2023:DHC:4596

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

Judgment reserved on: 21.02.2023
Judgment pronounced on: 10.07.2023

\+ **ARB.P.400/2022**

MARGO NETWORKS PVT LTD & ANR. ..... Petitioners

Through: Mr. Kunal Tandon, Mr. Shashank Shekhar and Ms. Aanchal Khanna, Advs.

Versus

RAILTEL CORPORATION OF INDIA LTD ..... Respondent

Through: Mr. Chetan Sharma, ASG along with Mr. Yamandeep Kumar, Ms. Sabah Iqbal Siddiqui, Mr. R.V. Prabhat, Mr.Vinay Yadav and Mr. SaurabhTripathi, Advs.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

SACHIN DATTA, J.

1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "**A&C Act**") seeks constitution of an independent Arbitral Tribunal consisting of three arbitrators to adjudicate the disputes that have arisen between the parties.

FACTUAL BACKGROUND

2. The disputes between the parties have arisen in the context of a Request for Proposal (hereinafter referred to as "**RFP**") issued by the respondent for *"Selection of Digital Entertainment Service Provider (DESP) for delivering Content on Demand (COD) services on Build Own Operate (BOO) model for Indian Railways".* The said work was awarded to the petitioner no.1 *vide* Letter of Award dated 14.01.2020 (hereinafter referred to as "**LOA**"). The petitioner no. 2 had issued the Performance Bank Guarantee (hereinafter referred to as "**PBG**") and the Bank Guarantee (hereinafter referred to as "**BG**") under the RFP and LOA for and on behalf of the petitioner no. 1, and is stated to be a proforma party in the present petition.

3. Various communications were exchanged between the parties in relation to : - (i) Execution of contract in terms of the LOA and its effective date; (ii) Extension of time for furnishing BG and PBG; (iii) Performance of the respective obligations of the parties thereto. The respondent *vide* letter dated 11.11.2021 purportedly terminated the LOA and invoked the BG.

4. Admittedly, the RFP contains an arbitration agreement between the parties in the following terms:

> *"…….*
> *SCHEDULE 11. GOVERNING LAW AND DISPUTE RESOLUTION*
>
> ***3.35. Governing Law and Jurisdiction***
> *The Contract Agreement shall be governed by and construed in accordance with the laws of the Republic of India. Subject to clause mentioned below, the Courts of New Delhi shall have the jurisdiction over any matter arising out of or in relation to the Agreement.*
>
> ***3.36. Dispute Resolution***

a. In the event of any dispute or difference between the Parties hereto as to the subject matter of the agreement, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Authority of any certificate to which the Bidder/DESP may claim to be entitled to, or if the Authority fails to make a decision within 60 (sixty) days, then and in any such case, the Bidder/DESP, after 60 (sixty) days but within 120 (one hundred twenty) days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.

b. The demand for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item-wise. Only such dispute(s) or difference(s) in respect of which the demand has been made, together with counter claims or set off, given by the Authority, shall be referred to arbitration and other matters shall not be included in the reference.

c. The arbitration proceedings shall be held in the following manner:
i. The arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Authority.
ii. The claimant shall subject his claim stating the facts supporting the claims along with all the relevant documents and the relief or remedy sought against each claim within a period of 30 (thirty) days from the date of appointment of the arbitral tribunal (the "Tribunal").
iii. The Authority shall submit its defence statement and counter claim(s), if any, within a period of 60 (sixty) days of receipt of copy of claims from Tribunal thereafter, unless otherwise extension has been granted by the Tribunal.
iv. The place of arbitration shall be within the geographical limits of the Location where the cause of action arose or the headquarters of the Authority or any other place with the written consent of both the parties.

d. No new claim shall be added during the arbitration proceedings by either party. However, a party may amend or supplement the original claim or defence thereof during the course of arbitration proceedings subject to acceptance by the Tribunal having due regard to the delay in making it.

e. If the Bidder/DESP does/do not prefer his/their specific and final claims in writing, within a period of 90 (ninety) days of receiving the intimation from the Authority that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the

Authority shall be discharged and released of all liabilities under the Agreement in respect of these claims.

f. Work under the Agreement shall, unless otherwise directed by the Authority continue during the arbitration proceedings, and no payment due or payable by the Bidder /DESP or the Authority shall be withheld on account of such proceedings, provided, however, it shall be open for the Tribunal to consider and decide whether or not such work should continue during arbitration proceedings.

