Globe Ground India Private Limited vs Airports Authority Of India on 29 April, 2024

Author: C.Saravanan

Bench: C.Saravanan

Arb.O.P.N

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.12.2023

PRONOUNCED ON : 29.04.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)No.312 of 2023
and A.No.3478 of 2023

Globe Ground India Private Limited
E9, Connaught Place,
New Delhi 110 001. .. Pet

vs.

1. Airports Authority of India
   Rajiv Gandhi Bhawan,
   Safdarjung Airport,
   New Delhi.

2. The Airport Director,
   Airport Authority of India,
   Chennai Airport,
   Chennai. ... Respo

Prayer:- Original Petition is filed under Section 34(2)(3) of the A
and Conciliation Act, 1996 praying to set aside the Award dated 18.
passed by the learned Sole Arbitrator in respect of the disputes be

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petitioner and the 1st respondent under the License Agreement dated 27.07.2016.

For Petitioner : Mr.Sathish Parasaran
Senior Counsel
for Mr.R.Palaniandava

For Respondent : Mr.R.Sankaranarayanan
Senior Counsel
for Mr.Rajkumar Jhaba

ORDER

The petitioner is aggrieved by the Impugned Award dated 18.05.2023 passed by the learned Arbitrator.

2. By the aforesaid Impugned Award dated 18.05.2023, learned Arbitrator has rejected the Statement of Claim of the petitioner and has allowed the Counter Claim of the respondents. The prayer of the petitioner in its Statement of Claim dated 11.08.2022 reads as under:-

> (i) For a direction to the respondent to refund the Advance License fee of Rs.14,98,961/- paid by the petitioner to the respondent.
>
> (ii) For a direction to the respondent to return the Bank https://www.mhc.tn.gov.in/judis Guarantee issued by the petitioner favour of the respondent towards Security Deposit of Rs.1,20,41,977/-.
>
> (iii) For a directing to the respondent not to encash the Bank Guarantee during the pendency of the present Arbitration proceeding.
>
> (iv) For a directing to the respondent to refund the Electricity Deposit of Rs.1,00,000/- paid by the petitioner to the respondent.
>
> (v) For a directing to the respondent to pay damages of Rs.31,11,723/-
>
> (vi) For Award interest @12% p.a. on the above prayers
>
> (i) - (v) from the date of first demand i.e. 07.08.2018.
>
> (vii) For a directing to the respondent to pay Rs 5,00,000/- towards cost of the present proceedings.

3. The Impugned Award preceded a decision of the Dispute Resolution Committee (DRC) wherein the claims of the petitioner were rejected on 28.12.2021. Following issues were framed before the Dispute Resolution Committee (DRC) : -

> i. What is the scope of license awarded to the Claimant? Whether there was any restriction on operation imposed on the claimant post award of the tender?
>
> ii. Whether Claimant is liable to pay the license. If yes, what is the quantum?
>
> iii. Whether the Claimant is entitled to any rebate in the License Fee payable to respondent?
>
> https://www.mhc.tn.gov.in/judis iv. Whether the Claimant is entitled for the refund of the security deposit for Rs.1,07,05,000/- and Rs.14,98,961/- and Rs.1,00,000/- towards electricity deposit and damage of Rs.31,11,723/- from Respondent?

4. The Dispute Resolution Committee (DRC) rejected the claim of the petitioner on 28.12.2021 with the following overrule:-

> "Observation Committee has come across during the course of hearing and documents produced that the previous contract for the Meet and Greet Service was cancelled based on non-issuance of AEPs by BCAS. Commercial Directorate should have reviewed the tender condition before inviting fresh tender to avoid disputes/litigation."

5. Operative portion of the Impugned Award dated 18.05.2023 reads as under:-

> "9 Findings of Tribunal and Award The following issues emerge from the various rival submission made by Claimant and Respondent:
>
> (a) Responsibility and Obligation to obtain AEPS:-
>
> https://www.mhc.tn.gov.in/judis It may be brought out that Draft contract was part of NIT. Considering various clauses of NIT, Award letter and Agreement, Tribunal observed that the obligation to obtain and keep valid various licenses, passes and other permits which would within its meaning include the AEPs* was solely with the Claimant and not the Respondent. The Claimant in its opening statement in Statement of Claim had admitted that they were providing ground handling services at airports. They had also filed documents of BCAS# security clearance issued to them in respect of Banglore airport dated 28-05-2013 (page 117 & 118 of SoC) for proving ground handling services valid for 5 years. As per letter BCAS reserves the right to revoke the security clearance at any time without assigning any reasons, in the interest of of national/civil aviation security.

Moreover, no other documents /evidence have been produced by Claimant substantiating their contention that Respondent is responsible for obtaining AEPs. The clauses unambiguously put the onus of obtaining AEPs on Claimant.

Further, no document have been produced by Claimant seeking any clarity on this if it was not clear to Claimant before making bid as part of its due diligence. The Claimant is one of the three bidder and emerged H1 by quoting 42% above the minimum MMLF(email dated 5-04-2023 &6-04-2023). This indicate the extent of due diligence carried out by the Claimant. Claimant being an existing concessionaire at airports and as part of his due diligence exercise for bidding for this NIT, it would be reasonable to https://www.mhc.tn.gov.in/judis conclude that the Claimant was well aware of its obligation to procure AEPs and various permissions and permits (process related thereto) that have to be obtained for providing meet and greet services in the airport premises and also that BCAS is the designated authority for issue of AEPs and not the Respondent. BCAS is an independent authority and Respondent does not have any control over the its functioning and processes /procedures or decisions. The Tribunal cannot go beyond the scope of the contract when the contract states that the obligation to obtain the AEPs is that of the Claimant. Therefore in the facts and circumstances Claimant cannot shift its obligation for AEPs on Respondent. The Tribunal decides this issue against the Claimant.

*Airport Entry Pass # Bureau of Civil Aviation Security

(b) Whether Respondent extended cooperation in resolving the AEPS issue From the submissions made by the Respondents and not contradicted by Claimant, the Tribunal conclude that Respondent had extended necessary cooperation to Claimant in resolving the issue of AEPs.

(c) Based on the rival submission made by Claimant and Respondent the Tribunal observed that services performed under the contract can be divided under the three periods. The contract was awarded on 27-06-16 for a period of 3 years effective from 27-07-16.

Period 09-08-2016 to 16-10-2016 Based on submissions made by Respondent and Claimant Tribunal observed that the operation of services under the contract required issue of AEPs by BCAS. Respondent issued temporary passes for the https://www.mhc.tn.gov.in/judis period 9-08-2016 to 11-08-2016 for Arrival and Departure areas and for 29-08-16 to 16-10-2016 for Arrival, departure, SHA, immigration areas. These passe allowed access to all areas namely Arrival, Departure, Security Hold Area, Immigration for all terminals. However, the contention of Claimant that these AEPs allowed access only till check in counters and AEPs were not allowed beyond check-in-counters resulting in provision of limited services by Claimant is not based on facts.

Respondent have filed noting of its' security department confirming issues of AEPs allowing access to all areas namely Arrival, Departure, Security Hold Area, Immigration during this period Representative of Claimant in the meeting called by APD on 4-10-2016 confirmed that by and large they are able to provide smooth services except for some issues in custom area for which APD and Claimant agreed for some stop gap arrangement. The Claimant vide letter dated 18-10- 2016 while requesting respondent to expedite furnishing of information to BCAS confirmed that AEPs are being issued valid for 3 or ten days which is a big hassle The issuance of AEPs for longer duration will ease the functioning to render our services smoothly.

Claimant vide letter dated 10-03-2017 had applied for Renewal (not Fresh) of AEPs for all terminals and areas which further confirms that initial passes issued by APD Chenna were for all areas. Claimant have not filed any document substantiating its charge that AEPs allowed only limited access till check in counters. Further Claimant in the letter dated 7th August, 2018 (page 73 of SoC) confirmed that rates of Rs750/ and Rs 500/ per pax was levied from 29-08-2016 to 16-10-2016. The https://www.mhc.tn.gov.in/judis tribunal therefore concludes that there was no breach of contract by Claimant/respondent and claimant could provided full range of services as per letter of Award during this period. Therefore Respondent was within its rights to charge license fee as per award letter for this period.

Period From 17-10-2016 to 5-06-2017 The Tribunal observed from the rival submissions made by Respondent and Claimant that AEPs issued by Respondent expired on 16-10-2016 and AEPs could not be obtained from BCAS despite follow up by Claimant and assistance provided by Respondent. Claimant informed suspension of services and Services remained suspended during this period.

Claimant vide letter dated 9-11-2016 requested respondent to stop charging license fee from 17-10-2016. Tribunal conclude that BCAS is designated authority for issue of AEPs. AEPs are issued keeping in view the national/aviation security concerns. Claimant being existing operator was aware of risk /uncertainty with regard to issue of AEPs Claimant despite being aware that AEPs for custom areas may not be issued (Refer Minutes of meeting dated 4-10-16 and meeting with Bureau of Immigration 5-01-17) did not terminate the contract instead unilaterally suspended the services. The Tribunal observed that Respondent based on the request of Claimant made through letter 9th November, 2016 did not raise bill for Licence fee for this period even though there was breach of contract by Claimant. As such there is no claim for License fee for this period.

Period From 06-06-2017 to 19-04-2018 https://www.mhc.tn.gov.in/judis As per Respondents' submission and not rebutted by claimant, Claimant applied for AEPs on 01-06-2017 for the permitted ares and requested Respondent vide letter dated 8-06-2017 to inform airline, ground handlers and other agencies reopening of Namaskar Meet and Greet Service about resumption of services. The Tribunal observed that vide letter dated 17th July 2017 addressed to AGM (Commercial) Chennai international Airport Claimant informed Respondent resumption of Meet and Greet Services from 11-06- 2017. Relevant extract of the letter is reproduced below.

"We are pleased to announce restart of "Namaskar"

Meet and Greet Services at Chennai international airport effective from June 11, 2017 with limited areas of services from curb side to departure check in counter at price of Rs 300 INR including taxes. This is due to AEP issued only for Arrival and Departure by BCAS Other conditions communicated vide letter date 8th November 2017 for resuming the services were as under.

• License fee be charged only for the days AEPs were issued and GGI were able to conduct Services •Space Rental shall be paid by GGI in accordance to the invoice raised by AAI for the allotted space under occupation of GGI • Passenger charges are reduced from Rs 750/&Rs 500/ per passenger respectively to Rs300/ per passenger at both Terminals. The Monthly license fee may be proportionately reduced.

• AAI may kindly take up the issue with BCAS for issuance of AEPs for all the areas as mentioned in the NIT/Award letter https://www.mhc.tn.gov.in/judis Tribunal conclude from the above that AEPs for Arrival and Departure areas were in place by 11-06- 2017 for providing the services as per revised scope of work.

