

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

COURT NO.1
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

CA No. 9486-9487/2019

CENTRAL ORGANISATION FOR RAILWAY ELECTRIFICATION
Petitioner(s)

Versus

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

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2 **TUSHAR MEHTA:** My Lord, before they start, can I take only two minutes, if Your
3 Lordships permit? I had my chance.

4

5 **CJI DY CHANDRACHUD:** Yes.

6

7 **TUSHAR MEHTA:** First of all, as I initially indicated, I have not taken any stand. I was to
8 assist Your Lordships broadly and that's how my note also reads. My Lord, my arguments are
9 over. My colleague, Mr. Nataraj appeared for CORE and also for the institute, and he had given
10 his own suggestion, because these are all ultimately broad ideas which we discuss. My Lord,
11 so far as multiple account holder clients like NBFCs are concerned, I could not complete
12 because of the lack of time. I had given a solution; instead of individually, every institute
13 maintaining a list of arbitrators, a panel of arbitrators etc., there is a system going on which is
14 recognized by governments, recognized by the High Court of Mumbai, and there are many
15 such institutions where, for example, a person who takes loan of 50,000, Schedule IV
16 minimum fee is 45,000. It's not workable. My Lord, the only thing which can, in my respectful
17 submission be done is, to direct resorting to this medium. There are several institutes only, for
18 example, if Your Lordships can for a second take 1998, Volume 5 of my submissions. This is
19 one example, and this is... banks are using this for small loan.

20

21 **CJI DY CHANDRACHUD:** What are they doing?

22

23 **TUSHAR MEHTA:** ODR, My Lord. That is Online Dispute Resolution.

24

25 **CJI DY CHANDRACHUD:** But that is just a format, whether it's physical or virtual. Who is
26 the Arbitrator?

27

28 **TUSHAR MEHTA:** My Lord, my learned friend is aware.

29

30 **SHASHANK GARG:** My Lord, there's a comprehensive list of arbitrators empanelled by
31 these institutions. For example, Sama and Presolv. All kinds of arbitrators are there, technical
32 as well as former judges who are empanelled. And My Lord the fee schedule is...

33

34 **TUSHAR MEHTA:** Affordable.

35

1 **SHASHANK GARG:** ...tailor-made to disputes like these, because sometimes the Arbitrator
2 is already aware that if a dispute comes to him he would be paid 2,000 or 5,000. Most of these
3 awards are given in a 45-day time period, and there is no interference of either of the parties.
4 They have already incorporated a clause in their Loan Agreement that it would go to Presolv
5 or Sama or somebody else who's an ODR platform. So...

6
7 **TUSHAR MEHTA:** \$1.2 billion disputes are under the management of one institute.

8
9 **CJI DY CHANDRACHUD:** The question is whether the NBFCs can themselves appoint an
10 Arbitrator and say, "Look we are going to send this dispute to you." That's what Ms. Dewan
11 was justifying.

12
13 **TUSHAR MEHTA:** Therefore, I saying that this is an issue where our focus on this side
14 should be to ensure that the arbitration as a mechanism, is strengthened. And therefore, I
15 started by saying that any argument on either of the extremes would do harm to the cause
16 which we are all concerned with. Therefore, instead of few instances where they have multiple
17 people to deal with, My Lord, that can be segregated. Because otherwise, the major chunk of
18 arbitration is not these people. They have major chunk 10,000, 5000, 15,000 depositors with
19 small deposits, etc. My Lord, at the cost of repetition, I advisedly did not raise any issue
20 whether core is right or *TRF* is right or *Perkins* is right or one is wrong and other is partly
21 right. Whatever Your Lordship finally decides, will govern the field. Your Lordships need not
22 go into individual judgments. On principles we have addressed Your Lordships. There are
23 several other institutes, yesterday I came to... banks, they have small deposits. But, they follow
24 this kind of procedure. And the arbitrators are appointed by such institutes. And if Your
25 Lordships sees the Board of Governors or Advisory Council, eminent people, former judges of
26 this court, Justice Srikrishna, former Chief Justice, Justice Lalit, et cetera they are there. These
27 are well recognised institutions dealing in arbitrations, running into... the quantum running
28 into some billion dollars, but individual claims are smaller. It's meant for smaller...

29
30 **CJI DY CHANDRACHUD:** Now who's going to argue...?

31
32 **TUSHAR MEHTA:** Grateful.

33
34 **CJI DY CHANDRACHUD:** Mr. Padmanabhan?

35
36 **ANAND PADMANANBHAN:** My Lord, I'll take just three, four minutes. My Lord, to
37 supplement the argument of Mr. Guru Krishna Kumar that 11(2) is conditioned by 12(3) or

1 Section 12 itself, my point would be, Act doesn't bar appointment by one party. That has been
2 argued by everyone. My Lord, further submission would be, that there is an implicit
3 recognition of one party appointing an Arbitrator. For that, My Lord, I will just highlight two
4 sections, 11(2) to 12(3) and 12(4), and then, coming back to 11(6).

5

6 **CJI DY CHANDRACHUD:** Yes.

7

8 **ANAND PADMANANBHAN:** 11(2) I need not read, so many people have read, My Lords.
9 I'll just read, what happens when once an Arbitrator is appointed by one party. My Lord,
10 whether the other party can challenge that appointment? If Yes My Lord, under what
11 circumstances? My Lord, Answer lies in 12(3) and 12(4).

12

13 **CJI DY CHANDRACHUD:** Yes.

14

15 **ANAND PADMANANBHAN:** 12 starts with My Lord, Obligation on the Arbitrator to
16 disclose the circumstances, if any. 12(3), "An Arbitrator may be challenged only if
17 circumstances exist that give rise to the justifiable doubts, as to his independence or
18 impartiality." Here, My Lord, where the Arbitrator himself discloses. The party may continue,
19 waive the rights under Section 4 or he may say, I don't want you. Then My Lord, (4), "A party
20 may challenge an Arbitrator appointed by him, in whose appointment he has participated,
21 only for reasons of which he becomes aware after the appointment has been made", where,
22 this My Lord, takes into a situation where Arbitrator doesn't disclose. My Lord, these are the
23 only two situation My Lord, under which an appointment of an Arbitrator can be challenged.

24

25 **CJI DY CHANDRACHUD:** Yes.

26

27 **ANAND PADMANANBHAN:** My Lord, there is no challenge prescribed that appointment
28 made by one party can challenged by the other party, on the ground that it has been
29 unilaterally done. Because the 11(2) itself, My Lord, is an agreement between the parties to
30 appoint an Arbitrator.

31

32 **CJI DY CHANDRACHUD:** 12(4). What's the other one?

33

34 **ANAND PADMANANBHAN:** 12(4) My Lord, is a situation where Arbitrator doesn't
35 disclose...

36

37 **CJI DY CHANDRACHUD:** 12(4) and 12(6)?

1
2 **ANAND PADMANANBHAN:** 12(3) and 12(4), and then finally 11(6). 11(6) when does the
3 court intervene My Lord, in such cases? 11(6) My Lords. "Where, under an appointment
4 procedure, agreed upon by the Parties." Again 11(2), "a party fails to act as required under
5 that procedure." My Lord, only in this circumstances. For example My Lord, I am the person
6 to appoint an Arbitrator. The other party gives me a notice, that you appoint an Arbitrator,
7 this is the dispute that has arisen. I fail to appoint an Arbitrator. In that situation alone I can
8 go under My Lord, invoke 11(6). My Lord, under no other circumstances, My Lord,
9 intervention of the court comes into picture. Therefore, my argument My Lord, the
10 appointment by one party is implicitly recognized My Lord, under these three provisions.
11 That's all My Lord.

