that is not the language in 64 as we have it here.
12 So My Lord, this is the limited scope...

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** So your contention then, is that if there is an
15 Arbitration Agreement by virtue of which absolute control is given to one party over the
16 appointment process, then the Court should treat it as one: Where parties have agreed to
17 arbitration as a procedure for resolving disputes. One.

18

19 **GOURAB BANERJI:** Right.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Two: Since you have agreed to a procedure for
22 resolving disputes to arbitration, that part of the clause which confers exclusive right on one
23 party is severable.

24

25 **GOURAB BANERJI:** Is invalid and...

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Three: The Court will then act in spirit of the
28 Arbitration Agreement, then appoint an Arbitrator.

29

30 **GOURAB BANERJI:** Appoint an independent Tribunal. My Lord, two and three is later, My
31 Lord. We are still stuck at actually one, because one is being debated.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Now, should we look at the statute and then go
34 to your cases?

35

1 **GOURAB BANERJI:** Right. First, before the statute, I would request Your Lordships to see
2 few paragraphs of the Law Commission Report, then the statute. It will be in sequence,
3 because...

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Let's see the statute first, then we'll go back to
6 the law. Then we'll understand.

7

8 **GOURAB BANERJI:** Very well My Lord, seven or eight provisions of the statute. It's at page
9 101.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Of? Volume III?

12

13 **GOURAB BANERJI:** Volume II. This is the statute after the 2015 Amendment because we
14 are now only post the 2015 Amendment. The reason I am showing some sections is only to
15 establish the proposition that, there are some provisions of the Arbitration Act, which are
16 mandatory. There is no general party autonomy. Some provisions as per the commentary and
17 as per the *travaux* are mandatory. So those cannot be derogated from. That's the language of
18 the act and that's the language of the commentary. Your Lordships may first see Section 4, few
19 sections. 101, My Lords, it starts, Volume II. We first see 4, which is at page 107. My Lords, the
20 only reason I'm showing it, I'll show some commentary on this later. This is the waiver
21 provision. It has some relevance in our case. "A party who knows that any provision of this act
22 from which the parties may derogate..." So, there are provisions in the Act, from which you
23 cannot derogate. The word 'derogate' is used in two sections of Part 1, Section 4 and Section
24 34. So you cannot, so My Lord, this section and Article 4 commentary, which I will show later,
25 recognizes there are some provisions which cannot be derogated from. Then Your Lordship,
26 sees 5, which is the extension provision, just for the sake of completion.

27

28 Then please, straight away come to Section 11, which is at page 110. 11 is titled Appointment of
29 Arbitrators. This is based on Article 11 of the Model Law. And what the other side relies on My
30 Lord, is (2). "Subject to Subsection (6), the parties are free to agree on a procedure for
31 appointing Arbitrator". Your Lordships have seen that? Then (6) is where the appointment is
32 made. When an application is filed, parties to request the Supreme Court or the High Court.
33 (6)(a), Your Lordships have seen in a different context earlier in NN Global saga. But please
34 come to (8) because we rely My Lord on (8). (8) is post amendment and therefore, the Law
35 Commission report becomes relevant insofar as (8) is concerned. "The Supreme Court or as
36 the case may be the High Court or the person or institution designated by such Court before
37 appointing an Arbitrator, shall seek a disclosure in writing from the prospective Arbitrator in

1 terms of Subsection 1(12)(i) and have due regard to." This is something which is deviant from
2 the procedure. "And have due regard to qualifications required for the Arbitrator by agreement
3 of the parties and b) the contents of the disclosure and other considerations as are likely to
4 secure the appointment of an independent and impartial Arbitrator." So My Lord about 11(8)
5 and it has been judicially also held by this Hon'ble Court, by Your Lordships that you are
6 required... I would not even say My Lord, you are... it's a discussion. You are required to deviate
7 from the procedure to ensure that the Tribunal that you appoint under 11, the Court is an
8 independent and impartial Tribunal. So My Lord, 11(8) is crucial for our purposes. I will show
9 some, the Law Commission Report on that and some commentary on that. This, in my view,
10 is something which **CORE** has completely missed. 11(8) has not been noticed. Then My Lords,
11 may go to Section 12 which is at page 112. This will be elaborately argued by various others
12 here. I'm just touching on it. 12 is grounds for challenge. This has been amended drastically
13 after the 2015 amendment in view of the Law Commission Report. 12 has been substituted.
14 My Lord, various disclosures are to be made .And then important is 12(5) at page 112. This is
15 *de jure* ineligibility. "Notwithstanding any prior agreement to the contrary, any person whose
16 relationship with parties or Counsel are the subject matter of dispute falls on any of the
17 categories specified by the Seventh Schedule shall be ineligible to be appointed as an
18 Arbitrator, provide the parties may subsequent to disputes having been arisen between them,
19 weigh the applicability by express agreement in writing". So My Lord, 12(5) talks about
20 Seventh Schedule ineligibility. Your Lordships have interpreted this in number of judgements
21 with this proviso. So 12 has to be read with 11 because 11, now 8, requires a disclosure by a
22 prospective Arbitrator, which wasn't there earlier. So now when the matter comes, say before
23 Your Lordships, under Section 11 or before the High Court under Section 11, if such a panel is
24 to be operated, they will have to make a disclosure of whatever relationship they have, and
25 independent of that disclosure, Your Lordships will ensure that there is an impartial and
26 independent Tribunal. So, the moment that burden is cast upon the Court My Lord, then there
27 is a problem with these panels, which are unilateral. There's no problem My Lord with a panel
28 of an Institution or an Independent panel. So, 12(5). 13 is a challenge procedure. I'm not
29 troubling Your Lordships. 14 is failure or impossibility to act i.e. *de jure* , Your Lordships, you
30 are familiar with that. Then please now come to one other portion. In fact, I was very happy
31 that the Ld. SG had highlighted that portion in his written submissions because we were also
32 intending to rely on it. Please come now to page 115. This is something which has been hinted
33 at in some of the judgments but not spelt out. Chapter V, Sections 18 to 27. Two sections here
34 are crucial to my submission. First is 18. Conduct of Arbitral Proceeding 18. Equal treatment
35 of parties. "The parties shall be treated with equality". This is one part, "And each party shall
36 be given full opportunity to present its case". Noted in the Ld. SG's submissions as the Magna

1 Carta of arbitration. And My Lord, which we will show that this equal treatment principle
2 applies even at the stage of the composition of the Tribunal, and that we will make good.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** What was that, chapter heading says, Conduct of
5 Arbitral Proceedings?

6

7 **GOURAB BANERJI:** Right. But the commentary and particularly, Section 21, has to be read
8 with 18. 21 suggests that the commencement of the arbitral proceedings starts when the
9 request is given. Your Lordships are familiar with 21. So, the appointment of the Arbitral
10 Tribunal actually comes after that.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Absolutely.

13

14 **GOURAB BANERJI:** And the idea is simple. Whatever contractually you have agreed, you
15 have agreed. But once you are before a quasi-judicial body or a substitute for the Court, then
16 all rules of fair play have to be there. You should be before somebody who is independent and
17 impartial, and you should be treated equally. So our submission is, 18 squarely applies, and
18 we'll show that. So this is one separate portion of the act, which has really squarely not been
19 considered. It has been hinted at, in a couple of judgments, but it's not been considered, 18
20 and 21. And then, just to complete this, please now come to 34. 34 is at page 121. As Your
21 Lordships know, there are two limbs to 34. One is party and one is public policy. The two
22 portions I want to show, which are of some relevance is, 34(2)(a)(ii) and 34(2)(a)(v). "An
23 Arbitral Award may be set aside by the Court only if the party making the application,
24 establishes on the basis of the record, that the Arbitration Agreement is not valid under the
25 law in force, law to which the parties are subjected or failing an indication under the law for
26 the timing in force". So arbitration is not valid under Indian law is a ground for setting aside
27 an award. And more pertinently, 34(2)(a)(v), there are some very interesting commentary on
28 (2)(a)(v). "The composition of the Arbitral Tribunal...", which is what we are now looking at,
29 "...or the arbitral procedure was not in accordance with the agreement of the parties...", this is
30 party autonomy, "...unless such agreement was in conflict with the provision of this part from
31 which the parties cannot derogate." So, now this is the second place in the act where the word,
32 derogate, is used. So, even if you have an agreement between the parties and that agreement
33 derogates from a mandatory provision of part one, the award can be set aside. "Or failing such
34 agreement, not in accordance with this part". That's the other position where there is no
35 Arbitration Clause. And I must mention here, there is a three-judge bench judgement, which
36 is a little problematic. I'll come back to it. So these are the sections which are relevant for the

1 purposes of our limited issue of unilateral appointment of a panel. Now, before I go to the four
2 judgments, may I now just invite Your Lordships...

3

4 **JUSTICE HRISHIKESH ROY:** Mr. Banerjee, just before we leave this statutory provisions,
5 this Chapter V is Conduct of Arbitral Proceedings.

6

7 **GOURAB BANERJI:** Correct.

8

9 **JUSTICE HRISHIKESH ROY:** Now, only by virtue of what is contained in Section 21, you
10 are saying that it will also relate to, not just conduct of the proceedings, but also
11 commencement and composition of the Tribunal.

12

13 **GOURAB BANERJI:** My Lord, I will show Your Lordships, some commentary on this very
14 Article 18, which suggests that the composition is also covered by 18. The heading, no doubt,
15 seems to suggest...

16

17 **JUSTICE HRISHIKESH ROY:** Yeah. Heading is a little misleading, contrary to what you
18 are trying to say.

19

20 **GOURAB BANERJI:** Your Lordship is absolutely right. But I will show... that's why I wanted
21 to mention. I will have to establish that this provision is relevant for the composition stage.
22 And that we will establish by the relevant material.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Now, which are the non-derogable provisions of
25 the part in regard to composition?

26

27 **GOURAB BANERJI:** Right. Now, My Lord...

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** That's Section 12?

30

31 **GOURAB BANERJI:** I would say 11(8)...

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** 12(5)?

34

35 **GOURAB BANERJI:** 11(8), 12, 18 for our purposes. In fact, there was a very long debate in
36 the working group. They wanted to make a list, but they didn't make... Ultimately, they didn't

1 make a list, they said it is to be this thing. There are two judgments of our Court. One on 12(5)
2 in *HARSAC* and one on...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Keep all the judgments, because we are a
5 constitution bench. You argue as a matter of first principle.

6

7 **GOURAB BANERJI:** So My Lord, 12(5)...

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** If you look at what, which judgements fall in line
10 with what we are ultimately inclined to...

11

12 **GOURAB BANERJI:** I understand. 12(5) is mandatory.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** 12(5) is mandatory.

15

16 **GOURAB BANERJI:** 12(5) is mandatory. 18 is mandatory.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** 12(5)?

19

20 **GOURAB BANERJI:** 12(5) read with 11(8), because 11(8) refers to 12. So 12, I have read with
21 11(8) and 18, according to my submissions, are mandatory and the commentary also says so.
22 There are various other provisions which are mandatory, but it is not necessary to enumerate
23 the complete...

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** I pose to you a hypothetical. Any Arbitrator
26 cannot fall within the degrees of prohibited relationship, if we can use that expression, which
27 has been spelled out in the Seventh Schedule. Now, what if the Arbitration Agreement
28 provides, that one of the parties shall appoint. Can such a clause be made consistent with 12(5)
29 by saying that the persons whom that party appoints, should not in any way be in breach of
30 the Seventh Schedule? Will that then be a provision which will be in conflict?

31

32 **GOURAB BANERJI:** My Lord, the answer there is unilateral...

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Is unilateral appointment itself, by itself,
35 contrary to the provisions of the act?

36

37 **GOURAB BANERJI:** Yes, because....

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CHIEF JUSTICE DY CHANDRACHUD: One is that, any appointment which of an Arbitrator who is in conflict with the Seventh Schedule is absolutely a non-derogable provision of the statute. But does the Arbitration Act itself frown upon unilateral appointment *per se*?

GOURAB BANERJI: My Lord, that is how Your Lordships have interpreted it in two judgements. And...

CHIEF JUSTICE DY CHANDRACHUD: No but, forget the judgements for a moment. Where did you get that? Where did you identify the...

GOURAB BANERJI: I identified it. I identified it in this fashion, My Lord. It flows from the amendments made pursuant to the Law Commission Report which frowned on unilateral appointments. The Law Commission... therefore, I want to show that, and I want to show the amend... particularly 11(8).

CHIEF JUSTICE DY CHANDRACHUD: Now that you have formulated the, shown us these statutory provisions, what you can do is this. You now formulate your points, you formulate your submissions. Then we will go into the four judgements, the Law Commission Report. So you can just formulate your submissions now.

GOURAB BANERJI: Right. My submissions are, I am only on panel. Because there is no challenge subject to correction.

JUSTICE PS NARASIMHA: We are only on?

GOURAB BANERJI: Panel, unilateral panel. Because, I know Your Lordship has asked me the question whether unilateral appointments are eschewed generally or not. But...

CHIEF JUSTICE DY CHANDRACHUD: Suppose the Railways, for instance says, that we will have a panel of people who are not connected with us at all. We have a panel, say...

GOURAB BANERJI: Absolutely. I have to answer that.

CHIEF JUSTICE DY CHANDRACHUD: We have a panel of retired judges.

GOURAB BANERJI: We have a panel of impeccable, integrity, etc., etc.

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CHIEF JUSTICE DY CHANDRACHUD: Is that permissible under the statute?

GOURAB BANERJI: My Lord, according to us, no. And I have formulated four or five prin...
under four or five heads.

CHIEF JUSTICE DY CHANDRACHUD: All right. Now, why don't you just take the next
three or four minutes and formulate your submissions. You can... We have asked you a
question right at the beginning, but to help us, you formulate your points. If you want to read
your written submissions, you can read your written submissions, but...

GOURAB BANERJI: That we will come to. I'll just four grounds on which... four different
jurisprudential grounds on which...

CHIEF JUSTICE DY CHANDRACHUD: All right. Just formulate that.

GOURAB BANERJI: There are four jurisprudential... One is, that a panel unilaterally
appointed by one party...

CHIEF JUSTICE DY CHANDRACHUD: One second.

GOURAB BANERJI: The word, better word would be, unilaterally controlled by one party.
A panel unilaterally controlled by one party would fall foul of Section 11(8) read with Section
12, in that it would not be independent and impartial, is the first ground. 11(8) read with 12 .

CHIEF JUSTICE DY CHANDRACHUD: In that it will not be...

GOURAB BANERJI: ...an Independent and Impartial Tribunal. It may be impartial, but it
is not independent. It will not be an independent and impartial Tribunal. Which is a non-
derogable My Lord, facet of arbitration jurisprudence. It has to be independent and impartial.
Otherwise, the entire edifice collapses.

CHIEF JUSTICE DY CHANDRACHUD: But independence, Is it a quality in the Arbitrator
or is it in the process of appointment?

GOURAB BANERJI: It's in the process. I will show My Lord, there's a very nice paragraph.
I will show, My Lord. Independence is *qua* the clause. We are not on... individual Arbitrator...

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CHIEF JUSTICE DY CHANDRACHUD: Your arguments could be, really that you must avoid an appearance of bias, not just actual bias. You don't have to so far as you are saying, well, I am agreeing because this particular panel which they have appointed, is suffering from lack of Independence. But the fact that one party controls it, must specify the principle that they must be... it must generate confidence in the arbitrating parties. It must generate a sense of credibility. Instead of saying upon Your Lordships, is not just actual bias, appearance of bias, which must be appointed.

GOURAB BANERJI: My Lord, one is the bias argument. My Lord, I am on the independence argument. Because if Your Lordship sees 11(8) My Lord, one is disclosure, bias, et cetera. And... just show 11(8) again.

CHIEF JUSTICE DY CHANDRACHUD: It will not be an independent one,

GOURAB BANERJI: Yes. This is an important question, because, let me do not put it very bluntly.

CHIEF JUSTICE DY CHANDRACHUD: And one more sentence you can add by in your first proposition, that a panel which is exclusive... a panel which is exclusively controlled by one party, according to you, suffers from a lack of independence.

GOURAB BANERJI: This is Proposition One.

JUSTICE P.S. NARASIMHA: For that, we'll have to draw in some 18. This is one of 11(18).

GOURAB BANERJI: 18 is separate. 18 is one more. This is 11 read with...

JUSTICE P.S. NARASIMHA: 18 is limited in its scope.

GOURAB BANERJI: 18. 18 is My Lords... Secondly, any clause which does not... Your Lordship has... exactly the same question Justice Roy put to me, limited in its scope. I will satisfy Your Lordships on that separately. The second limb, My Lord. It's a second ground on which I put... there are various grounds. Four grounds, we have formulated.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Independence may be also looked at from the
2 perception. Because now, we're not talking about a lack of independence to challenge an
3 award.

4

5 **GOURAB BANERJI:** Correct.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Right? Just as when you challenge judgement of
8 a Court on the ground that the judge lacked Independence, the threshold is very high. The
9 Judge had an interest in the subject matter, or was connected to the parties to the disputes, so
10 on and so forth. But independence at this stage of composition is a matter of perception,
11 because we are entering into a judicial proceeding, which is... arbitration is a substitute for a
12 judicial proceeding. So, when parties are entering upon arbitration, it is their perception of an
13 independent Adjudicator or lack of independence, which is crucial because you must create
14 conditions which foster a sense of confidence in the process.

15

16 **GOURAB BANERJI:** In fact, three phrases have been...

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Whether, in fact, that person was eventually
19 independent or otherwise begs the question...

20

21 **GOURAB BANERJI:** In these cases, in all the four cases before Your Lordships, are railways
22 and railways connected cases. From time immemorial they have something called Clause 64.
23 The problem here is, My Lord...

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** So independence at the stage of composition is
26 not an objective test of whether someone would or would not be biased. But, the perception of
27 a party who is affected, that perception might be that of an independent Adjudicator.