The Tribunal observed that BCAS vide letter dated 28- 04-2017 had decided to permit meet and greet services in Airports with following conditions:

> the meet and greet services may be permitted up to Q area of pre PESO Points at domestic terminal, check in area at international terminal. arrival hall including baggage claim area of domestic and arrival hall of international terminal other than custom and immigration area The tribunal does not find much substance in the contention of the Claimant that they were not aware of the BCAS letter dated 28-04-2017 before applying for AEPs on 1-06-2017 and their communication dated 8th June 2017 to Respondent to resume Services However, they have admitted they could procure the said letter at a very late stage but no evidence/document was produced confirming the date on which they could procure the said letter. Even after becoming aware about the letter restricting the services and meeting with Bureau of Immigration 5- 01-17 Claimant did not took any action to determine the contract but continued to provide truncated services until the expiry of notice period Therefore Tribunal conclude that Claimant was aware of of BCAS letter dated 28-04-2017 well before making application for AEPs and resumed the truncated services after carrying out detailed viability assessment at revised terms. The Tribunal also does not find any substance in the contention of Claimant that Respondent was aware of the conditions contained https://www.mhc.tn.gov.in/judis in the BCAS letter dated 28-04-2017 and should not have floated NIT. The NIT was issued in November 2015 whereas BCAS's letter is dated 28-04-2017 much after NIT and award of work. Therefore, Respondent floated the NIT as per the prevailing scenario and could not have foreseen that such a decision will be taken by BCAS. The Tribunal observed that this is a conscious decision of Claimant (after a revised business and viability assessment) out of his own volition to resume services at a uniform price of Rs 300 as against Rs 750/ per pax in the international Terminal and Rs 500/ per pax in domestic terminal. No document from Respondent to Claimant was produced by

Claimant requesting him for resumption of services. The Tribunal is inclined to agree with the submission made by Respondent that scope of work as per the award letter was much wider than the provision of meet-and-greet services in the immigration area alone [for which the AEPs were not given) and scope work is severable. Tribunal observed that reduced scope of services included all services except escorting in immigration counters. The Respondents' acceptance of request of the Claimant to reduce the license fee proportionately and charge only for the days when they could conduct business keeping in view its' business interest resulted in to legally enforceable binding amended contract. The Claimant continued to provide truncated services till the expiry of notice period for surrender of contract on 19-04-2018. Tribunal does not find any substance/merit in the Claimant's contention that the Respondent cannot charge any amount from the Claimant despite having exploited business opportunity at terms fixed by it and agreed to by Respondent. The Claimant through its various communication to Respondent had made request to charge license fee at reduced rate and for https://www.mhc.tn.gov.in/judis period AEPs were issued and they could conduct business. Respondent while forwarding the bill for Rs1,20,41,977/ vide letter dated 11-01-2019 informed Claimant that the details regarding AEPs issued for the period of your operations have been reconfirmed from our security Department as requested by you in the previous meeting at office of Airport Director and bill are raised proportionately as requested in your letter dated 8-11-2017. The Tribunal finds no reasons that having operated the concession and agreeing to pay the charges the Claimant can now retract. This will be against the principle of equity justice and fair play. Following the doctrine of Estoppel Claimant does not have any locus standi asking for waiver and refusing to pay License fee and other charges. The Tribunal decides the issue against Claimant and Claimant is liable to pay Licensee fee and other charges amounting to Rs 1,20,41,997/.

(c) Fraud/Misrepresentation / Concealment The Tribunal after examining rival submissions including case laws cited does not find much substance in the pleadings of the Claimant alleging fraud/misrepresentation / concealment by Respondent or for that matter frustration of the contract, status of contract ie.void or voidable, unequal terms as these are of no relevance at this stage having exploited the business opportunity offered by Respondent through this NIT and accepted by Claimant as per terms and condition of the contract out of his own volition and after due diligence. The Tribunal also observed that not one but three offers was received by the Respondent for this facility and the Claimant emerged the highest bidder by quoting 42% above the minimum price which indicate the extent of due diligence carried out by the Claimant. Further no such issue was raised https://www.mhc.tn.gov.in/judis during the currency of the contract or for that matter before DRC. The claimant have not produced any document to establish the alleged misrepresentation/concealment/ fraud committed by the Respondent so essential to make a contract void/voidable in terms of Indian Contract Act 1872.

Prima Facie Tribunal does not find much substance in the Claimant's allegation of fraud/misrepresentation/concealment. However, these issues have criminal connotation and therefore can not be subject matter of arbitration.

(d) Regarding termination of contract and lock in period. Tribunal observed that license agreement provided for multiple options for Termination of Contract by either party Termination of Contract by Claimant in February 2018 was a conscious business decision to arrest further losses in view of their inability to generate enough business as per the submission vide Annexure 15(Page 165 of SoC) out of business interest rather than anything else and it chose not to terminate the contract even when it become clear as early as 04-10-2016 that full range of services could not be provided due to issue of AEPs. Claimant after unilateral suspension of services from 16-10- 2016 to 7-06-2917 unilaterally resumed truncated service at reduced fee from pax and reduced Licence fee payment to Respondent. AEPs were valid till December, 2018 at the time of Termination Tribunal can not step in to their shoes.

(e)Damages Claimant have made a claim of Rs 31,11,723/ as damages and filed a certificate of a Chartered Accountant. Claimant have brought out that because of non issue of AEPs could generate revenue of Rs 7,93,765/ and have Incurred cumulative losses of https://www.mhc.tn.gov.in/judis Rs31,11,723/ which is solely attributable to Respondent who could not facilitate AEPs as per NIT/award letter. (Pg 175 & 176 of the Statement of Claims.) Respondent had submitted that it is relevant to note that for a claim of unliquidated damages to be sustained, the breach of the agreement has to be proved by the Claimant, liability to pay any damages will only arise in the event of a breach of contract. The Claimant has not alleged any breach of contract on the part of the Respondent except for feeble attempt to state that the Respondents have allocated only 5 counters while they had agreed to allocate a total of 8 counters in the airport premises. Therefore, there is no breach of the License Agreement by the Respondents and hence no damages are to paid by the Respondent., Further Claimant has not adduced any evidence to show that the amount claimed is in fact the loss caused to the Claimant except for a letter from a Charted Accountant.

Therefore, In such a position where no evidence is provided to substantiate the losses except for an unverified Chartered Accountant certificate whose genuineness and authenticity could not be verified by way of cross-examination of the Chartered Accountant ought to be out rightly rejected.

Tribunal is inclined to agree with the submission made by respondent that there is no breach on the part of Respondent keeping in view that the contract operated as per terms of award during 09-08-2016 to 16-10- 2016 and 11-06-2017 to 19-04-2018 as per amended terms and conditions. Services remained suspended by Claimant during 16-10-2016 to 10-06-2017.The Tribunal observed that damages claimed are nothing but losses incurred by the Claimant. Claimant by his https://www.mhc.tn.gov.in/judis own statement admitted that Respondent could not facilitate AEPs as per NIT/award letter which ipso facto means that primary obligation to procure AEPs is of Claimant. It became clear to Claimant as early as 04-10-16 that there are cor complexities in the issue of AEPs and Claimant failed to take steps to arrest losses, the Tribunal also observed CA certificate is factually incorrect as Claimant have not captured the revenue generated during the 09-08-2016 to 16-10-2016. No evidence has been provided to substantiate the losses except for an

unverified Chartered Accountant certificate.

It was the duty of claimant to mitigate /reduce the losses No such document evidencing any action by Claimant in this have been submitted. No other claim towards damages have been made.

There is no provision in NIT/Agreement guaranteeing any minimum business Concession agreement for operating a facility does not guarantee any business and it is for Concessionaire to generate business and assume business risk. The Claimant have failed to generate business for which Respondent should not be made to suffer.

Further as per para 8 of Other terms and condition of Award Letter stipulated that "The Authority shall not be in any way, be responsible for any loss suffered by the licensee on account of business and no reduction in licence fee shall be allowed in this account," This is known risk undertaken by the Claimant while bidding and considered in financial bid.

In view of the above Tribunal can not allow enrichment of Claimant at the cost of Respondent. The issue is decided against the Claimant.

https://www.mhc.tn.gov.in/judis

(f) Other Claims Refund of advance Tribunal have decided that Claimant is liable to pay License fee and other charges amounting to Rs 1,20,41,997/. Tribunal decides that Advance License fee of Rs 14,98,961 is refundable to claimant subject to payment of Rs 1,20,41,997 or alternatively Respondent may adjust Advance License fee amount against dues.

Return of Bank guarantee issued by Claimant Tribunal have decided that Claimant is liable to pay License fee and other charges amounting to Rs 1,20,41,997/ Tribunal decides that Bank Guarantee issued by Claimant may be returned to Claimant after satisfaction of dues of Respondent Direction to Respondent not to encash Bank Guarantee during pendency of Present Arbitration Proceeding No document/ request to bank for encashment of BG have been filed by Respondent or Claimant in this matter. Arbitration Proceedings concluded on 23rd March, 2023.

Tribunal conclude that there is no issue to be decided by the Tribunal in this regard.

Refund of Electricity deposit of Rs 1,00,000/- Tribunal have decided that Claimant is liable to pay License fee and other charges amounting to Rs 1,20,41,997/ Tribunal decides that Electricity Deposit of Rs100000/ is refundable to claimant subject to payment of dues of Respondent Award interest@ 12% p.a. on the above prayers (1) to https://www.mhc.tn.gov.in/judis

(v) from the date of First demand ie 7-08-2018 Tribunal have decided that Claimant is liable to pay License fee and other charges amounting to Rs 1,20,41,997/. In view of this the issue is decided against the Respondent to pay Rs 5,00,000/ towards Cost of present proceedings The Tribunal have decided all Claims of the Claimant against Claimant Therefore, the Tribunal does not find any merit in the Claim of Rs 5,00,000/ towards cost of proceedings. The issue is decided against the Claimant.

(g) Respondent in its prayer to Tribunal had prayed for direction to Claimant to pay the due amount of Rs 1,20,41,977/ along with interest @ 18% p.a. for the period of delay The Tribunal examined the prayer of the Respondent to payment of Rs 1,20,41,997/ along with interest @18% p.a. for period of delay.Agreement provides as under:

> Para 6 The Licence fee shall be paid by 10th day of every English calender month failing which simple interest @12% p.a. on delayed payments for the first month and thereafter 18% p.a. for maximum of two months thereafter be payable, as per AAI credit policy on all delayed payments without prejudice to the authority's other rights and remedies. Interest is the cost of capital/funds. By denying the due payments of Respondent the respondent was wrongly deprived of usage of these funds Interest is a natural accretion on the capital. Payment of interest constitutes a measure of restitution for such unjust deprivation of funds. Therefore Tribunal decided the issue of interest in favour of Respondent. Claimant is liable to pay the amount due along with interest as per agreement.
>
> https://www.mhc.tn.gov.in/judis
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> (h) The Tribunal also decided to grant Respondent pendent lite simple interest on the amount due @8% from the date of invocation of arbitration up to date of Award under Section 31(7) of Arbitration and Conciliation Act 1996
>
> (i) The award is to be satisfied within a period of period of three months, failing which the award shall carry compound interest @ 10% p.a. on the awarded amount from the date of award till its payment.
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> (j) Before parting with matter The tribunal places on record its appreciation for the valuable assistance rendered Sh Raman Kapoor and by Dr P. K. Ray learned Counsel for Claimant and Shri Raj Jhabakh and his team at JM Legal learned Counsel for Respondent and Sh.M. Selvanayagams JGM Commercial Chennai Airport and his team.

This award is made in three sets: one each for the Claimant one for the Respondents and one to be retained by Sole Arbitrator with the requisite stamp paper."

6. The brief facts of the case are that the petitioner had participated in a Tender floated by the respondent for hospitality service in the Chennai Airport for Meet and Greet Service (Swagat Seva). The petitioner was awarded the contract vide Annexure-2 on 27.06.2016 by the respondent. https://www.mhc.tn.gov.in/judis

7. As per the aforesaid award in Annexure-2 dated 27.06.2016, the petitioner was required to pay License fee for a sum of Rs.12,80,000/- per month for the first year and thereafter Rs.14,08,000/- per month during the second year and Rs.15,48,800/- during the third year.

