IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION APPLICATION (L) NO. 6984 OF 2023

Telex Advertising Pvt Ltd. .. Applicant

Versus

Central Railway .. Respondent

WITH

ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION APPLICATION (L) NO. 30940 OF 2023

N.P. Enterprises .. Applicant

Versus

General Manager, Western Railway and ors .. Respondents

WITH
ARBITRATION PETITION NO. 44 OF 2024
(CIVIL APPELLATE JURISDICTION)

Anjali Hotels Pvt Ltd .. Petitioner

Versus

Airport Authority of India, Pune .. Respondent

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Appearance in ARBAP(L) 6984/2023 & CARAP(L) 30940/2023

Mr.Mohammed Zain Khan with Mr.Ashraf Kapoor for the applicant in ARBAPL 6984/2023.

Mr.N.R. Bubna with Ms.Pooja Malik for the respondent/Central Railway in ARBAPL 6984/2023.

Mr.Dhananjay Deshmukh with Mr.N. Qureshi and Mr.Dushyant Krishnan for the applicant in CARAPL 30940/2023.

Mr.Mayuresh Lagu with Mr.Shashank Dubey i/b Mr.Sagar Patil for the respondent/Railway in CARAPL 30940/2023.

Appearance in ARP 44/2024.

Mr.G.S.Godbole, Sr. Advocate with Shon D. Gadgil i/b Mr.Murtaza Chherawala, Ms. Mihika Awate and Ms. Rukhsar Mulani for M/s. CNS Juris for the applicant.
Mr.H.V. Kode and Ms. J.S. Karnik for the respondent.

CORAM: BHARATI DANGRE, J.

DATED : 27th MARCH, 2024

JUDGMENT:-

1 The two Arbitration Applications filed by the applicants, requesting for appointment of a neutral Arbitrator for resolving the disputes which had arose in the wake of it's contract in one case with Central Railway and another with Western Railway, is tagged along with Arbitration Petition filed against Airport Authority of India, Pune and since all of the aforesaid proceedings involve a common question of law, as regards the appointment of an independent and impartial Arbitrator, in the wake of the clause providing for the appointment in their distinct contracts.

2 CARAP(L) No. 30940/2023 is filed by N.P. Enterprises against General Manager, Western Railway, Mumbai, and its officers, seeking appointment of Sole Arbitrator for adjudicating the claims arising out of the contract awarded to it by the Western Railway.

The appointment is sought in the backdrop of Western Railway issuing Letter of Acceptance (LOA) in favour of N.P. Enterprise, the applicant, pursuant to a tender being floated for mechanised and manual cleaning and house keeping of 13 railway stations of Bombay Division for period of four years at a cost of Rs.11,32,71,255/-. On 2/1/2020, a contract agreement was executed between the parties, and it provided that the notice inviting tender, instructions to tenderers, General Conditions of Contract (GCC), Special Conditions of Contract, other conditions agreed to and documented, shall be construed as a part of the agreement.

3 In the wake of the Pandemic, the applicant was directed to reduce manpower and was issued letter of deployment of workers. The Railway, vide its letter dated 2/1/2023, raised certain issues as regards payment made to the workers, and though the applicant replied to the allegations, which, according to it, were vague, and sought clarifications on some aspects, the applicant demanded outstanding payment of last eight months, as per the statement of demand and asked the amount to be cleared. On 20/6/2023, the applicant was blacklisted and imposed fine of Rs.5,00,000/- (Rupees Five lakhs) without any show cause notice being issued. Ultimately, on 13/7/2023, the respondents terminated the contract, forfeited the performance guarantee and debarred the applicant for a period of two years from participating, in any work with the Mumbai Division of Railway.

On approaching this Court, on 16/10/2023 under Section 9 of the Arbitration and Conciliation Act, 1996, the applicant succeeded in obtaining stay to the operation and effect of the action of blacklisting, by the respondents, however, the Court left it open for the parties to take appropriate steps for initiation of arbitration proceedings.

4 N.P. Enterprises invoked arbitration on 3/8/2023, by relying upon the arbitration clause in the agreement, seeking appointment of a Sole Arbitrator for redressal of its grievance by particularly, staking its demand for payment for the work carried out and for recalling the notice of termination/black listing.

Pursuant thereto, the Divisional Commercial Manager, Western Railway, intimated the applicant that the Arbitrator can be appointed only when the claims are quantified in monetary terms, as mentioned in clause 8.2.1.1 of GCC of Services, 2018, governing the contract, and hence the Arbitrator could not be appointed.

5 By filing the present application, N.P. Enterprises raises a question, whether an Arbitrator/s to be appointed as per clause 8.4 of the GCC, and in particular clause 8.4.1 and 8.4.2 shall satisfy the test of constitution of an independent and impartial Arbitrator, in the backdrop of Section 12(5) r/w Schedule V and VII of the Arbitration and Conciliation Act, 1996.

6 Second Application i.e. Arbitration Application(L) No. 6984/2023 is filed by Telex Advertising Pvt. Ltd against Central Railway, and in this case, the dispute arose in the background of the Central Railway floating tender for display of Advertisement Rights through Internal Media at designated place in 35 rakes maintained in Kurla car shed for a period of five years. On 14/3/2019, LoA was issued in applicant's favour, awarding the rights for a period of five years.

In the wake of the covid pandemic, resulting into imposition of restriction u/s.144 of Cr.P.C, there was restricted commutation through Railways and this constrained the applicant to request the respondent, for renegotiation of the terms of the Contract, on account of the reduced foot falls and for pro-rata reduction of licence fee, and if it was not to be taken into account, it was indicated that the contract would be terminated. The Railways issued a notice declaring the period of lock down to be treated as *FORCE MAJEURE,* and non-operational period to be treated as *DIES NON*. It was also notified that there will be no relief in payment of licence fee for non-fare revenue contracts and the relief shall be given only to those contracts, which complete their full term and submit a declaration thereupon.

The applicant, on 13/10/2020, signed the unfair unilateral and one sided undertaking and the respondent also provided formula to pay the licence fee.

Accordingly, the applicant paid an amount of Rs.Four lakhs as licence fee and requested to waive off the penal interest from 23/6/2020 to 31/3/2021. The applicant addressed a letter to the Commercial Manager, which invoked *force majeure*, due to lock down and expressed its intention to terminate the contract, and it also made clear, at a subsequent point of time that as the contract was sought to be terminated, it will not pay the licence fee.

The applicant received show cause notice and several demand notices, to pay license fees along with penal interest, and when the Petition was moved u/s.9 for interim reliefs, it was informed that the security furnished, was already encashed.

It is in this background, the applicant seek appointment of an independent arbitrator, in the wake of invocation of notice dated 13/7/2022, by invoking Clause 19 of the tender, calling upon the Railways to appoint a sole independent, neutral Arbitrator, which is without waiving the condition, as prescribed u/s.12(5) of the Arbitration Act, for reference of the disputes.

