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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 9th July, 2025*

\+ O.M.P. (T) (COMM.) 88/2024 & CRL.M.A. 32033/2024, I.A. 9694/2025

POWER GRID CORPORATION OF INDIA LTD .....Petitioner
Through: Mr. Jayant Mehta, Senior Advocate with Ms. Abiha Zaidi, Mr. Pritam Raman Giriya, Mr. Vikramaditya Sanghi, Mr. Anuj Manoj Bhave and Ms. Arushi, Advocates.

versus

MIRADOR COMMERCIAL PVT LTD .....Respondent
Through: Ms. Beenashaw Soni, Mr. Rajesh Mahendru, Mr. Gaurav Kejriwal, Mr. Ankit Kohli, Ms. Sejal Jain, Mr. Naresh Balodia and Mr. Ashutosh Anand, Advocates.

\+ O.M.P. (T) (COMM.) 89/2024 & CRL.M.A. 32032/2024, I.As. 9693/2025, 9798/2025

POWER GRID CORPORATION OF INDIA LTD .....Petitioner
Through: Mr. Jayant Mehta, Senior Advocate with Ms. Abiha Zaidi, Mr. Pritam Raman Giriya, Mr. Vikramaditya Sanghi, Mr. Anuj Manoj Bhave and Ms. Arushi, Advocates.

versus

MIRADOR COMMERCIAL PVT LTD .....Respondent
Through: Ms. Beenashaw Soni, Mr. Rajesh Mahendru, Mr. Gaurav Kejriwal, Mr. Ankit Kohli, Ms. Sejal Jain, Mr. Naresh Balodia and Mr. Ashutosh Anand, Advocates.

\+ O.M.P. (T) (COMM.) 90/2024 & CRL.M.A. 32031/2024, I.As. 9692/2025, 9807/2025

POWER GRID CORPORATION OF INDIA LTD .....Petitioner
Through: Mr. Jayant Mehta, Senior Advocate with Ms. Abiha Zaidi, Mr. Pritam Raman Giriya, Mr. Vikramaditya Sanghi, Mr. Anuj Manoj Bhave and Ms. Arushi, Advocates.

versus

MIRADOR COMMERCIAL PVT LTD .....Respondent
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CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

1. These petitions are filed on behalf of the Petitioner under Sections 14(1) and 14(2) of the Arbitration and Conciliation Act, 1996 ('1996 Act') seeking termination of mandate of the Sole Arbitrator appointed in terms of letter dated 26.07.2024. The three petitions were heard together and are being decided by this common judgment as the learned Arbitrator was appointed by the Respondent, on a composite reference.

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2. This petition concerns Contract Agreements dated 25.02.2010 relating to: (a) Ex-works Supply Contract Agreement for Tower Package-A8 for 765kV S/C for construction of 765kV S/C Meerut-Bhiwani Transmission Line (175kms) & LILO of 400kV D/C Bawana/Bahadurgarh-Hissar

Transmission Line at Bhiwani (15kms) associated with 765kV system for Central Part of Northern Grid-Part-III, (Supply Contract); and (b) Services Contract Agreement for construction of 765kV S/C Meerut-Bhiwani Transmission Line (175kms) & LILO of 400kV D/C Bawana/Bahadurgarh-Hissar Transmission Line at Bhiwani (15kms) associated with 765kV system for Central Part of Northern Grid-Part-III, (Services Contract), entered into between the Petitioner and SPIC-SMO, now a Division of the Respondent, along with Aster Teleservices Pvt. Ltd. ('Aster').

3. It is averred that 765kV S/C Meerut-Bhiwani Transmission Line was completed and commissioned on 31.01.2014. However, before the defect liability period ended, disputes arose between the parties and CWP No.8421/2014 was filed before the Punjab and Haryana High Court, wherein certain directions were passed by the Court in relation to foundation work of specific towers. Due to sub-standard quality of the tested tower, Petitioner also tested 35 other towers, of which 23 failed to meet the acceptable concrete strength limits. The Contractor, a Joint Venture of Aster and the Respondent was directed to rectify the defects but it failed to do so and rectification was carried out by third parties at its risk and cost and thus no money is outstanding towards the Respondent.

4. It is further averred by the Petitioner that the contract included a mechanism for resolving the disputes mutually and when they could not be resolved, reference was made to arbitration. Respondent claimed Rs.3,33,00,000/- plus interest under the contract agreement. This claim was flawed as the letters and minutes of meeting dated 22/23.03.2017, relied upon by the Respondent, were later contested by Aster, which also agreed to undertake rectification if Petitioner recovered this cost from Respondent's

fund. Aster, being a Joint Venture partner of the Respondent provided Bank Guarantees under the contract, which were encashed to cover the amount payable for rectification works. On 13.05.2024, Respondent issued notice invoking arbitration under Clause 39 of General Conditions of Contract ('GCC') claiming Rs.3,33,00,000/- plus interest as also nominating Mr. Justice Iqbal Ahmed Ansari (Retd.) as its nominee Arbitrator.