28

29 **GOURAB BANERJI:** Correct. Absolutely. I am obliged. In fact, three phrases are used in
30 judgments. Major objective, paramount consideration and important consideration. A
31 paramount consideration is Independence. This is of confidence so far as our Arbitrators are
32 concerned. If you have such a panel, the result both ways is bad. If the panel appointed by one
33 set of... one party decides in the favour of that party, the other party always has that lingering
34 doubt that, Mr. Banerji was appointed on the railway's panel, so therefore, he has a
35 predisposition.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** No, but the other Advocate... look at from the
2 side of the public sector.

3

4 **GOURAB BANERJI:** The other problem...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Look at this from the view of both sides.

7

8 **GOURAB BANERJI:** No difficulty, My Lord.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Public sector organization always has this fear,
11 that look... I mean, look at what's happening in the arbitration world. We will be taken to an
12 amount, we will have 20,000 crore award for this.

13

14 **GOURAB BANERJI:** Now you see this one-sided panel story. Now the one-sided panel...
15 Mr. Banerji now gives an award in favour of the Contractor. Now, immediately all sorts of
16 issues arise there, may be genuine. So, the solution is not a one-sided panel. The solution is
17 staring in the face. The solution is an independent panel by an independent institution. That
18 is why we are crying hoarse that we should have institutional arbitration. The problem is not
19 the individuals in the panel. The problem is who makes the panel. Today My Lords, both ways,
20 you lose.

21

22 **JUSTICE P.S. NARASIMHA:** [INAUDIBLE] saying that we need independence and full
23 stop. The problem is arising, what is the criteria, what are those principles on the basis of
24 which we are going to determine that there is lacking of independence here. Everybody agrees
25 that they have independence.

26

27 **GOURAB BANERJI:** The very fact... let me put it this way. The very fact that one party is
28 appointing somebody, is unfortunately enough, because what was arbitration. Arbitration was
29 where both parties had confidence in the individual. Here, you are basically putting up a list
30 and asking one. So, there will never be any confidence in that list of the other party. One of the
31 articles said, 'unloved and unappreciated panel'. One Party puts up a panel. Please keep the
32 distinction between the process of appointment and the eligibility of individual Arbitrators.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** So your first point I have formulated. A panel
35 unilaterally controlled by one party would fall foul of Section 11(8) read with Section 12. In
36 that, it will not be an independent panel. A panel appointed by one party will lack a degree of
37 independence.

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GOURAB BANERJI: Correct.

CHIEF JUSTICE DY CHANDRACHUD: That's the first point. What's the second point?

GOURAB BANERJI: Even if impartial. I assume for a moment, impartiality, etc., will come in when you have employees, retired employees... I'm going one step further, assuming you have absolutely respectable people.

JUSTICE PS NARASIMHA: What's the second proposition?

CHIEF JUSTICE DY CHANDRACHUD: What is the next proposition?

GOURAB BANERJI: My Lord, the next is, it will also fall foul...

CHIEF JUSTICE DY CHANDRACHUD: What will fall foul? Unilateral appointment?

GOURAB BANERJI: Yes. Also fall foul of the principle, the *magna carta* of equality between the parties. I'll satisfy Your Lordships of this.

CHIEF JUSTICE DY CHANDRACHUD: You are saying, unilateral composition of a panel...

GOURAB BANERJI: Composition, yes.

JUSTICE PS NARASIMHA: It also violates 18?

GOURAB BANERJI: 18, violates 18.

JUSTICE PS NARASIMHA: Level playing field.

GOURAB BANERJI: Sorry, My Lord?

JUSTICE PS NARASIMHA: Level playing field.

1 **GOURAB BANERJI:** Level playing field. This is the logic used by Justice Sikri also, level
2 playing field. Justice Banumathi also, same, level playing field. So the sentence is there, the
3 section is not there.

4

5 **JUSTICE PS NARASIMHA:** So, you want to extend it into even appointment process?

6

7 **GOURAB BANERJI:** My Lord, I will show that there is material to show that it actually
8 covers the appointment, the composition process. It's not just my submission...

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** What is the next point?

11

12 **GOURAB BANERJI:** Third point, which is, I would say, 3(a) and 3(b) is that such a clause,
13 particularly in respect of PSUs falls foul of 14 and unconscionability. A large number of
14 judgments, some of which the Ld. SG has also referred to, is this sort of arrangement is
15 unconscionable, contrary to Section 23. There are series of 10 US judgments. I will show only
16 one. There's a chart the SG has given, I will show one. These are broadly the reasons for which
17 this sort of panel should not be permitted to subsist. The band-aid solution is, and this is what
18 the High Courts are struggling with, a panel, as in CORE may be bad because it's very
19 restrictive but if it is sufficiently broad based, it may be okay.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** You are not giving the degrees at all. You are just
22 saying that, look, I'll sit out. I have won.

23

24 **GOURAB BANERJI:** The problem is that today there are a series of judgements. Every time
25 an 11 is filed, how many people are there? What are their qualification? Is 31 enough? Is 37
26 enough? What about 100? There is a Sarod panel. So, this is a solution, one which came out of
27 *Voestalpine* and it in my respectful submission, the band-aid solution. Because even if there
28 are a 100 people, and even if they are impeccable, there is always... I'm appointed to a panel
29 by the railways. In the back of my mind if I possibly decide in their favour, maybe I'll get
30 another appointment. Maybe, that may be a perception. I may be, in my mind, absolutely
31 independent. We've had instances where people have been removed from panels...

32

33 **JUSTICE NARSIMHA:** Independent and Impartiality is not in the degree.

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35 **GOURAB BANERJI:** It's not in the degree.

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37 **JUSTICE NARSIMHA:** It is in its absoluteness.

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GOURAB BANERJI: And what you facially see. What do you see.

JUSTICE P.S. NARASIMHA: Is that your 3(a) point? What is your 3(a)?

GOURAB BANERJI: 3(a) and 3(b) are unconscionability and Article 14. My Lord, legally, I am putting...

CHIEF JUSTICE DY CHANDRACHUD: To take what brother Narasimha just said that independence and impartiality...

GOURAB BANERJI: ...is not a matter of degree, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: But of?

GOURAB BANERJI: My Lord, it has to be facially judged.

CHIEF JUSTICE DY CHANDRACHUD: But is an absolute... it is absolute.

GOURAB BANERJI: It is absolute.

CHIEF JUSTICE DY CHANDRACHUD: So therefore, even if, theoretically, the party, which has a unilateral control proceeds to prepare a panel, which is otherwise absolutely, objectively independent, the objection is not on whether those people who are put in the panel are otherwise eligible or ineligible, it's the appearance of the process.

GOURAB BANERJI: It is the process. It is the source. If you cannot... it also flows from the other principle, if you cannot unilaterally appoint somebody, can you then have a panel of a 100 from which I have to choose? The source is the problem. The problem is not the panel. The problem is the process. The problem is the person who presents you with the *fait accompli*.

CHIEF JUSTICE DY CHANDRACHUD: All right. We've seen now all the provisions. The submissions are complete now. Anything else?

1 **GOURAB BANERJI:** Now I'll show the material... the material. My Lord, Your Lordships
2 may first see the Law Commission Report. Your Lordships have not seen those four
3 judgements. Am I required to show the...?
4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Let's first see the Law Commission, the material.
6 And then we will quickly look at the judgements. Because, the judgements are at the end.
7

8 **GOURAB BANERJI:** The judgements are at the end. Right. Your Lordships don't want to
9 be coloured by the two or three documents?
10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Exactly. They are a force of persuasive authority,
12 judgments of our experts, we will look at them in the end.
13

14 **GOURAB BANERJI:** My Lord, may first see the Law Commission Report because there are
15 some paragraphs of that are very, very important. This is serial... Volume IV, page 2722. Serial
16 Number, Tab Number 8.
17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Compilation of documents, right?
19

20 **JUSTICE P.S. NARASIMHA:** 4(a) or 4?
21

22 **GOURAB BANERJI:** 4.
23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Page?
25

26 **GOURAB BANERJI:** 2722, Stamp Number 8. But the only relevant paragraphs are from
27 page 2756.
28

29 **CHIEF JUSTICE DY CHANDRACHUD:** You must complement the juniors who've
30 prepared the compilation. A very well prepared. Otherwise, I tell you what we have is
31 compilation of judgment by Mr. Gourab Banerji, compilation of judgements by Mr. Niraj Kaul,
32 compilation by Mr. Shashank... whoever. So, it's such a headache because when you start
33 dictating a judgement, you have, like, ten compilations. The idea is to have one compilation
34 which everybody puts their cases together. The system is working well, yeah. Actually, I think...
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36 **GOURAB BANERJI:** My Lords, we will come to page 2756. Seven paragraphs are relevant,
37 I am just reading a few of those.

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JUSTICE HRISHIKESH ROY: 246 Report.

GOURAB BANERJI: 246 Report. Justice A.P Shah's Report. It starts at para 53. "It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with the principles of natural justice in the context of arbitration, neutrality of Arbitrators, viz. the independence impartiality is critical to the entire process". Then 54. The test for the 12(3) is being set out. 55 is, what was the previous position. Then 56. "The limits of this provision has been tested in the Indian Supreme Court in the context of contract with state entities naming particular person's designations associated with that entity as a potential Arbitrator". "Appears to be settled by a series of decisions of the Supreme Court." Then Your Lordships leaves all the decisions. "That Arbitration Agreements and government contracts will provide for arbitration by a serving employee of the department, valid and enforceable. While the Supreme Court in *IOC v Raja Transport* carve out, a minor exception when the Arbitrator was the controlling or the dealing authority, and this exception was used by Supreme Court and so and so, to appoint an Independent Arbitrator under Section 11, this is not enough. The balance between procedural fairness and binding nature of these contracts appears to have tilted in favour of the latter by the Supreme Court, and the commission believes that the present position of law is far from satisfactory since the principles of impartiality and independence cannot be discarded at any stage of this proceeding, specifically at the stage of the constitution of the Arbitral Tribunal in congruence to say that party autonomy can be exercised in complete disregard of these principles, even if the same has been agreed to, prior to the dispute, having arisen between the parties. There are certain minimum levels of independence and impartiality that would be required of the arbitral process, regardless of the parties' apparent agreement. Sensible law cannot, for instance, permit appointment of an Arbitrator who is himself a party to dispute or is employed by or similarly dependent on one party, even if that is what the parties agreed". This is the logic of the Law Commission. "Commission hastens to add, Mr. P.K. Malhotra, ex officio member of the Law Commission suggested having exceptions for the state, allow state parties to appoint the employee Arbitrators. Commission is of the opinion on this issue cannot be any distinction between state and non-state, concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent Adjudicators for resolution of disputes. In fact, when the party appoints Adjudicators for state, duty to appoint partial and independent, much more onerous. Right to natural justice cannot be said to have been waived only on the basis of prior agreement between the parties, at the time of the contract, before arising. Large scale amendments have being suggested, fundamentally shown neutrality. Commission believes it is critical, in particular, Amendments 11, 12 and 14." Your

1 Lordships have seen those amendments. Then, My Lords, 59. "Commission has proposed
2 requirement to have a specific disclosed Arbitrator state as the possible appointment
3 regarding existence of relation or interest of any kind likely to give rise to justifiable doubts".
4

5 Then they talk about the Fourth Schedule. Sorry, the IBA Guidelines. I'm not reading all that.
6 Then please come to 60. So, 59 distinguishes between *de jure*, eligibility, ineligibility and the
7 Seventh Schedule. Then, 60 is the exception. And this exception now, according to railways,
8 they have a clause where there's a format, where you sign on a 12(5) Agreement. So that is now
9 presented to you initially before you for you to waive, and many Contractors then waive it. But
10 that was not the purpose of this exemption. "The Commission however feels it's real and
11 genuine party autonomy must be respected. Certain situation, party should be allowed to
12 waive even the categories, eligibility as set in the proposed Fifth Schedule. This could be in
13 situations of family Arbitrators or other arbitrations where a person commands the blind faith
14 and trust of the parties." I don't think anybody can raise to this level, "Despite the existence of
15 objective, justifiable doubts, deal with such situation, Commission proposes a proviso to 12(5).
16 Parties may subsequent to disputes having arisen between them, waive the applicability. The
17 general rule has to be followed. If the High Court is approached in connection with an
18 appointment of the Arbitrator, Commission has proposed seeking disclosure, so and so, at
19 which context or the desi... is to have due regard of the content of such disclosure." So this is
20 the relevant portion of the Law Commission Report. Would Your Lordships look at the four
21 judgements now or should I put the material? Whichever way, My Lord.
22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Let's see the material, so we are done with that.
24

25 **GOURAB BANERJI:** So, I'm skipping those four judgments. I just want to mention that we
26 rely on certain paragraphs in Your Lordship's judgment in *Lombardi*. And in particular, we
27 rely...
28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Why don't you cite those judgements then? And
30 then we'll look at the material at the end.
31

32 **GOURAB BANERJI:** Right. There are four judgments which are in play, and *Lombardi* is
33 the basis on which we have made our submissions. The four judgments in play are, the first...
34 I'm not going in chronological sequence. There is *TRF and Perkins*, which are in respect of
35 appointment of sole Arbitrator. That's one category. Then there are two judgments. There is
36 *CORE* and a judgment called *Voestalpine*, which is the *DMRC judgment*, which is in the
37 context of panel. So, My Lords, I will first show, I will not even, in the interest of time, I will

1 not show *TRF*. I will show *Perkins* which then also reflects *TRF*. So I will show *Perkins*
2 and then will show *CORE* and then *Voestalpine*, which is some sort of halfway house. I want
3 to show these three in that order and then I'll make my submissions. First, if Your Lordship
4 sees *Perkin. Perkins Eastman vs HSCC, 2019, 17 SCR, 275*, Tab 51 of Volume III, page
5 1254. This is the judgement Your Lordships have been consistently following and I believe also
6 in Glock, etc., this Court has followed this...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Which Volume?

9

10 **GOURAB BANERJI:** Volume III, page 1254, Tab 51. The judgment dated 26-11-19, following
11 *TRF*. This was an 11(6). In fact, all the four matters before Your Lordships are at the 11(6)
12 stage. In this judgment, one issue was whether it was an international commercial arbitration.
13 That issue does not arise here. Please come straight away to paragraph 11, where the second
14 issue arises. Before that, if Your Lordship wants to... This is paragraph 11, where the second
15 issue arises, page 1268 and the clause is basically at 1269 D. Your Lordship sees that? "Unless
16 others as per any dispute between parties, according to the rule, shall be referred arbitration
17 of MD or buyer or his nominee, when you shall be in Delhi." So, this was the clause.

18

19 Paragraph 14, *TRF Energo* is quoted. 15 to 20 is relevant for our purposes. 15 starts at the
20 bottom of page 1272. "It was thus, held that the MD became eligible by operation of law to act
21 as an Arbitrator. He could not nominate another person to act as Arbitrator, once the identity
22 of MD was lost, power to nominate somebody else in Arbitrator also lost. Relevant clause, in
23 case had nominated the Managing Director himself to be the Arbitrator. Also impart the MD
24 to nominate another person to act as Arbitrator. MD thus, has two capacities. First as
25 Arbitrator. Second as an appointing authority. Present case we are considered with only one
26 capacity" Then My Lord, "We thus have two categories of cases. First similar to one dealt with
27 *TRF*. Managing Director himself is named as an Arbitrator, additional power to appoint any
28 other person." This... the finding... I'll just read this. "Appoint any other person who is choice
29 or discussion is Arbitrator. If in the first category of cases, MD was found incompetent because
30 of the interest, he could be said to are having in the outcome, result of the dispute, element of
31 invalidity directly relatable arisen from interest. He would be having an outcome of the
32 decision, that be the test. Similar invalidity would also arise and spring even the second
33 category. Interest here is in the outcome, likely to be taken, the possible bias, always be
34 present, irrespective where the matter. We are conscious that if such deduction is drawn on
35 decision, so on so, all cases having clauses similar to that which we are presently concerned,
36 party to the agreement would be disentitled to make any appointment of Arbitrator on its own.
37 Always be available to argue party, official, having disentitled. But in our view, that has to be

1 the logical deduction from *TRF Ltd*. Para 50 of the decision shows that this Court was
2 concerned with the issue, whether the MD, after becoming ineligible by operation of law, still
3 eligible to nominate an Arbitrator. Ineligibility referred therein, was a result of operation law.
4 Person having an interest in dispute, outcome or decision therein, must not only be ineligible
5 to act as an Arbitrator, not be eligible to appoint anyone else as an Arbitrator, such person
6 cannot and should not have any role in charting out any course to the dispute resolution by
7 having the power to appoint an Arbitrator." My Lord, we rely on this portion. The next
8 sentence in the paragraph further shows that in cases, "where both parties could nominate
9 their respective Arbitrators of their choice...", this is the critical portion My Lord, "...of their
10 choice, were found to be completely different situation. The reason is clear that whatever
11 advantage a party may derive by nominating an Arbitrator of its choice, would get counter-
12 balanced by equal power with the other party." This is the section My Lord, this is, this
13 language is essentially My Lord, 18 language. Because, this is arbitrator... This is a classic case.
14 I appoint one Arbitrator, the other side appoint another. "But in a case where only one party
15 has a right to appoint a sole Arbitrator, its choice...", so, My Lord, Your Lordship, will apply
16 this logic to the panel, "...will always have an element of exclusivity in determining or charting
17 the course for dispute resolution. Naturally, the person who has an interest in the outcome of
18 decision must not have the power to appoint the sole Arbitrator. That is being taken in the
19 essence of the amendments brought in *TRF*. Then My Lord, 17... so this is, the critical
20 paragraph is 16. 17 My Lord, *Raja Transport* is mentioned. This is a pre-amendment case.
21 The relevant portion of 17, Your Lordships, will come to para... page 1276.