8. Apart from the above, several other conditions were specified in the aforesaid award. A License Agreement was also signed between the petitioner and the respondent vide Agreement dated 27.07.2016. There is no dispute regarding the compliance by the petitioner in so far as the amount that was to be paid prior to the commencement of service under the Agreement dated 27.07.2016.

9. It is the case of the petitioner that the respondent had suppressed material information regarding access to the Airport beyond the ticketing counter which was dictated by Bureau of Civil Aviation Security (BCAS). Thus, the petitioner was unable to earn revenue to pay the aforesaid amount. It is submitted that under these circumstances, the petitioner was constrained to apply for the Claim Statement which has been rejected. On https://www.mhc.tn.gov.in/judis the other hand, the Arbitral Tribunal awarded the counter claim of the respondent.

10. That apart, it is submitted that the award itself suffers from Violation of Section 12 of the Arbitration and Conciliation Act, 1996 read with Schedule 7 to the Arbitration and Conciliation Act, 1996 as the Arbitral Tribunal constituted was without authority of law.

11. It is submitted that the Arbitrator appointed was a former employee of the respondent. It is submitted that even though the petitioner had expressed consent for appointment of the Arbitrator, the Arbitrator was incapacitated from acting as an Arbitrator in view of Section 12(1) of the Arbitration and Conciliation Act, 1996 read with Section 5 read with Clause (1) of VII of the Schedule Arbitration in the light of the decision of the Hon'ble Supreme Court in TRF Limited Vs. Energo Engineering Project Limited, (2017) 8 SCC 377.

https://www.mhc.tn.gov.in/judis

12. In this connection, the learned counsel for the petitioner placed reliance on the decision of the Honble Supreme Court in the case of Bharat Broadband Network Limited vs. United Telecoms Limited, (2019) 5 SCC 755. A specific reference was made to Paragraph 20 from the aforesaid decision.

13. It is submitted that Clause 30 of the General Terms and Conditions of the License Agreement dated 27.07.2016 is void ab initio and unenforceable and as such, any Award passed in furtherance thereto is liable to be set aside. It is submitted that the courts have held in a catena of decisions that an arbitration agreement/clause providing for such unilateral appointment of a Sole Arbitrator is void ab initio. The respondent contends that they provided a panel from which the petitioner chose an option. This would not aid the respondent once the appointment procedure under the agreement becomes non est and the only recourse would be for appointment of a neutral arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996.

https://www.mhc.tn.gov.in/judis

14. It is submitted that the Sole Arbitrator, Mr. Rajesh Bhandari was a former Executive Director (F&A) of the first respondent. Thus, he was ineligible for appointment in view of the statutory bar under Section 12(5) r/w. Entry 1 to the VII Schedule to the Act. Courts have repeatedly held that an

Award passed by a person who is ineligible for appointment as an Arbitrator is bad in law and unenforceable.

15. It is submitted that de hors the above, the fact that the petitioner selected a name does not aid the case of the respondent since there was no express agreement in writing as envisaged under the proviso to Section 12(5) of the Act. It is further submitted that there is no agreement specifically recording the issue of disqualification/ineligibility of the Arbitrator and a clear/specific waiver of the same from the petitioner after the dispute had arisen between the parties. Hence, the disqualification/ineligibility will operate under Section 12(5) of the Act. https://www.mhc.tn.gov.in/judis

16. It is further submitted that as such, the arbitration clause, appointment procedure, right to appoint, choice of arbitrator etc., are all bad in law, in view of which the Award ought to be set aside.

17. It is further submitted that the right of unilateral appointment to an interest party makes the arbitration clause non est. Further, apart from the fact that the appointed arbitrator cannot suffer statutory ineligibility, the person appointing/nominating the arbitrator also should be eligible to be appointed as an Arbitrator. Hence, the arbitration clause void and unenforceable. Further, the Chairman/Member of the first respondent being ineligible under the A&C Act, any appointment made by him whether single or by way of a panel is hit by Section 12(5) of the Act. In the present case, the proviso to Section 12(5) of the Act not being fulfilled, the appointment and the consequent Award are bad in law.

18. It is further submitted that the Respondent, at the time of admission, made a frail attempt to portray the selection of the Sole https://www.mhc.tn.gov.in/judis Arbitrator from a panel as being exempt from Proviso to Section 12(5) of the Act by referring to Central Organisation for Railway Electrification (CORE) vs. ECI-SPIC-SMO- MCML (JV) A Joint Venture Co., (2020) 14 SCC 712, wherein the Hon'ble Supreme Court has held that an arbitration clause providing for a panel of arbitrators from which selection of a sole arbitrator was to be made was permissible in law.

19. It is further submitted that in CORE, the arbitration clause provided for a panel, however, in the instant case, it provided for appointment of a Sole Arbitrator by the Chairman/Member. Hence, the said judgment would not apply. In any event, the view taken in CORE has been doubted and referred to a larger bench by two separate Co-ordinate Benches of the Hon'ble Supreme Court in Union of India vs. Tantia Constructions Limited, 2021 SCC OnLine SC 271 and JSW Steel Ltd. Vs. South Western Railway Ltd., 2022 SCC Online SC 1973, in which reference, hearing is ongoing. It is also pertinent to note that a Coordinate Bench of the Hon'ble Supreme Court has distinguished the findings in CORE subsequently in Glock Asia-Pacific Limited Vs. Union of India, (2023) 8 https://www.mhc.tn.gov.in/judis SCC 226, to hold that the disqualification/ineligibility will continue to apply to such appointment and the Award.

20. It is submitted that selecting one name from the panel provided by the Respondent would not amount to an express waiver as per Section 12(5) of the Act, as the provision clearly mandates that the parties must enter into a separate agreement in writing, after a dispute has arisen, to expressly

waive such disqualification. This position was further confirmed in the case of Bharat Broadband.

21. It is further submitted that in the case of P.Cheran vs. Gemini Industries and Imaging Ltd. reported in 2023 SCC Online Mad 1887, this Hon'ble Court has held that participation in the arbitral proceedings or having knowledge of the appointment of the arbitrator would not deprive the rights of the Petitioner to challenge the appointment of the Arbitrator in terms of Section 34 of the Act setting forth the violation of Section 12(5) of the Act. This is also in line with the scheme of the Act which provides under Sections 11 & 16 and based on judgments, under Section 34 of the Act that this issue can be raised at any stage.

22. It is submitted that the Meet and Greet Service for which the tender was floated by the Respondent, involves assisting passengers in completing all necessary formalities at the airport, from check-in all the way to upto boarding of flight and vice-versa. This service entails providing assistance to passengers in the (SHA) Security Hold Areas too, for which an (AEP) Aerodrome Entry Permit had to be obtained from BCAS. Admittedly the Respondent was in the know that BCAS was not providing AEPs to any third parties. The said decision of BCAS was communicated to all airports, including Chennai airport vide their communication dated 28.04.2017 informing them that the Meet and Greet Services may be permitted only till Check-in counter and at the Arrival hall other than the Customs and Immigration Area. The Respondents however did not divulge the details of the said communication to the Petitioner however kept informing the Petitioner that they would facilitate the process of obtaining the AEP from BCAS.

23. It is submitted that the File Notings of the respondents, which were placed on record during the Dispute Resolution Committee (DRC) https://www.mhc.tn.gov.in/judis proceedings, which preceded the arbitration, clearly reveals that the Respondents were all along aware that there were restrictions placed on issuance of AEP. The DRC in its report, in particular in the paragraph titled "Observation" had clearly stated as follows:

> "Committee has come across during the course of the hearing and documents produced that the previous contract for the Meet and Greet Service was cancelled based on non-issuance of AEP by BCAS. Commercial Directorate should have reviewed the tender condition before inviting fresh tender to avoid disputes/litigation."

24. It is further submitted that the respondents were fully aware of the issues with regard to the issuance of AEP and the earlier contract itself came to be cancelled because of that. However, without consideration of the same, and suppressing the restrictions placed on the AEP issuance and without reviewing the terms of the Tender, the Respondents had floated the subsequent tender.

25. It is further submitted that in the case of Esso Petroleum Co. Ltd. v. Mardon, [1976] ECWA Civ 4, the Court of Appeal in England, https://www.mhc.tn.gov.in/judis considered whether the promises of a petroleum company that a particular station would sell 400,000 gallons a year despite

a material change in the position of the petrol station that would affect the prospect was held to be a misrepresentation. The Court therein held that a statement as to potential throughput was a contractual warranty for it was a factual statement on a crucial matter made by a party who had, or professed to have special knowledge. The statement was made with the intention to induce another to enter into a contract, and thus such contract was formed. The party making such a statement would be in breach of the warranty and liable in damages for the breach.

26. It is submitted that the contract from its very inception was impossible to perform as BCAS was not convinced to provide AEP to the personnel of the contractors who are engaged in Meet and Greet Services in the SHA. It is submitted that the Respondent was well aware that AEP would not be issued by BCAS but still proceeded to float a tender with conditions that the Meet and Greet Services must be provided in the SHA also.

27. It is also submitted that assuming without admitting for a moment, if the service to be provided by the petitioner is restricted outside the SHA, then passengers would not be interested in availing the services offered by the petitioner as the same is of no use to them. It is also factually the case of the petitioner that factually the services were rendered outside the SHA and therefore did not garner any patronage from the passengers as they felt it was not helpful at all, apart from the fact that the passengers were not willing to pay for such partial services. Therefore, as per Section 56 of the Indian Contract Act, the contract was impossible and incapable of being performed and therefore was void.

28. It is further submitted that it is thus clear as day that the contract entered between the petitioner and the respondents was void and did not bind the petitioner same cannot be the basis of any legal/contractual obligations. The respondent having entered into the contract with the knowledge that the petitioner would not be able to perform its obligations under the contract is precluded from enforcing the terms of the contract, however, the respondent would still be liable to make good for the loss suffered by the petitioner.

29. It is submitted that the respondent, in all fairness, ought not have invited the tender in the present case as they were fully aware that the no successful tenderer would be able to render services to the Passengers in the SHA.

30. It is submitted that the respondent is also guilty of misrepresenting to the petitioner while entering into the contract. The respondent having knowledge that the AEP which is a sine qua non for entering the SHA of the Airport and for which permit is not being issued by BCAS, had concealed the same from the Petitioner. As submitted earlier, Ministry of Civil Aviation exercises administrative control over BCAS, the 1 Respondent and the Director General of Civil Aviation.

31. It is further submitted that since the first respondent as well as BCAS are both administratively controlled by the Ministry of Civil Aviation, it is obvious that the first respondent was fully aware about the regulations/guidelines with regard to issuance of AEP by

BCAS. Despite having full knowledge that BCAS was not issuing AEPs citing security concerns and admittedly, the earlier contract entered by the Respondent was cancelled on the same issue, the respondents have failed to intimate the Petitioner regarding the same.

32. It is therefore submitted that apparent that the Respondent was guilty of misrepresenting that they would facilitate the issuance of AEPs, while knowing that BCAS has denied permission to provide Meet and Greet Services in the SHA. It is submitted that these actions of the respondents clearly amounts to suppression.

