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

% ***Date of Decision: 29th November, 2023***

\+ ARB.P. 609/2023 & I.A. 11243/2023, 13903/2023 & 14465/2023

M/S SRI GANESH ENGINEERING WORKS ..... Petitioner
Through: Mr. A.K. Singla, Senior Advocate with Mr. Rahul Shukla, Mr. Vijayshree Pattnaik and Mr. Akash Jandial, Advocates

versus

NORTHERN RAILWAY & ANR. ..... Respondents
Through: Mr. Bhagvan Swarup Shukla, Central Government Standing Counsel with Mr. Sarvan Kumar, Mr. Shivam Gaur, Ms. Ramya Soni and Mr. Saksham Sethi, Advocates.

\+ O.M.P.(I) (COMM.) 78/2023

M/S SRI GANESH ENGINEERING WORKS ..... Petitioner
Through: Mr. A.K. Singla, Senior Advocate with Mr. Rahul Shukla, Mr. Vijayshree Pattnaik and Mr. Akash Jandial, Advocates

versus

NORTHERN RAILWAY & ORS. ..... Respondents
Through: Mr. Jatin Singh, Senior Panel Counsel with Mr. Keshav Sehgal, Mr. Shivam Gaur and Ms. Ramya Soni, Advocates

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

ARB.P. 609/2023

1. Present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') for appointment of a sole Arbitrator to adjudicate the disputes between the parties.

2. Petitioner is a partnership firm working in the Indian Railways for the last 35 years and as averred in the petition is currently working on 10 projects out of which one is the subject matter of the instant petition. Disputes between the parties arise from a contract agreement executed and signed between the parties on 03.08.2021 for performance of work related to "*Daryabad-Barabanki Section: Miscellaneous works such as construction of platform works, duty huts at level crossings & other allied works between Daryabad (including) Barabanki (excluding) section and Rasauli yard (excluding) in connection with 'proposed doubling of Barabanki-Akbarpur of Lucknow division on Northern Railway*'". Total cost of work was Rs.32,11,40,441.09/-. 5% Security Money was to be deducted from the progressive bills and Petitioner was required to submit Performance Bank Guarantee ('PBG') in terms of Clause 5.2 of Special Tender Conditions and Instructions to Tenderers, equivalent to 3% of the contract value. The work was to be completed within 24 months from the date of issue of Letter of Acceptance.

3. Extensive correspondence was exchanged between the parties where each one blamed the other for slow progress of the work and finally,

Respondents vide Termination Order dated 09.03.2023 terminated the contract, referring to an earlier 7 days' notice dated 28.02.2023. According to the Petitioner, the termination is illegal as it is without giving an opportunity to the Petitioner to complete the work when a balance period till 02.05.2023 was still available to the Petitioner for completion. Termination is challenged on other grounds which are emphatically refuted by the Respondents.

4. Petitioner filed a petition being O.M.P.(I) (COMM.) 78/2023 under Section 9 of the Act, seeking stay of letter dated 09.03.2023, terminating the contract with the Petitioner as also writing to the Bank which invoked the PBG. By order dated 14.03.2023, operation of the letter was kept in abeyance till the next date of hearing and the stay order is continuing. Petitioner submits that after passing of the order dated 14.03.2023, Petitioner sent a notice dated 14.03.2023 in terms of Clause 63 of General Conditions of Contract ('GCC') invoking the Dispute Resolution Mechanism and requesting the Respondents to appoint a Conciliator to adjudicate the disputes. Notice was served on the Respondents on 15.03.2023 along with copy of the order dated 14.03.2023, however, despite passage of 30 days stipulated in Clause 63, for the Respondents to notify the name of the Conciliator, Respondents failed to do so and the 30 days period expired on 16.04.2023.

5. Getting no response from the Respondents, on legal advice, Petitioner filed a writ petition being Writ-C No.2216/2023 before the Allahabad High Court, which was dismissed on the ground that the dispute was purely a contractual dispute, which could not be decided while

exercising jurisdiction under Article 226 of the Constitution of India, against which SLP(C) No.7972/2023 was also dismissed on 24.04.2023. In the meanwhile, Petitioner invoked Arbitration Clause 64(3) of GCC vide notice dated 22.04.2023, which was served upon the Respondents, however, the Arbitrator was not appointed.

6. By the present petition, Petitioner seeks appointment of a sole Arbitrator in terms of Clause 64(3)(b)(ii) of GCC, which reads as follows:-

> ***"64.(3): Appointment of Arbitrator:***
>
> *xxxx xxxx xxxx xxxx*
>
> ***64.(3)(b): Appointment of Arbitrator where applicability of Section 12(5) of Arbitration and Conciliation Act has not been waived off:***
>
> *xxxx xxxx xxxx xxxx*
>
> *(ii) In cases where the total value of all claims in question added together exceed ₹ 50,00,000/- (Rupees Fifty Lakh), the Arbitral Tribunal shall consist of a Panel of three (3) retired Railway Officer, retired not below the rank of Senior Administrative Grade Officer, as the arbitrators. For this purpose, the Railway will send a panel of least four (4) names of retired Railway Officer(s) empanelled to work as Railway Arbitrator duly indicating their retirement date to the Contractor within 60 days from the day when a written and valid demand for arbitration is received by the General Manager.*
>
> *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. 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 has served in the Accounts Department."*

7. Contention raised on behalf of the Petitioner is that the procedure prescribed in the arbitration clause is *non est* in view of the judgment of the

Supreme Court in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd., 2020 (20) SCC 760.*** It is submitted that the Supreme Court has categorically laid down that a person who has an interest in the outcome or decision in respect of a dispute must not have the power to appoint an Arbitrator. Clause 64(3)(b)(ii) of GCC provides for appointment of the Arbitral Tribunal from amongst a panel prepared and offered by the Respondents and Petitioner has justifiable doubts about the independence and impartiality of the Arbitrators so appointed. The procedure does not achieve the counter balancing contemplated in a situation where the arbitration agreement permits and gives freedom to the parties to nominate their respective Arbitrators, as per the judgment of the Supreme Court in ***TRF Limited v. Energo Engineering Projects Limited, (2017) 8 SCC 377.*** The appointment procedure also violates the counter balancing referred to and approved by the Supreme Court in ***Perkins (supra),*** since 2/3rd of the members of the Arbitral Tribunal are appointed by the Respondents. The mechanism of appointment envisaged in Arbitration Clause 64(3)(b)(ii) provides that the Arbitral Tribunal shall consist of a panel of 3 retired Railway officers, retired not below the rank of Senior Administrative Grade Officers and for this purpose, Railway will send a penal of at least 4 names of retired Railway Officer(s), empanelled to work as Railway Arbitrators. Contractor will be asked to suggest to the General Manager at least 2 names out of the panel for appointment as Contractor's nominee within 30 days from the date of despatch of the request by Railway. The General Manager shall appoint at least one out of them as 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. This procedure virtually amounts to unilateral appointment since Petitioner has to choose from a restricted panel and this violates the party autonomy principle.

