

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMMERCIAL ARBITRATION APPLICATION NO.135 OF 2017

Afcons Infrastructure Limited)....Applicant
V/s.
Konkan Railway Corporation Limited)....Respondent

Mr.Naushad Engineer a/w Ms.Meenakshi Iyer and Ms.Kranti Khatu
I/by Advaya Legal for the applicant.
Ms.Kiran Bhagalia I/by Chitra Phadke for respondent.

**CORAM : K.R.SHRIRAM,J
DATE : 23.10.2018**

P.C.:-

1. This petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 as amended (the Act).
2. The facts in this case are rather peculiar in as much as disputes have not arisen between the parties.
3. The chronology of dates and events are as under :-

Sr. No.	Date	Events
1.	19/10/2015	Respondent floated a tender vide Tender Notice No. KR/PD/J&K/ HO/Tender/Bridges /9/2015 for the work of "Construction of Bridge No. 34, 38, 39, 40, 41, 42, 43, 53, 55, 56, 57, 58, 59, 85, 87 and 88 on Katra - Dharam Section of Udhampur-Srinagar-Baramulla Rail Link Project in the State of Jammu & Kashmir" (" the project work ").
2.	1/02/2016	Applicant submitted its bid.
3.	16/03/2016	Applicant's bid came to be accepted by respondent
4.	28/03/2016	A contract bearing No. KR/PD/J&K/

		HO/Bridges/7/2016 was executed between applicant and respondent. Clauses 54, 55, and 56 provide for mechanism for dispute resolution by referring the disputes to a Standing Arbitral Tribunal ("SAT")
5.	20/06/2016	Respondent in terms of clause no. 55.1 of Special Conditions of Contract sent the details of the panel of four officers for nomination as Arbitrators. The first three officers were serving officers of Northern Railway and fourth one was a retired executive of the Railway Board. Respondent requested applicant to suggest two names to enable them to nominate applicant's nominee.
6.	04/07/2016	Applicant objected to the names contained in the panel of arbitrators as they were existing and former employees of respondent and appointing them would be in violation of Section 12 of the Arbitration and Conciliation Act, 1996 as amended by the Amendment Act of 2015 (" Amended Act "). Applicant appointed Mr. Santanu Basu Rai Chaudhuri to be its nominee arbitrator and called upon respondent to nominate its Arbitrator within a period of 30 days.
7	14/7/2016	Respondent replied to the applicant's letter dated 4 th July 2016. Respondent called upon applicant to revert with nomination of two officers mentioned in its letter dated 20 th June, 2016
8	03/08/2016	Applicant replied to respondent's letter dated 14 th July, 2016. Applicant reiterated what was mentioned in its letter dated 4 th July, 2016 and stated that the appointment procedure under the Contract was in violation of the Amended Act and therefore void under the Contract Act, 1872
9	22/08/2016	Respondent replied to applicant's letter dated 3 rd August, 2016. Respondent objected to the contents of applicant's letter and referred to the Proviso to Section 12 of the Amended Act. Respondent stated that Clause 55.1 of the Contract was agreed upon and signed by both the parties willingly after sub-section 5 of Section 12 came into force. Accordingly, Clause 55 of the Contract was valid.
10	19/06/2017	Applicant informed respondent that in a similar case AFCONS Infrastructure Ltd. Vs. Rail Vikas Nigam Limited, the Hon'ble Delhi High Court upheld appointment of independent and impartial Arbitral Tribunal. Applicant once again called upon respondent

		to appoint its arbitrator.
11	11/08/2017	Respondent once again refuted the contentions of applicant and called upon applicant to suggest the names from the panel. Respondent, however, forwarded the entire panel of serving and retired employees in purported compliance of the Supreme Court decision in Voestalpine V/s.Delhi Metro case. <u>Respondent threatened applicant that on failure to do so within 2 weeks from the date of receipt, respondent shall proceed with the appointment of the Arbitral Tribunal.</u>
12	19/08/2017	Applicant once again informed respondent that the appointment procedure as well as the qualifications of the arbitrators mentioned in the Contract was hit by Section 12(5) of the Amended Act read with the Seventh Schedule. The panel suggested by respondent was not in compliance with the judgment of the Hon'ble Supreme Court and on account of failure to appoint its nominee arbitrator, applicant shall be initiating appropriate proceedings for appointment of arbitrator.