33. It is therefore submitted that the Sole Arbitrator has failed to consider this legal issue in the Award and has mechanically proceeded to pass the Award in favour of the respondent, his former employer. https://www.mhc.tn.gov.in/judis

34. It is submitted that the Respondent being a Government enterprise, falls within the definition of 'State' under Article 12 of the Constitution of India. Therefore, the respondent is expected to meet a higher standard of transparency than a private party when engaging in business transactions. The respondents having public element cannot act arbitrarily or suppress material facts even in contractual matters as it is violative of Article 14 of the Constitution of India. It is submitted that the Hon'ble Supreme Court has held in Kumari Shrilekha Vidyarthi and Others vs. State of UP and others, (1991) 1 SCC 212, that State action cannot be arbitrary and in violation of Article 14 of the Constitution of India.

35. That apart, learned Senior Counsel for the petitioner also drew attention to the decision of the Hon’ble Supreme Court in Kumari Shrilekha Vidyarthi and Others vs. State of U.P. and Others, (1991) 1 SCC 212, wherein, it was held that in contractual matters, any such act of the State or a public body adversely affect the public interest. It is submitted that every holder of a public office is a trustee whose highest duty is to the people of the country and, therefore, every act of the holder of a https://www.mhc.tn.gov.in/judis public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good. A specific reference was made to Paragraph 27 of the aforesaid decision.

36. It is therefore submitted that the actions of the respondent in floating and awarding the tender after being informed of the fact that the BCAS would not issue AEP for the petitioner is condemnable. Had this been set forth in the tender document, then the petitioner would not have even ventured to submit its bid. This renders the action of the respondent being a State Enterprise violative of Article 14 of the Constitution of India.

37. Therefore, it is submitted that the Contract entered between the petitioner and the respondent has become void as the same was impossible of performance by the petitioner and the respondent who had entered into the contract knowing fully-well that the petitioner would not be in a position to perform the same is definitely not entitled to any relief. However, the Sole Arbitrator has failed to consider this aspect as well. https://www.mhc.tn.gov.in/judis

38. It is further stated that the entire procedure from the eligibility/qualification of the Arbitrator, to the power to appoint him and the procedure of appointment are also bad in law, vitiating the entire proceeding that took place thereafter, culminating in the Award. Such Awards have been declared to be void and unenforceable and this is a case where impartiality and inequality between the parties are clearly seen at every stage.

39. A reference is made to the decision of Calcutta High Court in Cholamandalam Investment & Finance Company Ltd. v. Amrapali Enterprises & Anr., 2023 SCC OnLine Cal 605. De hors this contention, even on the merit of the matter, the Award is in conflict with the basic notions of morality and justice as the contract is frustrated and is fraught with misrepresentation and hence, is in conflict with the public policy of India and deserves to be interfered with.

40. It is submitted that there should be an express agreement in writing for such waiver. In this case, it is submitted that the applicant was https://www.mhc.tn.gov.in/judis unaware of the law settled by the Hon'ble Supreme Court in Perkins Eastman Architects DPC and Another vs. HSCC (INDIA) Limited, (2020) 20 SCC 760 and therefore, even though the petitioner had consented for appointment of the Arbitrator on 08.06.2022, the consent cannot be construed to be a valid consent in terms of proviso to Section 12(5) of the Arbitration and Conciliation Act, 1996.

41. A further reference was made by the learned Senior Counsel to the decision of the learned Single Judge of this Court in P.Cheran vs. Gemini Industries and Imaging Limited, 2323 SCC OnLine Mad 1887. A specific reference was made to Paragraphs 21 & 23 of the aforesaid decision.

42. The learned Senior Counsel for the petitioner would submit that the impugned Award passed by the learned Arbitrator suffers from patent illegality and therefore attracts the sting under Section 34(2-A) of the Arbitration and Conciliation Act, 1996.

43. The learned Senior Counsel for the petitioner would further submit that the award is also liable to be interfered with and set aside in terms of Section 34(2)(b)(ii) read with Explanation (i) (ii) & (iii).

44. It is submitted that the previous contractor namely Akbar Travels withdrew the service as the access was limited upto the ticketing counter and therefore, the Tender that was floated subsequently which induced the petitioner of a false promise that the petitioner will be able to earn amounts for Meet and Greet Service (Swagat Seva) at Chennai Airport after investing a huge sum towards the License Fee, Security Deposit etc.

45. In this connection, learned Senior Counsel for the petitioner has drawn attention to the decision of the Hon'ble Supreme Court in Motilal Padampat Sugar Mills Co.Ltd., vs. State of Uttar Pradesh and Others, (1979) 2 SCC 409. It is submitted that there can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right, he intentionally abandons it. A specific reference was made to Paragraph 6 from the said decision.

46. It is therefore prayed for setting aside the impugned Award dated 18.05.2023, passed by the Sole Arbitrator in respect of the disputes between the petitioner and the first respondent under the License Agreement dated 27.07.2016.

47. The learned Senior Counsel for the petitioner also relied on the following decisions:-

i. TRF Limited Vs. Energo Engineering Project Limited, (2017) 8 SCC 377.

ii. HRD Corporation Vs. Gail, (2018) 12 SCC 471. iii.Prime Store, rep. by its Partner and others Vs. Sugam Vanijya Holdings Private Limited and others, 2023 SCC OnLine Mad 2898.

iv. Steelman Telecom Limited Vs. Power Grid Corporation of India Ltd., 2023 SCC OnLine Del 4849.

48. Defending the impugned Award, the learned Additional Solicitor General for the respondents would submit that the Award is well reasoned and does not call any interference in the hands of this Court under Section 34 of the Arbitration and Conciliation Act, 1996.

49. It is submitted that indeed there was a waiver in accordance with Section 12(5) of the Arbitration and Conciliation Act, 1996.

50. It is submitted that in accordance with the terms of the Arbitration Clause, the respondents had sent the names of the following five persons to the petitioner on 06.06.2022 to be nominated as Arbitrator:-

i.Sh.L.R.Garg, IAS (Retd.);

ii. Sh.Madhukar Gupta, Ex. Addl. Chief Secretary & Principal Resident Commissioner iii. Sh.N.Krishnamoorthi, DGW, (Retd.), CPWD; iv. Sh.Rajesh Bhandari, Ex.Executive Director (F&A), AAI; v. Sh.S.K.Gupta, Ex.Executive Director (Engg.), AAI.

51. It is submitted that the petitioner consented for appointment of Sh.Rajesh Bhandari, Ex.Executive Director (F&A), AAI as the Arbitrator vide E-Mail dated 08.06.2022. It is therefore submitted that the challenge to the impugned Award on the ground that the learned Arbitrator suffered from disqualification under Section 12(5) of the Arbitration and Conciliation Act, 1996 read with Schedules V and VII of the Arbitration and Conciliation Act, 1996 cannot be countenanced. It is submitted that it has to be construed that there was an ‘express agreement’ in view of Email dated 18.06.2022 of the petitioner.

52. It is submitted that in Bharat Broadband Network Limited vs. United Telecoms Limited, (2019) 5 SCC 755, the appointment of sole Arbitrator was made by the CMD contrary to the decision of the Hon'ble Supreme Court in the case of TRF Limited referred to supra rendered on 03.07.2017, where an application for terminating the mandate was filed under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996.

53. It is submitted on behalf of the respondent that the petitioner having participated in the appointment of the Arbitrator and thereafter in the Arbitral Proceedings, the petitioner is now precluded from raising objections in relation to the jurisdiction of the arbitrator at this juncture. It is submitted that the petitioner argued that the award of the Arbitrator will not be challenged on the ground that the award of the Arbitrator appointed was an employee and that the appointment of the Arbitrator will not be challenged or be open to question in any Court of Law, on this account. https://www.mhc.tn.gov.in/judis Dispute Resolution Clause as contained in the License Agreement reads as under : -

> "All disputes and differences arising out of or in any way touching or concerning this Agreement (except those the decision whereof is otherwise herein before expressly provided for or to which the Public Premises [Eviction of Unauthorised Occupants] Act and the rules framed thereunder which are now enforced or which may hereafter come into force are applicable) shall, in the first instance. Be referred to a Dispute Resolution Committee (DRC) setup at the airports, for which a written application should be obtained from the party and the points clearly spelt out. Before making a reference to Dispute Resolution Committee (DRC) setup at the airports, for which a written application should be obtained from the party and the pointe clearly spelt out. Before making a reference to dispute resolution to dispute resolution committee, the licensee will have to first deposit the disputed amount with AAl and the consent shall have to be obtained from the licensee for acceptance of the recommendations of the dispute resolution committee. In case the dispute is not resolved within 45 days of reference, then the case shall be referred to the sole arbitration of a person to be appointed by the Chairman/Member of the Authority subject to the condition that the licensee will have to deposit the disputed amount with AAl as condition precedent before making reference to the arbitration for adjudication of dispute. The award of the Arbitrator so appointed https://www.mhc.tn.gov.in/judis as aforesaid is or has been an employee of the Authority and the appointment of the Arbitrator will not be challenged or be open to question in any Court of Law, on this account."

54. Therefore, as provided for hereinabove, the existing arbitration clause as per the License Agreement provided for a unilateral appointment by the representative of the first respondent herein. It is an admitted fact that clauses of such nature are bad in law which the Supreme Court clarified succinctly in Perkins Eastman Architects DPC referred to supra. However, the actual appointment of the arbitrator, subsequent to the DRC proceedings, were done in a manner that was a clear departure from the arbitration clause mentioned above.

55. It is submitted that as evinced by the petitioner communication dated 09.02.2022, a request was made by the petitioner themselves for appointment of an arbitrator. In response thereto, the representative of the first respondent responded, by providing a panel of arbitrators from which the petitioner was provided with an option of choosing an arbitrator. It is pertinent to note that the panel contained 5 names of which only two names https://www.mhc.tn.gov.in/judis were ex-employees of the first respondent. The other three names were unconnected persons being retired officers of high ranking posts in other public sector undertakings.

56. It was the petitioner who vide, communication dated 08.06.2022, conveyed its consent for the appointment of one Mr. Rajesh Bhandari, Ex. Executive Director (F&A), AAI.

57. Such panel appointments, where the panel is provided by one party and the nominee is picked by the other Party, has been discussed extensively and upheld in Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited, (2017)4 SCC 645 wherein, it was held that when a broad panel to choose from has been provided to one party, despite the panel containing names of past employees of the said Party, would not lead the presumption of impartiality and neutrality as envisaged under Section 12 of the Act. This was because a counter-balancing of rights was created where the panel was picked by one party, with the ultimate choice of appointment being left to the other Party. This was further fortified by the https://www.mhc.tn.gov.in/judis judgment of the Apex Court in Central Organisation for Railway Electrification referred to supra.

58. It is therefore submitted that having willingly and without demur, acted in departure from the arbitration clause and having exercised its choice in appointing an arbitrator from a panel that was provided to it, the petitioner is precluded from now raising the same as a ground in the present Petition. In the event that the petitioner had any concern in relation to the said appointment of the Arbitrator, that it so willingly chose, it ought to have exercised the rights provided to it under Section 13(2) of the Act.

59. It is further submitted that Section 13(2) states that in the absence of the parties having agreed to a procedure for appointment of arbitrator, the party that intends to challenge an arbitrator, shall, within 15 days after becoming aware of the constitution of the Arbitral Tribunal or after becoming aware of any circumstances as provided in Section 12(3), send a written statement of the reasons for such challenge to the Arbitral Tribunal. https://www.mhc.tn.gov.in/judis

60. It is further submitted that as per Section 13(4) and 13(5), only upon such challenge being unsuccessful before the Tribunal and an arbitral award being passed by the arbitrator, the said Party can raise the said ground in a challenge under Section 34 of the Act.

