2024:DHC:2879

$~

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

Reserved on: 22nd March, 2024
Date of decision: 10th April, 2024

\+ **O.M.P.(MISC.)(COMM.) 256/2023**

M/S ROSHAN REAL ESTATES PVT LTD ..... Petitioner
Through: Ms. Anusuya Salwan, ld. Counsel with Mr. Parth Kaushik, Adv. (M: 9663852394)

versus

PUBLIC WORK DEVELOPMENT DELHI ..... Respondents
Through: Mr. Satyakam, ASC. (M: 8929015368)

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

Background

1. This hearing has been held through hybrid mode.

2. The present petition under Section 29A (3) & (4) of the Arbitration and Conciliation, Act 1996 *(hereinafter, '1996 Act')* has been filed by the Petitioner- Roshan Real Estate seeking extension of the mandate of the ld. Sole Arbitrator. According to both the parties, arguments have been concluded before the ld. Sole Arbitrator and only the final award is to be delivered. Hence, a six months extension of the mandate of the ld. Sole Arbitrator is sought.

3. The brief background of the present petition is that tenders were invited by the Respondent-Public Works Developments *(hereinafter, 'PWD')* in

August, 2013 for *'Redevelopment of C-block of the Delhi High Court'* in respect of certain RCC framed structure buildings, water supply, sanitary & electrical installations vide NIT/No..18/NIT/CE/PWD/M *(hereinafter, 'the contract')*. The bid submitted by the Petitioner was declared to be the successful bid on 5th December, 2013, and as per the Petitioner, by 10th July, 2017, the work was fully completed. As per the petition, the final bill was raised on 6th June, 2018 and the said bill was not paid. On 3rd July, 2020, the matter was referred to the Disputes Redressal Committee under the Chairmanship of Chief Engineer, however, the claims of the Petitioner were rejected. Vide letter dated 29th July 2020, the Petitioner invoked the arbitration clause 25 of the contract in terms of Section 21 of the 1996 Act.

4. The Respondent, vide letter dated 13th August, 2020, suggested a list of three Arbitrators to be picked by the Petitioner for appointment as the sole arbitrator. The said letter is relevant, and is set out below:

> *"With reference to your above cited letter on the subject matter vide which you have raised objection on appointment of Sh. B. B. Dhar, Retd. Chief Engineer, CPWD as arbitrator on the ground of professional relation with him as he was superintending your work in the past. The said appointment has been withdrawn on your request.*
>
> ***In view of the above objection, the following five empanelled PWD Arbitrators are mentioned below for choosing name of three arbitrators so that one of the arbitrator can be appointed as Sole Arbitrator*** *:-*
>
> *1. Sh. K. B. Rajoria, Retd. E-in-C, PWD*
> *2. Sh. A. K. Singhal, Retd. DG, CPWD*
> *3. Sh. Rakesh Mishra, Retd. DG, CPWD*
> *4. Sh. Dinesh Kumar, Retd. E-in-C, PWD*
> *5. Sh. Anil Kumar Sharma, Retd. SDG, CPWD*"

5. In response thereto, vide letter dated 13th August, 2020, the Petitioner stated as under:

> *"Dear Sir,*
>
> *Please refer to your letter of even No.1286-H dated 13.08.2020.*
>
> *With reference to your above quoted letter, and as desired by you therein, out of the list sent by your office, we hereby give you the name of three arbitrators as under:*
>
> *1. Shri Dinesh Kumar, Retd. E-In- C, PWD*
> *2. Shri Rakesh Mishra, Retd. DG, CPWD*
> *3. Shri A. K. Singhal, Retd. DG, CPWD."*

6. Finally, vide order dated 17th August, 2020, the Office of the Chief Engineer *(hereinafter, 'Chief Engineer')*, appointed Mr. Dinesh Kumar, Retired Engineer-in-Chief, PWD as the ld. Sole Arbitrator, to render the award in the dispute between the parties. It is not disputed that the ld. Sole Arbitrator has entered reference. The ld. Sole Arbitrator also sent a letter dated 17th August, 2020 giving his disclosure under Section 12(1)(a), & (b) of the 1996 Act. In terms of the said letter, the parties were also asked to file their objections to the appointment of the ld. Sole Arbitrator, if any, by 28th August, 2020.