5. It is averred that 28.06.2024, Petitioner wrote to the Respondent objecting to the premature arbitration notice and requesting the Respondent to adhere to the mandatory pre-arbitral step of approaching the Project Manager for dispute resolution, prior to initiating arbitration. Objection was also raised against composite reference in respect of three different packages/contracts. There was no response to the objections and instead Respondent sent another letter dated 26.07.2024 reiterating the appointment of its nominee Arbitrator as the Sole Arbitrator under Clause 39.2 of GCC, to which Petitioner objected vide letter dated 05.08.2024 reiterating the issues highlighted in its letter dated 28.06.2024. On 11.08.2024, Petitioner received a letter from the Sole Arbitrator confirming his appointment and scheduling the first meeting on 31.08.2024, constraining the Petitioner to file the present petition.

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6. Two Contract Agreements, both dated 21.05.2010, being Supply and Service Contracts were entered into between the Petitioner and SPIC-SMO, now a Division of the Respondent, along with Aster in respect of Tower Package A-1 for construction of Package A-3 i.e., 400kV D/C Makhu-Muktasar and 400kV D/C Makhu-Amritsar Transmission Line. It is stated that Respondent acquired SPIC-SMO through a Business Transfer

Agreement on 05.08.2011 and Aster, a Joint Venture Partner of the Respondent furnished Bank Guarantees under the Contract, which were released on 09.08.2016. Several disputes arose out of the said Agreements relating to non-payment to third parties/vendors, *inter se* disputes between the JV partners and failure of the Respondent to furnish a clear due, drawn and liability statement. As per the Petitioner, financial reconciliation could not be achieved by the Petitioner and the payment could not be released.

7. It is further averred that on 13.05.2024, Respondent issued notice invoking arbitration under Clause 39 of GCC demanding Rs.3,33,00,000/- plus interest and nominating Mr. Justice Iqbal Ahmed Ansari (Retd.) as its nominee Arbitrator. Petitioner responded to the invocation notice vide letter dated 11.07.2024 and requested the Respondent to revoke the notice being premature and adhere to the pre-arbitral step of approaching the Project Manager for dispute resolution before initiating arbitration. Petitioner also objected to Respondent's attempt to make a composite reference for three distinct packages/contracts. Copy of the reply was also sent to the office of the nominated Arbitrator. There was no response by the Respondent to the reply of the Petitioner and it did not even take recourse to Clause 38 of GCC for pre-arbitral disputes resolution. Instead, Respondent sent another letter dated 26.07.2024 appointing the nominated Arbitrator as the Sole Arbitrator purportedly acting under Clause 39.2 of GCC and requested the Petitioner to fix the first meeting date of the Arbitral Tribunal. Through letter dated 05.08.2024, Petitioner reiterated its objections but to no avail and subsequently Petitioner received a letter on 11.08.2024 from the Sole Arbitrator confirming his appointment and scheduling the first meeting on 31.08.2024, whereafter Petitioner filed the present petition.

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8. This petition has its genesis in a contract dated 21.05.2010 entered into between the Petitioner and SPIC-SMO, now a Division of the Respondent along with Aster regarding Tower Package-A1 400kV D/C Talwandi Sabo-Nakodar T/L along with LILO of one circuit at Moga. Disputes having arisen in relation to the contract, Respondent invoked arbitration on 13.05.2024 claiming Rs.3,33,00,000/- along with interest and appointing Mr. Justice Iqbal Ahmed Ansari (Retd.) as its nominee Arbitrator, to which objections were raised by the Petitioner vide letter dated 11.07.2024. However, Respondent did not revoke its notice and upon alleged failure of the Petitioner to nominate its Arbitrator under Clause 39.2 of GCC, appointed its nominee Arbitrator as the Sole Arbitrator, who scheduled the first meeting of the parties on 31.08.2024.

