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

Judgment pronounced on: 14.08.2023

\+ **ARB.P. 1064/2022**

STEELMAN TELECOM LIMITED ..... Petitioner

Through: Mr. Aniruddha Bhattacharya and Mr. Aditya S. Pandey, Advs.

Versus

POWER GRID CORPORATION OF INDIA LIMITED .....Respondent

Through: Mr. Sudhir Nandrajog, Sr. Adv. along with Mr. Azmat H. Amanullah andMr. Hardik Choudhary, Advs.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

SACHIN DATTA, J.

1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "A&C Act") seeks appointment of a sole arbitrator to adjudicate the dispute between the parties.

2. The disputes between the parties have arisen with respect to the work executed by the petitioner in furtherance of tender bearing No. ERTCC/ C&MIl7-18/I-75/T-139/AMC_LMC/Pkg-C dated 23.02.2018 floated by the respondent and awarded to the petitioner for the "AMC of Bhubaneshwar and Cuttack Intracity and Talcher-Bhubaneswar Intercity OFC Network and

LMC in various cities of Odisha for a period of three years".

3. Initially, a purchase order dated 12.10.2018 was issued by the respondent upon the petitioner. Clause 14 of the aforesaid purchase order incorporates the arbitration agreement, which is in the following terms:-

> *"14.0 ARBITRATION*
> *All disputes or differences in respect of which the decision, if any, of the Project Manager and/or the Head of the Implementing Authority has not become final or binding as aforesaid shall be settled by arbitration in the manner provided herein below:*
> *The arbitration shall be conducted by a sole arbitrator in case the amount of claim is less than Rs. 25 crore and by three member arbitral tribunal in case the amount of claim is greater than Rs. 25 Crore.*
> *Sole Arbitration*
> *The sole Arbitrator shall be chosen from a panel of empanelled Arbitrators maintained by POWERGRID. The same shall comprise of retired Judges and retired Senior executives of PSUs other than POWERGRID. Further, the choice of sole Arbitrator shall be governed by the amount of claim in the following manner:*

Sl. No.	*Claim Amount*	*Work Experience/Qualifications*
1.	*<Rs. 10 Crore*	*Sole Arbitrator-Retired Senior Executives of PSUs other than POWERGRID/Retired Distt Judges/High Court Judges.*
2.	*Rs. 10 Crore – Rs. 25 Crore*	*Sole Arbitrator – Retired High Court/Supreme Court Judges*

> *(a) In case of invocation of arbitration by POWERGRID, POWERGRID shall, within 30 days, send a list of names of 3 arbitrators from its list/database of Arbitrators and the contractor shall within the period of further 30 days select anyone person to act as "Sole Arbitrator", which will be confirmed by POWERGRID and matter will be referred to such appointed Arbitrator for further arbitration proceedings.*
> *(b) In case of invocation of arbitration by the Contractor, the Contractor shall request POWERGRID for its database of Arbitrators/chose from the list of Arbitrators available on POWERGRID's website, and the contractor shall, within 30 days, select anyone Arbitrator from the above to act as "Sole Arbitrator",*

which will be confirmed by POWERGRID within 30 days and matter will be referred to such appointed Arbitrator for further arbitration proceedings.
If the parties fail to appoint sole arbitrator within sixty (60) days after receipt of a notice from the other party invoking Arbitration, the appointment of sole arbitrator shall be done by Courts as per the provisions of Indian Arbitration and Conciliation Act, 1996 or any statutory modification thereof.