12

13 **CJI DY CHANDRACHUD:** Okay, thank you. Now, Mr. Doval?

14

15 **SUMAN K. DOVAL:** Yes My Lord. I am appearing from the **IRCON**, My Lord, it's a Railway
16 PSU. And much has been said about us because, we have a panel My Lord. We have separated
17 nine-pointer yesterday, points of submission.

18

19 **CJI DY CHANDRACHUD:** Yes.

20

21 **SUMAN K. DOVAL:** My Lord, I will read. First to Seven are basically... it was said by the
22 Union, we go by that. As said, My Lord, the freedom to choose, run through the Act. And this
23 is nothing to be said. And unilateral appointments are not prohibited *per se*. And, with context
24 of PSU, with Railway PSU, **IRCON**, yesterday it was said that the claim has become now a
25 new revenue source. My Lords, why I'm saying so, choosing from the panel, they had the
26 freedom to choose, and they had the freedom to say, "This chosen by us is not a fair person."
27 That freedom lies in 12(3) and 12(4), which I read right now. In this particular case, we had
28 given a complete panel of 31 person and we supplied the entire disk to the Respondents. It can
29 be seen Volume 4...

30

31 **CJI DY CHANDRACHUD:** That's okay. That's the facts of [UNCLEAR]

32

33 **SUMAN K. DOVAL:** Yes My Lords. And this bias has been said thorough English, 'bias is to
34 be presumed'. According to us, bias cannot be presumed, it needs to be demonstrated. Yes, My
35 Lords. That's my submission. Thank you.

36

1 **CJI DY CHANDRACHUD:** Thank you. Now... for the parties now, I think, Mr. Shashank
2 Garg, you wanted to argue for 5 minutes for *Union of India*? Though we have heard the
3 Solicitor, we can hear you as well.

4

5 **SHASHANK GARG:** It is only on the aspect of the perspective of overruling because that
6 was not covered by the learned Solicitor.

7

8 **CJI DY CHANDRACHUD:** What are you arguing?

9

10 **SHASHANK GARG:** My Lords, there is a fine distinction that this Hon'ble Court needs to
11 keep in mind is, what is being argued today is an extension of the reference. So, the perspective
12 overruling is being sought by this side is to prospectively overrule the impact of *TRF and*
13 *Perkins*. That in my understanding, neither is the scope and nor should be entertained. If
14 that prospective overruling takes place, there are several awards which have been set aside
15 and arbitrations have now started *de novo*, all of them will get impacted. If Your Lordships are
16 ultimately going to prospectively overrule, it would mean that Lordships are going to uphold
17 what has been held in *TRF and Perkins*. That means, that law has always been good law.
18 So, there is no question of opening of those awards or those outcomes which are getting
19 impacted by *Perkins and TRF*. As far as the CORE is concerned, my submission is the
20 clauses, which are like CORE... My Lords, only one more submission, as far as the clauses like
21 CORE, where the party has maintained the panel and has given some choice, whether limited
22 or a free choice, that's a question that Lordships will ultimately determine, My Lords there
23 also there has to be a retrospective impact of the judgment, with the only exception of cases
24 where awards have come. My Lords, because if award has come that means the parties have
25 participated in the arbitration, have accepted the panel, had an opportunity to challenge. No
26 challenge is pending in either court of law. So, wherever awards have come and the clause is
27 akin to CORE... Just a follow up of this would be, wherever... this is presuming what the
28 outcome of the judgment would be, speculating that. But application of Section 15 would be
29 required instead of asking parties to go and file a 11. Wherever these parties are impacted by a
30 clause which this court ultimately holds as bad, My Lords, they should move for a substitution
31 under 14 and get an... Arbitrator appointed in 15. So that, My Lords, the arbitration can
32 commence from the stage it was stopped rather than setting the clock back. I'm so sorry.

33

34 **JUSTICE HRISHIKESH ROY:** Arbitrator is appointed under the same procedure as far
35 the original Arbitrator is concerned?

36

37 **SHASHANK GARG:** Yes, My Lord. But, if this Hon'ble bench...

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JUSTICE HRISHIKESH ROY: But suppose, because of some incapacity or something, the Arbitrator is appointed and he has to be substituted, the substituted Arbitrator gets appointed in the same process as Arbitrator A was appointed, or what?

SHASHANK GARG: Yes, My Lords. There is an application that can be moved before the court, and the court will give you credit to the Clause. But if the Clause itself has been held to be illegal or not valid, then My Lords the court would...

JUSTICE HRISHIKESH ROY: Suppose there's no reference to the Clause about the validity or anything, the particular procedure is prescribed under which A is appointed. A becomes incapacitated. Then B is to be appointed by following the procedure...

SHASHANK GARG: Same procedure.

JUSTICE HRISHIKESH ROY: ... leading to the appointment of A.

SHASHANK GARG: Same procedure, without interference of the court, My Lord, in the normal course. If there is no interference of course, the same procedure will be applied. So, My Lords, it should not be the case where everybody is wait to file a fresh Section 11. Wherever any party is getting impacted in an ongoing arbitration, it should be a case for substitution from that stage. So, their grievance is also met, My Lords... Yes, My Lords, that's all. Grateful, My Lords.

CJI DY CHANDRACHUD: We have some interveners. Now can the interveners give us all a set of submissions, because otherwise there will be no end to it.

MAHESH JETHMALANI: My Lord, I have... the first of the...

NAKUL DEWAN: Because, I have given Your Lordships my...

CJI DY CHANDRACHUD: All right, let's start with Mr. Jethmalani. Mr. Jethmalani?

MAHESH JETHMALANI: I have given detailed written submissions at 5-E.

CJI DY CHANDRACHUD: Just tell us what is your point.

1 **MAHESH JETHMALANI:** And also, I have precis in the lunch time, my written
2 submissions. So, if Your Lordships want, I have emailed it.

3

4 **CJI DY CHANDRACHUD:** Just tell us, what is your main point that you're arguing.

5

6 **MAHESH JETHMALANI:** Yes, My Lords. I have basically five points, My Lord. I first want
7 to show Your Lordships the reference of it, because the objection is taken that **TRF** and
8 **Perkins** can't be revisited. But, My Lord, under the Reference Order, those who are opposing
9 the ban on unilateral contracts, have to go into **TRF** and into **Perkins** and see whether they're
10 correctly... because the fundamental objection that legislative intent is manifested in
11 unambiguous words by the Seventh Schedule, that doesn't provide for any ban on any of the
12 persons mentioned in the Seventh Schedule to appoint arbitrators. That's, My Lord, an
13 extensive. It's an extension, first in **TRF**, and then, **Perkins** has extended **TRF** to unilateral
14 contracts. My Lord, **TRF** was concerned with a very limited issue, and that is the issue of when
15 a Managing Director post 2015, who had the power under an Arbitration Clause to arbitrate
16 himself, once he was disqualified, could he then appoint an Arbitrator? And that's the answer
17 which they...

18

19 **CJI DY CHANDRACHUD:** We got your point. You're saying that there's no ban on persons
20 mentioned in the Seventh Schedule appointing an Arbitrator.

21

22 **MAHESH JETHMALANI:** Arbitrator. That's the fundamental point. The legislative intent
23 is clear. Now, My Lords, from the Seventh Schedule, because... just to give one example. If they
24 wanted to ban appointment of an Arbitrator named in the Seventh Schedule, they could have
25 just added one more clause in the Seventh Schedule and said, "Arbitrators appointed by
26 persons in Clauses 1 to 19 above". So, My Lords, that's...

27

28 **CJI DY CHANDRACHUD:** Thank you, Mr. Jethmalani.