8. Insofar as the judgment of the Supreme Court in ***Central Organization for Railway Electrification v. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company, (2020) 14 SCC 712 (hereinafter referred to as '*****CORE*****'),*** relied upon heavily by the Respondents is concerned, it was urged that the correctness of the judgment has been doubted by Co-ordinate Benches of the Supreme Court in ***Union of India v. M/s Tantia Constructions Limited, SLP (C) No. 12670 of 2020*** and ***JSW Steel v. South Western Railway & Anr, SLP (C) No. 9462 of 2022.*** It is also submitted that several Co-ordinate Benches of this Court have appointed independent arbitrators in light of the fact that **CORE** judgment has been referred to a Larger Bench. Reliance was placed on the judgments of this Court in ***Margo Networks Pvt. Ltd. and Another v. Railtel Corporation of India Ltd., 2023 SCC OnLine Del 3906; Steelman Telecom Limited v. Power Grid Corporation of India Limited, 2023 SCC OnLine Del 4849; Gangotri Enterprises Ltd. v. General Manager Northern Railways, 2022 SCC OnLine Del 3556;*** and the judgment of the High Court of Punjab & Haryana dated 15.02.2021, in ***M/s Wonder Laminates Private Limited v. Rail Coach Factory, Kapurthala and Another, in Arbitration Case Nos.106/2020 and 107/2020,*** wherein independent arbitrators were appointed, while dealing with similar/identical arbitration clauses.

9. *Per contra*, Mr. Bhagvan Swarup Shukla, learned Central Government Standing Counsel for the Respondents opposes the petition by placing heavy reliance on the judgment of **CORE** and argued that the present case is covered on all four corners by the ratio of the said judgment. It is also contended that Petitioner is seeking appointment contrary to the appointment procedure agreed between the parties under the contract dated 03.08.2021, which is legally impermissible. It is argued that after the letter dated 22.04.2023 was received by the Respondents through the counsel for the Petitioner, Respondents have agreed to constitute an Arbitral Tribunal under Clause 64(3)(b)(ii) of GCC, 2020 and vide letter dated 22.07.2023, Respondents have sent a list of four Arbitrators to the Petitioner, from which any two names can be selected by the Petitioner and the Respondents will be bound to select anyone of the two as one of the members of the three-member Arbitral Tribunal. This procedure cannot be termed as a unilateral appointment and is compliant with the observations of the Supreme Court in ***Perkins (supra)***, as the Petitioner has the freedom and choice to choose its nominee from the panel and the 'counter balancing' is achieved.

10. Mr. Shukla further submits that the procedure of appointment prescribed in Clause 64(3)(b)(ii) requires appointment of retired Railway officers and not serving officers and thus is not hit by Section 12(5) read with Schedule VII of the Act. He also contends that the panel of four retired Railway officers from which the Petitioner has a right to choose one, is a broad-based panel in consonance with the directions of the Supreme Court in the judgment in ***Voestalpine Schienen Gmbh v. Delhi***

Metro Rail Corporation Ltd, (2017) 4 SCC 665 and no infirmity can be found with the procedure. Placing reliance on the Circular dated 09.04.2021, it is submitted that without prejudice to the above contentions, if the Court was inclined to appoint an independent Arbitral Tribunal, the fee must be regulated in accordance with the provisions of the said Circular and not Fourth Schedule of the Act.

11. I have heard learned Senior Counsel for the Petitioner and learned Central Government Standing Counsel for the Respondents.

12. Before proceeding further, it will be relevant to extract for ready reference the response of the Respondents vide letter dated 22.07.2023, to the notice of invocation by the Petitioner as follows:-

NORTHERN RAILWAY
(Construction Organisation)

Office of
Dy Chief Engineer/C-III,
Northern Railway, Lucknow

Through Regd. Post/E-MAIL

No.74-W-3-2-440-WA-LKO/Dy.CE/C-III/LKO

Dated: 22.07.2023

M/s Sri Ganesh Engineering Works,
Plot No. 55 & 56, 8th Cross,
Bhuvaneshwarinagar, Hebbal,
Post-Bengaluru-560024

Sub: Notice for invoking Arbitration under clause 64 (1) dated 22.04.2023 of the GCC July 2020 read with Contract Agreement no. 74/W/3/2/440/WA/LKO/0082729035093 dated 03.08.2021 for miscellaneous works in Daryabad-Barabanki Section of Lucknow division
Name of work: Miscellaneous work such as construction of Platform works, duty huts at level crossings & other allied works between Daryabad (including) Barabanki (excluding) section and Rasauli Yard (excluding) in connection with "Proposed Doubling of Barabanki-Akbarpur of Lucknow Division on Northern Railway.
Ref :- 1. Your's Notice for invoking Arbitration under clause 64 (1) dated 22.04.2023 of the GCC July 2020 through Shri Rahul Shukla, Advocate, E-13, LGF, Greater Kailash Enclave-I, New Delhi-110048
2.. This office letter No. No.74-W-3-2-440-WA-LKO/Dy CE/C-III/LKO Dated: 22.07.2023

With reference to letter under reference-2, You have been intimated on 11.07.2023 with request to suggest two names among the below panel of four Arbitrators within 15 days positively as a panel of four Retd. Railway officers nominated by General Manager, Northern Railway, Baroda House, New Delhi on 11.07.2023. One name from the above two suggested names one would work as Arbitrator (contractor's nominee).

1. Smt. Rashmi Kapoor, Retd. AM/Finance/RB
2. Sh. Hemant Kumar Singh, Retd. ADG/RDSO/LKO
3. Sh. Ashok Kumar Harit, Retd. GM/BLW
4. Sh, Santosh Kumar Agrawal, Retd. DG/IRICEN

Hence, you are again requested to suggest two names among the above panel of four Arbitrators within stipulated time i.e. within 15 days from 11.07.2023. So that AT may be appointed to dispose the Arbitration case as early as possible.

This is for your prompt action please.