7. In the first meeting held on 31st August, 2020, the ld. Sole Arbitrator fixed the procedure *qua* the conduct of the arbitral proceedings and recorded as under:

> *"1. The Constitution of this Arbitral Tribunal with the sole Arbitrator was notified by Arbitrator vide letter no. —**ARB/DIC43/1** dated **17-08-2020** to the parties.*
> *2. The objections to the appointment as sole Arbitrator were invited by: **28/08/2020** from both the parties.*
> ***3. The Claimant and Respondent did not file any***

> ***objection to the appointment of Sole Arbitrator, which (sic.) is also confirmed by both the parties today***.
> *4. After welcoming all the representatives of the parties, Sole Arbitrator declared under sec. 12(1) of the Arbitration and Conciliation (Amendment) Act, (1996) 2015 and the disclosures were made as required under Sixth Schedule and stated that there are no circumstances likely to give rise to justifiable doubts, as to their independence and impartiality. The Claimant and Respondent confirmed that they have no objection to the Appointment of* ***Sh. Dinesh Kumar*** *as* ***Sole Arbitrator.****"*

8. After the first proceeding, where the ld. Sole Arbitrator recorded as above, pleadings were completed by the parties. Subsequently, schedule for hearing was fixed. On 14th March, 2023, it was recorded that the parties had agreed for a further six-month extension under Section 29A (3) of the 1996 Act. The extract of the said order dated 14th March, 2023 is also extracted below:

> *"4. Both the parties have agreed to extend the time for making the award as per Section-29A(1) of the Arbitration & Conciliation Act, 1996 for further period of 6 months as per Section- 29A(3) which is recorded here as consent of both the parties.."*

9. However, thereafter, due to personal reasons of travel etc. the ld. Sole Arbitrator asked the parties to seek a further extension of six months and hence, the present petition. In the *interregnum*, the mandate of the ld. Sole Arbitrator expired on 28th August, 2023.

10. Notice in the present petition was issued on 14th August, 2023. Vide order dated 24th November, 2023, this Court recorded the contentions of the Respondent— against the extension of the mandate of the ld. Sole Arbitrator,

and asked the Petitioner to make submissions. The relevant portion of the said order reads as follows:

> *"2. The petition is sought to be vehemently opposed by the respondent on the ground that the learned sole arbitrator albeit appointed by the respondent themselves, was disqualified under Section 12(5) of the Act, having been unilaterally appointed by the respondent. It is, therefore, urged that on this ground alone, the proceedings before the learned arbitrator are void and consequently, there is no question of any extension being granted by this Court.*
> *3. In support of his plea, learned counsel for the respondent while not denying that the proceedings before the learned arbitrator are at a very advanced stage wherein the award has been reserved after time had been extended in February, 2023 with the mutual consent of the parties, primarily relies on the decision of the Apex Court in* ***Bharat Broadband Network Ltd. vs. United Telecome Ltd. (2019) 5 SCC 755*** *to contend that the respondent is still entitled to urge that the proceedings before the learned arbitrator are void.*
> ***4. Learned counsel for the petitioner prays for time to examine the decision in Bharat Broadband Network Ltd.(supra) and make submissions.***
> ***5. In the meanwhile, as prayed for, it will be open for both sides to file e-copies of the decisions on which they wish to rely****."*

11. Hence, the limited question raised relates to the interpretation of the judgment of the Supreme Court in ***Bharat Broadband Network Ltd. vs. United Telecome Ltd., (2019) 5 SCC 755.*** The ld. Counsel for the Petitioner has addressed submissions on this issue.