9. Mr. Jayant Mehta, learned Senior Counsel appearing for the Petitioner initially argued that the mandate of the Sole Arbitrator deserves to be terminated being a unilateral appointment in the teeth of Section 12 of 1996 Act and judgments of the Supreme Court in ***Perkins Eastman Architects DPC and Another v. HSCC (India) Limited, (2020) 20 SCC 760; Bharat Broadband Network Limited v. United Telecoms Limited, (2019) 5 SCC 755*** and ***Central Organisation for Railway Electrification (CORE) v. ECI SPIC SMO MCML (JV) A Joint Venture Company, 2024 SCC OnLine SC 3219.*** It was urged that Respondent appointed the Sole Arbitrator without consent of the Petitioner and the appointment is thus *non-est* in law being violative of the principle of party autonomy, which is well recognized and accepted in arbitration regime and is to be followed and adhered to even at the stage of appointment of the Arbitrator. Post the decision of the Supreme

Court in ***Perkins (supra)***, law recognises only two permissible modes of appointing an Arbitrator: first, by mutual consent of the parties; and second, by an order of the Court. There is no third option or path available to a party to an arbitration agreement of taking recourse to unilateral appointment without the consent of the other party, since there ought to be neutrality in the dispute resolution process. In ***CORE (supra)***, the Supreme Court emphasised that basis of any arbitration is the freedom of the parties to agree to submit their disputes to an individual whose judgment they are prepared to trust and obey. Therefore, when only one party consents to the appointment of an Arbitrator, it raises doubts about the Arbitrator's independence and impartiality and this breaches multiple foundational layers i.e., Constitution of India, Arbitration and Conciliation Act and the Arbitration Agreement between the parties. Reference in this regard was made to the judgment of the Supreme Court in ***Lombardi Engineering Limited v. Uttarakhand Jal Vidyut Nigam Limited, (2024) 4 SCC 341.*** Reliance was also placed on the judgment of the Calcutta High Court in ***Yashovardhan Sinha Huf and Another v. Satyatej Vyapaar Pvt. Ltd., 2022 SCC OnLine Cal 2386.***

10. Elaborating the argument, Mr. Mehta contended that the Arbitration Clause 39.2, in the instant case provides for constitution of three-member Arbitral Tribunal, of which Petitioner and Respondent are to appoint their respective nominee Arbitrators and the two nominated Arbitrators are to appoint the third Presiding Arbitrator and to this extent, party autonomy is completely preserved. However, the Arbitration Clause in the second part provides that if either party fails to appoint its Arbitrator within 60 days after receipt of notice from the other party, the Arbitrator nominated by the party

invoking arbitration, shall become the Sole Arbitrator to conduct arbitration and permits unilateral appointment, falling foul of the ***Perkins (supra)*** line of judgments, taking away the party autonomy and breaching the ethos of independence and impartiality of an Arbitrator.

11. It was further argued that no doubt, parties are empowered to agree upon the procedure for appointing Arbitrators but in situations where the agreed procedure fails, only the Courts are vested with the authority to appoint an Arbitrator upon the request of the party, which means that where one party to the Arbitration Agreement invokes arbitration and the other party does not respond, the only course of action is to approach the Court under Section 11 of 1996 Act. No party can take unto itself appointment of the Arbitrator unilaterally only because the other party has failed to respond and/or act in furtherance of the invocation notice. In this context, reliance was placed on the judgments in ***Oyo Hotels and Homes Private Limited v. Rajan Tewari and Another, 2021 SCC OnLine Del 446; Dr. S.P. Gupta v. Kirori Mal College and Others, 2024 SCC OnLine Del 6663;*** and ***M.K. Jain v. Angle Infrastructure Pvt. Ltd., 2021 SCC OnLine Del 3504***. It was pointed out by Mr. Mehta that in ***Oyo Hotels (supra),*** Respondent invoked the arbitration clause which stipulated that a Sole Arbitrator will be mutually appointed by the parties and also nominated its Arbitrator. Petitioner did not respond to the notice, leading to the Respondent unilaterally appointing the nominated Arbitrator, which was challenged by the Petitioner before this Court. Allowing the petition, Court ruled that since the appointment of the Arbitrator was *non-est,* being violative of the agreed procedure, Petitioner was within its right to approach the Court for appointment of an Arbitrator under Section 11 of 1996 Act. Relying on this judgment, it was further

argued that any clause that grants undue advantage to the party invoking arbitration cannot be allowed to operate. If the Petitioner allegedly failed to appoint its Arbitrator within 60 days from the receipt of the invocation notice from the Respondent, the only course of action open to the Respondent was to approach the Court for appointment. Appointment of Respondent's nominee Arbitrator as the Sole Arbitrator to conduct arbitration between the parties, not only undermines principle of equality in arbitration but also gives rise to justifiable doubts on the impartiality of the Arbitrator. In fact, this is a reason why first part of Clause 39.2 precludes unilateral appointment by the parties to the Arbitration Agreement and empowers each party to nominate its respective Arbitrators and any risk of bias is counter balanced by the appointment of the Presiding Arbitrator by the nominated Arbitrators. Mr. Mehta also relied on the judgment of this Court in ***Dr. S.P. Gupta (supra),*** holding that unilateral appointment of Arbitral Tribunal is strictly prohibited and if one party invoking arbitration finds the other unresponsive, it must approach the Court under Section 11(5) or (6) for appointment of the Arbitrator.

