

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)

TRANSCRIPT OF HEARING

29-August-2024

Document Control

Document Name & Date	Transcript of CA No. 9486-9487 of 2019 Hearing dated 29.08.2024
Status	Released
Version	1.0
Last Update	29.08.2024
Nature of Update	Original version
Release Date	29.08.2024
Document Owner	Supreme Court of India

11:00 AM IST

1 **CHIEF JUSTICE DY CHANDRACHUD:** So sorry, we are all late in sitting in court because
2 today we dedicated the new creche. Large number of young men and women lawyers. The
3 earlier creche about 200 m², which could accommodate with about 30 children. Now we have
4 450 m² creche, which accommodates close to 100 children. For the staff and for the members
5 of the Bar.

6

7 **TUSHAR MEHTA:** And the children do come.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** It's packed. In fact, we have constantly
10 requests... Now my child has turned six, can I have an extension for four months because of a
11 child? So for those of you members of the Bar, you may not have children or as in the case of
12 the Solicitor, you have a grandchild, but please do go and see the creche. It's in the additional
13 buildings, administrative buildings complex. It is a beautiful creche facility.

14

15 **JUSTICE PS NARASIMHA:** It's so beautiful that you might want yourself to stay there.

16

17 **TUSHAR MEHTA:** I'm waiting for the moment when some Honourable Judge says that you
18 are too childish in your arguments. That makes me eligible to go there. But we can do one
19 thing. We can... I will not use... 'Donate' is not the correct word. We can contribute by giving
20 toys or something.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** You know, we have in the creche, we have play
23 area for the children. The entire area is lined up with cushions, so a child shouldn't... It is child
24 friendly, bathrooms have been redesigned for little children, including for changing rooms for
25 changing babies nappies. But we have apart from play area, a dining area for children, a
26 feeding area for young mothers where you can feed your child in privacy. And there is a
27 sleeping area for the children also. Completely quiet area where the children can sleep during
28 the day, so on and so forth. Especially for... I always say, "It's not just the mothers thing, it is
29 the father's thing as well." All young lawyers who would like to go and see, please go and see
30 during the course of the day.

31

32 **TUSHAR MEHTA:** We will make it a point to go.

33

1 **CHIEF JUSTICE DY CHANDRACHUD:** You will be happy to see the... And of course, we
2 also unveiled today the new branch of the Bank of Maharashtra in the administrative buildings
3 complex. So, for the benefit of the lawyers, and it's a hi-tech branch where we will have
4 automated lockers, all the other facilities, including wealth management, so on and so forth.
5 So the prosperity of the lawyers should be reflected in equal financial services to them.

6

7 **JUSTICE HRISHIKESH ROY:** Some of the financial services that were explained by the
8 Branch Manager and the Chairman, I thought it would mostly be intended for the
9 professionals in the field, not for the judges.

10

11 **TUSHAR MEHTA:** Not till the Hon'ble Judges retire. But lockers for lawyers for professional
12 services may not be a good idea. I'm obliged, My Lords. I will just highlight what I would be
13 assisting with. The first principle...

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Solicitor, we'll of course, go by very
16 happening and fair statement yesterday, that you will not take as much time as it reflected in
17 the statement which I... We have seen your written submission which is comprehensive
18 actually.

19

20 **TUSHAR MEHTA:** I stand by that. From there also, whatever my learned friends have
21 already drawn Your Lordship's attention to, I will skip. And my broad roadmap for assisting
22 Your Lordships is this - Arbitration has necessarily its routes in the contract, and contract, by
23 necessary definition, is an act of volition.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** One second. The contract is a...?

26

27 **TUSHAR MEHTA:** Act of volition by definition.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** I know. But equally we know the other flip side,
30 say somebody who wants to be a Contractor with Railways, does not really have a negotiating
31 capacity. Either you accept the contract...

32

33 **TUSHAR MEHTA:** I have an answer to that. My submission...

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** It is an act of volition. So you've agreed to this
36 Arbitration Clause, how can you complain of the Arbitration Clause? At the same time, we
37 must also, see both the sides.

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TUSHAR MEHTA: Certainly, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: It is not that element of volition, if I want to sort of supply bitumen for the construction of a road, and I am a small petty Contractor, I've no negotiating power.

TUSHAR MEHTA: Standard form contracts.

CHIEF JUSTICE DY CHANDRACHUD: Or Clause 64. I leave Clause 64 or I leave the contract.

TUSHAR MEHTA: Correct. Your Lordships as custodian of fundamental rights, would look into it. But I'm just starting my arguments. Your Lordships at the end of it, may perhaps be satisfied that the system which I have envisaged within the framework of law, may meet with Your Lordship's concerns, and may achieve the object for which the Act is enacted.

CHIEF JUSTICE DY CHANDRACHUD: All right, so that first point is...

TUSHAR MEHTA: Second, party autonomy is ingrained in the entire architecture of the Act.

CHIEF JUSTICE DY CHANDRACHUD: Yes. That's your argument being transcribed.

TUSHAR MEHTA: In the entire architecture of the Act, My Lords. That's the submission. Third, unwittingly, the Respondents who began the argument were trying to find out whether there is any permissive provision which provides for a neutral panel. My respectful submission is the question is wrong and therefore, we are not getting an answer. The question should be, whether there is any restriction which prohibits the panel which I'm going to analyse. The panel also must satisfy Your Lordships conscience.

CHIEF JUSTICE DY CHANDRACHUD: Just for a clarification, you say, "The option which I'm going to suggest..." You'll be making that statement on behalf of the Union of India as an entity or how? Because...

1 **TUSHAR MEHTA:** Yes, My Lords. But I'm not suggesting on my own. I own what I am
2 arguing on behalf of Union, Railway... Central Railway organisation is the Petitioner. So for
3 Petitioner also. That's not the point. It is to be found in the Act itself.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Oh, then there is. Yes.

6

7 **TUSHAR MEHTA:** Why this exercise is necessary? Because I am not going individually to
8 *Perkins* or any other judgment leading to *Tantia*. That's not relevant because Your
9 Lordships are in a five-judge combination. We address Your Lordships on principles, and My
10 Lords would examine on principles. But somewhere down the line, there is a concept that this
11 kind of panel does not give them the choice, and therefore, penal is impermissible. This is my
12 paraphrasing. The wordings of the judgment may be wrong... may be different, but this is,
13 broadly few judgements have taken them. And that is a valid concern that they must also have
14 a choice. But please, My Lord, kindly bear in mind, this is My Lord, an alternative dispute
15 redressal mechanism. The party's contract, instead of going into the normal conventional
16 litigation, we would customize our dispute resolution mechanism. My Lord, the objection
17 necessarily pre-suppose that the panel is controlled by one party and therefore, we do not have
18 much of a choice when there is a provision which misses the distinction between a panel 'being
19 maintained' and 'panel being controlled'. I can maintain a panel of neutral and impartial
20 arbitrators without in any way controlling it.

21

22 **JUSTICE PS NARASIMHA:** Panel maintained and?

23

24 **TUSHAR MEHTA:** Controlled. That is the distinction. They argue that this panel is
25 controlled by you. My respectful submission is that the panel is maintained by me, not
26 controlled by me. Your Lordships are aware, My Lord, depending upon the nature of activity
27 of that particular contract there can be, a panel involving Honourable Judges. It can be
28 Structural Engineers. It can be Architects. It can be Civil Engineers. It can be Chartered
29 Accountants, everyone.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** You're right actually, Solicitor. Because, their
32 argument was that... my objection according to their mining there, objection is that this panel
33 is controlled by the authority. By Railways or by BHEL or whoever else. You will have to in
34 your option, which you explore before us. You will have to tell us how, who do you ensure the
35 control element is [UNCLEAR].

36

1 **TUSHAR MEHTA:** I'm grateful for that. My Lord that is where the judgment in *DMRC*, I
2 said *DMRC*, because *Voestalpine*...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** *Voestalpine*.

5

6 **TUSHAR MEHTA:** Easy pronunciation. I say *DMRC*. They say that - Your panel should be
7 broad-based Panel, having no, having various people from various facets of life, depending
8 upon the organisation which is making the panel. And that judgment is fortunately not
9 disputed by anyone. That judgment says that - Panel *per se*, if it is contractually so, provided
10 is not something impermissible, but you cannot have a panel of say 20 people, choose any one
11 of them.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Except that Mr. Kaul in the latter part of the
14 submission yesterday said that -Look, while I accept the broad *Voestalpine* principle. This
15 part which says that - So long as you constitute a broad-based panel that is valid. He says that
16 he has the same in his submission, because I just looked up my notes.

17

18 **TUSHAR MEHTA:** Otherwise, My Lord, kindly see the flip side of the argument.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Because you know, to read, para-phrase what
21 Mr. Kaul argued. He said, "*Voestalpine* recognises the principle of a broad-based panel and
22 the submission is... the objection is that the panel cannot be unilateral to the extent that
23 *Voestalpine* allows it." He says, "*Voestalpine* needs to be modified or reconsidered." That's
24 what squarely placed.

25

26 **TUSHAR MEHTA:** To that extent, there is a divergence, My Lord, they are not accepting.
27 My Lord, the other side has argued one extreme, that whatever the one side does is unilateral,
28 and therefore necessarily not impartial or would otherwise be objected to. But the flip side is
29 if that is not accepted, then you are free to choose your arbitrator, which may have some issues
30 of impartiality and neutrality. And when I say impartiality and neutrality, I also include
31 integrity.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** But then, that will apply to you also, that's the
34 point.

35

36 **TUSHAR MEHTA:** Correct. Therefore, I have an answer.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** What Annirudh argued yesterday in the latter
2 part of the submission was that- You may have a situation where the arbitrator who's in your
3 panel, perfectly fulfils the Schedule Seven requirements. And since you are approaching it in
4 the balanced way, we are really putting it to you so that you can find a solution for us as well
5 as you. So, Annirudh argued that - Look, the arbitrator on your panel, nobody will breach the
6 Seventh Schedule requirement but apart from the objection that this is a unilateral panel, there
7 must be one more thing. Take a concrete case, he says where, that person has already done
8 one arbitration in a period of three years, you constitute the panel so as to appoint only those
9 people who have already ruled.

10

11 **TUSHAR MEHTA:** Skewed incentive.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** See that interpretation of Clause 36 of General
14 Conditions of Contract. Second, he says -"After the lapse of that three-year time period, when
15 the cooling off period is over, you means, the organisation can look at what is the track record
16 of this arbitrator, has an arbitrator been particularly helpful from an institutional perspective
17 for us?" They are not saying it is turbulent on your part to do that, but this is natural. This is
18 natural in the part of any organisation. So, therefore, the objection that this may not
19 necessarily result... a broad-based panel may not be an adequate formulation, because, within
20 that broad-based panel, there may be some problems which will never come to light otherwise.
21 How do we answer that in the scheme which you are creating for us. Justice Hrishikesh Roy
22 says, "Does it hit the Equality principle then?"

23

24 **TUSHAR MEHTA:** I'll come to that. There, there is some confusion. Equality principle has
25 a different connotation under the Act. I'll take Your Lordships to some...

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** You go in your own way. Last point that I noted
28 is -*Voestalpine* holds with the panel should be broad based having people from various
29 facets of life.

30

31 **TUSHAR MEHTA:** Ultimately, I'll say this last, but I'll...

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** You are supporting that part of *Voestalpine*,
34 right? You are supporting that *Voestalpine* principle, I take it, that the panel should be broad
35 based...

36

1 **TUSHAR MEHTA:** Yes, yes. I am adding something into it. Because ultimately as a
2 Government, we are also interested in ensuring that the arbitration as an alternative dispute
3 mechanism, grows it further and whatever are the hindrances or whatever are... what is
4 preventing people from going into arbitration, especially the Government agencies, is taken
5 care of and therefore, I am adding something.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Absolutely. And one perspective which
8 Government must also bear in mind is, that if we are now, today in an economy where we feel
9 that private investment is crucial for the growth of the nation...

10

11 **TUSHAR MEHTA:** Correct, My Lord. Government is concerned.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, from a broader national perspective
14 of the Government, it may be the interest of one PSU to rig the arbitration. They are not saying
15 they do it. And I'm just telling you, but from the wider perspective of the Government as a
16 Nation state, there is a rightly public interest, a national interest, in ensuring that the process
17 of arbitration is fair.

18

19 **TUSHAR MEHTA:** Absolutely, absolutely.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** One element in that is, of course, huge public
22 revenues are involved. If you get an award for 20,000 crores, it is part of the public revenues
23 paid for it. Equally Government as a Nation, representing the Nation has to be concerned of
24 the fact that you must have the faith of the private sector in the arbitration process.

25

26 **TUSHAR MEHTA:** Who will invest.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** To invest. And this is not just foreign investors,
29 but domestic investors also. So there is, in that sense, there is a Government interest in both
30 sides.

31

32 **TUSHAR MEHTA:** Public interest. That means public interest.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Government interest is not pure only in getting
35 favourable outcomes in the arbitration. That may be the interest of ONGC, BHEL, particular
36 contract....

37

1 **TUSHAR MEHTA:** No. no. I understand. I'm not taking it from that...

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Government interest is in a much broader
4 perspective, which you must bear it...

5

6 **TUSHAR MEHTA:** I have not examined this from that myopic point of view. But I'll be very
7 candid with Your Lordships, while being careful about the expressions I use. Sometimes the
8 system which we are following that, there is one arbitrator appointed by the Governor,
9 Government, PSU or any other public sector body and a private body. Sometimes, because of
10 lack of neutrality, which includes integrity, we do not have a level playing field. I'll use my
11 expressions very cautiously and I know, I am able to convey what I'm... Therefore my panel,
12 which I am improving upon **DMRC judgement** is: (a) They have a right to say that this is a
13 tailor-made panel to defeat them is a valid concern. To obviate that...

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Can you say that again?

16

17 **TUSHAR MEHTA:** The panel should not only be broad based, but these are the criteria
18 which Your Lordships may consider while improving upon what **DMRC** has said. I'm sorry, I
19 forget the first name, therefore, I am, for my easy reference using it as **DMRC judgement**.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Say should have additional safeguards, over and
22 above **Voestalpine**.

23

24 **TUSHAR MEHTA:** Yes, My Lord.

25

26 **JUSTICE PS NARASIMHA:** Like?

27

28 **TUSHAR MEHTA:** First, the preparation of the panel must be open to all and transparent.

29

30 **JUSTICE HRISHIKESH ROY:** Just to... Panel preparation should be transparent, not vis-
31 a-vis a particular case, but generally.

32

33 **TUSHAR MEHTA:** General, yes. And when I say, open and transparent, I mean, I will give
34 an example My Lord, of say Ministry of Urban Development and Urban Housing. They issue
35 an advertisement that we are preparing a panel of Engineers. These are the qualifying criteria.
36 These are eligibility criteria. You must ensure that there are no vigilance angles, because

1 Engineers are always having some vigilance angles sometime. You are not having any vigilance
2 angles just to ensure the integrity of the individual, etc., etc.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Those are important. So first was, preparation of
5 panel must be open to all and transparent. Two, I've said it two, the process and then in two,
6 I've said process, (a) Issuance of an advertisement laying down the parameters for...

7

8 **TUSHAR MEHTA:** Anyone can apply for being included in the panel.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Issuance of an advertisement, laying down
11 parameters. Brother Roy said - laying down parameters for a panel.

12

13 **TUSHAR MEHTA:** Yes, My Lords. And anyone can apply, who is qualified as per the panel.
14 So, that we can decide, at least from our internal inquiries, etc., about the reputation, about
15 the integrity issues. This is not, My Lord, very difficult to gather. So, there is some check.
16 Otherwise, there is no check. The expressions which are used in the arbitration field, I'll not
17 use those expressions.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Then just don't answer immediately, because you
20 are going in a systematic way. Suppose 15 years down the line, Mr. Kaul, says, "Well, I want to
21 now be an arbitrator." Would you expect him to apply for empanelment? How do you deal
22 with that issue?

23

24 **TUSHAR MEHTA:** That...

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** The best will never apply for empanelment.

27

28 **TUSHAR MEHTA:** My Lords, in international field even eminent people, as eminent as Mr.
29 Kaul, may send the details. I mean 'apply' perhaps may not be a correct word, but may send
30 the details. Somebody else can send his details on his behalf. An option for invitation can also
31 be... an option for invitation can also be kept open. There is no... we are not trying to make a
32 tailor-made panel.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** See I'll tell you, you are right. We are, I mean,
35 calling for applications, promotes transparency. All right? But I'll tell you a little bit of my
36 experience, because I've been now chairing the selection committees for appointing Chairs of
37 national Tribunals in India. Whether it's National [UNCLEAR] Tribunals, National Company

1 Law, [UNCLEAR] Tribunals. So many of my colleagues sit on these Tribunals. The moment
2 we circulate an advertisement for application, best judges don't apply. They say, "If I am good
3 enough, take me. Why should I subject to myself to..." More eminent professionals, they will
4 not apply. Now, therefore what we have, Government has also... the Government has found a
5 solution to it. The Government calls it a Search cum Selection Committee. So, very often when
6 I say sit with the Secretary Ministry of Finance, Secretary Department of Personnel and
7 Training. These are usually the Secretaries who come, right? Or Secretaries Consumer Affairs.

8

9 **TUSHAR MEHTA:** Justice or whichever is the...

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Right? They normally say that -"Sir, we will open
12 it out for advertisement, but it's a Search cum Selection Committee." So they always tell us
13 that you have the overriding power to also give us names of people, who will not otherwise
14 apply. Now that assumes a degree of good faith, right? If I'm sitting there, there's a degree of
15 good faith, that the Chief Justice of India is sitting on the Panel. See I very often recruit my
16 colleagues, Brother Justice Hrishikesh Roy is sitting there. We are feeling on part of the
17 Secretaries and if Brother Roy is recommending somebody, Brother Narasimha is
18 recommending somebody, there bound to be good people above Board. And there of course,
19 there's the IB process and everything is also there, track records are verified by the Intelligence
20 Bureau. But this is okay, you know when you have people who are at this level. What happens
21 suppose the Railways are constituting a panel. Who will take that decision on whom to induct
22 in the panel?