29

30 **MAHESH JETHMALANI:** Just one minute. Something on the two judgements. My Lord,
31 **TRF** and **Perkins**, in as much as... So, My Lords, **TRF** held... Now My Lord, this is the starting
32 point.

33

34 **CJI DY CHANDRACHUD:** Tell us, does Tenth Schedule apply to arbitration or not?

35

36 **MAHESH JETHMALANI:** My Lord... frankly I have not...

37

1 **CJI DY CHANDRACHUD:** The reason I asked you whether the Tenth Schedule applies to,
2 is because the Solicitor General has now come to this side.

3

4 **MAHESH JETHMALANI:** I see. I didn't note that. I had [UNCLEAR], but I didn't notice
5 that moved from here to there.

6

7 **TUSHAR MEHTA:** Sir, I gave reason...

8

9 **CJI DY CHANDRACHUD:** Mr. Jethmalani wanted to [UNCLEAR] No, he made a
10 declaration in the beginning that he [UNCLEAR]

11

12 **TUSHAR MEHTA:** My Lord, I can [UNCLEAR] my learned friend, when he was surprised
13 that I came and sat here. I said, you are the best person to tackle the situation where one party
14 who is supposed to be in opposition sits together, and you represent them.

15

16 **MAHESH JETHMALANI:** In an extension to that, animal kingdom reference of wolves and
17 My Lord, he is running with a hare and hunting with the hounds, no doubt. Now My Lord, the
18 Reference Order itself if I am to argue, if I am to My Lord, defend unilateral contracts, I have
19 to say a word on *TRF* and *Perkins*. I have give a detailed submission dissecting those
20 judgements. But just, if Your Lordships, want, I will hand over my submission on those two
21 judgements. I will just give Your Lordships... I'm going to read it out basically. It won't take
22 me more than five minutes.

23

24 **CJI DY CHANDRACHUD:** Alright.

25

26 **MAHESH JETHMALANI:** My Lord, really 3, 4, and 5 the ones about the three leading
27 judgments that impinge in this reference.

28

29 **CJI DY CHANDRACHUD:** It's in fine print?

30

31 **MAHESH JETHMALANI:** And then My Lord, just 6, 7 and 8 My Lord, is a defence against
32 My Lord, the much-maligned NBFCs. Now My Lord, I'll start from Clause 3. "*TRF* held an
33 MD, who had also an additional distinct power of appointment, ineligible to appoint an
34 Arbitrator, because", My Lord, in my respect with submission, "it felicitously conflated the
35 power to appoint an Arbitrator with a power to delegate its own powers to appoint an
36 Arbitrator." My Lord, I dissected that judgement in detail, in my 25-page written submission.
37 "It thus invoked the maxim, *Qui facit per alium facit per se* i.e. what one cannot do, he cannot

1 do to another. The Arbitrator is an independent appointee, and not the alter ego of the person
2 appointing him". Now that's as far as **TRF** is concerned. Then My Lord, **Perkins** extended it
3 to all unilateral contracts. "**Perkins** extended the principle in **TRF** to all unilateral contracts
4 on the basis of what is construed to be, the rationale in **TRF**, that the Arbitrator appointed by
5 a person, is ineligible to himself act as an Arbitrator by virtue of the disqualification of the
6 Seventh Schedule, has an interest in the outcome of the dispute. And if this was the case, that
7 is a case that only one party has been a right to appoint the sole Arbitrator, its choice will
8 always have an element of exclusivity in determining or charting the cause for dispute
9 resolution". Now whether **CORE**, which is directly in point, but My Lord, indirectly the other
10 two judgments, because **CORE**, dilutes the absolutism in **TRF** and **Perkins**, on the ground,
11 that the Unilateral Clause it dealt with, offered the counterparty a choice of appointing one
12 from a panel. It thus, opened the door for upholding Unilateral Arbitration Clauses, depending
13 on the facts of the case. The facts prevailing in the Intervener's case are far better than the facts
14 in **CORE**." Now My Lord, this is on the alternative. The first is that **TRF** and **Perkins** were
15 wrongly decided. Then My Lord, in the alternative, I am on better footing than the clause.
16 Now, the public policy is something Your Lordships, talked about yesterday, "There's a public
17 interest element in the lending activities of the NBFCs. NBFCs, in addition to wealthy lenders,
18 also lend to segments which banks do not reach, in spite of the same prudential lending norms,
19 as are imposed on banks. Now My Lord, a large segment of the applicants' borrowers are low-
20 income borrowers whose savings are in gold, and particularly gold ornaments. The Intervener
21 lends against these assets and thereby assists both, the growth of the economy and the capital
22 markets. India's status as the fastest growing economy in the world today is based on domestic
23 demand, which in turn is fuelled by liquidity afforded *inter alia* by NBFCs who reach
24 segments, not reached before". Then My Lord, "The strength of capital market to sustain by
25 retail investors. Several of the small borrowers of the NBFC who pledge gold against loans,
26 invest the same in the capital markets where they get higher rate of return". Now My Lord,
27 "the Intervener", coming to the facts of the scale, and that's my last two clauses. "The
28 Intervener is a public limited company with a large number of individuals shareholders". My
29 Lord, I had to protect them. "There are large defaults in repayment of loans, advanced by the
30 Intervener. For recovery of loan amount between 50,000 to 20 lakhs, there are a large number
31 of individual borrowers who are in such default. The Intervener is accountable to its
32 shareholders and hence in respect of these loans, and adopted the relatively cheaper and
33 speedier remedy for recovery of their loans i.e. invocation of the Arbitration clause under the
34 Loan Agreements.

35

36 A large number of borrowers do not respond to arbitration notices in spite of service of those
37 notices. Almost all the dispute do not require elaborate hearings or trials involving witnesses.

1 Evidence is almost entirely documentary, and the scope of the dispute is narrow, as loans and
2 non-repayment of the same are undeniable. Arbitrators are chosen from a panel of lawyers
3 with 10 years' experience, who have no relationship whatsoever with the Intervener or the
4 dispute, and do not fall foul of the Fifth and Seventh Schedule. In view of the repeated recorded
5 absence of the borrowers, several arbitral awards are passed *ex parte*". I'll just finish it. "In
6 view of the repeated recorded absence of the borrowers, several arbitral awards are past *ex*
7 *parte*, few are contested, but no one in the past has ever objected to the appointment to the
8 sole Arbitrator." That's is our experience, nobody has said that. "It is only after judgment is
9 **Perkins**, that borrowers at stage of execution proceedings, raised the contention that the
10 Arbitrator had been unilaterally appointed and hence is ..."

11

12 **CJI DY CHANDRACHUD:** What's the profile of your borrowers?

13

14 **MAHESH JETHMALANI:** I have...

15

16 **CJI DY CHANDRACHUD:** They are rickshaw drivers, small commercial vehicle owners.
17 None of them are before us.

18

19 **JUSTICE PADMIDIGHANTAM SRI NARASIMHA:** They can't afford to.

20

21 **MAHESH JETHMALANI:** Some of them can't afford. What is the state... I will tell Your
22 Lordships. The last Clause 8 puts out the alternative.

23

24 **CJI DY CHANDRACHUD:** You are giving the colour of law. You're just giving a formal
25 imprimatur of the law to your actions, that's all.

26

27 **MAHESH JETHMALANI:** May I say this. Look at the alternative. If I opt of the...Your
28 Lordships ...

29

30 **CJI DY CHANDRACHUD:** ... a lawyer, he will pass a standard from award, go and seize
31 somebody's car, somebody's house, somebody's property.