12. On the issue of whether the legitimacy of the appointment of the Arbitrator can be questioned and challenged in a petition under Section 14(1)A read with 14(2) of 1996 Act, Mr. Mehta urged that legislatively this position has been recognised by 2015 Amendment incorporating the words *'shall be substituted by another Arbitrator'* to overcome the procedural lacuna of appointment of a substitute Arbitrator upon termination of the mandate of the Arbitrator. Reliance was placed on the judgment of this Court in ***Proddatur Cable TV Digi Services v. Siti Cable Network Limited, 2020 SCC OnLine Del 350,*** where the Court relying on and following the

judgment of the Supreme Court in ***Bharat Broadband (supra),*** terminated the mandate of the Arbitrator under Section 14 of 1996 Act on the ground that the Arbitrator had become *de jure* incapable of adjudicating the disputes between the parties.

13. Without prejudice to the aforesaid contentions, it was next argued that invocation of arbitration agreement by the Respondent was wholly flawed inasmuch as composite reference is impermissible where contracts are separate, distinct and have independent arbitration clauses in light of the judgment of the Supreme Court in ***Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. and Others, (2013) 1 SCC 641***. In the present case, the three contracts/packages in respect of which composite invocation was made by the Respondent pertain to different works, have different scope, obligations and deliverables and therefore, each contract has to be treated as an independent agreement. In this context, Mr. Mehta also relied on the judgment of this Court in ***Libra Automotives Private Limited v. BMW India Private Limited and Another, 2019 SCC OnLine Del 9073,*** wherein the Court held that directing parties to go for a composite arbitration under a Sole Arbitrator would amount to re-writing the terms of the Dealership Agreement between the parties. Overlapping of certain issues in different and distinct agreements does not mean that arbitration proceedings under two respective contracts cannot commence and continue independently. In ***Huawei Telecommunications (India) Co. Pvt. Ltd. v. Bharat Sanchar Nigam Limited (BSNL) and Another, 2020 SCC OnLine Del 2700,*** this Court held that arbitration agreement in one contract cannot automatically be incorporated into another unless parties clearly express such an intention when entering into subsequent agreements.

14. Reliance was also placed on the judgment of the Supreme Court in ***Duro Felguera, S.A. v. Gangavaram Port Limited, (2017) 9 SCC 729,*** wherein the Supreme Court was dealing with Respondent's request for single Arbitral Tribunal through composite reference of disputes arising from five separate contracts and a Corporate Guarantee. Respondent argued that given the overlapping nature of the disputes, a composite reference would align with parties' intent and public policy while Duro argued that contracts were distinct and independent, necessitating separate Arbitral Tribunals for efficient dispute resolution though potentially with the same Arbitrators. The Supreme Court held that each of the five package contracts along with the Corporate Guarantee contained its own independent arbitration clause, which were not reliant on the terms of the original Package No. 4 or the MOU and a composite reference was unjustified as this would also violate the principle of severability of arbitration clauses. In light of these submissions, Mr. Mehta submitted that the mandate of the Sole Arbitrator be terminated and this Court may appoint a substitute Arbitrator.

15. *Per contra,* Ms. Beenashaw Soni, at the outset, points out that a detailed order was passed by this Court on 06.09.2024, issuing notice limited to examining the vulnerability of Clause 39.2 of GCC in light of ***Perkins (supra)*** and its sequel judgments. All other issues raised by the Petitioner with regard to composite reference, claims being time barred, non-impleadment of necessary and proper parties and non-resort to pre-arbitral conciliation procedure, were held to be within the domain of the Arbitrator under Section 16 of 1996 Act. Petitioner challenged the order before the Supreme Court in SLPs No. 26889-26890/2024, which were dismissed on 28.03.2025 and the order dated 06.09.2024 has thus attained

finality. It is thus not open to the Petitioner to reagitate these issues and enlarge the scope of arguments at this stage.

