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

% **Date of decision: 22 December 2022**

\+ O.M.P. (T) (COMM.) 57/2022 & I.A. 8611/2022

M/S OSHO G.S. AND COMPANY ..... Petitioner

Through: Mr. Avnish Trivedi, Ms. Ritika Trivedi, Ms. Rhythem Nagpal and Mr. Anurag Kaushik, Advs.

versus

M/S WAPCOS LIMITED ..... Respondent

Through: Mr. Amit Pradhan, Mr. Ajit Sharma and Mr. A. Renganath, Advs. for WAPCOS.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

YASHWANT VARMA, J. (ORAL)

1. This petition has been preferred seeking to invoke the jurisdiction of the Court as conferred by Sections 14 and 15 of the **Arbitration and Conciliation Act, 1996**[1] for termination of the mandate of the sole arbitrator appointed by the respondent and for consequential substitution.

2. For the purposes of disposal of the present petition, the following essential facts may be noticed. The petitioner is stated to have been awarded the work for construction of the Office-cum-Residential Complex for the Narcotics Control Bureau, Chandigarh, Punjab on 06 October 2016. On 24 October 2016, consequent to the aforesaid work being awarded to the petitioner, an agreement came to

[1] the Act

be drawn and executed between the parties. The agreement contemplated disputes that may arise being referred for resolution by way of arbitration. The arbitration clause which stands embodied in clause 5.30.2 of the agreement dated 24 October 2016 is reproduced hereinbelow: -

> *"5.30.2 Arbitration Procedure – Save where expressly stated to contrary in the Contract, any Dispute shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996 by sole arbitrators appointed by CMD, WAPCOS"*

3. Upon disputes having arisen between the parties, the petitioner here by way of its notice of 05 April 2022 communicated to the respondent the various claims which it proposed to raise and consequently sought reference of the disputes to arbitration. In order to appreciate the rival submissions which were advanced on this petition, it would be relevant to extract paragraphs 7 and 8 of that communication hereinbelow: -

> "7. That having left with no option, our client while conveying the intent to refer the disputes for arbitration in terms of Clause 25 read with Clause 5.30.2 of Agreement dated 24.10.2016 call upon you for appointment of an independent and impartial sole arbitrator within thirty (30) days from the receipt of this Notice and reference of dispute thereof in terms of provisions of Arbitration and Conciliation Act, 1996 read with THE FIFTH SCHEDULE [See Section 12 (1) (b)] to the Sole Arbitrator with the approval and consent of our client (as mandated by Section 12 of the Arbitration and Conciliation Act, 1996). In the event you fail to respond within the statutory period of thirty (30) days, our client shall be compelled to seek recourse to appropriate legal proceedings as they may be advised in this regard at your costs and expenses.
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> 8. This notice is being sent to you without prejudice to our client's all rights, contentions and remedies in law. Our client reserves its right to add/alter and present its claims, additional claims and any such further reliefs under law before the Arbitral Tribunal, at the appropriate stage."

4. By a letter of 11 May 2022, the respondent proceeded to appoint Sh. N.P. Kaushik, a retired Additional District Judge belonging to the Delhi Judicial Services as the sole arbitrator. Immediately upon receipt of the aforesaid communication, the petitioner by way of a legal notice of 15 May 2022 apprised the respondent as well as the nominated arbitrator of its reservations with respect to participating in the proceedings likely to be drawn by the Tribunal. The objection was based on the assertion that since the CMD of the respondent would stand *de jure* disqualified in terms of Section 12(5) of the Act, any unilateral appointment made by that authority would suffer a similar disqualification. It was also submitted that the petitioner had not agreed to waive the *de jure* disqualification which would attend to the appointment of the sole arbitrator as envisaged under Section 12(5) of the Act. The petitioner based its objection essentially on the principles which were enunciated by the Supreme Court in **Perkins Eastman Architects DPC vs. HSCC (India) Ltd.**[2]. It is thereafter that the petitioner approached this Court for seeking the termination of the mandate of the arbitrator and for substitution.