23

24 **TUSHAR MEHTA:** I'm going to answer that question.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** It will be ultimately a General Manager in the
27 Railways. At what level in that decision will be made, will it be the Chairman of the Railway
28 Board?

29

30 **TUSHAR MEHTA:** That is, My Lord, highest dispute...

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** The real devil lies in the fine print.

33

34 **TUSHAR MEHTA:** My Lord, perhaps, the minute nitty-gritties can be gone into only by the
35 Legislature but...

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** Just one second. Because I might forget it. We
2 just in a...

3
4 **TUSHAR MEHTA:** Please Your Lordships.

5
6 **CHIEF JUSTICE DY CHANDRACHUD:** Because, it might slip our minds. Point from
7 Brother Hrishikesh Roy -"Will this be a panel... It should not be a panel then confined only to
8 one Undertaking. For instance, is it possible for the Union Government to say that - Well, we
9 are preparing a panel across Undertakings, because we have say, we have large number of
10 PSUs. [UNCLEAR] This is a panel. We will do the exercise at the level of what... Maybe at the
11 level of the Cabinet Secretary of the Government of India, because you are dealing with
12 thousands of crores, not lakhs of crores, that we will do this exercise across our Public Sector
13 Undertakings, and we will review the panels on a yearly basis. You can have, suppose there's
14 a Secretariat where you are reviewing the track record, any adverse complaints about the
15 conduct of an arbitrator, so on and so forth. We have to also fact in that arbitration is what
16 sometimes a very bad name. We have wonderful arbitrators. We have some amazing
17 arbitrators. But we also have both ends of the spectrum today.

18
19 **TUSHAR MEHTA:** That's the concern of, second is the concern of...

20
21 **CHIEF JUSTICE DY CHANDRACHUD:** So would you be therefore contemplating a
22 situation where the Government of India prepares 'a panel' for all Undertakings of the
23 Government of India, which will include your Coal fields, it will include your Railways or will
24 it operate at a Ministerial level? So Ministry of Coal will have a Panel, Ministry of Finance will
25 have a Panel, Ministry of Corporate Affairs will have a Panel, that will be again, unworkable.

26
27 **TUSHAR MEHTA:** Yes. My answer is very clear. My personal answer is - Yes. I'll take
28 instructions. I don't see any problem. Why I'm confident that I may not have any problem.
29 Your Lordships are aware, and My Lord, all of you, Your Lordships must have come across...
30 There are certain things which are applicable to everyone. For example, public procurement.
31 The Government of India means the policy which is binding on all Public Sector Undertakings,
32 that this is how you will have to procure goods, services, etc.

33
34 **CHIEF JUSTICE DY CHANDRACHUD:** Just see how complex it's going to become. And
35 that's something we justify. We all mentioned just a minute ago. Take the case of Food
36 Corporation of India. Take the case of Western Coal Fields. Food Corporation of India has a
37 PAN India presence. You have contracts for transportation, contracts for godowns, for which

1 you are awarding tenders, for which there are Arbitration Clauses. Now, if we were to
2 contemplate a situation where the Government of India were to do this exercise, the task could
3 be gigantic, because you will have contracts from 10 crores to 10,000 crores.

4

5 **TUSHAR MEHTA:** And 10 lakhs.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** And 10 lakhs.

8

9 **TUSHAR MEHTA:** And 10 lakhs also.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Value based also.

12

13 **TUSHAR MEHTA:** Value based and the eligibility based. For example, for some, we need
14 only Engineers, for some where there are questions of law, we need judicial mind.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Are we walking into a mine field?

17

18 **JUSTICE PS NARASIMHA:** We are. We are slowly and steadily [UNCLEAR] in writ bar,
19 we are facing the distinction between public law and private law. Today's discussions and
20 much of yesterday's distinctions seem to be, how to bring in transparency in public dealings.
21 That is what public law does, administrative law is what it does. But this is in the realm of a
22 private remedy. We are talking about private remedies, where the choices are with the
23 contracting parties to decide how our remedies should work out. It's a different matter. In a
24 contract, where there is a conflict of interest, contractual principles will resolve the conflict of
25 interest. But superimposing public law perspective...

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** It is very difficult.

28

29 **JUSTICE PS NARASIMHA:** As if these are public tenders, so, where is the transparency?
30 Where is a level playing field? Those principles, knowing very well, England has kept it aside
31 completely, when it came to private and judicial or private composition of judicial remedies.
32 As well as today...

33

34 **TUSHAR MEHTA:** My Lord, why this is...

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36 **CHIEF JUSTICE DY CHANDRACHUD:** And we are not talking... What we apply today,
37 this reference is not only confined to PSUs. There will be also...

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TUSHAR MEHTA: Private parties, of course.

CHIEF JUSTICE DY CHANDRACHUD: There will be large corporations also.

TUSHAR MEHTA: Reliance vs GSW hypothetically.

CHIEF JUSTICE DY CHANDRACHUD: Many of the large companies.

TUSHAR MEHTA: Larsen and Toubro vs so and so.

CHIEF JUSTICE DY CHANDRACHUD: Now, how this whole concept of having a one panel work in the private sector? What we...

TUSHAR MEHTA: It cannot work. It cannot work.

CHIEF JUSTICE DY CHANDRACHUD: To just bring a synthesis, where Brother Narasimha has a point that you are extensioning the realm of private law. So, in our effort to protect the revenues of the Government, we must lay down a principle which applies across the board to contracting parties.

TUSHAR MEHTA: Let me answer that squarely.

JUSTICE PS NARASIMHA: There is a slight distinction between mediation and arbitration to the extent that we... It automatically becomes a decree enforceable. The meaning of 'decree being enforceable' is that the state's power is behind a decree, behind an alliance. To that extent, it becomes public, but with respect to all other matters, choices of remedies, choices of [UNCLEAR] and court keeps superimposed. Forget about that. A discussion is another matter.

TUSHAR MEHTA: Squarely, my answer is this. We are required to go into the question because the question in one line, which has arisen is, whether in a private field of a contractual relationship, there is a permissibility of a clause, which permits panels to be prepared by one party. It is always open for others not to follow that.

CHIEF JUSTICE DY CHANDRACHUD: No, if you are right that you can always prepare a panel, it is no difficulty. If you say that - Well, others, it's only a optional. They're not bound by... and of course, that resolves their argument. Now take the flip side, what you said and

1 apropos what fell from Brother Narasimha, you are suggesting this essentially for a public
2 sector context. Take a case of a private insurance company, who has insurance dealings with
3 individuals. They put an Arbitration Clause in a contract.

4

5 **TUSHAR MEHTA:** I have answers. Can I show the...?

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Now for every private insurer, will they say that
8 - Well, we will prepare a panel which will be broad-based. Our process will be transparent. We
9 will invite people to apply for our panel. There'll be, like, a 100 insurance companies, 100
10 construction companies, a 100 engineering companies. How would that preparation of a
11 panel...

12

13 **TUSHAR MEHTA:** I will be able to show examples where bench have similar systems
14 working very effectively, which is called online dispute resolution. I'll be able to... Let us start
15 with this. I started from a wrong side of the...

16

17 **JUSTICE PS NARASIMHA:** No, no. We are discussing.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** We are not saying... We are not against you.

20

21 **TUSHAR MEHTA:** No, I understand.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** We are just trying to explore the limits of your
24 submission. Please. We understand.

25

26 **TUSHAR MEHTA:** No, I understand.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** A great deal of thought has gone on your part
29 and your team into making these submissions. We respect that. We are not against you. We
30 are just trying to explore the limit. Because when we write a judgement, eventually we'll have
31 to factor that....

32

33 **TUSHAR MEHTA:** Your Lordships would also examine and bind parties where one
34 company enters into a contract with another company, the question will be, if one company
35 says that we will have a broad-based panel out of which you will have to elect. Would that pass
36 the muster?

37

1 **JUSTICE PS NARASIMHA:** One minute. Mr. Solicitor, invariably we are getting into areas
2 of intersection of public law and private law.

3

4 **TUSHAR MEHTA:** Correct, My Lord.

5

6 **JUSTICE PS NARASIMHA:** Where does public law come in? Even if it is a private contract
7 between the parties, if there is a clause which is unconscionable, to that extent in public law,
8 we will set it aside. Therefore, that will come in the realm of public law proceedings. But if we
9 go further and then say that clauses should be of this nature, clauses should be of level playing
10 field and start prescribing the method and manner by which private parties could compose the
11 judicial, the private remedies then it has... the distinction is completely done away with. Only...

12

13 **TUSHAR MEHTA:** I bow down.

14

15 **JUSTICE PS NARASIMHA:** Only that far and no further, all these arguments are in fact
16 arguments in the realm of public law saying that you can't have a unilateral clause, so that
17 should lead to, like in *O'Reilly vs Mackman*, file a petition before a public law court and
18 say this clause is invalid. You can't have a contract. Section 28 of the Contracts Act is actually
19 invoked. So to that extent, the clauses could be set aside because if [UNCLEAR]

20

21 **TUSHAR MEHTA:** In an individual case.

22

23 **JUSTICE PS NARASIMHA:** [UNCLEAR] the contract, that we will do. That remedy we can
24 give.

25

26 **TUSHAR MEHTA:** In an individual case.

27

28 **JUSTICE PS NARASIMHA:** To administer a private...

29

30 **TUSHAR MEHTA:** It cannot be done. My Lord, can I show...?

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** One more thing I would like to add, ultimately
33 what jurisdiction will you be exercising? You will be exercising the 142 jurisdiction of this
34 Court.

35

36 **TUSHAR MEHTA:** No, My Lord. Ignore that part.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** As a Court, we have no such power. Now,
2 exercising the 142 jurisdiction to lay down structural parameters for composition of arbitral
3 tribunals, I dare say that we'd be soundly criticizing the world of business and...

4

5 **TUSHAR MEHTA:** Something which I would, My Lord...

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** What has the Supreme Court done? Because you
8 know, I mean....

9

10 **TUSHAR MEHTA:** No, no, I'm not on that. I think we are completely on different...

11

12 **JUSTICE HRISHIKESH ROY:** You see, the panel that you are proposing.

13

14 **TUSHAR MEHTA:** My Lord, forget the panel for the time being.

15

16 **JUSTICE HRISHIKESH ROY:** All right. What has been suggested is, it will definitely
17 address the concern about impartiality, independence, integrity but then it does not address
18 the concern of party autonomy, which is very relevant in the realm of...

19

20 **TUSHAR MEHTA:** Exactly, My Lord. Therefore... I'll show it from the Act itself. Let me now
21 confine to the Act. Now, as My Lord Justice Narasimha has rightly said, that this is to be the
22 answer has to be found from the private law remedy of contract. Please have a look at the
23 Arbitration Act. Let us see what the Act says. Now forget My Lord, the Government or Public
24 Sector Undertakings. Let us see, My Lord, please come to Chapter II. Your Lordships possibly
25 are referring to the book not the...

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** We can go to the soft copy.

28

29 **TUSHAR MEHTA:** No, I am comfortable...

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Where's the soft copy of that?

32

33 **TUSHAR MEHTA:** No, I'm better off, this is better.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** We are making sure that you also become
36 completely digital.

37

1 **TUSHAR MEHTA:** No, My lord, I'm using digital,. I'm using digital, but for the Act, My Lord
2 I prefer the Barrett. Now we are in a private domain. We are in a private domain and kindly
3 keep two examples in mind. Which are, for example, Public Sector Undertaking. I'm not
4 obsessed with that while answering this question, but Public Sector Undertaking having an
5 apprehension that exclusive choice would result into a kind of not neutral or not impart... not
6 impartial situation. Number 2, Number 2. Kindly bear these examples in mind. I'm not naming
7 the company, but it is a part of a judgment of this Honourable Court, and I have filed an
8 affidavit. I'm sorry, My Lord Justice Narasimha is on something else.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Public sector company.

11

12 **TUSHAR MEHTA:** First is a public sector company having no level playing field. They
13 choose the arbitrators, particular arbitrators of their choice, and there is an apprehension that
14 we usually end up not having a level playing field. And I know Your Lordship knows what is
15 the meaning of that expression. Second example. Now, in a private domain, there is one
16 company of which I know, and it's a part of the judgment. It's a construction company of a big
17 scale. They enter into contract only to ensure that the contract is eventually terminated
18 midway and they file arbitration and earn a big award. And I have filed an Affidavit on behalf
19 of the company, that their main income is out of arbitral awards and not from business. Now
20 I am a private company. I am a Larsen & Toubro. I am JSW. I am entering into a contract with
21 that company and I'm saying that, this will going, this is going to be my clause in the contract,
22 you take it or leave it. It's a voluntary act. This is My Lord, second example. Please bear these
23 two examples in mind and see how the scheme of the Act operates. There is in every section,
24 every part, there is a party autonomy engrained. It's not something, My Lord, which a party
25 which is existing for a panel is doing for the first time or doing contrary to law. Please have a
26 look at Section 4 now.

27

28 [NO AUDIO] Contracts also between A company and B Company. There are apprehensions
29 that B company may have a better level playing field than A Company, in private contracts.
30 But forget everything. Let us see what the Act says.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, we'll read the provision of the Act and see
33 how you are reading...

34

35 **TUSHAR MEHTA:** Yes, My Lord. And whether if the Act does not prohibit, alternatively if
36 the Act permits one party to have a clause regarding there being a panel, which right now,

1 there is doubt whether it is permissible or not. Whether the Act permits. Please come to
2 Section 4.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Section?

5

6 **TUSHAR MEHTA:** Section 4. I'll invite Your Lordship's attention to only relevant clauses,
7 just to... which assist the Court in this particular question. Section 4, Your Lordships have? I'll
8 read. "A party who knows..." Can I read? "A party who knows that (a) any provision of this part
9 from which the parties may derogate or any requirement under the arbitration agreement has
10 not been complied with, and yet proceeds with the arbitration without stating his objection to
11 such non-compliance without undue delay or if a time limit is provided for stating that
12 objection within that period shall be deemed to have waived his right to show object." The
13 meaning, as I have understood, is, that party is clear that some provision is derogable, but
14 agrees to it or there is some requirement in the arbitration agreement, but permits it to be
15 waived, if I may use my expression, then it is prevented, meaning thereby...

16

17 **JUSTICE PS NARASIMHA:** This is estoppel principle.

18

19 **TUSHAR MEHTA:** Correct, meaning thereby...

20

21 **JUSTICE PS NARASIMHA:** Estoppel because....

22

23 **TUSHAR MEHTA:** Correct, My Lord.

24

25 **JUSTICE PS NARASIMHA:** Estoppel not against a statute, will not apply here, so estoppel
26 will apply.

27

28 **TUSHAR MEHTA:** The statute operates as an estoppel. The statute says - Your conduct
29 operates as estoppel. We don't have to borrow the...

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Now, what do you think as a derogable
32 provisions?

33

34 **TUSHAR MEHTA:** Pardon, My Lords.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Which are the derogable provisions?

37

1 **TUSHAR MEHTA:** I'll come to that. Kindly, My Lord.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Please bear that in mind. Later on...

4

5 **TUSHAR MEHTA:** I know, My Lords. I'll have to answer that. My learned friend as says 34.
6 I have something to say on that.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** All right. Then Section 4, then what else?

9

10 **TUSHAR MEHTA:** Section 4. This says party autonomy. You can have a provision and by
11 conduct, you can waive that provision, then thereafter, don't object because you are estopped
12 from objecting. That is Section 4. Now, please see My Lord, the title of Chapter III. And this is
13 My Lord, relevant. The title of Chapter III, which is Section 10 onwards, is "Composition of
14 arbitral tribunal". Your Lordships are...

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Going back to 4. 4 is in two parts. The first part
17 deals with derogable provisions of the Act.

18

19 **TUSHAR MEHTA:** Yes, My Lord.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** The second deals with the arbitration agreement.

22

23 **TUSHAR MEHTA:** Correct.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Requirement of the arbitration agreement. If you
26 don't raise it at the earliest possible opportunity, then you have estopped it and thereafter you
27 can't raise.

28

29 **TUSHAR MEHTA:** I'll just give an example what it means.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Like CPC says -Objection is to place of suing, a
32 territorial jurisdiction. If you don't raise a point of territorial jurisdiction at the earliest
33 possible opportunity, you can't raise it later on.

34

35 **TUSHAR MEHTA:** Correct.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** Because it stabilises the court of competent
2 jurisdiction. You can't say the suit was filed in Gurgaon instead of Delhi later.

3

4 **TUSHAR MEHTA:** Another example. What B means, Your Lordship have come across
5 several Arbitration Clauses. Generally, that arbitration will have to precede the conciliation
6 that there has to be a conciliation. And if it fails, then arbitration.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** That's their Clause B, Requirement of the
9 arbitration.

10

11 **TUSHAR MEHTA:** Exactly. So that suppose, somebody straight away come to the
12 arbitration, participates, then it cannot say that we have missed one.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Conciliation.

15

16 **TUSHAR MEHTA:** That's, My Lord, the... So this is party autonomy. Nothing turns on the
17 question in hand. Now please...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Like the MSME Act says - You must have
20 conciliation and then arbitration.

21

22 **TUSHAR MEHTA:** Yes, My Lord. Even in several agreements, there is a provision for
23 conciliation first and then arbitration. Now Chapter III. Composition of the arbitral tribunal.
24 This is the only chapter which provides how arbitral tribunal can be constituted and as per the
25 definition, sole arbitrator is also a Tribunal, multi member panel is also a Tribunal.

26

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

28

29 **TUSHAR MEHTA:** Now, My Lord, 10 is not relevant for either of us. Please come to 11. The
30 way I would respectfully read Section 11 and if my learned friends are right, then we will make
31 one provision at least nugatory. Provision in the chapter of composition of arbitral tribunal.
32 And Your Lordship would also simultaneously find the party autonomy, a tailor-made
33 customized agreement is in contemplation of the parliament. Everywhere, in every section.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** [UNCLEAR] there for arbitration.