7 The relevant clause in this Application, is clause no.19 of the Contract, which contemplated reference of dispute or difference between the parties, as to the respective rights and liabilities, on any matter in question to arbitration and clause no.3 relating to the appointment of arbitrator is worded as under:-

3 : Appointment of Arbitrator

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

(a)(i) In cases where the total value of all claims in question added together does not exceed Rs.1,00,00,000/- (Rs. 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 the General Manager.

(a)(ii) In cases not covered by the Clause 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 atleast four (4) names of Gazetted Railway Officers of one or more departments of the Railway which may also include the names(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 General Manager.
Licensee will be asked to suggest to the General Manager at least 2 names out of the panel for appointment as Licensee'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 Licensee'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. The General Manager 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 officers in SA grade of other departments of the Railways for the purpose of appointment of Arbitrator.

3(b): Appointment of Arbitrator where applicability of section 5 of the A & C Act has not been waived off: 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 penal of atleast four (4) names of retired Railway Officer(s) empanelled to work as Railway Arbitrator duly indicating their retirement date to the Licensee within 60 days from the day when a written and valid demand for arbitration is received by the General Manager.

The Licensee will be asked to suggest to the General Manager atleast two 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 atleast one out of them as the Licensee's nominee and will, also simultaneously appoint the balance number of Arbitrator form amongst the 3 Arbitrators so appointed. General Manager shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of Licensee's nominees' While nominating the Arbitrators, it will be necessary to ensure that one of them has served the Accounts Department.

8 In the first case, the relevant clause, is Clause no.VIII captioned as 'Settlement of Disputes – Indian Railway Arbitration Rules', which form part of the General Conditions of Contract of Service and the relevant clause is Clause no.8.4, which pertains to appointment of arbitrator, which is identically worded as clause no.3 which is reproduced above.

It is thus clear that these two petitions revolve around the clause contained in the General Conditions of Contract (GCC) of Railway, which has set out the manner of appointment of an Arbitrator, when any dispute or difference between the parties, require a reference to the Arbitrator.

The GCC contemplate reference of all disputes and differences arising out of or in connection with the contract, whether during the progress of the work or after its completion, to be referred by the contractor to the General Manager and the General Manager shall notify his decisions on all matters referred to by the contractor within 120 days on its receipt, except the 'excepted matters' (not arbitrable) and the decision of the Railway Authority, thereon, is final and binding on the contractor. However, if the Railway withhold any certificate to which the contractor may claim to be entitled to, or if it fails to make a

decision within 120 days, then within 180 days of presenting the final claim on disputed matters, the contractor shall demand in writing, a reference to arbitration.

It is open to the parties to waive off the applicability of sub-section 12(5) and such waiver shall be in writing.

9 The third petition, which is tagged along with, is an Arbitration Petition filed by the petitioner Anjali Hotels Pvt. Ltd, for appointment of Sole Arbitrator in the wake of the disputes that have arisen out of the breach of leave and licence agreement dated 1/6/2020 executed with the Airport Authority of India, Pune.

The licence agreement was executed between the parties on 1/6/2020 and on 5/9/2023, termination notice was issued by the respondent, which resulted in invocation of arbitration and requesting for a reference to the Dispute Resolution Committee, which was competent to resolve the disputes within 45 days. The Dispute Resolution Committee examined the complaint and recommended in favour of the petitioner and permitted it to operate the executive lounge at the existing terminal building beyond 5/1/2024, till the closure of operations in the terminal building.

10 The applicant invoked arbitration clause contained in the leave and licence deed on 18/10/2023, nominating the Sole arbitrator and requested the Airport Authority to convey its acceptance. However, the request was turned down by referring

to clause 30(a) of the licence Agreement, and since the Arbitrator could not be appointed, the application is filed under sub-section (6) of Section 11 for appointment through this Court.

The relevant clause in the licence agreement reads thus :-

> *"All disputes and differences arising out of or in any way touching or concerning this Agreement (except those the decision whereof is otherwise herein before expressly provided for or to which are now enforce or which may hereafter come into force are applicable), shall, in the first instance, be referred to a Dispute Resolution Committee (DRC) setup at the airport for which the written application should be obtained from the party and the points clearly spelt out. IN case the dispute is not resolved within 45 days of reference, then the case shall be referred to the sole arbitrator of a person to be appointed by the Tender Accepting Authority i.e. Chairman/Member/Executive Director/ Regional Executive Director of the Authority, as the case may be. The venue of the arbitration shall be Corporate Headquarters/concerned Regional Headquarters of the Authority. The award of the arbitrator so appointed shall be final and binding on the parties. The Arbitration and Conciliation Act, 1996, shall be applicable. Once the arbitration clause has been invoked, the DRC process will cease to be operative."*

11 Heard Advocate Dhananjay Deshmukh for N.P. Enterprises who is opposed by Advocate Mayuresh Lagu representing Western Railway. I have also heard Advocate Mohd. Zain Khan for the applicant – Telex Advertising, who is opposed by Advocate N.R. Bubna representing Central Railway.

Since learned Senior counsel Mr.Godbole was representing the applicant in the third matter, which involved a similar issue about the independence and impartiality of the nominated arbitrator in light of the clauses contained in the distinct contract, I requested Mr.Godbole to render assistance in resolving the issue, which again cropped up after the Division Bench decision of the Apex Court in case of Central Organisation

for Railway Electrification Vs. M/s.ECI-SPIC-SMO-MCML (JV) A Joint Venture Company,[1] (for short "CORE") and I must express my gratitude to the learned senior counsel, who has readily accepted the request and has placed before me the entire conspectus of the said matter with reference to Section 12 along with Schedule V to VII of the Arbitration and Conciliation Act, 1996.

12 An independent and impartial arbitrator is the hallmark of the arbitration proceedings, both at domestic and international front. Independence of an arbitrator, which is an objective concept, is capable of being ascertained by the parties at the outset of the arbitration proceedings in the light of the existing circumstances, which may be disclosed by the Arbitrator, or which the parties may gather from the surrounding circumstances, which involve the appointment of the Arbitrator, whereas the partisan approach of the Arbitrator may become evident during the arbitration proceedings. Thus, an arbitrator may be independent and yet lack impartiality or vice versa.

Rule against bias is one of the fundamental principles of natural justice, which is applicable with equal force in all quasi-judicial proceedings, apart from the judicial one. When the parties chose Arbitration, as a mode for settlement of their disputes, they expect the resolution of their disputes through an Arbitrator to be independent, impartial, unconnected with either

1 *(2020) 14 SCC 712*

of the party, as if he is not so, it may result into actual bias or apprehension of bias and would play foul of his independence as an Arbitrator, who has to discharge adjudicatory function, by remaining both independent and impartial.

13 With this avowed object, the Arbitration Act, 1996 itself has included provisions, which would lead to an inference of the Arbitrator not being independent or where, the circumstances give rise to an apprehension of bias and Section 12 of the Arbitration Act, inserted by Act No.3 of 2016, require a person to be approached in connection with his possible appointment as an Arbitrator, to disclose in writing any such circumstances, which may foul of his independence and impartiality.

