IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 29TH DAY OF APRIL, 2026

PRESENT

THE HON'BLE MRS. JUSTICE ANU SIVARAMAN

AND

THE HON'BLE MR. JUSTICE T.M.NADAF

COMMERCIAL APPEAL NO. 245 OF 2021

BETWEEN:

AVTEC LIMITED
A COMPANY INCORPORATED UNDER
THE PROVISIONS OF THE COMPANIES ACT, 1956
AND HAVING ITS REGISTERED OFFICE AT
PITHAMPUR INDUSTRIAL AREA
SECTOR III PO SAGORE DISTRICT
DHAR, MP-4544774
BRANCH OFFICE AT
POONAPALLI VILLAGE
MATHAGONDAPALLI POST
HOSUR-635 114
BY ITS SENIOR MANAGER (FINANCE)

...APPELLANT

(BY SHRI. PRAMOD NAIR, SENIOR COUNSEL FOR SMT. RAMYA RAMACHANDRAN, ADVOCATE)

AND:

PDS LOGISTICS INTERNATIONAL
PRIVATE LIMITED
A COMPANY INCORPORATED UNDER
THE PROVISIONS OF THE COMPANIES ACT, 1956
AND HAVING ITS REGISTERED OFFICE AT
No.201 AND 206, 2ND FLOOR
BLOCK 'B', CONNECTION POINT
HAL OLD AIRPORT EXIT ROAD
BENGALURU-560 017
REP. BY ITS MANAGING DIRECTOR

...RESPONDENT

(BY SRI. K.B.S. MANIAN, ADVOCATE)

THIS COMMERCIAL APPEAL IS FILED U/S 13(1A) OF THE COMMERCIAL COURTS ACT, 2015 R/W SECTION 37(1)(c) OF THE ARBITRATION AND CONCILIATION ACT, 1996, PRAYING TO (a) CALL FOR THE RECORDS IN COM.A.S.No.99/2019 PENDING ON THE FILE OF LXXXV ADDITIONAL CITY CIVIL AND SESSIONS JUDGE AT BENGALURU (CCH-86). (b) SET ASIDE THE IMPUGNED JUDGMENT DATED 22.10.2021 PASSED BY THE LXXXV ADDITIONAL CITY CIVIL AND SESSIONS JUDGE AT BENGALURU (CCH-86) (DOCUMENT NO.1) AND ETC.

THIS COMMERCIAL APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 06.03.2026 AND COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, **ANU SIVARAMAN J.,** PRONOUNCED THE FOLLOWING:

CORAM: HON'BLE MRS. JUSTICE ANU SIVARAMAN
and
HON'BLE MR. JUSTICE T.M.NADAF

CAV JUDGMENT

(PER: HON'BLE MRS. JUSTICE ANU SIVARAMAN)

This appeal arises from the judgment and order dated 22.10.2021 passed by the LXXXV Additional City Civil and Sessions Judge (CCH-86), Bengaluru ('Commercial Court') in Com.A.S.No.99/2019, whereby the Commercial Court allowed the petition filed by the respondent herein under Section 34 of the Arbitration and Conciliation Act, 1996 ('Arbitration Act'), and set aside the Arbitral Award dated 21.03.2019.

2. We have heard Shri. Pramod Nair, learned senior counsel as instructed by Smt. Ramya Ramachandran, learned counsel appearing for the appellant and Shri. K.B.S. Manian, learned counsel appearing for the respondent.