36

1 **TUSHAR MEHTA:** Yes. Now, 11(a)... (1). "A person of any nationality may be an arbitrator
2 unless otherwise agreed by the parties." Here comes party autonomy and the freedom to enter
3 into a contract. This is relevant only to show that parties can agree, the contract is supreme.
4 But second is most important question, important provision.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Procedure for appointing the arbitrator.

7

8 **TUSHAR MEHTA:** "Subject to sub-section (6), the parties are free to agree on a procedure
9 for appointing the arbitrator or arbitrators." There can be an agreement which says that
10 procedure will be as, I'm sorry My Lord, as conventionally followed. I will select my arbitrator.
11 Other side will select his arbitrator. And both will request for someone to preside over. That
12 can be one procedure. Another procedure can be, you voluntarily enter into a contract which
13 provides for an arbitration agreement which says that the procedure of appointment will be a
14 panel of arbitrators. And you select one from the panel. Correct, My Lord? Nothing prevents
15 up to sub-section (2), from parties in their act of volition, agreeing into an agreement about
16 the procedure for appointment.

17

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

19

20 **TUSHAR MEHTA:** Now, this interpretation of sub-section (2) gets further strengthened by
21 sub-section (3) "Failing any Agreement referred to in sub-section (2)." So, procedure of your
22 choice, part's choice, if you cannot arrive at or the arbitration agreement is silent. "Failing any
23 agreement referred to in sub-section (2) in an arbitration with three arbitrators. Each party
24 shall appoint one arbitrator and the two appointed arbitrators shall appoint the third
25 arbitrator, who shall act as the presiding arbitrator." So this is the second Statutory option.
26 First option is, that you choose your method of constituting the Tribunal.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** So, (3) is an exception to (2)?

29

30 **TUSHAR MEHTA:** To (2). So, other than this conventional method of one electing one, one
31 selecting one, another selecting second, and they selecting presiding arbitrator is an exception,
32 if there is no other customised mode of Arbitration Tribunal Constitution is provided for.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** If parties have provided for a procedure for
35 appointment...

36

37 **TUSHAR MEHTA:** Yes.

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CHIEF JUSTICE DY CHANDRACHUD: That will govern?

TUSHAR MEHTA: That will govern.

CHIEF JUSTICE DY CHANDRACHUD: So that shows that, that procedure for appointment is a derogable provision? Isn't it?

TUSHAR MEHTA: Yes, yes.

CHIEF JUSTICE DY CHANDRACHUD: Subject to. It's a derogable provision. The very fact, he says that it's failing an agreement, so that once there's an agreement, that agreement prevails.

TUSHAR MEHTA: Even one, even one is derogable, that arbitrator can be...

CHIEF JUSTICE DY CHANDRACHUD: Even a Sole arbitrator?

TUSHAR MEHTA: Yes, arbitrator can be of any nationality is also derogable. That unless parties otherwise decide.

CHIEF JUSTICE DY CHANDRACHUD: The only non-derogable provision is which will not be an even number.

TUSHAR MEHTA: Yes My Lord, It can't be. It can't be. Then (3A). "The Supreme Court and the High Court shall have the power to designate arbitral institutions from time to time, which have been graded by the Council under Section 43-I, for the purpose of the Act. Provided..." My Lord, I'm skipping the proviso. Please come to (4). sub-section (4). This may not assist Your Lordships. (3A) will have no relevance for this question. Your Lordships are on sub-section (4)?

CHIEF JUSTICE DY CHANDRACHUD: Yes, (4).

TUSHAR MEHTA: (4). "If the appointment procedure in sub-section (3) applies..." meaning thereby no agreement. sub-section (3) is - In absence of customised agreement. Then what? "and -" If there is no such provision (3) applies, then "(a) A party fails to appoint an arbitrator within 30 days from the receipt of a request to do so from the other party or the two appointed

1 arbitrators fail to agree on the third arbitrator within 30 days from the date of their
2 appointment. The appointment shall be made on an application of the party by the arbitral
3 institution designated by the Supreme Court in case of International Commercial Arbitration
4 or by the High Court in case of arbitrations other than International Commercial Arbitration,
5 as the case may be." So if there is no customised, I'm using that expression, agreement, then
6 (3). If (3) is also not present, then (4). Then kindly come to (5). "Failing any agreement referred
7 to in sub-section (2)." Your Lordship has that? So there is no provision for a customised
8 manner of Constitution." in an arbitration..."

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** I'll just come from a 5 minute of break.

11

12 **TUSHAR MEHTA:** Yes, yes My Lord. Your Lordships may come after 10 minutes, have
13 some...

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** 5 minutes.

16 Yes, Mr. Mehta.

17

18 **TUSHAR MEHTA:** May I please? I was on sub-section (5).

19

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

21

22 **TUSHAR MEHTA:** Your Lordships would mark one thing that (4) comes into play when (2)
23 is absent. I hope I am...

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Very fair.

26

27 **TUSHAR MEHTA:** Correct, My Lord, (4) comes into play when (2) is absent. (2) is absent
28 when there is no agreement between the parties providing for the procedure.

29

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

31

32 **TUSHAR MEHTA:** Now that is first, (4) when there is no agreement and (5), sub-section
33 (5). (5), may I read (5)? "Failing any agreement referred to in sub-section (2)." So, no
34 procedure prescribed. "... in an arbitration with a sole arbitrator, if the parties fail to agree on
35 the arbitrator within 30 days from the receipt of a request by one party from the other party
36 to so agree, the appointment shall be made on an application of the party in accordance with
37 the provisions contained in sub-section (4)." The highlight My Lord, which I would

1 respectfully make is, that (4) and (5) would come into picture only when there is no procedure
2 under sub-section (2). I. I... Justice Narasimha, I am able to make... (4) and (5) will come only
3 when there is no (2).

4

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

6

7 **TUSHAR MEHTA:** Now, (6) -"Where, under an appointment procedure agreed upon by the
8 parties." That is under sub-section (2) "A party fails to act as required under that procedure or
9 the parties or the two appointed arbitrators fail to reach an agreement expected of them under
10 that procedure or a person, including an institution, fails to perform any function entrusted to
11 him or it under that procedure." The procedure may stipulate. Just giving a hypothetical
12 example that in case of a dispute, resulting into an arbitration, the arbitral tribunal would be
13 constituted, say, by Delhi Arbitration Centre. That can be possible, which is considered, My
14 Lord, under (6)(c). "The appointment shall be made on an application of the party by the
15 arbitration, arbitral institution designated by the Supreme Court in case of International
16 Commercial Arbitration or by the High Court in case of arbitrations other than International
17 Commercial Arbitration, as the case may be, to take necessary measure unless the agreement
18 on the appointment procedure provides other means for securing the appointment." I'm sorry.

19

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

21

22 **TUSHAR MEHTA:** Even (6) is derogable. Please see, My Lord. (6) last line. If either of these
23 three contingencies arise, namely parties do not appoint, party appointed arbitrators do not
24 appoint the presiding arbitrator or if an institution is named in the agreement, the institution
25 does not do anything. Then the party will approach the High Court or the Supreme Court, but
26 that is subject to last, unless the agreement on the appointment procedure provides, other
27 means for securing the appointment." Even approaching the Supreme Court or the High Court
28 is also a derogable provision by agreeing to it under an agreement made under (2). Now omit
29 (7). It is omitted in 2019, kindly come to (8). Your Lordships have (8)?

30

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

32

33 **TUSHAR MEHTA:** "The arbitral institution referred to in sub-section (4), (5) and (6)" (6)
34 provided there is no contrary agreement. But let us take that there is an agreement, and either
35 (4), (5) and (6). The institution which Your Lordships have designated is approached "before
36 appointing an arbitrator shall seek a declaration, disclosure in writing from the prospective
37 arbitrator in terms of sub-section (1) of Section 12 and have due regard to." My Lord, kindly

1 pause here for a minute. The argument was, argument of Mr. Banerji was that this part is non-
2 derogable. I agree to that. I have a customised agreement under sub-section (2) there is a
3 failure and (4), (5), or (6) kicks in (6) will kick in only in case of (2), correct My Lord? Am I
4 clear? sub-section (6) will kick only when there is an agreement under sub-section (2) but then
5 12 is non-derogable. You cannot appoint a disqualified person who is disqualified under
6 Section 12. I'll come to that My Lord. So, again, reading "The arbitral institution referred to in
7 sub-section (4), (5) and (6)." If we have (2) we are not concerned with (4) and (5).

8
9 "Before appointing an arbitrator, shall seek a disclosure in writing from the prospective
10 arbitrator in terms of sub-section (1) of Section 12 and have due regard to any qualifications
11 required for the arbitrator by agreement of the parties and the contents of the disclosure and
12 other considerations as are likely to secure the appointment of an independent and impartial
13 arbitrator." But we are not concerned with A and B, because their argument was, that it is non
14 derogable to which I have no difficulty. My right under sub-section (2), my volition and their
15 volition to enter into a contract with a customized arbitration procedure, customized
16 procedure for appointment of arbitrator, will be down by Section 12. I cannot disqualify
17 anyone. I cannot make my manager an arbitrator. Giving an example. How it operates. There
18 cannot be an agreement under sub-section (2), which says that my Managing Director will be
19 the arbitrator, because that is prohibited under 12. 12 mandate will apply to my choice and
20 their choice in entering into a contract under sub-section (2). Now, please come to 12. Section
21 12. The rest will not assist Your Lordships either way. And whatever I am keeping Your
22 Lordships can take it, is not relevant for either of us. In such matters, we don't argue to win a
23 case or lose a case. We really assist the Court. Now, there are some provisions that came in 19,
24 my learned friend points out.

25
26 **GOURAB BANERJI:** [NO AUDIO]

27
28 **CHIEF JUSTICE DY CHANDRACHUD:** In fact, I was comparing it with your soft copy
29 and then the hard copy, because it quotes 19 provisions.

30
31 **GOURAB BANERJI:** [NO AUDIO]

32
33 **JUSTICE PS NARASIHMA:** The institutional part of it is not...

34
35 **TUSHAR MEHTA:** It does not make any difference to the interpretation. I think he agrees.
36 Are you agreeing or not?

1 **GOURAB BANERJI:** This section is technically not the correct provision.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** The correct provision of 8 is in footnote 2.

4

5 **GOURAB BANERJI:** Correct. Correct. It is the Chief Justice, the High Court or the Supreme
6 Court...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** "A person or institution designated by him in
9 appointing an arbitrator shall have due regard to any qualifications required of the arbitrator
10 by the agreement of parties and any other consideration, other considerations are likely to
11 secure the appointment of an independent and impartial arbitrator."

12

13 **TUSHAR MEHTA:** The sum and substance of what my learned friend says, and I agree, is,
14 instead of institution, please read the Hon'ble Chief Justice, that's all. Nothing turns on the
15 interpretation or the issue we are confronted with. Now please come to Section 12. I'm sorry,
16 My Lord, the Chief Justice is somewhere, in some...

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** (b) of sub-section (8) says -"Other
19 considerations that are likely to secure the appointment of an independent and impartial
20 arbitrator."

21

22 **TUSHAR MEHTA:** When...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, the court has that duty to ensure that
25 the person you are appointing is independent and impartial.

26

27 **TUSHAR MEHTA:** Correct. But, that is... Only at the cost of repetition, let me say. Even
28 without this provision, the court has the duty to appoint an impartial and independent
29 arbitrator. That.. nobody disputes that. But at the cost of repetition, please note this. (8) kicks
30 in when (4), (5), (6) is present and (4), (5), (6)... (4) means no agreement under (2). (5) means
31 no agreement under (2). (6) means there is an agreement, but you fail to act. So, this does not
32 touch upon the party's autonomy to enter into a contract providing for a specialized
33 mechanism for appointment of arbitrator.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** No, but even where the parties have provided for
36 a procedure for the appointment of an arbitrator under (2), thereafter, if you look at the
37 unamended, the provision prior to 2019. It says (6)...

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TUSHAR MEHTA: My Lord, (6).

CHIEF JUSTICE DY CHANDRACHUD: (6) prior to the amendment...

TUSHAR MEHTA: Yes.

CHIEF JUSTICE DY CHANDRACHUD: "Where under an appointment procedure agreed upon by the parties." We are now dealing with an agreed procedure.

TUSHAR MEHTA: Yes. Seekings for that, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Right. The party fails to act as required under that procedure.

TUSHAR MEHTA: Correct.

CHIEF JUSTICE DY CHANDRACHUD: The parties or the two arbitrators fail to reach an agreement expected with them.

TUSHAR MEHTA: Correct.

CHIEF JUSTICE DY CHANDRACHUD: "A person, including an institution, fails to perform. Party may request the Supreme Court, or as the case maybe, the High Court or any personal institution to take the necessary measure. Unless..." that you pointed out." Unless the agreement on the appointment procedure provides other means." Other than going to the Supreme Court or the High Court or the institution. All right? Now when (8) says...

TUSHAR MEHTA: My Lord, before that, kindly pause here for a minute on my request. (6) definitely would kick in. (6) necessarily presuppose an agreement under (2).

CHIEF JUSTICE DY CHANDRACHUD: Under (2).

TUSHAR MEHTA: And non-compliance of what is stipulated under that agreement. Now kindly come to (8). "The arbitral institution referred to in sub-section..."

CHIEF JUSTICE DY CHANDRACHUD: Just read (8) from the soft copy actually.

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TUSHAR MEHTA: Yes, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: Which is at 111.

TUSHAR MEHTA: Yes, My Lord. Where.... (8) Your Lordship wants.

CHIEF JUSTICE DY CHANDRACHUD: (8) The Supreme Court...

TUSHAR MEHTA: "The Supreme Court, or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of Section 12 and have due regard to, (a) any qualifications required for the arbitrator for the agreement of the parties." So Your Lordships, I mean, Your Lordship means the Supreme Court or the High Court will also be governed by the agreement under (2).

CHIEF JUSTICE DY CHANDRACHUD: And (b). (b) says -" The contents to the disclosure." And so your disclosure has to be made before you appoint the Arbitrator.

TUSHAR MEHTA: Correct.

CHIEF JUSTICE DY CHANDRACHUD: "And other consideration..." That's very important. "And other considerations as are likely to secure the appointment of an independent and impartial arbitrator."

TUSHAR MEHTA: Correct, My Lords.

CHIEF JUSTICE DY CHANDRACHUD: This seems to suggest that even where parties have agreed to the procedure for the appointment of an arbitrator but that procedure has not been implemented for a variety of reasons. You move the Supreme Court, Supreme Court is not bound or the High Court is not bound by that procedure. That's the point.

TUSHAR MEHTA: No, My Lord.

JUSTICE PS NARASIMHA: There are line of three judgments of Justice Lodha where under the agreements, there is an obligation to appoint an arbitrator, but one of the parties has not complied. So 11(6) come into the play. It was argued at that stage, that now 11(6) has

1 been filed. But when a court appoints, you must appoint according to the arbitration
2 agreement. He has rejected the argument, saying - Number one, that freedom no more exists
3 because of non-compliance of you, now the power and rights exclusively vests in the court
4 itself. And we will appoint and when the court appoints the procedure contemplated under (8)
5 (a) and (b) will apply. Those are the line of cases.

6

7 **TUSHAR MEHTA:** In case of non-compliance, we are concerned.

8

9 **JUSTICE PS NARASIMHA:** Obviously issue arises only on non-compliance.

10

11 **TUSHAR MEHTA:** We are concerned whether (2) can have a particular procedure or not.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Of course, (2) can have a procedure.

14

15 **TUSHAR MEHTA:** But..

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** But if that procedure is failed and the matter
18 comes to the court, then you are not bound by the rigors of the procedure which have been
19 provided by the party.

20

21 **TUSHAR MEHTA:** Certainly, My Lord, certainly. But please read (8) again.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Because when the court appoints, there's an
24 overarching duty of the court to predict independence and impartiality and therefore the court
25 is not merely a rubber stamp to say - Okay, I'll look at the agreement and I'll appoint the same
26 person or the same people, however, lack of independence or impartiality there may be.

27

28 **TUSHAR MEHTA:** That's not my argument also. I'm not pitching it that high, but please
29 read it again. (8), what would be Your Lordship's consideration, the Supreme Court or the
30 High Court's consideration? "The Supreme Court, or as the case may be, High Court, or the
31 person or institution designated by such Court before appointing an arbitrator shall seek a
32 disclosure in writing from the prospective arbitrator in terms of sub-section (1) Of Section 12
33 and have due regard to." So this is disqualification disclosure. "and due regard to, (a) any
34 qualifications required for the arbitrator by the agreement of the parties." Suppose agreement
35 of the party says that Engineer will be appointed, then Your Lordships will have a regard to
36 that.

37

1 **JUSTICE PS NARASIMHA:** That's because earlier set of cases said that even if court
2 appoints, it must go by the agreement.

3

4 **TUSHAR MEHTA:** Yes. that is '40... 1940 Act.

5

6 **JUSTICE PS NARASIMHA:** But new rule after amendment and the two judgements also.

7

8 **TUSHAR MEHTA:** Yes, 1940 Act then. And second, the contents of the disclosure.
9 Disclosure means...

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** By the prospective arbitrator...

12

13 **TUSHAR MEHTA:** The disqualification. "The contents of the disclosure and other
14 considerations..." which is a wider, completely wide room for the court, My Lord. So apart
15 from disclosure, Your Lordships can likely to... will appoint a person who is likely to be
16 independent and impartial. So My Lords, sum and substance is, there can be an agreement
17 under (2) complete autonomy. If there is an agreement but conditions not complied with, you
18 come to (6). While exercising powers under (6), Your Lordships will examine (8).

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** But if there is no failure in the procedure, then
21 parties are bound by what is envisaged by procedure under (2).

22

23 **TUSHAR MEHTA:** And therefore, yes, for (2) does not prohibit parties to agree to a
24 particular procedure, which may include a procedure of selection from the panel.

25

26 **JUSTICE PS NARASIMHA:** Invariably, 11 is filed on the ground that have asked for
27 arbitration, but they are appointing from the panel. So 11(6) is filed on that ground?

28

29 **TUSHAR MEHTA:** No, but they cannot. If they have agreed on it.

