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

Reserved on : 14.10.2022

Decided on: 31.10.2022

+ **ARB.P. 366/2020**

GANGOTRI ENTERPRISES LTD Petitioner
Through: Mr. Sarthak Chiller and Mr. Sanjeev
Mahajan, Advocates (Ph.9811212045,
e-mail: advsarthakchiller@gmail.com)

versus

GENERAL MANAGER NORTHERN
RAILWAYS Respondent
Through: Ms. Pratima N. Lakra, CGSC with
Ms. Vrinda Baheti, Advocates
(Ph.9968324260, e-mail:
advocatepratima@gmail.com).

+ **ARB.P. 367/2020**

GANGOTRI ENTERPRISES LTD Petitioner
Through: Mr. Sarthak Chiller and Mr. Sanjeev
Mahajan, Advocates (Ph.9811212045,
e-mail: advsarthakchiller@gmail.com)

versus

GENERAL MANAGER NORTHERN
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Through: Ms. Pratima N. Lakra, CGSC with
Ms. Vrinda Baheti, Advocates
(Ph.9968324260, e-mail:
advocatepratima@gmail.com).

+ **ARB.P. 368/2020**

GANGOTRI ENTERPRISES LTD Petitioner
Through: Mr. Sarthak Chiller and Mr. Sanjeev
Mahajan, Advocates (Ph.9811212045,
e-mail: advsarthakchiller@gmail.com)

versus

GENERAL MANAGER NORTHERN
RAILWAYS

..... Respondent

Through: Mr. Sushil Raaja, SPC, UOI for GM
Northern Railways.

+ **ARB.P. 370/2020**

GANGOTRI ENTERPRISES LTD

..... Petitioner

Through: Mr. Sarthak Chiller and Mr. Sanjeev
Mahajan, Advocates (Ph.9811212045,
e-mail: advsarthakchiller@gmail.com)

versus

GENERAL MANAGER NORTHERN
RAILWAYS

..... Respondent

Through: Mr. Sushil Raaja, SPC, UOI for GM
Northern Railways.

CORAM:

HON'BLE MS. JUSTICE MINI PUSHKARNA

JUDGMENT

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31.10.2022

MINI PUSHKARNA, J.

1. The aforesaid petitions have been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'Act') with prayer for appointment of nominee arbitrator for the respondent, who along with the nominee of the petitioner appointed vide notice dated 25.06.2020, would appoint a presiding Arbitrator and the said Arbitral Tribunal so constituted would adjudicate upon the disputes that have arisen between the parties under the Agreement.

2. The parties entered into Contract Agreements on different dates for execution of various works as awarded to the petitioner by the respondent.

3. In ARB.P. 366/2020, contract between the parties dated 14.01.2009 was for work of 'additional works such as construction of boundary wall/ retaining wall, circulating area, entry road, service road, RCC Box Bridge and other allied works in connection with development of new passenger terminal at Anand Vihar', for an amount of Rs.17,70,25,337.94/-.

4. In ARB.P. 367/2020, contract between the parties dated 15.10.2007 was for work of 'Earthwork in filing, blanketing, const. of minor bridges, major bridges, major bridges No.8,) approx. 3 x 12.20 m span) No. 16 (approx. 4 x 9.15 m span) including pile foundations and PSC slab, provision of additional openings under existing ROB No.9 & 15 of sizes (approx . 1 x 10.30 m span) & (approx. 1 x 10.30 + 1 x 5.00 m) respectively Box Pushing Technique, RCC Box Bridges over nallah, miscellaneous building works and other allied works in c/with 3rd and 4th Line between Sahibabad & Anand Vihar', for an amount of Rs.30,95,25,507.10/-.

5. In ARB.P. 368/2020, contract between the parties dated 01.01.2009 was for work of 'Construction of New Station Building, Platforms, etc. in connection with development of facilities at Delhi Sarai Rohilla' by Northern Railways.

6. In ARB.P. 370/2020, the contract between the parties dated 30.01.2012 was for work of 'Construction of 100 Units type-V transit accommodation for essential Operational and Maintenance staff of Railway at Safdarjung and other allied work'.

7. Subsequently, disputes arose between the parties. In ARB.P. 366/2020, contract was rescinded by the respondent vide letter dated

21.09.2017. In ARB.P. 367/2020, work is stated to have been completed by the petitioner on 15.10.2015, though completion was granted by the respondent on 19.11.2016 post facto since works of approach road was done subsequently after approval from the department. In ARB. P. 368/2020, the work awarded to the petitioner was short-closed by respondent on 30.10.2014 on the ground that Northern Railways had no fund for the said building available with the department. The contract in ARB.P. 370/2020 was short closed by the respondent vide letter dated 04.01.2016 upon request of the petitioner.