3. The appellant - M/s AVTEC Limited and the respondent - M/s PDS Logistics International Private Ltd., entered into an agreement dated 13.07.2016 for logistics

services. A dispute arose between the parties in respect of payment of consignments, pursuant to which the appellant herein invoked the arbitration clause and appointed the Sole Arbitrator on 30.08.2018. The Statement of Claim was filed by the appellant herein on 28.11.2018. Thereafter, the learned Arbitrator passed an *ex parte* Award dated 21.03.2019, allowing the claim of the appellant. The respondent challenged the said Award before the Commercial Court in Com.A.S.No.99/2019 under Section 34 of the Arbitration Act, praying to set aside the Award under Section 34(2)(a)(iii),(iv),(v) and Section 34(2)(b)(ii) of the Arbitration Act. The Commercial Court by the impugned judgment dated 22.10.2021, allowed the said petition and the Award of the Sole Arbitrator dated 21.03.2019 was set aside. The present appeal is filed by the appellant under Section 37 of the Arbitration Act assailing the said judgment.

4. The Commercial Court by its judgment dated 22.10.2021 framed two points for consideration- first, whether the grounds urged in the plaint were available to the plaintiff under Section 34(2)(a)(iii),(iv),(v) and Section

34(2)(b)(ii) of the Arbitration Act, and second, what order should follow. The Commercial Court answered Point No.1 in the affirmative and accordingly allowed the petition. The Commercial Court held that the notice appointing Sole Arbitrator was issued on 30.08.2018 whereas his consent was obtained only on 31.08.2018, establishing that the defendant had declared the learned Arbitrator as Sole Arbitrator even before obtaining his consent. This circumstance probabilises that the defendant had personal meetings with the learned arbitrator. It found all prior arbitrators appointed by the defendant had recused themselves from the case establishing that all those persons were known to the defendant or its counsel in one or the other way.

5. The Commercial Court held that the clause of appointment of sole arbitrator at the instance of the appellant herein established that he had an interest in the outcome of the dispute and thereby reserved the right to appoint an arbitrator. Relying on the decision of the Apex Court in ***Perkins Eastman Architects DPC and Another***

v. HSCC (India) Limited reported in ***(2020) 20 SCC 760***, the Commercial Court held that in cases where one party has a right to appoint a sole arbitrator, that party's choice will always have an element of exclusivity in determining or charting the course for dispute resolution, and that the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. The Commercial Court further observed that the letter written by the plaintiff/respondent herein objecting to the jurisdiction of the learned Arbitrator was not considered and the respondent was asked to withdraw his stand so as to provide an opportunity to file objections, and that this action of the learned Arbitrator is against the principles of natural justice. On the basis of these findings, the Commercial Court allowed the petition under Section 34 of the Arbitration Act and the impugned Award dated 21.03.2019 was set aside by Order dated 22.10.2021.

6. The learned senior counsel appearing for the appellant submitted that the Commercial Court failed to rule on the issue of jurisdiction raised by the appellant. Clause

1(w) of the Arbitration Agreement provides for the exclusive jurisdiction to the Courts in Hosur. It is also submitted that the Commercial Court's reliance on the decision of the Apex Court in ***Perkins Eastman***'s case (supra) is incorrect. The decision was rendered on 26.11.2019 while the award was issued on 21.03.2019. Further, the Commercial Court did not decide on the retrospective applicability of the case. Therefore, the said decision is not applicable to the instant case.

7. It is further submitted that the composition of the Tribunal was in accordance with the Arbitration Agreement. Clause 1(v) of the Agreement deals with the procedure of appointment of the arbitrator. Therefore, the parties had agreed that the appellant would have the unilateral right to appoint an arbitrator. Further, it is submitted that it was always open to the respondent to file an application under Section 12 of the Arbitration Act to challenge the appointment of the arbitrator. Since, this was not done, the respondent has waived its right to object under Section 12(5) of the Arbitration Act. It is also submitted that the

respondent could have approached this Court under Section 11 of the Arbitration Act for the appointment of an arbitrator to the dispute.

8. It is further submitted that the findings of the Commercial Court regarding the impartiality of the Sole Arbitrator are misplaced. The respondent never pleaded that the arbitrator was personally known to the appellant, yet the Commercial Court drew adverse inferences from a minor discrepancy in consent-notification dates. The appellant's counsel had confirmed the arbitrator’s availability before issuing the appointment letter dated 30.08.2018, after which the arbitrator formally acknowledged consent. The Tribunal’s composition was therefore valid.