22

23 **JUSTICE HRISHIKESH ROY:** So, Mr. Banerji, the proposition is that your choice to make
24 or nominate an Arbitrator cannot be limited to the offerings laid out by one party?

25

26 **GOURAB BANERJI:** That's our case.

27

28 **JUSTICE HRISHIKESH ROY:** So, in a situation like this, it is not a choice that is being
29 exercised. But you are confined to the offerings that is given by the other side.

30

31 **GOURAB BANERJI:** Correct. It's a poisoned well. It's a limited, My Lord...

32

33 **JUSTICE HRISHIKESH ROY:** But it's again a matter of perception. Somebody from
34 amongst the panel can also render an award against the authority, which has made the...

35

36 **GOURAB BANERJI:** In fact, that is exactly what happened. The panel in the *DMRC* case
37 was of three engineers nominated from the railway panel, the same clause Your Lordships,

1 delt in **DAMEPL** is the same clause where three are nominated. One, I pick from theirs,
2 second, they pick from theirs, third, they pick from theirs. Three members may go that way.
3 My Lord, there are all sorts of problems with that also. Therefore My Lord, this limited choice
4 is where the... I should have my liberty, they should have their liberty. Alternatively, neither
5 should have liberty. We go to somebody independent, and that either it is an institution which
6 is independent and appoints in which you believe which has credibility, or the Court to appoint
7 somebody independent. Then I don't have a problem, they don't have a problem. Neither of us
8 has a problem, even if the award goes against me. The Tribunal My Lord, it's a matter of faith.
9 Every case we come across, you scratch at the surface, the main problem is...

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Banerji, the only point is this, just reflect on
12 it. I don't know whether that consideration is at all relevant. Is there a risk of filling the golden
13 Goose in the sense that, where the Government says we are not going to go to the arbitration
14 at all?

15

16 **GOURAB BANERJI:** My Lord, they have themselves set up institutions. It's not that there
17 are no institutions available to them. My Lord, they have themselves set up institutions. Surely,
18 somebody has to be believed. There has to be some... Either you believe the Courts, or you
19 believe your own institution. It can't be... I follow, My Lord. That is exactly...

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** This judgement is over?

22

23 **GOURAB BANERJI:** Yes. My Lord, just one last paragraph, just above 18. This judgement
24 is also very helpful because it quotes some portions of **Voestalpine**. So I just place it from
25 here. My Lord, please come to para 18. I just want to read 18 for 1 second. Subparagraph... this
26 is the in fact, even the old law... 8 of the aforesaid paragraph 48 lays down. Just, please just
27 read that, just above. "If circumstances exist giving rise to justifiable doubts as to
28 independence, impartiality of to a person nominated, or, if other circumstances warrant
29 appointment of an independent Arbitrator, by ignoring the procedure prescribed, Chief
30 Justice may ignore the designated Arbitrator appointed." So each circumstances warrant
31 appointment of an independent Arbitrator, even prior to the amendment. And that is what
32 Your Lordships have said in para 66 of **Lombardi**. You, for the purpose of appointing an
33 independent Arbitrator, you have the power, indeed, the duty under 11(8) to do it. And that is
34 what was missed in **CORE**. You... if somebody has approached a Court, Court can't say this is
35 the procedure. I am a post office. This is exactly what I have to do, you please do this. So, 11(8),
36 this paragraph is relevant. Then various quotations are there. Then 19 is **Voestalpine**. These
37 are very hard-hitting paragraphs 20,21, 22 and 30, which has been set out in **Voestalpine**.

1 So, the **DMRC** case. "Independence, impartiality are hallmarks of any arbitration
2 proceedings. Rule against bias, one of the fundamental principles of natural justice applied to
3 all judicial, non- judicial. So, this relation, notwithstanding, fact relationship is contractual.
4 Source of Arbitrator is deduced from the agreement. Notwithstanding the same, non-
5 independence and non-impartiality, such Arbitrator would, though commercially, would
6 render him ineligible. Genesis beyond rationale. Even when the Arbitrator is appointed by the
7 terms of contract by the parties of the contract, is independent of the party, functions and
8 duties require him to rise above parties and interests of the parties". So this is My Lord, one
9 portion where **Jivraj and Hashwani** is quoted. And similarly My Lord, the French Court
10 has quoted. Then 22. "Independence and impartiality, two different concepts. Arbitrator may
11 be independent, yet lack impartiality. Impartiality is more subjective, independence more
12 objective concepts, straightforwardly ascertained by the parties at the outset in the light of the
13 circumstances made by the Arbitrator, while partiality will more likely surface during the
14 arbitration process." Then 30. "Time has come to send positive signals to the international
15 business community in order to create a healthy arbitration. Furthermore, as enlightened by
16 the Law Commission, duty becomes more onerous than government contracts. One of the
17 parties are Public Sector Undertaking itself. In the incident case also, choice is given by
18 **DMRC**, limited to choose an Arbitrator from panel, becomes imperative." This is the broad-
19 based panel argument. I'll come to that later. In the light of report of so and so, imperative of
20 creating healthy arbitration... then that's all that is relevant in this judgement. The rest is on
21 maintainability etc..

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Banerji, can we just take 2 or 3 minutes
24 break? Just suffered from a lower back twist last week. Just two or three minutes, I just want
25 to take a little break and come back, that's all. Just walk a little bit in the passage and come
26 back. Just two or three minutes.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

29

30 **GOURAB BANERJI:** My Lord, I had a little re-think. I'll show the **CORE** judgement and
31 the **Voestalpine** judgement later. But, let me first show the material, because those
32 judgements in any case Your Lordships, will have to consider. But let me My Lords, since I am
33 showing the material, let me show the material as to what is on record. My Lord, the first
34 proposition is, that the party autonomy is not unfettered. There are some mandatory
35 provisions, and My Lord, for which purpose Your Lordships, are permitted to... My Lord, I
36 wouldn't say required, to look at the preparatory material which is the basis of the article,
37 which is then the basis of the section. My Lord, in fact, very interestingly, when the UN General

1 Assembly recommended the model law to us, to all the countries, it asked the secretariat to
2 send the *travaux préparatoires* along with it. That resolution My Lord, is one page, it's on
3 record. Your Lordship may just see. Which is why My Lord, we are relying on the *travaux*, that
4 is Volume III, Serial Number 162, page 5015. It makes very interesting reading. This is the
5 General Assembly resolution by which model law was recommended, 5015... sorry, Volume
6 IV.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Volume IV?

9

10 **GOURAB BANERJI:** IV.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Model on International Commercial Arbitration
13 at UNCITRAL?

14

15 **GOURAB BANERJI:** Volume III, Madam.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Volume III. We've got it. Volume III, 5015.

18

19 **GOURAB BANERJI:** This is the General Assembly resolution. I'm not going to read the
20 whole thing. But please see, after being recognizing, convinced, noting, convince, requests the
21 Secretary General to transmit the text on the model law, together with the *travaux* and
22 recommends that...

23

24 **JUSTICE PS NARASIMHA:** Where are you actually?

25

26 **GOURAB BANERJI:** My Lord, this is the resolution column, left column.

27

28 **JUSTICE P.S. NARASIMHA:** What is the page again, Mr Banerji?

29

30 **GOURAB BANERJI:** Page is 5015.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Left column?

33

34 **JUSTICE P.S. NARASIMHA:** Under the General Assembly?

35

36 **GOURAB BANERJI:** Yes, General Assembly. 40th session, 40/72 model...

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Transmit the text to the model law.

2

3 **GOURAB BANERJI:** Along with the *travaux* and recommends that all states give due
4 consideration. So, they actually My Lord, not only sent the text, but they also send the *travaux*.
5 That's the only reason I'm... but, it gives you the basis as why it is to be referred to. So, the first
6 proposition is that there are certain rights which are not waivable, and I had shown Your
7 Lordship, Section 4 and Section 34, which uses the word 'derogate'. And the commentary on
8 that My Lord, is at Volume IV. I am only going to show two or three pages, not more, just to
9 fit it in. Volume IV, Serial 145, page 10149 at 10150. This is at 10150... 10149 is the cover of...
10 My Lord, what has happened is the material is spread over large portions of the website. There
11 is a textbook My Lords, which is this Holzman and Noyhouse, which actually chapter wise,
12 analyses each article. My Lord, 10150 is same as Section 4. Please see the third paragraph.
13 Third paragraph, second sentence. "Secretariats commentary on Article 4, makes it clear that
14 in case of requirement of the Arbitration Agreement, that stipulation must be valid, and in
15 particular not in conflict with..."

16

17 **JUSTICE PS NARASIMHA:** We are at 10150.

18

19 **GOURAB BANERJI:** 10150, commentary. Please see the Item 1. Non- compliance with
20 Arbitration Agreement or non-mandatory provision...

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Compliance with arbitration. Yes.

23

24 **GOURAB BANERJI:** "Procedural defaulted issue must be a breach of stipulation in the
25 Arbitration Agreement or a non-mandatory requirement. Secretariat's commentary on Article
26 4 makes it clear that, in case of a requirement of the Arbitration Agreement, stipulation must
27 be valid, and in particular, not in conflict to the mandatory provision." And the foot note gives
28 the Secretariat and that's also on record. So this shows that there is a mandatory provision.
29 Then My Lord, please come to 10151, bottom of the page. Second sentence.

30

31 **JUSTICE P.S. NARASIMHA:** 015?

32

33 **GOURAB BANERJI:** Next page. 10151. Last, bottom My Lord. "A waiver under Article 4,
34 however, applies only to the non-mandatory provisions of law, that is, those provisions upon
35 which the parties may agree to the contrary. This qualification, not part of the initial draft of
36 provision specifically included to soften its effect. Proposed at one point, to provide a list in
37 the law of such mandatory provisions, working group decided not to include such a list because

1 of the view unnecessary, subject to certain drafting provisions. Nevertheless, number of
2 provisions clearly indicate that non-mandatory character, either by providing explicit freedom
3 or providing a rule of procedure, but stipulating parties may be agree otherwise. Examples of
4 provisions appear to be mandatory and therefore, cannot be waived under Article 4 are the
5 following. Requirement the Arbitration Agreement is in writing." I rely on the next one. "The
6 requirement that the parties be treated with equality. Each party be give them full opportunity
7 in presenting." So Article 18 is not... is mandatory, My Lord. There's a judgment of our Court
8 in *Vedanta* which also says that it is mandatory. It is... 18 cannot be derogated from. That's
9 the only reason I'm showing this. Then My Lord, this is the commentary on Article 4. Your
10 Lordships may now see the commentary on Article 34. That's the other place where the word
11 'derogate' is used. The commentary on Article 34 is at page 10054. Serial number 144. Little
12 behind. 10054. This is Tab 144. That's the bookmark. And just one paragraph, I'll show at
13 10061. This is a little important because My Lords, there is a three-judge judgment which
14 seems to suggest a little differently, but I'll just read it. The second significant change was
15 made to subparagraph 2(a)(4) of Article 34. Corresponding clause of the New York
16 Convention, Article 5(1)(d) reads, "The composition of the Arbitral Tribunal of the arbitral
17 procedure was not in accordance with the agreement of the parties, failing such an agreement,
18 not in accordance with the law of the country where it was made. The final text of the model
19 law includes a new phrase following the first, unless such agreement was in conflict with the
20 provision of this law, from which the parties cannot derogate. History of this new phrase
21 becomes footnote." Please come to the next page. I'm not reading the... May I just read this
22 one? Because it is of some relevance on mandatoriness. "The history of this new phrase begins
23 in a footnote to the Secretariat's initial draft of what became Article 36, incorporated by
24 reference to early drafts of 34. That footnote noted that the view then prevailing amongst
25 commentators was the language of the New York Convention gave absolute priority to the
26 agreement to the parties, irrespective of whether such agreement is in conflict with a
27 mandatory provision of the applicable law. Secretariat said here that this rule could not
28 possibly apply to the enforcement of domestic awards, kinds of awards which Article 34 is
29 concerned, presumably domestic courts by definition would be bound to apply the mandatory
30 provision of domestic law. Working group agreed..." and My Lord, I'll skip that paragraph.
31 Then last paragraph. "During the Commission's consideration of the working group's final
32 draft, which was the same as the final text, a potential ambiguity was noted by several
33 delegations. They said that the provision might still be interpreted not to allow an award to be
34 set aside whether procedures set forth in the Arbitration Agreement had been followed but
35 where that procedure conflicted with the mandatory provision of law. While no change was
36 made in the text of the law, the Commission Report recorded the understanding that where
37 the agreement was in conflict with the mandatory provisional law, provisions will prevail." If...

1 and that's the same section which Your Lordships have seen this morning, 34(2)(a)(v),
2 composition of the Arbitral Tribunal, arbitral procedure was not in accordance with agreement
3 of parties, unless such agreement was in conflict with the provision of this part. So 34(2)(a)(v)
4 specifically addresses a situation where the composition of the Tribunal may be in agreement...
5 in our case, may be in accordance with what the parties say, but if it is contrary to a mandatory
6 provision of the law, it should be satisfied. That's what the commentary says. I must...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Just a minute. Deals with a situation where the
9 composition...

10

11 **GOURAB BANERJI:** That was the intention, My Lord.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Accord with...

14

15 **GOURAB BANERJI:** There is some ambiguity in the language of 34(2)(a)(v) and it was
16 brought to the notice of the Commission. The Commission says that obviously, mandatory, if
17 there is any mandatory provision, even if...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** That will prevail.

20

21 **GOURAB BANERJI:** Right. There is a directly opposite judgment to this. This was not cited
22 before a three-judge bench. There is a judgment of Your Lordships which says exactly the
23 opposite, and it is my duty to bring it to Your Lordships notice. Where the argument which is
24 accepted, which is rejected is, mandatory overrules contract. Argument is, even if it is contrary
25 to a mandatory provision, still, the contract will prevail. I'll give Your Lordships the reference.
26 It is *Narayan Prasad Lohia*. It is at page 681. If I don't show it, it will be unfair. There is a
27 judgment which says the opposite, I must show it.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Volume III, page 681?

30

31 **GOURAB BANERJI:** Sorry, My Lord?

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Volume III?

34

35 **GOURAB BANERJI:** Volume III, page 681, Tab 22. Actually, this reasoning was probably
36 unnecessary in this case, because it was held that it was a derogable provision. But still, this
37 reasoning is there. 681 and the relevant portion is at 695. If Your Lordship sees 695 is what

1 Mr. Venugopal argues, which is consistent with what I showed from the working group. So Mr.
2 Venugopal's argument, which I commend for Your Lordships acceptance is, 695.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Read between *Placitum* B and C. In other words,
5 according to Mr. Venugopal.

6

7 **GOURAB BANERJI:** "Even if the composition is in accordance to the agreement, award can
8 be set aside if it is in conflict with the provisions of Part 1." This is what he argued. That is
9 rejected by the Court, and it is held at page 6, that entire paragraph is there, at 696 last
10 sentence. "Thus so long as the composition of the arbitral procedure is in accordance with the
11 agreement to the party, Section 34 does not permit challenge to an award merely on the ground
12 composition of the arbitral was in conflict with the provisions of Part 1. This also indicates that
13 ten is a derogable." My Lord, here...

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Where is this by the way? 690?

16

17 **GOURAB BANERJI:** 6, last sentence of the first paragraph.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** As long as the composition of the...

20

21 **GOURAB BANERJI:** The judges don't notice that there are derogable provisions and...

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** ...and non-derogable.

24

25 **GOURAB BANERJI:** So, if it is non-derogable, you cannot contract out of a law. I just want
26 to show that. So, the first proposition is there are certain provisions of the act which are non-
27 derogable. Non-derogable is also a clumsy word, which are mandatory. Language used is
28 mandatory. There are two provisions which I have said are mandatory. Your Lordships have
29 already noted, 11(8) 12(5) and 18.

30

31 The third point is... 11(8) has to be read with 18. This is one aspect which, the third point, My
32 Lords, I would say, is 11(8) permits for a diversion from the agreed procedure, for which I just
33 want to show Your Lordship three or four paragraphs of **Lombardi**. Just three or four
34 paragraphs of **Lombardi**. 11(8) permits this diversion. If Your Lordship just sees **Lombardi**,
35 I'm not going to read it. Three of Your Lordships are party to it, familiar with this. **Lombardi**
36 site is at Volume III, page 2058. Various issues are framed My Lord. I am not going to go into
37 it. It's that issue regarding pre-deposit. Please first see paragraph 81 onwards, My Lord.

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CHIEF JUSTICE DY CHANDRACHUD: Thank you for citing SCR. All the juniors have put SCR. Because now all our judgements are in the digital form in the digital SCR.

GOURAB BANERJI: Earlier, I remember at least in the 90s, you couldn't cite anything else. The judges would not even recognize an SCC or a let alone scale or something.

JUSTICE P.S. NARASIMHA: SCR couldn't keep pace. That's why...

GOURAB BANERJI: That's why this problem came. Now it's caught up.

CHIEF JUSTICE DY CHANDRACHUD: Now it's absolutely up to date.

GOURAB BANERJI: In fact, Your Lordships direction is that they have to file only SCR copies. My Lords, may straight away come to page 2105, para 82. 82 My Lord, bottom of...

CHIEF JUSTICE DY CHANDRACHUD: At page?

GOURAB BANERJI: 2105. My Lord, if I am right, the Arbitration Agreement has to be consistent with 11, 12, and 18, and then, 84 is concept of party autonomy cannot be stretched. And then My Lord, 86 and 87, that's all I want to show. There are other paragraphs. In the interest of time, I'm not showing the other paragraphs. 86, 87 are page 94. "If circumstances give rise to... covers composition." After all, 18 may not cover composition. It may be after the Tribunal is formed, everything else. Why should it cover composition? Now My Lord, there was some doubt on this. There are two parts to the commentary. I'll show both. And I'll show My Lords, what is the understanding generally. Now My Lords may first see the commentary on 11. It's very interesting. My Lord, it reads, shall we say, both ways. Just give me a minute. I'll show 11 first in fairness, and then I'll show 18. 11 commentary My Lords is at... Now, I just want to show Your Lordships of the material on Article 11 and 18. And then, I'll continue. On 11, it's the discovery of Mr. Nariman. This is the clout digest.

