2023:DHC:8641

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

Judgment pronounced on: 01.12.2023

\+ **ARB.P. 753/2023 and IA No. 14079/2023 (Stay)**

J. S. R. CONSTRUCTIONS ..... Petitioner
Through: Mr. Shamik Sanjanwala, Adv

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA AND ANR
..... Respondents
Through: Mr. C. S. Chauhan and Ms. Jasleen Singh Sandha, Advs.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

ARB.P. 753/2023

1. The present petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (the "A&C Act") seeks the following reliefs:

> *"a. Appoint a presiding arbitrator to preside over the arbitral tribunal consisting of Mr. Subhash I. Patel and Mr. Prabhat Krishna to adjudicate upon the claims of the Petitioner based on or arising out of the Contract Agreement dated 01.04.2005; and*
> *b. Declare the appointment of Mr. Ranjit Sahu as the presiding arbitrator, by Respondent no. 2, as null and void and quash and set aside the same;*
> *c. Declare the constitution of the arbitral tribunal vide letter dt.19.07.2023, communicated vide email dt. 19.07.2023, comprising of Mr. Ranjit Sahu (Presiding Arbitrator), Mr. Subhash I. Patel and Mr. Prabhat Krishna as non-est and void."*

FACTUAL BACKGROUND

2. The disputes between the parties have arisen in the context of a Contract between the petitioner and the respondent no.1 for work relating to *"construction of four lane road over bridge (KM. 22.850 to KM. 24.650)*

including approaches at Butibori on Nagpur-Hyderabad Section of NH-7 in lieu of existing level crossing no. 113 in the State of Maharashtra, NS- 29".

The said work was awarded to the petitioner by the respondent no.1 and a formal Contract Agreement dated 01.04.2005 was also entered into between the parties for the work in question. The applicable arbitration clause in the Contract Agreement is in the following terms:

> *"Substitute Sub-Clause 67.3 with the following:*
> *Any dispute in respect of which the Recommendation(s), if any, of the "Board has not become final and binding pursuant to Sub-Clause 67.1 shall be finally settled by arbitration as set forth below. The arbitral tribunal shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer and any Recommendation(s) of the Board related to the dispute.*
>
> > *(i) A dispute with an Indian Contractor shall be finally settled by arbitration in accordance with the Arbitration & Conciliation Act, 1996, or any statutory amendment thereof. The arbitral tribunal shall consist of 3 (three) Arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding Arbitrator. In case of failure of the two Arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding arbitrator shall be appointed by the Appointing Authority as specified in the Appendix to Bid. For the purposes of this Sub-Clause, the term "Indian Contractor" means a Contractor who is registered in India and is a juridical person created under Indian law as well as a joint venture between such a Contractor and a Foreign Contractor.*
> >
> > *(ii) In the case of a dispute with a Foreign Contractor, the dispute shall be finally settled in accordance with the provisions of UNCITRAL Arbitration Rules. If agreed to by both the parties, the disputes shall be settled in accordance with the Arbitration and Reconciliation Act, 1996. The arbitral tribunal shall consist of three Arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by.tne parties, and shall act as Presiding Arbitrator. In case of failure of the two Arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the*

appointment of the Arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Authority specified in the Appendix to Bid. For the purposes of this Sub-Clause, the term "Foreign Contractor" means a Contractor who is not registered in India and is not a juridical person created under Indian Law.

(iii) Neither party shall be limited in the proceedings before such tribunal to the evidence or arguments before the Board for the purpose of obtaining its Recommendation(s) pursuant to Sub-Clause 67.1. No Recommendation shall disqualify any Board Member from being called as a witness and giving evidence before the Arbitrator(s) on any matter whatsoever relevant to the dispute.

(iv) Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employer, the Engineer, the Contractor and the Board shall not be altered by reason of the arbitration being conducted during the progress of the Works.

(v) If one of the parties fail to appoint its arbitrator in pursuance of Sub-paras (i) and (ii) above, within 30 days after receipt of the notice of the appointment of its Arbitrator by the other party, then the Appointing Authority specified in the Appendix to Bid shall appoint the Arbitrator.