3.37. Appointment of Arbitrator

a. In cases where the total value of all claims in question added together does not exceed Rs. 25,00,000 (Rupees twenty five lakh only), the Tribunal shall consist of a Sole Arbitrator, nominated by the Railways. The sole arbitrator shall be appointed within 60 (sixty) days from the day when a written and valid demand for arbitration is received by the Authority.

b. ***In cases not covered by the paragraph (a) above, the Tribunal shall consist of a panel of3 (three) arbitrators. For this purpose, the Railway will send a panel of more than 3 (three) names within 60 (sixty) days from the day when a written and valid demand for arbitration is received by the Authority. The Bidder/DESP will be asked to suggest to the Authority at least 2 names out of the panel for appointment as Bidder/DESP 's nominee within 30 (thirty) days from the date of dispatch of the request by the Authority. The Authority shall appoint at least one out of them as the Bidder/ DESP's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 (three) arbitrators so appointed. The Authority shall complete this exercise of appointing the Tribunal within 30 (thirty) days from the receipt ofthe names of the Bidder/DESP's nominees.***

c. If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the Authority fails to act without undue delay, the Authority shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such reconstituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator (s).

d. The Tribunal shall have power to call for such evidence by way of affidavits or otherwise as the Tribunal shall think proper, and it shall be the duty of the parties hereto to do or cause to be done all such things as may be necessary to enable the Tribunal to make the award without any delay. The Tribunal should record day to-day proceedings. The proceedings shall normally be conducted on the basis of documents and written statements.

e. While appointing arbitrator(s) as mentioned above, due care shall be taken that he/they is/are not the one/those who had an opportunity to deal with the matters to which the Contract Agreement relates or who in the course of his/their duties as Indian Railways' employee expressed views on all or any of the matters under dispute or differences. The proceedings of the Tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had in the course of his service opportunity to deal with the matters to which the Contract Agreement relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.

f. The arbitral award shall state item wise, the sum and reasons upon which it is based. The analysis and reasons shall be detailed enough so that the award could be inferred therefrom.

g. A party may apply for corrections of any computational errors, any typographical or clerical errors or any other error of similar nature occurring in the award of a Tribunal and interpretation of a specific point of award to Tribunal within 60 (sixty) days of receipt of the award.

h. A party may apply to Tribunal within 60 (sixty) days of receipt of award to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

i. In case of the Tribunal, comprising of 3 (three) members, any ruling on award shall be made by a majority of members of Tribunal. In the absence of such a majority, the views of the presiding arbitrator shall prevail.

j. Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.

k. The cost of arbitration shall be borne by the respective parties. The cost shall inter-alia include fee of the arbitrator(s), as per the rates fixed by Railway Board from
time to time and the fee shall be borne equally by both the parties. Further, the fee payable to the arbitrator(s) would be governed by the Instructions issued on the subject by Railway Board from time to time irrespective of the fact whether the arbitrator(s) is/are appointed by the Authority or by the court of law unless specifically directed by Hon'ble court otherwise on the matter.

l. Subject to the provisions of the aforesaid Arbitration and Conciliation Act, 1996 and the rules thereunder and any statutory modifications thereof shall apply to the arbitration proceedings under this Section 11.
……."

5. The petitioner *vide* demand-cum-invocation notice dated 10.01.2022 raised certain claims upon the respondent and also assailed the procedure for appointment as contemplated in the aforesaid clause 3.37 on the basis that it was allegedly one sided, onerous and contrary to the law laid down by the Supreme Court in ***Voestalpine Schienen Gmbh Vs. Delhi Metro Rail Corporation Ltd.***[1]. *Vide* the aforesaid communication, the petitioner stated that it 'desired' to appoint its nominee Arbitrator, and requested the respondent to nominate its arbitrator; the two arbitrators so appointed would thereafter appoint the presiding arbitrator so as to constitute the arbitral tribunal to adjudicate the disputes between the parties.