9. It is further submitted that the award is not in conflict with the public policy of India. The petition filed by the respondent merely alleges a challenge on the ground under Section 34(2)(b)(ii) of the Arbitration Act but does not accord reasons for the same. In the absence of any cogent grounds on how the award is violative of public policy, the impugned judgment ought to be set aside.

10. The learned senior counsel appearing for the appellant relied on the following decisions:-

- ***State of West Bengal and Others v. Associated Contractors****, reported in* ***(2015) 1 SCC 32;*** and
- ***BGS SGS SOMA JV V. NHPC Limited****, reported in* ***(2020) 4 SCC 234.***

11. The learned counsel appearing for the respondent, on the other hand, contends that the appellant had admittedly initiated the first proceedings under Section 9 of the Arbitration Act before the City Civil Court at Bengaluru and had thus acquiesced to the jurisdiction of the Courts at Bengaluru. It is further submitted that the Agreement only records Hosur as the venue of arbitration and the said fixation of venue had been given a go-by, by the appellant himself by conduct of the arbitration in Bengaluru. It is contended that having consented to a change of venue and seat to Bangaluru, the appellant is *estopped* from contending that the seat of the arbitration was in Hosur. It is further contended that there has been a unilateral appointment of an arbitrator after the 2015

amendment of the Arbitration Act and that the same is bad in law.

12. We have considered the contentions advanced. We notice that two major questions arise for consideration:-

(i) Whether the Commercial Court had jurisdiction to entertain the Section 34 application filed by the respondent challenging the Arbitral Award dated 21.03.2019; and

(ii) Whether the Commercial Court was justified in setting aside the Arbitral Award.

13. On the first issue we notice that the appellant has contended that the seat of arbitration was Hosur, Tamil Nadu as per Clause 1(w) of the Agreement dated 13.07.2016 and that only the Courts at Hosur had exclusive jurisdiction to try all disputes arising out of the agreement to the exclusion of all other Courts. The respondent on the other hand, has contended that the appellant, by its own conduct, had acquiesced to the jurisdiction of the Bengaluru Courts and is estopped from contending otherwise.

14. The law on the determination of seat of arbitration has been comprehensively laid down by the Apex Court in ***BGS SGS SOMA JV v. NHPC Ltd.*** reported in ***(2020) 4 SCC 234***. The Apex Court held that the seat of arbitration is the juridical home of the arbitration and determines which Court has exclusive supervisory jurisdiction over the arbitral proceedings including jurisdiction to entertain applications under Sections 9, 34 and 37 of the Arbitration Act. The Apex Court further held that where the arbitration agreement designates a place as the venue of arbitration and there is no other indication of a different seat, the venue is to be treated as the seat. Once a seat is determined the Courts at the seat have exclusive supervisory jurisdiction and no other Court has jurisdiction regardless of where the cause of action arose or where the parties are located.

15. Further, the Apex Court in ***M/s. Inox Renewables Ltd. v. Jayesh Electricals Ltd.*** passed in ***Civil Appeal No.1556/2021*** on **13.04.2021**, held that the seat of arbitration can be changed by mutual agreement of

the parties and it need not be in writing. In ***Quippo Construction Equipment Ltd. v. Janardan Nirman Pvt. Ltd.*** reported in ***(2020) 18 SCC 277,*** the Apex Court held that where a party participates in arbitral proceedings without raising objection to jurisdiction must deemed to have waived all such objections.

16. In the instant case, the Clause 1(v) of the Agreement dated 13.07.2016 designated Hosur as the venue of arbitration. Clause 1(w) of the Agreement provided that it is only the Courts at Hosur that shall have exclusive jurisdiction to try all disputes arising out of the agreement to the exclusion of all other Courts. It is not in dispute that on a reading of these clauses, that the seat of arbitration was Hosur and the Courts at Hosur had exclusive supervisory jurisdiction over the arbitral proceedings. However the conduct of the parties in the present case departed from this contractual position.