Three member arbitral tribunal
The arbitration shall be conducted by three arbitrators, who are retired High Court/Supreme Court Judges, one each to be nominated by the Contractor and the Employer and the third to be appointed by both the arbitrators in accordance with the Indian Arbitration & Conciliation Act. If either of the parties fails to appoint its arbitrator within sixty (60) days after receipt of a notice from the other party invoking the Arbitration clause, the arbitrator appointed by the party invoking the arbitration clause shall become the sole arbitrator to conduct the arbitration. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus regarding appointment of presiding Arbitrator within a period of 30 days from the appointment of the arbitrator appointed subsequently, the presiding arbitrator shall be appointed by Courts as per the provisions of Arbitration and Conciliation Act.
The cost of arbitral proceedings inter-alia including the Arbitrators' fee, logistics and any other charges shall be equally shared by both parties.
In case of Sole Arbitration, the fees to be paid to the sole Arbitrator shall be as per the terms of empanelment in POWERGRID whereas in case of the three member tribunal, the Arbitrator's fees shall be as agreed upon by the Arbitrators in line with the Arbitration & Conciliation Act. However, the expenses incurred by each party in connection with the preparation, presentation, etc. of its proceedings shall be borne by each party itself.
The language of the arbitration proceedings and that of the documents and communication between the parties shall be English. The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 or any statutory modification thereof. The venue of arbitration shall be New Delhi.
The decision of the sole arbitrator/the majority of the arbitrators, as the case may be, shall be final and binding upon the parties. In the event of any of the sole arbitrator/any of the aforesaid arbitrators dying, neglecting, resigning or being unable to act for any reason, it will be lawful for the parties to nominate another sole arbitrator/another arbitrator in place of the outgoing arbitrator.

During settlement of disputes and arbitration proceedings, both parties shall be obliged to carry out their respective obligations."

4. Subsequently, a duly stamped contract agreement dated 05.11.2018 was executed between the parties which *inter alia* provides as under:-

"*1.1 Contract Documents (Reference GCC Clause 2.2)*
The following documents shall constitute the Contract between the Employer and the Contractor, and each shall be read and construed as an integral part of the Contract:

VOLUME-A
1. This Contract Agreement and the Appendices thereto.
2. LOI Ref No: ERTCC/C&M/17-18/I-75/T-139/AMC_LMC/Pkg-C/LOI- 487 dated 04.10.2018
3. ***Purchase Order Ref. no.: 5100017748 dtd 12.10.2018***

VOLUME-B
3. "Bidding Documents" comprising of the following:
(a) Volume -I of Bidding Documents comprising of Conditions of Contract.
(b) Volume II of Bidding Documents comprising of Technical Specifications.

VOLUME-C
4. Bid Submitted by the Contractor.
(Only relevant extracts are attached herewith for easy reference. Should the circumstances warrant, the original Bid along with the enclosures thereof, shall be referred to)."

5. Thus, the purchase order dated 12.10.2018 which contains the arbitration agreement is expressly made an integral part of the contract between the parties. Disputes having arisen between the parties, a demand notice dated 16.06.2022 was issued by the petitioner whereby the petitioner, *inter alia*, alleged as under:-

"*2. It is apparent that in such circumstances, that inter-alia the PGCIL has breached its obligations under the aforesaid Tender, LoI, Contract, the Other Contracts with PGCIL and applicable statutory law as:*

a) PGCIL has failed to release the payments due and payable to my Client under the Tender, LoI and Contract as a sum of Rs. 39,98,202 /-(Rupees Thirty-Nine Lakhs Ninety-Eight Thousand Two Hundred and Two Only) [inclusive of GST] which is due and payable to my Client for Work done between October, 2018-July, 2019 and the same has not been paid till date;

b) PGCIL has wrongfully terminated the Tender, LoI and Contracts as the delay caused in execution of the Work was due to the wrongful act on part of PGCIL in failing to release the payments due and payable to my Client under Tender, LoI and Contract for in accordance with the payment terms as existing between the parties and for reasons which squarely fall under the ambit of the force-majeure clause covering incident such as the cyclone Fani;