30

31 **JUSTICE PS NARASIMHA:** Cannot, it is your argument.

32

33 **TUSHAR MEHTA:** That's my submission, yes, Your Lordships are right. So long as 12 is
34 met. Now kindly come to Section 12. Section 12 again is housed in the chapter titled
35 "Constitution of the Tribunal"... "Composition of the Tribunal." Am I with Your Lordships on
36 Section 12?

37

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

2

3 **TUSHAR MEHTA:** "When a person is approached in connection with his possible
4 appointment as an arbitrator, he shall disclose in writing any of the circumstances..." My Lord,
5 'he shall,' this is non-derogable.

6

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

8

9 **TUSHAR MEHTA:** So he must disclose, either approached by the party as per the procedure
10 prescribed under Section 11(2) or maybe by the Supreme Court or the High Court, "(a) such as
11 the existence, either direct or indirect, of any past or present relationship with or interest in
12 any of the parties or in relation to the subject matter in dispute, whether financial, business,
13 professional or other kind, which is likely to give rise to justifiable doubts as to his
14 independence and impartiality." Kindly see My Lords, the clauses, because this does not
15 disqualify him. Only responsibility is to disclose.

16

17 Then (b). And (b), My Lords I have a separate submission to make for Your Lordship's kind
18 consideration. "Which are likely to affect his ability to devote sufficient time to the arbitration
19 and in particular, his ability to complete the entire arbitration within a period of twelve
20 months." This is what a prospective arbitrator is supposed to give. I'll come to that point. I'm
21 not raising it right now, My Lord, but this is a very, very vital point which will go to the root of
22 the issue.

23

24 Then Explanation 1- "The ground stated in the Fifth Schedule." In ICC arbitrations, when an
25 arbitrator is appointed, I'll show when I come to that. In ICC arbitrations... I'm not arguing
26 this right now. At the end, I'll say. But just as a, by way of an information. In ICC arbitration
27 whenever a prospective arbitrator is approached, is requested, there is a format, that give me
28 your calendar of 24 months henceforth. They decide whether he is able to devote sufficient
29 time and whether the arbitrator would be able to complete it within a time period. I'll come to
30 that a little later. Now (2). "An arbitrator," sub-section (2). "From the time of his appointment
31 and throughout the arbitral proceedings, shall, without delay disclosed to the parties in writing
32 any circumstances referred to in sub-section (1), unless they have already been informed of by
33 him." Suppose some disqualification. Not disqualification, some contingency under 12(1)(a)
34 occurs during the arbitration, so he is supposed to disclose that. So throughout the liability of
35 disclosure continues. Now (3) - "An arbitrator may be challenged only if - (a) Circumstances
36 exist that give rise to justifiable doubts as to his independence or impartiality." Kindly pause
37 it here. Pause here for a moment. This is one of the grounds on which his appointment can be

1 challenged. And if Your Lordships can now read it with Explanation 1 appended to
2 immediately after (b), sub-section (b). The ground stated in Fifth Schedule shall guide in
3 determining whether circumstances exist which give rise to justifiable doubts as to the
4 independence or impartiality. So this is to be connected with or read with (3)(a). (5)(a),
5 Grounds are generally the guiding principles, but they are not the exhaustive list. There can
6 be other. One of my learned friend, said that when there is one arbitrator in the panel who
7 always decides in favour of one party, maybe that can be a ground, My Lord, under (3)(a) that
8 we have a reasonable ground that he is not neutral, he is not impartial, he is not independent.
9 Then (b) - "He does not possess the qualifications agreed to by the parties." then (4)" A party
10 may challenge an arbitrator appointed by him or in whose appointment he has participated
11 only for the reasons of which he becomes aware after the appointment has been made." If he's
12 already aware when the appointment was made, then waive. It is derogable. Then he cannot
13 challenge estoppel. You cannot challenge then (5). (5) is, My Lord, non-derogable. Please see.
14 Your Lordships have seen 12(1). Mere disclosure. No consequence. Now (5). "Notwithstanding
15 any prior agreement to the contrary, any person whose relationship with the parties or counsel
16 or the subject matter of the dispute falls under any of the categories specified in the Seventh
17 Schedule shall be ineligible to be appointed as an arbitrator." This is the distinction between
18 (1) and (5).

19

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

21

22 **TUSHAR MEHTA:** So (1) is mere disclosure. (5) disqualification. He is ineligible. This will
23 govern 11(2) also. There cannot be an Arbitration Clause which permits a person falling under
24 12(5) to become the arbitrator. That is non-derogable.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Schedule Five can be derogated from, parties
27 may say that - Well, despite the fact they may be justifiable, justifiable doubts as to his
28 impartiality and fairness, I still accept him. Seventh Schedule is ineligibility.

29

30 **GOURAB BANERJI:** Yes. Exactly.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. Exactly.

33

34 **TUSHAR MEHTA:** I understand. If I agree to (7), I necessarily agree to everything which is
35 in (5) akin to (7).

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** Family Arbitrator [UNCLEAR].

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GOURAB BANERJI: There's a waiver My Lord. Family Arbitrator there's a waiver under 12(5) proviso. You can waive...

TUSHAR MEHTA: Waive afterwards...

GOURAB BANERJI: And that's what the Law Commission says in paragraph 60, that in family arbitrations, you can waive it. That was one of the example.

CHIEF JUSTICE DY CHANDRACHUD: Right.

TUSHAR MEHTA: Yes, because it's always advisable that someone related is the arbitrator. Please see the proviso.

JUSTICE HRISHIKESH ROY: This waiver under 12(5) proviso, it is subsequent to dispute...

TUSHAR MEHTA: Subsequent. Yes.

JUSTICE HRISHIKESH ROY: Subsequent at that stage.

TUSHAR MEHTA: It cannot be at 11(2) stage.

JUSTICE HRISHIKESH ROY: It cannot be at stage...

CHIEF JUSTICE DY CHANDRACHUD: Express agreement in writing.

GOURAB BANERJI: It has to be an express agreement.

CHIEF JUSTICE DY CHANDRACHUD: I know that the arbitrator is my uncle, but I still... we both agree to this arbitrator.

TUSHAR MEHTA: Therefore, we are not concerned with such a scenario. But absent the proviso in the agreement contemplated, even in family arbitration, (7) would kick in. So, "Provided that parties may, subsequent to the dispute having arisen between them, waive the applicability of this sub-section by an express agreement in writing." So this is not... This is to

1 be contrasted with other provisions where you can by conduct, condone ineligibility or
2 disqualification.

3

4 **JUSTICE PS NARASIMHA:** Is there any other provision which uses this expression
5 notwithstanding any prior agreement? Or this is the only provision, I think, it overrides an
6 agreement.

7

8 **TUSHAR MEHTA:** This is subject to correction, but other provisions are subject to the
9 agreement to the contrary.

10

11 **JUSTICE PS NARASIMHA:** Yes, it's the converse. Therefore, shows importance.

12

13 **TUSHAR MEHTA:** This is notwithstanding, more rigorous. Otherwise, possibly, the effect
14 is same.

15

16 **GOURAB BANERJI:** There's some commentary which I had showed yesterday, which said
17 that that list was not drawn up because you could make out wherever it is subject to the
18 contrary, it is not mandatory. And where it is not, it is.

19

20 **TUSHAR MEHTA:** That's common. I have some reservation. Commentaries are ultimately
21 views, but notwithstanding anything to the contrary, or at the end, subject to the contrary
22 agreement, would have the same impact. Notwithstanding anything contrary to the agreement
23 means the statute prevails, correct? But statute is exempted by the provision by saying, that
24 except where parties agree otherwise. So they are converse situations. Yes. Now, please see...

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Sub-section (5) provides for non-derogability in
27 its substantive part. But that is relaxed by the proviso where there's an express agreement
28 between the parties after the dispute has arisen.

29

30 **TUSHAR MEHTA:** Yes.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Why after the dispute has arisen? Because
33 parties are conscious of what is the nature of the contentious matter.

34

35 **TUSHAR MEHTA:** Dispute and the nature of this contentious matter.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** Dispute and contentious matter, they expressly
2 agree in writing...

3

4 **TUSHAR MEHTA:** That my maternal uncle would be...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Cannot be upfront before the dispute has arisen,
7 you must be conscious of the dispute and then express the agreement in writing.

8

9 **TUSHAR MEHTA:** And this is just, academically for interpretation. Some of the provisions
10 say, that by conduct, you are deemed to have waived your objection. This is the provision
11 where for Seventh Schedule, there has to be an express agreement, not merely by conduct or
12 by inaction. By not objecting, you cannot waive. There has to be an express provision.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Overriding of a prior agreement by sub-section
15 (5) is subject to the further exception carved out in the proviso.

16

17 **TUSHAR MEHTA:** Correct. Now, kindly see 14(1)(b). I'm just saying that everything is party
18 autonomy, you can contract whatever you want to contract. Because, instead of a conventional
19 litigation method, you are devising your own method of adjudication. Therefore, the entire Act
20 is replete with party autonomy, that you decide whatever you want to decide. Just as an
21 example, 14(1)(b). "The mandate of an arbitrator shall terminate and he shall be substituted if
22 he withdraws from his office or the parties agree to the termination of his mandate." Parties
23 can even enter into an agreement which says that, now, henceforth, we are in the middle of
24 arbitration, but we terminate your mandate. Everything is party autonomy driven. Then My
25 Lord, please see next chapter, "Jurisdiction of Tribunals." We are not concerned... I'm just
26 highlighting the heading of the chapter. 16 is "Competence of arbitral tribunal to rule on its
27 jurisdiction" and 17 is "Interim measures." But we are not supposed to read it. Now please
28 come to Chapter V. Now thus far, Your Lordships were examining sections under the heading,
29 "Composition of the Tribunal", with which we are concerned.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** So, you will finish by 01:00?

32

33 **TUSHAR MEHTA:** Your Lordships will agree on two points. We started little late. Actually
34 I started further late, I was answering and this happens when you are on the... to come to bat
35 after the first inning, and I have not been repetitive or irrelevant.

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** Roughly how long more then?

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TUSHAR MEHTA: Not more than half an hour.

CHIEF JUSTICE DY CHANDRACHUD: Try and compress it as much as you can within half an hour.

TUSHAR MEHTA: I'll try. Please come to Chapter... I'm sorry.

JUSTICE PS NARASIMHA: You have been highlighting the [UNCLEAR] of party autonomy, which runs through the entirety of the Act. That's what you say.

TUSHAR MEHTA: Yes, My Lord. And I am also dealing with their submissions which are made in my respectful submission out of context. That's what I'm trying to show by saying that one chapter "Composition of Tribunal" is over. Now, Chapter V, "Conduct of arbitral proceedings". So, the Tribunal is constituted, whether it's a sole arbitrator or a multi member Tribunal. Now, how the conduct will take place, please come to 18, Section 18. "Equal treatment of parties". Your Lordships have, My Lord?

CHIEF JUSTICE DY CHANDRACHUD: Yes.

TUSHAR MEHTA: "Equal treatment of parties: The parties shall be treated with equality." By whom? By the arbitrator. Because it is in the chapter of conduct of arbitral proceedings. And next line, My Lords, strengthens the interpretation I am respectfully giving. "The parties shall be treated with equality, and each party shall be given full opportunity to present his case." By whom? By the arbitrator. This does not talk of equality in terms of the contract under 11(2). This is before the arbitrator. The Tribunal is constituted, and now proceedings are going on.

JUSTICE HRISHIKESH ROY: Here the argument of the other side was that the conduct of the arbitral proceeding would also include the appointment and composition of the arbitral proceeding, the arbitral tribunal.

TUSHAR MEHTA: Yes, Sir.

JUSTICE HRISHIKESH ROY: I'm sure you are trying to address that...

TUSHAR MEHTA: Yes.

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JUSTICE HRISHIKESH ROY: What was argued yesterday.

TUSHAR MEHTA: Yes. because composition is a separate chapter providing for every step of composition. Conduct has a separate chapter providing for every step in conduct and unless My Lord, we give that meaning. My Lord, how would we reconcile 18 "The parties shall be treated with equality." By whom? By the Arbitrator and it gets strengthened. "And each party shall be given a full opportunity to present his case." By whom? Obviously, during the conduct of arbitral proceedings by the arbitrator. So this equality is not equality of entering into an agreement under 11(2).

JUSTICE HRISHIKESH ROY: See the manner we also read it. Yes, as we read it yesterday, because it is immediately followed by 19, which talks about the procedure, and that will be governed by the arbitral. But the argument is that? No, even at the stage of appointment this equality principle should come.

TUSHAR MEHTA: Treated equally by whom? We are two parties. We can't treat each other equally. We can contract that one will not be equal to the other. It's an act of volition, which purely in a private domain, private law. When it says giving an opportunity of hearing, My Lord, would we give opportunity of hearing to each other, when it is My Lord, under the heading conduct of arbitral proceeding with a mandate that everyone will be heard means by the Tribunal. There cannot be with profound respect any other meaning given to it. To come out of this argument My Lord, the reliance is placed on 21.

CHIEF JUSTICE DY CHANDRACHUD: 21.

TUSHAR MEHTA: Now please come to 21. "Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commences on the date on which a request for that dispute to be referred to arbitration is received by the Respondent." The argument is that it is only after this notice, arbitration notice, that the Tribunal is constituting, and therefore...

CHIEF JUSTICE DY CHANDRACHUD: Yes.

TUSHAR MEHTA: 18 should be read as...

JUSTICE HRISHIKESH ROY: Commencement.

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TUSHAR MEHTA: Commencement. Why this Section 21 is placed in this chapter, not to ensure that the entire chapter applies to the initial appointment of initial contract which would determine the method of appointment of arbitrator. Please come to 23. "Within a period of time agreed upon by the parties or determined by the arbitral tribunal the claimant shall state the facts when the claim will be made." There has to be a beginning of time when the proceedings continue, proceedings start that from the date of the notice within five months you must file your Statement of Claims. Because the object of the Act is expeditious disposal. 21 is in this Chapter only to ensure that parties can use that date as a starting date for filing Statement of Claim, filing Defence, filing documents, etc., etc.

JUSTICE PS NARASIMHA: Earlier on the '40 Act Commencement was declared to be from the time when an Arbitrator enters reference...

TUSHAR MEHTA: Yes, My Lord.

JUSTICE PS NARASIMHA: That they have deliberately changed it to...

TUSHAR MEHTA: Yes but My Lord, even 21. Please come to 21 again. I'm obliged. Please come to 21 again, on my request. "Unless otherwise agreed by the parties."

CHIEF JUSTICE DY CHANDRACHUD: It's a derogatory provision.

TUSHAR MEHTA: Yes. So we can say, that the date of commencement would be the first meeting of the arbitral tribunal. This is why it is housed in the chapter which provides for conduct of arbitral proceedings. One more I missed, My Lords. I'm obliged to my learned friend. I'm obliged to my learned friends. I missed Section 19, which furthers respectful interpretation of 18. Please see 19. "The arbitral tribunal shall not be bound by the Code of Civil Procedure or the Indian Evidence Act. Subject to this part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this part, conduct the proceedings in the manner it considers appropriate." So 18 is during the conduct of arbitral proceedings. And 19 presupposes that they're already... Arbitral tribunal in existence. It is constituted under Chapter II. Now, please see the first line.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Really would stretch with logical conclusion
2 mean that the requirement of equality under Section 18 would override even an agreed
3 procedure.

4

5 **TUSHAR MEHTA:** Agreed procedure and it would make the second part of 18 redundant
6 that parties will be given full opportunity of hearing. By whom? It can't be by each other. That
7 I will hear him and he will hear me.

8

9 **JUSTICE PS NARASIMHA:** The relationship is governed by agreement.

10

11 **TUSHAR MEHTA:** 11.

12

13 **JUSTICE PS NARASIMHA:** But the conduct of arbitrator must be equal.

14

15 **TUSHAR MEHTA:** Equal.

16

17 **JUSTICE PS NARASIMHA:** If it doesn't, then 34 comes in, saying that you would not, and
18 it is...

19

20 **TUSHAR MEHTA:** Suppose, suppose there is an arbitral agreement that they would not
21 have a right of defence, except on ABCD grounds, then 18 kicks in. Then the tribunal is bound
22 to treat both equally and give them full opportunity. Suppose there is an agreement that they
23 will not be heard... 21 is housed in this Chapter V because there is a provision for fast-track
24 arbitration agreement also. Parties can agree that now this would be the date. Date would be,
25 hypothetically, the first meeting of the arbitral tribunal, and we agree, that it would be over
26 within three months. We put it on a fast track. Or this would be the date on which the
27 arbitration has started, and we agree that within one month, pleadings will be completed.
28 Therefore, to smoothen the conduct of arbitration proceedings, 21 is kept here. Just quickly,
29 25, just first line, just to show My Lord, party autonomy is writ large. It runs through the
30 architecture of this Act. Default of a party - "Unless otherwise agreed by the parties.." this can
31 be done. Then 26, "Unless otherwise agreed by the parties..." The tribunal may appoint so and
32 so. So, parties are free to choose what they are contracting, what is their commercial bargain.
33 Now My Lord, sometimes Your Lordships do something to achieve the ends of justice in a 226
34 jurisdiction, which arbitral tribunal also can be conferred with. Please come to Section 28, sub-
35 section (2). This also is dependent upon the parties agreeing to confer their jurisdiction. The
36 title is, "Rules applicable to substance of dispute" but, relevant is (2), sub-section (2). "The
37 arbitral tribunal shall decide *ex aequo et bono* or amiable composition, only if the parties have

1 expressly authorized it to do so." Otherwise, arbitral tribunal is bound by the terms of the
2 contract. Now, Your Lordship may kindly come to 36... 34. May I continue My Lord?

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** We will come back after lunch. After lunch, after
5 the Solicitor concludes, in the list which is given to us, we'll first hear Counsel appearing for
6 the parties. Then whatever time we have left, we'll give a little time to the interveners. So, we
7 have Mr. Nataraj for **CORE**, Mr. Arvind Kamath for **BMRCCL**. Then we have, Guru in
8 **Sundaram Finance**, Ms. Madhavi Divan from **Mahindra & Mahindra**. Then we have
9 Anand Padmanabhan for a petitioner in **Equitas**. And we have Suman Doval for the
10 Respondent in **IRCON**. We'll give a little time to each one, and then, whatever time remains,
11 we'll ration out between the interveners and wrap it up today in the afternoon. All right. Ten
12 minutes, one counsel on your side. All right. [UNCLEAR]

13

14 **TUSHAR MEHTA:** Time is non-derogable.