32

33 **MAHESH JETHMALANI:** My Lord, two responses to that, if I may, because that fell from
34 Your Lordships yesterday also. My Lord, the scope of these disputes is not like it was big
35 government contracts where somebody says performance...

36

1 **CJI DY CHANDRACHUD:** Volume is large. The amounts in each individual case must be
2 very small. 70,000, 5 lakhs, 10 lakhs. What is 10 lakhs today in commercial dispute? But look
3 at the impact on the society.

4

5 **MAHESH JETHMALANI:** What is the counter to that? My Lord, kindly just see. Please see
6 Clause 8, and that's my final argument, which is some kind of a response, I hope, which
7 prevails with Your Lordships. To what just fell from Your Lordships. Please see 8. My Lord,
8 there has never been any complaint... My Lord, this is dealing with Your Lordship's
9 expressions of the defaulter's nightmare. "There has never been any complaint of harassment
10 on the Intervener's borrowing during the state of execution. The question of a defaulter's
11 nightmare situation has never written in the case of the Interveners". But My Lord, "in the
12 absence of arbitration proceedings, the Interveners will be compelled to seek recourse to
13 courts by filing summary suits". We can't let it go, we are responsible to our shareholders.
14 "Thus, adding to the burdens of the court's arrears, borrowers will be even less prone to
15 contesting summary suites in view of the fact the option is more expensive and more protective
16 than arbitrations". Finally My Lord, the defaulter's nightmare does exist. It will equally exist
17 at the stage of execution of decrease and summary suits. I am obliged.

18

19 **CJI DY CHANDRACHUD:** Thank You.

20

21 **NAKUL DEWAN:** Can I straight away take Your Lordships, to Section 2, Subsection 6, which
22 My Lords, has not been shown to Your Lordships, now, and that is in fact, My Lords, the
23 guiding right of party autonomy under the Arbitration Act. And My Lords, it's extremely
24 important. Please have a take on the Arbitration Act, because this will... My Lords, I have three
25 submissions. Let me just articulate the submissions. One, Section 2(6) is the guiding light to
26 understand the extent and the scheme of party autonomy under the Arbitration Act. That's my
27 first submission. My second submission is at Section 11(2) and the freedom that is granted
28 there, has to be read in conjunction with Section 2(6), and it is not circumscribed by Section
29 18. And my third point is, that party autonomy is balanced by the safeguards inbuilt into the
30 Act. And the last point Your Lordship have heard sufficiently. I will not... I don't need to
31 elaborate on the last point. But if My Lordships will have a look at my first point, and please
32 have a look at Section 2, Subsection 6, because this will also, in my respective submission,
33 answer Mr. Banerji's point of the extent to which Section 18 can, in fact, operate. And there is
34 some legislative history. There is a Model law and how we have departed to some extent from
35 the Model law. Section2(6) reads...

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37 **CJI DY CHANDRACHUD:** Yes.

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NAKUL DEWAN: "Where this part, except Section 28" which is the governing law clause, where domestic disputes will be govern by Indian Law, "leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorize any person, including an institution, to determine that issue." And, I had filed a set of skeletal submissions in the afternoon yesterday. It's a three-page skeletal. If they can just put that up for Your Lordship's considerations. I have compared that with the Model law at paragraph 4(b), which will be at page 2. My Lords, we also have hard copies if Your Lordships will like. I think Your Lordships may have that up on the screen. What the Model law set up is this, "For the purposes of this law, where a provision of this law, except Article 28, leaves the parties here to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination." Now while the Model law...

JUSTICE PADMIDIGHANTAM SRI NARASIMHA: Mr. Balaji has given?

NAKUL DEWAN: That's right, My Lord. I am deeply grateful. Yes now how this works. In fact, there are some commentaries on this. There are about 32 instances under Part 1 where parties have been given the freedom. In fact, the entire concept of Part 1 is the amount of party autonomy that is inbuilt into the Statute. 11(2) is one example. "Freedom to agree on the procedure". Two, take for example, the number of arbitrators, Section 10. You may make a determination in the contract. You may make a decision saying we're not making a decision on the contract. But let's assume that we appoint an institution, the institution can make that decision based on the kinds of disputes that arises. Again, freedom, My Lords, to a contract. 11(1) Nationality. I might not make a determination when I have executed a contract. My Lords, have Shareholder Agreements, where let's assume, investment has come from all over the world. You may not turn around and say that I will not have a neutral national law, you may turn around and say I won't have a particular person coming in. A lot of issues determine post the dispute arising. The freedom is given under 2(6). So, out of the 32 instances, Section 10 is one section, 11(1) is one section, 11(2) is certainly one Your Lordships have seen the terminology of 11(2), Challenge procedure. I may decide I have an ad hoc arbitration, where I may decide that an institution may determine the challenge to an Arbitrator. I don't want to move a challenge before the Arbitrator. I don't want to come to court. That freedom is set out under 11(6). And what 11(6) says is that, but for 28, we will recognise that freedom. It does not circumscribe it to Section 18. So, that's my first broad submission that Your Lordship has. When Your Lordships in fact looks...

1 **JUSTICE PADMIDIGHANTAM SRI NARASIMHA:** What is the subtitle of Construction
2 of References?

3

4 **NAKUL DEWAN:** Yes. So, My Lords, what it sets out now, Your Lordships is looking at
5 2(6)?

6

7 **JUSTICE PADMIDIGHANTAM SRI NARASIMHA:** Just above 2(6).

8

9 **NAKUL DEWAN:** Yes, where this part...

10

11 **JUSTICE PADMIDIGHANTAM SRI NARASIMHA:** It is divided into two parts. One
12 with respect to scope.

13

14 **NAKUL DEWAN:** That's correct.

15

16 **JUSTICE PADMIDIGHANTAM SRI NARASIMHA:** First is the definition part, second
17 is scope, third is construction of references. Have you got that?

18

19 **NAKUL DEWAN:** My Lords, I'm just...

20

21 **JUSTICE PADMIDIGHANTAM SRI NARASIMHA:** Reference to arbitration, I suppose.

22

23 **NAKUL DEWAN:** That's right.

24

25 **JUSTICE PADMIDIGHANTAM SRI NARASIMHA:** That's all right. You can tell us later.

26

27 **NAKUL DEWAN:** No, I'm just opening the Statutory Enactment. Is Your Lordships because
28 your lordship has. If your lordship is looking at the... "The definition in this part, unless the
29 context otherwise requires." And 2(6) says, "Where this part, except Section 20 leaves the
30 parties to determine a certain issue." So one certain is, what are these issues? And My Lords,
31 I have set out that there are 32 instances under Part 1 which include 11(2), which include 11(1),
32 which include Section 10, which include Section 13, include Section 14. That freedom shall
33 include the right of the party to authorise any person, and the Model law said third parties.
34 We did not adopt the Model law.

35

1 **CJI DY CHANDRACHUD:** This is a simple provision for delegation. If a party can
2 determine an issue, you can delegate the power to determine that issue to someone else. That's
3 what it says.

4

5 **NAKUL DEWAN:** Correct. And therefore, I can delegate my Managing Director to become
6 an appointing authority. I don't have to necessarily delegate it to a third party.

7

8 **CJI DY CHANDRACHUD:** Provided your Managing Director has the power to appoint an
9 Arbitrator in the first place.

10

11 **NAKUL DEWAN:** That's correct. And that is, My Lords, what Your Lordships will hold and
12 determine whether that is correct or not, and where Your Lordships have heard submissions,
13 there is no express proscription.

14

15 **CJI DY CHANDRACHUD:** Thank you.