c) Without prejudice to b), PGCIL has wrongfully invoked both Bank Guarantees and arbitrarily and illegally appropriated a collective sum of Rs. 25,50,287 /- (Rupees Twenty-Five Lakhs Fifty Thousand Two and Eight Only) by such encashment despite being entitled a maximum of Rs. 11,25,143.3 (Rupees Eleven Lakhs Twenty-Five Thousand One Hundred and Forty Three and Three Paise Only) as liquidated damages for the alleged breach by my Client of the aforesaid Tender, LoI and Contract. Without prejudice to the specific case of my Client that the termination was wrongful even if in the event the same was legal the maximum amount deductible was Rs. 11,25,143.3 (Rupees Eleven Lakhs Twenty-Five Thousand One Hundred and Forty-Three and Three Paise Only) as liquidated damages and thus, PGCIL unjustly enriched itself and wrongfully withheld an amount of Rs. 14,25,143.7 /- (Rupees Fourteen Lakhs Twenty-Five Thousand One Hundred and Forty-Three Rupees and Seven Paise Only) by wrongful invocation of the aforesaid Bank Guarantees.

d) PGCIL has wrongfully withheld the amount of Rs. 25,20,984/- (Rupees Twenty-Five Lakhs Twenty Thousand Nine Hundred Eighty-Four Only Only) which has no connection with the Tender, LoI and Contract and is being arbitrarily withheld by PGCIL being the outstanding due and payable to my Client under the Other Contracts with PGCIL. Such action has no legal basis whatsoever as there was no privity of contract allowing such withholding the laws of India specifically prohibiting adjustment of dues under one contract against another.

e) PGCIL has caused a direct loss of Rs 5,09,36,837.65 /- (Rupees Five Crore Nine Lakhs Thirty-Six Thousand Eight Hundred Thirty-

Seven and Paisa Sixty-Five Only) viz. the bid amount made by my Client in the New Tender as my Client would have been an income on being declared successful bidder in the New Tender."

6. *Vide* the aforesaid communication dated 16.06.2022, the petitioner further demanded as under:-

"10. Under the circumstance, my Client having exhausted amicable attempts at settlement of disputes, is left with no other alternative than to demand inter-alia, the following from PGCIL:

a) Without prejudice to the remaining prayers hereinbelow immediate return of the sum of Rs. 14,25,143.7/- (Rupees Fourteen Lakhs Twenty-Five Thousand One Hundred and Forty-Three Rupees and Seven Paise Only) which PGCIL has appropriated by wrongful invocation of the aforesaid Bank Guarantees; and

b) Immediate release of the payments due and payable to my Client under the Tender, LoI and Contract being a sum of Rs. 39,98,202/- (Rupees Thirty-Nine Lakhs Ninety-Eight Thousand Two Hundred and Two Only) for the Work done and executed under the aforesaid Tender, LoI and Contract; and

c) Immediate release of the amount of Rs. 25,20,984/- (Rupees Twenty-Five Lakhs Twenty Thousand Nine Hundred Eighty-Four Only) which has no connection with the Tender, LoI and Contract and is being arbitrarily withheld by PGCIL being the outstanding due and payable to my Client under the Other Contracts with PGCIL; and

d) Immediate payment of the amount of Rs. 1,76,60,279/- (Rupees One Crore Seventy-Six Lakhs Sixty Thousand Two Hundred and Seventy-Nine Only) [without GST] being the remaining billable amount for my Client under the aforesaid Tender, LoI and Contract which could not be earned due to the wrongful termination of the aforesaid Tender, LoI and Contract; and

e) Payment of the amount of Rs 5,09,36,837.65/- (Rupees Five Crore Nine Lakhs Thirty-Six Thousand Eight Hundred Thirty-Seven and Paisa Sixty-Five Only) being a direct loss income my Client would income on being awarded the remaining Work in the New Tender."