4. Applicant has approached this court under Section 11 in view of the threat by respondent in its communication dated 11.8.2017 that it shall proceed with the appointment of the Arbitral Tribunal. Under the contract, this Arbitral Tribunal shall continue during the duration of contract and the applicant in case of dispute will require to raise disputes once in six months.

5. Admittedly, there is valid and subsisting arbitration agreement. The arbitration agreement and procedure for appointing the arbitrators is rather peculiar and the same reads as under :-

“55.0 Standing Arbitral Tribunal

55.1 *The Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below JA grade, or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer as the Arbitrators. The SAT shall be formed within **three months** from the date of the execution of the Contract. For this purpose, the Corporation will send a panel of more than 3 (Three) names of Gazetted Railway Officers of one or more departments of the Railway, which may also Include the name(s) of retired Railway Officers to the contractor from the panel approved by Northern Railway. Within two weeks from the receipt of the list, the contractor shall intimate in writing two names from the said list to the Chairman and Managing Director, KRCL. The Chairman and Managing Director, KRCL shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators from the panel approved by Northern Railway duly indicating the presiding arbitrator from amongst the 3 arbitrators so appointed. While nominating the Arbitrators, it will be necessary to ensure that one out of them is from the Accounts department.*

55.2 *If the contractor fails to select the members from the approved panel within **14 (Fourteen) days** of the date of the receipt of the said approved panel, the Corporation shall immediately in writing inform this fact to the Chairman and Managing Director, KRCL. On receipt of this information, the Chairman and Managing Director, KRCL shall within two weeks, appoint one Arbitrator from the list of arbitrators given to the contractor.*

55.3 *If one or more of the Arbitrators appointed refuses to act as Arbitrator, withdraws from his office as Arbitrator, or vacates his office or is unable or unwilling to perform his functions as Arbitrator for any reason whatsoever or dies or in the opinion of the Chairman and Managing director of KRCL, fails to act without undue delay, the Chairman and Managing Director shall terminate the mandate of such Arbitrator and thereupon new Arbitrator shall be appointed In the same manner, as the outgoing Arbitrator had been appointed.*

55.4 *In the specific cases of any misconduct by any of the members of the TRIBUNAL, the parties shall have the right to specifically bring it to the notice of the TRIBUNAL such conduct, through a statement filed with necessary documents in proof of such misconduct and the TRIBUNAL, after taking NOTICE of such conduct initiate the replacement of the member concerned, in the same manner the member to be replaced was appointed.*

55.5 Reference to Arbitration :

55.5.1 *In partial modification of Clause 43 of GCC, the Contractor*

has to prepare and furnish to the Engineer-in-charge and to Chief Engineer of Project, once in every six months an account giving full and detailed particulars of all the claims for any additional expenses, to which the Contractor may consider himself entitled to and all extra or additional works ordered by the engineer which he has executed during the preceding six months. If any dispute has arisen as regards execution of the works under the contract, while submitting the said half yearly claims, the contractor shall give full particulars of such dispute in the said submission. After signing Contract Agreement, within 6 months, contractor shall submit all the claims from the date of award of contract in first submission of claims.

55.5.2 *The Contractor will submit a copy of the half yearly claims under 55.5.1, to Chief Engineer, along with particulars of any other disputes which may have arisen between the parties in respect of the execution of the Contract to the Arbitral Tribunal.*

55.5.3 *The parties shall submit all the relevant documents in support of their claims and the reasons for raising the dispute to the TRIBUNAL.*

55.5.4 *If the claims made by the Contractor in the said submission to Chief Engineer, is refuted or the payment is not made within one month from the date of the submission of the said half yearly claims, a dispute would be deemed to have arisen between the parties. The contractor, within one month from the date when the dispute arises or is deemed to have arisen, will communicate to the Arbitral Tribunal on a half yearly basis of the said refusal/non payment. The said communication will be the reference of the dispute to the ARBITRAL TRIBUNAL appointed under the present agreement.*

