

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

TUESDAY, THE 09TH DAY OF OCTOBER 2018

THE HON'BLE MR. JUSTICE C.SARAVANAN

O.P. Nos.624 & 625 of 2018

O.P. No.624 of 2018:-

In the matter of Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015

and
In the matter of Arbitration Agreement No.2/MTP/CN/2014 dated 25.03.2014.

URC Construction (P) Ltd.,
No.119, Power House Road,
Erode-638 001, Tamil Nadu.

... Petitioner

-Versus-

1. The General Manager,
Southern Railway,
Headquarters Office,
Park Town, Chennai-600 003.

2. The Chief Engineer,
S & RB/CN/MS, Construction,
Southern Railway,
Periyar E.V.R. High Road,
Egmore, Chennai-600 008.

... Respondents

Original petition praying that this Hon'ble Court be pleased to:-

a) appoint an independent and impartial arbitrator to hear and decide the disputes between the petitioner and the respondents arising out of the contract No.2/MTP/CN/2014 dated 25.03.2014 as set out under details of claims in Para No.19

above;

b) direct the respondents to pay the cost of this petition.

O.P. No.625 of 2018:-

In the matter of Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015

and
In the matter of Arbitration Agreement No.69/CN/2013 dated 08.07.2013.

URC Construction (P) Ltd.,
No.119, Power House Road,
Erode-638 001, Tamil Nadu. Petitioner

-Versus-

1. The General Manager,
Southern Railway,
Headquarters Office,
Park Town, Chennai-600 003.
2. The Chief Engineer/Central,
Construction,
Southern Railway,
Periyar E.V.R. High Road,
Egmore, Chennai-600 008. Respondents

Original petition praying that this Hon'ble Court be pleased to:-

a) appoint an independent and impartial arbitrator to hear and decide the disputes between the petitioner and the respondents arising out of the contract No.69/CN/2013 dated 08.07.2013 as set out under details of claims in Para No.18 above;

b) direct the respondents to pay the cost of this petition.

These Original Petitions coming on this day before this court for hearing the court made the following order:-

Short point that arises for consideration in this petition is whether the court should appoint arbitrators under section 11 (6) of the Arbitration and Conciliation Act, 1996 in the given facts and circumstances of the case.

2. The brief facts relevant for the case are as follows:

i) Respondent is a "State" and is the largest public utility undertaking in the world. It is a state monopoly. To provide its services, it engages the services and also sources goods from both private and public suppliers/ service providers. Contracts are awarded for supply of services/goods as the case may be by floating tender.

ii) Both in the Tender documents and Letter of Acceptance issued to a successful bidder/contractor it made clear that in the event of any dispute, same shall be resolved by arbitration.

iii) Same is captured in the formal agreement that are signed after the contract is awarded.

iv) Elaborate procedure is prescribed for every conceivable

contingency in these documents so much so even a detailed procedure for appointment of arbitrators is controlled by the respondent.

v) For the purpose of this case, the introduction of the IV, V and VII Schedule to the Act by the amendment Act are relevant.

vi) Petitioner participated in a tender floated by the respondent.

vii) Petitioner was declared as a successful bidder and was awarded a contract. A Letter of Acceptance dated 3.1.2014 bearing reference W.496/PBW/293/CN (7663) was issued to the petitioner for a total cost of Rs.22, 55, 92, 060.

viii) Pursuant to the aforesaid Letter of Acceptance, the petitioner executed a Performance Bank Guarantee and also executed an Agreement dated 25.3.2014 bearing No. 2/MTP/CN/2014 dated 25.3.2014.

ix) In connection with the contract, certain disputes have arisen between the petitioner and the respondent. Details of the disputes which led to the initiation and commencement of the arbitration proceedings are not relevant for the purpose of this enquiry and are therefore not adverted.

x) Suffice to state that the petitioner demanded a sum of Rs.5,58,41,130/-plus other amount to be quantified and

computed later which has to be eventually determined in the arbitration proceeding.

xi) The petitioner had issued a notice dated 30.4.2018's to the respondent with a request to send a panel of arbitrators in terms of V and VI schedule to the Arbitration and Conciliation Act, 1996 as amended within a period of 30 days from the receipt of the aforesaid letter.

