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

\+ ARB.P. 154/2023

SHAPOORJI PALLONJI AND COMPANY PRIVATE LIMITED ..... Petitioner

Through: Mr. Sandeep Sethi, Sr. Adv. with Mr. Saurav Agarwal, Mr. Saad Sherwani, Mr. Ravi Tyagi, Mr. Mayank Mishra, Mr. Chirag Sharma, Mr. Siddharth Dey, Ms. Mayuri Shukla, Ms. Sakshi Tibrewal, Ms. Shreya Sethi, Ms. Janvi Tewari, Mr. J. Amakl Anand, Ms. Alisha Sharma, Mr. Babit Jamwal, Ms. Sonali Jaittley Bakhshi, Mr. Jaiyesh Bakhshi, Mr. Ajay Sharma and Mr. Vikram Singh Dalal, Advs.

versus

UNION OF INDIA ..... Respondent

Through: Mr. Apporv Kurup, CGSC, Ms. Swati Bhardwaj, Ms. Nidhi Mittal, Ms. Aparna Arun and Mr Ojaswa Pathak, Advs. for UOI.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

O R D E R

% **20.02.2023**

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 has come to be preferred consequent to disputes having arisen between the parties and emanating from a Contract for Redevelopment of General Pool Residential Colony at Sriniwaspuri, New Delhi [hereinafter and for the sake of brevity to be referred to as "the Contract"]. The Contract was stipulated to come to

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an end in terms thereof on 31 December 2022. By a communication dated 26 December 2022, the respondent proceeded to unilaterally extend its term up to 23 February 2023. Questioning the aforesaid action, the petitioner is stated to have issued a letter dated 09 January 2023 seeking reference of all disputes which had arisen to arbitration. Along with the said communication, the petitioner also proceeded to nominate one Mr. Sharad Kumar as its nominee arbitrator. Since the parties failed to concur on the constitution of the Tribunal, the instant petition came to be filed before the Court seeking to invoke its powers conferred by Section 11 of the Act.

2. On the last occasion when the matter was taken up for consideration, a dispute was raised with respect to the text of clause 25 and in terms of which the respondent had submitted that even after a decision has been taken either by the Engineer-in-Chief or the Chief Project Manager, the parties are to approach the Dispute Redressal Committee **[“DRC”]**. However, today Mr. Kurup, learned CGSC appearing for the respondent, on instructions states that the petitioner appears to be correct in its submission that the stipulation with respect to parties being required to approach the DRC stands deleted from clause 25. In order to allay any further doubts in this respect the Court extracts Clause 25 as it stands set out in the original Contract and a copy of which was placed for its perusal: -

“

Clause 25	Existing Clause 25 is replaced with the following clause: Except where otherwise provided in the contract, all disputes and claims relating to the meaning of the specifications, designs, drawings and instructions here-in-before mentioned and as to the quality of workmanship or materials used in the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings,

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specifications, estimates, instructions, orders or these conditions or otherwise concerning the work or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned here-in-after.

If the agency considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work to be unacceptable, he shall promptly within 15 days request the Chief Project Manager in writing for written instructions or decision. Thereupon, the Chief Project Manager shall give his written instructions or decision within a period of one month from the receipt of the agency's letter. If the Chief Project Manager fails to give his decision within the aforesaid period, or if any party is dissatisfied with the decision of the Chief Project Manager, then either party may within a period of 30 days from the receipt of the decision of the Chief Project Manager or from the last date prescribed above for the Chief Project Manager to give his decision if he delays or fails to give his decision, give notice to the Chief Project Manager for appointment of an arbitral tribunal on the proforma attached herewith, failing which the said decision shall Be final, binding and conclusive, and not referable to adjudication by arbitration. It is a term of contract that, each party invoking arbitration must exhaust the aforesaid mechanism of settlement of disputes prior to invoking arbitration.

Except where the decision has become final, binding and conclusive in terms of sub-para (i) above, disputes shall be referred for adjudication through arbitration by an arbitral tribunal.

The arbitral tribunal shall consist of three arbitrators chosen from a panel of seven arbitrators prepared by the Chief Project Manager. The panel will comprise of engineers retired from any government service from a position not below the level of Joint Secretary to the Government of India and having experience in the field of arbitration in construction contracts.