> ***12 Grounds for challenge*** *(1)When a person is approached in connection with his possible appointment as an Arbitrator, he shall disclose in writing any circumstances,*
>
> *(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parites or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and*
>
> *(b) which are likely to affect his liability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.*

In order to make it a substantive and effective provision, the legislature has also provided for two explanations to Section 12, to the following effect:

> *"Explanation 1- The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to a justifiable doubts as to the independence or impartiality of an Arbitrator.*
> *Explanation 2 - The disclosure shall be made by such person in the form specified in the Sixth Schedule."*

14 Similar safeguard also finds its place in Section 11, when the appointment is through an institutional arbitration, as contemplated under sub-section (3-A) of Section 11, and it being introduced by the same amending Act, by providing that before appointment of an arbitrator, even by the Arbitral Institution, it shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) from the prospective Arbitrator in terms of sub-section (1) of Section 12 and have due regard to the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

The legislature did not stop at this and provided for the situations, when during the conduct of the arbitral proceedings, any circumstances are created, and in such a scenario, it cast a duty on the Arbitrator, to disclose it to the parties in writing, without delay, unless the parties are already informed of the same.

In order to maintain the sanctity of the arbitral proceedings, by retaining the independent and impartial character of the Arbitrator, the legislature opened up a challenge procedure, inserting a provision and setting out the grounds for such challenge and sub-section (3) of section 12 provided thus :-

> *"(3) An Arbitrator may be challenged only if*
>
> *(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or*

> *(b) he does not possess the qualifications agreed to by the parties."*

Apart from the above, in order to strengthen the essence of Arbitration process and to make it more transparent, the legislature introduced sub-section (5) of Section 12 with effect from 23/10/2015, which read thus:-

> *"(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an Arbitrator;*
>
> *Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."*

15 In order to raise a challenge to the appointment of an Arbitrator, on whose appointment, within 15 days, a party become aware of any circumstances referred to in sub-section (3) of Section 12 or on becoming aware of any of those circumstances, is given the liberty to stake a challenge before the Arbitral Tribunal and upon facing this challenge, the Arbitrator may either withdraw from his office or the Arbitral Tribunal shall decide on the challenge.

In case the challenge is not successful, the Arbitral Tribunal shall continue with the arbitral proceedings and make an award. However, when such an award is made, the party challenging the appointment of the Arbitrator may make the application for setting aside, such an Arbitral Award in accordance with Section 34 of the Arbitration Act.

16 Another contingency resulting into termination of the mandate of the Arbitrator, and his failure or impossibility to act is to be found in Section 14 of the Act, which provide for termination of the mandate and substitution of the Arbitrator, by another, if the Arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons, fail to act without undue delay and withdraw from his office or the parties agree to the termination of his mandate.

A clarification is offered in sub-section (3) of Section 14 itself, by providing that if the Arbitrator withdraws from his office or a party agrees to the termination of the mandate of the Arbitrator, it shall not imply acceptance of the validity of any ground, referred to in sub-section (3) of Section 12.

If, however, any controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1) unless otherwise agreed between the parties, a party may, apply to the Court, to decide on termination of the mandate.

17 It is in this existing statutory scheme, as provided in the Arbitration and Conciliation Act, 1996, the question of impartiality and neutrality of Arbitrator is to be determined and particularly, when the procedure for appointment of Arbitrator is adopted in the Standard Contract, fixed by the Agency like the Railways, and where the arbitration proceedings are intended to be driven by it, since it is a party who has awarded a contract

employment etc, in favour of a party or a contract under the work order.

18 In case of N.P. Enterprises, the petitioner addressed a notice invoking the arbitration on 3/8/2023, and the notice specified the issues in dispute, in compliance with Clause 8.2.1.1. The respondent Railway admitted the invocation, however, resisted the appointment of the Arbitral Tribunal, by stating that same can only be done 'when the claims are quantified in monetary terms' and what is pressed into service it the following clause:-

> *"8.2 Demand for Arbitration*
> *8.2.1 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 Railway fails to make a decision within 120 days, then and in any such cases, 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.*
> *8.2.1.1 (a) 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 hash been made, together with counter claims or set off, given by the Railways, shall be referred to arbitration and other matters shall not be included in the reference.*
> *(b) The parties may waive off the applicability of sub-section 12(5) of 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".*

It is the case of Mr. Dhananjay Deshmukh representing the petitioner, that the amount being monetarily quantified is only relevant for appointment of Arbitrator, when

the application of Section 12(5) if waived and even clause 8.4.2 makes it clear that the Contractor shall specify the final claims in writing within period of 90 days from the Railways, is ready for payment and therefore, it is his argument that the quantification of the claim is only applicable for invoking clause 8.4.1, where the total claim does not exceed Rupees One Crore and the Tribunal shall consist of Sole Arbitrator, but if it does exceed Rupees One Crore, the panel shall consist of three Gazetted Railway Officers.

According to him, the applicant has not waived the applicability of Section 12(5) and therefore it was incumbent upon the General Manager of the Railways to complete the exercise within 30 days. However, no panel was submitted to the petitioner and hence, according to him, the respondents have waived its right to appoint a panel in terms of the contract. It is sought to be argued that once the Railways have failed to even submit a panel of Arbitrators, the consequences must follow i.e. it is deemed to have waived its right and High Court can be approached, and the Sole Arbitrator shall be appointed by the High Court.

19 Yet another argument advanced on behalf of Mr. Deshmukh is, notwithstanding Clause 8.4.2, that the Railways could not have suggested restrictive panel of only four retired Officers and the panel ought to have been a broad based one, in order to have a choice available.

Mr. Deshmukh has distinguished the judgment in CORE and he would place reliance upon the subsequent decision of the Apex Court in case of *Union of India Vs. M/s.Tantia Constructions Limited*[2] and *Simplex Infrastructures Ltd Vs. Rail Vikas Nigam Limited*[3], as well as the decision of the Delhi High Court in case of *SMS Limited VS. Rail Vikas Nigam Limited,*[4] *Consortium of AutoMeter Alliance Ltd, and Canny Elevators Co. Ltd Vs. Chief Electrical Engineer,*[5] and *PSP Projects Ltd Vs. Bhiwandi Nizampur City Municipal Corporation.*[6]

Mr.Godbole has placed before me the compilation of judgments spread over the lines, which has pronounced upon the unilateral appointment of Arbitrators, by an interested party.

20 The counsel for Railway; the Central Railway and Western Railway respectively – would place heavy reliance upon the decision of the Apex Court in case of CORE and Mr.Bubna has also pressed into service, a decision of the Apex Court in case of *Gregory Patrao and others Vs. Mangalore Refinery and Petrochemicals Limited and ors*[7].