8. The process of invocation and appointment of Arbitral Tribunal in all the four cases is provided under Clauses 63 and 64 of the General Conditions of Contract (GCC). Clause 63 of GCC provides for settlement of disputes by referring the disputes to GM, Railways, who has to decide the same within 120 days of receipt of the same. This process is required to be followed before appointment of any Arbitral Tribunal. Clause 64 provides for the process of appointment of arbitrator. Clause 63 and 64 of GCC which existed when the parties entered into respective Agreements are reproduced below for ready reference:

***“SETTLEMENT OF DISPUTES- INDIAN RAILWAY
ARBITRATION RULES***

63. Matters Finally Determined By The Railway: All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the contractor to the GM and the GM shall, within 120 days after receipt of the contractor's

representation, make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in Clauses 8, 18, 22(5), 39, 43(2), 45(a), 55, 55-A(5), 57, 57A, 61(1), 61(2) and 62(1) to (xiii)(B) of General Conditions of Contract or in any Clause of the Special Conditions of the Contract shall be deemed as 'excepted matters' (matters nor arbitrable) and decisions of the Railway authority, thereon shall be final and binding on the contractor; provided further that 'excepted matters' shall stand specifically excluded from the purview of the Arbitration Clause.

64. (1) Demand For Arbitration:

64. (1) (i) In the event of any dispute or difference between the parties here to as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railways of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the "excepted matters" referred to in Clause 63 of these Conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.

64.(1) (ii) The demand for arbitration shall specify the matters which are in question, or subject of the dispute of difference as also the amount of claim item - wise. Only such disputes(s) or differences(s) in respect of which the demand has been made, together with counter claims or set off, given by the Railway, shall be referred to arbitration and other matters shall not be included in the reference.

64.(1) (ii) (a) The Arbitration proceeding shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railways.

(b) The claimant shall submit his claim stating the facts supporting the claims alongwith all the relevant documents and the relief of remedy sought against each claim within a period of 30 days from the date of appointment of the Arbitral Tribunal.

(c) The Railways shall submit its ' defence statement and counter claim(s), if any, within a period of 60 days of receipt of copy of claims from Tribunal thereafter, unless otherwise extension has been granted by Tribunal.

*(d) **Place of Arbitration:** The place of arbitration would be within the geographical limits of the Division of the Railways where the cause of action arose or the Headquarters of the concerned Railways or any other place with the written consent of both the parties.*

64.(1) (iii) No new claim shall be added during proceedings by either party. However, a party may amend or supplement the original claim or defence thereof during the course of arbitration proceedings subject to acceptance by Tribunal having due regard to the delay in making it.

64.(1) (iv) if the contractor(s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the railways that the final bill is ready for payment, the/they will be deemed to have waived his/their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these items.

64.(2) *Obligation During Pendency Of Arbitration:*

Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the Railway shall be withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal to consider and decide whether or not such work should continue during arbitration proceedings,

64.(3) Appointment of Arbitrator:

64.(3) (a)(i) *in case where the total value of all claims in question added together does not exceed Rs.25,000,000 (Rupees twenty five lakh only), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway not below JA Grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM.*

{Authority: Railway Board's letter No. 2012/CEI/CT/ARB./24, Dated 22.10./05.11. 2013}.

64.(3) (a)(ii) *In case not covered by the Clauses 64 (3) (a) (i), the Arbitral Tribunal shall consist of a Panel of three Gazetted Railway Officers not below JA Grade or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM. Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the Contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them is from the Accounts Department. An officer of Selection*

Grade of the Accounts Department shall be considered of equal status to the officer in SA grade of the other departments of the Railway for the purpose of appointment of arbitrator.

64. (3) (a)(iii) if one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such reconstituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator (s).

64.(3) (a)(iv) The Arbitral Tribunal shall have power to call for such evidence by way of affidavits or otherwise as the Arbitral Tribunal shall think proper, and it shall be the duty of the parties hereto to do or cause to be done all such things as may be necessary to enable the Arbitral Tribunal to make the award without any delay. The Arbitral Tribunal should record day to day proceedings. The proceedings shall normally be conducted on the basis of documents and written statements.

64.(3) (a)(v) While appointing arbitrator (s) under Sub-Clause (i), (ii) & (iii) above, due care shall be taken that he/they is/are not the on/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Railway servant (s) expressed views on all or any -of the matters under dispute or differences. The proceedings of the Arbitral Tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had, in the course of his service opportunity to deal with the matters to which the contract relates or who in the

course of his/their duties expressed views on all or any of the matters under dispute.

64.(3) (b)(i) The arbitral award shall state item wise, the sum and reasons upon which it is based. The analysis and reasons shall be detailed enough so that the award could be inferred therefrom.

64. (3) (b)(ii) A party may apply for corrections of any computational errors, any typographical or clerical errors or any other error of similar nature occurring in the award of a Tribunal and interpretation of a specific point of award to Tribunal within 60 days of receipt of the award.

64.(3) (b)(iii) A party may apply to Tribunal within 60 days of receipt of award to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

64. (4) In case of the tribunal, comprising of three Members, any ruling on award shall be made by a majority of Members of Tribunal. In the absence of such a majority, the views of the Presiding Arbitrator shall prevail.

64. (5) Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.