6. The respondent replied to the aforesaid communication on 09.02.2022, asking the petitioner to act in strict conformity with the aforesaid clause 3.37 of the RFP and to appoint its nominee arbitrator from the panel being maintained by Indian Railways. Annexed alongwith the aforesaid communication dated 09.02.2022 was a list of the panel arbitrators

[1](2017) 4 SCC 665

maintained by the Indian Railways, comprising of ten persons, each of them admittedly being former employees of either the Railways or RailTel. It was also stated in the aforesaid communication dated 09.02.2022 that none of the said persons were associated with the project in question in any manner.

7. *Vide* communication dated 25.02.2022, the petitioner reiterated that clause 3.37 was contrary to Section 12 read with Schedule V and VII of the A&C Act.

8. *Vide* communication dated 10.03.2022, the respondent again asked the petitioner to choose its nominee arbitrator from the panel provided to the petitioner *vide* communication dated 09.02.2022. In the said communication, it was also stated that the presiding arbitrator could be appointed by the nominee arbitrator of both the parties (instead of the Respondent appointing the same).

SUBMISSIONS OF THE PARTIES

9. In the above backdrop, learned counsel for the petitioner has contended as under:

Clause 3.37 of the RFP (which contains the arbitration agreement) is contrary to the principles contained in Judgments passed by the Supreme Court in ***Voestalpine[2], TRF Limited Vs. Energo Engineering Projects Limited[3],*** and ***Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd.[4]*** on the grounds that:-

a) The aforesaid clause 3.37 enables the respondent to unilaterally constitute the arbitral tribunal.

b) The procedure envisaged in the said clause 3.37 does not achieve

[2]Supra
[3](2017) 8 SCC 377
[4]2019 SCC Online SC 1517

counter balancing as it is completely one sided.

c) The panel offered by the respondent is a restrictive panel and therefore, not in terms of the judgment in ***Voestalpine*** (supra).

10. As regards the judgment of Supreme Court in ***Central Organization for Railway Electrification Vs. ECI-SPIC-SMO-MCML (JV) a Joint Venture Company***[5] *(hereinafter referred to as* ***"CORE")*** is concerned, learned counsel for the petitioner sought to distinguish the same and contended that the factual conspectus involved in ***CORE*** was quite different from the present case. In the present case, the Petitioner *vide* its communication dated 10.01.2022, has sought to seek constitution of an independent Arbitral Tribunal, and even suggested the name of a former judge of the Supreme Court for being appointed as its nominee Arbitrator, whereas in ***CORE***, the petitioner therein filed its petition under Section 11(6) of the A&C Act without taking any such step. It is further contended that the correctness of ***CORE*** has been doubted by coordinate benches of the Supreme Court in ***Union of India Vs. M/s Tantia Constructions Limited***[6] and ***JSW Steel Vs. South Western Railway & Anr.***[7] and therefore ought not to be followed. Reference has been made to various rulings of coordinate benches of this Court and other High Courts to contend that the judgment in ***CORE*** has not been universally followed in the light of the disagreement expressed in the ***Tania Constructions (supra)***.

11. *Per contra*, Mr. Chetan Sharma, learned ASG appearing for the respondent has strenuously relied upon the judgment in ***CORE*** and sought to emphasize that the same is squarely applicable to the present case.

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[5](2020) 14 SCC 712
[6][SLP (C) No. 12670 of 2020]
[7][SLP (C) No. 9462 of 2022]

12. He has submitted that in terms of the said judgment, the constitution of the arbitral tribunal must strictly be in accord with the agreement between the parties, and there is no justification for derogation therefrom. He submits that it has also been affirmed in ***CORE*** that merely because arbitrators in the panel consist of names of retired employees of the railways, the same does not make such retired employees ineligible to act as arbitrators.

ANALYSIS AND CONCLUSION

13. At the outset, it is necessary to consider the judgment of the Supreme Court in the case of ***CORE*** inasmuch as, the appointment procedure that fell for consideration in that case, is similar with the procedure involved in the present case.

14. A careful reading of ***CORE*** reveals that it purports to decide the following issues:

i. Whether an independent arbitrator/ Arbitral tribunal can be appointed without reference to the clauses of General Conditions of Contract (GCC)?

ii. Whether retired railway officers are not eligible to be appointed as arbitrators under Section 12(5) read with Schedule VII of the Act?

iii. What is the consequence of failure to act in terms of the contract in not responding within thirty days from the date of the request?

iv. Whether a General Manager, who becomes ineligible by operation of law to be appointed as arbitrator, is not eligible to nominate the arbitrator?