xii) The petitioner was required to chose two names , one of whom would be selected by the General Manager of the Respondent as the petitioner's nominee arbitrator as per the terms of the agreement to which I shall advert shortly.

xii) The petitioner by the letter dated 28.6.2018 rejected the names proposed by the General Manager of the respondent.

xiv) The respondent by letter dated 21.6.2018 bearing reference No.G.16/D GM/ARB/CN/4.38 furnished the name of 4 retired officers of the respondent as the probable arbitrators.

xv) Petitioner submits that appointment of retired employees of the respondent was not keeping in tune with both

letter and spirit of the amendment to the Arbitration and Conciliation Act, 1996 and therefore submitted that the panel of arbitrators named in the letters were not acceptable for being appointed as arbitrators to resolve the dispute between them.

xvi) Clause 64(3)(a)(ii) in the agreement reads as under:-

"In cases not covered by the clause 64(3)9(a)(i), the Arbitral Tribunal shall consist of a Panel of three Gazetted Rly.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. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Rly.Officers of one or more departments of the Rly.which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM.Contractor will be asked to suggest to General Manager atleast 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint atleast one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from amongst the 3 arbitrators so appointed. GM shall complete their exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts department. An officer of Selection Grade of the Accounts Department shall be considered of

equal status to the officers in SA grade of other departments of the Railway for the purpose of appointment of arbitrator."

xvii) According to the petitioner the above clause under which the General Manager of the respondent Railways appoints arbitrators undermines justice and fair play in the arbitration proceeding as its General Manager selects arbitrators for resolution of dispute in arbitration proceeding.

xviii) As per the clause, the appointment of arbitration vests with the General Manager of the respondent. After the General Manager sends the name of four persons, the petitioner is required to choose two names for appointment of one of them as their nominee arbitrator by the General Manager within 30 days from the date of receipt of the letter.

xix) The General Manager has to simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel as also the presiding arbitrator.

xx) The General Manager has to complete this exercise of appointing the arbitral tribunal within 30 days from the receipt of the names of the contractors nominee's. The clause

also contemplates an officer of selection grade of the Accounts Department can be also considered of equal status to the officers SA of other grade of the Department of the railways for the purpose of appointment of arbitrator.

xxi) The petitioner questioned the appointment of retired officers of the respondent as arbitrators on the ground that such appointments will be contrary to section 12 (1) (a), Section 12(3) (a) and section 12 (5) read with V and the VII scheduled to the Arbitration and Conciliation Act, 1996.

xxii) Dissatisfied with the four names given by the respondent, the petitioner filed a filed O.P No.301 of 2018 had approached this High Court for orders under section 11(6) of the Act before expiry of the period prescribed under the clause.

xxiii) It was withdrawn on 2.7.2018 premature.of integrity are appointed by the respondent as the entire process is controlled by the General Manager of the Respondent.

xxiv) It is this process of appointment of arbitrators in

the contract between the petitioner and the respondent which has been now questioned and therefore the petitioner prays for appointment independent arbitrators to resolve the disputes between them under Section 11(6) of the Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015.

3. Prima facie the clause relating to appointment of the arbitrator appears to be, contrary to the provisions of the Arbitration and Conciliation Act, 1996 before amendment and certainly after amendment insofar as the clause allows the respondent to not only appoint its own serving employees as arbitrators but also vest the right to appoint a presiding arbitrator with the General Manager of the respondent.

4. Appointment of serving employees is an absolute bar under Section 12(5) read with VII Schedule cannot be permitted in the light of the amendment to the Arbitration and Conciliation Act, 1996.

5. Convoluted process of appointment of arbitrators and a presiding arbitrator does arise serious doubts about independence and impartiality of the arbitral tribunal even if

men of integrity from the panel of retired officers are appointed by the respondent arbitrators as the entire process is controlled by the General Manager of the respondent.

6. However, leaving aside the cynicism expressed by the petitioner apprehending an unfair and biased arbitral proceedings, the merits of the contention will have to be decided in the light of the provisions as they stand and case laws that have developed on the subject.