21 In the gamut of the decisions placed before me, and in order to ascertain, whether the decision of the Three Judges Bench of the Apex Court in CORE, has sealed the position in law on the aspect of appointment of Arbitrators, to be chosen from

2 2021 SCC Online SC 271
3 2018 SCC Online Del 13122
4 2020 SCC Online Del 77,
5 2021 SCC Online Del 4042
6 2023 SCC Online Bom 230
7 (2022) 10 SCC 461

the panel maintained by the Railways, and particularly, when the panel include the retired Officers of the same Department, and whether it has conclusively held, that they do not incur any ineligibility on this ground, and are competent to be included in the panel of Arbitrators, I must refer to the authoritative pronouncements from the Apex Court in the past, and as to how the ratio flowing from these decisions, have received recognition when the Three Judges Bench decided CORE(supra).

22 In *Voestalpine Schienen GMBH Vs. Delhi Metro Rail Corporation*[8] a decision delivered after Section 12 of the Act of 1996, was amended, based on the recommendations of the Law Commission, which specifically dealt with the issue of 'neutrality of Arbitrators, recognized that the independence and impartiality are two different concepts; an Arbitrator may be independent and yet lack impartiality or vice versa.

The most pertinent observation from the Law Report read as below:-

> *"22 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 rational 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*

8 (2017) 4 SCC 665

as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in Jivraj v. Hashwani in the following words:-

> "*the dominant purpose of appointing an arbitrator is the impartial resolution of 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.*

23 The Apex Court in *Voestalpine*, was dealing with the contract with the Delhi Metro Rail Corporation Limited (DMRC) where the Arbitration Agreement between the parties was contained in clause 9.2 of the General Conditions (GCC) read with clause 9.2 of the Special Conditions of the Contract (SCC) and which provided as under:-

> *"…… there shall be three arbitrators. For this purpose the purchaser will make out a panel of engineers with the requisite qualifications and professional experience. This panel will be of serving or retired engineers "government departments or of public sector undertakings;*
> *(b)*
> *(c) For the disputes to be decided by three Arbitrators, the purchaser will make out a list of five engineers from the aforesaid panel. The supplier and purchaser shall choose one arbitrator each, and the two so chosen shall choose the third arbitrator from the said list, who shall act as the presiding arbitrator".*

With this clause in the background, the respondent furnished the names of five persons to the petitioner with a request to nominate its Arbitrator from the panel. However, it was not acceptable to the petitioner, as it felt that the panel consisted of serving of retired engineers, either of the respondent or the Government Department or Public Sector Undertakings, who did not qualify as independent Arbitrators, and with the

amendment in Section 12, such a panel had lost its validity, as it was contrary to the amended provision.

It is in the wake of these contentions being advanced, on behalf of the petitioner, their Lordships adverted to various contingencies mentioned in the Seventh Schedule, which would render a person ineligible to act as an Arbitrator; Entry-1 being, "The Arbitrator is an employee, consultant, Advisor, or has any other past or present business relationship with a party.

The objection of the petitioner was, the panel of the Arbitrators drawn by the respondents, consisting of those persons who are government employees or ex-government employees.

Dealing with this contention, Their Lordships remarked that this by itself may not make such persons ineligible, as the panel included even persons who have worked in the Railways, under the Central Government or the Central Public Works Department, or Public Sector Undertakings, and they could not be treated as 'employees', or 'consultant' or 'advisor' of the DMRC.

What was pertinently observed must be reproduced;

> *"24 If this contention of the petitioner is accepted, then no person who had earlier worked in any capacity with the Central Government or other autonomous or public sector undertakings, would be eligible to act as an Arbitrator, when he has even remotely connected with the party in question like DMRC in this case. The amended provision puts an embargo on a person to act as an Arbitrator who is the employee of the party to the dispute. It also deprives a person to act as an Arbitrator if he had been the consultant or advisor, or had any past or present business relationship with DMRC. No such case is made out by petitioner."*

24 It was emphatically held, that in a situation where the proposed Arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with the party, then, he is rendered ineligible and incompetent, to act as an Arbitrator. This analogy was taken ahead, when it was held, that a person who is a Manager, Director, or part of the Management or has controlling influence in an affiliate of one of the parties, if the affiliate is directly involved in the matter in dispute, then even he is incapacitated.

The ratio flowing from the instructive pronouncement is capitulated in para 26; where it is held that, simply because a person is a retired Officer, who retired from Government or other statutory Corporation, or Public Sector Undertakings and had no connection with DMRC, could not be treated as ineligible to act as an Arbitrator, and had this been the intention of the legislature, Seventh Schedule would have covered such persons as well. The rationale in including such persons in the panel with different backgrounds was also justified, in para 26, in following words :-

> *"Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. The very reason for empaneling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators. It may also be mentioned herein that the Law Commission had proposed the incorporation of the Schedule which was drawn from the red and orange list of IBA guidelines on conflict of interest in international arbitration with the observation that the same would be treated as the guide 'to determine whether circumstances exist which give rise to such justifiable doubts'. Such persons do not get covered by red or orange list of IBA guidelines either."*

25 Yet one glaring aspect was also focused upon in *Voestalpine* i.e. the discretion vested in DMRC, to pick up five persons from the panel and forwarding their names to the other side, to select one of these five, as its nominee, and nomination of its Arbitrator by DMRC from these five names.

The above procedure was found to be suffering from two adverse consequences; in the first place, the choice given to the other party is limited, as it had to choose amongst one of the five names that are forwarded, and there is no free choice to nominate a person out of the entire panel and secondly, with the discretion given to DMRC to select these five persons, which give rise to a room of suspicion, in the mind of other side, that the Authority must have picked up its own favourites and such a situation deserve to be countenanced.

To offer a solution, clauses (b) and (c) of 9.2 of Special Conditions of Contract were directed to be deleted and instead, choice was to be given to the parties to nominate any person from the entire panel maintained by DMRC and similarly, the Arbitrators, nominated by each party was also given full freedom, to choose the third Arbitrator/the umpire.

26 The crux of the decision in *Voestalpine Schienen GMBH (supra)* can be highlighted, to the effect that keeping in mind the spirit of the amended provision, and in order to instil confidence in the mind of the other party, it is imperative that the

Panel of Arbitrators maintained by any Authority should be broad based, and apart from serving or retired engineers of Government Departments, Public Undertaking, Engineers of prominence and high repute from private sector should be included.

What was expected of DMRC was to prepare a broad based panel, which will afford enough choice for choosing an Arbitrator, with technical expertise.

27 Taking the jurisprudence involved in Section 12(5) of the Amended Act read with Schedule V and VII, forward once again, a Three Judges Bench in *TRF Ltd Vs. Energo Engineering Projects Limited*,[9] when the waiver of ineligibility of an Arbitrator was discussed, categorically held that the waiver must be by an express agreement in writing.

Another take away from the said decision is, if in terms of the arbitration clause in the agreement, a dispute was referred to a Sole Arbitrator or its nominee, the Managing Director having become ineligible, to act as an Arbitrator by virtue of the Amendment, and becomes ineligible by operation of law, similarly, he cannot nominate another person as he would suffer from the same ineligibility.