16. On the aspect of the alleged unilateral appointment of the Sole Arbitrator, Ms. Soni argues that Arbitration Clause 39.2 is significantly different from the Arbitration Clauses under consideration before the Supreme Court in ***Perkins (supra)*** and ***CORE (supra)***. Clause 39.2, according to her, does not clothe any one party with the absolute power to unilaterally appoint the Arbitrator so as to violate Section 12(5) of 1996 Act or the law laid down by the Supreme Court in this regard. The clause envisages one party to the Arbitration Agreement nominating/appointing its Arbitrator and writing to the other party to nominate its Arbitrator and on the second party failing to do so within the time specified in the clause, providing that the Arbitrator appointed by the first party will be the Sole Arbitrator. Parties consciously agreed that in the event of default by one party, the Arbitrator nominated by the other will be Sole Arbitrator and therefore appointment in the present case is not a unilateral appointment and is pursuant to a procedure agreed between the parties. The argument is that parties not only agreed to the procedure of constituting the Arbitral Tribunal but also agreed to the mechanism to be followed in case one party defaulted.

17. It was further argued that reliance of the Petitioner on the judgments in ***Perkins (supra)*** and ***CORE (supra)*** is misplaced. In ***Perkins (supra)***, the Supreme Court was examining Clause 24, which contemplated appointment of a Sole Arbitrator by the CMD of the Respondent. Referring to the judgment of the Supreme Court in ***TRF Limited v. Energo Engineering Projects Limited, (2017) 8 SCC 377,*** wherein the appointment of the Arbitrator was to be made by the Managing Director of the Respondent, the

Supreme Court held that the Managing Director of the party to the dispute will be incompetent to act as an Arbitrator because of the interest that he would have in the outcome or result of the dispute. The ineligibility would also apply to the second category of cases where the Managing Director does not himself act as an Arbitrator but is empowered or authorized to appoint any other person of his choice or discretion. However, Clause 39.2 in the present case is peculiar and completely different, wherein parties themselves agreed to the consequences of default by either party.

18. Pertinently, while at the initial stage, the argument on behalf of the Petitioner was that the Arbitration Clause 39.2, to the extent it contemplated and recognised appointment of the nominee Arbitrator of the party invoking arbitration as the Sole Arbitrator to conduct the arbitral proceedings, was hit by ***Perkins (supra)*** line of judgments being unilateral appointment, in rejoinder, stance of the Petitioner changed to arguing that no occasion had arisen for the Respondent to appoint its nominee Arbitrator as the Sole Arbitrator as Petitioner had not 'failed' to appoint the Arbitrator in terms of Clause 39.2. It was urged that the expression 'failure' cannot be restricted to failure to 'appoint' *simplicitor* and if the party receiving the invocation notice raises legitimate objections in response to the notice, which go to the very root of appointment of the Arbitrator and commencement of arbitration, there is no failure to appoint and the second part of Clause 39.2 will not come into play. It was submitted that on receipt of the invocation notice from the Respondent, Petitioner immediately sent a detailed response enumerating multiple objections to the invocation notice viz., (a) there can be no composite reference in respect of three packages having distinct scopes of works, awarded through separate contracts relating to setting up of

separate transmission lines, with no connection with each other and with separate NoAs, LoAs, Special Conditions of Contract, General Conditions of Contract as also the regional offices of the Petitioner dealing with the 3 packages being separate and distinct; (b) claims being time barred since projects were completed in 2014 and Bank Guarantees were released in August, 2016; (c) non-joinder of necessary and proper parties inasmuch as contract was awarded to a JV of two entities comprising of SPIC-SMO (now a division of the Respondent) and Aster, but Aster was not impleaded though a necessary and proper party; and (d) premature invocation without resorting to resolution of the dispute through negotiations before the Project Manager of the Petitioner as a Conciliator. There was no response to these objections by the Respondent. In the absence of 'failure' on the part of the Petitioner under Clause 39.2, the default clause did not trigger and Respondent could not have appointed its nominee Arbitrator as a Sole Arbitrator.

19. Counsel for the Respondent strongly objecting to the change in stance of the Petitioner and urged that this contention of the Petitioner, raised at the stage of rejoinder arguments, was beyond its pleaded case as also in the teeth of order dated 06.09.2024, whereby notice was issued limited to the grievance of the Petitioner that arbitration clause 39.2, envisaging unilateral appointment, was hit by the judgments in ***Perkins (supra), Bharat Broadband (supra),*** and ***Haryana Space Application Centre (HARSAC) and Another v. Pan India Consultants Private Limited, (2021) 3 SCC 103.*** It was argued that the contention must be rejected at the outset, as no party can be or should be permitted to argue contrary to the pleadings and/or change its stance, during the course of hearing, to set up altogether a new

case, especially when the opposite party has had no chance to meet the same. Without prejudice, it was argued that even on merit this contention only deserves rejection. The expression 'failure' only means failure to appoint and is open to no other interpretation, least of all to mean that the party receiving invocation notice is entitled to raise objections to the invocation notice and then sit back. If this plea is accepted, the agreement between the parties to provide for the consequences of one party defaulting in appointing its Arbitrator in Clause 39.2, will be defeated and by merely raising objections, which are in the domain of the Arbitrator, the non-claimant will succeed in stalling the arbitration process.