61. It is submitted that admittedly, the petitioner never filed any Application or made any Statement under Section 13(2) of the Act. On the contrary, it was the petitioner that chose the Arbitrator from a panel of arbitrators and willingly participated in the arbitral proceedings.

62. It is the contention of the petitioner that the respondent, being aware of the fact that the BCAS was unlikely to provide the AEP to the petitioner for the purposes of the provision of services,

misrepresented the same to the Petitioner and has thus committed fraud. Further, owing to the non-grant of the AEP, the act envisaged by the contract is now impossible, thereby rendering it void as per Section 54 of the Contract Act. https://www.mhc.tn.gov.in/judis

63. It is also submitted that as far as the contention of fraud is concerned, the same was not the ground for filing the petition under section 34 of the Arbitration and Conciliation Act, 1996 and hence cannot be argued. Even proceeding on a demurrer that the ground could be admitted, it is pertinent to note that Section 17 of the Contract Act provides an inclusive definition of the term "fraud". Similarly, as far as the contention of misrepresentation is concerned, Section 18 of the Contract Act provides an inclusive definition of the term "misrepresentation".

64. It is further submitted that the law that becomes relevant in this regard is Section 2(i) of the Contract Act that defines a “voidable contract” to be one that is enforceable by law at the option of one party but not at the option of the other. Further, pertinently, Section 2(j) of the Contract Act states that "a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable". When read together, it would indicate that when a party, at whose option a contract is said to be enforceable, does not so do, then the contract would become void.

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65. It is submitted that the conduct of the petitioner is to be noticed. It is the contention of the petitioner that the respondent herein misrepresented facts to the Petitioner. If this is taken to be true, the said Agreement came to be voidable at the option of the petitioner. In accordance with Section 2()), the Agreement would only become void if the petitioner herein rescinded the Agreement and made it unenforceable. Section 27 of the Specific Relief Act, 1963 is relevant. As per the said Section, a party may sue to have a contract rescinded where the contract is voidable at its option.

66. However, much to the contrary, the petitioner herein sought to continue the operations and provide services at revised and updated terms as identified hereinabove instead of rescinding the contract. This is fortified by the petitioner's action of continuing to perform the Agreement on revised terms, of its own accord. This is evinced by the communication dated 17.07.2017 of the petitioner indicating that the Meet & Greet services have resumed from 11.06.2017.

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67. It is further submitted that notwithstanding the above, the exception to Section 19 of the Contract Act would indicate that if the Party at whose option a contract is voidable, could have discovered the trust with ordinary diligence, then the said contract would no longer be voidable. In this regard it is necessary to draw reference to the Aircraft Act, 1934. Section 2(2) defines an Aerodrome, which would necessarily mean the space within which the Petitioner was to provide services. Section 5 of the Aircraft Act further stipulates that the Central Government may by notification make rules for the manufacture, possession, use and operation of aircrafts and for securing the safety of aircraft operations. In the exercise of such power, the Aircraft (Security) Rules,

2011 were published and notified as under:-

> a. “The said rules have been superseded by the Rules of 2023, however, for the purpose of the present Petition, the Rules of 2011 remain pertinent. Rule 2(1)(c) of the Rules define an "Aerodrome Entry Permit" to mean a photo identity card, smart card or temporary permit issued by the Commissioner of Security (Civil Aviation), Bureau of Civil Aviation Security, Ministry of Civil Aviation or any person authorised by the Central Government for entry https://www.mhc.tn.gov.in/judis into the aerodrome or part of an aerodrome. b. Rule 2(g) defines "Commissioner" as the Commissioner of Security (Civil Aviation), Bureau of Civil Aviation Security, Ministry of Civil Aviation who shall be appropriate authority for the requirements of Annex 17.
>
> c. Rule 2(u) of the Rules states that "security" means a combination of measures, human and material resources intended to be used to safeguard civil aviation against acts of unlawful interference;
>
> d. Rule 2(x) of the Rules define "security restricted area" means airside areas of an airport into which access is controlled to ensure security of civil aviation including passenger areas between the screening check point and the aircraft, the ramp, baggage mark-up area, cargo sheds, mail center, airside catering and aircraft cleaning premises;
>
> e. Rules 18 and 19 of the Rules set out the restrictions on the entry into the aerodrome and security restricted area. The rules specify that access will only be granted to those that have the AEP and the same shall be issued only by the Commissioner after due verification. The Central Government may direct any other person to issue such AEP. The access to the aerodrome with the AEP or without shall be entirely at the will and verification of the Commissioner and/or the aerodrome operator and the same is not within the control of any other authority including the Respondents herein”.
>
> https://www.mhc.tn.gov.in/judis

68. Therefore, at the time of participating in the tender, it is presumed that the Petitioner herein would acquaint itself with the applicable laws and rules to the services that it was meant to bind them. It is pertinent to state that as per the clauses in the letter of award granted to the Petitioner and the License Agreement dated 27.07.2016 was executed between the Parties. It was solely the responsibility of the Petitioner to obtain necessary permits and licenses that will be required to provide the services under the Agreement.

69. It is therefore submitted that the petitioner, knowingly executed the Agreement and accepted the obligations of obtaining all permits and licenses upon itself alone, cannot presently state that it was the Respondent's obligation to facilitate the same. Further, no act of misrepresentation has taken place and even if it be admitted that there was a misrepresentation, in argue do, the petitioner

consciously refrained from exercising the rights available to it to render the Agreement void and instead chose to consciously and by express consent and communication in this https://www.mhc.tn.gov.in/judis regard, continued to perform the obligations under the Agreement. It is therefore prayed for dismissal of this petition.

70. The learned counsel for the respondent has placed reliance on the following decisions:-

> i. Central Organisation for Railway Electrification Vs. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company, (2020) 14 SCC 712.
>
> ii. Government of Haryana PWD Haryana (B and R) Branch Vs. G.F.Toll Road Private Limited and others, (2019) 3 SCC 505.

71. I have considered the arguments advanced by the learned counsel for the petitioner and the respondent. I have perused the documents filed by both parties.

72. In Bharat Broadband Network Limited Vs. United Telecoms Limited, (2019) 5 SCC 755, the Hon'ble Supreme Court referred to Section 12(5) of the Arbitration and Conciliation Act, 1996 and held as under:-

> "20. This then brings us to the applicability of the proviso to Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, https://www.mhc.tn.gov.in/judis the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub- section (5) of Section 12 by an express agreement in writing. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an "express agreement in writing". The expression "express agreement in writing" refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct. Here, Section 9 of the Contract Act, 1872 becomes important. It states:
>
> "9. Promises, express and implied.—Insofar as the proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied." It is thus necessary that there be an "express" agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court as indicating an express agreement on the facts of the case is dated 17-1-2017. On this date, the Managing https://www.mhc.tn.gov.in/judis Director of

> the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as an arbitrator. Shri Khan's invalid appointment only became clear after the declaration of the law by the Supreme Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] which, as we have seen hereinabove, was only on 3-7-2017. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an application on 7-10-2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] and asking him to declare that he has become de jure incapable of acting as an arbitrator. Equally, the fact that a statement of claim may have been filed before the arbitrator, would not mean that there is an express agreement in words which would make it clear that both parties wish Shri Khan to continue as arbitrator despite being ineligible to act as such. This being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2) and Section 16(2) of the Act to the facts of the present case, and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator. The judgment under appeal is also incorrect in stating that there is an express waiver in writing from the fact that an appointment letter has been issued by https://www.mhc.tn.gov.in/judis the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate.

73. Paragraph Nos.21 & 23 in P.Cheran Vs. Gemini Industries & Imaging Limited, rep. by its Official Liquidator, 2023 SSC OnLine Mad 1887, it was observed as under:-

> “21. Keeping in mind the provisions of law and the relevant case laws relied on by the parties and the arguments advanced by the learned counsel for the Parties, this Court is inclined to deal with the issue as regards the validity of the unilateral appointment of the learned Sole Arbitrator without providing express agreement in writing by the petitioners in terms of proviso of Section 12(5) of the Act.
>
> 23. The first principle of natural justice is ‘nemo judex in causa sua’ which means ‘no man can be a judge in his own cause’. This principle intends to avoid any ‘reasonable apprehension of bias’ that may arise during any judicial process. Section 12 of the Arbitration and Conciliation Act, 1996 lays down provisions for the appointment of an Arbitrator and conditions where the appointment may be valid or invalid”

74. In Motilal Padampat Sugar Mill Co. Ltd., Vs. State of Uttar Pradesh and others, (1979) 2 SCC 409, the Court held as under:-

https://www.mhc.tn.gov.in/judis “6. Secondly, it is difficult to see how, on the facts, the plea of waiver could be said to have been made out by the State Government. Waiver means abandonment of a right and it may be either express or implied from conduct, but its basic requirement is that it must be “an intentional act with knowledge”. Per Lord Chelmsford, L.C. in Earl of Darnley v. London, Chatham and Dover Rly. Co. [(1867) LR 3 HL 43, 57 : 16 LT 217] There can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right, he intentionally abandons it. It is pointed out in Halsbury's Laws of England (4th Edn.) Volume 16 in para 1472 at p. 994 that for a “waiver to be effectual it is essential that the person granting it should be fully informed as to his rights” and Isaacs, J. delivering the judgment of the High Court of Australia in Craine v. Colonial Mutual Fire Insurance Co. Ltd. [(1920) 28 CLR 305 (Aus)] has also emphasised that waiver “must be with knowledge, an essential supported by many authorities”. Now in the present case there is nothing to show that at the date when the appellant addressed the letter dated June 25, 1970, it had full knowledge of its right to exemption under the assurance given by Respondent 4 and that it intentionally abandoned such right. It is difficult to speculate what was the reason why the appellant addressed the letter dated June 25, 1970 stating that it would avail of the concessional rates of Sales Tax granted under the letter dated January 20, 1970. It is possible that the appellant might have thought that since no notification exempting the appellant from Sales Tax had been issued by the State Government under https://www.mhc.tn.gov.in/judis Section 4-A, the appellant was legally not entitled to exemption and that is why the appellant might have chosen to accept whatever concession was being granted by the State Government. The claim of the appellant to exemption could be sustained only on the doctrine of promissory estoppel and this doctrine could not be said to be so well defined in its scope and ambit and so free from uncertainty in its application that we should be compelled to hold that the appellant must have had knowledge of its right to exemption on the basis of promissory estoppel at the time when it addressed the letter dated June 25, 1970. In fact, in the petition as originally filed, the right to claim total exemption from Sales Tax was not based on the plea of promissory estoppel which was introduced only by way of amendment. Moreover, it must be remembered that there is no presumption that every person knows the law. It is often said that everyone is presumed to know the law, but that is not a correct statement : there is no such maxim known to the law. Over a hundred and thirty years ago, Maule, J., pointed out in Martindale v. Falkner [(1846) 2 CB 706 : 135 ER 1124] :

“There is no presumption in this country that every person knows the law : it would be contrary to common sense and reason if it were so.” Scrutton, L.J., also once said:

“It is impossible to know all the statutory law, and not very possible to know all the common law.” But it was Lord Atkin who, as in so many other spheres, put the point in its proper context when he https://www.mhc.tn.gov.in/judis said in Evansv.Bartlam [(1937) AC 473, 479 : (1937) 2 All ER 646] :

> "... the fact is that there is not and never has been a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application." It is, therefore, not possible to presume, in the absence of any material placed before the Court, that the. appellant had full knowledge of its right to exemption so as to warrant an inference that the appellant waived such right by addressing the letter dated June 25, 1970. We accordingly reject the plea of waiver raised on behalf of the State Government.