What is of significance in this decision, is paragraph no.54, which reads thus:-

> *"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*

9 (2017) 8 SCC 377

> *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."*

28 The *de jure* ineligibility of Arbitrator appointed by person who is himself *de jure* ineligible to be an Arbitrator vide Section 12(5) read with Schedule VII was again reiterated in *Bharat Broadband Network Limited Vs. United Telecoms Limited*[10], by holding that appointment of such Arbitrator is *void ab initio*, and the award passed by such an Arbitrator is a nullity.

29 In *Perkins Eastman Architect DPC & Anr Vs. HSCC (India) Ltd*,[11] a line of distinction in the two categories of cases was noticed (i) when the Managing Director himself is named as an Arbitrator, with an additional power to appoint any other person as an Arbitrator; and (ii) where the Managing Director is not to act as an Arbitrator himself, but he is empowered or authorized to appoint any other person of his choice or discretion as an Arbitrator.

Holding that the first category to be governed by TRF Ltd (supra), applying the test to the second category, it was inferred that if the interest that the person concerned has, in the

10 (2019) 5 SCC 755
11 (2020) 20 SCC 760

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 and therefore, a party or an official or an authority having interest in the dispute, was also held to be disentitled to appoint an Arbitrator.

The decision in TRF Ltd, however, received a further clarification in paragraph no.21, by recording that in TRF, the Court was concerned with the issue, "*whether the Managing Director, after becoming ineligible by operation of law is, still eligible to nominate as an Arbitrator*."

The ineligibility was a result of operation of law in that person, having interest in the dispute, or in the outcome or decision thereof, must not only be ineligible to act as an Arbitrator himself, but must also be ineligible to appoint anyone else, and that such person cannot and should not have any role in chartering the course of the dispute resolution.

However, further observations in TRF, dealing with cases where both parties could nominate respective Arbitrators of their choice, was found to be a completely different situation and this found support from the fact 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 there has to be a Sole Arbitrator, its choice will have an element of exclusivity in determining or chartering the course

of dispute resolution and 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, and this was clarified to be the essence of the amendments brought in by the Act of 2015 and recognized by the decision in TRF Limited.

Once again, the imperatives of creating healthy arbitration environment, was the focus.

30 Then, comes the decision of the Three Judges Bench in case of *Central Organisation of Railway Electrification (supra),* which is pressed into service by the counsel representing the Railways, once again, in relation to Clause 64 of the General Conditions of Contract (GCC), which was modified after the Amendment Act, 2015, considering the possibility of waiver/non-waiver of Section 12(5) and providing for constitution of Arbitral Tribunal consisting of three Arbitrators, either serving or retired Railway Officers.

The background facts would divulge that, the respondent filed a Petition seeking appointment of Arbitrator in terms of Clause 64 of the GCC and the High Court appointed a Sole Arbitrator without resorting to the procedure for appointment, as prescribed in the contract and when the decision was subject to challenge before the Apex Court, it was ruled that when the agreement specifically provide for appointment of the Arbitral Tribunal, consisting of three Arbitrators from out of the panel, of serving or retired railway Officers, then the appointment

should be in terms of the agreement, as agreed by the parties, in particular, and in the case in hand, when the appellant had not, by its alleged default in appointment of Arbitrator, waived its right to appoint the Arbitrator.

The earlier decisions in case of *Voestalpine Schienen GMBH*, *Perkins Eastman, TRF Ltd*, were recounted before the Bench and Clause no.64 of the GCC, was dissected, with specific reference to the excepted matters, and a clause providing that the parties may waive off the applicability of Section 12(5) and if they agree of such waiver in writing, after disputes having arisen between them, in the formation under Annexure 12.

What was thus before the Apex Court, was the identical clause, which is before me, and it is in this background the Three Judges Bench, speaking through Justice R. Banumathi, (as her Ladyship then was), ruled as under:-

> *"20 It is pertinent to note that even in the application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, the respondent prayed for appointment of a sole arbitrator in terms of Clause 1.2.54(b)(i) of the Tender Agreement/Clause 64 of the General Conditions of Contract for adjudicating the disputes which have arisen between the parties. In the petition filed under Section 11(6) of the Act, the respondent prayed for appointment of one Shri Ashwani Kumar Kapoor to act as the arbitrator. Thus, the respondent itself sought for appointment of arbitrator in terms of Clause 64 of the General Conditions of Contract. The appointment of Shri Ashwani Kumar Kapoor as arbitrator, of course, was not agreeable to the appellant, since it was found that said Shri Ashwani Kumar Kapoor was not in the panel of arbitrators and therefore, could not be considered for appointment as arbitrator. As the value of the work contract was worth more than Rs.165 crores, the dispute can be resolved only by a panel of three arbitrators in terms of Clause 64(3)(b) of the General Conditions of Contract. The respondent was not right in seeking for appointment of a sole arbitrator in terms of Clause 1.2.54(b)(i) of the Tender Agreement/Clause 64 of the General Conditions of Contract."*

31 Dealing with the contention that the retired railway officers are not eligible to be nominated as Arbitrator, and they are statutorily ineligible, the principle in *Voestalpine Schienen GMBH* was invoked to the effect that merely because the panel of Arbitrators drawn by DMRC, are government employees or ex-government employees, that by itself may not make such person ineligible to act as Arbitrator and if they were the persons who had worked in the Railways, Central Government, etc. the ineligibility may not fall.

By referring to the decision in *State of Haryana Vs. G.F. Toll Road,*[12] a conclusion is drawn by the Apex Court, held that the appointment of a retired employee of a party to the agreement, cannot be assailed on the ground that he is retired/former employee of one of the parties to the agreement and there is no bar u/s.12(5) of the Arbitration and Conciliation Act, for appointment of a retired employee to act as an Arbitrator.

32 The view in *Voestalpine Schienen GMBH,* (supra) which has focused upon a wide choice of arbitrators, by empanelling the retired railway officers with technical aspects, is also noted and it is held that merely because panel of Arbitrators are the retired employees, who have worked in the Railways, it would not make them ineligible, to act as Arbitrators.