Submissions:

12. In the reply affidavit dated 6th November, 2023, one of the main objections raised by the Respondent is that the constitution of the tribunal is itself *void ab initio*, since the appointment was made by the Chief Engineer. This is submitted keeping in view the mandate of Section 12(5) of the 1996 Act, as no written agreement was entered into between the parties to proceed with arbitration under an ineligible arbitrator.

13. It is further argued by Mr. Satyakam, ld. ASC that if the appointment in itself is a nullity, it does not depend on any declaration or determination. The appointing authority, in this case – the Chief Engineer, was itself affected by ineligibility in terms of Section 12(5) of the 1996 Act, thus, rendering the appointee ineligible to act as the ld. Sole Arbitrator.

14. Additionally, the fact that the ld. Sole Arbitrator requested objections from the parties, and the parties submitted in writing that they had no objections to the appointment, does not constitute an agreement in writing, being aware of the ld. Sole Arbitrator's ineligibility, as required by the proviso to Section 12(5) of the 1996 Act. According to the Respondent, the record does not show that such submissions were made with full knowledge of the ld. Sole Arbitrator's ineligibility. At most, such conduct represents acquiescence to the jurisdiction of an illegally constituted tribunal and does not constitute an express agreement in writing as contemplated by the proviso to subsection (5) of Section 12 of the 1996 Act.

15. It is further argued that inherent lack of jurisdiction strikes at the very root of the matter. In this scenario, where the ld. Sole Arbitrator's appointment was void from the beginning, proceedings cannot be legitimised by absence of objections from one of the parties. This is because ineligibility arises by

force of law, and does not depend on the conduct of the parties.

16. Reliance is placed by Mr. Satyakam, ld. ASC on the following decisions:

S. No.	***Decisions***	***Citation***
1.	***TRF Ltd. v. Energo Engineering Projects Ltd.***	***(2017) 8 SCC 377***
2.	***Bharat Broadband Network Ltd. v. United Telecom Ltd.***	***(2019) 5 SCC 755***
3.	***Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.***	***(2020) 20 SCC 760***
4.	***Gupta Bros India v. Press Trust of India Ltd.***	***2023 SCC OnLine Del 620***
5.	***Govind Singh v. Satya Group Pvt. Ltd.***	***2023 SCC Online Del 37***
6.	***Man Industries (India) Ltd. v. Indian Oil Corporation Ltd.***	***2023 SCC Online Del 3537***

17. Ld. ASC further submits that should a petition under Section 34 of the 1996 Act be preferred against the award that would be rendered in due course of time, there exists a possibility that the award issued by the said ld. Sole Arbitrator might be set aside, given the fact that the Chief Engineer appointed the ld. Sole Arbitrator. Therefore, he suggests that to avoid this risk, the mandate should not be extended, and a new arbitrator should be appointed instead.

18. Ld. ASC also refers to Section 12(5) of the 1996 Act to argue that the said provision applies regardless of any agreement to the contrary. In light of ***TRF Ltd. (supra)*** and the Seventh Schedule of the 1996 Act, it is contended that anyone who is themselves ineligible under these provisions, cannot serve as the appointing authority either.

19. On the other hand, Ms. Anusuya Salwan, ld. Counsel appearing for the

Petitioner, submits that the proceedings indicate that the appointment of the ld. Sole Arbitrator was made with the consent of the parties. Therefore, the ld. Counsel argues that the appointment would not be affected by the Seventh Schedule or Section 12(5) of the 1996 Act.

20. Furthermore, the ld. Counsel for the Petitioner asserts that since the Respondent had consented to the said appointment, the judgment of the Supreme Court in ***TRF Ltd. (supra)*** would not apply. She submits that similar issues were considered by the Supreme Court in ***Central Organisation for Railways v. ECI-SPIC-SMO-MCML (JV) (MANU/SC/1758/2019)***. In this case, the Supreme Court clearly held that if a choice is given from a panel of retired Railway Officers and the other parties also make a choice, then ***TRF Ltd. (supra)*** does not apply. Paragraph 37 of ***Central Organisation (supra)*** is cited in support of her argument.