55.5.5 *The said claims of the contractor so referred to ARBITRAL TRIBUNAL so far it relates to the disputed claims, shall be treated as Statement of Claims of the Contractor and the ARBITRAL TRIBUNAL shall call upon the KRCL to submit its reply. The ARBITRAL TRIBUNAL after giving an opportunity of being heard to both the parties, decide the dispute within a period of four months from the date of communication of the dispute under clause 55.5.3 above. The Arbitral Tribunal will pass a reasoned award in writing, while deciding the Dispute. Once the award is declared, the Arbitral Tribunal cannot review the same except what is permissible in terms of provisions contained in Arbitration and Conciliation Act, 1996. The parties shall be entitled to the remedies under the Arbitration and Conciliation Act 1996 or any amendment thereof.*

55.5.6 *The parties agree that all the claims of any nature whatsoever, which the contractor may have in respect of the work of the preceding six months, should be made In the said Statements of half yearly claims. If the Contractor does not raise the claim, if any, arising from the work done in the, preceding six months in the*

statement of half yearly claim, to Engineer in Charge and Chief Engineer, the Contractor shall be deemed to have waived and given up the claims. The ARBITRAL TRIBUNAL shall not entertain any such disputes, which have not been raised in the statement of half yearly Claim before the Chief Engineer/Engineer-in-Charge and such claims will stand excluded from the scope of arbitration and beyond the terms of reference to the ARBITRAL TRIBUNAL.

55.5.7 The parties agree that where the Arbitral award is for payment of money, no interest shall be payable on the whole or any part of the money for any period till the date on which the award is made.

55.5.8 After receiving the intimation from the KRCL that the final bill Is ready for payment, the Contractor shall within 60 (sixty) days of such Intimation make a detailed statement of claims If any arising after the submission of the last half yearly statement mentioned in **clause 55.5.1** above, to the KRCL. If the claim is refuted or the payment is not made within 3 (three) months from the receipt of the said statement, a dispute would be deemed to have arisen in respect of such claims, which will be decided by the ARBITRAL TRIBUNAL in the same manner as **clause 55.5.4, 55.5.5 and 55.5.6** above. If no such claims are raised, the contractor would be deemed to have no claims.

55.6 General Terms

55.6.1 The Arbitral Awards shall be implemented by both the parties unless challenged under the provisions of the Arbitration Act 1996.

55.6.2 The Obligations of the Employer, the Engineer-in-charge and the Contractor shall not be altered by reasons of arbitration being conducted during the progress of works. Neither party shall be entitled to suspend the work on account of arbitration and payments to the Contractor shall continue to be made in terms of the contract and /or as awarded (except when Award is challenged in the Court in which case the payments would be as per the court's orders)

55.6.3 The provisions of the Arbitration and Conciliation Act 1996, with statutory modifications thereto will apply to the Arbitration proceedings under this agreement.

55.6.4 Subject to the contents of the foregoing clauses, all the disputes which may arise between the parties In connection with or arising out of the Contract or the execution of the Works, whether during the execution of works or after their completion and whether before or after the repudiation or after termination of contract, shall be referred to the **ARBITRAL TRIBUNAL** appointed under this agreement. The **ARBITRAL TRIBUNAL** shall decide the disputes in accordance with the terms of the **PRINCIPAL CONTRACT** excluding excepted matters defined in GCC and/or in

Principal Contract Agreement, which fall beyond the jurisdiction of Arbitrators and matters which under the terms of the Contract attain finality.

55.6.5 *The **ARBITRAL TRIBUNAL** shall remain in force during the entire period the **PRINCIPAL CONTRACT** is in force and until the closure of the **PRINCIPAL CONTRACT** with the final no claim certificate, which will be filed with **ARBITRAL TRIBUNAL**. However, the time limitation for filing final list of claims is governed by **clause 55.5.8** above. The agency shall **submit no claim certificate** except for the claims raised **during earlier half** yearly claims.*

55.6.6 *The Arbitral Tribunal shall conduct the Arbitration proceedings at Mumbai/Delhi or any other convenient venue which shall be decided by KRCL.*

55.6.7 *The cost of arbitration shall be borne equally by the respective parties. The cost shall inter-alia include fee of the arbitrators as per the rates fixed by the Konkan Railway Corporation Limited from time to time.”*

Applicant is unhappy mainly with parts of clauses 55.1 to 55.4 because the Arbitration clause stipulate that :