The finding recorded reads, to the following effect:-

> *"36 As discussed earlier, after Arbitration and Conciliation (Amendment) Act, 2015, the Railway Board vide notification dated 16.11.2016 has amended and notified Clause 64 of the General*

12 (2009) 3 SCC 505

> *Conditions of Contract. As per Clause 64(3)(a)(ii) [where applicability of Section 12(5) of the Act has been waived off], in a case not covered by Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below the rank of Junior Administrative Grade or two Railway Gazetted Officers not below the rank of Junior Administrative Grade and a retired Railway Officer retired not below the rank of Senior Administrative Grade Officer, as the arbitrators. For this purpose, the General Manager, Railway will send a panel of at least four names of Gazetted Railway Officers of one or more departments of the Railway within sixty days from the date when a written and valid demand for arbitration is received by the General Manager. The contractor will be asked to suggest to General Manager at least two names out of the panel for appointment as contractor's nominees within thirty days from the date of dispatch of the request from the Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will also simultaneously appoint balance number of arbitrators from the panel or from outside the panel duly indicating the "Presiding Officer" from amongst the three arbitrators so appointed. The General Manager shall complete the exercise of appointing the Arbitral Tribunal within thirty days from the date of the receipt of the names of contractor's nominees."*

In paragraph no. 38, it is further recorded that the respondent conveyed their disagreement in waiving the applicability of Section 12(5) and the appellant sent a panel of four retired railway officers to act as Arbitrators, requesting the respondent to select any two, and what is held is, that the respondent having been given the power of select two names out of the four, the power of the appellant, nominating its Arbitrator gets counter balanced, by the power of choice given to the respondent and the power of General Manager to nominate the Arbitrator is counter balanced by the power of the respondent to select any of the two nominees and therefore, it is conclusively held as under:-

> *"In view of the modified Clauses 64(3)(a)(ii) and 64(3)(b) of GCC, it cannot therefore be said that the General Manager has become ineligible to act as (sic nominate) the arbitrator. We do not find any merit in the contrary*

contention of the respondent. The decision in TRF Ltd is not applicable to the present case."

Conclusively, it was held that since the agreement provide for appointment of Arbitral Tribunal consisting of three Arbitrators from out of the panel of serving or retired railway officers, the appointment should be in terms of the agreement, and therefore, the High Court was not justified in appointing an independent Sole Arbitrator, ignoring clause 64(3)(A)(ii) and 64(3)(b) of the GCC.

33 Heavy reliance is placed upon the decision in *CORE* by the counsel representing the respondents, and it is submitted that the Three Judge Bench has now held that the appointment of the Arbitral Tribunal be from the panel maintained by the Railways, comprising of serving or retired officers is valid and merely because the panel comprise of Arbitrators who are the retired employees working in Railways, it do not make them ineligible to act as Arbitrators.

The question that arise for determination is whether the distinct clauses in the three cases before me, two clauses in the original contract and clause in the lease agreement in the third case, where the appointment of the Arbitrator is to be made in the manner set out in the relevant clause, would be violative of Section 12(5) read with Schedule V and VII of the Arbitration and Conciliation Act, 1996.

34 My attention is invited by the counsel for the applicants that the Three Judge Bench decision delivered in case of CORE, has been now referred to a larger Bench in the wake of the order passed on 11/1/2021 by another Three Judge Bench in case of Union of India Vs. M/s. Tantia Construction Ltd, by recording as under :-

> "*Having heard Mr.K.M. Nataraj, learned ASG for sometime, it is clear that on the facts of this case, the judgment of the High Court cannot be faulted with. Accordingly, the Special Leave Petition is dismissed. 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 1635. We have perused the aforesaid judgment and prima facie disagree with it for the basis 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.*"

35 My attention is also invited to certain subsequent pronouncements of the Apex Court and the High Courts revolving around the same issue.

In case of *Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited and ors, Vs. Ajay Sales and Suppliers*,[13] once again the ratio in case of *Voestalpine, TRF Ltd, Bharat Broadband Network Ltd*, is reiterated and considering the object and purpose of insertion of sub-section (5) of Section 12 r/w Seventh Schedule of 1996 Act, a Two Judges Bench of the Supreme Court has declared the Chairman of the petitioner Sangh to 'ineligible', to continue

13 (2021) 17 SCC 248

as an arbitrator, though in the Seventh Schedule, the word 'Chairman' is not mentioned, but it is held that it would fall in the category of Clause 1, 2, 5 and 12 of Seventh Schedule.

Paragraph nos.20 and 21 of the decision in case of *Voestalpine* is quoted with approval, and it is reiterated that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel, or the subject matter of the dispute falls under any of the categories specified in Seventh Schedule, he shall be ineligible to be appointed as an Arbitrator.

36 Further, in case of *Ellora Paper Mills Ltd Vs. State of Madhya Pradesh*[14], another two Judges Bench of the Apex Court, once again reiterated that if a person falls within any of the categories set out in Seventh Schedule, he is as a matter of law is ineligible to be appointed as an arbitrator and the only way in which this ineligibility can be removed, again, in law, is that parties may after disputes being arisen between them, waive the applicability of the sub-section by an "express agreement in writing".

For this reason, the Arbitral Tribunal – Stationery Purchase Committee, consisting of the Officers of the respondent State, was held to suffer from ineligibility and it was held that in an eventuality when the arbitration clause is found to be foul with the amended provision, the appointment of the arbitrator would

14 (2022) 3 SCC 1

be pale of the arbitration agreement, empowering the Court to appoint an arbitrator.

The Arbitral Tribunal in the case, comprised of various Officers of the State and relying upon Voestalpine, TRF Ltd, Bharat Broadband, the members of the Tribunal were held to be ineligible to act/continue as arbitrators in view of sub-section (5) of Section 12 and a former Judge of the Supreme Court was appointed as an Arbitrator to resolve the disputes.

37 A Three Judges Bench in Lombardi Engineering Ltd, Vs. Uttarakhand Jal Vidyut Nigam Ltd,[15] framed an issue; "Whether the arbitration Clause No. 55 of the Contract empowering the Principal Secretary/Secretary (Irrigation) State of Uttarakhand, to appoint an arbitrator of his choice", find foul with the amended provisions of the Arbitration and Conciliation Act, 1996.

Once again, by relying upon paragraph nos.20 to 25 of *Voestalpine*, issue no.(iv) was answered with reference to Section 12 and the recommendation of the Law Commission on the issue of "neutrality of arbitrators", on an exhaustive reference being made to the foreign judgments on an arbitration agreement which is unconscionable, by invoking the unconscionability doctrine that is used to set aside, 'unfair agreements resulting from inequality of bargaining power'. By relying upon 9 Judges Bench of Supreme Court of Canada in case of *Uber Technologies Inc.*

15 2023 SCC Online SC 1422

Vs. Heller, the Apex Courts did not approve of the power in the agreement, empowering the Principal Secretary, Government of Uttarakhand, to appoint a Sole Arbitrator and instead, appointed an arbitrator itself to continue the arbitral proceedings.

38 From reading of the pronouncements subsequent to the decision in CORE, it is evidently clear that the principle laid down in Voestalpine has been consistently followed and the amendment introduced in the Act of 1996, in the wake of the recommendation of Law Commission, has been given a widest interpretation, focusing upon the 'neutrality of arbitrators'.

Keeping in mind the spirit with which Section 12 has been amended, by the Amending Act of 2015, it is manifest that the main object in introducing the provision was to assure neutrality of the arbitrators and any person whose relationship with the parties or the counsel or the subject matter of the dispute falls under any of the categories specified in Seventh Schedule, he becomes ineligible to be appointed as an Arbitrator and any clause in an agreement between the parties which provide for such an eventuality, finds foul with the amended provision and an arbitrator appointed in violation of sub-section (5) of Section 12 and which is in derogation of Seventh Schedule, cannot be said to be an independent arbitrator. If he loses his independence, he definitely becomes ineligible to act as an arbitrator, as independence is the hallmark to arbitration proceedings. The only way in which this ineligibility can be removed, is by waiving

the applicability of sub-section (5) of Section 12, but which should be again expressly by an agreement in writing.