16

17 **NAKUL DEWAN:** My Lords, if you can just give another couple of minutes, and I'm not
18 going to take too much time. So, that is one part of my submission. The reason why Section 18
19 does not proscribe our circumscribe this power, is for the very simple reason that Section 18
20 applies in the case when your arbitration proceedings are conducted. So, it deals with the
21 point of conduct. Now, hypothetically if... please have a look at the language of Section 18. If
22 I have decided that a particular arbitral institution was going to appoint the Arbitrator, that
23 institution had to treat up with equality, because that is evidence from the plain language of
24 Section 18 which uses the terminology "the party shall be treated with equality". So all I'm
25 saying is this. The plain language of 18 is, that the party shall be...

26

27 **CJI DY CHANDRACHUD:** [UNCLEAR] of arbitration.

28

29 **NAKUL DEWAN:** That's right. Please have a look at the plain language of 18. I'm going
30 beyond the plain language. "The party shall be treated with equality". That's the plain
31 language. Now, if that's the plain language, I would say that it presupposes a third party. So
32 yes, If I, My Lords, go to a particular institution, that institution My Lords does not correspond
33 with one of the parties, the institution that treats one of the parties unequally, certainly Section
34 18 gets attracted. But that does not proscribe me. So if I am appointing...

35

36 **JUSTICE PADMIDIGHANTAM SRI NARASIMHA:** The 'party' here is party has defined
37 under 2(h). Party means party to the Arbitration Agreement.

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NAKUL DEWAN: That's right. The 'party' shall be treated with equality. So, it presupposes a...

CJI DY CHANDRACHUD: A third party. Means, there is someone else who is treating someone...

NAKUL DEWAN: For example, My Lords, I have my own Managing Director. If my Managing Director does not consult with the counterparty, I can understand. Your Lordships may say, sorry, that appointment is bad. But does it...

CJI DY CHANDRACHUD: But, 18, you just said, doesn't apply to appointment at all.

NAKUL DEWAN: That's right. That's my first... Save and accept, I am willing to accept that today... my first argument was conduct. I'm not My Lords, elaborating on that. But I am willing to accept that supposing I go to a particular institution, and that institution has to appoint, that institution may consult with us, may not consult with, every clause is different. If that institution does not treat both of us equally, Your Lordships may well say just may well that 18 extends to the appointment under 11. My Lords, there may...

CJI DY CHANDRACHUD: No, but the moment we say that 18 extends to appointment under 11, then we can't say it will extend to an appointment only in certain situations.

NAKUL DEWAN: No.

CJI DY CHANDRACHUD: Either it extends to appointment of Arbitrator as a composition of the Tribunal, or does not.

NAKUL DEWAN: I'm deeply grateful. Because I have no difficulty with that. My Lord, it is Mr. Banerji's argument that 18 extends to 11. It is our argument that it doesn't. If Your Lordships is to accept Mr Banerji's argument, My Lords, I still go and say that it does not proscribe unilateral appointments because, the person who's the appointing authority... there is a difference My Lord, between an appointing authority and the Arbitrator. If the appointing authority does not act in accordance, My Lords, with the principles of equality, Your Lordships, may well turnaround, or My Lords, any court may turn around and say Sorry, this appointment is bad.

1 **CJI DY CHANDRACHUD:** So therefore, are you... are you therefore considering you know
2 the equality principle will necessarily apply to this fasciculus of provisions, which fall in
3 Chapter 2?

4

5 **NAKUL DEWAN:** My Lord, I am taking this as an alternative argument. My first argument
6 is that heading is very clear, it deals with the conduct. But my second alternative argument is,
7 that should Your Lordships, My Lord, accept Mr. Banerji's submission, that it goes to 11, I say
8 that it does not proscribe unilateral appointments. That My Lords, is my second submission.
9 My third submission, as I'd mentioned, I don't need to elaborate on. It's in there in my
10 skeleton, My Lords, Your Lordships has it.

11

12 **CJI DY CHANDRACHUD:** Anybody else ?

13

14 **PV DINESH:** My Lords, I won't take much time.

15

16 **CJI DY CHANDRACHUD:** Yes Dinesh.

17

18 **PV DINESH:** My first submission My Lords... I am also appearing for one of the NBFCs My
19 Lord. My first submission My Lords, is that when the arbitrability of dispute has no subjective
20 element, and limited to the objective assessment, 11(2) should be given to the full meaning. In
21 other words My Lords, the appointing authority presumes, because Arbitration Act presumes
22 bias. That talks about... 11(3) talks about bias. And even 11(9), that Chief Justice may be
23 appointing a person other than the national... I mean some other nationality, that is also
24 presumption of bias. So my submission is, that even if the appointing authority is biased,
25 appointed Arbitrator is biased, if the subject matter can be assessed only objectively, there is
26 no subjective element, because this happens in a recovery money simplicitor arbitration
27 proceedings. It is not more than an administration of a dispute, it is a management of a
28 contract to a logical conclusion. So, it's only what you are trying to find out, what is the
29 schedule of payments, when is the payment, and this, in other words, My Lords, this can be
30 even fixed by artificial intelligence process.

31

32 **JUSTICE PADMIDIGHANTAM SRI NARASIMHA:** Your argument is they qualify like
33 a summary suit? You just see...

34

35 **PV DINESH:** It's a summary... My Lords, recovery is a simplicitor work on AI. Imagine if you
36 have a metadata with the values of all this, what is the payment schedule, default payment,
37 what is the interest component and it would render an arbitration award which is nothing but

1 an award given by an individual. So when you can treat this arbitration awards in a very
2 mechanical manner, objectively, without any subjective element. Because 12(2), Your
3 Lordships, is only looking at rule against bias, and see that there is any presumption or any...
4 at least any element of bias. Here there is no scope for bias at all. So, if there is no scope for
5 bias at all, 12(2) should be given full effect. That's my first submission My Lords. And just
6 adding to Mr. Nakul Dewan's arguments, My Lords. Section 21 starts with "unless otherwise
7 agreed by the parties". So, "unless and otherwise agreed by the parties" is nothing but 12(2)...
8 11(2). It has been read into, though it has not been specifically mentioned.

9

10 **CJI DY CHANDRACHUD:** Let's now hear the other side.

11

12 **PV DINESH:** And one more submission. My Lords, in many cases, I got an *ex parte*
13 arbitration awards, and my submission is, 12(5) *proviso*, whenever there is an *ex parte* awards
14 My Lords, that should be treated as 12(5) *proviso*, because the party did not invoke. So, it
15 should be presumed that party waived that 12(5) *proviso* rights. That's my respectful
16 submission.

17

18 **CJI DY CHANDRACHUD:** Thank You. Yes, Mr. Naresh Kaushik.

19

20 **NARESH KAUSHIK:** ... invite you to my clause. But I am facing the situation whereby my
21 awards are not being executed. My clause, in fact, My Lords, is something better than what is
22 being opposed. My primary submission is My Lords, that the unilateral appointment is not
23 barred, and the interpretation of Section 11(2), is to be seen in the context of Section 4 and 5
24 also, with regard to the inference. In any event, My Lords, even assuming that unilateral
25 appointment can be objected to, after the stage is crossed, the bar of Section 4 puts in, then
26 you can't question it before the court, particularly at this stage of execution that your award is
27 bad. That is the situation which we are facing. Now, kindly permit me to leave my clause of
28 contact, which cannot be construed by any stretch of imagination to be a unilateral
29 appointment. My Lords, my clause reads that, "As per the terms and conditions of the
30 Agreement, it was expressly agreed by you that all claims and disputes arising out of the said
31 Agreement shall be adjudicated upon the provisions of Arbitration and Conciliation Act 1996,
32 together with its amendments and rules there under. Accordingly, we hereby conveyed
33 proposed the names of below named persons from our panel of arbitrators, and request you
34 to exercise your liberty to select/nominate anyone as the sole Arbitrator, or alternatively,
35 propose the name of the Arbitrator from your end to resolve the dispute." We give equal
36 opportunity, that in case you do not accept our Arbitrator, anyone from our panel, then you

1 please nominate the Arbitrator and have the dispute resolved. That may be taken into
2 consideration in the context of the situation which is being faced by me where...