15. With regard to the first issue mentioned hereinabove, as to whether an independent arbitrator could be appointed without reference to or in disregard of the relevant stipulation/s contained in the GCC, it was held,

relying upon ***Union of India Vs. Parmar Construction Co.***[8] *and* ***Union of India Vs. Pradeep Vinod Construction Co.***[9] that in the facts of the said case and considering the relevant arbitration clause and the surrounding circumstances, the High Court was not justified in appointing an independent arbitrator without resorting to the procedure prescribed in the GCC.

16. As regards the second issue in ***CORE*** *viz* whether retired officers of the Railway were eligible to be appointed in view of the Section 12(5) read with Schedule VII of the Act, it was held relying upon ***Voestalpine*** (supra) and ***Government of Haryana PWD Haryana (B and R) Branch Vs. G.F. Toll Road Private Limited and Others***[10] that retired employees of the Railways were not ineligible to act as an arbitrator.

17. On the third issue as to whether the parties had failed to adhere to the relevant contractual procedure, it was found in the facts of the case that the respondent therein had taken recourse to Section 11(6) of A&C Act without adhering to the procedure prescribed under the contract and that therefore the respondent therein was not justified in contending that the right of the appellant therein to constitute the arbitral tribunal was extinguished.

18. On the fourth issue as to whether the General Manager was eligible/ineligible to nominate/ appoint an arbitrator, after taking into account the stipulation/s in the relevant arbitration clause, and the observations of the Supreme Court in ***TRF Ltd.*** (supra) and ***Perkins*** (supra) it was held as under :-

> "……

[8](2019) 15 SCC 682 : (2020) 2 SCC (Civ) 390
[9](2020) 2 SCC 464 : (2020) 1 SCC (Civ) 579
[10](2019) 3 SCC 505

> *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.*
>
> *39. There is an express provision in the modified clauses of General Conditions of Contract, as per Clauses 64(3)(a)(ii) and 64(3)(b), the Arbitral Tribunal shall consist of a panel of three gazetted railway officers [Clause 64(3)(a)(ii)] and three retired railway officers retired not below the rank of Senior Administrative Grade Officers [Clause 64(3)(b)]. When the agreement specifically provides for appointment of the Arbitral Tribunal consisting of three arbitrators from out of the panel of serving or retired railway officers, the appointment of the arbitrators should be in terms of the agreement as agreed by the parties. That being the conditions in the agreement between the parties and the General Conditions of the Contract, the High Court was not justified in appointing an independent sole arbitrator ignoring Clauses 64(3)(a)(ii) and 64(3)(b) of the General Conditions of Contract and the impugned orders cannot be sustained.*
> *……"*

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 India***[12]. 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

[11][SLP (C) No. 9462 of 2022]
[12]2022/DHC/004244

for the purpose of adjudication of other aspects which have not been purported to be answered in ***CORE***. As observed in ***Delhi Airport Metro Express Private Limited vs. Delhi Metro Rail Corporation***[13]:

> *".....*
> *33.....*
> *every judgement must be read as applicable to the particular facts proved, or assumed to be proved. The generality of the expressions which are found in a judgment cannot be considered to be intended to be the exposition of the whole law.....*
> *.....*
> *35.....*
> *ratio decidendi is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based on facts which may appear to be similar*
> *....."*

20. Two fundamental issues which fall for consideration in this case and which were not specifically answered in ***CORE***, are as under:-

i. **When appointment of arbitrator/s is to be made out of a panel prepared by one of the parties, whether the said panel is required to be "broad-based", in conformity with the principle laid down in *Voestalpine* (supra), and if so, what is the consequence where the panel is not sufficiently "broad based"** ?

ii. **Whether "counter balancing" [as contemplated in *Perkins* (supra)] is achieved in a situation where one of the parties has a right to choose an arbitrator from a panel whereas the remaining (2 out of 3) members of the arbitral tribunal are appointed by the other party?**

21. The Supreme Court in ***Voestalpine*** (supra)**,** considers in detail, an

[13](2022) 9 SCC 286

arbitration agreement which contemplates that one of the parties thereto shall provide a panel to the other side for the purpose of appointment of arbitrator(s).