17. The appellant herein filed an application under Section 9 of the Arbitration Act before the XII Additional City Civil and Sessions Judge at Bengaluru before the arbitration

even commenced. It was the appellant invoking the jurisdiction of the Bengaluru Courts over a matter arising directly out of the same Arbitration Agreement. By filing a Section 9 application before the Bengaluru Courts, the appellant acknowledged and invoked the jurisdiction of those Courts over the arbitration. The learned Arbitrator by his letter dated 31.08.2018 specifically brought to the notice of both parties that the venue of arbitration was indicated as Hosur in the agreement but that since it is convenient to all concerned the venue should be changed to Bengaluru. The appellant did not raise any objection whatsoever to this proposal.

18. Further, the appellant participated in the arbitration proceedings at Bengaluru. The first meeting was held at Bengaluru on 22.10.2018 and the appellant participated without raising any objection to the venue. The Statement of Claim was filed and evidence was led. The appellant having participated in the arbitration at Bengaluru on merits without raising any objection to the venue.

Therefore, the appellant had acquiesced to the venue and consequently, the seat has been changed to Bengaluru.

19. We are of the opinion that the LXXXV Additional City Civil and Sessions Judge at Bengaluru did have jurisdiction to entertain the Section 34 application filed by the respondent. The contention of the appellant that the Section 34 application was not maintainable before the Bengaluru Courts does not stand.

20. The second question for consideration is whether the Commercial Court was justified in setting aside the award of the Sole Arbitrator. We notice that the Commercial Court set aside the Award on the ground that the unilateral appointment of the Sole Arbitrator by the defendant/appellant herein was wrong, relying on the decision of the Apex Court in ***Perkins Eastman***'s case (supra). The appellant has challenged this finding on the ground that ***Perkins Eastman***'s case (supra) was decided on 26.11.2019 which is after the Award was passed on 21.03.2019 and therefore the Commercial Court erred in applying it retrospectively. While the question of the

retrospective application of the decision need not be decided in the present appeal, the setting aside of the Award is sustainable on the ground of persistent objections raised by the respondent to the appointment of the Sole Arbitrator. These objections were not properly adjudicated by the learned Arbitrator.

21. The arbitration clause in the Agreement reads as follows:-

> "*(v) All questions, differences or disputes arising out of construction, meaning or otherwise of this Agreement or any matter connected thereto arising between the Company and the Contractor or their respective representatives, shall be referred to arbitration by a sole Arbitrator, to be appointed by the Company. The Provisions of the Arbitration and Conciliation Act, 1996 or any re-enactment or amendments thereto shall be applicable and the decision of the Sole Arbitrator shall be final and binding on both the parties. The venue of arbitration shall be Hosur and the language of arbitration shall be English.*
>
> *(w) It is only the Court at Hosur shall have exclusive jurisdiction to try all disputes arising out of this Agreement to the exclusion of all other courts."*

22. The respondent had objected to the appointment of arbitrators on two prior occasions and on both the occasions, the arbitrators had recused themselves from the proceedings owing to the objections raised by the respondent. After the appointment of the learned Arbitrator, on 09.01.2019 the respondent, through its Managing Director, addressed the learned Arbitrator and raised objections to his appointment that the choice of the arbitrator and the manner of appointment had been unilaterally assumed by the appellant and that the respondent was unable to accept or participate in the arbitral proceedings initiated unilaterally at the behest of the appellant herein. The operative portion of the letter dated 09.01.2019, reads as follows:-

> " *We are afraid that we have strong objections to submit to your jurisdiction. The choice of the arbitrator and the manner of appointment has been unilaterally assumed by the Petitioner at his will and discretion. We have at every stage refused to accede to the appointments made unilaterally by the Petitioner. In particular, we have categorically expressed our inability to participate in the arbitration which entails costs and expenditure as*

set out in the Schedule of expenditure.. It appears these communications were suppressed from you in the Petitioners counsel having directly and unilaterally engaged you. We are unable to meet the costs as indicated.