75. In Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, (1991) 1 SCC 212, the Hon'ble Supreme Court held as under:-

> "27. Unlike a private party whose acts uninformed by reason and influenced by personal predilections in contractual matters may result in adverse consequences to it alone without affecting the public interest, any such act of the State or a public body even in this field would adversely affect the public interest. Every holder of a public office by virtue of which he acts on behalf of the State or a public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract. Thus, every holder of a public office is a trustee whose highest duty is to the people of the https://www.mhc.tn.gov.in/judis country and, therefore, every act of the holder of a public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good. With the diversification of State activity in a Welfare State requiring the State to discharge its wide ranging functions even through its several instrumentalities, which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touchstone of Article 14. "

76. As noted above, the primary ground on which the petitioner has attacked the impugned Award is that the impugned Award is nullity in view of the proviso to Section 12(5) of the Arbitration and Conciliation Act, 1996 which has to be read in conjunction with VII Schedule to the Arbitration and Conciliation Act, 1996.

77. The amendment to Section 12 in the form of insertion of Section 12(5) of the Arbitration and Conciliation Act, 1996 was made by Act No.3 of 2016 with effect from 23.10.2015. The aforesaid amendment inserted several new provisions to the Act including VII Schedule to the Act apart from amendments to the other Schedules.

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78. In the context of Section 12(5) of the Arbitration and Conciliation Act, 1996 read with VII Schedule to the Act, the Hon'ble Supreme Court had pronounced its Judgment on 03.07.2017 in TRF Limited Vs. Energo Engineering Project Limited, (2017) 8 SCC 377. The said case dealt with a

case when the Agreement containing the Arbitration Clause was signed prior to the above amendment. An appeal against the order of the High Court appointing an Arbitrator who was disqualified from acting as an Arbitrator in view of the amendment to the Arbitration and Conciliation Act, 1996 vide Act No.3 of 2016 with effect from 23.10.2015 was before the Court was before the Court. There, the appellant invoked Clause 33 of the General Terms and Conditions of the Purchase Order dated 28.12.2015 seeking to refer the dispute to an Arbitrator as per which any dispute or difference between the parties in connection with the agreement shall be referred to the sole arbitration of the Managing Director or his nominee. A former Judge of the High was appointed as an Arbitrator by the Managing Director of the respondent therein in terms of aforesaid Clause. After the appointment was made, the appellant however filed an application under https://www.mhc.tn.gov.in/judis Sections 11(5) and 11(6) of the Act for appointment of an independent Arbitrator under Section 11(2) of the Act in view of the Amendment to the Act.

79. The said case was laid on the basis of restrictions in Section 12(5) of the Act read with V & VII Schedules to the Act. The V Schedule contemplates the situation which gives rise to justifiable doubts as to the independence or impartially of arbitrators. It has to be read in conjunction with Section 12(1)(a) of the Act, as per which, when a person is approached in connection with his possible appointment as an Arbitrator, such person shall disclose in writing any circumstances, such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality. Section 12(1)(a) of the Arbitration and Conciliation Act, 1996 reads as under:-

> https://www.mhc.tn.gov.in/judis
>
> 12.Grounds for challenge.- (1)When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—
>
> (a)such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality;

(b)....

.....

80. In the above case, the High Court proceeded to appoint a former Judge as a Sole Arbitrator to decide the dispute between the parties. Comparing the provisions as it stood prior to amendment and after the amendment, the Hon'ble Supreme Court ultimately concluded that the Managing Director of the respondent therein who is ineligible to act as an Arbitrator was also ineligible to appoint an Arbitrator. The decision of the High Court appointing a former Judge of the Hon'ble Supreme Court as sole Arbitrator in terms of aforesaid Clause 33(d).

81. The appellant had thus preferred an application under Section 11(5) read with Section 11(6) of the Act on the ground that was set aside on the ground that once the identity of the Managing Director as the Sole Arbitrator is lost, the power to nominate someone else as an Arbitrator is obliterated. Facts in the above case is captured in para 5 of its decision which reads as under :-

> "5. After the appointment was made, the appellant preferred an application under Section 11(5) read with Section 11(6) of the Act for appointment of an arbitrator under Section 11(2) of the Act. The said foundation was structured on the basis that under Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) read with the Fifth and the Seventh Schedules to the amended Act, the Managing Director had become ineligible to act as the arbitrator and as a natural corollary, he had no power to nominate. The stand put forth by the appellant was controverted by the respondent before the High Court on the ground that the Fifth and the Seventh Schedules lay down the guidelines and the arbitrator is not covered under the same and even if it is so, his power to nominate someone to act as an arbitrator is not fettered or abrogated. The High Court analysed the clauses in the agreement and opined that the right of one party to a dispute to appoint a sole arbitrator prior to the amended Act had been well recognised and the amended Act does not take away such a right. According to the learned https://www.mhc.tn.gov.in/judis Designated Judge, had the intent of the amended Act been to take away a party's right to nominate a sole arbitrator, the same would have been found in the detailed list of ineligibility criteria enumerated under the Seventh Schedule to the Act and, therefore, the submission advanced by the appellant, the petitioner before the High Court, was without any substance. Additionally, the High Court noted that the learned counsel for the petitioner before it had clearly stated that it had faith in the arbitrator but he was raising the issue as a legal one, for a Managing Director once disqualified, he cannot nominate. That apart, it took note of the fact that the learned arbitrator by letter dated 28-1-2016 has furnished the requisite disclosures under the Sixth Schedule and, therefore, there were no circumstances which were likely to give rise to justifiable doubts as to the independence and impartiality. Finally, the Designated Judge directed that besides the stipulation in the purchase order governing the parties, the court was inclined to appoint the former Judge as the sole arbitrator to decide the disputes between the parties".

> As regards the issue about fresh appointment, the Hon'ble Supreme Court remanded the matter to the High Court for fresh consideration. Para 55 of the Judgment. Paragraphs 54 & 55 of the decision in the case of TRF Limited referred to supra reads as under:-

> https://www.mhc.tn.gov.in/judis "54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director,

> nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.
>
> 55. Another facet needs to be addressed. The Designated Judge in a cryptic manner has ruled after noting that the petitioner therein had no reservation for nomination of the nominated arbitrator and further taking note of the fact that there has been a disclosure, that he has exercised the power under Section 11(6) of the Act. We are impelled to think that that is not the right procedure to be adopted and, therefore, we are unable to agree with the High Court on that score also and, accordingly, we set aside the order appointing the arbitrator. However, as Clause (c) https://www.mhc.tn.gov.in/judis is independent of Clause (d), the arbitration clause survives and hence, the Court can appoint an arbitrator taking into consideration all the aspects.

Therefore, we remand the matter to the High Court for fresh consideration of the prayer relating to appointment of an arbitrator".

82. The above decision was rendered on 03.07.2017 by a Larger Bench of the Hon'ble Supreme Court. The Hon'ble Supreme Court, thereafter, passed its Judgment in Perkins Eastman Architects DPC and another Vs. HSCC (India) Limited, (2020) 20 SCC 760 on 26.11.2019. In Perkins Eastman Architects DPC and another Vs. HSCC (India) Limited, (2020) 20 SCC 760, referred to its earlier decision in Bharat Broadband Network Limited Vs. United Telecoms Limited, (2019) 5 SCC 755 including decision in the case of TRF Limited referred to supra and in Voestalpine Schienen Gmph Vs. Delhi Metro Rail Corporation Limited, (2017) 4 SCC 665.

83. The view of the Hon'ble Supreme Court in the case of TRF Limited referred to supra was re-iterated in paragraph 21 of Perkins https://www.mhc.tn.gov.in/judis Eastman Architects DPC and another Vs. HSCC (India) Limited, (2020) 20 SCC 760. It reads as under:-

> "21. But, in our view that has to be the logical deduction from TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Para 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate

an arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole https://www.mhc.tn.gov.in/judis arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and recognised by the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]".

84. Referring to paragraph 32 of the decision in the case of TRF Limited referred to supra and the decision in the case of Voestalpine Schienen Gmph referred to supra, a similar issue as was discussed in paragraph 25, 26 & 27 in Perkins Eastman referred to supra. They read as under:-

"25. In the light of the aforestated principles, the report of the Law Commission and the decision in Voestalpine Schienen GmbH [Voestalpine Schienen GmbH v. DMRC, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , the imperatives of creating healthy arbitration environment demand that the instant application deserves acceptance.

26. The further question that arises is whether the power can be exercised by this Court under Section 11 of the Act when the appointment of an arbitrator has already been made by the respondent and whether the appellant should be left to raise challenge at an appropriate stage in terms of remedies available in law. Similar controversy was gone into by a Designated Judge of this Court in Walter Bau AG [Walter Bau AG v.

https://www.mhc.tn.gov.in/judis Municipal Corpn. of Greater Mumbai, (2015) 3 SCC 800 : (2015) 2 SCC (Civ) 450] and the discussion on the point was as under : (SCC pp. 805-06, paras 9-10) "9. While it is correct that in Antrix [Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd., (2014) 11 SCC 560 : (2014) 4 SCC (Civ) 147] and Pricol Ltd. [Pricol Ltd. v. Johnson Controls Enterprise Ltd., (2015) 4 SCC 177 :

(2015) 2 SCC (Civ) 530] , it was opined by this Court that after appointment of an arbitrator is made, the remedy of the aggrieved party is not under Section 11(6) but such remedy lies elsewhere and under different provisions of the Arbitration Act

(Sections 12 and 13), the context in which the aforesaid view was expressed cannot be lost sight of. In Antrix [Antrix Corpn. Ltd. v.

Devas Multimedia (P) Ltd., (2014) 11 SCC 560 : (2014) 4 SCC (Civ) 147] , appointment of the arbitrator, as per the ICC Rules, was as per the alternative procedure agreed upon, whereas in Pricol Ltd. [Pricol Ltd. v.

Johnson Controls Enterprise Ltd., (2015) 4 SCC 177 : (2015) 2 SCC (Civ) 530] , the party which had filed the application under Section 11(6) of the Arbitration Act had already submitted to the jurisdiction of the arbitrator. In the present case, the situation is otherwise.

10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar https://www.mhc.tn.gov.in/judis the jurisdiction under Section 11(6) cannot be countenanced in law. In the present case, the agreed upon procedure between the parties contemplated the appointment of the arbitrator by the second party within 30 days of receipt of a notice from the first party.

While the decision in Datar Switchgears Ltd.

[Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151] may have introduced some flexibility in the time-frame agreed upon by the parties by extending it till a point of time anterior to the filing of the application under Section 11(6) of the Arbitration Act, it cannot be lost sight of that in the present case the appointment of Shri Justice A.D. Mane is clearly contrary to the provisions of the Rules governing the appointment of arbitrators by ICADR, which the parties had agreed to abide by in the matter of such appointment. The option given to the respondent Corporation to go beyond the panel submitted by ICADR and to appoint any person of its choice was clearly not in the contemplation of the parties. If that be so, obviously, the appointment of Shri Justice A.D. Mane is non est in law. Such an appointment, therefore, will not inhibit the exercise of jurisdiction by this Court under Section 11(6) of the Arbitration Act. It cannot, therefore, be held that the present proceeding is not maintainable in law. The appointment of Shri Justice A.D. Mane made beyond 30 days of the receipt of notice by the petitioner, though may appear to be in conformity with the law laid down in Datar Switchgears Ltd.