(vi) Arbitration proceedings shall be held at Delhi or at the place near to the project site. The language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

(vii) The decision of the majority of Arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in "connection with the preparation, presentation, etc., of its proceedings as also the fees and expenses paid to the Arbitrator appointed by such party or on its behalf shall be borne by each party itself."

3. Disputes having arisen between the parties, a notice invoking the arbitration clause was sent by the petitioner to the respondent no.1 on 30.04.2022, seeking to raise certain claims upon the respondent no.1 and appointing its nominee arbitrator. In response thereto dated 23.05.2023, the respondent no.1 also appointed its nominee arbitrator. As per Clause 67.3 of

the GCC, the nominee arbitrators appointed by each party had to mutually nominate a presiding arbitrator. However, vide email dated 01.07.2023, petitioner's nominee arbitrator informed the parties that both the nominee arbitrators have failed to agree on a presiding arbitrator and hence, requested the parties to take further action as per the due procedure.

4. As per Clause 67.3 of the GCC, in case the two Arbitrators appointed by the parties fail to reach upon a consensus, the presiding arbitrator shall be appointed by the Appointing Authority as specified in the Appendix to Bid. As per the Appendix to Bid, the Appointing Authority is "Director General (Road Development and Special Secretary), Ministry of Shipping, Road Transport & Highways" i.e. the respondent no. 2/MoRTH.

5. Thereafter, the respondent no.1 vide letter dated 12.07.2023 informed that the matter was referred to the Director General, MoRTH; accordingly, the Director General, MoRTH has appointed a presiding arbitrator in the matter.

6. The petitioner objected to the appointment of the presiding arbitrator vide its letter dated 13.07.2023. The said letter reads as under:

> *"NS-29/2023-24/183* *July 13, 2023*
>
> *To,*
> *Sh. Ranjit Sahu, Chief-engineer (retd)*
> *House no.229/D/N-6,*
> *IRC Village, Jaya DevVihar,*
> *Bhubaneswar,Odisha-751015.*
> *Mob. No. 9437001992/9439455730*
> *Email: ranjitsahu13@gmail.com*
>
> *Sub:- In the matter of Arbitration between M/S J S R Constructions p ltd. and NHAI.*

Ref:- Construction of ROB Butibori and it's approaches from Km 22.865 to Km 24.650 of Nagpur-Hyderabad Section of NH-7 (New NH-44), Package NS-29 at Railway Crossing no.113.

We are in receipt of the letter no. NHAI/RO/NGP/1/13/ROB-Butibory/NS-29 (comp no 212449)/458 dt 12.07.2023 received thru email at 1.39 pm 13.07.2023, written by Mr. Mr Pawan Kumar, holding the designation of Chief General Manager (legal) of NHAI.By this letter we have been informed about your appointment as the Presiding Arbitrator in the matter of dispute between M/S J S R Constructions (p) ltd and NHAI. We are further informed that your appointment was made by the Director General, being the Appointing Authority under the arbitration agreement.

Without intending any disrespect to you or casting any doubts on your independence and impartiality; we are of the opinion that your appointment is invalidly made, being "void", since the provision, naming Director General as the appointing authority is itself "void". NHAI functions as an arm of Ministry of road transport and Highways and is under the control and supervision of the said Ministry. DG is the automatically nominated Director of the said Ministry on the Board of Directors of NHAI.

In view of the void appointment, we propose to take steps to approach the Hon'ble High Court at Delhi for declaration of the same as-void .and to instead have a presiding arbitrator appointed by the Hon'ble High Court at Delhi, as the Presiding Arbitrator.

Hence, we request you to desist from taking any action pursuant to the said appointment letter till appropriate order(s) are obtained from the Court of Competent Jurisdiction.

Thanking you,

Yours Sincerely

For J S R Constructions p ltd.

(J Siva Narayana Reddy)
Authorized signatory"

7. Despite the aforesaid objection of the petitioner, the presiding arbitrator issued a communication dated 19.07.2023, sent to the parties, stating that the Arbitral Tribunal stands constituted.