(Vikas Goel)
Dy Chief Engineer/C-III,
Northern Railway, Lucknow

13. The moot question that arises for consideration is whether the procedure envisaged in Clause 64(3)(b)(ii) of GCC, under which Respondents have proposed the names of four retired Railway officers from the panel maintained by the Railways, is valid in view of the judgment of the Supreme Court in ***Perkins (supra)*** where emphasis is laid on: (a) party autonomy; and (b) likelihood of bias of appointing authority, having interest in the outcome or result of the dispute. In the said judgment, the Supreme Court observed as follows:-

> *"20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an arbitrator."*

14. The Supreme Court took note of the judgment in ***TRF Limited (supra)***, where the Managing Director himself was a named Arbitrator and the Supreme Court had found him ineligible/incompetent on account of the

interest he would have in the outcome of the dispute. In light of this principle, the Supreme Court in ***Perkins (supra)*** held that the invalidity would apply to second category also where the Managing Director appoints an Arbitrator of his choice or discretion, if he is himself ineligible to be appointed as an arbitrator. The said principle was reaffirmed by the Supreme Court in ***Bharat Broadband Network Limited v. United Telecoms Limited, (2019) 5 SCC 755***. This Court in ***Proddatur Cable TV Digi Services v. Siti Cable Network Limited, 2020 SCC OnLine Del 350,*** following the judgment in ***Perkins (supra)*** held that unilateral appointment of the arbitrator by one party to the contract does not meet the test of impartiality and independence under Section 12(5) of the Act.

15. At this stage, it would be important to refer to the **CORE** judgment, which is the main plank of the opposition by the Respondents. In the said judgment, while dealing with an arbitration clause, which contemplated appointment of an Arbitral Tribunal out of a panel maintained by the Respondents therein and taking note of the observations in ***TRF Limited (supra)*** and ***Perkins (supra)***, the Supreme Court held as follows:-

> ***"37.*** *Clause 64(3)(b) of GCC deals with appointment of arbitrator where applicability of Section 12(5) of the Act has not been waived off. In terms of Clause 64(3)(b) of GCC, the Arbitral Tribunal shall consist of a panel of three retired railway officers retired not below the rank of Senior Administrative Grade Officers as the arbitrators. For this purpose, the Railways will send a panel of at least four names of retired railway officers empanelled to work as arbitrators indicating their retirement date to the contractor 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 the General Manger at least two names out of the panel for appointment of contractor's nominees within thirty days from the date of dispatch of the request of the Railways. The General Manager shall appoint at least one out of them as the contractor's nominee and will simultaneously appoint the remaining arbitrators from the panel*

or from outside the panel, duly indicating the "presiding officer" from amongst the three arbitrators. The exercise of appointing the Arbitral Tribunal shall be completed within thirty days from the receipt of names of contractor's nominees. Thus, the right of the General Manager in formation of the Arbitral Tribunal is counterbalanced by the respondent's power to choose any two from out of the four names and the General Manager shall appoint at least one out of them as the contractor's nominee.

38. *In the present matter, after the respondent had sent the letter dated 27-7-2018 calling upon the appellant to constitute the Arbitral Tribunal, the appellant sent the communication dated 24-9-2018 nominating the panel of serving officers of Junior Administrative Grade to act as arbitrators and asked the respondent to select any two from the list and communicate to the office of the General Manager. By the letter dated 26-9-2018, the respondent conveyed their disagreement in waiving the applicability of Section 12(5) of the Amendment Act, 2015. In response to the respondent's letter dated 26-9-2018, the appellant has sent a panel of four retired railway officers to act as arbitrators giving the details of those retired officers and requesting the respondent to select any two from the list and communicate to the office of the General Manager. Since the respondent has been given the power to select two names from out of the four names of the panel, the power of the appellant nominating its arbitrator gets counterbalanced by the power of choice given to the respondent. Thus, the power of the General Manager to nominate the arbitrator is counterbalanced by the power of the respondent to select any of the two nominees from out of the four names suggested from the panel of the retired officers. 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. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377: (2017) 4 SCC (Civ) 72] is not applicable to the present case."*

16. In the **CORE** judgment, the Supreme Court was dealing with a similar clause being Clause 64(3)(b) of GCC, wherein the procedure envisaged constitution of an Arbitral Tribunal comprising of three retired Railway officers not below the rank of Senior Administrative Officers. For this purpose, Railways was to send a panel of at least four names of retired Railway officers empanelled to work as Arbitrators to the Contractor

within 60 days from the date when a written and valid demand is received by the General Manager. The Contractor was required to suggest at least two names out of the panel for appointment of Contractor's nominee within 30 days and General Manager would then appoint at least one out of them as Contractor's nominee and simultaneously appoint the remaining arbitrators from the panel or from outside the panel, duly indicating the 'Presiding Officer' from amongst the three Arbitrators. The Supreme Court upheld the validity of the appointment procedure on the ground that the right of the General Manager to constitute the Arbitral Tribunal is counter balanced by Contractor's power to choose any two from out of the four names and the General Manager 'shall' appoint at least one out of them as the Contractor's nominee.

17. Two questions, therefore, arise at this stage: (a) whether proposal of four names by the Railways from amongst the panel drawn up by them, from which Petitioner has the freedom to choose two and amongst whom one will be the Contractor's nominee, can be termed as a procedure akin to appointment from a broad-based panel, in consonance with the observations of the Supreme Court in ***Voestalpine (supra);*** and (b) whether the appointment procedure achieves the 'counter balancing' emphasized by the Supreme Court in ***Perkins (supra)*** and ***TRF Limited (supra).***

18. Both these questions need not detain this Court as they have been considered and answered by the Co-ordinate Benches of this Court. In this context, I may first refer to the judgment in ***Steelman (supra)***, wherein relying upon the judgment in ***Margo (supra),*** the Court held as follows:-

> ***"20.*** *The validity of an appointment procedure which contemplates appointment of arbitrator/s from a panel of persons maintained by one of*

the contracting parties, was upheld in Central Organisation (supra) subject to actual counterbalancing being achieved between the right of a party to draw up a panel vis-a-vis the power of choice conferred on the other contracting party to choose from that panel. This is, however, subject to the further requirement as laid down in Voestalpine (supra) that the panel of arbitrators drawn up for this purpose must be broad based. The test for determining whether the panel is fully broad based or not is also to be found in Voestalpine (supra) wherein it was observed as under:—

> *"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 broadbased panel on the aforesaid lines, within a period of two months from today."