15

16 **PETITIONER'S COUNSEL:** I am appearing for Tata Motor Finance. My application is filed.

17

18 **COUNSEL:** May I request Your Lordships two minutes direct my... [UNCLEAR]

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Don't worry.

21

22 **TUSHAR MEHTA:** On Section 21, I'll show only two sections, and last Section is 36.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** 21, we saw?

25

26 **TUSHAR MEHTA:** Pardon me.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** 21 we saw. Right?

29

30 **TUSHAR MEHTA:** Your Lordships have seen. I have already pointed out 21 why it is there,
31 that you have to have some date to count limitation from. In this context, please see Section
32 43. 43, sub-section (4).

33

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

35

36 **TUSHAR MEHTA:** May I read? Can we have 43, sub-section (4).

37

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

2

3 **TUSHAR MEHTA:** The title is "Limitations" and (4) - "Where the Court orders that an
4 arbitral award be set aside, the period between commencement of arbitration and the date of
5 the order of the Court shall be excluded in computing the time prescribed by Limitation Act."
6 That is why 21. That there has to be some date from which you count the commencement.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** What is the commencement?

9

10 **TUSHAR MEHTA:** And 21 also says, unless otherwise agreed by the parties. So the
11 commencement date is also a fluctuating date. Can be decided by the parties and (2) also. Sub-
12 section (2) of 43. "For the purposes of this section and the Limitation Act an arbitration shall
13 be deemed to have commenced on the date referred to in 21."

14

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

16

17 **TUSHAR MEHTA:** Similar is the provision of Section 9, sub-section (2). 9(2) Your Lordship
18 has, My Lords? It has nothing to do with constitution of the tribunal. "Where before
19 commencement of the arbitral proceedings a Court passes an order for any interim measure
20 of protection under sub-section (1), the arbitral proceedings shall be commenced within a
21 period of 90 days from the date of such order." For this purpose to compute the time from that
22 date, it is mentioned. Now only section on which my learned friend, Mr. Banerji relied upon,
23 Section 34. Please come to 34. 34(2)(v) that was relied upon by him. 2(a)(v). Sorry. I'm sorry.
24 I stand corrected 2(a)(v). The argument was, please read My Lord first. "The composition of
25 the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of
26 parties." First. Obviously, My Lord, if it is not in accordance with the agreement of the parties,
27 the award goes. 34 has this ground. Second, "Unless such agreement was in conflict with a
28 provision of this Part." This part would mean part 1 applicable to domestic arbitrations. Part
29 2 is international commercial arbitrations. "With a provision of this Part from which parties
30 cannot derogate." My Lord, I have already pointed out that Section 12 is the provision from
31 which you cannot derogate. You cannot exempt disclosure *qua* Fifth schedule and ineligibility
32 in the Seventh Schedule and therefore if arbitral agreement provides for any of these non
33 derogable part. Then 34 will apply and the award would be set aside. This would never help
34 my learned friend in canvassing that there is any restriction to Section 11(2) and I have been
35 able to show to My Lord, in my respectful submission, that everywhere the thread is party
36 autonomy. Now quickly I'll take Your Lordships to my written submissions. My Lord, it is
37 Volume V(A). Some of the judgments we have reproduced. I will not read. My Lord, I

1 respectfully request Your Lordships that it may be treated as read, but in some cases I'll give
2 the gist of what it says. Your Lordship may come to the bottom of page 35. **Centrotrade**. Your
3 Lordship have this?

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Which part is this?

6

7 **TUSHAR MEHTA:** Part 1. Page 35. "Argument submissions supporting one party having a
8 neutral panel of arbitrators." My Lord, ignore the title. Basically, there is no restriction, My
9 Lord, in having an agreement agreed to, by the parties, that the selection would be from one
10 of the panel names. At the foot, My Lord, Clause 7... V(A), My Lord, I'm sorry. Volume V(A).

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Part 1, arguments.

13

14 **TUSHAR MEHTA:** Yes, My Lord. Page 35.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Mine is on page 36.

17

18 **TUSHAR MEHTA:** My Lord, Justice....

19

20 **JUSTICE J. B. PARDIWALA:** Got it, got it.

21

22 **TUSHAR MEHTA:** Justice Misra, My Lord, have...?

23

24 **JUSTICE MANOJ MISRA:** Yes.

25

26 **TUSHAR MEHTA:** My Lord, I am on Clause 7. Lordships need not read it, I'll just orally
27 point out, what the Court held, My Lord, in **Centrotrade**. It is essentially on party economy,
28 party autonomy. This was a typical clause in a contract where, after an arbitral award, that
29 award would be tested by another arbitral tribunal. The Court said that, "It is odd, it is
30 awkward, but nonetheless we respect the party autonomy and therefore..." This was. Kindly
31 come to page 36 for... This judgment, in para 8. Only highlighted part may be read, just for...
32 to save time. "Therefore, you have this paramount public policy to consider that, you are not
33 likely to interfere with this freedom of contract." My Lord, this is said in the context of
34 arbitration. This, I am relying upon to show that there can be an agreed clause providing for a
35 panel. Now, page 37, bottom. My Lord, "Russell on Arbitration". This para, I would like to read
36 My Lord, further.... Your Lordship gets, My Lord? Page 36, 37 bottom Clause 14, Russell on
37 Arbitration states, "Further, where the agreement is a commercial agreement provides that,

1 an arbitral tribunal is to be constituted, from a panel wholly appointed by one side, the party
2 not involved in the appointment cannot seek to attack the award on the basis that the
3 procedure would result in an impartial tribunal. The rationale for this, is that, it is common in
4 commercial contracts, that one party has little choice when it comes to the arbitration
5 provisions and where that party has agreed to the arbitration procedure, they must be taken
6 to have waived any objection. However, the position may be different, where non appointing
7 party is a consumer." Now Your Lordships may come to 16. My Lord, this judgment... This is
8 My Lord, *Wilson Taylor Asia Pacific Private Limited*. This is the judgment of
9 Singapore Supreme Court, authored by Justice Sundaresh Menon.

10
11 **CHIEF JUSTICE DY CHANDRACHUD:** Para?

12
13 **TUSHAR MEHTA:** Para 16, page 38.

14
15 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

16
17 **TUSHAR MEHTA:** My Lords, 16, part 4 of present written submissions. I'll take Your
18 Lordships through page 65.

19
20 **CHIEF JUSTICE DY CHANDRACHUD:** You're taking us through the judgment itself?

21
22 **TUSHAR MEHTA:** The Judgement, My Lord. I'm taking Your Lordships through the
23 judgment itself. I'm sorry, My Lord. I am a little slow in... My Lord, it is Volume III, page 4591.

24
25 **JUSTICE PS NARASIMHA:** Come again.

26
27 **TUSHAR MEHTA:** Volume III, page 4591. I'll read only one judgment. I'm not reading
28 other judgments. I'll just... para 8. This is Supreme Court of Singapore, which Your Lordships
29 would find at, page 4589 and His Lordships, the Chief Justice, delivers the judgment at 4591.
30 I'll read only three paragraphs. Para 8, My Lords have ? My Lord, Justice Narasimha? Justice
31 Pardiwala?

32
33 **JUSTICE J. B. PARDIWALA:** Yes, got it. "The judge held" The impugn order is being
34 discussed. "The judge held that the clause constituted an arbitration agreement despite its
35 asymmetrical nature. After an extensive survey of modern Commonwealth Authority, the
36 judge decided that a contractual dispute resolution agreement conferring an asymmetrical
37 right, in other words, right enjoyed by only one party to the agreement, but not by the other to

1 elect whether to arbitrate a future dispute was nevertheless an arbitration agreement. Thus he
2 dismissed the Respondent's argument of that clause was not an arbitration agreement because
3 of its lack of mutuality. The judge also held that the fact that the contractual dispute resolution
4 agreement granted right to elect whether to arbitrate. A future dispute was nevertheless an
5 arbitration agreement. Therefore, the characteristics of optionality in a dispute resolution
6 agreement was not inconsistent with the meaning of the nature of an arbitration agreement.
7 Summing up these principles, he concluded, that a contractual dispute resolution agreement,
8 which confers an asymmetric right to elect whether to arbitrate a future dispute is properly
9 regarded as so and so." Now please come to page 4593, para 13. Now His Lordship's finding
10 starts, para 13.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** There are two things. Only one party could seek
13 arbitration, they upheld that. And second, in respect of a future arbitrary, future dispute of
14 arbitration was made optional. They said still, it's an arbitration agreement.

15

16 **TUSHAR MEHTA:** Yes. Slightly My Lord...

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Slightly different.

19

20 **TUSHAR MEHTA:** No, different, but slightly more stringent case than what we have. Even
21 arbitrability was also one sided. Para 13.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Arbitrarily was one-sided.

24

25 **TUSHAR MEHTA:** Not only the selection of whether to arbitrate was also subject to one
26 party agreeing. Ultimately, I will point out, My Lord, wherever this, any country wanted to
27 prohibit, they have prohibited by legislation by choice, that we will not permit one-sided
28 appointment. Otherwise one of party autonomy is we can agree that all right, only one party
29 will decide. Here, My Lord, that's not the case.

30

31 **JUSTICE PS NARASIMHA:** There are instances when statute[UNCLEAR].

32

33 **TUSHAR MEHTA:** Yes, I'm coming to that. Yes, I'll assist Your Lordship with that. 13. "In
34 respect of the first of three requirements outlined at 11 above, we agreed with the judge and
35 also the Appellant, that the clause constituted a valid arbitration agreement between the
36 Appellant and the Respondent. It was immaterial for this purpose, that Clause A entitled only
37 the Respondent, but not the appellant to compel its counterparty to arbitrate a dispute. The

1 lack of mutuality characteristics and made an arbitration of a future dispute entirely optional
2 instead of placing parties under an immediate obligation to arbitrate their disputes, the
3 optionality characteristics. On the weight of modern commonwealth authority with the judge
4 considered neither of these features prevented the Court from finding that there was a valid
5 arbitration clause between the parties and before us, neither party contains otherwise." Now
6 coming back to my written submissions. As a matter of fact, apropos, My Lord Justice
7 Narasimha's query. Yesterday it was shown in UNCITRAL Model Law this restriction was
8 suggested. I'll just...

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** But, it was not specifically imposed, because they
11 said that the... two reasons they give that... three reasons. That the existing provisions are
12 adequate and that it would lead to ambiguity in the law.

13

14 **TUSHAR MEHTA:** Correct. Your Lordships are right. Now, My Lord, kindly come to page
15 41. I can skip, they've already argued my case so, I am not... I have put both the sides of the
16 coin, but they have started and put their part of the arguments. Some of the judgment, which
17 I relied upon are also relied upon by them. Of course, I must be thankful to Mr. Banerji that
18 he said that he is reading from my judgment, that apart. Now My Lord, I am on a page 57. Got
19 a very important issue. My learned friend Mr. Kaul read one blog of Jan Paulsson to satisfy
20 Your Lordships that unilateral arbitration clause is always to be frowned upon. Your Lordship
21 recalls.

22

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

24

25 **TUSHAR MEHTA:** Now, Before I read this, let me clarify one thing and this is where, My
26 Lord, I think inadvertently, Mr. Kaul must have missed this and I'll show from his article itself.

27

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

29

30 **TUSHAR MEHTA:** In International Arbitration Law, the word unilateral arbitration has
31 different connotation. Wherever Jan Paulsson, My Lord, he writes. His concepts... and this is
32 very crucial for deciding or for understanding the blog which Mr. Kaul heavily relied upon.

33

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

35

36 **TUSHAR MEHTA:** Jan Paulsson's understanding of unilateral arbitration is, I choose my
37 arbitrator other party chooses their arbitrator, and both of them choose the presiding

1 arbitrator is unilateral arbitrator. Because we are choosing our own judges, and therefore he
2 is the proponent of the theory that arbitral tribunal has to be chosen by a neutral body. So he
3 is advocating institutional arbitration. He has been a proponent of institutional arbitration,
4 that this system is wrong. That I select my choice of an arbitrator, They select their choice of
5 arbitrator and both of them select one to preside over. That itself he treats as unilateral
6 arbitrator. And just to show from his blog. But first please read page 57. This is my
7 paraphrasing, but I'll read it from the article also. Please come to, let me read from the article.
8 So my paraphrasing maybe objected to because it may have my colour. Volume IV, page 3662
9 in my volume, My Lords. This is the article they have cited. My learned friend missed the first
10 three paragraphs.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** In the same compilation?

13

14 **TUSHAR MEHTA:** In the same compilation. Your Lordships may find Volume IV, page
15 3662, tab 26. This is what Mr. Kaul relied upon. Let us read, My Lord, first three paragraphs.
16 First two also would be enough. What is his understanding of unilateral appointment. Then
17 he frowns upon it. Your Lordship gets? "What could be more basic? Arbitrations begin with
18 each side naming an arbitrator. References are occasionally made to fundamental right to
19 name one's arbitrator. But there is no such right. Moreover, if it is existed, it would certainly
20 not be fundamental. The original concept that legitimates arbitration is that an arbitrator in
21 whom both parties have confidence. It is quite unlikely that a party will have confidence in an
22 unknown arbitrator selected by its unloved opponent." My selecting would not be trusted by
23 him. His selecting would not be trusted by me, and therefore it should go to a neutral body for
24 the purpose of constituting the tribunal. He's advocating that. Whether he is pitching it too
25 high, maybe he is right. We do not know. I can't sit in judgment. But this is his understanding.
26 Now, My Lord, please come to page 3663 at the bottom.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Just read the last paragraph of 3662 also.

29

30 **TUSHAR MEHTA:** Yes, My Lord.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** The common practice.

33

34 **TUSHAR MEHTA:** "The common practice of unilateral appointments of co-arbitrators may
35 be said to be popular in the sense of being perceived as a valuable opportunity on which,
36 parties invest. This seems clear from the frequency of explicit contractual stipulations to this
37 effect, as well as from similar provisions found in rules devised by arbitral institutions. It may

1 seem surprising to ask, whether this is compatible, with the very concept of arbitration? Yet,
2 it is a serious question. It touches on a simple but a profound matter, the legitimacy of
3 arbitration rests on the party's confidence in arbitrators. There is every reason to doubt, that
4 any party is willing to have its case decided by its opponent's chosen arbitrator."

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Just read next para also.

7

8 **TUSHAR MEHTA:** Yes. "The two main purported justifications for the practice of unilateral
9 appointments are hardly convincing. It is said that, One, even homer nods, and therefore three
10 heads are better than one, especially when the stakes are high. And two, Parties will have
11 greater confidence in the selection of arbitrators selected for their special knowledge or skills."
12 So, he is talking about, 'my, choosing mine' and 'he, choosing his.'

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** The next sentence.

15

16 **TUSHAR MEHTA:** "Yet, each of these objectives may just as easily be met, when all three
17 arbitrators are chosen jointly or by an appointing authority."

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** This makes clear that, what he's really driving at,
20 is that the arbitrator should be selected by neutral arbitral institution.

21

22 **TUSHAR MEHTA:** Third party. So...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** And, unilateral appointment is referred to in the
25 context of unilateral appointment of co-arbitrators. One each side.

26

27 **TUSHAR MEHTA:** One by me, one...

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** And that one party is appoint [UNCLEAR].

30

31 **TUSHAR MEHTA:** Yes, My Lord. And the entire... the meaning, context and content of the
32 entire blog would change, if we understand, Jan Paulsson's understanding of, what he means,
33 by the word 'unilateral appointment'. Now, the last para on this page. "The only solution,
34 which will be reliable in all circumstances, is that an arbitrator, no matter the size of the
35 tribunal should be chosen jointly or selected by a neutral body. This aspect of the process
36 should no longer be misused, as a sales argument for arbitration. Confidence enhancement is

1 properly focused on procedural rights. The right to be heard, the opportunity, et cetera, et
2 cetera." So, My Lord,...

3

4 **NEERAJ KISHAN KAUL:** [UNCLEAR] that specifically, these were the unilateral
5 appointments.

6

7 **TUSHAR MEHTA:** Yes, as he understood by him.

8

9 **NEERAJ KISHAN KAUL:** "[UNCLEAR] not so, when there are unilateral tribunals.
10 [UNCLEAR] inducing and [UNCLEAR] the arbitral tribunal. Disputants tend to be interested
11 in one thing only, a favourable outcome. They exercise their right of unilateral appointment,
12 like everything else, with that overriding objective in view. The result is, speculation, about
13 ways and means to shape a favourable tribunal or at least to avoid a tribunal favourable to the
14 other side, which is logically assumed to be speculating with the same fervour and towards the
15 same end. Forgotten is the search for the arbitrator, trusted by both sides." So he talks about
16 the unilateral appointments.

17

18 **TUSHAR MEHTA:** My Lord, I can do one thing. Jan Paulsson has written a book, "Idea of
19 Arbitration". I'll supply that book. This is his understanding of unilateral arbitration. The way
20 we conventionally, My Lord, understand, I select my arbitrator, they select their arbitrator and
21 third person is presiding, That is his understanding.

22

23 **JUSTICE HRISHIKESH ROY:** In any case, he's canvassing, as we understand,
24 appointment of arbitrator by neutral institution. That is what, he is ultimately canvassing.

25

26 **TUSHAR MEHTA:** We are dealing with ad hoc arbitrations. We are not...

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** It's a view. It's a just view. It's just a view of some
29 very very....

30

31 **TUSHAR MEHTA:** And it is a good view, My Lords. Institutional arbitration is always
32 preferable, but that's not the issue before the court right now. We are dealing with ad hoc
33 arbitrations. So therefore, his view, even if right, will not support the view that a panel is
34 unilateral according to Jan Paulsson. Now, My Lord, page 58, Gary Born. I'll only read one
35 line, My Lord, because it is on the same principles, but for page 59. Of course, these are all
36 views. Ultimately, Your Lordships, in my respectful submission, will have to construe the act,
37 whether it permits or prohibits.

