



2025:DHC:9704



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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 29th October, 2025

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O.M.P. (T) (COMM.) 116/2024**M/S JAIPRAKASH HYUNDAI
CONSORTIUM**

.....Petitioner

Through: Mr. Lovkesh Sawhney, Senior
Advocate with Mr. Kartik Dhingra
and Mr. Rohit Kumar, Advocates

versus

M/S SJVN LIMITED

.....Respondent

Through: Mr. Uttam Datt, Senior Advocate
with Ms. Sonakshi Singh, Mr.
Kumaar Bhaskar & Mr. Naman
Kumar, Advocates.
Mr. Amit Tiwari, CGSC with Mr.
Arnav Mittal, GP, Mr. Ayush Tanwar,
Mr. Ayush Srivastava, Advocates for
R-2.**CORAM:****HON'BLE MR. JUSTICE AMIT BANSAL****AMIT BANSAL, J. (Oral)**

1. The present petition has been filed under Section 14 read with Section 15 of the Arbitration and Conciliation Act, 1996 (hereinafter 'Act') seeking the following reliefs:-

i. Terminate the appointment and mandate of the allegedly illegally appointed Presiding Arbitrator namely Shri P. Umashankar,



2025:DHC:9704



Retd. IAS; and restrain him from discharging the functions of a Presiding Arbitrator and/ or cancel continuation of so called/purported arbitration proceedings before Arbitral Tribunal presided by him and/or,

ii. Direct both the Nominee Arbitrators to appoint Presiding Arbitrator, or

In the alternative,

iii. Appoint/Substitute any independent and impartial arbitrator to act as Presiding Arbitration for adjudication of disputes.

2. The necessary facts for deciding the present petition are as follows:
 - 2.1. The disputes between the parties arose under Contract bearing no.3.0, which was signed between the parties on 24th June 1996.
 - 2.2. The arbitration clause is Clause 67 of the General Clauses and Conditions (hereinafter 'GCC'). In terms of the said arbitration clause, the Board of arbitrators was to be constituted by three (3) arbitrators, one (1) to be nominated by the Contractor, the second by the NJPC (SJVNL), and the third by the Secretary (Power), Ministry of Energy, Govt. of India.
 - 2.3. The petitioner invoked the arbitration clause. The arbitration proceedings culminated in an Arbitral Award dated 11th January 2009, passed in favour of the petitioner.
 - 2.4. The respondent challenged the aforesaid Arbitral Award under Section 34 of the Act in OMP(COMM) 170/2017 and by judgment dated 12th July 2023, the said Arbitral Award was set aside.
 - 2.5. An appeal, being FAO(OS)(COMM) 214/2023, was preferred by



2025:DHC:9704



the petitioner under Section 37 of the Act, against the aforesaid judgment, which was dismissed by the Division Bench of this Court by judgment dated 20th February 2024, with liberty to the parties to initiate fresh arbitration.

- 2.6. Thereafter, the petitioner again invoked the arbitration clause and appointed its nominee arbitrator as Justice (Retd.) V.K. Gupta, (Former Chief Justice, State of Uttarakhand). The respondent appointed Justice (Retd.) Kuldeep Singh (Former Judge of the High Court of Himachal Pradesh) as its nominee arbitrator.
 - 2.7. The respondent, relying upon the letter dated 21st November 2021 issued by the Ministry of Power, notified the appointment of the Presiding Arbitrator, namely Sh. P. Umashankar, Retd. IAS.
 - 2.8. Both the nominee arbitrators raised the issue of the legality of the appointment of the Presiding Arbitrator by the respondent. By letter dated 17th July 2024, the respondent refused to change the Presiding Arbitrator.
 - 2.9. In view of the aforesaid letter issued by the respondent, the nominee arbitrator appointed by the respondent, *i.e.* Justice (Retd.) Kuldeep Singh, (Former Judge of High Court of Himachal Pradesh) resigned as an arbitrator.
 - 2.10. Subsequently, the respondent *vide* letter dated 18th September 2024, appointed Justice (Retd.) Kurian Joseph as its nominee arbitrator in place of its earlier nominee arbitrator, Justice Kuldeep Singh.
3. In these facts and circumstances, the petitioner has challenged the



2025:DHC:9704



appointment of the Presiding Arbitrator, Sh. P. Umashankar, Retd. IAS, by the respondent in the present proceedings.

4. Senior counsel appearing on behalf of the petitioner submits that the Ministry of Power holds a 60% shareholding in the respondent company and therefore, is an interested party. Therefore, the Presiding Arbitrator appointed by the respondent no.2 is barred to act as an arbitrator under the 'Seventh Schedule' read with Section 12 (5) of the Act.

5. Senior counsel for the petitioner submits that Clause 67 of the GCC allows only one party to appoint the Presiding Arbitrator, which is not permissible. He further submits that unilateral appointment of an Arbitrator/Umpire is not permissible in terms of the decision of the Supreme Court in *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*¹, and more recently in *Lombardi Engg. Ltd. v. Uttarakhand Jal Vidyut Nigam Ltd.*², wherein *Perkins* (supra), was discussed, and it was held that the Court should proceed to appoint an independent arbitrator.