[Datar Switchgears Ltd. v. Tata Finance https://www.mhc.tn.gov.in/judis Ltd., (2000) 8 SCC 151] , is clearly contrary to the agreed procedure which required the appointment made by the respondent Corporation to be from the panel submitted by ICADR. The said appointment, therefore, is clearly invalid in law."

27.It may be noted here that the aforesaid view of the Designated Judge in Walter Bau AG [Walter Bau AG v. Municipal Corpn. of Greater Mumbai, (2015) 3 SCC 800 : (2015) 2 SCC (Civ) 450] was pressed into service on behalf of the appellant in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] and the opinion expressed by the Designated Judge was found to be in consonance with the binding authorities of this Court. It was observed : (TRF case

[TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , SCC p. 397, paras 32-33) "32.Mr Sundaram, learned Senior Counsel for the appellant has also drawn inspiration from the judgment passed by the Designated Judge of this Court in Walter Bau AG [Walter Bau AG v. Municipal Corpn. of Greater Mumbai, (2015) 3 SCC 800 : (2015) 2 SCC (Civ) 450] , where the learned Judge, after referring to Antrix Corpn. Ltd. [Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd., (2014) 11 SCC 560 : (2014) 4 SCC (Civ) 147] , distinguished the same and also distinguished the authority in Pricol Ltd. v. Johnson Controls Enterprise Ltd. [Pricol Ltd. v. Johnson Controls Enterprise Ltd., (2015) 4 SCC 177 : (2015) 2 SCC (Civ) 530] and came to hold that : (Walter Bau AG https://www.mhc.tn.gov.in/judis case [Walter Bau AG v. Municipal Corpn.

of Greater Mumbai, (2015) 3 SCC 800 :

> (2015) 2 SCC (Civ) 450] , SCC p. 806, para
>
> 10) '10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law....'
>
> 33.We may immediately state that the opinion expressed in the aforesaid case is in consonance with the binding authorities we have referred to hereinbefore."
>
> 85. In the light of the decision of the Hon'ble Supreme Court in the case of TRF Limited referred to supra, the appointment made in the case of Perkins Eastman referred to supra was set aside and the Hon'ble Supreme Court has appointed Dr.Justice A.K.Sikri, a former Judge of the Hon'ble Supreme Court as an Arbitrator to decide the dispute arising out the Agreement dated 22.05.2017.

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86. In Bharat Broadband Network Limited which was discussed above, the decision of the Hon'ble Supreme Court in the case of TRF Limited referred to supra was adverted to. The Hon'ble Supreme Court in the case of Bharat Broadband Network Limited referred to supra has held that the appointment of one Mr.Khan was ab initio and neither estoppels nor waiver operated against the appellant from challenging same in absence of an agreement in writing under the proviso to Section 12(5) of the Act.

87. The Hon'ble Supreme Court compared the facts of the case in TRF Limited referred to supra and the fact of the case in Bharat Broadband Network Limited referred to supra, and observed as under:-

> "18.... It will be noticed that the facts in the present case are somewhat similar. The APO itself is of the year 2014, whereas the appointment by the Managing Director is after the Amendment Act, 2015, just as in TRF Ltd. [TRF Ltd.v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Considering that the

> appointment in TRF Ltd.[TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] of a retired Judge of this Court was set aside as being https://www.mhc.tn.gov.in/judis non est in law, the appointment of Shri Khan in the present case must follow suit."

88. In Bharat Broadband Network Limited referred to supra, the dispute arose between the parties and therefore, the respondent invoked the Arbitration Clause in the General (Commercial) Conditions of Contract [GCC] and called upon the Managing Director of the appellant to appoint an independent impartial Arbitrator to adjudicate the dispute arising out of the Advance Purchase Order dated 30.09.2014 read with Clause III. 20.1 contained in the General (Commercial) Conditions of Contract [GCC].

89. In Bharat Broadband Network Limited referred to supra, after the appointment was made on 17.01.2017, the appellant chanced to notice the decision of the Hon'ble Supreme Court in the case of TRF Limited referred to supra , rendered on 03.07.2017 and thus, requested the Arbitrator to not to proceed as he was de jure incapable of performing his function as an Arbitrator and to withdraw, from the proceedings and therefore to allow the appellant to approach the High court for appointment of a new Arbitrator in his place.

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90. One Mr.Khan, the learned Arbitrator however by his cryptic order dated 21.10.2017 rejected the request of the appellant which led to filing of the application under Section 14 & 15 of the Arbitration and Conciliation Act, 1996 stating that the learned Arbitrator had become de jure incapable of acting as an Arbitrator and therefore, new Arbitrator be appointed in his place.

91. The High Court by its Judgment dated 22.11.2017 reported in 2017 SCC OnLine Del 11905 rejected the application stating that very person who appointed the learned Arbitrator was estopped from raising the plea that such an Arbitrator cannot be appointed after participating in the proceedings. It was further stated that the respondent had also filed a claim statement before the learned Arbitrator without any reservation and therefore, it would amount to a waiver of the applicability of Section 12(5) of the Act.

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92. The Hon'ble Supreme Court in paragraph 15 of the decision in the case of Bharat Broadband Network Limited referred to supra, after considering the decision of its earlier decision rendered in the case of TRF Limited referred to supra held that the proviso to Section 12(5) of the Act contemplates "express agreement in writing" and observed that "The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an "express agreement in writing". It further observed that "Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is

interdicted by the Seventh Schedule."

93. The decision of the Hon'ble Supreme Court in the case of Bharat Broadband Network Limited referred to supra has to be construed carefully in the context of sequence of events as the appointment was made on 17.01.2017 (after the amendment to Section 12 of the Act with effect https://www.mhc.tn.gov.in/judis from 23.10.2015 by Act No.3 of 2016) and prior to the decision of the Hon'ble Supreme Court in the case of TRF Limited referred to supra which was rendered on 03.07.2017.

94. Whereas, in the facts of the present case, the request for appointment was made by the petitioner after the dispute arose between the parties and in response, the respondent has consented the names of Arbitrators to appoint the learned Arbitrator from the names given by the respondent on 01.06.2022. By a reply mail, the petitioner consented for appointment of Mr.Rajesh Bhandari, Ex.Executive Director (F&A), AAI as the Arbitrator. Thus, there is "express agreement in writing" by the petitioner waiving the appointment of said Mr.Rajesh Bhandari as the Arbitrator. That apart under the agreement dated 27.06.2016 which is after the amendment to Act with effect from 23.10.2015, the parties agreed as follows:-

> "The award of the Arbitrator so appointed as aforesaid is or has been an employee of the Authority and the appointment of the Arbitrator will not be challenged or be open to question in any Court of Law, on this account." https://www.mhc.tn.gov.in/judis

95. That apart, the Arbitration Clause 30 of License Agreement dated 27.07.2016 in the present makes it clear that in case the dispute is not resolved within 45 days of reference, then the case shall be referred to the sole Arbitration of a person to be appointed by the Chairman/Member of the Authority subject to the condition that the petitioner will have to deposit the disputed amount with the respondent as condition precedent before making reference to the Arbitration for adjudication of the dispute. Arbitration Clause 30 of License Agreement dated 27.07.2016 further states that the award of the arbitrator so appointed as aforesaid is or has been an employee of the Authority and the appointment of the Arbitrator will not be challenged or be open to question in any Court of Law, on this account. The above Licence Agreement is dated 27.07.2016. Clause 30 of the License Agreement dated 27.07.2016 reads as under:-

> "30. All disputes and differences arising out of or in any way touching or concerning this Agreement (except those the decision whereof is otherwise herein before expressly provided for or to which the Public Premises [Eviction of unauthorized Occupants] Act and the rules framed thereunder which are now https://www.mhc.tn.gov.in/judis enforced or which may hereafter come into force are applicable), shall, in the first instance, be referred to a Dispute Resolution Committee (DRC) setup at the airports, for which a written application should be obtained from the party and the points clearly spelt out. Before making a reference to dispute resolution to dispute resolution committee, the licensee will have to first deposit the disputed amount with AAI and the consent shall have to be obtained from the licensee for acceptance of the recommendations of the dispute resolution

committee in case the dispute is not resolved within 45 days of reference, then the case shall be referred to the sole arbitration of a person to be appointed by the Chairman/Member of the Authority subject to the condition that the licensee will have to deposit the disputed amount with AAI as condition precedent before making reference to the arbitration for adjudication of dispute. The award of the arbitrator so appointed as aforesaid is or has been an employee of the Authority and the appointment of the Arbitrator will not be challenged or be open to question in any Court of Law, on this account.

Before making a reference to Dispute resolution committee, the licensee will have to first disputed amount with AAI and the consent shall be given by the licensee for acceptance of the recommendations of the Dispute Resolution Committee.

The case shall be referred to the sole arbitrator by the Chairman / Member of the Authority subject to the condition that the licensee shall have to deposit the disputed amount with AAI as condition precedent before making reference to the Arbitration for adjudication of dispute.

https://www.mhc.tn.gov.in/judis During the arbitral and dispute resolution proceedings, the licensee(s) shall continue to pay the full amount of license fee / dues regularly as per the award / agreement and perform all covenants of the agreements.

96. It would have been different if such an appointment and consent was made prior to the decision of the Hon'ble Supreme Court in the case of TRF Limited referred to supra which decision was followed by the Hon'ble Supreme Court in Perkins Eastman referred to supra. In any event, it was imperative on the part of the petitioner or the respondent to have filed application for terminating the mandate under Sections 13, 14 & 15 of the Act as was held in Walter Bau AG v. Municipal Corpn. of Greater Mumbai, (2015) 3 SCC 800.

97. Therefore, having allowed the Arbitration Proceedings to proceed, it is not open for the petitioner to state that the Arbitrator lacked jurisdiction as his appointment was suggested on 06.06.2022. The appointment of the learned Arbitrator was not hit by the restrictions in Section 12(5) of the Arbitration and Conciliation Act, 1996. Having allowed the proceedings https://www.mhc.tn.gov.in/judis without any demur, it is not open for the petitioner to question the same.

The petitioner consented to the appointment of the learned Arbitrator by his response dated 08.06.2022 makes it clear that there is "express agreement in writing".

98. Thus, in the fact of the case, it is clear that there was a clear "express agreement in writing" as is contemplated in proviso to Section 12(5) of the Act in the License Agreement dated 27.07.2016 signed between the petitioner and the respondent which

is after the amendment to the Act with effect from 23.10.2015 although prior to the decisions of the Hon'ble Supreme Court in the cases of TRF Limited referred to supra, Perkins Eastman referred to supra and in the case of Bharat Broadband Network Limited referred to supra.

99. That apart, the decision in the case Central Organisation for Railway Electrification Vs. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company, (2020) 14 SCC 712 was rendered by the Larger Bench of the Hon'ble Supreme Court presided over by three Judges of the Hon'ble https://www.mhc.tn.gov.in/judis Supreme Court on 17.12.2019 at about the same time when the decision was rendered in the case of Perkins Eastman referred to supra on 26.11.2019.

100. The Hon'ble Supreme Court in Central Organisation for Railway Electrification has also referred to the decision in the case of Perkins Eastman referred to supra in paragraph 35 and discussed the issue in the context of amendment brought to the General Conditions of Contract.

The Hon'ble Supreme Court has observed as under:-

36. As discussed earlier, after the Arbitration and Conciliation (Amendment) Act, 2015, the Railway Board vide Notification dated 16-11-2016 has amended and notified Clause 64 of the General Conditions of Contract. As per Clause 64(3)(a)(ii) [where applicability of Section 12(5) of the Act has been waived off], in a case not covered by Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three gazetted railway officers not below the rank of Junior Administrative Grade or two railway gazetted officers not below the rank of Junior Administrative Grade and a retired railway officer retired not below the rank of Senior Administrative Grade Officer, as the arbitrators.