We are therefore unable to accept or participate in the arbitral proceedings initiated unilaterally at the behest of the Petitioner. "

However, the learned Arbitrator by his communication dated 23.01.2019 construed these objections as a voluntary waiver of the respondent's privilege to contest the proceedings and not as a jurisdictional challenge requiring adjudication. The operative portion of the said communication dated 23.01.2019, reads as follows:-

"In terms of Section 16 of the Arbitration and Conciliation Act, 1996, this Tribunal is competent to address any objection as to the existence or validity of the arbitration agreement and to decide on such an objection. In the instant case, the claim that the nomination of the arbitrator is not by mutual agreement and that the costs and expenses are prohibitive are only now raised. On both counts the respondent is not precluded from participating in these proceedings. If the objection as to jurisdiction of this Tribunal could be substantiated before this Tribunal, which unfortunately is not apparent, there could be a ruling on the same. And

if the Respondent is not willing to meet the arbitrator's fees and costs, the same would be met by the Claimant, subject to the result of the proceedings, in terms of Section 38 of the said Act. Hence the willful withdrawal from these proceedings, by the Respondent, would be a voluntary waiver of its privilege to contest the proceedings.

In the above situation, this Tribunal issues the following directions:

a. The venue for the next meeting of the Tribunal shall be at RNB Centre for Arbitration & Mediation LLP. Bengaluru.

b. The Claimant shall pay and bear the Arbitrator's fee and other expenses, subject to the result of the proceedings. In terms of the Schedule of Fees and charges furnished the Arbitrators fee on a claim of Rs.2.75 Crore would be Rs. 8,25,000 and the Administration charges are Rs. 61,875. The Claimant shall hence deposit 50% of the Arbitrator's fee and the full amount towards Administration charges, at the earliest, favouring 'Justice Anand Byrareddy' or by RTGS to the account, the details of which are available in the cancelled cheque leaf enclosed. In addition, a sum of Rs. 5000 is payable towards secretarial charges in respect of the First Meeting held on 22-10-2018.

c. The Claimant shall file its affidavit in evidence of its witness or witnesses, in support of its claim, on or before 15th February, 2019 and have such

> *witness or witnesses present for further evidence at the next sitting of the Tribunal, on 18th February, 2019."*

23. The waiver of the right to object is laid down in Section 4 of the Arbitration Act. Section 4 of the Arbitration Act reads as follows:-

> *4. Waiver of right to object.—A party who knows that—*
> *(a) any provision of this Part from which the parties may derogate, or*
>
> *(b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.*

In ***Quippo Construction Equipment Ltd.***'s case (supra), the Apex Court held that if a party, despite knowing about the arbitration proceedings, neither participated nor raised jurisdictional objections, the party is deemed to have waived such objections. In the instant case, we notice that the respondent had objected to the appointment of the Sole Arbitrator. On 18.02.2019 a representative of the

respondent appeared before the Arbitral Tribunal with an application seeking permission to file objections and an opportunity of hearing on the assumption of jurisdiction. The learned Arbitrator however refused to entertain this application on the ground that it was inconsistent with the earlier stand taken by the Managing Director and that the counsel for the respondent had not filed a vakalath.

24. On 04.03.2019 the respondent filed an application under Section 16 of the Arbitration Act raising the jurisdictional objection. The application was rejected on the ground that it was not accompanied by a vakalath. The learned Arbitrator then proceeded to hear the matter on merits and reserved it for Award on the same day.