CHIEF JUSTICE DY CHANDRACHUD: In fact, this was the last submission which Mr. Nariman drafted and emailed it at about twelve noon, the day before he passed away, the night before he passed away. He was working on this until the few hours before he passed away.

GOURAB BANERJI: A lot of the material I am citing was his independent research, and particularly, this one. So a lot of it was done by him. Your Lordships may come to Volume IV,

1 3807. This is part of the case law UNCITRAL text digest. There is a site which collects case law
2 on UNCITRAL text. I'm one of the... all of us are correspondents from India. 3807. It's a
3 summary at paragraph 20. This is the purpose of 11. Purpose of 11 is... the key purpose of 11,
4 paragraph 20.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Actually, 11 corresponds to Section 11.

7

8 **GOURAB BANERJI:** In fact, it was Article 611. But 11 corresponds to 11. "Exercise of the
9 Courts of competent authorities discretion. Securing an independent and impartial Tribunal
10 was said in one case, to be the major objective that ought to be pursued by the Court or
11 competent authority intervening on the basis of 11. While in another case it was said to be the
12 paramount consideration, it has also been explicitly identified as an important consideration
13 in several other cases." And then, footnotes of the cases are also on record. So, when Your
14 Lordship looks at Section 11, this is one major aspect to be looked at. It is not simply procedure,
15 appoint whoever is set on the panel, simply appoint. Major consideration is impartiality and
16 independence. This is generally the law in respect to 11. That's why you give this power to a
17 Court or an authority. Otherwise, anybody else could have...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** 21, they refer to qualifications. If qualifications
20 are provided, the Court cannot change the qualification. If a lawyer... if a physician has to be
21 appointed, you cannot appoint a lawyer.

22

23 **GOURAB BANERJI:** I am relying on 20, paragraph 20. 20 says that this is the objective,
24 namely independent, impartial Tribunal. This is the major objective. This is the paramount
25 consideration. Once is major, once is paramount. So when Your Lordships are construing 11,
26 otherwise, what is the joy of coming to a Court or an authority? You are essentially... the
27 Arbitral Tribunal as a substitute in the... it's an alternative dispute resolution. This is a
28 substitute. So this is one aspect. Now, please see commentary on 11 and commentary on 18.
29 Commentary on 11 is Serial Number 141 in Volume IV at page 10040.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** It's from the same book, right?

32

33 **GOURAB BANERJI:** This is the book which has all the extracts.

34

35 **JUSTICE P.S. NARASIMHA:** Tell the number again.

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** 10040. Same one.

1
2 **GOURAB BANERJI:** Tab 141. 10040. Article 11 is there, My Lord. Please come to page
3 10042, at the bottom. I just want to read this a little carefully. "Paragraph 2 of Article 11 does
4 not state any limitations on the parties' freedom to agree on a procedure for appointing an
5 Arbitrator or Arbitrators. The provision does state that the freedom is subject to the provisions
6 of paragraph 4 and 5 of this article." Similar to ours. "But those paragraphs only provide for
7 supplementary intervention by the Courts in case the agreed-on procedure fails to work. They
8 do not place any express limitation on the parties. Nevertheless, in drafting paragraph 2, it
9 was recognized that the model law as a whole implied certain restrictions on the parties
10 agreement regarding appointment of Arbitrators. The third working group cites examples, two
11 articles that give rise to such restrictions. Article 12, concerning grounds for challenge. Article
12 34, concerning the Court's power to set aside arbitral... That's for example, if the procedure
13 agreed on results in Arbitral Tribunal, fails to meet the standards impartiality, independence,
14 Arbitrator would subject... Similarly, if an appointment results in a party not receiving proper
15 notice, an award may be set aside and refuse recognition. These are specific restriction
16 contained in the model law, go to the effects of the procedure. These restrictions, results of the
17 selected appointment, not the procedure itself. Thus, the Arbitration Agreement does not
18 provide the proper notice." Then My Lord, 11, next para. "The working group considered at
19 some length, adding to Article 11, an explicit limitation on the parties freedom to determine
20 the procedure for selection of Arbitrators. Provision would have stated, procedure agreed upon
21 parties to be invalid or to the extent that it gave one party predominant position in the words
22 of an alternative draft manifesting unfair advantage with regard to the appointment of
23 Arbitrator. This provision was later deleted. One, problem did not arise frequently." My Lord,
24 they were not probably aware that the problem arises very frequently here, but that was their
25 understanding. "To other provisions of the law..." And we rely on this. "Other provisions of the
26 law such as 12 and 34 could be used to address the problem. Wording was regarded as too
27 vague, could lead to controversy, dilatory practice, potential in violation of well-established
28 recognize upon practicing. While the working group concluded that such a provision had no
29 place in the model law and the final text accepted by the Commission confirmed that decision,
30 the working group did note that each determination should not be understood as expressing
31 support for unfair practices." And My Lords, I just want to show what exactly it said, is at page
32 9998 of the same volume. Serial 1. I want to show the sentence actually which the working
33 group used. Serial 137 at 9998. Paragraph 89, 90 and 91 is basically what is summarized in the
34 book. "The working group...", 91, I'm reading. "... after the deliberation, decided to delete
35 paragraph 2. That decision however, should not be understood as condoning practices where
36 one party has a clearly greater influence in the appointments without good reason." This was
37 definitely something which weighed with the working group. So, this is when 11 is debating.

1 Now, Your Lordship goes a little further. So now the debates continue and 18 is debated. Now
2 by the time 18 comes along, there is a little shift. Now Your Lordships will see the commentary
3 on 18, which is very interesting. My Lords, may come to Article 18 commentary.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** It was not because they accepted such clauses,
6 but they felt that the other provisions would be sufficient to deal with them.

7

8 **GOURAB BANERJI:** Now, 18 commentary is very interesting. Please come to 10050, Serial
9 143, Tab 143.

10

11 **JUSTICE P.S. NARASIMHA:** The previous one, which you showed is part of which
12 document?

13

14 **GOURAB BANERJI:** The previous one is an extract from the...

15

16 **RESPONDENT:** It's Tab 137, My Lords, at page 982.

17

18 **JUSTICE P.S. NARASIMHA:** Got it. Just wanted to...

19

20 **GOURAB BANERJI:** It is actually part of the report. That's the language of the working
21 group report.

22

23 **JUSTICE P.S. NARASIMHA:** We are at 10050.

24

25 **GOURAB BANERJI:** 10050. Now, I'll just read. This makes very interesting reading.
26 "Article 18 establishes fundamental principles. All arbitrations must be treated with equality."
27 Then it mentions *magna carta* of arbitral procedure, due process clause, etc.

28

29 Then My Lords, second paragraph. "In early drafts of the law, provision that now constitutes
30 Article 18 was included as the third paragraph 90, which is discussed below, it's an important
31 corollary. In order however, to emphasize the central importance of the principle of equality
32 and fairness, intention they apply to the entire arbitral proceedings, Commission decided they
33 should appear in a separate article."

34

35 Now, I am not reading the next paragraph. I'm just reading maybe, 10051, top corner. "Article
36 18 is just a limitation on Article 19, which provides broad autonomy. First, to the parties and
37 second, in the absence of party agreement, to the Tribunal to decide on the procedure to be

1 followed in conducting the arbitration." Now My Lord, the point which has been raised by
2 Your Lordships, is addressed at 10052. "The precise scope of application of Article 18 may give
3 rise to some questions." Your Lordships have this 10052? "As noted, the Commission Report
4 states, that the tenets of Article 18 are applicable to the entire arbitration proceedings. For this
5 reason, Commission moved the provision from 19(3) into a separate article at the beginning
6 of Chapter V, which concerned the conduct of proceedings." "In addition...", I rely on this, "...in
7 addition, the Secretariat stated, that the provision applies even more broadly than the 9 other
8 articles of Chapter V in urging the Commission to adopt the quoted interpretation. The
9 representative of the Secretariat stated, it has always been the understanding of the working
10 group, that the fundamental principle enunciated in 19(3) Article would apply to arbitral
11 proceedings in general, it would govern all provisions of Chapter V and other aspects, such as
12 the composition of the Tribunal, not directly regulated therein." So My Lord, though one
13 interpretation could be that it would be a very truncated interpretation. It means that Tribunal
14 is setup which is not impartial or there is no equality between the parties. But they behave
15 impartially. So My Lord, even the procedure of composition of the Tribunal falls within that
16 period. Once you go, till the time you don't go to a forum, you can negotiate your rights. It may
17 be one sided contract. Once you go to a forum, which is a substitute for a judicial forum, then
18 My Lord, this you can't really have a... not a level playing field. And therefore, My Lord, their
19 understanding was that the composition is also something which is covered. And this is one
20 part of it. The commentaries also says this. I'll show the commentaries now and that will also
21 make it clear. First, if Your Lordship sees, these comments are also referred to... My Lord, may
22 first see... My Lord, beta binder is at page 10185, Serial 147, the same volume. My Lord, happily
23 for me, all this is reflected in the Ld. SG's submissions also. Much of this Section 18 has also
24 relied on by him. We were happy to note that he's also relying on it. We thought it might be a
25 little difficult. Please see page 10186, My Lord. This of course, is in the context of conceptual
26 arbitration rule. "Equal treatment of the parties in the appointment process. Due to the fact
27 that it is primarily upto the parties agreement to decide who should be the Arbitrator in any
28 given case. Also, due to the fact that under a(2), parties may determine how the appointing
29 authorities define a candidate, the position of Arbitrator. It is important to keep in mind the
30 rules as well as most national laws, Article 18 of UNCITRAL Model Law, plays paramount
31 importance on the equal treatment of parties in the arbitral process. Means that no party will
32 be given preference in the arbitration selection process, regardless of how strong the
33 bargaining power may be. This both, in the process agreed on by the parties or in the process
34 chosen by the appointing authority, any violation of this principle could lead to a setting aside
35 of the Arbitral Award for violation of this fundamental principle." This is one view which is
36 given in binder. And then My Lord, one more. I'll show there are a number of others. I'll just
37 show one more. Serial number 148.

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Page...This is [UNCLEAR], 10189. Just 10189, at 10191. 3. Limits on the primacy of the parties' agreement. 783. "The primacy of the parties' agreement is not absolute. It is limited in some respects by the requirements of the proper administration of justice." 784. "Certain of these limits have already been outlined and will be discussed later at greater length."

CHIEF JUSTICE DY CHANDRACHUD: Sorry, where is this?

GOURAB BANERJI: 10191.

CHIEF JUSTICE DY CHANDRACHUD: 10191.

GOURAB BANERJI: Limits of the primacy of the parties' agreement.

CHIEF JUSTICE DY CHANDRACHUD: One minute. Yes.

GOURAB BANERJI: "Primacy of the parties' agreement is not absolute, limited in some respects by the requirement of the proper administration of justice. Certain of these limits have already been outlined and will be discussed later at greater length. They are the Arbitrators, independent impartiality". My Lords that was my first submission. "Others result from the requirement that the parties' method of appointing the Arbitrators or the institutional rules chosen, comply with the fundamental principles of due process. These principles included particular, the parties' right to fair trial and their right to equal treatment. Latter is expressed in the UNCITRAL Model Law, Article 18 of which states a party shall be treated with equality." Dutch law is also mentioned. German law is also mentioned and those are quoted. They are much more specific. So these, in fact, in the recommendations by the expert committee, we have suggested similar amendments to be made to the relevant provisions. So, 18 in our respective submission, is also a ground on which this clause can be held to be contrary to the provisions of the act in view of the observations in *Lombardi*. And therefore, under 11(8), because there is evidently unequal treatment of the parties, it's a given, it's a given deal. In fact, the entire language of *Voestalpine* and the entire language of even *CORE* is that you balance. So balance is only when there is equality. This is, so far as this is concerned. One other very interesting judgment I want to put, and then I will come back to *CORE* and then conclude. One aspect of this... so whether Your Lordships put it in the impartiality... independence category or equal treatment category, the approach taken in the US is on the basis of unconscionability. Here also, we are grateful to the Ld. Solicitor, ten cases he has summarized in his written submissions. Ten such judgments he has summarised. I will

1 show what I would submit. We had filed three or four. Some others are there. I will show one
2 judgment, because this issue of panel and one party controlling a panel has arisen in multiple
3 cases in the US, with multiple, My Lord, this thing. I will show one, maybe, if Your Lordships
4 indulge, two cases which are very instructive. Your Lordship first sees Serial Number 140.

5

6 **JUSTICE P.S. NARASIMHA:** Volume?

7

8 **GOURAB BANERJI:** Volume III, page 4294. *Austin Trout*, 4294, Tab 140. *versus the*
9 *Boxing Organisation*. This was a professional boxer who wanted to avoid the clause in the
10 WBO Agreement. 38. I'm so sorry. Please come straight away to 4301, V. "That brings us to
11 Trout's last challenge, in which he takes aim at the District Court's ruling by focusing solely on
12 the arbitration selection process that the appeal regulations set forth. Trout contends correctly
13 that the provisions grant the WBO exclusive control over the appointment of the Arbitrators,
14 who will decide his case. Under its plain terms, the WBO could even appoint its own
15 employees, including direct dates to the Head of the WBO in the arbitral panel with no input
16 from Trout. In consequence, Trout argues that the Arbitration Agreement does not provide
17 him a fair opportunity to pursue either his claim under so and so, or is claimed under so and
18 so, to Arbitrator by virtue of the method of selection would be inherently biased." Then My
19 Lords, he cites a case which is distinguished. And Your Lordships has come to 4302. "But
20 Trout's contention that the Arbitration Agreement is unreasonable and unjust just because the
21 Arbitrator selection process permits the WBO to act both as party and judge has obvious force
22 notwithstanding that he does not identify any direct authority and support, his contention
23 Arbitration Agreement may not be enforceable. Nor does WBO contend Trout is forfeited or
24 waived in the agreement against enforcement. Instead, the WBO takes on argument about on
25 its merits." And then on this ground, there is further reasoning and ultimately, the Court holds
26 that this is a clause which is inherently problematic and allows the appeal on that point, and
27 leaves the... open the question of remarks. These were the only two relevant paragraphs there.

28

29 **JUSTICE P.S. NARASIMHA:** There is only the contention. Where is the finding?

30

31 **GOURAB BANERJI:** Sorry? My Lord, I'll just show. I'll just show them. My Lord, the finding
32 is...

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Para 14 at page 4305, they don't deal with the
35 issue actually.

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37 **GOURAB BANERJI:** My Lord, just a minute.

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CHIEF JUSTICE DY CHANDRACHUD: In determining whether the Arbitration Agreement should be enforced, absent invalid the Arbitrators, the Arbitrator selection mechanism. And if it should how to select an Arbitrator, however, they must show the parties intent. The federal policy favouring arbitration on the interplay between state law and federal policy, that the parties have not fully engaged with those factors or the applicability of the savings clause. They therefore, leave it to the District Court to determine in the first instance, whether the arbitration selection provision at issue here, is severable from the remaining...

GOURAB BANERJI: That's the second question. On the first question, they hold that the provision is not valid. But on the issue of severability, they [UNCLEAR]. Please see the second judgment, which is very clear. *McMullen*, which is 139. Serial Number 139, 4307. Two critical paragraphs. Paragraph 9 and paragraph 10. 4307 at 4314.

JUSTICE P.S. NARASIMHA: Which quote is this?

GOURAB BANERJI: 4314, 9. "Therefore, we must decide whether..." My Lord this is an extreme case, "Mayor staff provides McMullen with an effective substitute for the judicial forum to pursue her title seven claims. The tap adopted by Mayor is commendably fair except in one important aspect. It grants Mayor unilateral control over the pool of potential Arbitrators." This is a case... This is not a case of retired employee, etc. This is an otherwise, fair panel. Then the first judgment relied on by *McMullen* is on *Hooters*, and that is discussed. I am not going to read *Hooters* and *Floss*, they are all discussed here.

Please come straight away to para 10. I'm sorry. Just one minute. I am sorry. Please come before that to page 4315. "Mayor's tap is plainly even more even handed than the Arbitration Agreement issued at *Hooters* which allow for unfettered employer control over the potential Arbitrator, contained a myriad of unilateral bias clauses, giving *Hooters* an advantage in every way. But the Arbitration selection process provided under Mayor's is less fair than the arbitration process described as *Floss*'s fundamentally unfair." Then *Floss* is discussed. Then at the bottom. "The type of control exercised by Mayor over the potential Arbitrators is analogous to the exclusive control over the entire panel, exercised by the employer in *Hooters* and rejected by the fourth circuit. Furthermore, the Arbitrator selection procedure used by Mayor allows it to create the type of symbiotic relationship with its Arbitrators that we feared would promulgate bias in *Floss*. The risk of bias inherent in Mayor's procedure is demonstrated by the fact that Mayor uses the same panel..."

1 **CHIEF JUSTICE DY CHANDRACHUD:** If I look at it the *CORE* because you have five
2 minutes, then we will wrap up at lunch.

3

4 **GOURAB BANERJI:** Right. So My Lord, on this basis, it is held that it is not a My Lord,
5 effective substitute.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Fair enough. Now, let's go to *CORE*.

8

9 **GOURAB BANERJI:** Now My Lord, I'll just show Your Lordships, *CORE* and then I will...
10 just two or three lines I want to say at the end. My Lord, if we look at *CORE*, I am not showing
11 Your Lordships, *Voestalpine*, because there are number of paragraphs...

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** *Voestalpine* was, in fact, cited in *Perkins*,
14 para 19 of...