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> The Chief Project Manager shall within 30 days from the receipt of a request on prescribed proforma from either party for appointment of arbitral tribunal, shall appoint two arbitrators from the panel of seven arbitrators. The two appointed arbitrators shall appoint the third arbitrator from the same panel, who shall act as the presiding arbitrator.
>
> It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Project Manager.
>
> The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause.
>
> It is also a term of this contract that the arbitral tribunal shall adjudicate on only such disputes as are referred to it by the appointing authority and give separate award against each dispute and claim referred to it and, in all cases, where the total amount of the claims by any party exceeds Rs 1,00,000/- the arbitral tribunal shall give reasons for the award.
>
> The fees of the arbitral tribunal and the manner of its payment shall be determined by the arbitral tribunal after taking into consideration the rates specified in the Fourth Schedule of the Arbitration and Conciliation Act, 1996 as amended by the Amendment Act, 2015 or as per guidelines issued by the competent authority or ruling of Delhi High Court/Supreme Court of India."

3. On a consideration of the aforesaid provision, it is evident that the clause contemplates the agency raising all disputes that may arise firstly for the consideration of the Engineer-in-Chief who is to promptly take a decision thereon within fifteen days and to seek an opinion from the Chief Project Manager. The Chief Project Manager

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is to submit his written instructions or decision that may be taken within a period of one month from the receipt of the agency's letter. It is important to lay emphasis on the fact that the decision of the Engineer-in-Chief or for that matter of the Chief Project Manager is to be one which is in writing and duly expressed and communicated to the agency.

4. The agency, which is the petitioner here, had clearly set out the disputes which had arisen in terms of its communication of 09 January 2023. However, although this communication was addressed to both the Executive Engineer as well as the Chief Project Manager, no decision in writing of the latter was communicated to it. The Court deems it appropriate to also note that the very extension of the Contract unilaterally by the respondent was itself one of the disputed issues which stood raised. It was thus imperative for the Chief Project Manager or the Engineer in Chief to have communicated its decision in light of what was asserted by way of the communication dated 09 January 2023. A failure to act in accordance with the above, clearly conferred a right upon the agency to seek referral of disputes to arbitration in terms of clause 25.

5. The Court thus finds that the respondent did fail to act in accordance with clause 25 and thus entitling the petitioner to invoke the powers conferred on the Court by Section 11 of the Act. All that may be additionally observed is that the indication of a nominee arbitrator by the petitioner in terms of the communication of 09 January 2023 cannot be countenanced since that was clearly preempting the decision which was at the relevant time yet to be taken either by the Engineer-in-Charge or by the Chief Project Manager.

6. That leaves the Court to consider the issue of composition of

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the Arbitral Tribunal and the powers conferred upon the Chief Project Manager in terms of clause 25. On a plain reading of that clause, it is evident that it envisages the Arbitral Tribunal to comprise of three arbitrators to be chosen from a panel of seven maintained by the Chief Project Manager. The Chief Project Manager is obliged to make an appointment from out of that panel within thirty days from the receipt of a request by either party. The two appointed arbitrators, in turn then proceed to nominate the presiding arbitrator from the same panel.

7. A reading of that clause establishes that parties are neither conferred a right nor given an option to choose from out of the panel of seven that is maintained by the Chief Project Manager. The power to appoint and nominate arbitrators is vested entirely with the Chief Project Manager.

8. The question which thus arises is whether the appointment procedure as laid in place by clause 25 can be said to be valid in law bearing in mind the principles enunciated by the Supreme Court in **Perkins Eastman Architects DPC vs. HSCC (India) Ltd.**[1] and **Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd.**[2]. It becomes pertinent to note that arbitration as an alternate mode of dispute resolution rests primarily on the foundation of parties agreeing upon an independent authority being consensually empowered to resolve the disputes that may arise. The key prerequisites of resolution of disputes by way of arbitration is party autonomy and the independence and impartiality of the institution which is conferred the authority to adjudicate upon the dispute and render an award. The constituents of the Tribunal must therefore necessarily be persons/institutions in which and in whom parties repose implicit faith

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[1] (2020) 20 SCC 760
[2] (2017) 4 SCC 665

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and confidence. Connected with the above, is the right of parties to freely choose or designate such a person or institution for the purposes of dispute resolution. It too is an essential facet of the arbitral process bearing in mind the parties agreeing to confer authority upon that person/institution to undertake the adjudicatory process.