21. *The necessity of a truly broadbased panel has also been emphasized in the judgments of this Court in BVSR-KVR (Joint Ventures) v. Rail Vikas Nigam Ltd., 2020 SCC OnLine Del 456, Singh Associates v. Union of India, 2022 SCC OnLine Del 3419, Gangotri Enterprises Ltd. v. General Manager Northern Railways, 2022 SCC OnLine Del 3556 and L&T Hydrocarbon Engineering Limited v. Indian Oil Corporation Limited, 2022 SCC OnLine Del 3587.*

22. *In Margo Networks (P) Ltd. v. Railtel Corpn. of India Ltd., 2023 SCC OnLine Del 3906, it has been held that in the light of the specific issues dwelt upon in Central Organisation (supra), the same does not derogate from the principles laid down in Perkins (supra). As noticed hereinabove, in Central Organisation (supra) the Supreme Court upheld the validity of an appointment procedure which involves appointment of arbitrator/s out of a panel prepared by one of the contracting parties. However, as held in Margo (supra), the Supreme Court in Central Organisation (supra) did not specifically go into the issue as to whether the particular panel in that case was truly broad based, in consonance with Voestalpine (supra); and/or the circumstances in which a panel based appointment procedure can be said to achieve genuine "counterbalancing" as contemplated in Perkins (supra). In Margo (supra) it has been held as under:—*

"26. CORE does not in any manner overrule Voestalpine (supra) or narrow down the scope thereof, although it does not deal specifically with the issue as to whether the panel afforded by the Railways in that case was in conformance with the principles laid down in Voestalpine (supra).

xxx xxx xxx

35. Thus, in an appointment procedure involving appointment from a panel made 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 (supra), failing which, it would be incumbent on the Court, while exercising jurisdiction under Section 11, to constitute an independent and impartial Arbitral Tribunal as mandated in TRF (supra) and Perkins (supra). The judgment of the Supreme Court in CORE does not alter the position in this regard.

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37. This brings us to the next issue that arises in the context of the arbitration clause in the present case, viz. whether "counter balancing" is achieved in a situation where one of the parties has a right to choose an arbitrator from a panel whereas 2/3rd of the members of the arbitral tribunal are appointed by the other party.

38. In TRF Limited (supra), it was observed by the Supreme Court as under:—

> *"50……..At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstances can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. ……"*

39. Also in Perkins (supra), the Supreme Court observed as under:—

> *"21……The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always*

have an element of exclusivity in determining or charting the course for dispute resolution…

40. In the light of the aforesaid observations in TRF (supra) and Perkins (supra), it was observed by the Supreme Court in CORE as under:

"37……Thus, the right of the General Manager in formation of the Arbitral Tribunal is counterbalanced by the respondent's power to choose any two from out of the four names and the General Manager shall appoint at least one out of them as the Contractor's nominee.

38. ……Thus, the power of the General Manager to nominate the arbitrator is counter balanced by the power of the respondent to select any of the two nominees from out of the four names suggested from the panel of the retired officers. 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."

41. The fulcrum of CORE is that the right of one of the parties to prescribe a panel of persons from which the parties would appoint their nominee arbitrators is counter balanced by the power of other contracting party to choose therefrom. However, whether counter balancing can be achieved in a situation where one of the contracting parties has a right to appoint the remaining 2/3rd of the members of the arbitral tribunal, was not specifically considered in CORE. The said issue came to be considered by a coordinate bench of this Court in CMM Infraprojects Ltd. v. IRCON International Ltd. wherein it was, inter-alia, held as under:—

"21. The other anomaly which merits consideration is that the Managing Director of the Respondent, who has a direct interest in the outcome of the case, is directly appointing 2/3rd of the members of the Arbitral Tribunal. And also plays a role in the appointment of the 3rd arbitrator i.e., the contractor's nominee. This is against the spirit of the judgment in Perkins Eastman (supra). This argument was perhaps not raised in CORE (supra).

22. In cases where the arbitration clause provides a genuine counterbalancing of power of appointment between the two parties i.e., when one party appoints its nominee and the other party does the same and the two nominees together decide the presiding arbitrator the Court would not find any imbalance impinging upon

the concept of party autonomy. This was the sentiment expressed by the Supreme Court in TRF Limited v. Energo Engineering Projects Limited, particularly para 50 which reads as under:—

> *"50……..We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto."*

The said view was also endorsed in Perkins Eastman (supra) [para 21] to the following effect:

> *"21. But, in our view that has to be the logical deduction from TRF Limited. Paragraph 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited."*

The clause in the present case does not provide for any effective counter balancing. The process starts with selection of a panel by the Respondent and this restricts the element of choice that the contractor may exercise in choosing its nominee. Nonetheless, it allows the Respondent to ultimately choose the contractor's nominee from the two names suggested by the contractor. However, the clause also entitles the Respondent to choose the balance two arbitrators from the panel or even outside. This undeniably indicates that the scales are tipped in favour of the Respondent when it comes to the appointment process. In effect, 2/3rd strength of the Arbitral Tribunal is nominated by the Respondent. This leads to the inexorable conclusion that the clause in its current state may not be workable. Thus, the reliance of the Respondent upon the judgment in CORE (supra) is misplaced."

xxx xxx xxx

43. The above observations also squarely apply in connection with the arbitration agreement that falls for consideration in the present case. Thus, the appointment procedure contained in Clause 3.37 of the RFP fails to pass muster for this reason as well. The "counter balancing" as contemplated in Perkins (supra) cannot be said to have been achieved in a situation where one of the parties has a right to choose an arbitrator from a panel and where the remaining (2 out of 3) arbitrators are appointed by the other party."