7. The aforesaid demand notice dated 16.06.2022 was replied to by the respondent *vide* communication dated 29.07.2022 whereby the respondent

refuted the allegations/demand made by the petitioner. Consequently a notice invoking arbitration dated 01.08.2022 was issued by the petitioner wherein it was *inter alia* stated as under:-

> "*4. Till date my Client has received no communications from PGCIL demonstrating intentions of amicably resolving the dispute. I on behalf of my Client am thus compelled to invoke arbitration as per Clause 14 of the PO and hereby put you on notice of the aforesaid. It is stated that in the present case, Clause 14 of the PO has been admittedly made applicable and governing the present contract and Clause 14 of the PO specifically provides for the confirmation and appointment of the sole arbitrator to be made by PGCIL. Thus, PGCIL would be unilaterally deciding the appointment of the sole arbitrator in terms of Clause 14 and such unilateral appointment and such appointment procedure has been declared as ex-facie illegal by the Hon'ble Supreme Court as followed by the various High Courts. Without prejudice, it is further clarified that as under the aforesaid clause as the final unilateral decision for appointment of a sale arbitrator will be confirmed and made by PGCIL after my Client nominates an arbitrator from a panel of arbitrators suggested by PGCIL, such procedure is also ex-facie illegal in terms of the decisions of the Hon'ble Supreme Court as followed by the various High Courts in India including inter-alia the Hon'ble Calcutta High Court and the Hon'ble Delhi High Court.*
>
> *5.* ***I, thus state that the appointment procedure prescribed under Clause 14 of the PO is invalid and is in contravention of provisions of the Arbitration and Conciliation Act, 1996 i.e. Section 12(5) read with Schedule VII of the Act.*** *In light of this, I, on behalf of my Client, would like to propose the Hon'ble Justice Debi Prosad Dey (Retired) as the Hon'ble Sole Arbitrator for the adjudication of the pending disputes between the parties inter-se. I request PGCIL to kindly let me know if it approves such choice in writing within 30 (thirty) days of receipt of this letter, failing which, my Client shall take necessary steps in accordance with law. The details of the Hon'ble Justice Debi Prosad Dey (Retired) are as below:*
>
> *The Hon'ble Justice Debi Prosad Dey (Retired)*
> *A/2, 2nd Floor, Block II,*
> *Theme Residency, Opposite Police Lines,*
> *263, G.T. Road, Kajipara, Shibpur,*
> *P.O and P.S: Shibpur*
> *Howrah, West Bengal - 711102*

Email: debiprosaddey@gmail.com"

8. The aforesaid communication was responded to by the respondent *vide* communication dated 24.08.2022 wherein it was *inter alia* stated as under:-

> *"6. With respect to the ostensible invocation of arbitration vide your notice under clause 14 of the PO, and without prejudice to my Client's objections to the very maintainability of the claims sought to be raised by your Client, I would request you to kindly note as follows:*
>
> > *i. Both parties are ad-idem that the contractual documents contain a binding arbitration clause that mandates the reference of all disputes between the parties to arbitration under the provisions of the Act. Both parties have executed the contractual documents, pertaining to a purely commercial contract, with eyes wide open.*
> >
> > *ii.* ***Clause 14 of the PO, that mirrors the provisions of clause 39 of the General Conditions of Contract ("GCC"), as amended by the Special Conditions of Contract ("SCC"), specifically mandates claims arising out of the contractual documents, with an ostensible value of less than Rs. 25 crores, to be referred to adjudication before a sole arbitrator.***
> >
> > *iii. The arbitration clause further mandates the sole arbitrator to be a retired Judge of a High Court, a retired Judge of a District Court or a retired Senior Executive of a public sector undertaking other than my Client in cases where the claim amount is less than Rs. 10 crores, and a retired Judge of the Hon'ble Supreme Court of India or a High Court in cases where the claim amount is between Rs. 10 crores and Rs. 25 crores. The arbitration clause clearly specifies and delineates the process for appointment of such sole arbitrator.*
> >
> > *iv.* ***The process prescribed for appointment of a sole arbitrator under the contractual documents specifically envisage your Client selecting an individual to act as Arbitrator from the panel/database of Arbitrators maintained by my Client who would thereafter be formally confirmed by my Client having regard to the availability of Arbitrator to take up the Arbitration. It may also be mentioned that an Arbitrator is required to give a disclosure in terms of the Sixth Schedule of***