3

4 **CJI DY CHANDRACHUD:** You are on this side. Thank you very much. Now we'll call upon
5 Mr. Kaul and Mr. Gourab Banerji. Everybody else, please give a one-page *aide memoire*. We'll
6 look at it. We cannot go on and on. If we wait till tomorrow, we will have another 10 people.
7 Yes, Mr. Banerji, we will have to apply the [UNCLEAR]. We had to complete the hearing at 3'o
8 clock.

9

10 **SHUBHAM VERMA:** For your kind information, we have one peculiar circumstances in my
11 case.

12

13 **CJI DY CHANDRACHUD:** Put it in writing. We will read it.

14

15 **SHUBHAM VERMA:** My Lords, it is in writing.

16

17 **CJI DY CHANDRACHUD:** We will read it. Don't worry.

18

19 **GOURAB BANERJI:** Point by point, learned SG's submissions, very important. Whatever
20 Your Lordships will decide will have an impact not only...

21

22 **CJI DY CHANDRACHUD:** Sorry, what you were saying?

23

24 **GOURAB BANERJI:** My Lord, the SG's submissions, paragraph 4, "References of vital
25 importance. Answer will decide a substantial part of future of arbitration. Two, it is whatever
26 Your Lordship will decide is not *qua* a PSU and a Contractor. PSUs may have some degree of
27 government control and My Lord, responsibility. It will apply to corporation versus consumer,
28 builder versus homebuyer, employer versus employee, insurer versus insured and finance
29 company versus borrower". If Your Lordships are committing a unilaterally drawn up panel,
30 all these cases which are case cases of adhesion contracts, will be squarely impacted. This is,
31 the second point. The third point is that...

32

33 **TUSHAR MEHRTA:** I'm sorry. I didn't read any of my submissions.

34

35 **GOURAB BANERJI:** Please ignore my first submission, that it is not important.

36

1 **TUSHAR MEHTA:** I am sorry for interruption. UNCITRAL is dissecting my written
2 submissions, which I never read. I don't think this can be the end of the UNCITRAL's regional
3 body.

4

5 **GOURAB BANERJI:** I am not referring. Please forget my first point. It is not an important
6 point. Let us leave it aside. My second point is, it will effect all private and public parties across
7 the board. This is, as My Lord Justice Narasimha said, this is a private law area. It will affect
8 all parties across the board. Whatever Your Lordships lay down. So far as the various US
9 judgments are concerned, to answer one point, Your Lordships will just see one page. I'm not
10 going to read more than one page. 4316 at Volume 3. Please see this. Can it be put up please?
11 4316, Volume 3. This is the heart of our submission. My Lords, just see this. 4316, Volume 3.

12

13 **CJI DY CHANDRACHUD:** What is the document? That is... this one *McMullen versus...*

14

15 **GOURAB BANERJI:** Right. Please mark the last paragraph of Column 1, the first paragraph
16 of Column 2... and the footnote. I'm not going to read it. This is the heart of our submission

17

18 **CJI DY CHANDRACHUD:** The *McMullen*'s complaint, here?

19

20 **GOURAB BANERJI:** "The complaint however, goes beyond an allegation of a potentially
21 biased Arbitrator. *McMullen* cites a lack of fairness inherent in the Arbitrator selection
22 process. Supreme Court in *Gilmore* realized so and so. *McMullen*'s tab contains many of
23 the rules acclaimed by *Gilmore* for the ability to guard against potential. But unlike the rules
24 considered, tab grants one party unilateral control over the pool of potential Arbitrators.
25 Procedure prevents [UNCLEAR] from being an effective substitute for a judicial forum
26 because it inherently lacks neutrality." And, My Lord, the footnote is also important. I'm not
27 going to read it. The only last point I will make, the rest I will leave for Mr. Kaul is, My Lord,
28 the ding-dong argument on Section 18, which is Article 18, which is what I had argued apart
29 from the other points of independence. My Lord, he argument that has been put is, Chapter 2
30 is separate, Chapter 5 is separate, Chapter 2 is only to do with appointment, Chapter 5 is to do
31 with conduct of arbitral proceedings. 18 cannot extend to Chapter 2. That's the argument.
32 That's the argument put by the other side On a reading of the provision our short reply is,
33 Chapter 5 is, My Lord, wider. Chapter 2 is one part of Chapter 5. What is critical here is, that
34 Section 18 is based on Article 18. Article 18 commentary, I am leaving, My Lord. The 'travaux'
35 in so many words, the Secretariat says in page 11010042, the Secretariat says, one line, My
36 Lord. I'm reading that line and I conclude. One more thing I'll say, My Lord. 11...10052. "It
37 would apply to arbitral proceedings in general. It would govern all the provisions in Chapter

1 5, and other aspects such as the composition of the Arbitral Tribunal not directly regulated
2 therein”. This is not commentary in a book, this is how the working group, UNCITRAL working
3 group, whom I represent, and the Secretariat understood the Article, apart from the hack that
4 we have given a couple of books.

5

6 **CJI DY CHANDRACHUD:** Mr. Banerji, Section 18 is in two parts. “The parties shall be
7 treated with equality...”

8

9 **GOURAB BANERJI:** That part...

10

11 **CJI DY CHANDRACHUD:** and the second part, “and each party shall be given a full
12 opportunity to present his case”.

13

14 **GOURAB BANERJI:** I’m relying on the first part.

15

16 **CJI DY CHANDRACHUD:** No, both parts are very crucial, because these parts, both the
17 parts indicate that they deal with the treatment of a party by a third party. Now, who is that
18 third party, the Arbitral Tribunal. See, the parties shall be treated with equality. When you say,
19 both children shall be treated with equality at home, what does that mean? Treated with
20 equality by the parents. You always say, treatment is in relation to a third party, not in relation
21 to each other. And, each party shall be given... shall be given by whom? Shall be given by a
22 third party. Who is that third party? The Arbitral Tribunal.

23

24 **GOURAB BANERJI:** I am not relying on the second part, My Lord.

25

26 **CJI DY CHANDRACHUD:** No but both are... because of the word ‘and, both are... both
27 parts are joined by the words ‘and’. It’s cumulative. And therefore, they refer to the treatment
28 of a litigating party, the arbitrating party, by a third party which is the Arbitral Tribunal.

29

30 **GOURAB BANERJI:** My Lord, the first portion.... The first portion My Lord, is argued by
31 the other side that it is relevant *qua* a third party, My Lord. I would respectfully say, that is not
32 how it has been understood My Lord. It has been understood to cover, My Lord, equality *inter*
33 *se* between the parties. And we have given My Lord...

34

35 **CJI DY CHANDRACHUD:** Absolutely, but in the treatment which is afforded to each of
36 them by the Arbitral Tribunal.

37

1 **GOURAB BANERJI:** My Lord, that qualification is being brought in by the other side. That
2 is a gloss which is being put on by the other side.

3

4 **CJI DY CHANDRACHUD:** It's plain reading of the Act.