5. Learned counsel appearing for the petitioner has submitted that **Perkins** is a binding authority for the proposition that once a named employee or an officer stands disqualified by virtue of Section 12(5) of the Act to act as an arbitrator, it would consequently also lose the right to make an appointment. Learned counsel in support of his

[2] (2020) 20 SCC 760

submission placed reliance upon the following passages from the aforesaid decision: -

> "**17.** In *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , the agreement was entered into before the provisions of the Amending Act (3 of 2016) came into force. It was submitted by the appellant that by virtue of the provisions of the Amending Act and insertion of the Fifth and Seventh Schedules in the Act, the Managing Director of the respondent would be a person having direct interest in the dispute and as such could not act as an arbitrator. The extension of the submission was that a person who himself was disqualified and disentitled could also not nominate any other person to act as an arbitrator. The submission countered by the respondent therein was as under : (SCC p. 385, para 7.1)
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> > "*7.1.* The submission to the effect that since the Managing Director of the respondent has become ineligible to act as an arbitrator subsequent to the amendment in the Act, he could also not have nominated any other person as arbitrator is absolutely unsustainable, for the Fifth and the Seventh Schedules fundamentally guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence and impartiality of the arbitrator. To elaborate, if any person whose relationship with the parties or the counsel or the subject-matter of dispute falls under any of the categories specified in the Seventh Schedule, he is ineligible to be appointed as an arbitrator but not otherwise."
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> **18.** The issue was discussed and decided by this Court as under : (*TRF case* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , SCC pp. 403-04, paras 50-54)
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> > "*50.* First, we shall deal with clause (*d*). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear

that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. 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. But, here is a case where the Managing Director is the "named sole arbitrator" and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction. In this regard, our attention has been drawn to a two-Judge Bench decision in *State of Orissa* v. *Commr. of Land Records & Settlement* [*State of Orissa* v. *Commr. of Land Records & Settlement*, (1998) 7 SCC 162] . In the said case, the question arose, can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held : (SCC p. 173, para 25)

> '*25.* We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in *Roop Chand* v. *State of Punjab* [*Roop Chand* v. *State of Punjab*, AIR 1963 SC 1503] . In that case, it was held by the majority that where the State Government had, under Section 41(1) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, delegated its appellate powers vested in it under Section 21(4) to an "officer", an order passed by such an officer was an order passed by the *State Government* itself and "not an order passed by any *officer* under this Act" within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revision by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer *in his own right* and *not as a delegate* of the State. The State Government was, therefore,

not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate.'

(emphasis in original)

51. Be it noted in the said case, reference was made to *Behari Kunj Sahkari Awas Samiti* v. *State of U.P.* [*Behari Kunj Sahkari Awas Samiti* v. *State of U.P.*, (1997) 7 SCC 37] , which followed the decision in *Roop Chand* v. *State of Punjab* [*Roop Chand* v. *State of Punjab*, AIR 1963 SC 1503] . It is seemly to note here that the said principle has been followed in *Indore Vikas Pradhikaran* [*Indore Vikas Pradhikaran* v. *Pure Industrial Coke & Chemicals Ltd.*, (2007) 8 SCC 705].

52. Mr Sundaram has strongly relied on *Pratapchand Nopaji* [*Pratapchand Nopaji* v. *Kotrike Venkata Setty & Sons*, (1975) 2 SCC 208] . In the said case, the three-Judge Bench applied the maxim "*qui facit per alium facit per se*". We may profitably reproduce the passage : (SCC p. 214, para 9)

'*9.* … The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim:"*qui facit per alium facit per se*" (what one does through another is done by oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to do the illegal act within the prohibited area. It is immaterial whether, for the doing of such an illegal act, the agent employed is given the wider powers or authority of the "pucca adatia", or, as the High Court had held, he is clothed with the powers of an ordinary commission agent only.'

53. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. According to the learned counsel for the appellant, ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee.