23. *In the present case, the panel of the arbitrators prepared by the respondent comprises of former Supreme Court Judges, Former Judges of various High Courts and District Courts, Engineers, Financial Experts, Civil Servants. The same can be said to be broadbased and meets with the requirement laid down by the Supreme Court in Voestalpine (supra).*

24. *The only remaining question is whether the appointment procedure in question achieves counterbalancing as contemplated in Perkins (supra). Per se, there is no difficulty with an appointment procedure under which one of the parties draws up a "broadbased" panel and the other contracting party has the right to choose any person from that broadbased panel to act as a Sole Arbitrator. However, the equilibrium is disturbed where the party drawing up the panel is given a further right to accord its "confirmation" as to the choice exercised by the other contracting party.*

25. *It was sought to be contended on behalf of the respondent that the confirmation envisaged under the appointment procedure is a mere formality and therefore should not be construed as disturbing the balance/equilibrium in the appointment procedure. I am unable to accept this contention. Had this been so, there was no reason to incorporate the provision for "confirmation" in the appointment procedure. It may be*

noted that in Voestalpine (supra), the Supreme Court frowned upon a panel based appointment procedure which "created room for suspicion". Further, in Margo (supra) and CMM Infraprojects Ltd. v. IRCON International Ltd., 2021:DHC: 2578, Pankaj Mittal v. Union of India, Order dated 16.12.2021 passed by this Court in ARB.P. 607/2021 and Pankaj Mittal v. Union of India, Order dated 11.07.2023 passed by this Court in ARB.P. 130/2023, this Court has disapproved of appointment procedure/s giving greater say to one of the contracting parties. In CMM (supra), the Court specifically disapproved of an appointment procedure under which "the scales are tipped in favour of the respondent". In the present case, the tipping of scales in favour of the respondent is subtle, but clearly discernible.

26. *In the circumstances, it is incumbent on this Court to appoint an independent Sole Arbitrator to adjudicate the disputes between the parties."*

19. It is relevant to refer to some of the observations of the Court in ***Margo (supra)*** as they are directly applicable to the present case. After noting the respective contentions of the parties, the Court first culled out the four questions that had arisen before the Supreme Court in **CORE** and the questions are extracted hereunder for ready reference:-

"14. *A careful reading of* ***CORE*** *reveals that it purports to decide the following issues:*

i. Whether an independent arbitrator/Arbitral tribunal can be appointed without reference to the clauses of General Conditions of Contract (GCC)?

ii. Whether retired railway officers are not eligible to be appointed as arbitrators under Section 12(5) read with Schedule VII of the Act?

iii. What is the consequence of failure to act in terms of the contract in not responding within thirty days from the date of the request?

iv. Whether a General Manager, who becomes ineligible by operation of law to be appointed as arbitrator, is not eligible to nominate the arbitrator?"

(emphasis supplied)

20. On the second question, the Supreme Court relying upon ***Voestalpine (supra)*** and ***Government of Haryana PWD Haryana (B and***

R) Branch v. G.F. Toll Road Private Limited and Others, (2019) 3 SCC 505, held that retired employees of the Railways were not ineligible to act as Arbitrators. On the fourth question (iv), the Supreme Court held as follows:-

> *"38. …….Thus, the power of the General Manager to nominate the arbitrator is counter balanced by the power of the respondent to select any of the two nominees from out of the four names suggested from the panel of the retired officers. 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.*
>
> *39. There is an express provision in the modified clauses of General Conditions of Contract, as per Clauses 64(3)(a)(ii) and 64(3)(b), the Arbitral Tribunal shall consist of a panel of three gazetted railway officers [Clause 64(3)(a)(ii)] and three retired railway officers retired not below the rank of Senior Administrative Grade Officers [Clause 64(3)(b)]. When the agreement specifically provides for appointment of the Arbitral Tribunal consisting of three arbitrators from out of the panel of serving or retired railway officers, the appointment of the arbitrators should be in terms of the agreement as agreed by the parties. That being the conditions in the agreement between the parties and the General Conditions of the Contract, the High Court was not justified in appointing an independent sole arbitrator ignoring Clauses 64(3)(a)(ii) and 64(3)(b) of the General Conditions of Contract and the impugned orders cannot be sustained."*

21. Question No.(iv), as noted above, i.e. eligibility of the General Manager to nominate an arbitrator is really the heart of the dispute in the present case. Having noted the questions arising in **CORE**, the Co-ordinate Bench in ***Margo (supra),*** observed that although the **CORE** judgment has been referred to a Larger Bench of the Supreme Court, but the operation of the judgment has not been stayed and continues to hold the field but observed further that the judgment in **CORE** is an authority only in respect of the propositions identified and carved out therein and its applicability

cannot *ipso facto* be extended for the purpose of adjudication of other aspects which have not been purported to be answered in **CORE.** Two fundamental issues arising for its consideration were flagged by the Court and answered as follows:-

> ***"20.*** *Two fundamental issues which fall for consideration in this case and which were not specifically answered in* ***CORE****, are as under:—*
>
> ***i. When appointment of arbitrator/s is to be 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 principle laid down in Voestalpine (supra), and if so, what is the consequence where the panel is not sufficiently "broad based"?***
>
> ***ii. Whether "counter balancing" [as contemplated in Perkins (supra)] is achieved in a situation where one of the parties has a right to choose an arbitrator from a panel whereas the remaining (2 out of 3) members of the arbitral tribunal are appointed by the other party?***
>
> *xxxx xxxx xxxx*
>
> ***24.*** *The Supreme Court in Voestalpine (supra) also proceeded to observe as under:—*
>
> > *"……..*
> >
> > *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 broadbased panel on the aforesaid lines, within a period of two months from today****.*

……."

25. *Thus, it was held by the Supreme Court in Voestalpine (supra) that:*

i. Affording a panel of five names to the petitioner from which the petitioner was required to nominate its nominee arbitrator, was restrictive in nature; the same created room for suspicion that DMRC may have picked up its own favourite;

ii. Choice should be given to the concerned party to nominate any person from the entire panel of arbitrators;

iii. The two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator;

iv. The panel ought not to be restricted/limited to retired engineers and/or retired employees but should be broad based and apart from serving or retired employees of government departments and public sector undertakings, the panel should include lawyers, judges, engineers of prominence from the private sector etc.

26. ***CORE*** *does not in any manner overrule Voestalpine (supra) or narrow down the scope thereof, although it does not deal specifically with the issue as to whether the panel afforded by the Railways in that case was in conformance with the principles laid down in Voestalpine (supra).*

27. *The difficulties which were found to have inflicted the panel afforded to the petitioner in Voestalpine (supra) also squarely apply to the present case.*

28. *In the present case, the respondent has shared a panel of ten arbitrators with the petitioner, all being ex-employees of the Railways/RailTel. Apart from the ex-employees of the railways, no other person has been included in the panel. Such a panel is clearly restrictive*

and is manifestly not "broadbased" and therefore, impinges upon the validity of the appointment procedure prescribed in clause 3.37 of the RFP.