22. The appointment procedure that fell for consideration in ***Voestalpine*** (supra) was noted therein as under :

> *"…….*
> *8. As per the aforesaid procedure, having regard to the quantum of claims and counter claims, three arbitrators are to constitute the arbitral tribunal. The agreement further provides that respondent would make out a panel of engineers with the requisite qualifications and professional experience, which panel will be of serving or retired engineers of government departments or public sector undertakings. From this panel, the respondent has to give a list of five engineers to the petitioner and both the petitioner and the respondent are required to choose one arbitrator each from the said list. The two arbitrators so chosen have to choose the third arbitrator from that very list, who shall act as the presiding arbitrator.*
> *……."*

23. In the context of the above procedure, ***Voestalpine*** (supra) proceeds to hold that bias or even real likelihood of bias cannot be attributed to persons of the panel simply on the ground that they were retired government or PSU employees. The Supreme Court further notes in ***Voestalpine*** that during the course of proceedings in that case, DMRC had forwarded a list of all 31 persons on its panel to the petitioner therein for the purpose of nomination by the petitioner of its nominee arbitrator, thereby giving a very wide choice to the petitioner. However, with regard to the stipulation in the concerned arbitration agreement in terms of which a list of 5 engineers from the panel was to be given to the petitioner from which the petitioner was obliged to nominate its arbitrator, the Supreme Court held as under:

> *"…….*
> *28. Before we part with, we deem it necessary to make certain*

comments on the procedure contained in the arbitration agreement for constituting the Arbitral Tribunal. Even when there are a number of persons empanelled, discretion is with DMRC to pick five persons therefrom and forward their names to the other side which is to select one of these five persons as its nominee (though in this case, it is now done away with). Not only this, DMRC is also to nominate its arbitrator from the said list. Above all, the two arbitrators have also limited choice of picking upon the third arbitrator from the very same list i.e. from remaining three persons. ***This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by DMRC. Secondly, with the discretion given to DMRC to choose five persons, a room for suspicion is created in the mind of the other side that DMRC may have picked up its own favourites. Such a situation has to be countenanced.*** *We are, therefore, of the opinion that sub-clauses (b) & (c) of Clause 9.2 of SCC need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator from the whole panel.*

……..”

24. The Supreme Court in ***Voestalpine*** (supra) also proceeded to observe as under:-

“……..

29. Some comments are also needed on Clause 9.2(a) of GCC/SCC, as per which DMRC prepares the panel of "serving or retired engineers of government departments or public sector undertakings". ***It is not understood as to why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is imperative that panel should be broadbased. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like Judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy, etc. Therefore, it would also be appropriate to include persons from this***

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

25. Thus, it was held by the Supreme Court in ***Voestalpine*** (supra) that:

i. Affording a panel of five names to the petitioner from which the petitioner was required to nominate its nominee arbitrator, was restrictive in nature; the same created room for suspicion that DMRC may have picked up its own favourite;

ii. Choice should be given to the concerned party to nominate any person from the entire panel of arbitrators;

iii. The two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator;

iv. The panel ought not to be restricted/limited to retired engineers and/or retired employees but should be broad based and apart from serving or retired employees of government departments and public sector undertakings, the panel should include lawyers, judges, engineers of prominence from the private sector etc.

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.

29. The principle laid down in ***Voestalpine*** (supra) has been followed in a large number of cases to adjudge upon validity of appointment procedure involving appointment from a panel. Thus, In ***SMS Ltd. Vs Rail Vikas Nigam Limited***[14], out a panel of 37 names, only eight names had no connection with the Railways. It was held that even though the panel comprised as many as 37 names, it was not sufficiently broadbased. In that case, a previous judgement in the case of ***Simplex Infrastructures Ltd. Vs. Rail Vikas Nigam Limited***[15] was also taken note of, in which a panel of 26 names (out of which only 9 were unconnected with the Railways) was held to be not sufficiently broad based inasmuch as the same did not comprise independent persons such as judges, lawyers, engineers of prominence from

[14] (2020) SCC Online Del 77
[15] 2018 SCC Online Del 13122

the private sector etc. The said judgements were relied upon in the case of ***Overnite Express Limited Vs. Delhi Metro Rail Corporation***[16], this court went to the extent of holding that "the procedure of forwarding a panel of five names to the other contracting party to choose its nominee Arbitrator is now held to be no longer a valid procedure."