64.(6) The cost of arbitration shall be borne by the respective parties. The cost shall inter-alia include fee of the arbitrator (s), as per the rates fixed by Railway Board from time to time and the fee shall be borne equally by both the parties. Further, the fee payable to the arbitrator(s) would be governed by the instructions issued on the subject by Railway Board from time to time irrespective of the fact whether the arbitrator(s) is/are appointed by the Railway Administration or by the court of law unless specifically directed by Hon'ble court otherwise on the matter.

64.(7) Subject to the provisions of the aforesaid Arbitration and Conciliation Act 1996 and the rules thereunder and any statutory modifications thereof shall apply to the arbitration proceedings under this Clause.”

9. Respondent claims that Clause 64 of GCC has been modified vide respondent’s letter dated 11.11.2016 and that the petitioner was required to provide waiver of Clause 12 (5) of the Act. The modified Clause 64 of GCC in terms of the stand of the respondent is as follows:

“64.(1): Demand for Arbitration

64.(1) (i) : In the event of any dispute or difference between the parties hereto as to

The construction or operation of this contract", or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railways fails to make a decision within 120 days, then and in any such case, but except in any of the "excepted matters" referred to in Clause 63 of these Conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on dispute matters shall demand in writing that the dispute or difference be referred to arbitration.

64. (1) (ii)

The demand for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item-wise. Only such dispute or difference, in respect of which the demand has been made, together with counter claims or set off, given by the Railway, shall be referred to arbitration and other matters shall not be included in the reference.

64. (1) (ii) (b)

The parties may waive of the applicability of subsection 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015, if they agree for such waiver, in writing, after dispute having arisen between them, in the format given under Annexure XII of these conditions.

64. (1) (iii) (a)

The written and Arbitration valid demand proceedings for shall arbitration be is assumed received to by have the Railway, commenced from the day, a

64. (1) (iii) (b)

The claimant shall submit his claim stating the facts supporting the claims along with all the relevant documents and the relief or remedy sought against each claim within a period of 30 days from the date of appointment of the Arbitral Tribunal.

64. (1) (iii) (c)

The Railway shall submit its defence statement and counter claim(s), if any, within a period of 60 days of receipt of copy of claims from Tribunal thereafter, unless otherwise extension has been granted by Tribunal.

64 . (1) (iii) (d)

Place of Arbitration: *The place of arbitration would be within the geographical limits of the Division of the Railway where the cause of action arose or the Headquarters of the concerned Railway or any other place with the written consent of both the parties.*

64. (1) (iv)

No new claim shall be added during proceedings by either party. However, a party may amend or supplement the original claim or defense thereof during the course of arbitration proceedings subject to acceptance by Tribunal having due regard to the delay in making it.

64. (1) (v)

If the contractor(s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Railways that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims.

64.(2)

Obligation During Pendency of Arbitration: *Work under the contract shall, unless otherwise directed by the engineer, continue during the arbitration proceedings, and no payment due or payable by the Railways shall be withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal to consider and decide whether or not such work should continue during arbitration proceedings.*

64(3): Appointment of Arbitrator:

64 (3) (a). Appointment of Arbitrator where applicability of section 12(5) of Arbitration and Conciliation Act has been waived off:

64. (3) (a) (i): *in cases where the total value of all claims in question added together does not exceed Rs.1,00,00,000/- (Rupees One Crore only), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway not below JA Grade, nominated by the General Manager. The sole Arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM.*

64. (3) (a) (ii): *In cases not covered by the Clause 64 (3) (a) (i), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway officers not below JA Grade or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of*

SAG officer, as the arbitrators. For this purpose, the Railway will send a panel of at least four (4) names of Gazetted Railway Officers or one or more departments of the Rai/way which may also include the name(s) of retired Rai/way Officer(s) empanelled to work as Railway

Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by GM.

Contractor will be asked to suggest to General Manger at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of tile request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the residing arbitrator's from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the date of receipt of the names of contractor's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them is from the Accounts Department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA grade of other departments of the Railway for the purpose of appointment of arbitrator.

64 (3)(b) : Appointment of Arbitrator where applicability of Section 12(5) of A&C has not been waived of:

The Arbitral Tribunal shall consist of a Panel of Three (3) retired Railway Officer retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of at least four (4) names of retired Railway Officer(s) empaneled to work as Railway Arbitrator, fully indicating their retirement date to the contractor within 60 days from the day when a written and valid demand for arbitration for arbitration is received by the GM.

Contractor will be asked to suggest to General Manager at

least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will also simultaneously appoint the balance number of arbitrators either from the pane or from outside the panel duly indicating the presiding arbitrator from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the date of receipt of the names of contractor and nominees. While nominating the arbitrators, it will be necessary to ensure that one of them has advised in the Accounts Department.

64.(3) (b) (i) : *if one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such reconstituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator(s).*

64.(3) (c) (ii)

(a) The Arbitral Tribunal shall have power to call for such evidence by way of affidavits or otherwise as the Arbitral Tribunal shall think proper, and it shall be the duty of the parties hereto to do or cause to be done all such things as may be necessary to enable the Arbitral Tribunal to make the award without any delay. The proceedings shall normally be conducted on the basis of documents and written statements.