9. **Redfern and Hunter on International Arbitration** elucidates the concepts of independence and impartiality of arbitrators as follows: -

> "4.75 It is a fundamental principle in international arbitration that every arbitrator must be, and must remain, independent and impartial of the parties and the dispute. Although some confusion arose from the former practice in US domestic arbitrations whereby party-nominated arbitrators were to be considered 'non-neutral', the 2004 Revision of the American Arbitration Association (AAA)/American Bar Association (ABA) Code of Ethics for Arbitrators in Commercial Disputes reversed this domestic arbitration presumption. There is now a presumption of neutrality for all arbitrators, including party-appointed arbitrators, to be applied unless the parties' agreement, the arbitration rules agreed to by the parties, or applicable laws provide otherwise. This was already the case in international commercial arbitration conducted in the United States, and so this has 'brought the American system of arbitrator ethics substantially into the line with international norms'.
>
> 4.76 Experienced practitioners recognise that the deliberate appointment of a partisan arbitrator is, in any event, often counterproductive: the remaining arbitrators will very soon perceive what is happening and the influence of the partisan arbitrator during the tribunal's deliberations will be – at the very least–diminished. It is a far better practice to appoint a person who may, by reason of culture or background, be broadly in sympathy with the case theory to be put forward, but who will be strictly impartial when it comes to assessing the facts and evaluating the arguments on fact and law."

10. **Mustill and Boyd** in their work on **Commercial Arbitration** while describing the indispensable attributes of arbitration render the following pertinent observations: -

> "**(iv) A consensual tribunal**. It is also of the essence of a private arbitration that the tribunal shall be appointed as the result of

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> agreement between the parties. It is not, of course, necessary that the agreement to arbitrate shall name the arbitrator, or that the parties shall subsequently concur in a choice. The agreement may contemplate that persons will be appointed without the parties' wishes being consulted - as for example, where the right to nominate the tribunal is placed in the hands of a third party, or where the two chosen arbitrators are themselves to choose the umpire, or where the agreement provides for a reference to (say) the president of a stipulated body. Again, if a party is in default in making an appointment, or if a vacancy in the tribunal occurs after appointment, the choice may be made by the court, rather than by the parties, by virtue of powers conferred by the Act. Nevertheless, one can say that in every case of private arbitration the parties have consented, if not to the individual choice, at least to the way in which the choice is made.
>
> **(v) An impartial tribunal.** The requirement that the tribunal shall act impartially is so obvious as to require no elaboration. Moreover, it is of little practical importance, for it is hard to imagine the parties to a contract agreeing, either expressly or by implication, that the chosen tribunal should be permitted to act unfairly. An intention that the tribunal shall act fairly is a necessary condition, before an agreement to refer disputes can be characterized as an arbitration agreement. But it is not a sufficient characteristic. Many agreements for the impartial determination of right are not arbitration agreements."

11. What immediately strikes the Court when it evaluates clause 25 on the anvil of the principles enunciated above is that firstly the Chief Project Manager could be perceived to be an appointing authority who may have an interest in the outcome of the arbitral proceedings. Secondly, the arbitral proceedings could possibly involve a challenge being laid to the decision taken by the said authority itself. It also becomes pertinent to observe that clause 25 does not bestow a right on any of the parties to independently choose from the panel maintained by the respondents. In fact, the clause essentially only empowers the Chief Project Manager to make a nomination of two arbitrators from the said limited panel of seven. Neither of the parties are given the liberty to exercise their right to choose or nominate an arbitrator from their respective sides.

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12. It would be apposite to recall that in **Perkins** the Supreme Court had an occasion to examine the validity of two distinct categories of arbitration clauses namely, those where an authority was not only named as the arbitrator and additionally conferred the power to nominate as well as those where a person who was otherwise ineligible to be considered for appointment as an arbitrator being granted the right to nominate. The Supreme Court ultimately came to conclude that in neither of those situations would the appointment procedure so contemplated sustain. This is evident from the following passages of the report which are extracted hereinbelow: -

> "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

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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]"

13. While on the question of impartiality and independence of an arbitrator and its inherent importance to the integrity of the arbitral process itself, the Court also deems it apposite to refer to the following passages from the **246th Report of the Law Commission**: -

"53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of arbitration, neutrality of arbitrators, viz. their independence and impartiality, is critical to the entire process.