30. Similarly, in ***BVSR-KVR (Joint Ventures) Vs. Rail Vikas Nigam Ltd.***[17], this Court *inter alia* observed as under:

> *".....*
> ***29.*** *It was Mr. Rao's plea that this Court in SMS Limited (supra) in unequivocal terms has held the arbitration clause as invalid as the same does not suffice the concept of neutrality of Arbitrators. Suffice would it be to state, that in SMS Limited (supra) this Court while dealing with the same arbitration clause in paragraph 32 has held as under:*
> *"32. There is no dispute that there are only eight members out of thirty seven in the panel provided by the respondent Company who are Officers retired from organizations other than the Railways and PSUs not connected with the Railways. The Supreme Court in Voestalpine Schienen GMBH (supra) had observed as to why the panel should not be limited to Government departments or public sector undertakings; and went on to hold that in order to instill confidence in the mind of the other party, it is imperative that apart from serving or retired engineers of government departments and public sector undertakings, Engineers of prominence and high repute from private sector should also be included, likewise panel should comprise of persons with legal background like Judges and Lawyers of repute as it is not necessary that all the disputes that arise would be technical in nature. In fact, I find in the judgment of the Coordinate Bench of this Court in Simplex Infrastructures Ltd. (supra), the respondent Company had provided 26 names with only nine being Officers who were not connected with Railways or other Railways organizations/Companies, still there being no persons with any legal, accountancy backgrounds or from other diverse fields, the Court went ahead to hold clearly that in spite of repeated judgments relying upon the judgment of the Supreme Court in Voestalpine Schienen GMBH (supra), the respondent refused to comprehensively broad base its panel and had appointed the nominee Arbitrator on behalf of the respondent in the said case. So, it must follow, that the panel of thirty seven names given by the respondent Company,*

[16]2022:DHC:3144

[17]2020 SCC OnLine Del 456

also, does not satisfy the concept of neutrality of Arbitrators as it is not broad based."

30. *From the above narration it is clear that this Court in SMS Limited (supra) has held that the panel of 37 names (in this case only five names) given by the respondent Company does not satisfy the concept of neutrality of Arbitrators as it is not broad based as contemplated by the Supreme Court in the case of Voestalpine Schienen GMBH (supra). The said conclusion is squarely applicable in this case as the respondent Company has not even shown that they have broad based the panel keeping in view the mandate of the Supreme Court in Voestalpine Schienen GMBH (supra).*

……..

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.*

……"

31. Again in ***Consortium of Autometers Alliance Ltd. and Canny Elevators Co. Ltd. Vs. Chief Electrical Engineer/Planning, Delhi Metro Rail Corporation & Ors.***[18], in the context of the panel that fell for consideration in that case, this Court observed as under :

"……..

33. There is no dispute that out of the 51 names provided, there are 26 retired Judges, 22 public sector engineers and three public sector accountants / financial professionals. No doubt, the panel do not have persons like lawyers of repute or accountants / financial professionals or engineers from the private sector but the panel consisting of 51 names is ten times the initial panel of five names provided by the Respondent. The dispute between the parties is with regard to the Service Tax. Surely, with 26 retired Judges on the panel and also

[18] 2021:DHC:68

persons, who are serving / retired from public sector undertakings like Railways / RITES / RVNL other than the respondent Delhi Metro Rail Corporation and it was held by the Supreme Court in Voestalpine Schienen GMBH (supra) that panel consisting of names of persons, who have retired from other public sector undertakings will not be a ground to challenge it under Section 12(5) of the Act or relevant Schedules therein, this Court is of the view that arguments as advanced by Mr. Wadhwa are not sustainable in the facts of this case. Further, I note that the petitioner has nominated a retired Judge of the High Court as its nominee arbitrator and not a person with finance background. Merely because the Respondent could have further broad based the panel cannot be a ground to hold that the current panel of 51 names is not broad based when it consists of names of 26 retired High Court / District / Additional District Judges and serving / retired officers of the other Public Sector Undertakings.