SUBMISSIONS OF THE PARTIES

8. Learned Counsel for the petitioner contends that in light of the decisions of ***Perkins Eastman Architects DPC & Anr. v. HSCC (India) Limited***, (2020) 20 SCC 760, ***Voestalpine Schienen Gmbh v. Delhi Metro Rail Corporation Limited***, (2017) 4 SCC 665 and ***Bharat Broadband Network Limited v. United Telecoms Limited***, (2019) 5 SCC 755, any party having an interest in the outcome of the dispute can neither act as the arbitrator nor appoint an arbitrator. It is submitted that the respondent no. 1 is under the administrative control of the Appointing Authority/respondent no.2. It is further submitted that the respondent no. 1 authority consists of a full time Chairman, and not more than five full time Members and four part time Members who are appointed by the Central Government; the Appointing Authority is a part time member of the respondent no. 1. It is contended that the Appointing Authority/respondent no.2 has an interest in the outcome of the dispute and thus ineligible to appoint the presiding arbitrator.

9. *Per contra*, learned counsel for the respondents contends that since the Arbitral Tribunal has already been duly constituted, the present petition is not maintainable. It is submitted that the only remedy available to the petitioner is to challenge the appointment of the Arbitrator under Section 13(2) of the A&C Act. It is further submitted that the appointment procedure in the present case is valid in view of the law laid down by the Supreme Court in ***Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)***, (2020) 14 SCC 712; further the Supreme Court in ***Perkins*** (supra) has observed that where both the parties could nominate respective arbitrators of their choice, then whatever advantage a party may

derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. It is submitted that in the present case both the parties stand on an equal footing as both the parties have the right to nominate their respective Arbitrators of their own choice and if both the nominee Arbitrators do not agree with a name of a presiding arbitrator, the power to appoint the presiding arbitrator is given to the Director General, MoRTH, which is a different entity from the respondent no. 1.

ANALYSIS AND FINDINGS

10. I have perused the record and heard learned counsel for the parties.

11. Two questions that arise for consideration before this Court are (i) Whether the power given to the Director General, MoRTH in the arbitration clause to appoint the presiding arbitrator, when the two Arbitrators appointed by the parties fail to reach upon a consensus, is a valid procedure? and (ii) Whether a petition under Section 11 of the A&C is maintainable once an Arbitral Tribunal has been constituted?

12. As regards question (i) this Court finds that the power given to the Director General of MoRTH to appoint the presiding arbitrator when the two arbitrators appointed by the parties failed to reach upon a consensus, is hit by the judgment of the Supreme Court in ***Perkins*** (supra). In the said decision, it has been, *inter-alia*, held as under:

> *"20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Ltd. 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., 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. 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."*

13. Thus, any person who is ineligible to act as arbitrator must also not be eligible to appoint anyone else as an arbitrator; such person cannot be and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. In the present case, the respondent No.1/NHAI is under the administrative control of the respondent

no.2/MoRTH. Also, the appointing authority i.e. Director General of MoRTH is a part time member of the respondent no.1. As such, he is ineligible to be himself appointed as an arbitrator in terms of the aforesaid observation in ***Perkins*** (supra). Consequently, such a person is also ineligible to appoint any member of the arbitral tribunal.

14. There is another aspect of the matter. The appointment procedure, while conferring power upon the Director General of MoRTH to appoint the presiding arbitrator (despite being a part-time member of the respondent no.1 itself), in effect, gives a greater say to the respondents in constitution of the arbitral tribunal. Normally, in an appointment procedure where both the parties have the right to nominate the respective arbitrators, any advantage a party may drive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where one of the contracting parties has a further right to appoint a presiding arbitrator, this equilibrium gets disturbed. A presiding arbitrator must not be appointed by a person who has an interest in the outcome or decision of the dispute, as the same would defeat the purpose of unbiased adjudication of the disputes between the parties. In ***CMM Infraprojects Ltd. v. Ircon International Ltd.,*** 2021 SCC OnLine Del 5656, this Court specifically disapproved of an appointment procedure under which "the scales are tipped in favour of the respondent". In ***Margo Networks (P) Ltd. v. Railtel Corpn. of India Ltd.,*** 2023 SCC OnLine Del 3906, this Court held that the "counter balancing" as contemplated by the Supreme Court in ***Perkins*** (supra) cannot be said to have been achieved in a situation where 2 out of 3 arbitrators are appointed by one of the party.