(b) Before proceeding into the merits of any dispute, the Arbitral Tribunal shall first decide and pass its orders over any pleas submitted/objections raised by any party if any,

regarding appointment of Arbitral Tribunal, validity of arbitration, agreement, jurisdiction and scope of the tribunal to deal with the dispute (5) submitted to arbitration, applicability of time 'limitation' to any dispute, any violation of agreed procedure regarding conduct of the arbitral proceedings or pleas for interim measures of protecting and record its orders in day to day proceedings. A copy of the proceedings duly signed in by all the members of Tribunal should be provided to both the parties.

64.(3) (iii) (i) Qualification of Arbitrator (s)

(a) Serving Gazetted Railway Officers of not below JA level.

(b) Retired Railway Officers, not below SA Grade level three years after his date of retirement.

(c) Age of Arbitrator at the time of appointment shall be below 70 years.

(ii) An arbitrator may be appointed notwithstanding the total number of arbitration cases in which he has been appointed in the past.

(iii) While appointing arbitrator(s) under Sub-Clause

64.(3)(a) (i), 64.(3)(a)(ii), 64.(3)(b) above, due care shall be taken that he/they is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Railway Servant(s) expressed views on all or any of the matters under dispute or differences. The proceedings of the Arbitral Tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had, In the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.

64.(3)(d) (i) *The arbitral award shall state item wise, the sum and reasons upon which it is based. The analysis and*

reasons shall be detailed enough so that the award could be inferred therefrom.

64.(3)(d) (ii) *A party may apply for corrections of any computational errors, any typographical or clerical errors or any other error of similar nature occurring in the award of a Tribunal and interpretation of a specific point of award to Tribunal within 60 days of receipt of the award.*

64.(3)(d) (iii) *A party may apply to Tribunal within 60 days of receipt of award to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award.*

64.(4) *In case of the Tribunal, comprising of three Members, any ruling on award shall be made by a majority of Members of Tribunal. In the absence of such a majority, the views of the Presiding Arbitrator shall prevail.*

64.(5) *Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.*

64.(6)

(a) The cost of arbitration shall be borne by the respective parties. The cost shall inter-alia include fee of the arbitrator(s), as per the rates fixed by Railway Board from time to time and the fee shall be borne equally by both the parties, provided parties sign an agreement in the format given at Annexure II to these condition after/while referring these disputes to Arbitration. Further, the fee payable to the arbitrator(s) would be governed by the instructions issue on the subject by Railway Board from time to time irrespective of the fact whether the arbitrator(s) is/are appointed by the Railway Administration or by the court of law unless specifically directed by Hon'ble Court otherwise on the matter.

(b) (i) Sole Arbitrator shall be entitled for 25% extra fee

over the fee prescribed by Railway Board from time to time.

(ii) Arbitrator Tribunal shall be entitled to 50% extra fee, if Award is decided within six months.

64. (7)

Subject to the provisions of the aforesaid Arbitration and Conciliation Act 1996 and the rules thereunder and relevant para of general Conditions of Contract (GCC) and any statutory modifications thereof shall apply to the appointment of the arbitrators and arbitration proceedings under this Clause.”

10. Thus, in terms of clause 63 of GCC, petitioner referred and raised the disputes in its communication dated 24.08.2019 addressed to the General Manager, Northern Railways respectively in all the matters.

11. It is the case of the petitioner that despite receipt of notice by General Manager, Northern Railways and even after expiry of 120 days from the date of the notice, no decision has been received from the respondent or its General Manager. Instead, the respondent vide its communications dated 22.06.2020 in ARB.P.366/2020; dated 27.12.2019 and 02.06.2020 in ARB.P.368/2020 and dated 27.12.2019 and 02.06.2020 in ARB.P.370/2020, without invocation of Clause 64 by petitioner herein, sought to unilaterally propose a panel of four names and sought the petitioner's choice of its nominee out of the said proposed four names. No such communication took place in ARB.P.367/2020.

12. For reference, letter dated 22.06.2020 as received by the petitioner from the respondent in ARB.P.366/2020 is reproduced as

below:

“

NORTHERN RAILWAY

HEADQUARTER OFFICE
KASHMERE GATE.
DELHI-110006.

Na.74-W-4-1-409-WA-S.E,Rd- ARB Dated.-22-06-2020

**M/s. Gangotri Enterprises Limited,
B-158, Sector-A, Mahanagar, Lucknow**

Sub:- **Demand for arbitration for the work** of “Additional works such as construction of boundary wall/ retaining wall, circulating area, entry road, service road, RCC box bridge and other allied works in connection with Development of New Passenger Terminal at Anand Vihar” (Contract Agreement NO.74-W/1/358/WA/ANVR/SE Rd. dt. 14-01-2009 Agency:- M/s Gangotri Enterprises Ltd.)