54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive

> at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, 2016 SCC OnLine Del 2532] expressed by the High Court is not sustainable and we say so."

19. It was thus held that as the Managing Director became ineligible by operation of law to act as an arbitrator, he could not nominate another person to act as an arbitrator and that once the identity of the Managing Director as the sole arbitrator was lost, the power to nominate someone else as an arbitrator was also obliterated. The relevant clause in said case had nominated the Managing Director himself to be the sole arbitrator and also empowered said Managing Director to nominate another person to act as an arbitrator. The Managing Director thus had two capacities under said clause, the first as an arbitrator and the second as an appointing authority. In the present case we are concerned with only one capacity of the Chairman and Managing Director and that is as an appointing authority.

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.

21. But, in our view that has to be the logical deduction from *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Para 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 (3 of 2016) and recognised by the decision of this Court in *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]"

6. **Perkins** upon noticing the principles which were laid down in **TRF Ltd. vs. Energo Engg. Projects Ltd.**[3] ultimately proceeded to hold that the appointment that was made by the respondents would not sustain.

[3] (2017) 8 SCC 377

7. The Court notes that, in the facts of the present case, the arbitration clause which stands embodied in clause 5.30.2 confers a power of appointment upon the CMD of the respondent. That authority would clearly be disqualified from being appointed as an arbitrator by virtue of Section 12(5) of the Act. The disqualification which stands visited upon the CMD *de jure*, would also render him incapable in law of appointing an arbitrator also. This would clearly flow from the law as expounded in **Perkins**.

8. On behalf of the respondent one of the decisions which was cited for the consideration of the Court in this regard was of **Central Organization for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company**[4] which came to be rendered merely a month after the judgment in **Perkins** had been pronounced. It would be pertinent to note, at the outset, that **Central Organization** duly notices the earlier decisions of the Supreme Court in **TRF** as well as **Perkins**.

9. According to learned counsel for the respondent, the Supreme Court in **Central Organization** had found that the act of an authority or entity in appointing a person who may have been an erstwhile employee or had a connection with the affairs of that entity would not be treated as being disqualified under Section 12(5) of the Act. According to learned counsel, **Central Organization** has thus reiterated the basic and fundamental principle of a retired employee neither being *ipso facto* hit by the disqualifications which stand enumerated in the Seventh Schedule of the Act nor does the

[4] (2020) 14 SCC 712

appointing authority loose the right to make a nomination in accordance with the appointment procedure which has been accepted and recognized by parties. Learned counsel submitted that **Central Organisation** reemphasizes the importance of the agreed procedure for appointment being strictly adhered to.

10. The Court, however, notes that **Central Organization** was dealing with an appointment procedure which was distinct from the one which stands encapsulated in clause 5.30.2. This would be evident from Clause 64(3) of the General Conditions of Contract which had fallen for notice in the aforesaid decision. Those two clauses are extracted hereunder: -

> **"64. (3) Appointment of arbitrator:**
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> …….
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> 64. (3)(a)(ii) In case not covered by Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three gazette railway officers not below JA Grade or two railway gazetted officers not below JA Grade and a retired railway officer, retired not below the rank of SAG officer, as the arbitrators. For this purpose, the Railways will send a panel of at least four (4) names of gazetted railway officers of one or more departments of the Railways which may also include the name(s) of retired railway officer(s) empanelled to work as railway arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM...."
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> ……
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> **64. (3)(b) Appointment of arbitrator where applicability of Section 12(5) of the A&C Act has not been waived off**
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> The Arbitral Tribunal shall consist of a panel of three retired railway officers retired not below the rank of SAO officer, as the arbitrator. For this purpose, the Railways will send a panel of at least four names of retired railway officer(s) empanelled to work as railway arbitrator indicating their retirement date to the contractor within 60 days from the day when a written and valid demand for arbitrators is received by the GM.

> Contractor will be asked to suggest to General Manager at least two names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by the Railways. 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 three arbitrators so appointed. The GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contract's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them has served in the Accounts Department."