15. The Supreme Court in ***Perkins*** (supra), also underscored the need for creating healthy arbitration environment. It was, *inter-alia*, observed in the said decision as under:

> *"23. Sub-para (vii) of the aforesaid para 48 lays down that if there are justifiable doubts as to the independence and impartiality of the person nominated, and if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, such appointment can be made by the Court. It may also be noted that on the issue of necessity and desirability of impartial and independent arbitrators the matter was considered by the Law Commission in its Report No. 246. Paras 53 to 60 under the heading "Neutrality of Arbitrators" are quoted in the judgment of this Court in Voestalpine Schienen GmbH v. DMRC , while paras 59 and 60 of the Report stand extracted in the decision of this Court in Bharat Broadband Network Ltd. v. United Telecoms Ltd. For the present purposes, we may rely on para 57, which is to the following effect : (Voestalpine case [Voestalpine Schienen GmbH v. DMRC, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , SCC p. 681, para 16)*
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> > *"16. ... '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 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 P.K. 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.'"

24. In Voestalpine , this Court dealt with independence and impartiality of the arbitrator as under : (SCC pp. 687-88 & 690-91, paras 20 to 22 & 30)

"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)

'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, 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.*
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> * * *
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> ***30. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country**. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by DMRC. It, therefore, becomes imperative to have a much broadbased panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. We, therefore, direct that DMRC shall prepare a broadbased panel on the aforesaid lines, within a period of two months from today.*
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> *25. In the light of the aforestated principles, the report of the Law Commission and the decision in Voestalpine Schienen GmbH, the imperatives of creating healthy arbitration environment demand that the instant application deserves acceptance."*

16. Notwithstanding the parties' agreement, the arbitral process is expected to uphold certain minimum standards of independence and impartiality. Thus, a presiding arbitrator must not be appointed by only one of the contracting parties.

17. The reliance sought to be placed on the judgment of ***Central Organisation*** (supra), is clearly misconceived. The said judgement has been rendered in the context of an appointment procedure based on a panel

maintained by one of the contracting parties. Further the scope of the said judgment has been considered in ***Margo Networks*** (supra), in which it has been held as under:

> *"37. This brings us to the next issue that arises in the context of the arbitration clause in the present case, viz.* ***whether "counter balancing" is achieved in a situation where one of the parties has a right to choose an arbitrator from a panel whereas 2/3rd of the members of the arbitral tribunal are appointed by the other party.***
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> *38. In TRF Limited (supra), it was observed by the Supreme Court as under:—*
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> > *"50…At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstances can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto…"*
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> *39. Also in Perkins (supra), the Supreme Court observed as under:—*
>
> > *"21…The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution…"*
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> *40. In the light of the aforesaid observations in TRF (supra) and Perkins (supra), it was observed by the Supreme Court in CORE as under:*
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> > *"37…Thus, the right of the General Manager in formation of the Arbitral Tribunal is counterbalanced by the respondent's power to choose any two from out of the four names and the General Manager shall appoint at least one out of them as the Contractor's nominee.*
> >
> > *38. ...Thus, the power of the General Manager to nominate the arbitrator is counter balanced by the power of the respondent to*

select any of the two nominees from out of the four names suggested from the panel of the retired officers. In view of the modified clauses 64(3)(a)(ii) and 64(3)(b) of GCC, it cannot therefore be said that the General Manager has become ineligible to act as (sic nominate) the arbitrator. We do not find any merit in the contrary contention of the respondent. The decision in TRF Ltd. is not applicable to the present case."

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

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

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

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

of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto."