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Dear Sir's,

This is in reference to your letter cited above, the General Manager, Northern Railway, Baroda House, New Delhi has nominated a panel of following four retired Railway Officers, retired not below the rank of Senior Administrative Grade Officer to suggest at least two names out of the panel and there after G.M. will appoint one out of them to act as your nominee-

1. Shri Bhuvnesh P. Khare, Retd. GM/DLW.
2. Shri R.K. Gupta, Retd. GM/ER.
3. Shri Ashok Kumar Agarwal, Retd. GM/ICF/Chennai.
4. Smt. Saandhay Deep Das, Retd. FA&CAO/System/NR.

You are, therefore, requested to suggest at least two names out of the above panel, to be appointed as Co-Arbitrator as your nominee by the General Manager, Northern Railway, within 15 days from the date of issue of this letter positively.

(Parag Prasad)
Dy. Chief Engineer/ C/G-1
For General Manager

Copy to:-

1. The Dy. Chief Engineer/ Const., Northern Railway, State Entry Road, New Delhi:- for information and necessary action.”

13. It is the contention of petitioner that respondent was required to provide the decision in respect of the claims raised by petitioner in terms of Clause 63 of GCC and the stage for proposing panel, if permissible, would have come only on invocation of Clause 64 of GCC. Since the disputed claims raised by petitioner are above Rs.10 lakh, in terms of Clause 64(3)(a)(2) of the GCC, an Arbitral Tribunal comprising of three Arbitrators would be required to be constituted. Thus, in view of the same, petitioner raised disputes in terms of Clause 64 to be referred for Arbitration.

14. In view thereof, notices dated 25.06.2020 were sent respectively by the petitioner through its counsel in all the cases. By the said notices, petitioner appointed its nominee Arbitrators, namely, Justice (Retd.) O.P. Garg (former Judge of Allahabad High Court) in ARB. P. 366/2020 and Justice (Retd.) B.C. Kandpal (Former Judge of Uttarakhand High Court) in the other three cases, i.e., ARB. P. 367/2020, ARB. P. 368/2020, ARB. P. 370/2020.

15. Since no response was received from the respondent despite service of notices as aforesaid and the respondent failed to appoint any nominee Arbitrator, present petitions have been filed for appointment of nominee Arbitrator of the respondent. The petitioner has raised claims to the tune of approximately Rs. 97,83,04,430/- in ARB. P. 366/2020; approximately Rs. 101,89,58,153/- in ARB. P. 367/2020; approximately Rs. 39,38,26,452/- in ARB. P. 368/2020 and

approximately Rs. 30,03,57,367/- in ARB. P. 370/2020.

16. It is the contention of the petitioner that since General Manager of the respondent is interested in the outcome of the arbitration, he is as such ineligible to appoint petitioner's nominee arbitrator. Moreover, the persons proposed to be appointed as arbitrators in terms of Clause 64 (3)(a)(2) of the GCC are ineligible for appointment by virtue of amended Section 12(5) read with Seventh Schedule of the Act. It is further submitted that petitioner is not agreeable to waiver of Section 12(5) of the Act as demanded by the office of the respondent.

17. Respondent on the other hand, has opposed the present petitions. Ld. Counsel appearing for respondent submits that in terms of Clause 64 of GCC, respondent has nominated panel of four retired Railway officers, not below the rank of Senior Administrative Grade Officers. Thus, petitioner was requested to suggest at least two names out of the panel, out of which GM was to appoint one arbitrator as the nominee of petitioner. It is submitted that Railways is bound by the procedure prescribed under Section 64 (3)(b) of GCC for appointment of arbitrator, which is applicable to those cases where applicability of Section 12(5) of the Act has not been waived of. It is contended that the petitioner at best, can demand for resolution of dispute through arbitration under Clause 64 (1) (ii) of GCC and cannot nominate its Arbitrator.

18. Learned counsel for respondent has relied upon judgment of Supreme Court in the case of *Central Organisation for Railway Electrification vs. ECI – SPIC – SMO-MCML*, (2020) 14 SCC 712 to contend that in identical case involving same clauses, Supreme Court

has upheld the same. She has further relied upon judgment in the case of *Voestalpine Schienen GMBH vs. Delhi Metro Rail Corporation Ltd.*, (2017) 4 SCC 665 and contended that Supreme Court has held in the said case that merely because Arbitrators as drawn by Delhi Metro Rail Corporation ('DMRC') are government employees or ex-government employees, does not by itself make such persons ineligible to act as arbitrators of DMRC.

19. I have considered the contentions raised on behalf of both the parties.

20. Amendments have been made to the Arbitration and Conciliation Act, 1996 in Sections 12(1) and 12(5) and Fifth, Sixth and Seventh Schedule of the Act with respect to the issue of independence of Arbitrators. The present petitions require consideration of the issue of appointment of unilateral appointment sought to be done by the respondent despite the bar as provided by virtue of amended Sections 12(5) of the Act, which enumerates the disqualification in the Seventh Schedule.