> ***the Act when he is approached regarding possible appointment as an Arbitrator.***
>
> *v. You would be aware that the panel/database of Arbitrators maintained by my Client includes retired High Court judges, retired District Court judges as well as retired senior executives of various public sector undertakings (PSUs) other than my Client and is therefore broad-based.*
>
> *vi. In this regard, you are no doubt aware of the various decisions of the Hon'ble Supreme Court of India that, inter alia, have validated the appointment of arbitrators through processes similar to the one envisaged under the present contractual documents since the rights of one party with respect to appointment of an arbitrator are counter-balanced by the rights of the other party to participate in such appointment."*

9. In the above background, the present petition under Section 11(6) of the A&C Act has been filed by the petitioner seeking constitution of an arbitral tribunal in terms of the arbitration agreement between the parties.

SUBMISSIONS ON BEHALF OF THE PARTIES:

10. Learned counsel for the petitioner has contended as follows:-

i. The procedure prescribed in the arbitration agreement between the parties is *non-est* and void as the same provides for unilateral appointment by the respondent.

ii. The procedure prescribed in the arbitration agreement does not achieve any "counterbalancing" as contemplated in the judgment of ***TRF Limited Vs. Energo Engineering Projects Limited***[1] and in ***Central Organisation for Railway Electrification Vs. M/s. ECI-SPIC-SMO-MCML (JV), A Joint Venture Company***[2] inasmuch as the right conferred on the petitioner to nominate an arbitrator from the

[1](2017) 8 SCC 377
[2](2020) 14 SCC 712

panel maintained by the respondent is subject to a confirmation by the respondent.

iii. By merely providing a panel of arbitrators the respondent has sought to defeat the purport of Section 12(5) r/w the Schedule VII of the Arbitration and Conciliation Act, 1996.

iv. The judgment of the Supreme Court in the case of ***Central Organisation*** (supra), is distinguishable inasmuch as the relevant arbitration agreement in ***Central Organisation*** (supra) was differently worded and did not confer any "power of confirmation to the respondents as regards petitioner's nominee arbitrators".

v. It is further contended, *in arguendo*, that the judgment in ***Central Organisation*** (supra) is contrary to and in apparent conflict with the decision of the Supreme Court in the ***TRF Limited*** (supra) and ***Bharat Broadband Network Limited Vs. United Telecoms Limited***[3]**.**

vi. It is further contended that the correctness of the judgment in ***Central Organisation*** (supra) has been questioned by a three Judge Bench of the Supreme Court in the case of ***Union of India Vs. M/s Tantia Constructions***[4].

vii. It is further contended that consequently, various High Courts including Delhi High Court, Gujarat High Court, Punjab and Haryana High Court and Karnataka High Court have not followed the judgment of Supreme Court in the case of ***Central Organisation*** (supra).

11. *Per contra*, learned counsel for the respondent has contended as

[3](2019) 5 SCC 755
[4]SLP (C) No. 12670/2020

follows:-

i. That the present case is directly covered by the ratio of the judgment of the Supreme Court in ***Voestalpine Schienen GMBH Vs. Delhi Metro Rail Corporation Limited***[5], inasmuch as a broad based panel has been made by the respondent out of which the petitioner has been given the right to chose any person as a sole arbitrator.

ii. It is submitted that "confirmation" by the respondent of the petitioner's choice out of the panel of the respondent in the concerned Arbitration Agreement is not in the nature of a*veto* and does not limit the right of the petitioner to nominate any person out of the panel maintained by the respondent. It is further contended that there is no conflict in the ratio between the judgment rendered by the Supreme Court in ***Central Organisation*** (supra) and ***Perkins Eastman Architects DPC and Another Vs. HSCC (India) Ltd.***[6]. In this regard, reliance has been placed on a judgment of this Court in ***Osho G.S. and Company Vs. Wapcos Limited***[7].

iii. It is further submitted that respondent's panel is broad based comprising of 31 persons and the choice afforded to the petitioner is much wider than the choice afforded in terms of the arbitration clause in ***Central Organisation*** (supra).