21. Relying on ***Voestalpine Schienen Gmbh v. Delhi Metro Rail Corporation Limited (2017) 4 SCC 665,*** the Petitioner emphasises that appointing arbitrators from a broad-based panel is a correct and valid procedure. The Supreme Court in the said decision stressed the importance of a broad-based panel, stating that it should include not just retired government employees, but also experienced engineers from the private sector.

22. Responding to the submissions made by the ld. Counsel for the Petitioner, Mr. Satyakam, ld. ASC, submits that ***Central Organisation (supra)*** has been referred to a larger Bench of the Supreme Court. He also submits that any waiver of Section 12(5) of the 1996 Act must be in writing, in accordance with current PWD practices.

Analysis

23. Heard ld. Counsel for the parties.

24. The foremost thing to consider is that the present petition falls under Section 29A of the 1996 Act, seeking an extension of the mandate of the ld. Sole Arbitrator. The scope of such a petition is limited in nature.

25. A perusal of the order dated 14th March, 2023 shows that the ld. Sole Arbitrator acknowledges the fact that only the award needs to be passed. But due to certain personal circumstances, such as, travel abroad for a few months the award has been reserved for being published. The ld. Sole Arbitrator thus requested the parties to seek an extension.

26. The question that the Court needs to consider in this petition is whether or not there is sufficient cause for grant of such an extension or not. The Court is not expected to go into the question as to whether the ld. Sole Arbitrator was properly appointed or not. The parties have, by consent already, on 14th March, 2023, agreed for the first extension under section 29A(3) of the 1996 Act, which expired on 28th August, 2023. Thus, the first extension period, which was agreed by consent, having expired, the present petition has been filed under Section 29A (4) of the 1996 Act.

27. Section 29A of the 1996 Act is reproduced below:

> *"29A. Time limit for arbitral award.—*
> *(1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under subsection (4) of section 23: Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavor may be made to dispose of the matter within a period of twelve months*

from the date of completion of pleadings under sub-section (4) of section 23.
(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.
(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period*:*
Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.
Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application:
Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.

(5) The extension of period referred to in subsection (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court*.*

(6) While extending the period referred to in subsection (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral

proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material*.*

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.
(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party."

28. Under Section 29A (5) of the 1996 Act, an extension can be granted:

- on an application by any of the parties,
- only for sufficient cause and;
- on terms and conditions as the Court deems fit.

29. Under Section 29A (6) of the 1996 Act, the Court can substitute the arbitrator, however, in the present petition, neither of the parties have sought substitution, except that the Respondent has orally argued that the ld. Arbitrator needs to be replaced.

30. The objection raised by the ld. ASC, is that the appointment of the PWD's own engineer by the Chief Engineer, which was made with the consent of the parties, was an incorrect unilateral appointment. Therefore, in terms of the case laws relied upon, the Arbitral Tribunal is *void ab initio*,

rendering the constitution of the Arbitral Tribunal comprising of the ld. Sole Arbitrator *per se* invalid.

31. It is to be noted that this is not a petition where the PWD has either sought removal of the ld. Sole Arbitrator and termination of the mandate of the ld. Sole Arbitrator or appointment of a substitute Arbitrator.

32. Even though the present petition has not been filed seeking the removal of the ld. Sole Arbitrator, in ***TRF Ltd. (supra)***, the Supreme Court considered a petition under Section 11(6) of the 1996 Act, wherein the question arose regarding whether a person, who becomes ineligible to act as an arbitrator, can appoint an arbitrator. In this decision, according to the arbitration clause, disputes or differences were to be referred to the ld. Sole Arbitrator by the Managing Director or his sole nominee. The Managing Director of Energo Engineering Projects Ltd. had appointed a sole arbitrator in the matter. The Court considered whether the ineligibility under Section 12(5) of the 1996 Act extends to the nominee. In the facts of the case, the Supreme Court held as follows:-