20. Heard learned Senior Counsel for the Petitioner and counsel for the Respondent.

21. From a plain reading of the grounds set out in the three petitions, it is palpably clear that Petitioner seeks termination of the mandate of the Sole Arbitrator on multiple grounds: (a) composite reference in case of three contracts which pertain to separate transmission line projects with distinct and different scopes of work etc., contrary to the judgment of the Supreme Court in ***Chloro Controls (supra);*** (b) failure to take recourse to pre-arbitral procedure to attempt reconciliation and amicable resolution of disputes by Project Manager under Clause 38 of the contracts; (c) claims of the Respondent being time barred; (d) non-impleadment of Aster, which is a necessary and property party on account of the fact that the contract was awarded to a Joint Venture of two entities comprising of SPIC-SMO, now a division of the Respondent and Aster; and (e) unilateral appointment of the Arbitrator without the consent of the Petitioner in violation of Section 12(5) of 1996 Act and principle of party autonomy,

emphasised by the Supreme Court in ***Perkins (supra)*** and its sequel judgments.

22. It is relevant to mention that vide order dated 06.09.2024, Court had confined the adjudication of these petitions to examining whether Clause 39.2 of GCC contemplates unilateral appointment and is thus vulnerable in light of the judgements in ***Perkins (supra), Bharat Broadband (supra),*** and ***Haryana Space Application Centre (supra).*** Relevant part of the order is as under:

> *"4. One of the issues that has arisen for consideration in this case is whether the arbitration clause in the agreement between the parties is hit by the judgment of the Supreme Court in Perkins Eastman Architects DPC v HSCC (India) Ltd , Bharat Broadband Network Ltd v United Telecoms Ltd and Haryana Space Application Centre (HARSAC) v Pan India Consultants Pvt Ltd.*
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> *xxx xxx xxx*
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> *23. Mr. Sudhir Nandrajog, learned Senior Counsel has advanced the following submissions, to support the prayer:*
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> *……..*
>
> *(v) The appointment of the arbitrator was unilateral and was, therefore, in the teeth of the law laid down by the Supreme Court in Perkins Eastman Architects, Bharat Broadband Network and Haryana Space Application Centre, among others.*
>
> *xxx xxx xxx*
>
> *26. Having heard learned counsel for both sides, I am of the opinion that the submission of Ms. Soni, regarding the vulnerability of Clause 39.2 of the GCC to evisceration as being violative of Perkins line of decisions merits serious consideration.*
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> *27. While I am not inclined to take a final view in that regard at this point, without calling for a response from the respondent, there is clearly a difference between the structure of the arbitration agreement as contained in Clause 39.2 with the clauses which formed subject matter of consideration in the Perkins line of decisions.*
>
> *28. In this case, the clause, which was voluntarily executed by both parties, gave liberty to either party to write to the other, suggesting the name of an arbitrator. No party has been unilaterally given the right to*

appoint an arbitrator, without the consent of the other. On one party writing to other, naming the arbitrator, the other party has, under the arbitration clause, to respond, naming its own arbitrator.

29. It is only if the second party defaults in doing so that the arbitrator appointed by the first party functions as the sole arbitrator arbitrating on the disputes. As such, by defaulting in suggesting the name of its arbitrator, in response to the Section 21 notice issued by the respondent, it could be argued that the petitioner impliedly acquiesced to the arbitrator appointed by the respondent functioning as the sole arbitrator to arbitrate on the disputes. To that extent, the question of whether the appointment of the arbitrator was unilateral becomes highly debatable."

23. Having so observed, Court passed an interim order that all further proceedings in the arbitration would remain subject to outcome of these petitions. Insofar as other issues raised by the Petitioner pertaining to the disputes being time barred, composite reference etc., are concerned, it was ruled that none of these issues make out a case of the Arbitrator being *de jure* incapable of functioning under Section 14(1) of 1996 Act, which envisages termination of the mandate of the Arbitrator in circumstances where Arbitrator becomes *de jure* or *de facto* incapable of functioning as an Arbitrator or withdraws from office. It was held that these issues are in the domain of the Arbitrator and would be decided by the Arbitrator in exercise of jurisdiction vested in him by Section 16 of 1996 Act. This order was challenged by the Petitioner before the Supreme Court and SLP Nos.26889-26890/2024 were dismissed on 28.03.2025. Relevant passages from the order dated 06.09.2024 are as follows:

"23. Mr. Sudhir Nandrajog, learned Senior Counsel has advanced the following submissions, to support the prayer:

(i) A composite arbitration, for all the three GCCs, was not permissible in law. The specifics and even the dates of entering into the contracts were different. As such, the disputes would have to be individually raised in respect of each of the GCCs.