21. The position of law after amendment of the Act is that an employee of the respondent or even a retired employee would be ineligible to be appointed as an arbitrator. In the case of *Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd.*, reported as 2019 SCC Online SC 1517, Supreme Court has held that a party or an official or an authority having interest in the dispute would be disentitled to be appointed as an arbitrator. It has been held as follows:

23. Sub-para (vii) of the aforesaid para 48 lays down that if there are justifiable doubts as to the independence and

impartiality of the person nominated, and if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, such appointment can be made by the Court. It may also be noted that on the issue of necessity and desirability of impartial and independent arbitrators the matter was considered by the Law Commission in its Report No. 246. Paras 53 to 60 under the heading “Neutrality of Arbitrators” are quoted in the judgment of this Court in Voestalpine Schienen GmbH v. DMRC [Voestalpine Schienen GmbH v. DMRC, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , while paras 59 and 60 of the Report stand extracted in the decision of this Court in Bharat Broadband Network Ltd. v. United Telecoms Ltd. [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] . For the present purposes, we may rely on para 57, which is to the following effect : (Voestalpine case [Voestalpine Schienen GmbH v. DMRC, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , SCC p. 681, para 16)

“16. ... ‘57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the Arbitral Tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles — even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to

add that Mr P.K. Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous — and the right to natural justice cannot be said to have been waived only on the basis of a “prior” agreement between the parties at the time of the contract and before arising of the disputes.’ ”

(emphasis in original)

24. *In Voestalpine [Voestalpine Schienen GmbH v. DMRC, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , this Court dealt with independence and impartiality of the arbitrator as under : (SCC pp. 687-88 & 690-91, paras 20 to 22 & 30)*

“20. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rationale is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to

further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in Hashwani v. Jivraj [Hashwani v. Jivraj, (2011) 1 WLR 1872 : 2011 UKSC 40] in the following words : (WLR p. 1889, para 45)

'45. ... the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.'

21. Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in Consorts Ury [Fouchard, Gaillard, Goldman on International Commercial Arbitration, 562 [Emmanuel Gaillard & John Savage (Eds.) 1999] {quoting Cour de cassation [Cass.] [Supreme Court for judicial matters] Consorts Ury v. S.A. des Galeries Lafayette, Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France)}.], underlined that:

'an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator'.

22. Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings.

30. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by DMRC. It, therefore, becomes imperative to have a much broadbased panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. We, therefore, direct that DMRC shall prepare a broadbased panel on the aforesaid lines, within a period of two months from today.”

22. Thus, any person whose relationship with the parties or the counsel or the subject matter of the dispute falls under the Seventh Schedule, shall be ineligible to be appointed as arbitrator by virtue of Section 12(5) of the Act. Elucidating the law in this regard, Supreme Court in the case of ***Bharat Broadband Network Limited v. United Telecoms Limited***, (2019) 5 SCC 755, held as follows:

“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.

16. *The Law Commission Report, which has been extensively referred to in some of our judgments, makes it clear that there are certain minimum levels of independence and impartiality that should be required of the arbitral process, regardless of the parties' agreement. This being the case, the Law Commission then found:*

“59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the red and orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a “guide” to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed Section 12(5) of the Act and the Fifth Schedule which incorporates the categories from the red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so

appointed, notwithstanding any prior agreement to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed Explanation to Section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the red and orange lists of the IBA Guidelines), the ineligibility to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious subset of situations (as set out in the Fifth Schedule, and as based on the red list of the IBA Guidelines).

60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective “justifiable doubts” regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to Section 12(5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all other cases, the general rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1), and in which context the High Court or the designate is to have “due regard” to the contents of such disclosure in appointing the arbitrator.”

(emphasis in original)

Thus, it will be seen that party autonomy is to be respected only in certain exceptional situations which could be situations which arise in family arbitrations or other

arbitrations where a person subjectively commands blind faith and trust of the parties to the dispute, despite the existence of objective justifiable doubts regarding his independence and impartiality.”

23. Judgment in the case of ***Central Organisation for Railways Electrification (supra)***, as relied upon by respondent, cannot come to the aid of respondent. It is pertinent to note here that the said judgment has been referred to larger Bench in order to look into the correctness of the said judgment in the case of ***Union of India vs. M/s Tantia Constructions Ltd., SLP (Civil) No. 12670/2020***. While referring the said matter to larger Bench, Hon’ble Supreme Court held as follows:

“.....However, reliance has been placed upon a recent three-Judge Bench decision of this Court delivered on 17.12.2019 in Central Organisation for Railway Electrification vs. M/s ECI-SPIC-SMO-MCML (JV) A Joint Venture Company, 2019 SCC OnLine 2 1635. We have perused the aforesaid judgment and prima facie disagree with it for the basic reason that once the appointing authority itself is incapacitated from referring the matter to arbitration, it does not then follow that notwithstanding this yet appointments may be valid depending on the facts of the case.

We therefore request the Hon’ble Chief Justice to constitute a larger Bench to look into the correctness of this judgment.”

24. Perusal of the aforesaid order dated 11.01.2021 passed by the Supreme Court in the case of ***Union of India vs. M/s Tantia Constructions Ltd., (2021) SCC Online SC 271***, shows that Supreme Court has given a prima facie view, wherein it has disagreed with the judgment in the case of ***Central Organisation for Railways***

Electrification (supra).