11. The Court also notes that **Central Organization** was rendered on a challenge raised to an order passed by the Allahabad High Court on an arbitration petition preferred under Section 11 of the Act whereby the Court had proceeded to appoint a sole arbitrator by invoking its powers conferred by Section 11 of the Act and thus departing from the appointment procedure which was contemplated therein. It was the aforesaid view and the correctness thereof which was questioned in **Central Organization**.

12. Dealing with the aforesaid issue, the Supreme Court in **Central Organization** proceeded to observe thus: -

> "**24.** The contention of the learned counsel for the respondent is that the panel of arbitrators proposed by the appellant vide letter dated 25-10-2018 comprising of retired employees of the appellant are not eligible to be appointed as arbitrators under Section 12(5) read with Schedule VII of the Act. Further contention of the learned counsel for the respondent is that the panel of arbitrators drawn by the appellant consist of those persons who were railway employees or ex-railway employees and therefore, they are statutorily made ineligible to be appointed as arbitrators.
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> **25.** Contending that the appointment of retired employees as arbitrators cannot be assailed merely because an arbitrator is a retired employee of one of the parties, the learned ASG has placed reliance upon *Voestalpine Schienen GmbH* v. *Delhi Metro Rail Corpn. Ltd.* [*Voestalpine Schienen GmbH* v. *DMRC*, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] After referring to various judgments

and also the scope of amended provision of Section 12 of the Amendment Act, 2015 and the entries in the Seventh Schedule, the Supreme Court observed that merely because the panel of arbitrators drawn by the respondent, Delhi Metro Rail Corporation are the government employees or ex-government employees, that by itself may not make such persons ineligible to act as arbitrators of the respondent DMRC. It was observed that the persons who have worked in the Railways under the Central Government or the Central Public Works Department or public sector undertakings cannot be treated as employee or consultant or advisor of the respondent DMRC. In para 26 of *Voestalpine Schienen GmbH* [*Voestalpine Schienen GmbH* v. *DMRC*, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , the Supreme Court held as under : (SCC p. 689, para 26)

> "*26.* It cannot be said that simply because the person is a retired officer who retired from the government or other statutory corporation or public sector undertaking and had no connection with DMRC (the party in dispute), he would be treated as ineligible to act as an arbitrator. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. *The very reason for empanelling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators*. It may also be mentioned herein that the Law Commission had proposed the incorporation of the Schedule which was drawn from the red and orange list of IBA guidelines on conflict of interest in international arbitration with the observation that the same would be treated as the guide 'to determine whether circumstances exist which give rise to such justifiable doubts'. *Such persons do not get covered by red or orange list of IBA guidelines either*."
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> (emphasis supplied)

26. The same view was reiterated in *State of Haryana* v. *G.F. Toll Road (P) Ltd.* [*State of Haryana* v. *G.F. Toll Road (P) Ltd.*, (2019) 3 SCC 505 : (2019) 2 SCC (Civ) 170] wherein, the Supreme Court held that the appointment of a retired employee of a party to the agreement cannot be assailed on the ground that he is a retired/former employee of one of the parties to the agreement. Absolutely, there is no bar under Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015 for appointment of a retired employee to act as an arbitrator.

> **27.** By the letter dated 25-10-2018, the appellant has forwarded a list of four retired railway officers on its panel thereby giving a wide choice to the respondent to suggest any two names to be nominated as arbitrators out of which, one will be nominated as the arbitrator representing the respondent Contractor. As held in *Voestalpine Schienen GmbH* [*Voestalpine Schienen GmbH* v. *DMRC*, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , the very reason for empanelling the retired railway officers is to ensure that the technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators. Merely because the panel of the arbitrators are the retired employees who have worked in the Railways, it does not make them ineligible to act as the arbitrators."