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CHIEF JUSTICE DY CHANDRACHUD: Party autonomy is one golden thread which runs through the provisions of the Act.

TUSHAR MEHTA: Entire.

CHIEF JUSTICE DY CHANDRACHUD: If the Legislature intends to override party autonomy that overriding of party autonomy must be expressly set out, even indicated in such terms by the Act, which our Act has not done. Not under 12(5). [UNCLEAR]

TUSHAR MEHTA: My Lord, only para, page 59, 3rd un-numbered para, but highlighted part. Un-numbered para 3, this is Gary Born, I'm told he is considered to be an authority.

CHIEF JUSTICE DY CHANDRACHUD: Yeah.

TUSHAR MEHTA: 59. I rely on my friend, who has the domain expertise. Page 59, "although the issue is often," I have highlighted it, it's in bold, "although the issue is often highly fact bound, most Courts have upheld provisions in which one party provides a list of potential arbitrators from which the other party must choose an arbitrator." World over, this is global jurisprudence. The only condition is they should be neutral. They should not be my employees or related to me. In other words, they should not have the ineligibility contemplated under Section 12.

CHIEF JUSTICE DY CHANDRACHUD: Alright. What's next, Mr. Solicitor?

TUSHAR MEHTA: Limited scrutiny post arbitration, My Lord also, is one of the factors, because when I choose my arbitrator and they choose their arbitrator, and when there is no level playing field in persuading the arbitrators. When we lose, when we suffer an award. Your Lordship, knows what happens in 34, and rightly, for good reason. They were right to decide wrongly also. We can't go into it unless some strict ground mentioned under 34 is made out. So, this would disincentivise the arbitration as a mode of the dispute resolution. Therefore limited scrutiny of 34 may also lead, My Lord, to an inference, that kind of a neutral body that is not connected with me, what American Court says, intrinsically connected to one party. Like my Managing Director, my Consultant. Now, I am not reading, there is one judgment, and I would strongly... but I'm not reading it right now, because of lack of time.

JUSTICE PS NARASIMHA: What you said, that limited ground so far as the...

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TUSHAR MEHTA: Just to ensure that - Please approve a contract which I am permitted under 11(2), that from my neutral panel, they will select, they will not select as per their choice so that 34 virtually is an illusory remedy. That's the submission. There is one... I'll not read one judgment, but I would strongly recommend that all My Lords may read this judgment, because of lack of time I'm not reading it. It makes a very interesting read. The Honourable Court, it's an American judgment has My Lord, its *Board of Education of Berkeley versus W. Harley Miller*. It is a part of our written submissions dealing with asymmetrical clauses like this, that one party having a dominant right.

JUSTICE PS NARASIMHA: Where did you mention about that?

TUSHAR MEHTA: Yes, My Lord.

JUSTICE PS NARASIMHA: Just give the page, that's all.

TUSHAR MEHTA: Page 1670. I'm sorry. 1663 it starts.

CHIEF JUSTICE DY CHANDRACHUD: In the precedence compilation?

TUSHAR MEHTA: No, our compilation. Our compilation, Volume V.

CHIEF JUSTICE DY CHANDRACHUD: Yeah. 1665.

TUSHAR MEHTA: It starts 1663 at 1670. PDF 1665. I'll read two paragraphs and rest Your Lordships may read it. It makes an interesting read. It ultimately concludes what I am respectfully urging for Your Lordships consideration. But the way in which the judgment is written makes an interesting reading. "The basic problem..." somewhere on the right-hand side column, second paragraph from the bottom, Your Lordship gets? "The basic problem..." 1670 Right hand side column, second para from bottom. "The basic problem." My Lord Justice Pardiwala has it? It's very interesting. I have read it fully, but Your Lordships may read it at leisure. "The basic problem in all arbitration cases could probably best be explained not in terms of legal characterisation such as condition precedent, ousting costs of their jurisdiction, or revocability, but rather by a hypothetical case in the tradition of ancient fabulist Aesop. Let us assume for a minute that for some reason all rabbits and all the foxes decide to enter into a contract for mutual security, one provision of which were that the dispute arising out of the contract would be arbitrated by a panel of foxes. Somehow that shocks our conscience and it

1 doesn't help the rabbits very much either. Now, what happens if we have the same contract
2 with the same arbitration provision except that disputes will be arbitrated by a panel of wolves.
3 Is there such a community of interest among foxes and wolves that the wolves cannot be
4 impartial? Possibly. Now, what happens if the dispute will be resolved by a panel composed
5 by one squirrel, one elephant and one wolf. One might conclude that squirrels look like rabbits.
6 Wolf look like foxes. An elephant ought to surely be et cetera, et cetera." Eventually it says that
7 -"Elephant will surely be impartial, then animal law becomes procedurally very complex." My
8 Lord, I'm not reading it, but it ultimately reaches a conclusion that this unilateral in the way
9 in which we use it, is not illegal. My Lord, please come to... My Lord, last two points and I
10 know Your Lordships are looking at the watch. Otherwise I can ensure Your Lordship...

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** We had a long day of work. We have to have some
13 pleasantries also.

14

15 **TUSHAR MEHTA:** I understand. But so long as Your Lordships are looking at the watch,
16 there is no difficulty. I promise My Lords will not be required to look at the calendar.

17

18 **JUSTICE HRISHIKESH ROY:** But here the example the rabbits will jump and the fox will
19 trot.

20

21 **TUSHAR MEHTA:** An elephant is treated to be a neutral, obviously because he doesn't look
22 like either of them. Squirrels resemble rabbits and foxes resemble wolves.

23

24 **JUSTICE PS NARASIMHA:** Canine justice.

25

26 **TUSHAR MEHTA:** Yes Your Lordships are right. That's the word. Kindly come to page 65.
27 My Lord Justice Narasimha's question.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Of the written submission?

30

31 **TUSHAR MEHTA:** Yes. My written submission 65, part 5. "Asymmetrical arbitration
32 agreements in different jurisdictions." First two, in global context and present context manner
33 would be relevant because globally it has different shades. Asymmetrical has different
34 meanings. Not the way, My Lord we understand it. First, global context. Kindly come to the
35 table directly. Please come to page 65. There is a table given. My Lords have?

36

37 **JUSTICE HRISHIKESH ROY:** Yes.

1

2 **TUSHAR MEHTA:** The purpose is to show that whichever country wanted to expressly
3 prohibit one party to provide for a panel, it is so prohibited statutorily and there is an exception
4 made to the autonomy, party autonomy. Netherlands, for example, Your Lordships may kindly
5 remember the colour scheme, My Lord, the legend, green is permissible and the other colour
6 is impermissible. Kindly see the underlying portion. This is the statute in Netherlands, Dutch
7 Code of Civil Procedure. Your Lordship get that page?

8

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

10

11 **TUSHAR MEHTA:** "If the..." My Lords, I'll read, My Lords.

12

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

14

15 **TUSHAR MEHTA:** Page 65, Netherlands, the statutory prohibition. We don't have, I'm not
16 repeating. "If the arbitration agreement..." I'm reading the underlying part. This is the
17 statutory language. "If the arbitration agreement gives one of the parties a privileged position
18 with regard to the appointment of the arbitrator or arbitrators, the other party may, despite
19 the method of appointment laid down in that agreement, request the provisional relief judge
20 of the District Court within one month, after commencement of the arbitration to appoint the
21 arbitrator or arbitrators." So, the law does not permit or rather, leaves it open for the other
22 side, to not agree, even if agreement is providing. Then next is Germany. Similar My Lord. I'll
23 not read it. Same. My Lord, it is same. Page 66. 3rd is Spain. Spain. My Lord, page 66 .

24

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

26

27 **TUSHAR MEHTA:** Article 15(2) of Spanish Arbitration Act. Please see 2, sub-section (2).
28 "The parties are able to freely agree on the procedure for the appointment of the arbitrators,
29 provided, that there is no volition of principle of equal treatment. In the absence of any
30 agreement, the following rules shall apply." My learned friend wants to read 18, which is an
31 equal treatment by the arbitrator in 11(2). This is how 11(2) could have been, if the legislature
32 so intended. I hope, My Lord, I am able to make myself clear. 11(2) would have been in this
33 manner, if they wanted 18 and 11 to be read together. Then, Your Lordships may come to page
34 67. Again, Spanish, sub-section (6). Kindly come to 68. Estonia, Section 721(2) of Estonia Code
35 of Civil Procedure, My Lord, para 2, sub-section (2). "If an arbitral agreement gives one of the
36 parties, in the formation of an arbitral tribunal, an economic or other advantage over the other
37 party which is materially damaging to the other party. Such party may request that the Court

1 appoint one arbitrator or several arbitrators differently from the appointment which already
2 took place or from the rules of appointment agreed upon earlier." Clear statutory mandate that
3 you cannot have this. It is derogable, you can agree, other side can agree or they go to the court.
4 Poland same. Russia same. I'm sorry, may I assist Your Lordships, may I assist with any
5 section?

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** The argument was that a similar provision is
8 made in 11(8). 11(8) implicitly recognizes that.

9

10 **TUSHAR MEHTA:** 11(8), My Lords.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** 11(8). That there are considerations as are likely
13 to secure the appointment of an independent and impartial arbitrator,

14

15 **TUSHAR MEHTA:** Yes. But 11(8) kicks in. Please allow me to repeat a little while. Please
16 see (8). "The arbitral institution referred to in sub-section (4), (5), and (6)."

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** No, the unamended. There is Footnote two at the
19 bottom.

20

21 **TUSHAR MEHTA:** Yes.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** "The Chief Justice of India, the person or
24 institution designated by him in appointing an arbitrator shall have due regard to, (a) the
25 qualification and (b) other consideration as are likely to secure the appointment of an
26 independent and impartial arbitrator."

27

28 **TUSHAR MEHTA:** Yes.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** So, therefore, their argument was that when the
31 court exercises the power, They are not held bound by...

32

33 **TUSHAR MEHTA:** The court is not bound. But that's not my argument.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** The court is not bound.

36

1 **TUSHAR MEHTA:** But 11. When a party goes to the court. My Lord when... When the party
2 would go to the court under (8) in case of the contingency stipulated under (6). Please see (6).

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Then the court has a wider power.

5

6 **TUSHAR MEHTA:** No, I'm saying something slightly different. (6). Kindly see (6). (8) comes
7 only when we reach the court, we reach the court only if (6) contingency arise. Please see (6).
8 "Where..." The same page Your Lordships were, "where under an appointment procedure
9 agreed upon by the parties." So 11(2). "(a) party fails to act."

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** There's a failure of that process.

12

13 **TUSHAR MEHTA:** Then only we reach Your Lordship. So that does not take away 11(2).
14 That confers an additional power.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** [UNCLEAR].

17

18 **TUSHAR MEHTA:** On the court. Page 69 and 70. I'm on the last point.

19

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

21

22 **TUSHAR MEHTA:** Last point. Page 69 and 70, I have said that Singapore permits such a
23 clause, asymmetrical clause. Britain permits such a clause, asymmetrical clause. But that,
24 again is not a decisive factor. The point is, whenever Legislature wanted to restrict, it has done
25 so by statute.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** But we have to construe our statute more than
28 [UNCLEAR].

29

30 **TUSHAR MEHTA:** That's My Lord, the end of the matter. Last point, last point. And I would
31 really oblige, if Your Lordship can consider this. This is directly linked with this. Please come
32 to Section 12, this is the provision not a very popular thing to urge, but still, it is necessary at
33 times to urge. To ensure that the object is achieved 11(1)(b). Sorry, 12(1)(b) and this is my last
34 point. Your Lordship's yawn is more vocal than Your Lordships, words. This is my last point,
35 My Lord I can assure Your Lordships. "When a person is approached in connection with his
36 possible appointment as an arbitrator, he shall disclose in writing any circumstances -(b)." I'm
37 entering into a little unpopular area. "Which are likely to affect his ability to devote sufficient

1 time to the arbitration and in particular his ability to complete the entire arbitration within a
2 period of twelve months." This is observed in breach. My learned friend says - 100% breach.
3 We are *ad idem*, Mr. Banerji is also. So My Lords, I am fortified by...

4

5 **JUSTICE PS NARASIMHA:** [UNCLEAR]

6

7 **TUSHAR MEHTA:** Now. No, no why I said...

8

9 **JUSTICE PS NARASIMHA:** [UNCLEAR] are notified. See, the solution to that is to have
10 an arbitration council in place. If a council is in place, it will fulfil all the objectives.

11

12 **TUSHAR MEHTA:** Give me a minute. Why I raised this in this matter. My Lord, whenever
13 there is a panel, and I'll give the list of panels and I don't wish to argue. Just for to illustrate,
14 the panel gives the name of the arbitrator, other details, his qualifications, experience, et
15 cetera, and the number of arbitrations that particular arbitrator is doing. So that the other
16 party can choose that this arbitrator is doing nine arbitrations. He may not be able to devote
17 time to my dispute, so better I will go for some other arbitrator. I'll give that. Number two, In
18 ICC, whenever an arbitrator is approached, not only ICC, other institutions also, arbitrator is
19 called upon to give his two years calendar. We have placed that on record. I give the page. 1975.
20 It is the list. I know it's not...

21

22 **JUSTICE PS NARASIMHA:** Mr. Solicitor, you are making what we are saying.

23

24 **TUSHAR MEHTA:** My Lord, what has happened here..

25

26 **JUSTICE PS NARASIMHA:** Because specifically a 43D we have provided the duties of the
27 Council, which will be to formulate timelines, to formulate accreditation, to call for
28 information. How many arbitrations are pending before each, put it up all that on the website.
29 Everybody will know how many arbitration each arbitrator holds. What is the timeline? These
30 are the requirements. Now, all of these are ad hoc arbitrations. So even assuming that they are
31 ad hoc, some institutionalisation or some kind of a regulation must happen. That was the
32 purpose and object of the Council. What...Your concerns are reflected here under 43D, sub-
33 section 2. (2)(k)... (l) [UNCLEAR].

34

35 **TUSHAR MEHTA:** But My Lord, 12A(1)(b) also says within one year and there is thereafter
36 six months extension. But 29A. I only on the lighter side say before arbitrators, that arbitrators
37 have now comparable. It is on the lighter side, but nothing derogatory with film stars in two

1 ways. We always listen that we couldn't get the dates of this particular stars therefore we have
2 to appoint. It's very difficult to get dates. My learned friend would agree. Very difficult. That
3 today's date will go after three months, four months. And second, film stars operate in three
4 shifts, so do arbitrators. Morning shift, afternoon shift and night shift. It's good. There's
5 nothing wrong about it.

6

7 **JUSTICE HRISHIKESH ROY:** Did you say, three shifts or three screens?

8

9 **TUSHAR MEHTA:** I bow down, My Lord. I could say only three shifts.

10

11 **JUSTICE HRISHIKESH ROY:** I have also not said anything.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** He was just wondering whether he heard screens
14 or shifts.

15

16 **TUSHAR MEHTA:** Lawyers do that, that I can vouch for. We have been witnessing. Lawyers
17 hearing from more than one screen.

18

19 **JUSTICE PS NARASIMHA:** Unless we shift into... Ad hoc arbitration is an unorganized
20 sector. It is an unorganized sector. There is no regulation. Unless we shift into a situation...

21

22 **TUSHAR MEHTA:** In institutional arbitration this factor is considered. For example,
23 SAROD, we have a SAROD arbitration. It is considered that this learned arbitrator has more
24 than what can be done within one and half year. Twelve months, six months extension, but
25 thereafter we survive on 29A. Court keeps on extending. That's the hard reality. Ground
26 reality. And My Lord...

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Can you shortify the another provision and bring
29 that into existence in the institution? [UNCLEAR]

30

31 **TUSHAR MEHTA:** 12(1)(b) says My Lord, that, he has to disclose.

32

33 **JUSTICE PS NARASIMHA:** That is not answering that question, which Chief Justice has.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Why is the Government not notifying? What's
36 the concern?

37

1 **TUSHAR MEHTA:** There can be, My Lord. I'll consult the Government, and My Lord, it can
2 be, should be notified.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** It should be notified immediately.

5

6 **TUSHAR MEHTA:** Certainly.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** And you passed an Act, right? For the other one.
9 Indian... What is that act called?

10

11 **JUSTICE PS NARASIMHA:** It's part of this. Amended act. Included in this very chapter.

12

13 **TUSHAR MEHTA:** My Lord, but...

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** [UNCLEAR] Mr. Hemant Gupta.

16

17 **TUSHAR MEHTA:** But, My Lord, would it still? I'm posing a question to myself, dilute
18 12(1)(b)? That you have to complete by twelve months. You have to disclose, whether you will
19 be able to complete within twelve months? An extendable period, by consent, is only six
20 months. I leave it at that. So far as, My Lord, NBFCs are concerned, last point.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Solicitor, what we have done is, my learned,
23 two judges, Brother Justice Pardiwala and Justice Misra, we must have appointed, I think,
24 about 25-30 young lawyers as arbitrators in this...

25

26 **TUSHAR MEHTA:** That's a better way. But otherwise, My Lord, certainly, I...

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Certainly smaller claim. But, I...

29

30 **TUSHAR MEHTA:** No, certainly. My learned friend, My Lord, but, Your Lordships may...

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** [UNCLEAR] I thought in winding up matters.
33 Ultimately, it's not about winding up a company. It's small claims by consent to appoint
34 arbitrators and retired... Sorry, not retired, we had appointed young lawyers, juniors at the
35 Bar whom we have appointed.