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

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

The clause in the present case does not provide for any effective counter balancing. The process starts with selection of a panel by the Respondent and this restricts the element of choice that the contractor may exercise in choosing its nominee. Nonetheless, it allows the Respondent to ultimately choose the contractor's nominee from the two names suggested by the contractor. However, the clause also entitles the Respondent to choose the balance two arbitrators from the panel or even outside. This undeniably indicates that the scales are tipped in favour of the Respondent when it comes to the appointment process. In effect,

2/3rd strength of the Arbitral Tribunal is nominated by the Respondent. This leads to the inexorable conclusion that the clause in its current state may not be workable. Thus, the reliance of the Respondent upon the judgment in CORE (supra) is misplaced.

42. The reasoning and the conclusion in CMM (supra) on the above aspect was followed by this court in Pankaj Mittal v. Union of India, where in it was observed as under:

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

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

18. In view of the aforesaid, the stipulation conferring power on the Director General of MoRTH to appoint the presiding arbitrator, is invalid/unworkable and it is incumbent on this Court to appoint an independent presiding arbitrator.

19. In answer to question (ii), this Court finds that the present petition is maintainable. There is no merit in the argument of the respondents that since an Arbitral Tribunal has been constituted to adjudicate the disputes between

the parties, the present petition is not maintainable. In ***Perkins*** (supra), the Supreme Court in exercise of the powers under Section 11(6) of the A&C Act, appointed a Sole Arbitrator, even when appointment of an Arbitrator was already made; the Supreme Court, *inter-alia*, held as under:

> *"26. The further question that arises is whether the power can be exercised by this Court under Section 11 of the Act when the appointment of an arbitrator has already been made by the respondent and whether the appellant should be left to raise challenge at an appropriate stage in terms of remedies available in law. Similar controversy was gone into by a Designated Judge of this Court in Walter Bau AG and the discussion on the point was as under : (SCC pp. 805-06, paras 9-10)*
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> > *"9. While it is correct that in Antrix and Pricol Ltd., it was opined by this Court that after appointment of an arbitrator is made, the remedy of the aggrieved party is not under Section 11(6) but such remedy lies elsewhere and under different provisions of the Arbitration Act (Sections 12 and 13), the context in which the aforesaid view was expressed cannot be lost sight of. In Antrix, appointment of the arbitrator, as per the ICC Rules, was as per the alternative procedure agreed upon, whereas in Pricol Ltd., the party which had filed the application under Section 11(6) of the Arbitration Act had already submitted to the jurisdiction of the arbitrator. In the present case, the situation is otherwise.*
> >
> > *10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law. In the present case, the agreed upon procedure between the parties contemplated the appointment of the arbitrator by the second party within 30 days of receipt of a notice from the first party. While the decision in Datar Switchgears Ltd. may have introduced some flexibility in the time-frame agreed upon by the parties by extending it till a point of time anterior to the filing of the application under Section 11(6) of the Arbitration Act, it cannot be lost sight of that in the present case the appointment of Shri Justice A.D. Mane is clearly contrary to the provisions of the Rules governing the appointment of arbitrators by Icadr, which the parties had agreed to abide by in the matter of such appointment. The option given to the respondent Corporation to go beyond the panel submitted by Icadr and to appoint any person of its choice was clearly not in the contemplation of the parties. If that be so, obviously, the appointment of Shri Justice A.D. Mane is non est in law. Such an*

appointment, therefore, will not inhibit the exercise of jurisdiction by this Court under Section 11(6) of the Arbitration Act. It cannot, therefore, be held that the present proceeding is not maintainable in law. The appointment of Shri Justice A.D. Mane made beyond 30 days of the receipt of notice by the petitioner, though may appear to be in conformity with the law laid down in Datar Switchgears Ltd., is clearly contrary to the agreed procedure which required the appointment made by the respondent Corporation to be from the panel submitted by Icadr. The said appointment, therefore, is clearly invalid in law."