The Three Judges Bench in Core has relied upon a decision in case of *State of Haryana Vs.* G.F. *Toll Road Pvt. Ltd* (supra), and by referring to Voestalpine, it is recorded that the very reason for empaneling the retired Railway Officers is to ensure the technical aspects of the disputes are suitably resolved by utilizing their expertise, when they act as arbitrators and merely because panel of arbitrators are of retired employees, it do not make them ineligible to act as arbitrators.

39 In *Voestalpine*, the Apex Court was dealing with a panel of Arbitrators prepared by DMRC, which also comprised of Officers working in Central Government or other autonomous or public sector undertakings and the arguments advanced on behalf of the petitioner that the panel of arbitrators of DMRC included the Government employee or ex-government employees, was not accepted, by holding that the persons who have worked in Railways or under the Central Government or CPWD or Public Sector Undertakings, cannot be treated as employee or consultant or advisor of DMRC. The nub of the issue was clearly noted by, holding that the amended provision puts an embargo on a person to act as an arbitrator who is the employee of the party to the dispute and it deprives the person to act as an arbitrator, if he had been the consultant or the advisor or had any past or present relationship with DMRC.

In case of *Voestalpine*, panel was broad based as it included even the employees or ex-employees who were, in no way, related to DMRC, and it was held that it is open to pick up such an arbitrator, who is no way related to DMRC.

This being the crux of the issue on how independence and impartiality of an arbitrator can be attained, and which has been consistently followed, one has to be kept in mind, when a clause contained in an agreement is to be tested, being juxta posed against Section 12(5) and Schedule V and VII of the Arbitration and Conciliation Act.

In the clause before me, which is to be found in the Railways contracts, in cases where total value of claims does not exceed Rs. One crore, the Arbitral Tribunal shall be of a Sole Arbitrator, and the clause provide that the Arbitrator shall be a Gazetted Officer of Railway, not below JA Grade, nominated by the General Manager, who shall be appointed within 60 days from the date when a return and valid demand of arbitration is received by General Manager.

In all other cases, the Arbitral Tribunal shall consist three gazette railway officers not below JA Grade or two Railway gazette officers not below JA Grade and a retired Railway Officer, not below the rank of SAG Officers, as arbitrator. For this purpose, the Railway shall send a panel of at least four names of the gazette Railway Officers of one or more departments of the Railway, which may also include the name/s of retired Railway

Officer/s empaneled to work as Railway Arbitrator to the contractor within 60 days from the receipt of valid demand for arbitration. The other party shall then be asked to suggest to the General Manager atleast two names out of the panel of appointment as its nominee and the General Manager then shall appoint atleast one of them as the contractor's/licensees nominee and simultaneously appoint balance number of arbitrators from the panel or outside the panel duly indicating the presiding Officer amongst the three arbitrators so appointed.

40 The learned counsel Mr.Dhananjay Deshmukh and Mohammed Zain Khan are right in submitting that such a clause clearly is in teeth of Section 12(5) read with Schedule VII. As far as the mode in which the names of the proposed arbitrators shall be forwarded, also run contrary to the observation in Voestalpine and in particular, paragraph no.28, where it was held that when particular number of persons are to be picked from the panel, there is always a scope for restricting the free choice available and it was also held that by choosing these five persons, it would always give rise to a suspicion that they are favourites and will act in their favour. For this reason, it was directed that choice should be given to the party to nominate any person from the entire panel of arbitrators.

In this case, Clause 8.4.2 of the GCC gives the General Manager the power to appoint an arbitrator not only on its behalf but also on behalf of the petitioner and this is clearly in

violation of the decision of the Apex Court in case of *Perkins Eastman Architects DPC* (supra), and also in case of TRF Ltd (supra). Any person who is interested in the outcome or the decision in respect of the dispute, cannot himself act as an arbitrator, nor shall he exercise the power to appoint another person as an arbitrator.

The power to appoint the arbitrators in the Railway Contract vest in the General Manager and it is he who will nominate the sole arbitrator. In case where a panel of three arbitrators, the clause contemplate three gazette railway officers or two railway gazette officers and the retired railway officers and for this purpose, a panel of atleast four names shall be forwarded to the contractor, out of which two names are to be picked up by the contractor/licensee and amongst whom, the General Manager will select one and also nominate the balance number of arbitrators.

The vesting of the power in the General Manager, who is very much interested in the outcome of the proceedings, itself runs contrary to the principle of impartiality and independence of the arbitration process as the General Manager is obviously interested in the outcome of the proceedings between a contractor/ licensee/third party and the railways on the other.

The General Manager is an employee of the Railways and is expected to protect the interest of its employer and hence, no mater he may demonstrate that he has acted in best interest of the parties, the apprehended bias on his part, cannot be ignored.

41 The learned Senior counsel Mr.Godbole and the learned counsel appearing for the applicants in the two applications have placed before me the decision of Delhi High Court in case of M/s. Ganesh Engineering Works Vs. Northern Railways and anr, 2023 DHC 8497.

Perusal of the decision would disclose that the Delhi High Court was dealing with the issue whether the proposed names of four retired railway officers from the panel maintained by railways is valid in view of the decision of the Apex Court in case of Perkins Eastman (supra) where emphasis was laid down on party autonomy and the likelihood of bias of the appointing authority having interest in the outcome a result of the dispute.

Relying upon the decision of the co-ordinate benches of the Court in case of *Margo Networks (Pvt) Ltd. and Anr Versus Railtel Corporation of India Ltd*,[16] and in case of *Steelman Telecom Ltd. Versus Power Grid Corporation*[17], the decision in case of *CORE* was discussed threadbare, and in the wake of the law laid down in *Voestalpine*, *TRF Limited* and *Perkins Eastman Architects DPS*, the following observation is pertinently recorded:

> *"22. Therefore, from a reading of the aforementioned judgments, it palpably emerges that the judgment of the Supreme Court in CORE, did not deal with two specific questions i.e. (a) when appointment of an Arbitrator(s) is made out of a panel prepared by one of the parties, whether the said panel is required to be 'broad-based' in conformity with the principles laid down in Voestalpine (supra) and if so, what is the consequence where the panel is not sufficiently 'broad-based'; and (b) whether counter balancing, as contemplated in Perkins (supra) is achieved*

16 2023 SCC Online Del 3906
17 2023 SCC Online Del 4849

in a situation where one of the parties has a right to choose an arbitrator from a panel where 2/3rd members of the Arbitral Tribunal are appointed by the other party and these questions have been answered in Margo (supra), relying on the judgments of the Supreme Court in Voestalpine (supra), TRF Limited (supra) and Perkins (supra), by holding that the said appointment procedure fails to pass muster. It was held that the 'counter balancing' contemplated in Perkins (supra) cannot be said to be achieved in a situation where one of the parties has a right to choose an arbitrator from a panel where the remaining 2 out of 3 arbitrators are appointed by the other party. To come to this conclusion, Court referred to the judgments of this Court in SMS Limited v. Rail Vikas Nigam Limited, 2020 SCC OnLine Del 77; BVSR-KVR (Joint Ventures) v. Rail Vikas Nigam Ltd., 2020 SCC OnLine Del 456; Consortium of Autometers Alliance Ltd. and Canny Elevators Co. Ltd. v. Chief Electrical Engineer/Planning, Delhi Metro Rail Corporation and Others, 2021 SCC OnLine Del 4042 and Gangotri Enterprises Ltd. (supra).