(i) Tribunal shall consist of 3 Gazetted Railway Officers not below JA grade or 2 Gazetted Railway Officers not below JA grade and a retired Railway Officer, retired not below the rank SAG officer as the Arbitrators ;

(ii) Respondent was to send more than 3 names from out of its panel of Gazetted railway officers of one or more departments of the Railway, which may also include the panel approved by the Northern Railway ;

(iii) Applicant had to select 2 of the names proposed by respondent and communicate that to the Chairman and Managing Director (CMD) of Respondent ;

(iv) Respondent's CMD will select 1 out of the 2 as applicants' nominee and would also nominate the other 2, from the panel approved by the Northern Railway indicating the presiding arbitrator from amongst the 3 arbitrators ;

(v) This was to be Standing Arbitral Tribunal and all claims are to be referred to it.

JA = Junior Accounts Grade

SAG = Senior Accounts Grade.

Clauses 54 and 56 are also relating to dispute resolution, but not relevant for the moment.]

6. The main issue that arises for consideration before this court is, *whether the contention of respondent that applicant must chose from the panel of 31 serving or retired railway officers, of which more than 3 names will be recommended by respondent and out of these names recommended, applicant has to chose 2 names and out of these 2 names, respondent's Managing Director will decide which one will be applicant's arbitrator and thereafter appoint 2 more persons as per his choice to make it a panel of 3 arbitrators and he will also decide who of the 3 will be the Presiding arbitrator, is legally sustainable in view of the judgment of the Apex Court in Voestalpine Schienen GMBH vs.*

Delhi Metro Rail Corporation Limited.¹

1. (2017) 4 SCC 665

7. Ms.Bhagalia appearing for respondent stated that the applicant having entered into an agreement that contains clause-55 cannot ask for deletion of that clause but perhaps can seek expansion of the panel of arbitrators from which the applicant has to chose and she could recommend that to respondent, particularly as it was so suggested by the court. I did express to Ms.Bhagalia, that certain portions of clause 55 does appear to violate the recommendations and findings in *Voestalpine* (supra).

Mr.Engineer appearing for applicant, on instructions, stated that if respondent is willing to expand the list of arbitrators to include, apart from serving or retired engineers of railways or government departments and public sector undertakings, then 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, and also persons with accounting/finance background. In such a case, applicant will have no objection. Of course, Mr.Engineer also stated that even from this panel, respondent cannot recommend 3 or 4 persons and direct applicant to select only from those 3 or 4 persons. Mr.Engineer states that respondent can give complete list and it should be left to the absolute discretion of applicant to nominate arbitrator of its

choice. According to Mr.Engineer part of clause-55.1, which states that the managing director of the respondent shall indicate who shall be the presiding arbitrator also falls foul of section 11(3) of the Act. Mr.Engineer submitted that under sub-section 3 of section 11, in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two appointed arbitrators shall appoint third arbitrator who shall act as the presiding arbitrator. Mr.Engineer also adds that if respondent appoints any one from the list of 31 names already recommended or any one who might be connected to Railways as its arbitrator as presiding arbitrator, even that might fall foul of section 12(5) of the Act and they could be disqualified. Mr.Engineer, citing *Voestalpine* (supra), submitted that none of the 35 persons in the list provided by DMRC, even though were not employees of DMRC and not even connected to DMRC, still the Supreme Court observed that even they get disqualified as they were government/ex-government employees.

8. The Apex Court in its land mark judgment of *Voestalpine* (supra) was dealing with a similar situation and the question that was decided was whether the panel of arbitrators prepared by respondent therein violated amended provision of section 12 of the Act. Respondents' case in that matter can be found in paragraph-11 and the petitioners' case and the learned Attorney General's submissions can be

found in paragraphs-12 and 13, respectively, which read as under :-

“11. The respondents have contested the petition by filing its detailed reply, inter alia, taking upon the position that in view of the specific agreement between the parties containing arbitration clause, which prescribes the manner in which the Arbitral Tribunal is to be constituted, the present petition under Section 11(6) of the Act is not even maintainable. The respondent maintains that arbitration agreement as per which the Arbitral Tribunal is to be constituted from the panel prepared by the respondent does not offend provisions of Section 12 of the Act as maintained in the year 2015. It is submitted that the agreement is valid, operative and capable of being performed and the arbitrators proposed by the respondent are not falling in the category of “prohibited clause” as stipulated in under Section 12(5) of the Act read with Clause 1 of the Seventh Schedule thereto. As per the respondent, since the arbitration involves adjudication of technical aspects, the respondents have proposed the panel of retired engineers of the Government having requisite expertise to arbitrate the subject matter. They are neither serving nor past employees of DMRC and have no direct or indirect relations with DMRC. Therefore, they are capable of arbitrating the subject matter without compromising their independence and impartiality.