34. In fact, the Supreme Court in Voestalpine Schienen GMBH (supra) has not disapproved the procedure of preparing a panel of arbitrators, for appointing arbitrators to adjudicate the disputes between the parties. The ratio of the judgment of the Supreme Court in Voestalpine Schienen GMBH (supra) is that a party must have a wider choice for nominating its arbitrator from the panel. I am of the view, the panel now prepared by the Respondent having 51 names is broad based and the petitioner has a wider choice to choose its nominee arbitrator. If the plea of Mr. Wadhwa has to be accepted and the prayers made in the petition are granted, it shall make the panel and the procedure contemplated in the GCC redundant, which is impermissible. I also state that the reliance placed by Mr. Wadhwa on the judgment of SMS Ltd. (supra) is misplaced. The said judgment is clearly distinguishable as the subsequent panel produced by the respondent therein was clearly not broad-based owing to the presence of only 8 members out of 37 in the panel provided, who were officers retired from organization other than Railways (respondent therein) and Public Sector Undertakings connected with Railways whereas in the panel in hand, the 26 names include retired Additional District Judges / District Judges / High Court Judges.

……"

32. In ***M/s Singh Associates*** (supra) it was observed by this Court as under:-

"…..

34. No doubt, the respondent has stated in their reply that it can appoint a retired employee, but they have not placed before this Court, any names/panel prepared by them in terms of the Judgment of the Supreme Court in the case of Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd., Arbitration Petition (Civil) No. 50 of 2016, wherein it is held that a party cannot, on their own, appoint a retired employee to be an arbitrator without giving a choice of more than one retired employee to enable the other party to agree to one name from

amongst the panel, who can act as an arbitrator. Regard must be had to the direction of the Supreme Court in Voestalpine Schienen GMBH (supra), wherein it is held as under:

> *"28. Some comments are also needed on the clause 9.2(a) of the GCC/SCC, as per which the DMRC prepares the panel of 'serving or retired engineers of government departments or public sector undertakings'. It is not understood as to why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is imperative that panel should be broad based. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy etc. Therefore, it would also be appropriate to include persons from this field as well."*

35. In the absence of any submission/stand that such a panel has been prepared which inter alia includes retired employees of the respondent, this Court has no other alternative but to allow the present petition seeking appointment of an Arbitrator.

……"

33. This court in ***Gangotri Enterprises Ltd. Vs. General Manager Northern Railways***[19], in the context of an identical procedure for appointment in the context of a railways contract, taking note of the judgments passed in ***CORE*** (supra), ***Voestalpine*** (supra)**,** ***M/s Tantia Constructions Limited*** (supra), ***BVSR-KVR (Joint Ventures)*** (supra) and ***SMS Ltd. Vs. Rail Vikas Nigam Limited***[20]**,** *inter-alia,* held as under:-

> *"…….*
>
> *31. In the present cases, it is seen that the panel of arbitrators as sent by the respondent contained only four names, which cannot be considered to be broad based by any extent of imagination. Thus, the said panel as given by the respondent does not satisfy the concept of neutrality of arbitrators as held by Supreme Court in the case of Voestalpine Schienen GMBH (supra). Further, as*

[19] 2022:DHC:4520
[20] 2020 SCC OnLine Del 77

already noted, Supreme Court has already given a prima facie view with respect to correctness of the judgment in the case of Central Organisation for Railway Electrification (supra), wherein a similar clause was considered and has passed reference order for constituting a larger Bench to look into the correctness of the said judgment. In view thereof, it is held that the petitioner herein was within its right to nominate its Arbitrator.
……"

34. Again in ***L&T Hydrocarbon Engineering Limited Vs. Indian Oil Corporation Limited***[21] it was held as under :-

"……..
96. In the present case, the stipulation requires forwarding three names (even if they are retired employees from other organizations and not IOCL) to the petitioners, for it to choose one name amongst them to act as the Sole Arbitrator. It cannot be overlooked that the list of three names is a restrictive panel limiting the choice of the petitioner to only three options. I have noted that the three persons named in the panel forwarded to the petitioner are retired officers of different organisations like ONGC, SAIL and GAIL. The integrity and impartiality of these officers could not be normally doubted. However, in the absence of a free choice given to the petitioner to choose the arbitrator from a broad and diversified panel, and the power conferred upon the respondent to forward any three names as the panel at its discretion, there is a possibility of apprehension arising on part of the petitioner about the impartiality of the persons in the panel so forwarded. Whether such an apprehension is justified or not, is not for this Court to decide, and is, in any case, immaterial. It is settled law that even an apprehension of bias of an arbitrator in the minds of the parties would defeat the purpose of arbitration, and such a situation must be avoided.
97. Therefore, I declare that the procedure for appointment of the arbitrator (if any) shall necessarily be in terms of the observations of the Supreme Court in Voestalpine Schienen GmBH (supra).
98. It is directed that in view of my conclusion in paragraph 80, the General Manager concerned shall consider the claims of the petitioner and take a decision whether they are to be notified or not, within eight weeks from today. Thereafter, the parties shall proceed in accordance with law.
……"

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

[21]2022/DHC/004531

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.