15

16 **GOURAB BANERJI:** My Lords may come to *CORE*, which is at Tab 52, page 1284 at 1289.
17 My Lord, in this case, the Allahabad High Court had appointed an independent Arbitrator. But
18 the Supreme Court reversed that and stuck to Clause 64. Your Lordships, may first see clause...
19 the heading. The first heading is from paragraph 12 to 22. It starts at page 1293, para 11 to 22,
20 "Is appointment of an independent Arbitrator without reference to the clauses of the GCC,
21 whether correct?" My Lord, my short reply to 11 to 22 is, it does not consider *Voestalpine*, it
22 does not consider 11(8), it does not consider the amendment to 11(8), it does not consider the
23 fact that there is a necessity for impartial Tribunal. Though, all this, was there in
24 *Voestalpine*. So My Lord, the problem with the first finding that this Hon'ble Court says, you
25 stick to the clauses. It does not consider the developments post 2015, at all. In fact, it relies on
26 a judgment in *Parmar*, which is a pre-2015 judgement. And not even My Lord, noticing that
27 even at pre-2015, you are required to have an impartial part. Now please see the clause. It's a
28 wonderful clause. Clause 64 is at page... para 15, and the relevant portion is 1297. This is what
29 is the clause. This similar clause is there in the first four matters.

30

31 **JUSTICE P.S. NARASIMHA:** This is a post-amendment clause, no?

32

33 **GOURAB BANERJI:** Sorry, My Lord?

34

35 **JUSTICE P.S. NARASIMHA:** This is the post-amendment clause?

36

1 **GOURAB BANERJI:** This is the post-amendment. Pre-amendment, I'm leaving. This is the
2 post-amendment clause. This is the clause which all railways and railway undertakings,
3 BMRC, DMRC, et cetera. All the four cases before My Lords, JSW is even worse because it has
4 one unilateral Arbitrator. But all of them have some variation of this clause. And the clause
5 is... I am not on retired or serving. The panel has...

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Where is that clause?

8

9 **GOURAB BANERJI:** The clause is at 1297 64(3)(b). In fact My Lord, it's quite interesting.
10 First, they present you with a clause which says, you please waive 12(5). They've already got a
11 format for that. So if you are in the business with them, then you waive 12(5) and you suffer
12 the consequences. They have a set format for that. But if you don't, then you come to this. "For
13 this purpose, railway will send a panel of least four names of retired officers empanelled to
14 work." So, the panel is unilateral. "Contractor will be asked to suggest at least two main
15 members out of the panel. GM will appoint one out of the two. Balance one from the panel, or
16 from outside the panel, presiding again to be appointed." So, all three effectively, I choose one
17 out of two. One and the other two, they appoint. Even the Chair, they appoint. So all three,
18 effectively are... the source comes from them. If this is the panel, I ask myself, either way you
19 will not get justice. This is completely unworkable. In fact the Ld. SG...

20

21 **JUSTICE P.S. NARASIMHA:** Has anybody ever done an impact assessment of the number
22 of awards? Invariably, despite all these, the awards have gone in favour of the Contractors,
23 hardly in favour of the [UNCLEAR]. You know. The reality is that.

24

25 **GOURAB BANERJI:** And that actually makes it much worse. Because that actually, makes
26 it much worse.

27

28 **JUSTICE HRISHIKESH ROY:** This clause, put the other party at a serious disadvantage
29 so far as choice of... it's a matter of concern.

30

31 **GOURAB BANERJI:** It is judiciary. There is no choice. In fact, the Ld. SG has conceded in
32 his notes that *CORE* is wrong.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** One is, you have to appoint your Arbitrator. You
35 means, the Claimant from out of the panel suggested by the railways. Two, the other two are
36 appointed by the railways. Even Chairperson is appointed by the railways.

37

1 **GOURAB BANERJI:** That's the clause, that's the standard clause.

2

3 **JUSTICE P.S. NARASIMHA:** Only difference between pre and post is that earlier they were
4 Gazetted Officers. Now you have retired officers in the panel. That's the only distinction.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you. Thank you.

7

8 **GOURAB BANERJI:** 15 minutes more, 10 minutes more.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Now, we'll wrap up. 1 o'clock means 1 o'clock. At
11 2 O'clock, we will hear Mr....

12

13 **GOURAB BANERJI:** I will just summarise in, literally in five minutes. I will not show any
14 documents.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Give us a small note after lunch.

17

18 **GOURAB BANERJI:** Just 5 minutes, Your Lordships.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** No. 2 o'clock now, Mr. Kaul. Thank you.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Kaul.

23

24 **NEERAJ KISHAN KAUL:** My Lords, *TRF* and *Perkins* recognize that ineligibility of an
25 Arbitrator on the grounds of independence and impartiality is a fundamental ground which
26 goes to the root of any dispute, and such a person who is ineligible to be appointed as an
27 Arbitrator cannot be allowed to appoint a Sole Arbitrator to the dispute either. So both, you
28 are ineligible in your own rights, and you neither have the power to appoint or nominate
29 another Arbitrator. And it then recognizes the mandate as laid down in 246th Law
30 Commission Report on the principles of natural justice, which include the rule against bias, to
31 say that party autonomy can't prevail. Prior, prior party autonomy or agreement between the
32 parties can't prevail over this. Rule against bias is not only existence of neutrality, but
33 appearance of neutrality as well. And on that issue, I'll show a very interesting article to Your
34 Lordships just in a minute. And what they emphasize in both these matters is that if an
35 overwhelming power is given to a party to appoint either a Sole Arbitrator or an overwhelming
36 majority of the Tribunal, you are effectively making him the appointing authority for the
37 Tribunal, who in turn would create an impression that as if he has a say in the adjudicative

1 process and charts the course of the proceedings as they go on. That's what **Perkins**
2 recognizes, that if you appoint or give someone a power to say that he can appoint the Sole
3 Arbitrator or an overwhelming number of people on the Arbitral Tribunal and practically
4 negates the power that the other party would have to appoint an Arbitrator, you are effectively
5 introducing a clause and the words used are-"which would lead to exclusivity in charting the
6 course of proceedings" and which ought not to be done. Now where **CORE** went wrong and
7 I'll deal with it in a minute, are the two paragraphs I'll read of **Perkins** vis-a-vis the paragraph
8 in **CORE. Perkins**, in para 16 of the judgment went on to say that a situation would be
9 completely different if both parties had equal power to nominate Arbitrators, then there would
10 be a counterbalancing that takes place. Does there... Sorry, ma'am. So then there would be a
11 counterbalancing that would take place. The mistake which **CORE** commits is, it picks up out
12 of that...This was really a Tribunal My Lords, **CORE** had a very interesting clause, it said four
13 names will be sent to the other side, out of which you pick up two. And out of those two, that
14 person will pick up one and the other two will also be nominated by him from with or without
15 the panel. Now **CORE** picks up this line to say that like **Perkins** there is a counterbalancing
16 in the two, whereas the counterbalancing as understood by **Perkins** was a completely
17 different counterbalancing compared to the counterbalancing which **CORE** talked about,
18 which is no counterbalancing at all in the eyes of law. Now My Lords, in this background,
19 please just have two paragraphs of a very interesting article written by Jan Paulsson, which I'd
20 like to rely on Volume IV, page 3663. First 3663, My Lords.

21
22 My Lords, with Your Lordships permission somewhere in the middle of this page is a para
23 starting with -"This has nothing to do per se with the choice between a Sole Arbitrator." My
24 Lord the Chief Justice has the case? "This has nothing to do per se with the choice between a
25 Sole Arbitrator and a Tribunal comprising three or more Arbitrators. In either case, when each
26 Arbitrator is chosen jointly by the parties or is appointed by a neutral institution, each is
27 invested with an equal measure of confidence and an equal claim to moral authority. Not so
28 when there are unilateral appointment, it seems obvious that a very different impulse is at
29 work here. Introducing an adversarial element into the very deliberation of the Arbitral
30 Tribunal disputants tend to be interested in one thing only, a favourable outcome. They
31 exercise their right of unilateral appointment, like everything else, with that overriding
32 objective in view. The result is speculation about ways and means to shape a favourable
33 Tribunal, or at least to avoid a Tribunal favourable to the other side, which is logically assumed
34 to be speculating with the same fervour and towards the same end. Forgotten is the search for
35 the Arbitrator trusted by both sides." And kindly skip one paragraph and come to the next one
36 after that, which starts with -"The only solution." "The only solution which will be reliable in
37 all circumstances is that any Arbitrator, no matter the size of the Tribunal should be chosen

1 jointly or selected by a neutral body, this aspect of the process should no longer be misused as
2 a sales argument for arbitration. Confidence enhancement is properly focused on procedural
3 rights, the rights to be heard, the opportunity to confront the opponent's case, equality of arms,
4 rather than risking the unelectable contamination of the ideal that an Arbitrator trusted by
5 both sides by notions of constituency." And My Lords, one interesting statistic that it also gives
6 on page 3662. If Your Lordships, were to have for a minute on page 3662, the third paragraph
7 from the top is an interesting statistics, which starts with the "must confront an uncomfortable
8 fact." My Lords, have that? "An uncomfortable... we must confront an uncomfortable fact, as
9 illustrated by two studies of ICC cases in different years earlier this decade. Dissenting
10 opinions were almost invariably more than 95% the work of the Arbitrator nominated by the
11 losing party, see so and so, so and so. Dissenting opinions so and so, so and so, so and so."
12 Now My Lords, one very pertinent question that Your Lordships, put to us right in the
13 beginning, in the morning was, with regard to an agreement containing an ineligible Arbitrator
14 within it, an arbitration clause. Now 12(5) takes care of that situation. 12(5) invalidates or
15 makes ineligible the Arbitrator, not the agreement. And then read with **Broadband** goes on
16 to say that the moment he is ineligible in terms of Section 14 and in consonants of the 246th
17 Law Commission Report, he is deemed to be *de jure* ineligible to conduct any proceeding and
18 ordinarily **Broadband** says that you would have gone the root of 12(1) to 12(4), read with
19 Section 13 for removal of an Arbitrator. Here he is, per se, ineligible and is to be substituted
20 immediately forthwith under 14 and that paragraph of **Broadband** , I'll read to Your
21 Lordship, but kindly have 12(5) and 14 for a minute, My Lords, "The provisions." First have
22 12, Section 12, Sub-Clause 5. My Lords, 112 of Section 12, Sub-Clause 5.

23
24 My Lords have Section 12? "Notwithstanding any prior agreement to the contrary, any person
25 whose relationship with the parties or counsel or the subject matter of the dispute falls under
26 any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as
27 an Arbitrator." And read this, with 14. Kindly have 14. "(1) The mandate of an Arbitrator shall
28 terminate and he shall be substituted by another Arbitrator if: (a) he becomes *de jure* or *de*
29 *facto* unable to perform his functions or for other reasons, fails to act without undue delay."
30 And then it goes on. And kindly see the interplay of the two sections as captured by this
31 Honourable Court in **Bharat Broadband**. If Your Lordship were to have Volume III. It's
32 page 1181, My Lords, Volume II, para 17 on page 1200. Paragraph 17 of **Bharat Broadband**.
33 "The scheme of Section 12, 13 and 14, therefore, is that where an Arbitrator makes a disclosure
34 in writing, which is likely to give justifiable doubts as to his independence or impartiality, the
35 appointment of such Arbitrator may be challenged under Section 12(1) to Section 12(4) read
36 with Section 13. However, where such person becomes ineligible to be appointed as an
37 Arbitrator, there is no question of challenge to such Arbitrator before such Arbitrator. In such

1 a case, that is, a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted
2 in as much as the Arbitrator becomes as a matter of law, that is *de jure* unable to perform his
3 functions under Section 12(5) being ineligible to be appointed as an Arbitrator. This being so
4 his mandate automatically terminates and he shall then be substituted by another Arbitrator
5 under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become
6 *de jure* unable to perform his function, as such, that a party has to apply to the court to decide
7 on the termination of the mandate unless otherwise agreed by the parties. Thus, in all Section
8 12(5) cases, there is no challenge procedure to be availed of. If an Arbitrator continues as such,
9 being *de jure* unable to perform his functions as he falls within any of the categories mentioned
10 in 12(5) read with the Seventh Schedule, a party may apply to the court, which will then decide
11 on whether his mandate is terminated. Questions which may typically arise under Section 14
12 may be as to whether such person falls within any of the categories mentioned in the Seventh
13 Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act.
14 As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted
15 with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct, whereas the
16 proviso to Section 12(5) deals with waiver by express agreement in writing between the parties
17 only if made subsequent to the dispute having arisen between the parties." So that is the
18 scheme of the Act My Lords. You are, per se ineligible and we don't have to go before you
19 moving an application. You can be substituted under 14 with another Arbitrator, until and
20 unless a dispute arises, if you are ineligible or not. And that is why in *Perkins* and *TRF*, it
21 was said that if this person is per se ineligible, where is the question of to act as an Arbitrator,
22 whereas the question of is nominating someone else as an Arbitrator. And that is why, when
23 the reference order in *Tantia* came.

24

25 *Tantia* said that if merely because in *CORE* there was a panel sent to them, if the person
26 himself is per se, ineligible, merely because he sends a panel of five and says, "Pick up..." Panel
27 of four. "Pick up out of them two and I'll choose one of them." How does that counterbalance?
28 And that is why *Tantia* said, "We disagree with the reasoning in *CORE* and were pleased to
29 refer it to a Constitution bench." Now My Lords it's important for Your Lordships to see what
30 was the reasoning in *CORE* that one paragraph on counterbalancing vis-a-vis the one
31 paragraph in *Perkins*. I'm not bothering Your Lordships with other findings in *TRF*,
32 *Perkins* which are in detail dealing with these issues, if Your Lordship...

33

34 **JUSTICE P.S. NARASIMHA:** In *CORE* schedule, Seventh Schedule which of those
35 provisions make him per se? One is it? According to you, section... Clause 64 methodology is
36 a per se methodology.

37

1 **NEERAJ KISHAN KAUL:** Yes.

2

3 **JUSTICE P.S. NARASIMHA:** So that's why it falls under what?

4

5 **NEERAJ KISHAN KAUL:** No, My Lords then in 12(5) makes it ineligible.

6

7 **JUSTICE P.S. NARASIMHA:** 12(5) has to be read. It can't be open end.

8

9 **NEERAJ KISHAN KAUL:** Entry 1, My Lords, the Seventh Schedule.

10

11 **JUSTICE P.S. NARASIMHA:** Yeah. That's... Sorry.

12

13 **NEERAJ KISHAN KAUL:** Sorry. I didn't get... Entry 1.

14

15 **JUSTICE P.S. NARASIMHA:** Yes, yes. According to you Entry 5 is the...

16

17 **NEERAJ KISHAN KAUL:** Entry 1 - "Arbitrator's relationship with the parties or counsel:
18 The Arbitrator is an employee, consultant, advisor, or has any other past or present business
19 relationship with the party."

20

21 **JUSTICE P.S. NARASIMHA:** All that happens?

22

23 **NEERAJ KISHAN KAUL:** Please, My Lords?

24

25 **JUSTICE P.S. NARASIMHA:** All that is available in 64 application? Is fully satisfied?

26

27 **NEERAJ KISHAN KAUL:** In which application?

28

29 **JUSTICE P.S. NARASIMHA:** 64. 64 gets fully satisfied and completely gets covered under
30 1? That's how, that's the way we have to test, right?

31

32 **NEERAJ KISHAN KAUL:** Yes. General Manager will appoint and General Manager is hit
33 by the section. The appointing authority is himself ineligible. And that is what *Perkins* and
34 *TRF* say, that if the person cannot act as an Arbitrator on his own...

35

36 **CHIEF JUSTICE D. Y. CHANDRACHUD:** He cannot nominate.

37

1 **NEERAJ KISHAN KAUL:** He cannot nominate another Arbitrator. That is my respectful
2 submission for Your Lordship's kind consideration. And so to say that what you can't do
3 directly, you can't do in an indirectly either and that is why, My Lords, the principle which is
4 also then emphasized is, who has an overwhelming say in Constitution of an Arbitral Tribunal?
5 A person apart from unilateral appointments, the other party not having a say, you're
6 practically vesting it in a party who has been held to be ineligible himself, will now have an
7 overwhelming or unilateral say in the nomination of another person. And that is why, **Perkins**
8 and **TRF** go on to say that that will undisputably lead to an impression that such a party will
9 be the sole or the major appointing authority, who will in turn have a bearing on the
10 adjudicative process and charting out exclusively the course of the arbitration proceedings.
11 That's the line in philosophy behind these two judgments. Now, My Lords, would Your
12 Lordships be kind enough to have **Perkins**, paragraph 16, page 1273. 1273, Volume III,
13 paragraph 16 if Your Lordships were to just... Paragraph 16. "But in our view, that has to be
14 the logical deduction from **TRF**. Para 50 of the decision shows that this Court was concerned
15 with the issue, whether the Managing Director after becoming ineligible by operation of law,
16 is he still eligible to nominate an Arbitrator? The ineligibility referred to therein was as a result
17 of operation of law in that a person having an interest in the dispute or in the outcome of the
18 decision thereof must not only be ineligible to act as an Arbitrator, but must also not be eligible
19 to appoint anyone else as an Arbitrator and that such person cannot and should not have any
20 role in charting out any course to the dispute resolution by having the power to appoint an
21 Arbitrator. The next sentence in the paragraph further shows that, cases where both the parties
22 could nominate respective Arbitrators of their choice were found to be completely a different
23 situation. The reason is clear, that whatever advantage a party may derive by nominating an
24 Arbitrator of its choice would get counterbalanced by equal power with the other party. But in
25 a case where only one party has a right to appoint a sole Arbitrator, its choice will always have
26 an element of exclusivity in determining or charting the course of dispute resolution.
27 Naturally, the person who has an interest in the outcome or decision of the dispute must not
28 have the power to appoint a Sole Arbitrator." Now, this was the reasoning on counterbalancing
29 which was given...