5

6 **GOURAB BANERJI:** I would... we'll show... anyway. My Lord, one more last point before I
7 hand over. The provisions which are relied on and the judgments of the English Court and of
8 *Russell*, et cetera, which are relied on the English section reads completely differently. 33
9 mentions what Your Lordship says by the Arbitral Tribunal. There is a direct contrast between
10 33 of the English Act and 18 of our Act. 33 mentions Arbitral Tribunal, 18 is completely
11 different. And My Lord, it is wrecked... The portion quoted by the learned Solicitor General in
12 *Russell* is half complete. The second portion specifically deals with equality of parties. I will
13 show that.

14

15 **CJI DY CHANDRACHUD:** Mr. Pothan, yesterday where did you disappear after Mr.
16 Banerji argued. You were supposed to... We had divided time between Mr. Pothan and Mr.
17 Banerji. We will give you 30 seconds. Tell us what you have to argue?

18

19 **GEORGE POTHAN POOTHICOTE:** Just to supplement Mr. Banerji's statement. I just had
20 a reference of the New York Convention, which also speaks about public policy and principles
21 of natural justice. It's all covered in my written submissions, My Lord, and the three exit cases,
22 the standard drawn by exit in case of bias, I'll just give you the reference of the page numbers
23 My Lords. It's Volume 3, tab 142, tab 143, and tab 152. It actually says that the Convention
24 does not require an actual dependence of bias, rather, it is sufficient to establish the
25 appearance of dependence of bias. On the New York Convention My Lord, it's just that, the
26 New York convention precedes the Model law. The purpose for having a Model law was,
27 because there was a difficulty enforcing these awards, because there was no uniform
28 legislation. That's where the public policy and principles of natural justice are covered here,
29 and that is addressed in the Model law, in the Right to Equality.

30

31 **CJI DY CHANDRACHUD:** Thank you Mr. Pothan.

32

33 **NEERAJ KISHAN KAUL:** My Lord, just very briefly,

34

35 **CJI DY CHANDRACHUD:** Yes, yes Mr. Kaul

36

1 **NEERAJ KISHAN KAUL:** I'll address only the argument of party autonomy, which has
2 been said, runs through like a common thread to the scheme of the Act as a defence, their side.
3 My Lord, if Your Lordships, sees the entire debate from the 246 Law Commission Report,
4 including parts of the *Union of India's* synopsis, which is being filed by the learned SG in
5 that matter, all say two clear things. Impartiality and independence are critical and essential
6 to an arbitral process. That's the *Union of India* synopsis, I'll give the picture. And
7 apprehension is not actual... neutrality is not actual, neutrality is also an apprehension of bias
8 as to be avoided. And a principle on natural justice. It includes the rule of bias, any arbitral
9 process would be subject to it. This is *Union of India's* synopsis as well. It was this concern
10 of the Law Commission Report in the 246 report, in three paras. If you Lordships permit I'll
11 read them out or give the paras, which dealt with them and said that these are creating serious
12 problems. That you are today having people where binding contracts are prevailing over
13 overarching principles of independence and impartiality, you cannot extend the principle of
14 autonomy to such an extent that you disregard the principles of neutrality, impartiality and
15 independence. A suggestion was made by one of the members to the Law Commission Report
16 to say that, no, no situation should be different in the case of a State. The Law Commission
17 says we disregard that. In fact, the bigger the party, and in the case of the State, the degree of
18 fairness, the degree of impartiality, the degree of independence is even more onerous than in
19 the case of a private party in such a case. 12(5) draft was recommended, and the legislature, in
20 its wisdom, picked up the 12(5) draft in its entirety as recommended by the 246 Law
21 Commission. And the words of 12(5) start by saying "Notwithstanding any prior agreement to
22 the contrary". My respectful submission, my lord, is that these starting words are a complete
23 answer to the question and argument of party autonomy. You may have any agreement to the
24 contrary, but the words in 12(5) are "Notwithstanding any prior agreement to the contrary", is
25 contained therein. And if you are hit by Seventh Schedule, you are *per se* ineligible. In fact, I
26 read out *Broadband* to Your Lordship, that even you don't have to go on the under 14 for
27 that. You straight away go to the court and say substitute him with another Arbitrator. Now
28 the argument sought to be made is, that look, there is nothing in the Act which bars party
29 autonomy. 12(5) starts by saying, "notwithstanding any prior agreement to the contrary". If
30 you are ineligible, you are ineligible. What did *TRF* do? *TRF* and *Perkins* took to its logical
31 conclusion by saying that, if you are ineligible *per se* to be an Arbitrator, how can you nominate
32 another party unilaterally or curate something unilaterally, to the extrusion of the other party?
33 You can't do it. Now My Lord, other question put to Your Lordships, is unilateral clauses, there
34 is no bar. What is a unilateral clause? A unilateral clause is either the party appointing an
35 Arbitrator or his employee appointing an Arbitrator. In either of the two cases, he is hit by
36 Seventh Schedule, Entry 1 and another entry is from 1 to 19. Either he appoints it himself or
37 his employee appoints it. That's what a unilateral arbitral clause is, and that is clearly

1 prohibited by Seven. You can't do. *TRF and Perkins*, only goes further and says if you can't
2 do it and you're completely ineligible, and *Perkins* discusses against paragraph 16 and 15,
3 they say why? Why can an employee or a person not do it himself? Because he has a direct
4 interest in the outcome of the arbitral process.

5

6 **CJI DY CHANDRACHUD:** Is it your case, therefore, that the moment the party cannot act
7 as an Arbitrator in its own cause, which is fundamental, therefore, you have precluded from
8 even preparing a panel, without the panel being required to be tested on the touchstone of
9 impartial?

10

11 **NEERAJ KISHAN KAUL:** And unilaterally you cannot curate a panel.

12

13 **CJI DY CHANDRACHUD:** Is there an ir-relatable presumption that the panel prepared by
14 party which is ineligible, will itself be void?

15

16 **NEERAJ KISHAN KAUL:** My Lords, my I straightaway...

17

18 **CJI DY CHANDRACHUD:** That's your argument.

19

20 **NEERAJ KISHAN KAUL:** There is a good reason, *Perkins* says that why is ultimately an
21 Arbitrator...

22

23 **CJI DY CHANDRACHUD:** Or is it a nuisance point that, well the Union of yourself be
24 eligible to arbitrate, so long as the panel which you prepare, is a panel which otherwise does
25 not suffer from any of the vices which are provided under the Act. That should pass... subject
26 to a challenge in an individual... [UNCLEAR]

27

28 **NEERAJ KISHAN KAUL:** May I just say, and I'll compete with that.

29

30 **CJI DY CHANDRACHUD:** That's the point, where you have to think of.

31

32 **NEERAJ KISHAN KAUL:** May I just show three paras which are important for Your
33 Lordships to see because that led to 12(5). I just need to show three paras of the Law
34 Commission Report. Please have para 53 on page 2756.

35

1 **CJI DY CHANDRACHUD:** And then I have one question. What is the ambit of 13 and 14?
2 How do you distinguish between the ambit of 13 and 14? First you come to your point and then
3 end with this, otherwise I will forget it.

4

5 **NEERAJ KISHAN KAUL:** Should I answer that first?

6

7 **CJI DY CHANDRACHUD:** No. First give us what you were saying.

8

9 **NEERAJ KISHAN KAUL:** Yes. 13, 14 are answered in **Broadband**. I'll give that para. I
10 read out in my opening, I'll give it a para to My Lords. My Lords, please have para 53 on page
11 2756. This is the Law Commission Report, Volume 4. This is what led to 12(5) being
12 introduced.

13

14 **JUSTICE PADMIDIGHANTAM SRI NARASIMHA:** 2754?

15

16 **NEERAJ KISHAN KAUL:** At 2756, My Lord, it starts at 2737. At 2756. 2756, para 53. It
17 starts with Neutrality of Arbitrators, the heading.

