

SC judgment: Govt cannot unilaterally appoint arbitrators

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NEW DELHI: The Supreme Court on Friday ruled that government entities and public sector units (PSUs) cannot unilaterally appoint arbitrators in public-private arbitration agreements because such clauses violate the principle of equality under Article 14 of the Constitution.

In a decision seen as a move towards ensuring greater impartiality and fairness in arbitration proceedings involving government contracts, the top court ensured equality in public-private contract disputes and upholds a core tenet of the Arbitration Act that arbitration should be conducted by an independent, impartial body.

The bench, led by Chief Justice of India (CJI) Dhananjaya Y Chandrachud and including justices Hrishikesh Roy, PS Narasimha, Pankaj Mithal and Manoj Misra, grappled with pressing questions about unilateral arbitrator appointments by PSUs, as raised in a bundle of matters that sought an authoritative decision on contours defining the independence and impartiality of arbitral tribunals under the Arbitration and Conciliation Act, 1996.

The judgment, authored by the CJI, reflected the court's resolve to make the arbitration process impartial by rejecting the often one-sided arrangement found in government contracts, which allowed PSUs to name the arbitrator without consulting the private party. This unilateral power, the CJI's judgment concluded, is contrary to the fundamental rights guaranteed under Article 14 of the Indian Constitution, which mandates equality before the law.

"A clause that allows one party to unilaterally appoint a sole arbitrator gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further, such a unilateral clause is exclusive and hinders equal participation of the other party in the appointment process of arbitrators...Unilateral appointment clauses in public-private contracts are violative of Article 14," held the CJI.

Authoring the lead opinion on

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behalf of himself and justices Mithal and Misra, the CJI clarified that the decision would have a prospective application, affecting only those arbitrator appointments made after this judgment.

The ruling emphasised that the principle of parity enshrined in Section 18 of the Arbitration and Conciliation Act should govern all stages of arbitration, including the appointment of arbitrators. In the current case, the court stressed that an agreement that allows one party to select the sole arbitrator — particularly in cases where one side is a powerful public sector entity — inherently undermines the neutrality of the arbitration, leading to justifiable doubts regarding the independence of the arbitrator.

Justice Chandrachud's majority opinion also addressed the practical implications of this ruling on three-member arbitration panels. While the Arbitration Act permits PSUs to maintain lists or panels of potential arbitrators, the bench held, it would be improper for a PSU to compel the other party to select from this list alone. Such an arrangement, it declared, fails to offer equal participation, which is essential in ensuring a fair process. By making one party adhere to an arbitrator list curated by its opponent, the entire arbitration could become skewed in favour of the PSU. Justice Chandrachud elaborated that such clauses violate the fundamental principle of fair play because they limit the private party's influence over an arbitrator selection process dominated by the government entity.

Justice Hrishikesh Roy, in a partial dissent, presented a nuanced view, asserting that the Arbitration Act does not automatically disallow all forms of unilateral arbitrator appointments.