12. In support of the aforesaid plea taken in the petition, Mr. Gopal Jain, learned Senior Counsel appearing for the petitioner submitted that the entire ethos and spirit behind the amendment in Section 12 by the Amendment Act, 2015 were to ensure that the Arbitral Tribunal consists of totally independent arbitrators and not those persons who are connected with the other side, even remotely. He submitted that Respondent 1 i.e., DMRC was public sector undertaking which had all the trappings of the Government and, therefore, even those persons who were not in the employment of DMRC, but in the employment of the Central Government or other government body/public sector undertakings should not be permitted to act as arbitrators. He submitted that the very fact that the panel of the arbitrator consisted only of “serving or retired engineers of government departments or public sector undertaking” defied the neutrality aspect as they had direct or indirect nexus/privity with the respondent and the petitioner had reasonable apprehension of likelihood of bias on the part of such persons appointed as arbitrators, who were not likely to act in an independent and impartial manner.”

13. Mr. Mukul Rohatgi, learned Attorney General justifying the stand taken by the respondent, with the aid of the provisions of the Act and the case law, also drew attention to a subsequent development. He pointed out that though in its earlier letter dated 8-7-2016 addressed by the respondent to the petitioner, a list of persons was given asking

the petitioner to choose its arbitrator therefrom, the respondent has now forwarded to the petitioner the entire panel of arbitrators maintained by it. This fresh list contains as many as 31 names and, therefore, a wide choice is given to the petitioner to nominate its arbitrator therefrom. It was further pointed out that many panelists were the retired officers from Indian Railways who retired from high positions and were also having high degree of technical qualifications and experience. The said list included five persons who were not from the Railways at all but were the ex-officers of the other bodies like, Delhi Development Authority (DDA) and Central Public Works Department (CPWD). No one was serving or ex-employee of DMRC. He further submitted that merely because these persons had served in the Railways or other government departments, would not impinge upon their impartiality."

9. The case of applicant and respondent, in the present case, are also similar to the submissions made by applicant and respondent in *Voestalpine* (supra).

10. In addition, Ms.Bhagalia submitted that the applicants' bid came to be accepted by respondent vide letter of acceptance dated 16.3.2016 and the contract was executed on 28.3.2016 and therefore, the applicant is also deemed to have waived the applicability of sub-section 5 of Section 12 of the Act.

11. My observations below are to make organization like respondent to stop having restrictive clauses like clause 55 but have a more inclusive clause for dispute resolution. Despite the observations of the Apex court in *Voestalpine* (supra), if public sector organizations like respondent have such repressive one sided clauses for dispute resolution, I will not be surprised, in future, if they have clauses under which respondent will decide who will be the Lawyer to represent

contractors like applicant. If Government organisations and PSUs change their attitude, it would also save substantial judicial time.

12. Before we proceed further, it will be also useful to reproduce sub-section 5 of section 12 of The Arbitration and Conciliation Act, 1996 which reads as under :-

“12. Grounds for challenge-

(1).....

(2).....

(3).....

(4).....

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator.

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

13. It will also be useful to reproduce paragraph-60 of the Law Commission Report which reads as under :-

“60. The Commission, however, feels that “real” and “genuine” party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective “justifiable doubts” regarding his independence and impartiality. To deal with such situations, the Commission has proposed to proviso to Section 12(5), where parties may, “subsequent to disputes having arisen between them”, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all other cases, the general rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(5) and in which context the High Court or the designate is to have “due regard” to the contents of such disclosure in appointing the arbitrator.”