18

19 **CJI DY CHANDRACHUD:** Yes. Neutrality of Arbitrators?

20

21 **NEERAJ KISHAN KAUL:** Yes. "It is universally accepted that any *quasi*-judicial process,
22 including the arbitral process, must be in accordance with the principles of natural justice. In
23 the context of arbitration, neutrality of arbitrators i.e., their independence and impartiality,
24 is critical to the entire process." Then 55, "The Act does not lay down any other condition to
25 identify the circumstances which gives rise to justifiable doubts, and it is clear that there can
26 be many such circumstances and situations. The test is not whether, given the circumstances,
27 there is any actual bias, so that is setting the bar too high, but whether the circumstances in
28 question give rise to any justifiable apprehension of bias. The limits of this provision have been
29 tested in the Indian Supreme Court in the context of contracts with state entities naming
30 particular persons and designations associated with that entity as a potential Arbitrator. It
31 appears to be settled by a series of decisions of the Supreme Court see so and so and so and
32 so... that arbitration agreements and government contracts which provide for arbitration by a
33 serving employee of the department, are valid and enforceable. While the Supreme Court in
34 **Indian Oil Corporation versus Raja Transport** so and so... carved out the minor
35 exception and situation, and the Arbitrator was controlling or dealing authority in regard to
36 the subject contract or if he is a direct subordinate as contracted from an officer of an inferior
37 rank in some other department to the officer whose decision is the subject matter of dispute,

1 and this exception was used by the Supreme Court in so on so and so... to appoint an
2 independent Arbitrator under 11, that is not enough." Now the most important para 57. "The
3 balance between procedural fairness and binding nature of these contracts appears to have
4 been tilted in favour of the latter by the Supreme Court, and the Commission believes the
5 present position of law is far from satisfactory. Since the principles of impartiality and
6 independence cannot be disregarded at any stage of the proceedings, especially at the stage of
7 constitution of the Arbitral Tribunal, it would be incongruous to say that party autonomy can
8 be exercised in complete disregard of these principles, even if the same has been agreed prior
9 to the disputes having arisen between the parties.

10
11 There are certain minimum levels of independence and impartiality that should be required
12 of the arbitral process, regardless of the party's apparent agreement. A sensible law cannot,
13 for instance, permit appointment of an Arbitrator who is himself a party to the dispute or who
14 is employed by, or similarly dependent in one party, even if this was... this is what the parties
15 agree. The Commission hastens to add, that Mr. P.K. Malhotra, the Ex-officio Member of the
16 Law Commission, suggested having an exception for the State and allowing the State parties
17 to appoint employee Arbitrators. The Commission is of the opinion that on this issue, there
18 cannot be any distinction between State and Non-State parties. The concept of party autonomy
19 cannot be stretched to a point where it negates the very basis of having impartial and
20 independent Adjudicators for resolution of disputes. In fact, when the party appointing an
21 Adjudicator is the State, the duty to appoint an impartial and independent Adjudicator is that
22 much more onerous, and the right to natural justice cannot be said to have been waived only
23 on the basis of a prior agreement between the parties at the time of contract and before arising
24 of disputes." And then. My Lords, a draft 12(5) on page 2776-2777 was suggested. That 12(5)
25 is exactly which is what the legislature adopts, and 12(5) as Your Lordships now see on the
26 Statute Book. So this was the background. And the *Union of India*, in the synopsis that it
27 files, Your Lordships may just note that page. I'm not troubling Your Lordships with reading
28 it. Their own... the Solicitor General's submissions. Please note page 41, Volume 5A. Page 41,
29 Volume 5A, para 1, 2 and... if Your Lordships permit, I'll just read two paras. Kindly have para
30 1 on page 41, Volume 5A. My Lords has that? Para 1. My Lords, please have para 1 of this
31 submission on Volume 5A. It says, "Party autonomy is central to the Arbitrator process, has
32 been considered brooding and guiding spirit". And then, "However, party autonomy is not
33 synonymous to complete autonomy, and is subject to principles of natural justice, or which
34 rule of bias is an essential ingredient. Moreover, ensuring independence, impartiality...
35 moreover ensuring independence, impartiality, and integrity of the arbitration is essential to
36 the integrity of the arbitral process, and justice must not only be done, but manifestly and
37 undoubtedly seem to be done. An apprehension of neutrality, lack of neutrality is also a

1 concern.” Now, My Lords, the moment you accept that in the light of the 246 Law Commission
2 Report in 12(5), which starts by saying, “Notwithstanding any agreement to the contrary”, a
3 prior agreement, Schedule 7 is a complete answer because that is the prohibition. That's where
4 the prohibition lies. The moment you authorize a person in his own rights, who has a direct
5 interest in the outcome of the petition, or his employee to nominate or act as an Arbitrator,
6 there is a direct conflict, and **Perkins** deals with it. Your Lordships will, of course, go through
7 **Perkins** and **TRF**. **Perkins** says... **Perkins** says the reason for the judgment in **TRF** is
8 because the person has a direct interest in the outcome. And lastly, My Lords of that issue of
9 fairness, let me just make two submissions and then I'm done. My Lord, it is inconceivable to
10 say that impartiality and independence and fairness is integral to an arbitral process, but it
11 will apply to the conduct of a proceeding not to the composition of Arbitral Tribunal. When
12 Your Lordships dealt with computer. When your launches deal with **Lombardi**, one was,
13 Your Lordships followed **Perkins**, but there was another clause which talked about pre-
14 deposit before an Arbitral Tribunal could be approached. Now there is no bar in the
15 Arbitration Agreement. But what did Your Lordship say? Your Lordship said that the court
16 can always, if it's an unconscionable contract or an unconstitutional contract, strike it down.
17 According to me, my respectful submission is, that the Act itself provides and says Section 7 is
18 a bar. What you can't do directly, you can't do indirectly. But presuming, and they are taking
19 their case at the highest that there was no bar, which, according to us, is there, Your Lordships
20 could always, on the lines of **Lombardi**, apply the principle of unconscionable contacts,
21 Article 14, especially where the state or a PSU is involved does come in. Fairness... fairness is
22 there, equality is there, antithesis of any form of inequality or discriminatory treatment. How
23 can you unilaterally curate a panel and decide on your own and then say it is broad-based?
24 The whole issue that we are attacking is, why can it not be institutional? Why can there not be
25 a general panel for any of the respected institutions that both can go to? Why should you get
26 the right to curate a panel and say, look I put so many respectable people. The question is not
27 the integrity or the merit of those people. The question is, can you do it unilaterally and the
28 apprehension that you adhere to neutrality in the process? That's the issue. Can you do it? And
29 merely because if you are the State? And lastly My Lord, You Lordships has said that there are
30 these cases where the PSU suffered. My Lords, knows that than in any number of cases,
31 impartiality is required on both sides. As they have suffered, and I say this with some sense of
32 responsibility, any number of cases I've appeared in, where the actions of the PSU and their
33 officers were so arbitrary, that they bought good companies to their knees in the way they have
34 acted. Naturally, there were the officers writing on set lines on what they are required to write,
35 which raises an equal apprehension our part. If it raise an apprehension a part of the State,
36 then there is an arbitration award which has been influenced. So impartiality and

1 independence is of equal weightage on both sides. I'm very, very grateful My Lords, for this
2 indulgence.

3

4 **TUSHAR MEHTA:** Thank you very much. We are immensely grateful.

5

6 **CJI DY CHANDRACHUD:** Thank you very much. Very insightful submissions.

7

8 **RESPONDENT COUNSEL:** We may put fresh submission by Monday, My Lord?

9

10

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END OF DAY'S PROCEEDINGS