ANALYSIS AND CONCLUSION:-

12. There can be no quarrel with the proposition that by virtue of the Section 12(5) of Arbitration and Conciliation Act, 1996, any person who falls under any of the category specified in the VII Schedule of the

[5](2017) 4 SCC 665
[6]2019 SCC OnLine SC 1517
[7]2022 SCC OnLine Del 4598

A&C Act shall be ineligible to be appointed as an arbitrator.

13. Further, it has been held in ***TRF Limited*** (supra) that a person who is ineligible to be appointed as an arbitrator cannot nominate another person to act as an arbitrator.

14. In ***Bharat Broadband*** (supra), it was held following ***TRF Limited*** (supra) that once a person become ineligible to be appointed as arbitrator by operation of law, he cannot nominate another person to act as an arbitrator. Thus, appointment of an arbitrator made by a person who is ineligible to make such an appointment goes to the root of the matter.

15. Again, in ***Perkins*** (supra), it was held as under:-

> *"20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited where the Managing Director himself is named as an arbitrator. 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 the cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases.*** *We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an arbitrator."*

16. In ***Proddatur Cable TV Digi Services Vs. Siti Cable Network***

Limited[8], it was held that unilateral appointment of the arbitrator by one of the parties to the contract does not meet the test of impartiality and independence under Section 12 (5) of the A&C Act**:-**

> *"23. Thus, following the ratio of the judgment in the case of Perkins (supra), it is clear that a unilateral appointment by an authority which is interested in the outcome or decision of the dispute is impermissible in law. The Arbitration Clause in the present case empowers the company to appoint a Sole Arbitrator. It can hardly be disputed that the 'Company' acting through its Board of Directors will have an interest in the outcome of the dispute. In the opinion of this Court, the clause is directly hit by the law laid down in the case of Perkins (supra) and the petition deserves to be allowed."*

17. It is notable, however, that in ***TRF Limited*** (supra), the Supreme Court expressly clarified 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.……."*

18. 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.……."*

19. Taking note of the aforesaid observations in ***TRFLimited*** (supra) and ***Perkins*** (supra), in the context of an arbitration clause which contemplated

[8] (2020) SCC OnLine Del 350

appointment of an arbitral tribunal out of the panel maintained by one of the contracting parties, the Supreme Court in ***Central Organisation*** (supra) *inter alia* held 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.……."*

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) Vs. Rail Vikas Nigam Ltd.***[9], ***M/s Singh Associates Vs. Union of India***[10], ***Gangotri Enterprises Ltd. Vs. General Manager Northern Railways***[11] and ***L&T Hydrocarbon Engineering Limited Vs. Indian Oil Corporation Limited***[12]**.**

22. In ***Margo Networks (P) Ltd. Vs. Railtel Corpn. of India Ltd***[13], 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

[9]2020 SCC OnLine Del 456
[10]2022 SCC OnLine Del 3419
[11]2022 SCC OnLine Del 3556
[12]2022 SCC OnLine 3587
[13]2023 SCC OnLine Del 3906

in Voestalpine (supra).

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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. Vs. IRCON International Ltd***[14]***, Pankaj Mittal Vs. Union of India***[15] and ***Pankaj Mittal Vs. Union of India***[16], 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.

27. Accordingly, Mr. Justice (Retd.) Najmi Waziri, Former Judge of Delhi High Court, (Mob. No. - 9810097311) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

28. The respondent shall be entitled to raise preliminary objections as regards arbitrability/maintainability of the claims which shall be decided by the arbitrator, in accordance with law.

29. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as required under Section 12 of the A&C Act; and in the event there is any

[14]2021:DHC:2578
[15]Order dated 16.12.2021 passed by this Court in ARB.P. 607/2021
[16] Order dated 11.07.2023 passed by this Court in ARB.P. 130/2023

impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.

30. The learned Sole Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

31. Parties shall share the arbitrator's fee and arbitral costs, equally.

32. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.

33. Needless to say, nothing in this order shall be construed as an expression of this court on the merits of the case.

34. The present petition stands disposed of accordingly in the aforesaid terms.

AUGUST 14, 2023 **SACHIN DATTA, J.**
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