14. So far as the objection raised by Ms.Bhagalia that the applicant has waived the applicability of sub-section 5 of section 12, in my view, Ms.Bhagalia is not correct. This is because the proviso is applicable only to a situation where a party has waived the applicability of section 12(5) “subsequent to disputes having arisen between them”. As noted earlier, disputes are yet to arise between the parties. Therefore, by signing the contract with clause-55, in my view, applicants have not waived sub-section 5 of section 12 of the Act. Moreover, this is not a family dispute or where a person commanding blind faith and trust of the parties is being appointed despite the existence of objective “justifiable doubts”.

15. When one considers clause-55, it clearly violates, in letter and spirit, the judgment of the Apex Court in *Voestalpine* (supra). We are not discussing those who are on the panel of arbitrators but in my prima facie view each person from the list may be ineligible even if anyone from the list of 31 provided by respondent is appointed as an arbitrator by either of the parties.

16. The arbitration clause stipulates that Tribunal shall consist of three Gazetted Railway officers or two Railway Gazetted Officers not below JA grade and a retired Railway officer, retired not below the rank of SAG officer of the Railway. Applicant has to select and

forward, two of the more than 3 names proposed by respondent to the CMD of respondent and the CMD will select one out of two, as applicant's nominee and also appoint the other two from the panel approved by Northern Railway and also indicate who amongst the three arbitrators will be the Presiding arbitrator. This has to be standing arbitral Tribunal for the duration of the contract.

17. The contract relates to the 290 k.m. of Jammu-Udhampur-Srinagar-Baramulla Rail link (USRBL) project that is being constructed by Indian Railways as National Project for the State of Jammu & Kashmir. The Katra-Qazigund (148 km) is divided among 3 agencies i.e., Northern Railway, KRCL, IRRCON. The contract in this matter is relating to KRCL's (respondent) scope of work for 67 k.m. KRCL (respondent) is a Central Public Enterprise under Ministry of Railway. Government of India has entrusted this part of USRBL project to KRCL through Northern Railway. Contract has been executed between the KRCL(respondent) and Northern Railway on 9.8.2005 and KRCL is executing this project in terms of the said agreement on behalf of northern railway. Applicant is appointed by KRCL as a contractor/sub-contractor in this project. The organization structure of Indian Railways as it appears in the Indian Railways website, an extract of which is at Annexure-`C' to the application, is as under :-

18. At 'Annexure-D' of further affidavit on behalf of applicant is a letter dated 15.10.2009 from Government of India, Ministry of Railways (Railway Board) to General Managers of All Indian Railways which provides that General Managers of all Railways have power to sanction honorarium to Gazetted Railway servants appointed to act as arbitrators at Rs.10,000/- per month and the General Manager has power to sanction fee to retired railway officer appointed as arbitrators upto Rs.75,000/- per case. Therefore, the arbitrators to be appointed by applicant will also be getting honorarium from respondent, though Ms.Bhagalia submitted that cost will be shared between the parties.

19. Also at Annexure-E of further affidavit on behalf of applicant is a letter dated 14.11.1996 from Railway Board to all GMs,CAO/Cs regarding appointment of retired railway officers as arbitrators. This gives guidelines for appointment of retired railway officers as arbitrators and other conditions. Under this even the arbitrator to be appointed by a contractor will be paid TA/DA by Railways. How can one party pay TA/DA for an arbitrator of the other party ? Further clause 8 of the said Guidelines reads as under :-

“G.M. will keep watch on the performance of the arbitrator and if the G.M. finds that the arbitrator does not appear to be fair, he may consider deleting the arbitrator's name from the panel for the subsequent

period.”

Therefore, the G.M. of Railways (on behalf Indian Railways this contract is being executed) will keep a watch on the performance of the arbitrator and will review their performance annually. This will mean that even if the arbitrator's integrity may not be questioned he will constantly be worried of not upsetting the G.M.

20. Therefore, even if the panel of 31 names recommended by respondent does not contain anyone who are employees of KRCL or ex-employees of KRCL (respondent) still all of them would fall under the common control of the Railway Board- Indian Railways, as per the organization structure given above.