For this purpose, the General Manager, Railways will send a panel of at least four names of gazetted railway officers of one or more departments of the Railways within sixty days from the date when a written and valid demand for arbitration is https://www.mhc.tn.gov.in/judis received by the General Manager. The contractor will be asked to suggest to the General Manager at least two names out of the panel for appointment as contractor's nominees within thirty days from the date of dispatch of the request from the Railways. The General Manager shall appoint at least one out of them as the contractor's nominee and will also simultaneously appoint balance number of arbitrators from the panel or from outside the panel duly indicating the "Presiding Officer" from amongst the three arbitrators so appointed. The General Manager shall complete the exercise of appointing the Arbitral Tribunal within thirty days from the date of the receipt of the names of contractor's nominees.

37. Clause 64(3)(b) of GCC deals with appointment of arbitrator where applicability of Section 12(5) of the Act has not been waived off. In terms of Clause 64(3)(b) of GCC, the Arbitral Tribunal shall consist of a panel of three retired railway officers retired not below the rank of Senior

Administrative Grade Officers as the arbitrators. For this purpose, the Railways will send a panel of at least four names of retired railway officers empanelled to work as arbitrators indicating their retirement date to the contractor within sixty days from the date when a written and valid demand for arbitration is received by the General Manager. The contractor will be asked to suggest the General Manger at least two names out of the panel for appointment of contractor's nominees within thirty days from the date of dispatch of the request of the Railways. The General Manager shall appoint at least one out of them as the contractor's nominee and will simultaneously https://www.mhc.tn.gov.in/judis appoint the remaining arbitrators from the panel or from outside the panel, duly indicating the "presiding officer" from amongst the three arbitrators. The exercise of appointing the Arbitral Tribunal shall be completed within thirty days from the receipt of names of contractor's nominees. Thus, the right of the General Manager in formation of the Arbitral Tribunal is counterbalanced by the respondent's power to choose any two from out of the four names and the General Manager shall appoint at least one out of them as the contractor's nominee.

38. In the present matter, after the respondent had sent the letter dated 27-7-2018 calling upon the appellant to constitute the Arbitral Tribunal, the appellant sent the communication dated 24-9-2018 nominating the panel of serving officers of Junior Administrative Grade to act as arbitrators and asked the respondent to select any two from the list and communicate to the office of the General Manager. By the letter dated 26-9-2018, the respondent conveyed their disagreement in waiving the applicability of Section 12(5) of the Amendment Act, 2015. In response to the respondent's letter dated 26-9-2018, the appellant has sent a panel of four retired railway officers to act as arbitrators giving the details of those retired officers and requesting the respondent to select any two from the list and communicate to the office of the General Manager. Since the respondent has been given the power to select two names from out of the four names of the panel, the power of the appellant nominating its arbitrator gets counterbalanced by the power of choice given to the respondent. Thus, the power of the General https://www.mhc.tn.gov.in/judis Manager to nominate the arbitrator is counterbalanced by the power of the respondent to select any of the two nominees from out of the four names suggested from the panel of the retired officers. In view of the modified Clauses 64(3)(a)(ii) and 64(3)(b) of GCC, it cannot therefore be said that the General Manager has become ineligible to act as (sic nominate) the arbitrator. We do not find any merit in the contrary contention of the respondent. The decision in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] is not applicable to the present case.

39. There is an express provision in the modified clauses of General Conditions of Contract, as per Clauses 64(3)(a)(ii) and 64(3)(b), the Arbitral Tribunal shall consist of a panel of three gazetted railway officers [Clause 64(3)(a)(ii)] and three retired railway officers retired not below the rank of Senior Administrative Grade Officers [Clause 64(3)(b)]. When the agreement specifically provides for appointment of the Arbitral Tribunal consisting of three arbitrators from out of the panel of serving or retired railway officers, the appointment of the arbitrators should be in terms of the agreement as agreed by the parties. That being the conditions in the agreement between the parties and the General Conditions of the Contract, the High Court was not justified in appointing an independent sole arbitrator ignoring Clauses 64(3)(a)(ii) and 64(3)(b) of the General Conditions of Contract and the impugned orders cannot be sustained.

40. In the result, the impugned orders dated 3-1-2019 [ECI – SPIC- SMO - MCML (JV) v. Central Organisation for Railway Electrification, 2019 SCC OnLine All 2404] and 29-3-2019 [ECI-SPIC-SMO-MCML (JV) v. Central Organisation for Railway Electrification, 2019 SCC OnLine All 5271] passed by the High Court of Judicature at Allahabad in Arbitration Application No. 151 of 2018 are set aside and these appeals are allowed. The appellant is directed to send a fresh panel of four retired officers in terms of Clause 64(3)(b) of the General Conditions of Contract within a period of thirty days from today under intimation to the respondent contractor. The respondent contractor shall select two from the four suggested names and communicate to the appellant within thirty days from the date of receipt of the names of the nominees. Upon receipt of the communication from the respondent, the appellant shall constitute the Arbitral Tribunal in terms of Clause 64(3)(b) of the General Conditions of Contract within thirty days from the date of the receipt of the communication from the respondent. The parties to bear their respective costs.

101. The decision in the case of P.Cheran Vs. Gemini Industries & Imaging Limited, rep. by its Official Liquidator, 2023 SSC OnLine Mad 1887 pertains to the Award dated 29.04.2015. However, it has referred to the decision rendered in the context of amendments to the provision of the Arbitration and Conciliation Act, 1996 after amendment with effect from https://www.mhc.tn.gov.in/judis 23.10.2015 in the light of the decisions of the Hon'ble Supreme Court in the cases of TRF Limited referred to supra, Perkins Eastman referred to supra and in the case of Bharat Broadband Network Limited referred to supra.

102. This view has been followed by this Court in another case in Prime Store, rep. by its Partner and others Vs. Sugam Vanijya Holdings Private Limited and others, 2023 SCC OnLine Mad 2898, wherein, the Award passed on 22.03.2021 was challenged although defect to the jurisdiction can be challenged at any point of time as held by the Hon'ble Supreme Court in the case of Kiran Singh Vs. Chaman Paswan, AIR 1954 SC 340 as under:-

> "6. The answer to these contentions must depend on what the position in law is when a court entertains a suit or an appeal over which it has no jurisdiction, and what the effect of Section 11 of the Suits Valuation Act is on that position. It is a https://www.mhc.tn.gov.in/judis fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was coram non judice, and that its judgment and decree would be nullities. The question is what is the effect of Section 11 of the Suits Valuation Act on this position."

103. In the facts of the present case, there is a clear indication that there was an 'express waiver' by the petitioner. Therefore, the challenge to the impugned Award is not made out. There is no defect in jurisdiction assumed by the Arbitrator as the petitioner consented for appointment of the learned Arbitrator after the amendments to the provision of the Arbitration and Conciliation Act, 1996 after amendment with effect from 23.10.2015, on 08.06.2022.

104. In the light of the above discussion, the challenge to the impugned Award on the ground that the Arbitrator was de jure incapable of resolving dispute between the parties cannot be countenanced. In view of the above, the challenge to the impugned Award is therefore unsustainable.

105. As far as the challenge to the decision on merits is concerned, there is hardly any case made out by the petitioner as the scope for interference under Section 34 of the Arbitration and Conciliation Act, 1996 is very limited as per the decision of the Hon'ble Supreme Court in Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India (NHAI), (2019) 15 SCC 131.

106. Scope of interference under section 34 of the Arbitration and Conciliation Act, 1996 is very limited. This Court can neither sit as a court of appeal or re-appreciate the evidence placed before the Arbitral Tribunal https://www.mhc.tn.gov.in/judis or substitute the finding of the Arbitral Tribunal with its own conclusion on facts or evidence. In this connection the decision of the Honourable Supreme Court in The Project Director, NHAI V. M. Hakim, (2021) 9 SCC 1 is invited wherein it was held that the power to set aside an Arbitral Award under Section 34 of the Arbitration And Conciliation Act, 1996 does not include the authority to modify the award. It further held that an award can be 'set aside' only on limited grounds as specified in Section 34 of the Act and it is not an appellate provision. It further held that an application under Section 34 for setting aside an award does not entail any challenge on merits to an award.

107. The Honourable Supreme Court in Ssangyong Engineering and Construction Co Ltd versus National Highway Authority of India, (2019) 15 SCC 131 has held that an award can be set aside on the ground of patent illegality under section 34 (2-A) of the Arbitration And Conciliation Act, 1996 only where the illegality in the award goes to the root of the matter. It further held that erroneous application of law by an Arbitral Tribunal or the re-appreciation of evidence by the court under section 34 https://www.mhc.tn.gov.in/judis (2-A) of the Arbitration and Conciliation Act, 1996 is not available.

108. The Court held that the above ground is available only where the view taken by the Arbitral Tribunal is an impossible view while construing the contract between the parties or where the award of the tribunal lacks any reasons. The Court further held that an award can be set aside only if an arbitrator/arbitral tribunal decide(s) the question beyond the contract or beyond the terms of reference or if the finding arrived by the Arbitral Tribunal is based on no evidence or ignoring vital evidence or is based on documents taken as evidence without notice to the parties.

109. The Honourable Supreme Court in Patel Engineering Ltd V. NEEPCO, (2020) 7 SCC 167 held that patent illegality as a ground for setting aside an award is available only if the decision of the arbitrator is found to be perverse or so irrational that no reasonable person would have arrived at the same or the construction of the contract is such that no fair or reasonable person would take or that the view of the arbitrator is not even a possible view.

110. The Honourable Supreme Court in McDermott International Inc. v. Burn Standard Co. Ltd, (2006) 11 SCC 181 held that while interpreting the terms of a contract, the conduct of parties and correspondences exchanged would also be relevant factors and it is well within the arbitrator's jurisdiction to consider the same.

111. The Honourable Supreme Court in Sutlej Construction Ltd. v. UT of Chandigarh (2018) 1 SCC 718, held that when the award is a reasoned one and the view taken is plausible, re-appreciation of evidence is not allowed while dealing with the challenge to an award under Section 34 of the Arbitration And Conciliation Act, 1996 for setting aside an award. It further held that the proceedings challenging the award cannot be treated as a first appellate court against a decree passed by a trial court.

112. The Honourable Supreme Court in Sheladia Associates Inc. V. TN Road Sector Project II, Represented by its Project Director, 2019 https://www.mhc.tn.gov.in/judis SCC OnLine Mad 17883 reminded itself of the Hodgkinson principle which has been explained by the Honourable Supreme Court in the oft-quoted and celebrated Associate Builders Case being Associate Builders V. Delhi Development Authority, (2015) 3 SCC 49. It held that Hodgkinson principle in simple terms means that the Arbitral Tribunal is the best judge with regard to quality and quantity of evidence before it. It further held that if there is no infraction of Section 28(3) of the Arbitration And Conciliation Act, 1996 the question of challenge on the grounds of public policy does not arise.

113. Therefore, this Arbitration Original Petition is liable to be dismissed and is accordingly dismissed. Consequently, connected application is closed. No costs.

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Index           : Yes/No
Internet        : Yes/No
Neutral Citation : Yes/No
Rgm/jen/kkd
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C.SARAVANAN, J.

Rgm/jen/kkd

Pre-delivery Order in
Arb.O.P.(Com.Div.)No.312 of 2023