(ii) Necessary parties had not been impleaded in the matter, as the

GCCs had been executed not with the individuals but with the JV.

(iii) The claims of the parties were grossly barred by time.

(iv) The Section 21 notice had been issued by the respondent without complying with pre-arbitral protocol prescribed in Clause 38 of the GCC. There was no recourse to the arbitral remedy before the Project Manager in the event of failure of conciliation. In respect of the two GCCs dated 21 May 2010, there was not even an attempt at conciliation in the first place.

(v) The appointment of the arbitrator was unilateral and was, therefore, in the teeth of the law laid down by the Supreme Court in Perkins Eastman Architects, Bharat Broadband Network and Haryana Space Application Centre, among others.

xxx xxx xxx

30. Insofar as the other arguments raised by Mr. Nandrajog are concerned, prima facie, these are arguments which are available to be raised before the arbitrator under Section 16 of the 1996 Act. The question of whether the disputes are time barred, or whether the respondent is entitled to raise the dispute covering all the three GCCs when the initial notice covered only one contract agreement, or whether the respondent was properly represented as the agreement was with the JV, and other such issues which have been raised by Mr. Nandrajog are issues which clearly fall within the remit of the arbitrator, as contemplated by Section 16(1) of the 1996 Act.

31. In its recent decision in SBI General Insurance Co Ltd v Krish Spinning, the Supreme Court has revisited nearly all earlier authorities on this aspect. The Supreme Court has, in no uncertain terms, held, in the interests of fostering arbitral autonomy, that the court should not extend its consideration to those issues which are available to the Arbitral Tribunal under Section 16 of the 1996 Act. As such, even while exercising jurisdiction under Section 11(6) of the 1996 Act, the Supreme Court has now held that the Court could examine only two aspects; the first being whether there exists an arbitration agreement between the parties and the second being whether the Section 11(6) petition has been filed within three years of the Section 21 notice issued by the party.

32. The issue of whether the dispute is arbitrable, whether it is discharged by accord and satisfaction or whether the claims are barred by time, have specifically been held by the Supreme Court to be issues which have to be relegated for decision to the arbitral tribunal. Even the aspects of whether there exists an arbitration agreement between the parties, or whether the Section 11(6) petition was filed within three years of issuance of Section 21 notice, can only be examined by the Section 11 referral court prima facie. If, to arrive at a conclusion on these issues, anything more than a

prima facie examination is required, even these issues have to be relegated for decision by the arbitral tribunal.

33. As such, in the scenario as it exists today, issues which can be decided by the arbitral tribunal under Section 16 of the 1996 Act have to be decided by the arbitral tribunal alone, and it is only once the arbitral tribunal returns a finding on such issues that a court can exercise judicial review and take corrective steps, if necessary.

34. The present petitions, moreover, have been filed under Section 14 of the 1996 Act. Section 14(1) envisages the termination of the mandate of the arbitrator only in two circumstances. The arbitrator must either become de jure or de facto incapable of functioning as an arbitrator, or must withdraw from office.

35. In the present case, except for the arguments based on the Perkins line of decisions, none of the other submissions advanced by Mr. Nandrajog make out a case of the arbitrator being de jure incapable of so functioning. They are all issues which the arbitrator, in exercise of the jurisdiction vested in him by Section 16 of the 1996 Act, can very well decide.

36. The only issue which may survive for consideration is whether the Clause 39.2 of the GCCs is hit by the Perkins line of decisions."

24. Therefore, as rightly flagged by counsel for the Respondent, the issues of composite reference, claims being allegedly time barred, non-impleadment of necessary party etc. cannot be re-agitated by the Petitioner at this stage. Even otherwise, from the judgments of the Supreme Court in ***Cox and Kings Limited v. SAP India Private Limited and Another, (2024) 4 SCC 1; Arif Azim Company Limited v. Aptech Limited, 2024 SCC OnLine SC 215***; ***SBI General Insurance Co. Ltd. v. Krish Spinning, 2024 SCC OnLine SC 1754;*** and ***Adavya Projects Pvt. Ltd. v. Vishal Structurals Pvt. Ltd. and Others, 2025 SCC OnLine SC 806***, it is clear that it is the domain of the Arbitrator to decide issues with respect to: disputes being arbitrable/time barred; non-impleadment of necessary and proper parties to arbitral proceedings etc.