13. Proceeding then to deal with the decisions of the Supreme Court in **TRF** and **Perkins**, the Supreme Court in **Central Organization** observed as follows: -

> "**33.** In *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , though the Court observed that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator, in para 50, the Court has discussed about another situation where both the parties could nominate respective arbitrators of their choice and that it would get counterbalanced by equal power with the other party. In para 50 of *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , the Supreme Court held as under : (SCC p. 403)
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> > "*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."
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> (emphasis supplied)
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> **34.** Considering the decision in *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , in *Perkins Eastman Architects DPC* v. *HSCC (India) Ltd.* [*Perkins*

Eastman Architects DPC v. *HSCC (India) Ltd.*, (2020) 20 SCC 760 : 2019 SCC OnLine SC 1517] , the Supreme Court observed that there are 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 authorised to appoint any other person of his choice or discretion as an arbitrator. Observing that if in the first category, the Managing Director was found incompetent similar invalidity will always arise even in the second category of cases, in para 20 in *Perkins Eastman* [*Perkins Eastman Architects DPC* v. *HSCC (India) Ltd.*, (2020) 20 SCC 760 : 2019 SCC OnLine SC 1517] , the Supreme Court held as under:

> "*20.* … 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."

36. As discussed earlier, after the Arbitration and Conciliation (Amendment) Act, 2015, the Railway Board vide Notification dated 16-11-2016 has amended and notified Clause 64 of the General Conditions of Contract. As per Clause 64(3)(*a*)(*ii*) [where applicability of Section 12(5) of the Act has been waived off], in a case not covered by Clause 64(3)(*a*)(*i*), the Arbitral Tribunal shall consist of a panel of three gazetted railway officers not below the rank of Junior Administrative Grade or two railway gazetted officers not below the rank of Junior Administrative Grade and a retired railway officer retired not below the rank of Senior Administrative Grade Officer, as the arbitrators. For this purpose,

the General Manager, Railways will send a panel of at least four names of gazetted railway officers of one or more departments of the Railways within sixty days from the date when a written and valid demand for arbitration is received by the General Manager. The contractor will be asked to suggest to the General Manager at least two names out of the panel for appointment as contractor's nominees within thirty days from the date of dispatch of the request from the Railways. The General Manager shall appoint at least one out of them as the contractor's nominee and will also simultaneously appoint balance number of arbitrators from the panel or from outside the panel duly indicating the "Presiding Officer" from amongst the three arbitrators so appointed. The General Manager shall complete the exercise of appointing the Arbitral Tribunal within thirty days from the date of the receipt of the names of contractor's nominees.

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."

14. It ultimately concluded that where the agreement specifically provides for the appointment of an Arbitral Tribunal consisting of three arbitrators from out of a panel of serving or retired railway officers, the appointment must necessarily be in accord with the terms of the said agreement. It was in that light that the Supreme Court went on to hold that the High Court was not justified in appointing an independent sole arbitrator.

15. From the aforesaid discussion, it is manifest that the principles which were laid down in the **Central Organization** would have to be appreciated bearing in mind the appointment procedure which was contemplated and provisioned for in the agreement as well as the questions which specifically arose from the order of the High Court which formed the subject matter of challenge before the Supreme Court. It must at the outset be noted that **Central Organisation** was not dealing with a case where the designated authority under the

appointment procedure stood *de jure* disqualified. Further and on a due consideration of the appointment procedure which enabled a party to choose from a panel of proposed arbitrators, it found that the power of appointment conferred on one party gets *"counterbalanced by the power of choice"* conferred on the other. It is these two distinguishing features of **Central Organisation** which must be necessarily borne in mind while seeking to discern its true ratio. It further went on to hold that merely because the nominated arbitrator was formerly employed with an entity, that would not render the individual disqualified or ineligible to act as an arbitrator. Insofar as this aspect is concerned, the Court notes that even **Perkins** holds that past employment would not render a person ineligible under the Seventh Schedule.