29. *The principle laid down in Voestalpine (supra) has been followed in a large number of cases to adjudge upon validity of appointment procedure involving appointment from a panel. Thus, In SMS Ltd. v. Rail Vikas Nigam Limited, out a panel of 37 names, only eight names had no connection with the Railways. It was held that even though the panel comprised as many as 37 names, it was not sufficiently broadbased. In that case, a previous judgment in the case of Simplex Infrastructures Ltd. v. Rail Vikas Nigam Limited was also taken note of, in which a panel of 26 names (out of which only 9 were unconnected with the Railways) was held to be not sufficiently broad based inasmuch as the same did not comprise independent persons such as judges, lawyers, engineers of prominence from the private sector etc. The said judgments were relied upon in the case of Overnite Express Limited v. Delhi Metro Rail Corporation, this court went to the extent of holding that "the procedure of forwarding a panel of five names to the other contracting party to choose its nominee Arbitrator is now held to be no longer a valid procedure."*

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31. *Again in Consortium of Autometers Alliance Ltd. and Canny Elevators Co. Ltd. v. Chief Electrical Engineer/Planning, Delhi Metro Rail Corporation, in the context of the panel that fell for consideration in that case, this Court observed as under:*

> *"……..*
>
> *33. There is no dispute that out of the 51 names provided, there are 26 retired Judges, 22 public sector engineers and three public sector accountants/financial professionals. No doubt, the panel do not have persons like lawyers of repute or accountants/financial professionals or engineers from the private sector but the panel consisting of 51 names is ten times the initial panel of five names provided by the Respondent. The dispute between the parties is with regard to the Service Tax. Surely, with 26 retired Judges on the panel and also persons, who are serving/retired from public sector undertakings like Railways/RITES/RVNL other than the respondent Delhi Metro Rail Corporation and it was held by the Supreme Court in Voestalpine Schienen GMBH (supra) that panel consisting of names of persons, who have retired from other public sector undertakings will not be a ground to challenge it under Section 12(5) of the Act or relevant Schedules therein, this Court is of the view that arguments as advanced by Mr. Wadhwa are not sustainable in the facts of this case. Further, I note that the petitioner has nominated a retired Judge of the*

High Court as its nominee arbitrator and not a person with finance background. Merely because the Respondent could have further broad based the panel cannot be a ground to hold that the current panel of 51 names is not broad based when it consists of names of 26 retired High Court/District/Additional District Judges and serving/retired officers of the other Public Sector Undertakings.

34. In fact, the Supreme Court in Voestalpine Schienen GMBH (supra) has not disapproved the procedure of preparing a panel of arbitrators, for appointing arbitrators to adjudicate the disputes between the parties. The ratio of the judgment of the Supreme Court in Voestalpine Schienen GMBH (supra) is that a party must have a wider choice for nominating its arbitrator from the panel. I am of the view, the panel now prepared by the Respondent having 51 names is broad based and the petitioner has a wider choice to choose its nominee arbitrator. If the plea of Mr. Wadhwa has to be accepted and the prayers made in the petition are granted, it shall make the panel and the procedure contemplated in the GCC redundant, which is impermissible. I also state that the reliance placed by Mr. Wadhwa on the judgment of SMS Ltd. (supra) is misplaced. The said judgment is clearly distinguishable as the subsequent panel produced by the respondent therein was clearly not broad-based owing to the presence of only 8 members out of 37 in the panel provided, who were officers retired from organization other than Railways (respondent therein) and Public Sector Undertakings connected with Railways whereas in the panel in hand, the 26 names include retired Additional District Judges/District Judges/High Court Judges.

……."

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33. *This court in Gangotri Enterprises Ltd. v. General Manager Northern Railways, 2022: DHC: 4520, in the context of an identical procedure for appointment in the context of a railways contract, taking note of the judgments passed in CORE (supra), Voestalpine (supra), Tantia Constructions Limited (supra), BVSR-KVR (Joint Ventures) (supra) and SMS Ltd. v. Rail Vikas Nigam Limited, 2020 SCC OnLine Del 77, inter-alia, held 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 said judgment. In view thereof, it is held that the petitioner herein was within its right to nominate its Arbitrator.

……."

34. *Again in L&T Hydrocarbon Engineering Limited v. Indian Oil Corporation Limited, 2022/DHC/004531, it was held as under:—*

"……..

96. In the present case, the stipulation requires forwarding three names (even if they are retired employees from other organizations and not IOCL) to the petitioners, for it to choose one name amongst them to act as the Sole Arbitrator. It cannot be overlooked that the list of three names is a restrictive panel limiting the choice of the petitioner to only three options. I have noted that the three persons named in the panel forwarded to the petitioner are retired officers of different organisations like ONGC, SAIL and GAIL. The integrity and impartiality of these officers could not be normally doubted. However, in the absence of a free choice given to the petitioner to choose the arbitrator from a broad and diversified panel, and the power conferred upon the respondent to forward any three names as the panel at its discretion, there is a possibility of apprehension arising on part of the petitioner about the impartiality of the persons in the panel so forwarded. Whether such an apprehension is justified or not, is not for this Court to decide, and is, in any case, immaterial. It is settled law that even an apprehension of bias of an arbitrator in the minds of the parties would defeat the purpose of arbitration, and such a situation must be avoided.

97. Therefore, I declare that the procedure for appointment of the arbitrator (if any) shall necessarily be in terms of the observations of the Supreme Court in Voestalpine Schienen GmBH (supra).

98. It is directed that in view of my conclusion in paragraph 80, the General Manager concerned shall consider the claims of the petitioner and take a decision whether they are to be notified or not, within eight weeks from today. Thereafter, the parties shall proceed in accordance with law.

……."

35. *Thus, in an appointment procedure involving appointment from a panel made 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 (supra), failing which, it would be incumbent on the Court, while exercising jurisdiction under Section 11, to constitute an independent and impartial Arbitral Tribunal as mandated in TRF (supra) and Perkins (supra). The judgment of the Supreme Court in* ***CORE*** *does not alter the position in this regard.*

36. *In the facts of the present case, applying the principles laid down in Voestalpine (supra) and in view of the aforesaid judgments of this Court, including in L&T Hydrocarbon Engineering Limited (supra), it is evident that the panel offered by the respondent to the petitioner in the present case is restrictive and not broadbased. The same adversely impinges upon the validity of the appointment procedure contained in clause 3.37 (supra), and necessitates that an independent Arbitral Tribunal be constituted by this Court.*