> *"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*."*

33. This judgment is, thereafter, considered in ***Bharat Broadband Network Ltd. (supra)*** where, again the Court was considering the ineligibility of a person appointed as the ld. Sole Arbitrator, who was a nominee of the Managing Director of the Bharat Broadband Network Ltd. The Supreme Court observed that the parties did not, in the said case, despite knowledge of him being a nominee of the Managing Director, go ahead and express full faith and confidence in him to continue. This was again a petition under Section 12(5) of the 1996 Act read with Sections 13,14 and 15 of the 1996 Act. It was held that once an arbitrator becomes ineligible by operation of law, as specified in Section 12(5) of the 1996 Act, they lose the capacity to nominate another person as an arbitrator. The fundamental principle is that a person who is statutorily ineligible cannot make a nomination for this role. Consequently, any arbitrator appointment made by an ineligible individual is considered void, addressing the core issue of "eligibility". According to the Supreme Court, ***TRF Ltd. (supra)*** does not specify that its application is only prospective; meaning, it does not validate appointments of individuals like nomination in the present case, made prior to the judgment's date. Therefore, such appointments are deemed invalid regardless of when they were made.

34. Again, in ***Perkins Eastman (supra)***, a similar view was expressed. A ld. Single Judge of this Court in ***Gupta Bros India (supra)***, recently considered all the above decisions where the arbitration clause specified appointment by the CEO of the owner. The question in the said case was

whether there could be unilateral appointment by the CEO/CAO. The Court held that the unilateral appointment of the ld. Sole Arbitrator by the officer of Press Trust of India was itself impermissible in law. The relevant portions are as under:-

> *"**13. The judgments of the Supreme Court in TRF and Perkins make it clear that a person interested in the arbitration proceedings is neither entitled to act as an arbitrator, nor entitled to appoint an arbitrator unilaterally. The Supreme Court has so held on an interpretation of Section 12(5) of the Act. The proviso to Section 12(5) of the Act, which provides for waiver from the provisions upon an express agreement in writing, has been considered in Bharat Broadband , wherein the Supreme Court has held that such waiver cannot be implied by the conduct of parties, including participation in the arbitration proceedings.***
>
> ***14. These decisions have been considered by the Division Bench of this Court in two recent judgments, Ram Kumar v. Shriram Transport Finance Co. Ltd. and Govind Singh v. Satya Group (P) Ltd. . In both the judgments, arbitral awards have been set aside under Section 34 of the Act inter alia on the reasoning that the ineligibility of a unilaterally appointed arbitrator goes to the root of his jurisdiction**.*
>
> *15. Regardless of whether the learned arbitrator was appointed by the CEO or CAO in the present case, the undisputed position is that she was unilaterally appointed by an officer of PTI. Mr. Kumar's argument, however, is based upon the ostensible consent accorded by GBI. In this connection, the order of the learned arbitrator dated 14.09.2018 mentions that learned counsel for the parties had given a no objection to her appointment in writing. Significantly, no copy of such a document has been produced before the Court by PTI.*

…

21. In view of the above, I am of the view that the unilateral appointment of the learned arbitrator by the officer of PTI, whether it was by the CAO or the CEO, is itself impermissible in law and the mandate of the learned arbitrator is therefore terminated*.*

22. It is made clear that no allegation of personal bias or mala fides have been made against the learned arbitrator and the present order is not intended to impute any such bias or mala fides to her."

35. The Petitioner has relied upon the decision in ***Central Organisation (supra)*** which also considered the decisions in ***TRF (supra)*** and ***Bharat Broadband Network Ltd. (supra).*** The said case concerned the nomination of an arbitrator from a panel of retired officers in the Railways. The Court, therein, held as under:-

"37. In the present matter, after the respondent had sent the letter dated 27.07.2018 calling upon the appellant to constitute Arbitral Tribunal, the appellant sent the communication dated 24.09.2018 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 26.09.2018, 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 26.09.2018, 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***

> ***counter-balanced by the power of choice given to the respondent. 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 the arbitrator. We do not find any merit in the contrary contention of the respondent. The decision in TRF Limited is not applicable to the present case."*