25. Similarly, in a recent case, in the case of *Steel Ltd. vs. South Western Railway and Anr.*, Special Leave to Appeal (C)No. 9462/2022, by order dated 16.08.2022, Supreme Court by a Bench headed by Chief Justice of India directed for constitution of a larger Bench to consider the correctness of the judgment in the case of *Central Organisation for Railways Electrification (supra)*. Thus, Supreme Court held as follows:

“1. The basic issue involved in the instant matter is whether the appointment of the Arbitrator was in conformity with the law laid down by this Court in *TRF Ltd. V. Energo Engineering Projects Ltd, (2017) 8 SCC 377*; and, *Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2020) 20 SCC 760*.

2. The High Court has gone by the decision rendered by a Bench of three-judges of this Court in *Central Organisation For Railway Electrification v. ECL-SPIC-SMO-MCML (JV), A Joint Venture Company, (2020) 14 SCC 712*, which decision had distinguished the applicability of *TRF Ltd. (supra)* and *Perkins Eastman Architects DPC (supra)* to the fact situation involved therein.

3. It has been brought to our notice that subsequently, a Bench of three-Judges of this Court in *Union of India v. M/s. Tantia Constructions Ltd., [SLP (Civil) No. 12670 of 2020]*, vide its order dated 11.01.2021, prima facie expressed its disagreement with the view taken in *Central Organisation For Railway Electrification (supra)* and requested the Hon'ble the Chief Justice of India to constitute a larger Bench to look into the correctness of the decision in *Central Organisation For Railway Electrification (supra)*.

4. *In the present case, after the appointment of the Arbitrator nominated by the respondent herein, the proceedings took place before the Arbitrator and award was passed on 30.03.2022.*

5. *The copy of the Award shows that there was no participation on part of the present petitioner. Further, none had stepped into the box on behalf of the respondents in support of its case.*

6. *We need not, at this stage, go into the correctness of such Award, as those questions are not presently arising for our consideration. It is however, quite clear that the correctness of the decision in **Central Organisation For Railway Electrification** (supra), based on which the appointment of the Arbitrator was made and the matter had proceeded before the Arbitrator, was doubted by a subsequent Bench of three Judges.*

7. *In the circumstances, we direct that the papers of the present matter be placed before the Hon'ble the Chief Justice of India for constituting a larger Bench.*

8. *Since the issue has been re-occurring, we may observe that it would be in the fitness of things that the question is resolved at an early date.*

9. *Pending such consideration, the effect and operation of the Award dated 30.03.2022 shall remain stayed."*

26. Reliance by the respondent on the Judgment in the case of **Voestalpine Schienen GMBH** (supra), is misplaced. In the said case, DMRC had forwarded a panel of 31 persons, thereby giving a wide choice to the petitioner therein to nominate its Arbitrator. Further, it is

specifically noted in the said judgment that the said persons on the panel of DMRC are not the employees or ex-employees or in any way related to the DMRC.

27. However, this is not the position in the present case. Coming to the facts of the present case, it is seen that the panel suggested by the respondent comprises of only four retired officials of Northern Railways. Even the final choice of appointing the nominee of the petitioner is claimed by General Manager, Northern Railways. Thus, the entire process as envisaged in the arbitration Clause in the present case is contrary to the law laid down by Supreme Court.

28. In the said judgment of *Voestalpine Schienen GMBH (supra)*, Supreme Court while commenting adversely on the procedure as contained in the Arbitration Agreement in the said case, held as follows:

“27. As already noted above, DMRC has now forwarded the list of all 31 persons on its panel thereby giving a very wide choice to the petitioner to nominate its arbitrator. They are not the employees or ex-employees or in any way related to DMRC. In any case, the persons who are ultimately picked up as arbitrators will have to disclose their interest in terms of amended provisions of Section 12 of the Act. We, therefore, do not find it to be a fit case for exercising our jurisdiction to appoint and constitute the Arbitral Tribunal.

28. Before we part with, we deem it necessary to make certain comments on the procedure contained in the arbitration agreement for constituting the Arbitral Tribunal. Even when there are a number of persons empanelled, discretion is with DMRC to pick five persons therefrom and forward their names to the other side which is to select one of these five persons as its nominee (though

in this case, it is now done away with). Not only this, DMRC is also to nominate its arbitrator from the said list. Above all, the two arbitrators have also limited choice of picking upon the third arbitrator from the very same list i.e. from remaining three persons. This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by DMRC. Secondly, with the discretion given to DMRC to choose five persons, a room for suspicion is created in the mind of the other side that DMRC may have picked up its own favourites. Such a situation has to be countenanced. We are, therefore, of the opinion that sub-clauses (b) & (c) of Clause 9.2 of SCC need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator from the whole panel.

29. Some comments are also needed on Clause 9.2(a) of GCC/SCC, as per which DMRC prepares the panel of “serving or retired engineers of government departments or public sector undertakings”. It is not understood as to why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is imperative that panel should be broadbased. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like Judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy, etc.