37. This brings us to the next issue that arises in the context of the arbitration clause in the present case, viz. **whether "counter balancing" is achieved in a situation where one of the parties has a right to choose an arbitrator from a panel whereas 2/3rd of the members of the arbitral tribunal are appointed by the other party.**

38. In ***TRF Limited*** (supra), it was observed by the Supreme Court as under:-

> *"50.....At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstances can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto.*
> *……."*

39. Also in ***Perkins*** (supra), the Supreme Court observed as under:-

> *".....*
> *21.....The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution…*
> *....."*

40. In the light of the aforesaid observations in ***TRF*** (supra) and ***Perkins*** (supra), it was observed by the Supreme Court in ***CORE*** as under:

> *".....*
> *37.....Thus, the right of the General Manager in formation of the Arbitral Tribunal is counterbalanced by the respondent's power to choose any two from out of the four names and the General Manager shall appoint at least one out of them as the Contractor's nominee.*
> *38. .....Thus, the power of the General Manager to nominate the arbitrator is counter balanced by the power of the respondent to select any of the two nominees from out of the four names suggested from the panel of the retired officers. In view of the modified clauses 64(3) (a) (ii) and 64 (3) (b) of GCC, it cannot therefore be said that the General Manager has become ineligible to act as (sic nominate) the arbitrator. We do not find any merit in the contrary contention of the respondent. The decision in TRF Ltd. is not applicable to the present case.*
> *……."*

41. The fulcrum of ***CORE*** is that the right of one of the parties to prescribe a panel of persons from which the parties would appoint their nominee arbitrators is counter balanced by the power of other contracting party to choose therefrom. However, whether counter balancing can be achieved in a situation where one of the contracting parties has a right to

appoint the remaining 2/3rd of the members of the arbitral tribunal, was not specifically considered in ***CORE***. The said issue came to be considered by a coordinate bench of this Court in ***M/s CMM Infraprojects Ltd. Vs. IRCON International Ltd.***[22] 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 Limited9 , 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 Limited4 . 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*

[22]2021:DHC:2578

> *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 Limited4 ."*
>
> *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 Vs. Union of India***[23]**,** 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 – 'M/s. 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.*

[23]Order dated 16.12.2021 in ***Pankaj Mittal Vs. Union of India*** ARB.P. 607/2021

……..”

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.

43. In the circumstances, the prayer of the Petitioner seeking appointment of an independent, impartial Arbitral Tribunal to adjudicate the disputes between the petitioner no.1 and the respondent, is allowed. The agreement between the parties contemplates a three member Arbitral Tribunal. Accordingly, Justice (Retd.) Dr. A. K. Sikri, Former Judge, Supreme Court of India, (Mobile No. 9818000300) is appointed as the Petitioner’s nominee Arbitrator; Mr. Justice (Retd.) M.R. Shah, Former Judge, Supreme Court of India (Mobile No. 9825049081) is appointed as the nominee Arbitrator of the Respondent. The two arbitrators shall now concur to appoint the third Arbitrator/ presiding Arbitrator within 30 days of the date of service of this order.

44. In the event, the Arbitrators are unable to concur on the name of the third/ presiding Arbitrator, the parties shall be at liberty to approach the Court.

45. The parties are directed to appear before the Arbitral Tribunal as and when constituted.

46. Needless to say, the Arbitrators shall make the necessary disclosure(s)

as required under Section 12 of the Act. The Arbitrators shall fix their fees in consultation with the parties.

47. It is clarified that the Court has not examined any of the claims/ contentions of the parties on the merits of the substantive disputes/s; and all rights and contentions in this regard are left open. Both the parties shall be free to raise their claims/counter claims before the Arbitral Tribunal in accordance with law.

48. With the above directions, the present petition is disposed of.

JULY 10, 2023 **SACHIN DATTA, J**
rohit