24 The aforementioned judgments of this Court, as rightly contended by the learned counsel for the Petitioner squarely apply to the present case and this Court is not persuaded to take a different view. The choice given to the Petitioner is from a panel of four Retired Railway officials, out of whom Petitioner has to choose two, is a 'restricted' choice and cannot be countenanced in law, being in contravention of the party autonomy principle. In Voestalpine (supra), an identical situation had arisen where there was a stipulation in the concerned arbitration agreement whereby a list of five engineers from the panel was to be given to the Petitioner and he was obliged to nominate its Arbitrator from amongst those five. The Supreme Court condemned the procedure and observed that it had two adverse consequences. In the first place, the choice given was limited and there was no free choice to nominate from outside the entire panel prepared by DMRC and secondly, with the discretion given to DMRC to choose five persons, room for suspicion was created in the mind of the other side that DMRC may have picked up its own favourites. Therefore, according to the Supreme Court, the purpose of independent appointment would not be served if the Petitioner was given choice to nominate any person from the panel. The Supreme Court further observed that it is imperative to have a broad-based panel so that there is no misapprehension that principle of impartiality and independence has been discarded at any stage of the constitution of the Arbitral Tribunal. Applying these observations, the choice to the Petitioner to choose two amongst a panel of four Arbitrators cannot be termed as an effective counter balancing and would amount to giving a restricted choice in terms of the judgment in Voestalpine (supra), compromising on impartiality and independence of the appointed Arbitral Tribunal. The procedure envisaging appointment of 2/3rd strength of the Arbitral Tribunal by the Respondents, to my mind, tilts the scale in favour of the Respondents and is directly hit by the judgments in Perkins (supra), TRF Limited (supra) and Voestalpine (supra). Therefore, it is incumbent that this Court appoints an independent Arbitral Tribunal to adjudicate the disputes between the parties."

Similar view is taken in another decision of the Delhi High Court in case of *Simplex Infrastructure Ltd Vs. Rail Vikas Nigam Limited*[18] as well as *SMS Ltd Vs. Rail Vikas Limited*[19].

42 In an appointment, procedure involving appointment from a panel prepared by one of the contracting parties, it is mandatory for the panel to be sufficiently broad based in conformity with the principle laid down in *Voestalpine*, failing which it would be incumbent on the Court while exercising jurisdiction under Section 11 to constitute an independent and arbitral tribunal as mandated in *TRF Ltd* (supra) and *Perkins Eastman* (supra).

43 In *Gangotri Enterprises Ltd Vs General Manager, Northern Railway*[20], in the context of identical procedure for appointment, in the context of Railway contracts, taking note of the judgment in *CORE*, *Voestalpine*, *SMS LTd Vs. Rail Vikas Nigam Ltd* (supra), it was observed as under :-

> *"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 judgment. In view thereof, it is held that the petitioner herein was within its right to nominate its Arbitrator."*

18 2018 SCC Online Del 13122
19 (2020) 1 HCC (Del) 304
20 2022 BHC 4520

44 In the wake of the aforesaid position emerging in law and when applied to the facts placed before me, involving Clause 8.4.1 of the GCC, in case of Railways and Clause 30 in case of licence agreement, of Airport Authority of India, Pune, since the appointment of Arbitrator would fall within the teeth of the decision in case of *Voestalpine Schienen GMBH Vs. Delhi Metro Rail Corporation, (2017) 4 SCC 665, TRF Ltd Vs. Energo Engineering Projects Limited, (2017) 8 SCC 377* and *Perkins Eastman Architect DPC & Anr Vs. HSCC (India) Ltd, 2020) 20 SCC 760,* the Arbitrator cannot be nominated in this fashion, which is an unilateral appointment. Similarly, the argument advanced in case of N.P. Enterprises, that there is no quantification of the claim and therefore, the applicant is not justified in invoking arbitration also fails to impress me, as the notice invoking arbitration has clearly set out the dispute and since the respondent railway has failed to act, it has waived it's right, which entitled the applicants to seek reference to a sole arbitrator, however, not in the manner suggested in the relevant Clause i.e. Clause no.8.4.1 of GCC, in N.P. Enterprises and Clause No.19 in Telex, and also as per Clause 30 in the licence agreement in case of Mr.Godbole. Since the respective clauses making unilateral appointments cannot be acted upon and a case is made out for reference of disputes arising between the parties to the arbitration of a sole arbitrator, with the appointment of the

Arbitrator by this Court, the Arbitration Petition and two Arbitration Applications stand disposed off.

In the wake of the above, the following Arbitrators are appointed in each matters:-

ARBITRATION APPLICATION (L) NO. 6984 OF 2023

Mr. Hormaz C. Daruwalla, Senior Advocate, having his office at Behramji Mansion, 3rd floor, Sir Pherozshaw Mehta Road, Mumbai 400001, is appointed as Sole Arbitrator in ARBAP(L) 6984/2023, to adjudicate the disputes and differences that have arisen between the applicant and the respondent.

COMM. ARBITRATION APPLICATION (L) NO. 30940 OF 2023

Mr. Hormaz C. Daruwalla, Senior Advocate, having his office at Behramji Mansion, 3rd floor, Sir Pherozshaw Mehta Road, Mumbai 400001, is appointed as Sole Arbitrator in CARAP(L) 30940/2023, to adjudicate the disputes and differences that have arisen between the applicant and the respondent.

ARBITRATION PETITION NO. 44 OF 2024

Advocate Shanay Shah, is appointed as Sole Arbitrator in ARP No.44/2024 to adjudicate the disputes and differences that have arisen between the petitioner and the respondent.

The Arbitrators shall, within a period of 15 days before entering the arbitration reference forward a statement of disclosure as contemplated u/s. Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary and Senior Master of this Court to be placed on record.

The nominated Arbitrators, shall after entering the reference fix the date of first hearing and issue further directions, as are necessary.

The nominated Arbitrators in each matter, shall be entitled for the fees as per Bombay High Court (Fee Payable to Arbitrators) Rules, 2018 and the arbitral costs and fees of the Arbitrators shall be borne by the parties in equal portion and shall be subject to the final Award that may be passed by the Tribunal.

All rights and contentions of the parties are kept open in the respective proceedings.

(SMT. BHARATI DANGRE, J.)

Tilak