37. *This brings us to the next issue that arises in the context of the arbitration clause in the present case, viz.* ***whether "counter balancing" is achieved in a situation where one of the parties has a right to choose an arbitrator from a panel whereas 2/3rd of the members of the arbitral tribunal are appointed by the other party.***

xxx *xxx* *xxx*

41. *The fulcrum of* ***CORE*** *is that the right of one of the parties to prescribe a panel of persons from which the parties would appoint their nominee arbitrators is counter balanced by the power of other contracting party to choose therefrom. However, whether counter balancing can be achieved in a situation where one of the contracting parties has a right to appoint the remaining 2/3rd of the members of the arbitral tribunal, was not specifically considered in* ***CORE****. The said issue came to be considered by a coordinate bench of this Court in CMM Infraprojects Ltd. v. IRCON International Ltd., 2021: DHC: 2578 wherein it was, inter-alia, held as under:—*

> *"……..*
>
> *21. The other anomaly which merits consideration is that the Managing Director of the Respondent, who has a direct interest in the outcome of the case, is directly appointing 2/3rd of the members of the Arbitral Tribunal. And also plays a role in the appointment of the 3rd arbitrator i.e., the contractor's nominee. This is against the spirit of the judgment in Perkins Eastman (supra). This argument was perhaps not raised in CORE (supra).*

22. In cases where the arbitration clause provides a genuine counterbalancing of power of appointment between the two parties i.e., when one party appoints its nominee and the other party does the same and the two nominees together decide the presiding arbitrator the Court would not find any imbalance impinging upon the concept of party autonomy. This was the sentiment expressed by the Supreme Court in TRF Limited v. Energo Engineering Projects Limited, particularly para 50 which reads as under:—

> *"50……..We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto."*

The said view was also endorsed in Perkins Eastman (supra) [para 21] to the following effect:

> *"21. But, in our view that has to be the logical deduction from TRF Limited. Paragraph 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the*

power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited."

The clause in the present case does not provide for any effective counter balancing. The process starts with selection of a panel by the Respondent and this restricts the element of choice that the contractor may exercise in choosing its nominee. Nonetheless, it allows the Respondent to ultimately choose the contractor's nominee from the two names suggested by the contractor. However, the clause also entitles the Respondent to choose the balance two arbitrators from the panel or even outside. This undeniably indicates that the scales are tipped in favour of the Respondent when it comes to the appointment process. In effect, 2/3rd strength of the Arbitral Tribunal is nominated by the Respondent. This leads to the inexorable conclusion that the clause in its current state may not be workable. Thus, the reliance of the Respondent upon the judgment in CORE (supra) is misplaced.

……."

42. *The reasoning and the conclusion in CMM (supra) on the above aspect was followed by this court in Pankaj Mittal v. Union of India, Order dated 16.12.2021 in ARB.P. 607/2021 where in it was observed as under:*

"…….

4. This Court has considered the afore-noted clause in a recent judgment passed in ARB.P. 407/2020 dated 23rd August, 2021 titled - 'CMM Infraprojects Ltd. v. IRCON International Ltd.', wherein an identical clause has been considered by this Court. The clause herein as worded, permits the Respondent to make nomination of 2/3rd strength of the Arbitral Tribunal, which tilts the scales in favour of the Respondent in the appointment process. For this reason and others as noted in the afore-noted judgment, the Court found the case of Central Organisation for Railway Electrification (supra) distinguishable. The said reasons apply to this case as well.

……."

43. *The above observations also squarely apply in connection with the arbitration agreement that falls for consideration in the present case. Thus, the appointment procedure contained in Clause 3.37 of the RFP fails to pass muster for this reason as well. The "counter balancing" as contemplated in Perkins (supra) cannot be said to have been achieved in a situation where one of the parties has a right to choose an arbitrator from a panel and where the remaining (2 out of 3) arbitrators are appointed by the other party."*

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 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).***

23. Coming back to the facts of the present case, it needs examination whether the procedure envisaged in Clause 64(3)(b)(ii) of GCC, wherein no doubt four names of Retired Gazetted Railway officials are proposed by the Respondents, from which Petitioner has the freedom to choose two and out of which one shall be nominated as the Contractor's nominee, passes muster, in view of the judgments of the Supreme Court in ***Voestalpine (supra), Perkins (supra), TRF Limited (supra)*** and the judgments of this Court, referred to above. There is no denying the fact that while one member of the three member Arbitral Tribunal will be Petitioner's nominee but remaining two out of three Arbitrators would be appointed by the Railways and therefore the 'counter balancing' will not be achieved and thus this appointment procedure cannot be sustained in law. I am also fortified in this view by the judgment of this Court on this aspect in ***Pankaj Mittal v. Union of India, 2021 SCC OnLine Del 5712,*** where a similarly worded clause permitting the Respondent to make nomination of 2/3rd strength of the Arbitral Tribunal was held to be untenable in law tilting the scales in favour of the Respondent, in matter of appointment of the Arbitral Tribunal. I may also refer to other judgments where this Court has appointed independent Arbitrators holding the clauses to be heavily tilted in favour of the Appointing Authority, overlooking the binding dictum of the Supreme Court to give primacy to party autonomy by appointment of independent and impartial Arbitrators viz. ***SRICO Projects Pvt. Ltd. v. Central Railside Warehouse Co. Ltd., 2022 SCC OnLine Del 255*** and ***L&T Hydrocarbon Engineering Limited v. Indian Oil Corporation Limited, 2022 SCC OnLine Del 3587.*** In this context, it would be useful to

allude to a recent judgment of this Court in ***Taleda Square Private Limited v. Rail Land Development Authority, 2023 SCC OnLine Del 6321,*** wherein a similar issue fell for consideration and the Court held as follows:-

> *"**5.** From a perusal of the aforesaid, what emerges is that the methodology as prescribed under clause 23.5.10 of the agreement while entitling the claimant/petitioner to select one of the arbitrators from the panel of five offered by the respondent also empowers the respondents to nominate the other two arbitrators. Having given my thoughtful consideration to the rival submission of the parties, I find that the respondent's plea that the petitioner should be compelled to select its nominee arbitrator from the five member panel provided by the respondent cannot be accepted. Not only has such an approach been disapproved by the Apex Court in Voestalpine Schienen Gmbh (supra) but has also been categorically dealt with by a Coordinate Bench in Margo Networks Pvt. Ltd. (supra), wherein the Court while dealing with a similar clause pertaining to the railway board had, after examining various decisions of the Apex Court including the decisions in Voestalpine Schienen Gmbh (supra) and Central Organisation for Railway Electrification (supra), come to a conclusion that the panel of arbitrators being offered by the respondent therein, which was a ten member panel in the said case, was clearly restrictive and, therefore, proceeded to appoint the nominee arbitrators for both the petitioner and the respondent.*
>
> ***6**. At this stage, it would be apposite to refer to the relevant extracts of the decision in Margo Networks Pvt. Ltd. (supra):—*
>
> > *"25. Thus, it was held by the Supreme Court in* Voestalpine *(supra) that:*
> >
> > > *i. Affording a panel of five names to the petitioner from which the petitioner was required to nominate its nominee arbitrator, was restrictive in nature; the same created room for suspicion that DMRC may have picked up its own favourite;*
> > >
> > > *ii. Choice should be given to the concerned party to nominate any person from the entire panel of arbitrators;*
> > >
> > > *iii. The two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator;*
> > >
> > > *iv. The panel ought not to be restricted/limited to retired engineers and/or retired employees but should be broad*

based and apart from serving or retired employees of government departments and public sector undertakings, the panel should include lawyers, judges, engineers of prominence from the private sector etc.