27. It may be noted here that the aforesaid view of the Designated Judge in Walter Bau AG was pressed into service on behalf of the appellant in TRF Ltd. and the opinion expressed by the Designated Judge was found to be in consonance with the binding authorities of this Court. It was observed : (TRF case, SCC p. 397, paras 32-33)

"32. Mr Sundaram, learned Senior Counsel for the appellant has also drawn inspiration from the judgment passed by the Designated Judge of this Court in Walter Bau AG, where the learned Judge, after referring to Antrix Corpn. Ltd., distinguished the same and also distinguished the authority in Pricol Ltd. v. Johnson Controls Enterprise Ltd. and came to hold that : (Walter Bau AG case, SCC p. 806, para 10)

'10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law.…'

33. We may immediately state that the opinion expressed in the aforesaid case is in consonance with the binding authorities we have referred to hereinbefore."

28. In TRF Ltd., the Managing Director of the respondent had nominated a former Judge of this Court as sole arbitrator in terms of the aforesaid Clause 33(d), after which the appellant had preferred an application under Section 11(5) read with Section 11(6) of the Act. The plea was rejected by the High Court and the appeal therefrom on the issue whether the Managing Director could nominate an arbitrator was decided in favour of the appellant as stated hereinabove. As regards the issue about fresh appointment, this Court remanded the matter to the High Court for fresh consideration as is discernible from para 55 of the judgment. In the light of these authorities there is no hindrance in entertaining the instant application preferred by the applicants.

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30. In the aforesaid circumstances, in our view a case is made out to entertain the instant application preferred by the applicants. We, therefore, accept the application, annul the effect of the letter dated 30-7-2019 issued by the respondent and of the appointment of the arbitrator…."

20. In ***BVSR-KVR v. Rail Vikas Nigam Ltd.,*** 2020 SCC OnLine Del 456 this Court has held as under:

"26. Having heard the learned counsel for the parties, the foremost issue, which has arisen for consideration is whether, as submitted by Mr. Seth, this petition is not maintainable as there is already an Arbitral Tribunal in place.

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33. Mr. Seth has also relied upon the judgment of the Supreme Court in Grid Corpn. of Orissa Ltd. (supra) to contend that once Arbitral Tribunal has come into existence a petition under Section 11(6) of the Act was not an appropriate remedy and it was upon for the party to raise objections as to the constitution and jurisdiction of the Arbitral Tribunal itself under the provisions of the Act.

34. Similarly, he had also relied upon the judgment of this Court in Newton Engineering & Chemicals (supra) to contend that there was no provision under the Act empowering the Court to terminate the mandate of the Arbitrator appointed in terms of the agreement between the parties and the remedy to any challenge against the appointment of Arbitrator was under Section 13 of the Arbitration and Conciliation Act before the Arbitrator. I am not in agreement with the submissions made by Mr. Seth by relying upon aforesaid two judgments for the simple reason that in Perkins Eastman Architects DPC (supra), the Supreme Court while dealing with an application under Section 11(6) read with Section 11(12)(a) of the Act of 1996 held that as per the scheme of Section 11 of the Act, if there are justifiable doubts as to the independence and impartiality of the persons nominated, and if other circumstances warrant appointment of an independent Arbitrator by ignoring the procedure prescribed, such appointment can be made by the Court.

35. If that be so, there is no impediment for this Court to appoint an independent Arbitrator for adjudicating the dispute and difference between the parties…."

21. In view of the aforesaid, there is no impediment in entertaining the present petition. This Court therefore annuls the effect of the letter dated 12.07.2023 issued by the respondent no.1; and the letter dated 19.07.2023 issued by the presiding arbitrator, whereby it was purported to be informed that the Arbitral Tribunal stood constituted.

22. Accordingly, Mr. Justice (Retd.) R. Subhash Reddy, Former Judge Supreme Court of India, (Mobile No.: 9099938005) is appointed as the presiding arbitrator.

23. The learned presiding arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as required under Section 12 of the A&C Act.

24. The presiding arbitrator shall fix his fees in consultation with the parties.

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

26. The present petition stands disposed of in the above terms. Pending application stands disposed of.

DECEMBER 01, 2023*/hg* **SACHIN DATTA, J**