21. Paragraph nos.27, 28, 29 & 30 of ***Voestalpine Schienen GMBH*** (supra) read as under :-

“27. As already noted above, DMRC has now forwarded the list of all 31 persons on its panel thereby giving a very wide choice to the petitioner to nominate its arbitrator. They are not the employees or ex-employees or in any way related to DMRC. In any case, the persons who are ultimately picked up as arbitrators will have to disclose their interest in terms of amended provisions of section 12 of the Act. We, therefore, do not find it to be a fit case for exercising our jurisdiction to appoint and constitute the Arbitral Tribunal.

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.

29. Some comments are also needed on Clause 9.2(a) of GCC/SCC, as per which DMRC prepare 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 instill 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.”

22. *Voestalpine* (supra) was delivered by the Apex Court way back on 10.2.2017. More than 20 months have passed since then. I can understand the contract was entered into before this decision in *Voestalpine*. But nothing prevented respondent to take the cue from *Voestalpine* and talk to applicant to revise clause 55. Not only respondent has not taken that initiative (they may or they may not) but even now the so-called broad based panel of respondent are only having names of those who were either connected with railways or PSU. It does not contain names of engineers of prominence and high repute from private sector. They should also be included. Likewise panel should comprise of persons with legal background like Judges and lawyers, people having knowledge and expertise in accountancy etc. The panel of arbitrators maintained by respondent is, therefore, in my opinion, not in conformity with the judgment of the Supreme Court of India in *Voestalpine* (supra). Not only the panel recommended is not in conformity with *Voestalpine* (supra), even the procedure of appointment of arbitrator as prescribed in clause-55 is totally wrong. I cannot accept that one of the party to the agreement will recommend four names from the panel, thereby limiting their choice, which means there is no free choice, and the other party has to select and forward two names from those four names to Managing Director of the other party to decide who will be the first party's

arbitrator. Further, with the discretion given to KRCL to choose more than 3 names, a room of suspicion is created in the mind of other side that KRCL may have picked up its own favorites. Such a situation has to be countenanced. This procedure, therefore, certainly falls foul of the requirement of neutrality of arbitrators. I also agree with Mr. Engineer that the part in the arbitration clause which empowers the Chairman and Managing Director of respondent to even appoint the presiding arbitrator is violative of section 11(3) of the Act. The two arbitrators appointed by the parties shall decide who shall be the presiding arbitrator.

23. Further clause 55.4 of the Contract also provides that if there is a complaint of misconduct against any of the members of the Tribunal, the same shall be brought to the notice of the Tribunal and the Tribunal will initiate the replacement of the member concerned in the same manner the member replaced was appointed. This proposition also is contrary to provisions of Section 14 of the Act. All these show clause-55 will fall foul of the judgment of the Apex Court in *Voestalpine* (supra).

24. In the circumstances, I would expect respondent to rework on clause 55 and discuss with applicant to amend that clause or prepare a broad based panel of arbitrators consisting of engineers of prominence and high repute from private sector, persons with legal

background like Judges and lawyers, people having knowledge and expertise in accountancy etc. Respondent shall, while deciding the broad based panel, keep in mind the true spirit and intent of the word “broadbased panel”. I would suggest broadbased would mean at least eight to ten names under each category.

25. Respondent shall also not decide who will be the arbitrator to be appointed by applicant. Respondent, once it prepares the broad based panel of arbitrators, shall only forward those names to applicant and it will be open for applicant, i.e., the applicant will have a free choice, to decide who shall be its nominated arbitrator. It will be open to respondent to decide who will be its arbitrator and the two arbitrators shall appoint the presiding arbitrator and the trio shall form the arbitral panel.

26. Respondent shall furnish a broad based list of panel of arbitrators to applicant within two months from today. Applicant will respond with the name of its arbitrator within four weeks of receiving the list. Respondent thereafter shall nominate its arbitrator within 14 days and the two arbitrators shall nominate the third and presiding arbitrator.

27. If, after appointment, applicant still feels that the arbitrator appointed by respondent or the presiding arbitrator appointed could be disqualified, it is open to applicant to approach this court for

appropriate orders. All rights and contentions of the parties are kept open in this regard.

28. Respondent shall not execute the threat as contained in its letter dated 11.8.2017. If applicant does not appoint the arbitrator within four weeks period prescribed, it will be open for respondent to approach this court under Section 11 of the Act.

29. Application disposed accordingly.

(K.R.SHRIRAM,J)