Therefore, it would also be appropriate to include persons from this field as well.

30. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by DMRC. It, therefore, becomes imperative to have a much broadbased panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. We, therefore, direct that DMRC shall prepare a broad based panel on the aforesaid lines, within a period of two months from today.”

29. This Court in the case of *SMS Limited vs. Rail Vikas Nigam Ltd.*, reported as *2020 SCC Online Del 77*, while setting aside the appointment procedure observed that the panel was not broad based as it majorly comprised of retired or serving employees of respondent thereby creating a reasonable apprehension of bias and partiality. It was held as follows:

“32. There is no dispute that there are only eight members out of thirty seven in the panel provided by the respondent Company who are Officers retired from organizations other than the Railways and PSUs not connected with the Railways. The Supreme Court in Voestalpine Schienen GMBH (supra) had observed as to why the panel should not be limited to Government departments or public sector

undertakings; and went on to hold that in order to instill confidence in the mind of the other party, it is imperative that apart from serving or retired engineers of government departments and public sector undertakings, Engineers of prominence and high repute from private sector should also be included, likewise panel should comprise of persons with legal background like Judges and Lawyers of repute as it is not necessary that all the disputes that arise would be technical in nature. In fact, I find in the judgment of the Coordinate Bench of this Court in Simplex Infrastructures Ltd. (supra), the respondent Company had provided 26 names with only nine being Officers who were not connected with Railways or other Railways organizations/Companies, still there being no persons with any legal, accountancy backgrounds or from other diverse fields, the Court went ahead to hold clearly that in spite of repeated judgments relying upon the judgment of the Supreme Court in Voestalpine Schienen GMBH (supra), the respondent refused to comprehensively broad base its panel and had appointed the nominee Arbitrator on behalf of the respondent in the said case. So, it must follow, that the panel of thirty seven names given by the respondent Company, also, does not satisfy the concept of neutrality of Arbitrators as it is not broad based.

33. The plea of Mr. Anil Seth is primarily that there is no cause of action for the petitioner to move this Court under Section 11(6) of the Act of 1996 by relying upon the judgment of this Court in Sushil Kumar Bhardwaj (supra). I am not in agreement with the submission made by Mr. Anil Seth for the simple reason that when the arbitration Clause itself is invalid for the reasons stated above and the petitioner having nominated its Arbitrator and called upon the respondent to appoint its nominee Arbitrator, the respondent by stating that the appointment of nominee Arbitrator by the petitioner is in violation of Clause 20.3(ii) of the GCC and that he also does not possess qualification as provided in Clause 20.3(iii) of the GCC

and by providing a panel of thirty seven names having called upon the petitioner to withdraw its nominee Arbitrator, the petitioner was well within its right to invoke the jurisdiction of this Court seeking a prayer for appointment of a nominee Arbitrator on behalf of the respondent.

.....
39. *But the aforesaid does not mean that the panel should only consist of the retired Officers who retired from Government or statutory corporation or PSUs but it must also be broad based as stated above, which is not the case herein. Hence, the plea is rejected.*

.....
41. *It is also pertinent to note that in the case of Perkins Eastman Architects DPC v. HSCC (India) Ltd., 2019 (6) ArbLR 132(SC), the Supreme Court while dealing with an application under Section 11(6) read with 11(12)(a) of the Act of 1996, held that as per the scheme of Section 11 of Act of 1996 if there are justifiable doubts as to the independence and impartiality of the person nominated, and if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, such an appointment can be made by the Court.”*

30. Similarly, in the case of ***BVSR-KVR (Joint Ventures) vs. Rail Vikas Nigam***, reported as ***2020 SCC Online Del 456***, this Court took identical view.

31. In the present cases, it is seen that the panel of arbitrators as sent by the respondent contained only four names, which cannot be considered to be broad based by any extent of imagination. Thus, the said panel as given by the respondent does not satisfy the concept of neutrality of arbitrators as held by Supreme Court in the case of ***Voestalpine Schienen GMBH (supra)***. Further, as already noted,

Supreme Court has already given a prima facie view with respect to correctness of the judgment in the case of *Central Organisation for Railway Electrification (supra)*, wherein a similar clause was considered and has passed reference order for constituting a larger Bench to look into the correctness of the said judgment. In view thereof, it is held that the petitioner herein was within its right to nominate its Arbitrator.

32. Considering the detailed discussion hereinabove, it is held that the present petitions under Section 11 of the Act are maintainable and there is no impediment in appointment of a nominee Arbitrator on behalf of respondent.

33. Accordingly, I nominate Justice (Retd.) Indira Banerjee, former Judge of Supreme Court. The two learned arbitrators in the respective cases shall appoint a Presiding Arbitrator.

34. All rights and contentions of the parties are left open for consideration by the Arbitral Tribunal.

35. The present petition is disposed of in terms of the aforesaid directions.

**(MINI PUSHKARNA)
JUDGE**

OCTOBER 31, 2022

PB