25. The Commercial Court had held that the unilateral appointment of the sole arbitrator by the appellant was impermissible in light of the Apex Court's decision in ***Perkins Eastman***'s case (supra) noting that a party with an interest in the outcome of the dispute cannot have the exclusive power to appoint a sole arbitrator. It further found that the appellant had declared the learned Arbitrator as the

Sole Arbitrator in the dispute by Notice dated 30.08.2018 even before obtaining his consent, which was confirmed only on 31.08.2018, which establishes that the learned Arbitrator was personally known to the appellant. The Commercial Court observed that despite the respondent having raised specific objections to the jurisdiction of the Tribunal, the unilateral nature of the appointment and the inclusion of claims said to be outside the scope of the Service Agreement, the learned Arbitrator neither adjudicated these objections in accordance with law nor afforded the respondent an opportunity of hearing. Therefore, the Commercial Court set aside the Arbitral Award dated 21.03.2019.

26. Having considered the contentions advanced, we notice that the objection to the unilateral appointment of the arbitrator was raised by the respondent in all stages of the proceedings. The said objection had been taken note of by the arbitrators appointed by the appellant earlier, who had recused in the light of the objection that the appointment is unilateral.

27. The principle in ***Perkins Eastman***'s case (supra) is an extension of the position laid down by a three-Judge Bench of the Apex Court in ***TRF Limited v. Energo Engineering Projects Limited*** reported in ***(2017) 8 SCC 377***. In ***TRF Limited***'s case (supra), the Apex Court held that once a person becomes ineligible to act as an arbitrator by virtue of Section 12(5) of the Arbitration Act such person also becomes ineligible to nominate any other person as arbitrator.

28. The Apex Court in ***TRF Limited***'s case (supra) in paragraph No.54 has held as follows:-

> *"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."

29. In ***Perkins Eastman***'s case (supra), the Apex Court extended the reasoning in ***TRF Limited***'s case (supra) to a category of clauses where the appointing authority is not itself named as the arbitrator, but is authorised to appoint an arbitrator of its choice. Paragraphs No.20 and 21 are as follows:-

"20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of

the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited , all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator.

21. But, in our view that has to be the logical deduction from TRF Limited . Paragraph 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 arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited."

30. The Apex Court observed that where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining the course of dispute resolution, and that naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. The Apex Court further held this principle to be the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 and recognised by the decision in ***TRF Limited***'s case (supra).

31. The contention that ***Perkins Eastman***'s case (supra) was decided after the Arbitral Award cannot be applied to the instant case as the decision does not lay down a new rule. It merely clarifies the legal position under Section 12(5) of the Arbitration Act read with the Seventh Schedule, both of which were inserted by the 2015 Amendment that came into force on 23.10.2015, well prior to the execution of the Service Agreement on 13.07.2016 and the appointment of the learned Arbitrator on 30.08.2018.

32. Even if a contention regarding the respondent having waived its right of appointment of arbitrator by virtue of signing the Agreement is considered, the contention is also not sustainable. The *proviso* to Section 12(5) of the Arbitration Act permits waiver only by an express agreement in writing between the parties after disputes have arisen and no such agreement is on record.

33. For these reasons, we find no grounds to interfere with the finding of the Commercial Court that the unilateral appointment of the Sole Arbitrator by the appellant under

Clause 1(v) of the Service Agreement was impermissible and the award rendered by an arbitrator so appointed was liable to be set aside on this ground.

In the above view of the matter, we find that there is no error in the finding of the Commercial Court. Accordingly, the commercial appeal is ***dismissed.***

Liberty is reserved to either party to approach this Court by way of an appropriate application under Section 11 of the Arbitration Act, for the appointment of a sole arbitrator to adjudicate the disputes arising out of the Agreement dated 13.07.2016.

All pending interlocutory applications shall stand *disposed of.*

Sd/-
(ANU SIVARAMAN)
JUDGE

Sd/-
(T.M.NADAF)
JUDGE

cp*