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Even though one party exclusively appoints an
32 Arbitrator. This is counterbalanced by the fact that the other party exclusively appoints their
33 Arbitrator.

34

35 **NEERAJ KISHAN KAUL:** Yes. So this was the...

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** Which is normally the case. [UNCLEAR]
2 between parties.

3

4 **NEERAJ KISHAN KAUL:** Yes. So this was the counterbalancing in *Perkins* that they
5 talked about. Now, please see how does *CORE* deal with it. Now, please have *CORE*,
6 paragraph 36. 1306. Same volume, para 36.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** 13?

9

10 **NEERAJ KISHAN KAUL:** 1306. 1306 with Your Lordships permission, para 36, Clause 64,
11 Sub-Clause 3, Sub-Clause b. My Lord, the Chief Justice has this? "Clause 64, Sub-Clause 3,
12 Sub-Clause b of the GCC deals with appointment of Arbitrator, where applicability of Section
13 12, Sub-Clause 5 of the Act has not been waived off. In terms of Clause 64(3)(b) of GCC, the
14 Arbitral Tribunal shall consist of a panel of three retired Railway Officers retired not below the
15 rank of Senior Administrative Grade Officers as Arbitrators. For this purpose, Railway will
16 send a panel of at least four names of retired Railway Officers empanelled to work as
17 Arbitrators, indicating their retirement date to the Contractor within 60 days from the date
18 when a written and valid demand for arbitration is received by the General Manager. The
19 Contractor will be asked to suggest the General Manager at least two names out of the panel
20 for appointment of Contractor's nominees within 30 days from the date of dispatch of the
21 request of the Railways. The General Manager shall appoint at least one out of them as the
22 Contractor's nominee and will simultaneously appoint the remaining Arbitrators from the
23 panel or from outside the panel duly indicating the Presiding Officer from amongst the three
24 Arbitrators. The exercise of appointing the Arbitral Tribunal shall be completely within 30
25 days from the receipt of names of Contractor's nominees. Thus, the right of the General
26 Manager in formation of the Arbitral Tribunal is counterbalanced by the Respondent's power
27 to choose any two from out of the four names and the General Manager shall appoint at least
28 one out of them as the Contractor's nominees." My Lords, with utmost respect, my submission
29 is, this is where the error lies. This is no counterbalancing in the eyes of law, this is no
30 counterbalancing in terms of what *TRF* and *Perkins*.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Because 'a' - the Claimant or Respondent in that
33 case has to be confined to the names listed by the Railways and that's one. And there is no
34 counterbalancing because the Railways then appoint two.

35

36 **NEERAJ KISHAN KAUL:** Yes.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** May or may not be in the panel also.

2

3 **NEERAJ KISHAN KAUL:** And out of these two also, I give two you choose one out of them.
4 And My Lords...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** And you can't go beyond the panel chosen by the
7 Railways.

8

9 **NEERAJ KISHAN KAUL:** This was no counterbalancing and *CORE* never helped *Perkins*
10 or disagreed with *Perkins* or *TRF* ever. It's not as if *CORE* disagreed that *TRF* or *Perkins*.
11 It held it to be good law but thought it was...

12

13 **JUSTICE P.S. NARASIMHA:** Supply.

14

15 **NEERAJ KISHAN KAUL:** Please.

16

17 **JUSTICE P.S. NARASIMHA:** Supply. You can choose any colour as long as it is black. So
18 there is no choice left.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Yeah. that's right.

21

22 **NEERAJ KISHAN KAUL:** Also with a very pertinent question, which during the course of
23 argument, Justice Roy had also put, on a panel which is given. Ultimately a panel, which is
24 given... You give me a panel. It can be a broad-based panel. It can be a small panel. It could be
25 any anything. And I'll show it from *Voestalpine* case. That panel also they changed from 5
26 to 31. I'll show to My Lords, there. Ultimately I may choose out of that panel someone I feel is
27 the most acceptable. That still does not mean that the person is my choice. A question that
28 Your Lordships had put. You give me a panel now, I will choose what is most acceptable to me
29 out of those 30 names or 40 names or 10 names. But that is still not my choice. So can you
30 curb my choice to appoint an Arbitrator. I have to choose. I will choose out of the lot that you
31 have given me because I have no other option to do that.

32

33 **JUSTICE HRISHIKESH ROY:** Making a choice is actually truncated and also it hits at
34 Section 18, which speaks about equal treatment of both parties.

35

36 **NEERAJ KISHAN KAUL:** Yes. I am very grateful.

37

1 **JUSTICE HRISHIKESH ROY:** That's the foot of your argument?

2

3 **NEERAJ KISHAN KAUL:** Absolutely on the panel also. So a panel which is unilaterally
4 curated by one party alone... which is unilaterally curated by one party alone, without any say
5 from the other party. With respect our submission is, does not give us the choice as mandated
6 by law or required by due process of law.

7

8 **JUSTICE HRISHIKESH ROY:** Taking a cue from what fell from Brother Narasimha, the
9 panel that we give, he said, "Pick any colour, but it has to be black." So 'Pick any colour'... it is
10 deemed to be void.

11

12 **NEERAJ KISHAN KAUL:** So, is that enough to say? And even in that judgment I'll come to
13 My Lords and just show where 5 became 31. We don't agree with that position also.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Kaul, you have provisions, which impose an
16 absolute ineligibility. Seventh Schedule read with Section 12. In cases which, where the
17 Arbitrator is not ineligible within the meaning of the Seventh Schedule with Section 12, where
18 do we actually source the prohibition in the Act?

19

20 **NEERAJ KISHAN KAUL:** To?

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** On... one of the parties providing for a panel but
23 a panel which is consistent with the Seventh Schedule.

24

25 **NEERAJ KISHAN KAUL:** If that person is himself incapable of ineligible or being
26 appointed as an Arbitrator, he cannot also nominate or provide a panel.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** You are absolutely [UNCLEAR]

29

30 **NEERAJ KISHAN KAUL:** How does he provide a panel? Well, how does he provide a
31 panel? If the GM is to provide a panel...

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** See, *Perkins* and the other cases are the cases
34 where the Managing Director could nominate an Arbitrator. So they said, "You can't act as an
35 Arbitrator because you are the Managing Director. Therefore, you cannot nominate an
36 Arbitrator."

37

1 **NEERAJ KISHAN KAUL:** And similarly, that Managing Director could not give a panel
2 either, because that panel is a panel curated by him, My Lords. The submission...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** You're right. On grounds of equity what you say
5 is, it makes sense. But where do you source this legal norm in this?

6

7 **NEERAJ KISHAN KAUL:** My respectful submission going by..

8

9 **JUSTICE P.S. NARASIMHA:** That is going out of Perkins.

10

11 **NEERAJ KISHAN KAUL:** Please My Lord?

12

13 **JUSTICE P.S. NARASIMHA:** That's an interpretation on the basis of *Perkins*.

14

15 **NEERAJ KISHAN KAUL:** Yes, Your Lordships are absolutely right.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Where do we locate it in the statute? We want to
18 have a jurisprudential basis in the statute.

19

20 **NEERAJ KISHAN KAUL:** Statute one is what Your Lordship said, all parties should be
21 treated equally. If I have to go... if I have to go and be bound by a panel curated by the other
22 side and choose someone from that panel, where is the equality between the two parties? And
23 My Lords, with great respect, it leads to serious erosion of confidence as far as independence
24 and impartiality is concerned.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Another thing which may just reflect on it, which
27 may help your case, could there be grounds on which a party may object to a panel suggested
28 by the other side, though that panel is consistent with, it does not breach the Seventh Schedule.
29 In other words, what I'm trying to ask you is, assuming that the other side provides you a panel
30 none of whom is in breach of the Seven Schedule, could there be a legitimate objection on any
31 other ground not falling within the Seventh Schedule?

32

33 **NEERAJ KISHAN KAUL:** May I with respect say, that I take it that a panel provided is a
34 panel completely eligible. Panel completely unaffected by the rigors of Seventh Schedule, any
35 of the entries therein. It's a panel of impeccable names in every which way.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, your answer is this one only, which is
2 that under the Arbitration Law as it stands, each party has an unrestricted right to nominate
3 its own Arbitrator. Untrammelled by the choice of the other party,

4

5 **NEERAJ KISHAN KAUL:** Right.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** That is, we have to test it on that ground.

8

9 **NEERAJ KISHAN KAUL:** Yes, My Lord.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Where do you source it in the Act?

12

13 **NEERAJ KISHAN KAUL:** My respectful submission for that is, that if a person who is
14 ineligible to act as an Arbitrator and is ineligible to nominate an Arbitrator is also ineligible to
15 give a panel of Arbitrators who are unaffected by Schedule Seven Entry 1 or any other entry.
16 But he cannot give that panel because the reasoning is the same. What you can't do directly,
17 you can't do indirectly either. The person may nominate someone. But that nominee may not
18 be affected by Schedule Seven at all. The Managing Director of Railways could appoint or
19 nominate a person who...

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** So the objection is about authority to nominate.

22

23 **NEERAJ KISHAN KAUL:** Yes. The authority to nominate, if...

24

25 **JUSTICE P.S. NARASIMHA:** What happens is the Contractor that is his case. He is
26 concerned about his case. So far as the Owner is concerned. For example, NHAI or take for
27 example Railways, for them every day there will be a request for 10 to 15 or even 20 arbitrations
28 every day. So there's a process by which they will have to continuously keep doing it. So it may
29 become necessary to have some kind of a panel by which they will keep appointing Arbitrators.
30 If we give a declaration of the nature that you are saying that you cannot have a panel at all, at
31 all inter se in a contract between two parties, owner of a public sector and a private. If panel is
32 not permissible, then in each case, we'll have to individually identify an Arbitrators and then
33 appoint it. The process of... The situation will be very difficult to...

34

35 **NEERAJ KISHAN KAUL:** May I answer that My Lords. My Lords, I am not for a minute
36 suggesting... I'm not for a minute suggesting there cannot be a panel. I am not suggesting that.
37 I was just coming to it. Let me, I'll just formulate and complete the submission. My only

1 submission is that the panel cannot be curated and unilaterally given by one side. For instance,
2 I'll give an instance.

3

4 **JUSTICE P.S. NARASIMHA:** One question, yeah correct. I want you to answer that
5 question. Why, the difficulty is arising because Owner is one. Contracts are independent,
6 Contractors are independent. If it is a society of Contractors or society of Builders, only
7 through the Builders society that you come to Railways or anyone, then you can have a
8 common panel between the society of Builders and Railways or NHAI. But that is not possible
9 because these contracts are happening standalone with various Contractors. Then in this case,
10 how does a panel get formed?

11

12 **NEERAJ KISHAN KAUL:** Well taken. Well taken and I'll just answer that. My Lords just
13 as an example we now have the India International Arbitration Centre Act. We have an
14 institution which is a deemed, it's an institution of national importance presided over by a
15 retired judge of the Supreme Court of India, in this case. What better examples than neutral
16 institutional...

17

18 **JUSTICE P.S. NARASIMHA:** You're saying the solution is institutional arbitration?

19

20 **NEERAJ KISHAN KAUL:** Yes.

21

22 **JUSTICE P.S. NARASIMHA:** That's it. That's the point.

23

24 **NEERAJ KISHAN KAUL:** And that's where the panel will lie. I fully understand what Your
25 Lordships are saying. Different Contractors going one to the other. I understand that. Your
26 Lordships are right. My submission is twofold. 1) The alternative mechanism for appointment
27 of Arbitrators from a panel is available in the form of these national institutions. These are
28 acts passed by Parliament, calling them institutes of national importance, institutions of
29 national importance. Secondly, my objection is that the reasoning for a panel that it cannot be
30 curated by an eligible... ineligible person is the same route, what was there for saying that he
31 could not nominate anyone. A person who cannot nominate another person because he is
32 ineligible then nominated person may be perfectly eligible to act as an Arbitrator, but he can't
33 nominate him. Similarly, he cannot give me a panel of 30 or 50 or 5 names.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Would it not be very extreme? I mean you're
36 right. I mean yours is an extension argument that if you cannot act as an Arbitrator Mr.
37 Railways, you can't nominate an Arbitrator who will act as an Arbitrator.

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NEERAJ KISHAN KAUL: And he maybe eligible otherwise.

CHIEF JUSTICE DY CHANDRACHUD: Would that not be very extreme? Because... Would that not be very extreme because if the panel which Mr. Railways nominates suffers from any, suffers from any ineligibility then, it's a different thing. I'll tell you why. We're not really in the realms strictly of, this is really an amalgam in many of these cases of public and private law, say National Highways Authority, Railways, National Hydro Power Corporation, they're dealing with contracts worth thousands and thousands of crores, and they are purveying in public money. This public expenditure and public revenue which is being spent. Now, would they not have a vested interest in ensuring that - Look, we are not only concerned with the independence of the Arbitrator we nominate. Though we want to ensure that there is overall an independent Arbitral Tribunal. Therefore, the overall Tribunal, because this possibly may [UNCLEAR] us in huge, we've see the nature of these awards. Why should we deny them completely the right to ensure that the arbitral panel consists of independent people? If they nominate, if they start nominating cronies, sorry I used that expression, suppose they nominate a retired employee, certainly there's a problem. Then you point out something to indicate that this panel does not consist of independent names. But suppose they give names of people which are independent their only intention then is this, do you have a problem with all the names we've suggested? If you don't, why, what's the difficulty about your choosing one of them?

NEERAJ KISHAN KAUL: My Lords, may I with respect say....

CHIEF JUSTICE DY CHANDRACHUD: Then your answer can be only one theory that - Look, I should have an untrammelled right to choose whoever I please in an arbitration.

NEERAJ KISHAN KAUL: May I answer that? My Lords, what is sauce for the goose is sauce for the gander. If their apprehension that you may just appoint anyone and not from here. We want to protect our interest. I can equally turn around and say, that what you are curating as a panel is something in which I have a crisis of confidence. I don't have confidence in that.

CHIEF JUSTICE DY CHANDRACHUD: Exactly. I agree with you, if you have a crisis of confidence in the panel which they have curated, certainly you have an objection. You have a valid objection. But if you have no crisis of confidence in a panel which they are curating, then, why should you have an objection to appointing one of them? We also see that they should not be then permitted to appoint outside the panel. If they create a panel of five, Suppose they

1 create a panel of ten. What's sauce for the goose is sauce for the gander. You must appoint one
2 among the ten. They must appoint one among the ten and the two Arbitrators will then appoint
3 a third-party Arbitrator.

4

5 **NEERAJ KISHAN KAUL:** May I with respect say that with utmost humility, will not be
6 sauce for the goose and sauce for the gander, because that panel is only curated by them.
7 Either, that's why I said, institutional arbitration panels, where an institution curates a panel,
8 and it's open to both the parties. Today, we are talking about a panel, may be the most
9 impeccable panel.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** But institutional arbitration still to kick off.

12

13 **NEERAJ KISHAN KAUL:** Please, My Lords.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** It's still to kick off.

16

17 **NEERAJ KISHAN KAUL:** We also have... for instance, I'm giving instances. I'll give
18 instances to Your Lordships. We today had the Delhi Arbitration Centre, the Mumbai
19 Arbitration Centre, all under the aegis of working under various Centres. Any of these
20 institutions. I'm not today going about questioning every institution where there is a panel. I
21 just gave an instance to Your Lordships, that there's also an Act. After all, we have the
22 Hyderabad institution, the Delhi Arbitration Centre, the Mumbai Arbitration Centre. Any of
23 these institutes working under a credible institution and can't get more credible than the High
24 Court concerned. If any one of them maintain a panel from where both the parties go and
25 choose their Arbitrators, then the whole perception of not only being neutral, but perceived to
26 be neutral comes in. Why should I be in any way fettered by the panel you create? What is it
27 that gives you the superior right, which I don't have to curate a panel just because you are the
28 Government or a PSU that you get a superior right to curate a panel and we should not go to
29 an independent institution, which gives us the name of people from which both of us could
30 select. What is it that just being the State gives you the superior right, that's not recognized
31 under law. There's no superior right vested in the State or any Institution.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** At the end of it, really, your challenge is, you are
34 extending the *Perkins Principle* or you are basically founding it on the basis of 18, Equality.

35

36 **NEERAJ KISHAN KAUL:** Equality and also, for instance, I'll just give an instance. For
37 instance...

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CHIEF JUSTICE DY CHANDRACHUD: There is no [UNCLEAR] a grey area in the Act. Now we have to interpret it.

NEERAJ KISHAN KAUL: Not a direct answer. My learned friend points out something, which I may just read out. It's not a direct answer to what Your Lordships asked me. For instance, grounds of challenge in Section 12.

CHIEF JUSTICE DY CHANDRACHUD: Conclude your submissions. We are past 03:00.

NEERAJ KISHAN KAUL: In all humility, My Lords, I tried to cover it as fast as I can.

CHIEF JUSTICE DY CHANDRACHUD: But, you make it to the point. There is lot of questioning for the other side to answer.

NEERAJ KISHAN KAUL: I just have four or five, I'll run through, not read any of it.

JUSTICE P.S. NARASIMHA: Point wise, tell us. Point wise.

NEERAJ KISHAN KAUL: Just point out in pointers for a five judgement...

CHIEF JUSTICE DY CHANDRACHUD: Summarise what you have.

NEERAJ KISHAN KAUL: Can I just point out one thing. In Section 12, My Lords, ultimately, on grounds of challenge, what you disclose is said likely to give rise to justifiable doubts as to its independence or impartiality. Now, all that I am saying is that the moment a panel comes from an independent institution, could be anything, those doubts as to impartiality go. But the moment a panel howsoever impeccable the credentials is curated by one side to the detriment of the others, or to the exclusion of the others, there is bound to be erosion of confidence as far as the independence, impartiality and fairness of the Tribunal and the process is concerned. There is bound to be that and given the relationship with the State as it occurs on a day-to-day basis in contracts. Your Lordships gave instances, of so many awards have gone against the State. There are any number of instances where honest private parties have also suffered at the hands of the State and PSUs, in such unreasonable demands, claims and terminations being made from time to time. So, many of these companies have been brought to a standstill, bank guarantees encashed overnight.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Kaul, there's some substance in what you are
2 urging for another reason. Absent this, absent a transparent procedure, a lot of people what
3 they do, a lot of Contractors will do is to completely breach the integrity of the process by
4 having the appointing authority appoint people of their choice. That happens through the back
5 door. Given the fact of reality, given the Indian reality this you will not find in the pure article
6 or the pure laws written in Netherlands or Switzerland or Geneva, wherever.