26. CORE does not in any manner overrule Voestalpine (supra) or narrow down the scope thereof, although it does not deal specifically with the issue as to whether the panel afforded by the Railways in that case was in conformance with the principles laid down in Voestalpine (supra).

28. In the present case, the respondent has shared a panel of ten arbitrators with the petitioner, all being ex-employees of the Railways/RailTel. Apart from the ex-employees of the railways, no other person has been included in the panel. Such a panel is clearly restrictive and is manifestly not "broadbased" and therefore, impinges upon the validity of the appointment procedure prescribed in clause 3.37 of the RFP.

35. Thus, in an appointment procedure involving appointment from a panel made 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 (supra), failing which, it would be incumbent on the Court, while exercising jurisdiction under Section 11, to constitute an independent and impartial Arbitral Tribunal as mandated in TRF (supra) and Perkins (supra). The judgment of the Supreme Court in CORE does not alter the position in this regard.

36. In the facts of the present case, applying the principles laid down in Voestalpine (supra) and in view of the aforesaid judgments of this Court, including in L&T Hydrocarbon Engineering Limited (supra), it is evident that the panel offered by the respondent to the petitioner in the present case is restrictive and not broadbased. The same adversely impinges upon the validity of the appointment procedure contained in clause 3.37 (supra), and necessitates that an independent Arbitral Tribunal be constituted by this Court"

7. *In the light of the aforesaid, once the Coordinate Bench has dealt with an identical clause, I do not see any reasons as to why I should not adopt the same course of action. Even otherwise, I fail to appreciate as to how this position, where not only does the respondent have the power to unilaterally appoint two out of the three arbitrators and compels the petitioner to choose one of the panel of five arbitrators can be said to be meeting the test of "counter balancing" as laid down in Voestalpine*

> *Schienen Gmbh (supra) and Perkins (supra). The very fact that the petitioner was given an option to choose from a list of five persons in itself shows that the panel being offered by the respondent was not even sufficiently broad-based.*
>
> ***8.*** *I have also considered the decision in Union Territory of Ladakh (supra) and find that in the said case, the Apex Court emphasised that the High Court cannot refuse to follow any decision of the Apex Court only on the ground that it has referred to a larger Bench or a review petition thereto is pending. In the present case, as held by the Coordinate Bench, the question as to whether "counter balancing" can be achieved in a situation where one of the contracting parties has a right to appoint 2/3rd of the members of the arbitral tribunal was not specifically considered in Central Organisation for Railway Electrification (supra) and therefore, the said decision would not be applicable to the facts of the present case."*

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.

25. The Arbitration Agreement between the parties contemplates a three-member Arbitral Tribunal and accordingly, Mr. Shashank Garg, Advocate (Mobile No.9811326671) is appointed as nominee Arbitrator of the Petitioner and Mr. Abhishek Malhotra, Advocate (Mobile No.9811564568) is appointed as nominee Arbitrator for the Respondent for adjudication of disputes arising out of Contract Agreement dated 03.08.2021. The two learned Arbitrators shall appoint the Presiding Arbitrator within 30 days from the receipt of this order. The learned Arbitrators shall give a declaration under Section 12(1) of the Act before entering upon reference.

Insofar as the plea of the Respondent that the fee of the Arbitral Tribunal be fixed in accordance with the Railway Board Circular, handed over in Court, is concerned, this Court is not inclined to accept the same in view of the various judgments of this Court, some of which have been alluded to in the earlier part of the judgment directing that the fee will be regulated as per Fourth Schedule of the Act. No special and extraordinary circumstances have been made out by the learned counsel for the Respondent to take a different or divergent view from the view of the Co-ordinate Benches of this Court. Accordingly, fees of the Arbitral Tribunal shall be regulated as per Fourth Schedule of the Act.

26. Needless to state that this Court has not expressed any opinion on the merits of the case and all rights and contentions of the parties are left open to be decided by the learned Arbitral Tribunal, in accordance with law.

27. Petition along with pending applications is disposed of with the aforesaid directions.

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28. This petition has been filed under Section 9 of the Act seeking the following relief:-

> *"A. Stay the respondent from invoking the Bank Guarantees being no. (i) 16781/GL0002421 dated 01.07.2021 for a sum of Rs. 96,34,213/- (ii) 16781/GL0004421 dated 15.09.2021 for a sum of Rs. 1,76,62,723/- and (iii) 16781/GL0002521 dated 08.07.2021 for a sum of Rs. 1,76,62,723/- issued by Union Bank of India, Shahakarnagar Branch, Bengaluru-560092, till final adjudication of dispute between the parties."*

29. On 14.03.2023, operation of the impugned letter dated 09.03.2023 was kept in abeyance by the Court while issuing notice to the Respondents. The interim order is continuing till date.

30. Since Court has appointed the three member Arbitral Tribunal in ARB.P. 609/2023, as aforementioned, it would be appropriate to continue the same, subject to a further decision on the interim order by the learned Arbitral Tribunal. Looking at the fact that the interim order operates against the Respondents, it is directed that this petition will be treated as an application under Section 17 of the Act and decided accordingly by the Arbitral Tribunal. To avoid delay in the hearing of the application, Registry is directed to transmit the records of the petition to the learned Arbitral Tribunal for its consideration.

31. It is made clear that this Court has not expressed any opinion on the merits of the case and it is open to the Arbitral Tribunal to continue, vacate or modify the interim order as deemed fit, in accordance with law and the facts and circumstances of the case.

32. Petition is disposed of in the aforesaid terms.

JYOTI SINGH, J

NOVEMBER 29, 2023/kks/KA