6. Mr. Uttam Datt, senior counsel appearing on behalf of the respondent no.1 submits that there has been a waiver on the part of the petitioner as per the *proviso* to Section 12(5) of the Act, inasmuch as the petitioner has accepted the appointment of the Presiding Arbitrator appointed by the Ministry of Power as per the arbitration clause.

7. In this regard, reliance has been placed on a communication dated 17th September 2021, sent by the petitioner, wherein the petitioner has acknowledged the fact that the Presiding Arbitrator has to be appointed by the Ministry of Power. It is submitted that the aforesaid communication was

¹ (2020) 20 SCC 760

² (2024) 4 SCC 341



2025:DHC:9704



sent after the judgment of the Supreme Court in *Perkins* (supra) and therefore, it would amount to a clear waiver.

8. I have heard counsel for the parties.

9. The Supreme Court in *Perkins* (supra) has held that a person having an interest in the dispute or in the outcome or decision thereof would not be eligible to appoint an arbitrator.

10. In *Lombardi* (supra), the arbitration clause was similar to the one in the present case, which empowered the Principal Secretary/Secretary of the Government of Uttarakhand to appoint an Arbitrator even though the Government of Uttarakhand was not a party to the arbitration agreement. It was held by the Supreme Court that the appointment clause in the contract which enables one party to appoint the arbitrator or majority of the arbitrators through the competent authority which has a stake in the working of one of the parties and/or have an interest in the outcome of the disputes, have to be ignored while appointing the arbitrator(s) and such clause cannot be given effect to. Therefore, the stipulation empowering the Principal Secretary (Irrigation), Government of Uttarakhand to appoint a sole arbitrator and proceed to appoint an independent arbitrator was not given effect to.

11. Recently, the Constitution Bench of the Supreme Court in *Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Company*,³ has held that an arbitration clause cannot mandate the other party to select its arbitrator from a curated panel. Further, it has been held that unilateral appointment of a third arbitrator is violative

³ 2024 SCC OnLine SC 3219



of the principle of equality as enshrined in Section 18 of the Act. The following observation from the said judgment is set out below:

*“129. Equal treatment of parties at the stage of appointment of an arbitrator ensures impartiality during the arbitral proceedings. A clause that allows one party to unilaterally appoint a sole arbitrator is exclusive and hinders equal participation of the other party in the appointment process of arbitrators. Further, arbitration is a quasi judicial and adjudicative process where both parties ought to be treated equally and given an equal opportunity to persuade the decision-maker of the merits of the case. **An arbitral process where one party or its proxy has the power to unilaterally decide who will adjudicate on a dispute is fundamentally contrary to the adjudicatory function of arbitral tribunals.**”*

12. In the present case, the Ministry of Power (respondent no.2), having a majority shareholding in the respondent company, has appointed the Presiding Arbitrator in terms of Clause 67 of the GCC. In light of the principles laid down by the Supreme Court in the aforesaid judgments, such an appointment by a principal shareholder of the respondent company cannot be given effect to.

13. As regards the submission made by counsel for the respondent that the communication dated 17th September 2021 would amount to a waiver on the part of the petitioner under Section 12(5) of the Act, I am unable to accept the same.

14. The aforesaid letter was written by the petitioner in the context of another arbitration between the parties hereto. This letter cannot be treated as a waiver by the petitioner *qua* the present arbitration.

15. Counsel for the respondent has drawn the attention of the Court to a communication dated 31st May, 2024, sent by the respondent no.1 through which the petitioner was notified that the Government of India, *vide* its communication dated 12th November, 2021, has nominated the Presiding



2025:DHC:9704



Arbitrator in respect of the same contract between the parties. It is stated that the petitioner never raised any objection with regard to the aforesaid letter and, in fact, the petitioner participated in the preliminary hearing convened by the Arbitral Tribunal on 17th June, 2024.

16. It is no longer *res integra* that mere participation of a party in a hearing would not amount to a waiver in terms of the *proviso* to Section 12(5) of the Act. Reference may be made to the judgment of ***Bharat Broadband Network Ltd. v. United Telecoms Ltd.***⁴, wherein the Supreme Court has held that the waiver has to be express and it cannot be inferred under Section 12(5) of the Act:

*“15. Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be “ineligible™ to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. **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”. 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.**”*

⁴ (2019) 5 SCC 75



2025:DHC:9704



17. Reference may also be made to the judgment in *Mahavir Prasad Gupta v. GNCTD*⁵, wherein it was held by the Division Bench of this Court that mere participation in the proceedings in any manner does not amount to waiver as per the statutory requirement. A statement or conduct before the arbitral tribunal does not satisfy the statutory requirement of waiver, as the agreement must reflect awareness, emphasising the strictness of the *proviso*, which has raised the threshold for express agreement in writing as a waiver.

18. In view of the discussion above, the appointment and mandate of the Presiding Arbitrator appointed by the Ministry of Power is hereby terminated.

19. The Court is informed that the nominee Arbitrator has already been appointed by the respondent.

20. The petitioner is directed to appoint its nominee Arbitrator within two (2) weeks from today.

21. Thereafter, the two nominee Arbitrators of the parties shall together appoint a Presiding Arbitrator.

22. The petition stands disposed of in terms of the aforesaid.

AMIT BANSAL, J

OCTOBER 29, 2025

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CORRECTED AND UPLOADED ON 04.11.2025

⁵ 2025 SCC OnLine Del 4241