7

8 **NEERAJ KISHAN KAUL:** Absolutely right.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** This is the Indian reality.

11

12 **NEERAJ KISHAN KAUL:** Yes and that's why I said there are problems on both sides and a
13 party which can influence the outcome of a proceeding can also outcome the curation of a list.
14 So if those are the parties we are looking at, then what is it in the fairness, that you should look
15 at? Hopefully two honest parties who come to court. What kind of a panel would they look at?
16 A panel under the aegis of a national institute or a respectable institute like the National
17 Arbitration Centre or the Delhi Arbitrator Centre or the Mumbai Arbitration Centre. What
18 could be a better solution than that, where you completely erase any doubts that could be
19 raised as to the impartiality and fairness of the panel. Now, My Lords, quickly let me just run
20 through. Let me just run through two or three points on the judgments, and then I am done.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Just formulate them.

23

24 **NEERAJ KISHAN KAUL:** Yes, My Lords. My Lords, and in line with what I'm saying is also
25 the judgment of *HRD vs GAIL* which is page 1143 Volume III para. 18 Your Lordships may
26 note. Effectively saying that with the 246th Law Commission Report and the amendments
27 which have been brought about to the Arbitration Act. They did two things, they narrowed the
28 grounds of challenge under 34, and they introduced Seventh Schedule and Fifth Schedule and
29 Section 12 was amended to the Act. The Supreme Court emphasized that in view of his narrow
30 grounds now we must be even more careful in preserving independence, impartiality and
31 neutrality of Arbitrators, which was said in para. 18 of this judgement. That now you have
32 further restricted the grounds of challenge, thus even greater care as far as neutrality and
33 impartiality of the Arbitrator is concerned. My Lords as far as the judgment in *Voestalpine*
34 is concerned, it recognizes the principles that it should be broad based. In fact, that 5 was made
35 31, the Supreme Court did not interfere, saying that 31 is broad enough. It says it should be
36 broader. It shouldn't be restricted to retired or serving government employees. You must have
37 lawyers, doctors, chartered accountants, all on the panel. But our objection to *Voestalpine* will

1 still remain the same on this one limited issue. Of course it should be broad based, etc. , that
2 the panel cannot be unilaterally curated by one side. That part My Lords...

3

4 **JUSTICE P.S. NARASIMHA:** To that extent even *Voestalpine* is also against you.

5

6 **NEERAJ KISHAN KAUL:** Yes, My Lords. I'm saying so, My Lords. I have to bring it to Your
7 Lordships notice. That they said 5 became 31. The other issue, My Lord, which has not been
8 argued, which was an issue which arose in another judgment of the Supreme Court, which is
9 not the subject matter here today, but was touched upon by **CORE** was that under Entry 1
10 could retired employees be part of the panel? That in fact the TK Viswanathan Committee
11 Report I wanted to point out to Your Lordships. Your Lordships may just note. Para 3.88. The
12 report has gone to the Ministry of Law. Para 3.88, page 10690. Para 3.88, page 10690, Volume
13 IV. TK Viswanathan Committee Report says that there cannot be a... Volume IV(a). There
14 cannot be a panel unilaterally given from which I'm required to pick people. It has to be jointly,
15 either prepared by the two sides or institutionally. I'm not bothering for paucity time. I not
16 just making Your Lordships take notice of the concern para.

17

18 **JUSTICE P.S. NARASIMHA:** That's the proposed amendment.

19

20 **NEERAJ KISHAN KAUL:** That's the proposed amendment. That is gone. Now, My Lords,
21 Your Lordships have also in *Lombardi* where Your Lordship said that it was covered by...
22 Your Lordships followed *Perkins* and then on the pre deposit part because it talked about a
23 percentage being pre deposited for arbitration to be invoked. Your Lordships invoked the
24 general principle of legal due process, unconscionable contracts, and something being
25 unconstitutional. So Your Lordships held that such a contract or a clause which is
26 unconscionable can be struck down, as Your Lordships have held in many other judgments.
27 So all that I am saying is that apart from the specific that Your Lordships were asking, for
28 tracing the impartiality to the clause in the Arbitration Act, the fact is, wherever Your
29 Lordships have found a clause to be unconscionable, unconstitutional, Your Lordships have
30 dealt with it and struck it down. And *Glock* also, *Glock* also My Lords, Your Lordship applied
31 *Perkins*, followed *Perkins* and took note of the Law Commission in that as well My Lords.
32 I'm very grateful, if there's something else, My Lords, we will assist in rejoinder.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, Mr. Kaul.

35

36 **NEERAJ KISHAN KAUL:** Very grateful.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you.

2

3 **NEERAJ KISHAN KAUL:** My Lords, do I have Your Lordships liberty?

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Certainly, Mr. Kaul. We'll come back in two
6 minutes. We'll just take a little break for two minutes and come back.

7

8 **S. RAVI SHANKAR:** My Lords, I'll just address three of the points, which I wanted to give
9 clarification.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Have you formulated?

12

13 **S. RAVI SHANKAR:** The first point is My Lords. Now, the short issue before Your Lordship
14 is whether to sustain an Arbitration Clause as upheld in the Court. So when this is coming. Let
15 us see the basics of the Arbitration Clause. Basics of an Arbitration Clause, it is also a part of a
16 contract. It also has all the checks and balances what normal contracts will have. The better
17 thing or better position, the situation of an Arbitration Clause is because it is giving the
18 responsibility to both the parties to formulate a *quasi-judicial* authority, which is going to be
19 the first step of the litigation process. So all the other clauses of contract are mutual obligations
20 and responsibilities of the parties. So My Lords, will never go into the extent of using public
21 policy against a contractual provision, which is a mutual obligation and commercial things in
22 nature. But this being a clause where it has a special status of finalizing or formulating the first
23 step of a judicial mechanism. This is equal to the powers of the High Court in Section 11. So
24 such a power cannot be diluted, altered or tinkered using the party autonomy. Party autonomy
25 has to stop in front of the public policy test. So the public policy test in Indian constitution
26 cannot even imagine of having a 1% more power to the other party to formulate a *quasi-judicial*
27 authority. Hundred percent in all means Constitution ensures and guarantees delivery of
28 justice by undisturbed or unfiltered institution. So a clause when it is crossing that limit of
29 tilting the equality even by 1% of it, My Lords it becomes unilateral. Not even 1% of the power
30 given to one party more than the other will make that clause unilateral, then in such a case,
31 public policy has to be applied.

32

33 Point number two is My Lord, with regard to the appointment of the Tribunal, replacement of
34 the Arbitrators by the court. I beg to disagree with my seniors in this, My Lord. Courts do not
35 have the power to appoint the Arbitrators in case of a replacement because an Arbitration
36 Clause has different aspects of it. It has the language of arbitration, number of arbitrators, seat
37 of arbitration, law applicable to the arbitration, all those things. Particularly intention to

1 arbitrate. That is the first point. When Your Lordship is going to say that a particular
2 appointing procedure is bad in law if it not enforced which means that Arbitration Clause
3 unenforceable. Then 11(3) comes. 11(3) talks about the situation where an Arbitration Clause
4 does not have a mechanism to appoint the Arbitrator. Kindly see 11(3). May I read it?

5

6 **JUSTICE P.S. NARASIMHA:** What is the submission you are making?

7

8 **S. RAVI SHANKAR:** My Lords.

9

10 **JUSTICE P.S. NARASIMHA:** What is the point you are making?

11

12 **S. RAVI SHANKAR:** The point I am making My Lord, there was a submission from my other
13 senior counsels saying that in case, the arbitration appointment procedure is held bad in law
14 by the court, can the court appoint... replace the Arbitrators by themselves by the court?
15 Whether court can appoint the Arbitrator.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore that the procedure is invalid. The
18 courts has no power to appoint. It is not severable.

19

20 **S. RAVI SHANKAR:** It's provided in the law. 11(3) says that.

21

22 **JUSTICE P.S. NARASIMHA:** Yes.

23

24 **S. RAVI SHANKAR:** "A person of any nationality may be an Arbitrator." Two says, "Subject
25 to Sub-Section (6), the parties are free to agree on a procedure for appointing the Arbitrator
26 or Arbitrators." Third - "Failing any agreement referred to in Sub-Section (2) in the arbitration
27 where three Arbitrators, each party shall appoint one Arbitrator, and the two appointed
28 Arbitrators shall appoint the third Arbitrator, who shall act as the presiding Arbitrator." My
29 Lord.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** So, if the procedure fails or if the procedure is
32 held to be invalid?

33

34 **S. RAVI SHANKAR:** Procedure is held to be invalid. That particular portion alone vanishes.
35 The rest of the Arbitration Clause remains. Applicable law will remain. The number of
36 Arbitrators will remain. Intention to parties will remain. Seat of arbitration will remain. Only

1 missing link is appointment of the Arbitrators. So at that point of time, this 11(3) is the
2 appropriate section to apply.

3

4 **JUSTICE P.S. NARASIMHA:** 11(3) will come into play after 6, no? Under Sub-Section 2
5 talks about 6.

6

7 **S. RAVI SHANKAR:** Yes, My Lords.

8

9 **JUSTICE P.S. NARASIMHA:** Then the point is something else. Anyway, you complete. You
10 make your submission.

11

12 **S. RAVI SHANKAR:** Yes, My Lord. 11(6) talks about all failures, My Lord. So My Lord, my
13 humble submission is with regard to the appointing authority for the court is given only 11(6)
14 and Section 14. In addition to that, there is no provision in law which is providing the
15 appointing authority.

16

17 My Lord, third one is regarding the Tribunal... Sorry, this panel prepared by the Arbitrators,
18 My Lord. My Lord, there are different types of panels prepared by PSUs My Lord. For example,
19 my opposite party IRCON has a 36 people panel, which is all engineers, which was given to us,
20 which we rejected, then we came here. The 36 persons, the difference between arbitral centre
21 or some other institution or a neutral institution is the selection of Arbitral Tribunal is
22 transparent in nature. If I have to apply to FICCI as an Arbitrator, I got the empanelment. I
23 have to fulfil ten years of experience, five arbitration cases I should have done. I should have
24 an experience, exposure into arbitration, publications and all. Fine, I am getting in it. But I
25 cannot get into NHAI. It is closed. It is chosen for some people. So that also amounts to a kind
26 of limiting the right of the other party. If it is transparent to everybody, it's fine or if it is
27 optional, it is fine. You are selecting yourself and making it mandatory. How it is fine? It cannot
28 be fine because you are touching my right, at least by one person, which is not permissible in
29 law. My Lords, this panel also, they create one big panel, larger panel, and then they will
30 suggest a small panel of three or four, five people. From that you have to choose one among
31 them. So it further reduces. So that goes away.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** So just give an example. In the case of IRCON
34 can you select any one from the 36 or they will give 5 out of the 36?

35

36 **S. RAVI SHANKAR:** So they will give you five only My Lord, but High Court gave me a
37 liberty to select from all. But our contention is My Lord, as long as the panel is selected at the

1 discretion of some officers in the PSU or Government without a transparent procedure to
2 select. Tomorrow you specify, these are the qualification, this is the month we open for
3 empanelment, you select, fine. It doesn't happen. It happened as per the...

4 [NO AUDIO] But whatever it is there are various ways. Or if they want to make a panel as My
5 Lords said NHAI may have hundred cases. They cannot go and select at that point of time to
6 have a panel. Then don't compel me to select from there. Let it be an optional panel. If I like I
7 select otherwise I select from somebody else. That's all My Lord.

8

9 **JUSTICE HRISHIKESH ROY:** Just one query. Say Railways, you talked about Railways.
10 Now in railways, there could be so many arbitration requests.

11

12 **S. RAVI SHANKAR:** Yes, My Lord.

13

14 **JUSTICE HRISHIKESH ROY:** Maybe everyday there could be 50 or 100 arbitrations
15 request.

16

17 **S. RAVI SHANKAR:** Yes, My Lord.

18

19 **JUSTICE HRISHIKESH ROY:** Now, every time they have to look for somebody outside,
20 if they don't have some structure in place. That from this, we'll make choices.

21

22 **S. RAVI SHANKAR:** Perfectly alright. We don't have any objection to having an arbitration
23 panel by themselves, for their use. For us also it can be given as an option. These are the people,
24 their profile is this. If you want, you can choose, but you don't make us also compelled to
25 choose only from them. Let it be an optional panel.

26

27 **JUSTICE HRISHIKESH ROY:** No, optional panel is...

28

29 **S. RAVI SHANKAR:** Because among the three...

30

31 **JUSTICE HRISHIKESH ROY:** When you say optional panel. How... We are just trying to
32 understand your logic.

33

34 **S. RAVI SHANKAR:** My Lord, there are three arbitral...

35

1 **JUSTICE HRISHIKESH ROY:** No, just a minute. A panel is there. Say Railways. Let's take
2 Railways, panel is there and you are saying that if they ask us to choose from there, it is all
3 right, but they should not give those choice of four or five? Is that what you're saying?
4

5 **S. RAVI SHANKAR:** Even choosing my rights are reduced, because it is not a transparent
6 panel.
7

8 **JUSTICE HRISHIKESH ROY:** Then how are you saying that panel is alright?
9

10 **S. RAVI SHANKAR:** My Lord, panel... Because My Lord, the beauty of our... Yes, My Lord...
11

12 **JUSTICE HRISHIKESH ROY:** Railway can say that -"I select 'A' out of my panel of 50."
13 And the Contractor says, "He is, not of this 50, but he is my nominee." And between the two,
14 they will have the...
15

16 **S. RAVI SHANKAR:** Perfectly alright.
17

18 **CHIEF JUSTICE DY CHANDRACHUD:** And the Contractor according to you, wants to
19 select one from the railway panel, that's fine. That's his right. Give him a choice.
20

21 **S. RAVI SHANKAR:** The beauty of arbitration is, if a party is selecting an Engineer in an
22 engineering Contract. If Contractor is selecting a Judge or some legal person. That will be a
23 very nice combination. No requirement for an expert witness. If there are two judges there is
24 one Engineer. So, these all can happen, when the liberty is given to us. When liberty is curtailed
25 all this go. Everybody sits, all three retired Engineers. My Lord, my last submission. Just one
26 more, My Lords. Section 12, Schedule Five and Seven, in my opinion, should be kept away
27 while deciding this matter. This is a matter which is going to decide a system which is going to
28 test the Arbitration Clause and its validity. That is a post appointment system. The post
29 appointment system prescribes 19 items in the Schedule Nine and 34 items in Schedule Five.
30 They are only an opportunity for the parties to know about their personal connections. So that
31 is a different issue that should not be kept in mind while deciding this. Here My Lords are
32 going to decide the validity of a clause or a system which will ensure neutral arbitration. Much
33 obliged.
34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you so much.
36

1 **ROHAN TALWAR:** My Lords, I'm going to address My Lords firstly on a proposition which
2 has not been discussed, which is this skewed incentive which arises in unilateral appointment
3 procedures. My Lords, on two stakeholders. One is the appointing authority.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** You have said -Skewed incentive.

6

7 **ROHAN TALWAR:** My Lords. In cases where there are unilaterally appointed panels or
8 unilaterally proposed panels. My Lords, firstly, *qua* the appointing authority. Anyone who is
9 going to be rendering a verdict in their favour. There is a perverse incentive in economics
10 which is called to reappoint that person in the panel. And it's a known thing that panels are
11 reviewed periodically and thereafter curated. My Lord, the second skewed incentive is of the
12 Arbitrator in this case, who has an incentive to remain on this panel. So what would happen is
13 that...

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** What is the first skewed incentive?

16

17 **ROHAN TALWAR:** My Lords of the appointing authority, that if I'm an Arbitrator and I give
18 a judgment in favour, let's say, of the appointing authority.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Will be reappointed.

21

22 **ROHAN TALWAR:** I'll be reappointed.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** And there is no provision in the Act which bars
25 reappointments in more than one arbitration.

26

27 **ROHAN TALWAR:** Absolutely.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Beyond three. Schedule Five, Item 20.
30 "Arbitrator has within the past three years served as... been appointed as an Arbitrator in two
31 or more occasions by one of the parties or an affiliate of one of the parties."

32

33 **ROHAN TALWAR:** My Lords, however this is on the point of impartiality at this stage where
34 I'm questioning the appointment. I'm saying that in a year...

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** So in 3 years you can't accept more than two
37 arbitrations from one party.

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ROHAN TALWAR: My Lords, however...

JUSTICE P.S. NARASIMHA: Therefore its clear, in a case where you come across a situation where the person, the panel has already been appointed twice. You will say that you can appoint him at all.

ROHAN TALWAR: My Lords, firstly, these are not disclosed.

JUSTICE P.S. NARASIMHA: But this is different from what's being argued.

ROHAN TALWAR: My Lords, I will only pick a person, even after the scope of three years who has decided in my favour, and within those three years, I can repeatedly appoint up to twice before someone who has decided in my favour. This is *qua* the appointing authority. Let's call them Railways. *Qua* the Arbitrator also, My Lords, a perverse incentive is to remain on this panel. And My Lords, I may be on several panels. I may duplicate my appointment. And therefore, this perverse incentive in fact, is recognized in a judgment by the name of *Hooters of America vs Philips*. It's at page 3585 or Volume III My Lords.