36

1 **TUSHAR MEHTA:** Yes, and then, they are doing it very enthusiastically, and within the
2 time. I flagged it, My Lord, I don't wish to be more unpopular on this argument. Therefore, I
3 leave it at that. But 12(1)(b), is a mandate, and there is no consequence of non-compliance
4 with that mandate. My Lord, so far as NBFCs are concerned, there are certain institutions like
5 Railways, Non-Banking Financial Companies, where they deal with thousands of cases,
6 thousands of arbitrations. They will... by the very nature of their function. When I enter into
7 an agreement, for taking loan of say, Two lakhs or three lakhs, I know that there is a different
8 bargaining power. They are taking a greater risk. Something which I cannot borrow from the
9 bank is being borrowed from NBFCs. So, I agree to a particular arbitrator. Otherwise, also,
10 take for example, a person who has taken a loan of three lakhs. I'm posing a question to myself.
11 "Do we really expect him to go in search of an arbitrator?" He finds an arbitrator who is ready
12 to work as per Schedule 4 fees, et cetera, and, My Lord, deal with the NBFC.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Most of the smaller claims proceed *ex parte*,
15 actually.

16

17 **TUSHAR MEHTA:** Yes, but...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** That they are taking the lawyers [UNCLEAR].

20

21 **TUSHAR MEHTA:** But, to that, there is a solution, I am suggesting. I have a solution, which
22 I have placed on record. There is a solution on record. There is a page SAMA , My Lord, It is
23 called SAMA . One example. This is one example. There is an institution, which does online
24 dispute resolution. That's the best thing for small... SAMA stands for "*Samjhao Magar Pyar*
25 *sey*". Forget the name. They could have chosen a better name. It's called SAMA and My Lord,
26 this is at page 1983, Volume V(A). My Lord, please come to, only for a second. This may
27 perhaps be a game changer. Kindly come to page 2000, Volume V(A).

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** All right, we go on...

30

31 **TUSHAR MEHTA:** Only a minute. Only a minute, My Lord. This may be a game changer.
32 Your Lordships would... really contribute something, My Lord... would be able to contribute
33 something. Page 2000. My Lords, this is one organization. Volume V(A), page 2000. It is
34 recognized by the High Court, Government of Maharashtra, Bombay, Ministry of Justice
35 Union of India, et cetera. Its advisory Council is former Chief Justice Sri Krishna, Justice
36 Kannan, et cetera, et cetera. This is online dispute resolution for small people and the award
37 comes within 45 days, not expensive, no major delays. I have placed on record their entire

1 activity. And this is recognised by many. Many banks have joined this for their small depositors
2 or small problems. The loan agreements of smaller deposit, smaller loan, loanees have a
3 provision that dispute will be resolved by this. This, I think is the solution for smaller
4 depositors. We are not on big sharks. Obligated My Lord. I'm grateful. I exceeded my time a lot,
5 but I'm grateful.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Now we go to Mr. K. M. Natraj. Over and above
8 what the Solicitor has argued. Now, what is the point that you are making.

9

10 **KM NATRAJ:** Yes. Volume V(C). Morning I forward forwarded my short-written argument,
11 both on behalf of the Ford [UNCLEAR], that is the Petitioner in the main matter, which has
12 been referred to this Hon'ble Court. And also I am representing IIAC, Indian International
13 Arbitration Centre, which is an intervener, representing both in the matter.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** What is the substance of it, can you just
16 summarize?

17

18 **KM NATRAJ:** Yes. May I kindly have my short-written note, which is at Volume V(C).

19

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

21

22 **KM NATRAJ:** It's reflecting on the screen. I'll try to finish as early as possible without
23 repeating any of the points which has been raised by the learned Solicitor.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Can you tell us more? Just formulate what is not
26 has been argued.

27

28 **KM NATRAJ :** Yes. The first one, the party autonomy, which is the basic feature of the...

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** That Mr. Solicitor argued.

31

32 **KM NATRAJ:** Arbitration, for a different purpose I'm putting it. For the purpose of analysing
33 the very reference and the issue, which is the basic feature of the arbitration proceedings.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Your second bullet point is correct, 11(6) arises
36 only if any of the situations provided in [UNCLEAR] are not fulfilled.

37

1 **KM NATRAJ:** Secondly, there is no statutory bar on either of the parties either
2 independently or jointly appointing an arbitrator, there is no statutory bar. Either of the
3 parties can independently, one party can appoint an arbitrator or jointly by virtue of some kind
4 of agreement, jointly they can appoint. That is recognised and ingrained in Section 11(2) of the
5 Act, which is party autonomy.

6

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

8

9 **KM NATRAJ:** if that is the case when there is a statutory bar, party autonomy has to be
10 respected and which is further fortified by Section 11(6). [UNCLEAR] Section 11(6), which
11 again speaks of the agreed procedure.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** That's the submission?

14

15 **KM NATRAJ:** Yes, under 11(6) it further fortifies the party autonomy for appointment to
16 evolve any kind of procedure to be adopted by the parties, either individually or independently.
17 And again, section further, Section 12 also recognises and fortifies such a right.

18

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

20

21 **KM NATRAJ:** By keeping in mind two things have to be considered. One is both appointing
22 authority or appointing person and the arbitrator are two independent and distinct entities
23 and their identity is different. Appointing and acting are two distinct roles.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Alright, next. What is the next point?

26

27 **KM NATRAJ:** They are distinct rules. If they are distinct roles, the statutory prohibition is
28 only for the purpose of the acting as an arbitrator. Not for the purpose of appointing. The law
29 does not prohibit any kind of restriction so far as appointing authority is concerned.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, next.

32

33 **KM NATRAJ:** The appointing authority can appoint and the impartiality or the neutralities
34 that is attributable only to the arbitrator appointed and acting as an arbitrator.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Alright, What is the next one?

37

1 **KM NATRAJ:** If that is so, now, what is not provided under the statute that need not be read
2 into...

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** No limitation.

5

6 **KM NATRAJ:** No limitation prescribed under the Act.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** No limitation can be driven by
9 implicit[UNCLEAR]

10

11 **KM NATRAJ:** Yes. And the omissions. Even if it is an omission that cannot be supplied by
12 interpretation.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** All right. Anything else?

15

16 **KM NATRAJ:** Sir, in support of that four judgments I have also placed, including the wisdom
17 of the legislature upon which once there is no embargo on a person who can appoint, then
18 there is nothing more to be said about it. And two things in *TRF* this situation was totally
19 different. *TRF* that the arbitrator himself was the... Managing Director himself was an
20 arbitrator, and also he was supposed to appoint. In that context it was said so in *TRF* case.
21 And here in the second, this reference by Justice Nariman and three judges bench in *Tantia*.
22 Kindly see that reference itself is totally may not be appropriate this one reference. Kindly see
23 how it has been referred in this one in Volume I, page number 3. It pre-supposes something
24 which is not otherwise provided under the Act. Kindly have your reference at page number 3.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 1 page 3?

27

28 **KM NATRAJ:** Yes. [NO AUDIO] everything is on the arbitrators, not on the appointing
29 authority. So therefore, there is nothing to read, something relatable to the appointing
30 authority. I'll leave, please.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** That's all right. Now we will hear Mr. Arvind
33 Kamath. Mr. Kamath, apart from what has been argued, what you like to say?

34

35 **ARVIND KAMATH:** Yes, My Lords. I represent the BMRCL, which is the Bangalore Metro
36 Rail Corporation. My Lord, I'm purely on the issue of the maintenance of the panel system.
37 My Lord, I've got five...

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CHIEF JUSTICE DY CHANDRACHUD: The maintenance of?

ARVIND KAMATH: Maintenance of the panel by one party.

CHIEF JUSTICE DY CHANDRACHUD: Right.

ARVIND KAMATH: We are purely on that issue. My Lord, I've got five proposition/principles to be placed before Your Lordships.

CHIEF JUSTICE DY CHANDRACHUD: Go on. Tell us. Formulate.

ARVIND KAMATH: And My Lords, the first one is, that the contractual conferment of a right to form a panel of arbitrators is a commercial bargain.

CHIEF JUSTICE DY CHANDRACHUD: One second.

ARVIND KAMATH: I'm saying, the contractual confirmation of a right to form a panel of arbitrators, is a commercial bargain, and it falls within the purview of party autonomy under Section 11(2) of the Arbitration and Conciliation Act. Every commercial contract is a result of a commercial bargain. Parties are free to bargain their rights provided it is consistent with law and public policy.

CHIEF JUSTICE DY CHANDRACHUD: We see the point. What is the second point?

ARVIND KAMATH: The second point is that, enlisting of the names on a panel does not *per se* constitute appointment. I enlist the names only for the purpose of administrative exercise. Merely because I add the names on the list of potential arbitrators, there is no conferment of any rights, nor does it entail any remuneration, it does not even guarantee a right to be appointed.

CHIEF JUSTICE DY CHANDRACHUD: Got your point.

ARVIND KAMATH: It is obtaining prior consent.

CHIEF JUSTICE DY CHANDRACHUD: Third point, Mr. Kamath.

1 **ARVIND KAMATH:** The third point would be that.... Yesterday we saw the perception-
2 based challenge to the procedure of appointment is not sustainable in law.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** One second.

5

6 **ARVIND KAMATH:** Every strand of argument...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Just one second. Perception based challenge...

9

10 **ARVIND KAMATH:** To the procedure of appointment of arbitrators from a panel
11 maintained by one party is not sustainable.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** One second. Panel maintained by one party...

14

15 **JUSTICE PS NARASIMHA:** By one party, what...

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Is not sustainable.

18

19 **ARVIND KAMATH:** Is not sustainable. Yesterday we saw argument like for instance there
20 is an economic incentive to pass an award in favour of the party who maintains. It is based on
21 perception. The allegation that I curate a list is based on perception.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Fair enough. What is the fourth point?

24

25 **ARVIND KAMATH:** The fourth point would be that there are statutory safeguards to ensure
26 independence and impartiality of the empanelled Arbitrators. And it's a four tier, the statute
27 has laid down a four-tier mechanism and those four are... My Lord, I'll quickly enlist the four.
28 Number one is the insertion of Section 12(5), as well as Schedule Five and Seven.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Yes?

31

32 **ARVIND KAMATH:** Number two is the mandatory declaration, which is a conscientious
33 declaration. It is akin to an oath by a judge.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Mandatory disclosure.

36

37 **ARVIND KAMATH:** Mandatory disclosure.

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CHIEF JUSTICE DY CHANDRACHUD: The third?

ARVIND KAMATH: The third, the statute provides a challenge. Just in case an uncontentious decision is made by the arbitrator. It gives a right to the party to challenge him.

CHIEF JUSTICE DY CHANDRACHUD: Okay.

ARVIND KAMATH: And fourth is that if there is a challenge made and if it is declined, that gives a ground to challenge the arbitral award. So which means there is a judicial review of the decision of the arbitrator that there is no bias. And both those arbitrators appoint the presiding arbitrator. So, which means it's a very fair principle. Therefore, I'm breaking down the formation of the panel should be divested from the way the panel operates. The formation of the panel, it's a contractual right. But how the panel operates, *Voestalpine* has laid down the principles. So therefore, now to summarise maintenance of a panel by one party is not [NO AUDIO] following on the sole ground that *Tantia* doubted *CORE*. The single learned single judge should not have... Learned single judge should have followed *CORE*.

CHIEF JUSTICE DY CHANDRACHUD: Thank you.

ARVIND KAMATH: I'm grateful.

CHIEF JUSTICE DY CHANDRACHUD: You done a very valuable assistance. Very well formulated.

ARVIND KAMATH: I'm grateful.

CHIEF JUSTICE DY CHANDRACHUD: Yes. Now 1 second. Now we will ask Mr. Guru Krishnakumar.

GURU KRISHNAKUMAR: I'm in 501.4.

CHIEF JUSTICE DY CHANDRACHUD: Yes Guru. That's the formulation.

GURU KRISHNAKUMAR: My Lords, broadly four points. In fact, my submissions, I'll put it as propositions and leave it at that.

1 Number one. While adopting the submission on behalf of the Solicitor... by the Solicitor
2 General that the statute per se does not bar unilateral appointment of arbitrators. I adopt that.
3 While adopting that, I want to make this formulation. The excise of power under Section 11(2)
4 of the Act is conditioned by Section 12 of the Act. Because the language used in 12 is, anybody
5 invested with the authority to appoint before the appointment has to get declaration from the
6 prospective candidate. Which means, therefore, My Lords, please see the language for a
7 minute. Just have a look at that. Please see 12. When a person is approached in connection
8 with his possible appointment as an arbitrator, he shall disclose in writing any circumstances
9 then (a), (b), etc. Then please see the Second Explanation to 12 after (b). The disclosure shall
10 be made by such person in the form specified in the Sixth Schedule.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** All right. [UNCLEAR]

13

14 **GURU KRISHNAKUMAR:** Therefore, bodily My Lords 12 and Schedule Five and Schedule
15 Seven have to be read into 11(2). That's one.

16 Second point My Lords, mutuality which seems to be the premise on which there is reliance
17 on 18. There are three...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Mutuality?

20

21 **GURU KRISHNAKUMAR:** Mutuality is the premise on which Section 18 is being invoked
22 and sought to be read into the appointment process. Now for that I have three submissions.
23 Number one, that does not take note of the fact that 18 is a general provision in the next
24 chapter whereas 11 is a provision specifically for appointment. And the Legislature has
25 consciously not brought in that principle in 11.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** All right. Next.

28

29 **GURU KRISHNAKUMAR:** Third point My Lords. Assuming 18 can be invoked by some
30 basis. Mutuality will have to be understood in the business setting and the fact setting of the
31 party's transactions. Arbitration, at the end of the day, a consensual arrangement for
32 adjudication of disputes other than through the court process. Therefore the business setting
33 and the background of the transactions will have to be understood. There cannot be an
34 omnibus stand that unilateral appointments cannot be resorted to at all and to contextualise
35 this submission, I want to talk about my NBFCs, the Solicitor General referred to it in the
36 passing. I am representing an NBFC. I have a claim for a few lakhs of rupees in fact in this very
37 case. The party does not respond to the notice for appointment. I go ahead appoint the

1 arbitrator. Award is granted. The award is sought to be executed by me. At that stage, *Perkins*
2 has taken note of by the execution, by Court, by itself and My Lords, the award is held to be a
3 nullity and the whole thing is set aside. I've come against that My Lords.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** All right.

6

7 **GURU KRISHNAKUMAR:** Now, therefore, this is the second point My Lords. Business
8 setting has to be understood. In fact the fact that business setting is a factor in legislation.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** One minute. Yes. [UNCLEAR]

11

12 **GURU KRISHNAKUMAR:** The next point is, the nature of the transaction and business
13 setting. It is given importance in the statute itself. For that just please make a note of the
14 explanation to Schedule... Schedule Seven and Five. Just have a look at that. Please see,
15 Explanation 3. I'll just read that, My Lord. "For the removal of doubts, it is clarified, that it
16 may be the practice in certain kinds of arbitration, such as maritime or commodities
17 arbitration, to draw arbitrators from a small, specialised pool." Now, one thing...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Where are you reading it from? We didn't find.

20

21 **GURU KRISHNAKUMAR:** I'm reading from the Explanation to Schedule Seven. And it's
22 there in Schedule Five also.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Schedule's explanation.

25

26 **GURU KRISHNAKUMAR:** Yeah, schedule's explanation. Both Schedule Five and Schedule
27 Seven, My Lord. Explanation 3 in both.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** The practice in certain specific maritime or
30 commodity...

31

32 **GURU KRISHNAKUMAR:** Yeah. Such as maritime and... Therefore, the nature of the
33 business setting, My Lords, becomes material, even statutorily recognised.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Right.

36

1 **GURU KRISHNAKUMAR:** The last point is this, My Lord - What is the alternative, My
2 Lord, that we are talking about? The entirety of the submission is on a perceived apprehension
3 of bias. The entirety of the submission, it's on a supposition, that unilateral appointment
4 necessarily is not fair. Law cannot countenance that. In fact, My Lords, the alternative of
5 institutional records. Number one, My Lords, lack of institutions. Number two, metros versus
6 non-metros, My Lords, where is the access to institutions of that nature? We are looking at
7 small loans across the spectrum, My Lords, MSMEs, consumer durable loans, all of that. I
8 have today 6000 arbitration awards in my favour, and I have 10,000 cases every month or
9 something of that order. Third aspect, My Lord, if we have to take recourse to court, please see
10 the burden it will add to the court system.

11

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

13

14 **GURU KRISHNAKUMAR:** These are the points.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you. Now we'll hear Ms. Madhavi Divan.

17

18 **GURU KRISHNAKUMAR:** One last thing, My Lord. My apology. Alternate submission. In
19 case, My Lord, we are to countenance *Perkins*, please, My Lords, look at prospective
20 overruling. In case, My Lords are...

21

22 **TUSHAR MEHTA:** I didn't address that, but that is going to be a very vexed question, My
23 Lord.

24

25 **GURU KRISHNAKUMAR:** Yes.

26

27 **TUSHAR MEHTA:** Whichever way, Your Lordship decides, whether it would have
28 prospectivity or retrospectivity, because, in some cases, arbitrations are going on, some cases,
29 34 is going on...

30

31 **GURU KRISHNAKUMAR:** So many... Thousands of awards.

32

33 **TUSHAR MEHTA:** Some cases 37 is going on. In fact, Mr. Shashank Garg wanted to have
34 few minutes, if Your Lordships can permit, My Lord, on only prospectivity.

35

36 **GURU KRISHNAKUMAR:** In fact...

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** That's an alternate submission?

2

3 **GURU KRISHNAKUMAR:** That's an alternate submission. My submissions, My Lord, in
4 Volume V, have covered that also. My Lords can have a look at that. Page 277, my submissions
5 are there. I'm deeply obliged.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. Yes, Ms. Madhavi.

8

9 **MADHAVI DIVAN:** Yes, My Lord. I appear also for an NBFC and my issue is of unilateral
10 appointment. The points, I will make is, one, this is a very comprehensively crafted scheme
11 by the Legislature, under 12, 13 and 14, which has been ignored by the court, My Lord, in
12 *Perkins* and even before that in *TRF*. And I'm going to My Lord, show Your Lordships, the
13 devastating impact of not taking into account this comprehensive scheme, which creates two
14 categories of clouds on integrity... on independence and impartiality. There are two categories,
15 and perhaps this has not come up in the arguments this far. So I'm just spending a couple of
16 minutes on this.