36. The decision of the Supreme Court in ***Central Organisation (supra)***, has been doubted by Co-ordinate Benches of the Supreme Court in ***Union of India v. M/s Tantia Constructions Limited [SLP (C) No. 12670/2020, order dated 11th January, 2021]*** and ***JSW Steel v. South Western Railway [SLP (C) No. 9462 of 2022, order dated 16th August, 2022]***. A ld. Single Judge of this Court in ***Margo Networks Pvt. Ltd. v. Railtel Corp. (2023:DHC:4596)*** considered the decision of the Supreme Court in ***Central Organisation (supra)***, and held that the operation of the said judgment has not been stayed and continues to hold the field. The relevant portion of the said decision is as follows:

> *"19. Although, the correctness of the judgment of the Supreme Court in CORE was doubted by coordinate benches of the Supreme Court in the case of M/s Tantia Constructions Limited (supra) and JSW Steel Vs. South Western Railway & Anr.11 ,* ***the operation of the said judgment has not yet been stayed and therefore it continues to hold the field, as also observed by a coordinate bench of this Court in the case of M/s Singh Associates Vs. Union of India12 . However, it needs to be emphasized that the judgment in CORE is an authority only in respect of the propositions identified***

and carved out in CORE itself and its applicability cannot be ipso facto extended for the purpose of adjudication of other aspects which have not been purported to be answered in CORE…

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.

…

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 judgement 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.*
>
> *…*
>
> *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 M/s CMM Infraprojects Ltd. Vs. IRCON International Ltd…."*

37. The above decision in ***Margo (supra)*** has been followed by other decisions of this Court, such as in ***M/s. Sri Ganesh Engineering Works v. Northern Railway & Anr. (2023:DHC:8497)***.

38. The decision in ***Voestalpine (supra)***, has also been cited in ***Central Organisation for Railways (supra),*** where the Supreme Court held that persons, who may have earlier worked in any capacity with the Central Government, cannot be rendered ineligible. The Court in ***Voestalpine (supra)*** observed as under:-

> *"23) Keeping in view the aforesaid parameters, we advert to the facts of this case. Various contingencies mentioned in the Seventh Schedule render a person ineligible to act as an arbitrator. Entry no. 1 is highlighted by the learned counsel for the petitioner which provides that where the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with the party, would not act as an arbitrator. What was argued by the learned senior counsel for the petitioner was that the panel of arbitrators drawn by the respondent consists of those persons who are government employees or ex-government employees.* ***However, that by itself may not make such persons ineligible as the panel indicates that these are the persons who have worked in the railways under the Central Government or Central Public Works Department or public sector undertakings****. They cannot be treated as employee or consultant or advisor of the respondent – DMRC.* ***If this contention of the petitioner is accepted, then no person who had earlier worked in any capacity with the Central Government or other autonomous or public sector undertakings, would be eligible to act as an arbitrator even when he is not even remotely connected with the party in question, like DMRC in this case. The amended provision puts an embargo on a person to act as an arbitrator, who is the employee of the party to the dispute. It also deprives a person to act as an arbitrator if he had been the consultant or the advisor or had any past or present business relationship with DMRC. No such case is made out by the petitioner****."*

39. Mrs. Salwan, ld. Counsel for the Petitioner also relied upon the recent observations of this Court in ***Vivek Aggarwal v. Mr. Hemant Aggarwal and (2024:DHC:289)***, wherein the scope of Section 29(A) of the 1996 Act is discussed as under:-

> *"10. Heard. The* ***scope of Section 29A of the 1996 Act is very limited****, i.e. as to whether the extension of the*

mandate ought to be given or not. In ***Wadia Techno–Engineering Services Limited. v. Director General of Married Accommodation Project (2023:DHC:3457),*** *it was reiterated that the grievance of one of the parties with regard to the conduct of the arbitral proceedings, and a party's substantive challenge with regard thereto, are beyond the scope of adjudication in proceedings under Section 29Aof the 1996 Act. The relevant portion of the said decision are extracted as follows:*

"23. Mr. Shukla advanced an equally untenable argument, when he suggested that the power under Section 29A(4) of the Act cannot be exercised on an application made after the expiry of the mandate of the arbitral tribunal. ***The provision clearly provides that the Court may extend the period even after its expiry. Indeed, the second proviso provides that the mandate of the tribunal would continue until the disposal of such a petition. I see no justification in the text of the statute, or on a purposive interpretation thereof, to hold that the power can only be exercised on an application filed prior to the expiry of the mandate****.*

….