CHIEF JUSTICE DY CHANDRACHUD: *Hooters* was actually referred to by a judgement that was cited the Mr. Banerji.

ROHAN TALWAR: Mr. Banerji also of the referred to. It is just a sentence there which I want to refer to My Lord. So here also there was a panel.

JUSTICE P.S. NARASIMHA: So what they have held? They said that such person is ineligible to be appointed.

ROHAN TALWAR: My Lords. And there's a very interesting sentence just falling from what My Lord said. My Lords, I'm at page 3589, relevant. The appointment procedure is the Employee and *Hooters*, each selects an Arbitrator and two Arbitrators in turn select the third. Similar to *CORE*. Similar to my case as well. My Lords, the bottom of that paragraph, fourth line. "Further, nothing in the rules restricts *Hooters* from punishing Arbitrators who rule against the Company by removing them from the list. Given the unrestricted control that one party *Hooters* has over the panel, the selection of an impartial decision maker would be a surprising result." My Lords, this is one incentive I wanted to...

1 **CHIEF JUSTICE DY CHANDRACHUD:** Question. So within a period of 3 years also you
2 appoint an Arbitrator on a second location.

3

4 **ROHAN TALWAR:** Absolutely.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** And once, even after the period of 3 years, the
7 bar of 3 years has expired, you'll have an eye who held in your favour in your previous
8 arguments. That's your point.

9

10 **ROHAN TALWAR:** I have My Lord. Three years, giving a cooling off period, but after that
11 as My Lords are saying, I am aware who's decided in my favour.

12

13 **JUSTICE P.S. NARASIMHA:** So therefore, in the new proposed amendment, exactly, this
14 is what it is. Proposed amendment says that - We will now have instead of a prohibition, a
15 cooling off period. There's a cooling off period suggested by the new panel.

16

17 **ROHAN TALWAR:** My Lords. And My Lords, the second point I want to raise is regarding
18 the legislative infraction. What is exactly prohibited under this Act. My Lords, I want to read
19 a sentence at the cost of repetition in *TRF* and one sentence in *Perkins*. If My Lords may
20 have paid 1033 of *TRF*.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** But you went, what's the submission?

23

24 **ROHAN TALWAR:** My Lords, the submission is that there is an implicit legislative bar
25 arising out of the fact that an individual who has an interest in the outcome of a dispute cannot
26 be made the appointing authority.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** That Mr. Kaul argued.

29

30 **ROHAN TALWAR:** My Lords, just a sentence to show where is this coming from
31 legislatively. What is the statutory bar here, which these two decisions in my respectful
32 submissions have addressed already. My Lords, at paragraph 57, 1032 bottom. "In such a
33 context, the fulcrum of the controversy would be can an ineligible Arbitrator like the MD,
34 nominate an Arbitrator who may be otherwise eligible and a respectable person? As stated
35 earlier, we are neither concerned with objectivity nor individual respectability. We are only
36 concerned with the authority or the power of the Managing Director. By our analysis, we are
37 obligated to arrive at the conclusion that once the Arbitrator has become ineligible by

1 operation of law, he cannot nominate another as an Arbitrator." And end of the next sentence
2 -"The Arbitrator becomes ineligible as per prescription contained in 12(5)." Now, My Lord,
3 this is interpreted in *Perkins* and without... Apologies. My Lords, this next sentence from
4 *Perkins* is at 1274. I'm reading paragraph 16, where they interpret what is this.

5
6 My Lords, I'll just read that sentence. "The ineligibility referred to therein was as a result of
7 operation of law in that a person having an interest in the dispute or in the outcome of a
8 decision thereof, must not only be ineligible to act as an Arbitrator, but must also be eligible
9 to appoint anyone else as an Arbitrator." At the foot of this paragraph - "that has to be taken
10 as the essence of the amendments brought by the Arbitration and Conciliation Amendment
11 Act 2015." Independence, My Lords said is a complete virtue. It can't be negated at margins.
12 So, My Lords, of independence has to be seen as an absolute virtue. This amendment
13 introduced independence and impartiality. What My Lords, have said in *Perkins* is that the
14 essence of this amendment is that an interested party cannot adjudicate. If an interested party
15 cannot adjudicate because they have an interest in the outcome. They cannot nominate. Now,
16 whether I nominate 1,2 or 100 is immaterial.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you. Thank you.

19

20 **ROHAN TALWAR:** My Lords, obliged, My Lords.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Now Mr. Annirudh Krishnan.

23

24 **ANNIRUDH KRISHNAN:** I'll keep it extremely brief. My Lords, I locate impermissibility
25 under three heads. First, Section 18 of the Arbitration and Conciliation Act. Second, Section
26 23 of the Contract Act, and third where there is a State party involved under Article 14. In so
27 far the Section 18 is concerned, my note contains various references, a lot of which my learned
28 senior Mr. Banerji has already referred to, but in substance, what Section 18 proscribes is the
29 inequality in the process including the appointment process. What it requires is absolute
30 equality and if absolute equality is not guaranteed at the stage of appointment, absolute
31 equality is impossible during the process. Now this, My Lord, the equality is completely
32 independent of independence and impartiality. Independence and impartiality is a separate
33 paradigm covered by Section 12(5) and the two Schedules. Equality and when I refer to
34 equality, I'm referring to the lack of mutuality in the appointment process. Any unfair
35 advantage that any party has at the stage of appointment will result in a violation of Section
36 18. Let me give an example. There could be so many scenarios where the panel is perfectly
37 eligible, but the party nominating the panel may fill the panel with Arbitrators who have

1 already decided a similar issue in their favour in the past. So, in such a scenario, My Lord,
2 there is no Fifth Schedule or Seventh Schedule violation, but there will still be a violation of
3 right under Section 18, because why should one party have the right to fill the panel with
4 people of their choice?

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** In fact, you are right. I asked a question in the
7 morning. Are there any apprehension or objections independent of the Seventh Schedule and
8 this is what you have said, that you have now...

9

10 **ANNIRUDH KRISHNAN:** And I can give a real-life example. We did multiple arbitrations
11 against, in relation to Metro Rail construction. There was one Exclusion Clause which was a
12 subject matter of litigation in most of these arbitrations. Now, the first set we had a completely
13 independent panel. The second set of panels that were given to us, comprised of only those
14 who had interpreted that clause in favour of the Metro Rail corporation. Now, today, if the
15 Metro Rail Corporation has this unilateral power, it's independent of Fifth Schedule,
16 independent of Seventh Schedule. But is it not a violation of equality under Section 18, I asked
17 myself. This is the first point. Second, a query that fell from Your Lordship is that, this Section
18 18 is located under Chapter V, which deals with conduct of the arbitration.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Does that now go to the panel as opposed to the
21 power?

22

23 **ANNIRUDH KRISHNAN:** Sorry, My Lords?

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** That's your argument, now, therefore impeach
26 the panel as opposed to the power to...

27

28 **ANNIRUDH KRISHNAN:** My Lords, the panel is perfectly eligible because there is no
29 question of subject matter. There is no entry relating to subject matter by us in Fifth Schedule
30 and Seventh Schedule.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Really speaking, it doesn't encroach or does not
33 breach any provision of the statute.

34

35 **ANNIRUDH KRISHNAN:** It does not breach any provision of the statute, but the panel
36 comprises of only those Arbitrators who have decided the very same issue in favour of the

1 party appointing the panel. That's the reason why, My Lord, even though party autonomy is
2 important, party autonomy has to be balanced with... Sorry, My Lord.

3

4 **JUSTICE P.S. NARASIMHA:** As against each of the Arbitrator who had decided similar
5 cases against them.

6

7 **ANNIRUDH KRISHNAN:** They only decided one such case, but that's enough. They have
8 not decided more than two, so Fifth Schedule will not come in. So today there is... There is no
9 grievance against the individual Arbitrators, but it is that party that has filled the panel with
10 persons who have already decided the issue in the past. A party should not be permitted to
11 weaponize the appointment process.

12

13 **JUSTICE HRISHIKESH ROY:** Party autonomy cannot be for one of the party. The party
14 autonomy has to be mutual for both the parties.

15

16 **ANNIRUDH KRISHNAN:** And I bow down, My Lords. And party autonomy has its limits.
17 If there is a mandatory provision of law such as Section 18, party autonomy would give in to
18 such a mandatory provision because having a blemish-less process is an equally, if not more
19 important consideration. Today Your Lordships has laid down the law in relation to minimum
20 judicial interference. Why? Because it presumes that the regime is blemish-less today because
21 of the Fifth Schedule. Because of the Seventh Schedule.

22

23 **JUSTICE HRISHIKESH ROY:** In *TRF* they mentioned that we are not concerned about
24 respectability, right? So, since who have decided on a particular aspect in favour of the
25 organization, they will give more respect to them.

26

27 **ANNIRUDH KRISHNAN:** I go back to what my learned friend argued on the incentive for
28 appointment. Then, before I conclude, there is one passage. I don't think I may have the time,
29 but I'll only provide the reference to the drafting history. Some portions of the drafting history
30 my learned senior read out, but at page 9823, Volume IV, tab 135.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** But your point, that look, suppose they
33 constitute the panel and that panel only consists of people who have arbitrated in the past
34 and, say, decided that issue, construction of a specific notice provision for termination
35 favourably to that particular employer. Can we not raise a ground of challenge under 12(8)?

36

1 **ANNIRUDH KRISHNAN:** Because it's not any of the grounds contained under Schedule
2 Five or Seven.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** No, but 12(8) doesn't confine you to only Fifth
5 or the Seventh Schedule. 12 says -"Such as the existence either direct or indirect of any past or
6 present relationship with or interest in any of the parties or in relation to the subject matter in
7 the dispute whether financial, business, professional or other kind, which is likely to give rise
8 to justifiable doubts as to its independence or impartiality." So suppose Railways or any PSU
9 appoints an Arbitrator who has decided that very issue. All the arbitrators in the panel are
10 people who have decided in their favour.

11

12 **ANNIRUDH KRISHNAN:** My Lords may I? Two aspects. First, I will never know as a
13 Contractor, because what needs to be disclosed would only be what is set out in the Fifth
14 schedule. So this is not covered in the Fifth Schedule. So I will never know whether they have
15 decided in the past or not. Point number one. Point number two, let us assume that they had
16 decided the same issue not in relation to the same Metro Rail Corporation, but in relation to
17 another public sector undertaking. Your Lordships sees exclusion clauses in so many cases, so
18 many Government contracts.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** You have decided the same interpretation.

21

22 **ANNIRUDH KRISHNAN:** Same interpretation. So why should one party have the benefit
23 of...?

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** There is an asymmetry of information according
26 to you, because the Contractor will not know everything about that Arbitrator.

27

28 **ANNIRUDH KRISHNAN:** I bow down, My Lords.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Or each of the Arbitrators. To identifying the
31 background you will have to engage detective agency to find out the background with the
32 Arbitrators.

33

34 **ANNIRUDH KRISHNAN:** My Learned senior also mentions that *HRD vs GAIL*

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Where?

37

1 **GOURAB BANERJI:** *HRD vs GAIL*. Arbitrator had given a similar award earlier.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** That was rejected.

4

5 **GOURAB BANERJI:** Yes. The problem here is the process and not the individual...

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Who's concerned.

8

9 **GOURAB BANERJI:** That's the real problem.

10

11 **ANNIRUDH KRISHNAN:** Then, on the issue of whether, even though it is located in
12 Chapter V, whether Section 18 will apply to the arbitral appointments. There is one reference
13 I would like to provide Your Lordships. At page 9823, Volume IV, tab 135, which is part of the
14 drafting history of the UNCITRAL Model Law. My learned senior read out certain portions.
15 This portion also deals with it and specifically says that it will apply to the agreements between
16 parties in relation to the procedure for the arbitration. And even when Your Lordship sees the
17 scheme, even though it says conduct of arbitration, 18, 19 and 20 are prior to the notice of
18 arbitration.

19

20 19(2) gives parties to agree upon the liberty in relation to the procedure. 21 gives parties the
21 liberty to agree upon the place of arbitration. Therefore, when you look at the scheme, even
22 though Chapter V deals with conduct, it begins with the agreement between parties on various
23 aspects before going into 21, which is the commencement of the arbitration and thereafter the
24 procedures like pleadings etc. in the Arbitration. Therefore, the reading of the scheme along
25 with the drafting history in my respectful submission would, in my respectful submission,
26 make it clear that Section 18 applies to the appointment process as well. This passage, My
27 Lords, is very, very clear. The passage that I just mentioned, I've referred to it in my note My
28 Lord. I don't want to read it out because of the paucity of time. Finally My Lord, just before...
29 If Your Lordship is to accept this contention that Section 18 applies, there are various issues
30 that will arise. What happens to arbitrations that have been concluded? What happens to
31 arbitrations where the challenge is pending? Because Section 18 was unamended. It will apply
32 even in the pre-2015 era. Therefore, Your Lordships may consider using the power under
33 Article 142 to restrict the applicability in a post-2015 scenario, where a challenge has been
34 raised and is pending before a court today. Because if it is going to apply across the board it
35 will...

36

1 Second consequence. What happens if the offending portion alone is severed? Can the doctrine
2 of severability and Blue-Pencil rule be adopted, and can the court then go ahead and appoint
3 an independent Arbitrator? In this regard, My Lords, if one party has provided consent on the
4 basis that it has a right to unilaterally appoint or appoint a panel that goes to the root of the
5 consent to arbitrate. Therefore, in my respectful submission the doctrine of severability and
6 Blue-Pencil rule cannot be read in because it vitiates consent in the first place. So if Your
7 Lordship is to accept the Section 18 argument the Arbitration Clause itself goes. Point number
8 two. Point number three. Who can raise it? Can today the party that has nominated the panel
9 and thereafter lost in the arbitration, go and challenge it, saying section 18 has been violated?
10 In my respectful submission, the answer would be - no, because in such a scenario, the right
11 under Section 18 itself would not kick in. Section 18 is a right that accrues for the benefit of
12 the party that is discriminated against. Deeply obliged, My Lord. There are a lot of foreign
13 judgments and articles that I've referred to in my notes. I don't want to go into all of it. Deeply
14 obliged.

15

16 **SAURAV AGARWAL:** I will take four minutes exactly. I appear for Shapoorji Pallonji, which
17 is a Contractor. We have filed an intervention, My Lord, I had mentioned yesterday. My Lord,
18 I've mailed my note to the court master. And very briefly, I have formulated my points over
19 the lunchtime. My Lord, we are carrying the hard copies also, My Lord. Very quickly my point.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** What is the submission?

22

23 **SAURAV AGARWAL:** My submission is obviously to say that... Four points, My Lord I am
24 making. Section 7 which talks about Arbitration Agreement does not include an agreement on
25 who will appoint. It's only limited to intent to arbitrate. And I'll read Section 7. "Means an
26 agreement by the parties to submit to arbitration." So once that test is satisfied, the second
27 conditions which parties often put that unless I appoint only then I will go to arbitration. Or it
28 can be only from my panel, then only. That was a question that had come from Lordships in
29 the beginning. What if it is a conditional Arbitration Clause? But the requirement of Section
30 7 is limited to intent to arbitrate, right to appoint or unilateral right to appoint or limited to
31 panel of appointment has to be divorced from it. They cannot go together. Once the test of
32 intent to arbitrate is satisfied, then law kicks in.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

35

36 **SAURAV AGARWAL:** That's my first point, My Lord. I've put it in my note, submission
37 number one. And My Lord, intent to arbitrate has been recognized in the *Cox and Kings*

1 judgment which on the Group of Companies doctrine. That's my first point. Intent to arbitrate
2 is the first step. As per 7 - "Arbitration Agreement has been defined to be means an agreement
3 so and so, it is not predicated as to who will have the right to appoint. Does existence of an
4 Arbitration Agreement get satisfied as soon as the requirement of 7 is met?" Now, my second
5 point is, there are three aspects of Constitution of an Arbitral Tribunal, intent to arbitrate,
6 commencement and procedure. These are the three aspects before the Tribunal is in place.
7 Now 11(2) uses the word parties are free to agree on a 'procedure'.

8
9 My Lord, actually, the main mischief is here. How much stretching do we give to the word
10 'procedure'? Does it mean procedure in case parties fail to agree? Or would Lordship, consider
11 procedure to mean even determining who will appoint among the two parties? Procedure will
12 only mean methodology. The real problem is procedure. If Your Lordship gives interpretation
13 to the word 'procedure' in 11(2), the entire problem gets solved. That's the Gordian Knot,
14 because that is where the agreement is referred to which gets used that - "Oh, I have a right to
15 agree on the procedure for appointment of an Arbitrator. That means I can decide who will be
16 appointed as an Arbitrator." My submission here would be keeping in mind the mischief rule,
17 **Heydon's** rule, purposive interpretation. The word 'procedure' will have to be limited to
18 mean, in case parties fail to agree, then what is the procedure? That is, what is the fallback also
19 in 11(5). Then 11(8), which Mr. Banerji had referred, has the words 'independence', and it also
20 uses the word 'other considerations'. Your Lordships had put a question - What is their 'other'?
21 Those other considerations would kick in because it's a very wide term. My Lord, on Section
22 18, My Lord, I have referred to the judgment of **PAM Developments**, which had made
23 Section 18 applicable to even post arbitration. And on panel My Lord, I have just two points to
24 make. What cannot be done directly should not be done indirectly. If Your Lordship is
25 permitting one party to appoint an Arbitrator, then panel will be justified. But if one party
26 can't appoint a Sole Arbitrator or the Presiding Arbitrator, then even panel cannot be justified.
27 My Lord, three people cannot be appointed by one person.

28
29 **CHIEF JUSTICE DY CHANDRACHUD:** So tomorrow we will start with the arguments of
30 the Solicitor General.

31
32 **SAURAV AGARWAL:** One request, My Lord, my colleague says, intervention may be
33 formally allowed.

34
35 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

36

37 **END OF DAY'S PROCEEDINGS**