54. In the Act, the test for neutrality is set out in section 12(3) which provides –

"*An arbitrator may be challenged only if (a) circumstances exist*

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> *that give rise to justifiable doubts as to his independence or impartiality…*"

55. The Act does not lay down any other conditions to identify the "circumstances" which give rise to "justifiable doubts", and it is clear that there can be many such circumstances and situations. The test is not whether, given the circumstances, there is any *actual* bias for that is setting the bar too high; but, whether the circumstances in question give rise to any *justifiable apprehensions* of bias.

56. The limits of this provision has been tested in the Indian Supreme Court in the context of contracts with State entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court (**See** *Executive Engineer, Irrigation Division, Puri v. Gangaram Chhapolia,* 1984 (3) SCC 627; *Secretary to Government Transport Department, Madras v. Munusamy Mudaliar*, 1988 (Supp) SCC 651; *International Authority of India v. K.D. Bali and Anr*, 1988 (2) SCC 360; *S.Rajan v. State of Kerala*, 1992 (3) SCC 608; *M/s. Indian Drugs & Pharmaceuticals v. M/s. Indo-Swiss Synthetics Germ Manufacturing Co.Ltd.*, 1996 (1) SCC 54; *Union of India v. M.P. Gupta*, (2004) 10 SCC 504; *Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd.*, 2007 (5) SCC 304) that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in *Indian Oil Corp. Ltd. v. Raja Transport (P) Ltd.,* 2009 8 SCC 520 carved out a minor exception in situations when the arbitrator "*was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute*", and this exception was used by the Supreme Court in *Denel Propreitory Ltd. v. Govt. of India, Ministry of Defence,* AIR 2012 SC 817 and *Bipromasz Bipron Trading SA v. Bharat Electronics Ltd.,* (2012) 6 SCC 384, to appoint an independent arbitrator under section 11, this is not enough.

57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the arbitral tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles – even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of

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> the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr. PK Malhotra, the *ex officio* member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous – and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes."

14. **Voestalpine,** as well, had underlined the importance of neutrality of arbitrators and its significant bearing upon the sanctity of the arbitral proceedings in the following terms:

> "**20.** Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in *Hashwani* v. *Jivraj* [*Hashwani* v. *Jivraj*, (2011) 1 WLR 1872 : 2011 UKSC 40] in the following words: (WLR p. 1889, para 45)
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> > "*45.* … the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and,

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although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties."

21. Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in *Consorts Ury* [*Fouchard, Gaillard, Goldman on International Commercial Arbitration* 562 (Emmanuel Gaillard & John Savage eds., 1999) {quoting Cour de cassation [Cass.] [Supreme Court for judicial matters] *Consorts Ury* v. *S.A. des Galeries Lafayette*, Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France)}.] , underlined that:
"an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator."

22. Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings."

15. The Court further finds that the aforenoted decision had also entered the following noteworthy observations on the issue of a panel of arbitrators that may be offered to a party for the purposes of nomination: -

"**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

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> 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."

16. The Court notes that clause 25 not only fails to enable the petitioner to choose from out of a panel of seven names, the composition of that panel itself is left to the sole discretion of the Chief Project Manager. Thus, the Court comes to conclude that the constitution of a Tribunal in accordance with the procedure prescribed in clause 25 would clearly be tainted by fundamental illegality. It neither permits a party to independently choose or nominate an arbitrator, it also vests the power of constitution exclusively in the hands of the Chief Project Manager. Since the Chief Project Manager would itself be disqualified in law to arbitrate upon the dispute, the said authority cannot possibly be countenanced in law to have the power to constitute the Tribunal.

17. On an overall consideration of the aforesaid conclusions, while the Court finds itself unable to uphold the constitution of the Tribunal by the Chief Project Manager in accordance with clause 25, the ends of justice would warrant liberty being accorded to parties to independently nominate an arbitrator from their side. Since the panel as maintained by the Chief Project Manager is limited to the extent of assisting him in constituting a Tribunal, parties now would be free to nominate a person whose name may otherwise not form part of that panel.

18. Accordingly, the instant petition is allowed. The parties are granted the liberty to nominate their nominee arbitrators within a

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period of two weeks from today. The two nominated arbitrators may, in turn, choose the presiding arbitrator.

YASHWANT VARMA, J.

FEBRUARY 20, 2023
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