27. In the facts of the present cases, examined from this perspective, I do not find any grounds to withhold the extension sought. The proceedings have reached the stage of final arguments. It is clear that the learned arbitrator has proceeded with due expedition in the conduct of the proceedings. ***The respondent has sought extensions of time to comply with the directions of the learned tribunal from time to time, which have also been granted. At the very least, it appears that much time has been spent due to the respondent's requests for additional time to file pleadings, pay costs, and deposit arbitral fees. In fact, the respondent's reply in those petitions demonstrates its grievance that the learned arbitrator has not granted enough time to it for this purpose, which is quite contrary to any suggestion that the tribunal has not acted expeditiously. I, therefore, find that there is sufficient cause for extension of the mandate of the learned arbitral tribunal****.*

> …
> *28. The grievance of the respondent is with regard to the conduct of the arbitral proceedings. They have articulated their grievances in the petitions filed under Article 227 of the Constitution, which remain pending.* ***These considerations are entirely beyond the scope of adjudication in the present proceedings, as held in Orissa Concrete. The respondent's contention that those petitions would be rendered infructuous by an extension of the learned arbitrator's mandate in these petitions also does not commend to me. The manner in which the proceedings are being conducted, and the respondent's substantive challenge in that regard are not questions which can be agitated in these petitions. It is always open to the respondent to take such remedies as available to it in law in this regard****."*
> *11. Thus, insofar as the other issues are concerned which are raised the same cannot be considered in the present petition. The Respondent is stated to have filed an application under Section 13 of the 1996 Act before the ld. Arbitrator. Under such circumstances, this Court is of the opinion that it would not be appropriate to make any observations in respect of issues which are being considered under Section 13 of the 1996 Act, in the present petition which is under Section 29A of the 1996 Act.*
> *12. The mandate of the ld. Arbitrator is accordingly extended for a period of one year in terms of Section 29A(4) of the 1996 Act. Needless to add, in respect of any decision on the application under Section 13 of 1996 Act, the parties are permitted to avail of their remedies in accordance with law."*

40. In the light of the above case law, the facts of the present case needs to be considered.

41. Initially, vide communication dated 13th August, 2020, the PWD provided a panel of five arbitrators – all of whom were retired officials from either the PWD or CPWD. From this panel, the Petitioner was required to

consent to or choose three arbitrators, which was duly done vide communication on 13th August, 2020. Consequently, the Respondent had no objections to any of the three individuals acting as an arbitrator. The appointment of any person from this three-member panel constitutes an appointment with the consent of the parties. The fact that the Chief Engineer of the PWD appointed one of the arbitrators to whom the Petitioner had given consent demonstrates that the appointment was not unilateral, and thus in line with the judgement of the Supreme Court in ***Central Organisation (supra)***. Although the Chief Engineer was clearly ineligible, the arbitrator appointed was a person chosen from a panel agreed upon between the Respondent and Petitioner.

42. Moreover, in the present petition under Section 29A of the 1996 Act, there is no challenge to the appointment of an arbitrator. The Respondent has fully participated in the proceedings and has given consent earlier also under Section 29A(3) of the 1996 Act. The purpose of arbitration proceedings is to expedite the adjudication of disputes, and not permit objections to be raised in completely collateral proceedings in this manner.

43. In view of the above, the objections of the Respondent are rejected. The mandate of the ld. Arbitrator is thus extended till 31st July, 2024.

44. The petition is allowed in the above terms. All pending applications are disposed of.

PRATHIBA M. SINGH
JUDGE

APRIL 10 2024
mr/dn