17 There are two categories. One is, what is described as the non-negotiable category, which
18 appears in 12(5) read with the Seventh Schedule. Other than, My Lords, the proviso over there,
19 it is an absolute bar, absolute bar of ineligibility. Seventh Schedule based on red list, best
20 international practices, very intricately carved out bar of ranked ineligibility at the very
21 threshold. Now, when it comes to this rank threshold ineligibility, the effect is the arbitrator,
22 the appointment is void at the threshold, the cessation and the procedure is, that you go under
23 14(2). 14(2) for termination and substitution. So it's a different procedure when in category 1.
24 I'm describing it as category 1. Threshold ineligibility under Seventh Schedule, resulting under
25 14(2) in termination and substitution. Now, My Lords, mine is not a category. Unilateral
26 appointment is definitely not barred there. Definitely not. And therefore, applying the
27 principle of My Lord, express your unions, My Lord... I won't get. But basically the expression
28 of one means the exclusion of the other. This was all...

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** *Expressio unius est exclusio alterius*.

31

32 **MADHAVI DIVAN:** *Expressio unius est exclusio alterius*. So that is the principle. And
33 insofar as I am concerned, My Lords, please see it doesn't fall within that and these schedules,
34 the two schedules that and the other one I haven't yet referred to. The two schedules were
35 brought in by this Amendment in 2015. Before that, everything was left to a little bit of
36 vagueness, but now that there is the schedule, you have to follow it. The court could not have
37 added to this either in *Perkins* or in *TRF* to start with. They could not have added to this,

1 and they did not consider the devastating impact, which I'm going to point out which it is
2 having. Now, this so thus, that is category 1.

3 Category 2 shows that even cases like mine, if the other side is aggrieved they have a remedy.
4 They have a remedy. That category 2 falls into cases which are under the Fifth Schedule. So,
5 other than the non-negotiable variety, under 12(5), Seventh Schedule. You may also challenge
6 if you feel there are justifiable reasons for challenging the appointment of the arbitrator, which
7 may fall within Fifth Schedule. And mind you, I must point out, the Fifth Schedule is only a
8 guide. The language of section, I mean, to save time, I'm not refer referring to it. But please
9 note the word use it's to serve as a guide. Fifth Schedule is a guide. But Seventh Schedule is
10 exhaustive. So, if you apply that My Lords. Even a unilateral appointment perhaps you can
11 challenge, but it's not rank ineligibility at the threshold. That's the distinction I'm making. So,
12 what **Perkins** and **TRF** do is they knock them out at the threshold saying, you are ineligible.
13 That cannot work. That's not correct. What happens in the second category. I'm sorry, what
14 happens in the second category of cases that if you are aggrieved by some justifiable ground
15 which may fall within Schedule Five. It may be a little bit beyond Schedule Five, but you may
16 be guided by it. Then the procedure is different. It falls under Section 13. You go before the
17 arbitrator and challenge it. You go before the arbitrator, and if you are not successful, the
18 award is passed by the arbitrator, and then you may challenge it on that ground *inter alia*
19 under 34. And then the court decides whether he gets his fees or not. If you are successful.

20 So, there are two different parallel things, two categories, different procedures which are
21 prescribed with different consequences, but unilateral appointment may or may fall within the
22 second category. May, but it certainly does not make my arbitrator ineligible. Now, the reality
23 of our situation is... My Lord, the reality of our situation is our, other side does not in 95% of
24 the cases, doesn't even show up at the notice or the arbitration. So he has the opportunity to
25 challenge, if he wishes to, saying that this is unilateral and it is therefore not impartial, et
26 cetera. But he has not done so. So by the court in this case, that's a impugned order. The court
27 helping him out and setting aside the award effectively on the ground that this is a violative of
28 **Perkins** means what ultimately, it's a defaulter's paradise. It is giving him an incentive to
29 walk away. He is not wanting to challenge it. He's not coming over there, and yet we are
30 creating a situation of a defaulter's paradise.

31

32 So, now, please see my second point that I wish to make here is, that both **Perkins** and **TRF**
33 are with great respect. They are oblivious to not only this comprehensive scheme in the Act,
34 which takes care of every eventuality, but also the specific SOR which accompanied the 2015
35 Amendment, specific SOR and the business realities of the situation. And when I say business
36 realities, I don't only mean business prudence I mean, My Lords, today, for example, I have
37 awards worth 22,000 crores in excess. They are at a stage of execution. Some of those awards

1 have been knocked out on the ground of **Perkins**. That is the devastating impact it is having
2 when the other side has not even shown up to challenge it. Now, My Lord, even though every
3 year, I, as Mahindra and Mahindra, I do a lot [UNCLEAR] and this is for vehicle financing. So
4 these are small people who get loans to get taxis, trucks, auto rickshaws, et cetera. So it's
5 livelihoods, there is employment being generated and families are looked after through these
6 livelihoods. What happens in the process is that, if my today 22,000 crores because of
7 **Perkins** and the other judgment **TRF**, I'm not able to execute those awards, and they will be
8 knocked out. Some of my awards have already been knocked out of the stage of execution.
9 What happens is this, money is stuck in the economy. I'm not able to recover. I'm sorry.

10

11 **JUSTICE PS NARASIMHA:** How will awards become bad? These are in [UNCLEAR]

12

13 **MADHAVI DIVAN:** Because of **Perkins**. Because, My Lords, what they say because of
14 **Perkins** these arbitrators are ineligible. Unilateral appointment, because My Lords please
15 see, very interesting. I'm grateful. Why... this is what has happened. Please see My Lord, in
16 **Perkins**, that principle of **TRF** is taken...

17

18 **JUSTICE PS NARASIMHA:** [UNCLEAR] satisfied on the ground of **Perkins**.

19

20 **MADHAVI DIVAN:** Yes. In my case, hundreds and hundreds of awards at the stage of
21 execution.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** You appointed your arbitrator directly. What
24 happened?

25

26 **MADHAVI DIVAN:** My Lord, we appointed. They never challenged. The other side.

27

28 **JUSTICE PS NARASIMHA:** Most of them are all *ex parte* awards, is it?

29

30 **MADHAVI DIVAN:** *Ex parte*.

31

32 **JUSTICE PS NARASIMHA:** Okay, you appointed an arbitrator on the basis of your panel,
33 and he's proceeded to give an award, and those were set aside by the courts under 34 on the
34 ground that he [UNCLEAR] by **Perkins** .

35

36 **MADHAVI DIVAN:** [UNCLEAR] 34. They never came. At the stage of when I went to
37 execute...

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JUSTICE PS NARASIMHA: Naturally.

CHIEF JUSTICE DY CHANDRACHUD: But did you appoint an arbitrator by moving the court under 11 or you just unilaterally appoint?

MADHAVI DIVAN: My Lord, no. I appointed in accordance with my agreement. Point number one.

CHIEF JUSTICE DY CHANDRACHUD: So what you do is that you say, "Well, I'm appointing an arbitrator."

MADHAVI DIVAN: My Lords, please see. He is noticed.

JUSTICE PS NARASIMHA: That doesn't matter. The principal, what we are concerned is the way we should interpret.

CHIEF JUSTICE DY CHANDRACHUD: That's right. Whether [UNCLEAR] unilateral panel...

JUSTICE PS NARASIMHA: Your cases are all standalone cases where at the time of execution the courts have said the review of *Perkins* awards are set aside. You stand on a different footing.

GOURAB BANERJI: [UNCLEAR]

MADHAVI DIVAN: My Lord, UNCITRAL must have a limb. My Lord, I am saying this, how can *Perkins* apply, if I'm not in that red list. Mahindra and Mahindra, but there are many others.

NAKUL DEWAN: There are five other.

CHIEF JUSTICE DY CHANDRACHUD: Whom do you appoint as arbitrators?

MADHAVI DIVAN: Advocates. All advocates and nobody has said that they are...

1 **CHIEF JUSTICE DY CHANDRACHUD:** All right. We'll not go into the individual facts.
2 We know what is happening here.

3

4 **MADHAVI DIVAN:** My Lords, please see how... either I fall within 12(5). I have to fall within
5 12(5) and the Seventh Schedule. Where do I fall within that? I don't. That's my point. Please
6 see the practical reality and because ultimately you all in *NN Global, Shiv Shakti*, My
7 Lords, all those judgments, Your Lordships have said. So therefore, I'm saying - They have an
8 opportunity. If they are unhappy and we wrote to them saying - We are pointing so and so. If
9 you have an objection, please respond. They don't respond. They don't respond. And where do
10 I go? Companies like us...

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Your arbitration agreements provide for a sole
13 arbitrator to be appointed by you?

14

15 **MADHAVI DIVAN:** Yes and they do. And then no, it's not..

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** All right, we'll not go into this, actually. This we
18 need not go into. So essentially, the arbitration takes place by a sole arbitrator appointed by
19 the financier.

20

21 **MADHAVI DIVAN:** See, what's the alternative? I go under Section 11. Just please consider.
22 There is no provision...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** No, you can't go under Section 11 for award.

25

26 **MADHAVI DIVAN:** Exactly.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Because it's an 11(2) procedure.

29

30 **GOURAB BANERJI:** Not number of Section 11 have been filed by finance companies,
31 insurance companies after [UNCLEAR]. Independent arbitrators have been appointed by
32 High Courts. There is an ADRS platform. The learned Solicitor General also provided another
33 independent platform. The sort of...

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Ms. Divan, the point is only this, can there be a
36 unilateral clause by virtue of which, look, I will appoint an arbitrator. You may be a... I'm a
37 finance company I will appoint an arbitrator. I will appoint a lawyer who will be an arbitrator.

1 The matter will proceed *ex-parte* and some poor taxi driver, truck driver. Poor truck drivers,
2 he will be thrown out by a bunch of goons who will sort of catch him on a national highway,
3 throw him out in the middle of the night, take his stuff and say, "We have the award for 20
4 lakhs against you." That's what's happening. That's the reality. That's the reality.

5

6 **MADHAVI DIVAN:** Mr. Kaul, please allow me.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** That's the reality.

9

10 **MADHAVI DIVAN:** No, My Lords, please see this point. I cannot engage...

11

12 **JUSTICE PS NARASIMHA:** Don't take it to that extreme. It might be counterproductive to
13 you, to your argument. So far as the interpretation of the larger principles, we are thinking
14 about it. That you submit a submission. Don't go into this devastating effect and all that, is
15 irrelevant. On the interpretation of your clause, see, we have taken it into the account.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** This is actually putting arbitration on its head.
18 It's providing arbitration a bad name. You've dealt with n number of cases in the Bombay High
19 Court, where, I can tell you, where, less is the better, how it is granted.

20

21 **MADHAVI DIVAN:** Yes. What is my alternative path to have it? If he is not even coming, if
22 we were to come and...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Some poor taxi driver, or a truck driver, a two-
25 wheeler driver in Kolhapur, or some other town, can't go and contest against Mahindra and
26 Mahindra... That's a hard reality.

27

28 **MADHAVI DIVAN:** 56,000. If we opt out, what is the option. We can't go to goons. We can't
29 file a suit...

30

31 **NEERAJ KISHAN KAUL:** Contract in Delhi and Seat at Coimbatore. That's the kind of
32 things they are doing. Each of those arbitrations... I don't want to get into the merit of my
33 learned friend. 400 arbitrations per week, per arbitrator. So called appointed independent
34 arbitrators unilaterally.

35

36 **MADHAVI DIVAN:** How do I go? Ultimately, we are providing... Banks will not entertain
37 these taxi drivers. I am entertaining them. We are all providing loans to them, when we are

1 not doing favours. If we get back our money, we can finance more. We are providing a service.
2 Government's mantra is 'ease of doing business, provide employment.' This is happening
3 through us. How do we recover our money? We are giving money.

4

5 **TUSHAR MEHTA:** Sorry, but *Perkins* is a sole arbitrator case. That may perhaps not arise.
6 These issues... here, Your Lordships are deciding, 'whether a penal is permissible.'

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** That's right.

9

10 **TUSHAR MEHTA:** *Perkins* was... we generally forget while citing, it was a sole arbitrator.

11

12 **MADHAVI DIVAN:** So my case is also of a sole arbitrator, which is why I'm concerned. If I
13 don't fall in the red list, if I don't fall in the Seventh Schedule, how can I be knocked out on
14 the ground of eligibility?

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Fairly, if parties agree that, there will be a sole
17 arbitrator, appointed by consent, the other side doesn't consent, you have to move to the High
18 Court, under 11. High Court could ensure that a... genuinely independent...

19

20 **MADHAVI DIVAN:** Not consented, he receives the...

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Did you ask him... ask them for consent?

23

24 **MADHAVI DIVAN:** Yes, when I appoint the arbitrator, I asked him.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** But then, that matter will be dealt with
27 independently.

28

29 **RESPONDENT'S COUNSEL:** My Lords, since, I am appearing for...

30

31 **MADHAVI DIVAN:** Because of *Perkins*, My Lord, Your Lordships. If Your Lordships are
32 going to pronounce on ultimately, it will boil down to *Perkins*. Even in the panel matter, it
33 will come to *Perkins*, who is incapacitated. Who is incapacitated? That's the...

34

35 **NAKUL DEWAN:** My Lords, then Your Lordships should consider de-tagging this matter,
36 because...

37

1 **MADHAVI DIVAN:** I wrote to him - If you have any objection, please tell.

2

3 **NAKUL DEWAN:** My Lords, sorry for [UNCLEAR]

4

5 **MADHAVI DIVAN:** Yes, My Lord, my letter to him, asking if he is objecting, is on record.

6 My Lord, I...

7

8 **TUSHAR MEHTA:** My Lords, this NBFCs stand on a different footing. They have different
9 fact situation, different arbitration clauses. They are not concerned with panel. Kindly de-tag
10 it. It need not be dealt with by the Constitution Bench. And whatever judgment comes, My
11 Lord, whether they help them, whether they...

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** I'll tell you one thing, speaking for myself, as
14 single judge, division bench. I have seen what happens when unilateral appointments of
15 arbitrators are done. Literally, you can go... I am not saying that...

16

17 **TUSHAR MEHTA:** But, we have done our best, My Lord. It may not...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** [UNCLEAR] are necessary, but, most of the
20 defaulters are individual, poor people. Somebody is auto rickshaw...

21

22 **TUSHAR MEHTA:** Let... Madhavi, can I say something? You already...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** The procedure for arbitration... the procedure
25 for arbitration is perverted like this.

26

27 **TUSHAR MEHTA:** My Lord, kindly deal NBFC issues separately. Your Lordships are dealing
28 with the scheme of the Act.

29

30 **JUSTICE PS NARASIMHA:** No, we don't think, we need to do that. We will answer,
31 there is a difference...

32

33 **NAKUL DEWAN:** [UNCLEAR] Your Lordships because I have five lakh[UNCLEAR]

34

35 **TUSHAR MEHTA:** Our larger issues is to be coloured at the end by this case.

36

37 **NAKUL DEWAN:** I represent a body which has 5 lakh cases.

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JUSTICE PS NARASIMHA: Challenge it. That's your individual case. We will see. You might succeed.

NAKUL DEWAN: But 5 lakh arbitrations are now under effect.

MADHAVI DIVAN: [NO AUDIO] To appoint an arbitrator, how am I barred, is a party barred. It's a party barred from appointing, there is no such bar in the very intricately crafted act and schedules.

CHIEF JUSTICE DY CHANDRACHUD: All right, we will consider it.

MADHAVI DIVAN: Please consider that, My Lord and ultimately, nobody is giving these people note.

CHIEF JUSTICE DY CHANDRACHUD: Mr. Anand Padmanabhan?

TUSHAR MEHTA: I have my own submissions, I would not endorse any of these submission, but, because they have a fact specific case. That's all.

MADHAVI DIVAN: I mean, may I put in a written note.

CHIEF JUSTICE DY CHANDRACHUD: Mr. Anand Padmanabhan, is there?

ANAND PADMANABHAN: I will take three minutes by the clock.

CHIEF JUSTICE DY CHANDRACHUD: Three minutes. Then after Anand Padmanabhan, is the last of the Petitioners. Then we have Mr. Jethmalani, then Mr. Nakul Diwan, Dinesh [UNCLEAR], Suman Doval and Naresh Kaushik.

NAKUL DEWAN: My Lord, I have also... I've also filed...

CHIEF JUSTICE DY CHANDRACHUD: We'll assemble tomorrow at 02:00, because it's a... But we'll have to complete by 03:00. It's not 02:00 to 04:00. Because it's a miscellaneous day, I may have to go back to my regular bench. So, we'll sit 02:00. We'll take this between 02:00 and 03:00, not beyond 03:00.

1 **NEERAJ KISHAN KAUL:** Between us are seven minutes each.

2

3 **NAKUL DEWAN:** I will do it in five minutes. I don't need more.

4

5 **NEERAJ KISHAN KAUL:** That's all for us My Lords.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** We'll just look at quickly the reference by Justice
8 Nariman.

9

10 **GOURAB BANERJI:** Yes.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** That one parallel order which really doubts
13 *CORE*.

14

15 **NEERAJ KISHAN KAUL:** Yes, that doubt *CORE* in *JSW*, because Karnataka High Court
16 relied on *CORE*, they refer it also to the Constitution Bench.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Nobody's doubting...

19

20 **NEERAJ KISHAN KAUL:** They refer...*CORE* was doubted in *Tantia* and in *JSW*, there
21 was a completely different clause. The High Court said... The MD in the case said, "I am
22 appointing as per Court, ignoring the Arbitration Clause." And the High court says. "*CORE*
23 has said so, so what's wrong with it."

24

25 **RESPONDENT'S COUNSEL:** Your Lordships, I had a small request to make. I had a small
26 request to make. Today in the Alternate Bench, Item one is the Jet insolvency matter. If it can
27 kindly retain its position.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Constitutional Bench. How can we pass a
30 [UNCLEAR].

31

32 **RESPONDENT'S COUNSEL:** My apologies. My apologies

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** I'll talk to the registrar. Don't worry.

35

36 **RESPONDENT'S COUNSEL:** Deeply obliged.

37

1

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END OF DAY'S PROCEEDINGS