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

% **Date of decision: 23.03.2026**

+ ARB.P. 1871/2025

SALIL KUMARPetitioner

Through: Mr. Meenal Garg, Adv.
(through VC)

versus

INDIA TOURISM DEVELOPMENT CORPORATION

LIMITEDRespondent

Through: Mr. Anish Chawla, Adv.

CORAM:

HON'BLE MR. JUSTICE AVNEESH JHINGAN

AVNEESH JHINGAN, J. (ORAL)

1. This petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') for appointment of the arbitrator.

2. The brief facts are that on 20.12.2011, the respondent awarded the work of construction of a memorial of Smt. Vidyavati Ji, mother of Shaheed Bhagat Singh at village Moranwali, District Hoshiarpur, Punjab to the petitioner.

2.1 On 18.04.2019, the respondent unilaterally appointed a sole arbitrator and the proceedings culminated in award dated 09.05.2020. The arbitrator partly allowed the claims filed by the petitioner and



dismissed the counter claims of the respondent.

2.2 Both the parties filed petition under Section 34 of the Act against the award. The petition filed by the petitioner under Section 34 of the Act was dismissed by this court on 14.09.2021. The petitioner succeeded in an appeal under Section 37 of the Act and the award being violative of Section 12(5) of the Act was set aside on 02.04.2025 in view of the setting aside of the award by this court. The petition filed by the respondent under Section 34 of the Act was dismissed as infructuous on 19.04.2025. On 06.05.2025, the petitioner issued a notice under Section 21 of the Act and thereafter this petition.

3. Learned counsel for the respondent relies upon clause 48 of the contract to contend that arbitration either had to be by the Managing Director/Chief Engineer of the respondent or their nominee. In case the nominee could not proceed with the arbitration, the dispute shall not be referred to arbitration at all.

4. Learned counsel for the petitioner relies upon the decision of the Supreme Court in **Hindustan Construction Company Ltd. V. Bihar Rajya Pul Nirman Nigam Limited and Others** 2025 SCC OnLine SC 2578 decided on 28.11.2025 to contend that a similar clause of a contract between a Public Sector Undertaking (PSU) and a private company was held to be violative of Article 14 of the Constitution of India and severable from the clause of arbitration.

5. At this stage, learned counsel for the respondent submits that in the case relied upon by the learned counsel for the petitioner a consent



for appointment of arbitrator in proceedings under Section 11 was given and there was an intent of the parties to resolve the dispute by arbitration, whereas no such consent is there in this case.

6. The relevant portion of the clause of arbitration i.e., clause 25 in the case of **Hindustan Construction Company Ltd.** (supra) before the Supreme Court is reproduced below:

“12.9. ...It is also a term of this contract that no person other than a person appointed by such Managing Director or administrative head of the Nigam as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitrator at all. ...”

6.1 The Supreme Court held that the exclusive power with the contractee to appoint arbitrator should be severed and is unenforceable but the agreement of arbitration survives. It is held that the contract between public-private company should pass the test of fairness, equality and non-arbitrariness under Article 14 of the Constitution of India. The portion of clause 25 that for any reason the arbitration by the arbitrator appointed by the contractee is not possible the matter shall not be referred to arbitration at all violates Section 18 of the Act.

The relevant paragraphs of the judgment are reproduced:

“12.12. Accordingly, the portion of Clause 25 that vests exclusive appointment power in one party and forecloses arbitration in default of such appointment must be severed as void and unenforceable. However, the substantive agreement to arbitrate survives by virtue of the doctrine of severability.

12.14. The present contract, being a public-private



contract, must withstand not only conventional contractual scrutiny but also constitutional scrutiny. As held in CORE II, arbitral appointments in public contracts must satisfy the requirements of fairness, equality, and non-arbitrariness under Article 14.

12.15. The sub-clause in Clause 25 which provides that “if for any reason the matter shall not be referred to arbitration” is vague, uncertain, and arbitrary. The expression “for any reason” confers an unguided and absolute veto, particularly objectionable in a public contract. Such a clause fails the test of manifest arbitrariness and violates Section 18 of the Act, which mandates equal treatment of parties.

12.16. In light of the above discussion, the following propositions emerge:

- (i) The parties' conduct clearly demonstrates their intention to arbitrate, satisfying the requirement of Section 7(4)(c);
- (ii) Clause 25, in its substantive form, constitutes a valid arbitration agreement;
- (iii) The unilateral and exclusionary appointment mechanism is void and severable; and
- (iv) This Court is empowered under Section 11(6) to cure the defect and appoint an independent arbitrator.

12.17. Accordingly, it is held that a valid and subsisting arbitration agreement exists between the parties. Clause 25, when read in its entirety and construed in accordance with the doctrine of severability, satisfies the statutory requirements of an arbitration clause under Section 7 of the Act. The contrary finding of the High Court is unsustainable in law and is liable to be set aside.”

7. In view of the decision of the Supreme Court, the objection raised by the respondent that arbitrator cannot be appointed by this



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Court, is unsustainable, the distinction sought to be raised is ill-founded. The arbitration clause having similar language was held to be in violation of Article 14 of the Constitution of India and Section 18 of the Act and severed from clauses of arbitration. The consent given by the parties in the case before the Supreme Court at the stage of Section 11 is not a relevant consideration.

8. Learned counsel for the respondent relies upon paragraph 12.16(i) of **Hindustan Construction Company Ltd.** (supra) to contend that the consent given in Section 11 proceeding was considered, the contention lacks merit. The agreement between the parties to arbitrate the dispute satisfying the requirement of Section 7 of the Act is derived from the surviving part of clause 25 after severing the part of the clause vitiated of Article 14 of the Constitution of India and Section 18 of the Act.

9. The petition is allowed by appointing Justice Mr. Krishna Kumar Lahoti (Retd.) (Mobile No.9425152000) as the sole arbitrator for adjudication of the disputes which have arisen between the parties.

10. The fees of the learned Arbitrator will be governed by Schedule IV of the Act. Before entering upon reference, the learned Arbitrator will comply with Section 12 of the Act.

11. It is made clear that since this Court has not expressed any opinion on the merits of the rival claims of the parties, it will be open for the parties to file their respective claims/counter claims before the learned Arbitrator which will be considered in accordance with law.



12. A copy of this order be forwarded to the learned Arbitrator for information.

AVNEESH JHINGAN, J

MARCH 23, 2026
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Reportable:- **Yes**