25. Coming now to the question whether Clause 39.2 of GCC is hit by

Perkins (supra) line of decisions. Pleaded case of the Petitioner is that Clause 39.2 is hit by ***Perkins (supra)*** line of decisions and this was argued at length at the start of the hearing. Judgment in ***CORE (supra)*** was read in *extenso* to bring home the point that the mandate of the Sole Arbitrator deserves to be terminated being unilateral and in violation of principles of party autonomy, impartiality and independence of the appointed Arbitrator, the foundation pillars of an arbitration regime. However, in rejoinder, there was a shift in stand of the Petitioner, which was strongly opposed by the Respondent, and it was canvassed that under Clause 39.2, the nominee Arbitrator of the party invoking arbitration could be the Sole Arbitrator only in the event there was 'failure' of the party receiving the invocation notice but where the recipient raises genuine and legitimate objection(s) to the invocation and commencement of arbitration, as in this case, the default clause will not trigger.

26. It was submitted that in the present cases, there was no 'failure' in terms of Clause 39.2 since on receipt of the notice from the Respondent invoking arbitration, Petitioner objected to invocation and commencement of arbitration on multiple grounds, as being premature without resorting to pre-arbitral procedure; seeking composite reference; non-joinder of necessary parties; and claims being time barred. In absence of failure, the default mechanism of appointment of Respondent's nominee Arbitrator as Sole Arbitrator did not come into play.

27. Relevant it is to note at this stage that since the Petitioner has given up the argument that the arbitration Clause 39.2 is hit by ***Perkins (supra)*** line of judgments, I am not delving into the aspect of the vulnerability of the said clause, which in the *prima facie* view of the Court was open to interpretation

and debatable, in light of the contention of the Respondent that the clause is different from the arbitration clauses in ***Perkins (supra)*** line of decisions. This issue is thus left open.

28. The only issue that survives for consideration is construction of the phrase '***If either of the parties fails to appoint its arbitrator'*** in Clause 39.2, which is extracted hereunder, for ready reference:-

> ***"39. Arbitration***
> ...
> *39.2 The arbitration shall be conducted by three arbitrators, one each to be nominated by the Contractor and the Employer and the third to be appointed by both the arbitrators in accordance with the Indian Arbitration Act.* ***If either of the parties fails to appoint its arbitrator within sixty (60) days*** *after receipt of a notice from the other party invoking the Arbitration clause, the arbitrator appointed by the party invoking the arbitration clause shall become the sole arbitrator to conduct the arbitration."*

29. Having given my thoughtful consideration, the argument of Mr. Mehta, learned Senior counsel *albeit* ingenious, cannot be accepted. A plain reading of Clause 39.2, in my view, leaves no doubt that the construction placed on the clause by the Petitioner is erroneous. The clause is unequivocal and unambiguous and must be given its plain meaning. Expression 'failure' means and connotes failure to appoint the Arbitrator *simplicitor* within the stipulated time, with no shades of grey. Accepting the argument of the Petitioner that if the party receiving invocation notice responds by raising objections to the appointment, which are otherwise in the domain of the Arbitrator, there will no 'failure' contemplated under Clause 39.2, will lead to an incongruous situation. There will be no appointment by mutual consent since Petitioner will not nominate its Arbitrator having raised objections in response to invocation notice. There

will be no 'failure' since objections are raised and the default clause will not trigger. The nature of objections raised by the Petitioners are such that they can only be decided by the Arbitrator. There will thus be an impasse as in the absence of failure of a party to appoint the Arbitrator when called upon by the other party to do so, Court's jurisdiction will also not come into play. Surely, the parties while agreeing to incorporate Clause 39.2 would have never intended a dead lock and this is fortified by the fact that parties consciously provided that if one party fails to appoint its nominee, the nominee of the other party invoking arbitration will be the Sole Arbitrator, In my considered view, 'failure' in Clause 39.2 can only be construed as failure to appoint an Arbitrator within the time stipulated therein. In the present cases, admittedly, after receipt of the notice under Section 21 of 1996 Act for appointment of the Arbitrator from the Respondent, Petitioner failed to appoint its nominee Arbitrator in 60 days and accordingly, the default clause triggered and the Arbitrator appointed by the Respondent became the Sole Arbitrator to adjudicate the disputes. Court finds no reason to terminate the mandate of the Sole Arbitrator appointed by the Respondent in terms of Clause 39.2.

30. For all the aforesaid reasons, this Court finds no merit in the petitions and the same are dismissed. Pending applications also stand disposed of.

JYOTI SINGH, J

JULY 09 , 2025/ *Shivam/S.Sharma*