16. The distinction which however must be underlined is the nature of the arbitration clauses in the backdrop of which the two decisions aforenoted came to be rendered. **Central Organisation** was dealing with a clause which conferred a right on a party to choose from a panel of arbitrators. It was in that background that it was held that the interests of parties stood sufficiently safeguarded and balanced. **Perkins** on the other hand was dealing with a clause where the person conferred the right to appoint itself stood disqualified by law. Viewed in that light, it is manifest that there is no incompatibility or discord between the principles enunciated in the two decisions noted above. All that must be borne in mind is where under an arbitration agreement, the designated authority is rendered ineligible de jure, it cannot be recognised the right to have the right to appoint a third party as an arbitrator. That would clearly fall foul of the **Perkins** principle. The Supreme Court in **Central Organisation** was not called upon to

decide that issue at all. The said decision only upheld the validity of a particular appointment procedure whereunder parties were entitled to choose and nominate an arbitrator from out of a panel that was offered. While the correctness of the view expressed in Central Organisation has been doubted in **Union of India Vs. Tantia Constructions Limited**[5] and the matter has been referred for consideration of a larger Bench of the Supreme Court, that by itself would not justify the present matter being deferred on that score.

17. Insofar as the facts of the present case are concerned, undisputedly the appointment had to necessarily be made by the CMD of the respondent. That clause is thus at par and identical to the one which fell for notice and consideration of the Supreme Court in **Perkins**. The appointment in the present case would thus clearly be rendered unsustainable in light of the above.

18. Learned counsel for the respondent then contended that the Court must also take into consideration the fact that it was the petitioner itself which had approached the respondent for making of an appointment. The argument essentially was that once the petitioner had in terms of its letter of 05 April 2022 requested the respondent to appoint an arbitrator, it would be deemed to have waived the applicability of the non-derogable disqualifications introduced by virtue of Section 12(5). The Court, however, finds itself unable to countenance the aforesaid submission for the following reasons.

[5] 2021 SCC OnLine SC 271

19. As this Court reads paragraph 7 and 8 of the original communication addressed by the petitioner, it is evident that it had merely conveyed its intent for the referral of disputes to arbitration as per the agreement encapsulated in clause 25 read with clause 5.30.2 noticed hereinabove. The aforesaid communication required parties to take further steps for appointment of an independent and impartial sole arbitrator. The said notice further recorded that the aforesaid request was being made without prejudice to the rights and contentions of the petitioner here. In the considered opinion of this Court, the said communication cannot possibly be construed or understood as answering the requirements of a waiver as contemplated under Section 12(5). It would be important to recall that Section 12(5) and more particularly the Proviso thereto contemplates parties waiving the applicability of the said provision *"by an express agreement in writing"*. A unilateral request made by one of the parties for setting the appointment procedure in motion would clearly not answer the description of an express agreement in writing executed by the parties agreeing to the waiver of a disqualification of a nominated arbitrator under Section 12(5). The Court further notes that the aforesaid communication was in any case without prejudice to the rights and contentions which were available to the petitioner to urge and advocate.

20. Accordingly, and for all the aforesaid reasons, this Court is of the considered opinion that the unilateral appointment of the sole arbitrator by the CMD of the respondent would not sustain. A declaration is consequently entered that the mandate of the Arbitral Tribunal shall stand terminated.

21. The Court further clarifies that the present order is not liable to be construed as representing a reservation that it may have had with respect to either the ability or the impartiality of the nominated arbitrator. It was constrained to invoke its powers conferred by Sections 14 and 15 of the Act only in order to ensure that the appointment ultimately falls strictly in accordance with the provisions of the Act.

22. The Court in light of the above consequently appoints Zoheb Hossain [Official Address:- R-47, 2nd Floor, Greater Kailash-1, New Delhi] [Mobile No.9999711099] [email: hossainzoheb@gmail.com] as the sole Arbitrator for resolution of the disputes which have arisen.

23. The parties are directed to appear before the learned Arbitrator, as and when notified. This is subject to the learned Arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

24. The fees of the Arbitrator shall be decided according to the Fourth Schedule of the Act.

YASHWANuT VARMA, J.

DECEMBER 22, 2022
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