7. Learned counsel for the petitioner has drawn my attention to certain case laws and internal communications/circulars of the Railway Board. By letter dated 11.11.2016 bearing reference No.2015/CE-I/CT/ARB/18, which contains a format for obtaining waiver from applicability of the Section 12(5) and Section 31-A (5) of the Arbitration and Conciliation (Amendment) Act.

8. The letter also has format of the certificate to be given by the arbitrators indicating that they are not engaged in more than five ongoing arbitration cases for the railways at the time of their appointment.

9. The Railway Board has also issued a letter dated 17.1.2018 fixing the fee emoluments payable to retired employees working as arbitrator.

10. The fee fixed is 1% of the total claims including the counter claims subject to a maximum of Rs.1,50,000/-per case and in case the award is made within six months from the date of arbitration tribunal enters into reference, the arbitrator will be entitled to 50% extra fee subject to a maximum of Rs. 2, 25, 000/-per case.

12. The extra fees is supposed to be in consonance with the Board's letter dated 16.11.2016. The board letter also allows the officers to continue on their retirement if already functioning as arbitrator.

13. This is an incentive clause to encourage the arbitrators to pass award within the aforesaid time which according to the learned counsel for the petitioner threatens to compromise the quality of the proceeding and is contrary to the guidelines in IV schedule the Act.

14. Learned counsel has also drawn my attention for letter dated 14.11.96 bearing reference No 95/CE-1/CT/24. It states that the names of tge arbitrators in the panel can be added or deleted as and when necessary.

15. Further it is stated that retired officers shall be also entitled to normal TA/DA for any visits that the arbitrator may undertake for the site inspection et cetera.

16. The same letter further indicates that GM will keep a watch on the performance of the arbitrators and if the GM finds that an arbitrator does not appear to be fair, he may consider deleting the arbitrators name from the panel for the subsequent period.

17. This watch by the all seeing eyes of the General Manager who is the appointing authority seems to indicate that the arbitrators are under constant watch and should not not earn the displeasure of the General Manager.

18. It has been euphemistically suggested that deletion of names will arise if they appear to be unfair. Thus, the arbitrators appointed are in tenter hooks lest they may not

get appointed in future as arbitrator.

19. Learned counsel was at pains to state that these factors indicate that an arbitrator appointed by the General Manager of the railways cannot be expected to function in an unbiased manner as not only their performance is continuously evaluated but also incentives are given by the railways for completing the arbitration proceedings within six months which is unheard in the justice delivery system, even if it be under the alternative dispute resolution by way of arbitration.

20. The learned counsel relied on the decision of the Delhi High Court in **Afcons infrastructure Ltd versus Railway Vikas Nigam Ltd** 2017 SCC online Del 8675 in a support of her submission that to the extent clauses in the contract are contrary to law are not enforceable. She drew my attention to para Nos.9, 11 to 14 and 23 which read as under:

1.

" 9. It is common ground between the parties that a part of the arbitration clause is ultra vires Section 12(5) of the Act and that the doctrine of severability is applicable to sever the offending part of the arbitration clause and enforcing the remaining agreement. Both the parties are

committed for referring the disputes to arbitration. They also concur that by virtue of Section 12(5) of the Act read with Seventh Schedule to the Act, a serving officer of the Railways/ RVNL is ineligible for being appointed as an arbitrator.

11. It is well settled that the doctrine of severability or the Blue Pencil Rule is applicable where a part of the contract, which is void or unenforceable, can be severed from the main contract without affecting the substantial agreement between the parties. In *Shin Satellite* (supra), the Supreme Court had held that "it is the duty of the court to sever and separate trivial or technical part by retaining the main or substantial part and by giving effect to the latter if it is legal, lawful and otherwise enforceable. In such cases, the Court must consider the question whether the parties could have agreed on the valid terms of the agreement had they known that the other terms were invalid or unlawful. If the answer to the said question is in the affirmative, the doctrine of severability would apply and the valid terms of the agreement could be enforced, ignoring invalid terms."

12. It is also well settled that the Blue Pencil Doctrine (or the doctrine of severability) would apply to cross out (by running a blue pencil across) that part of the contract, which is invalid and unenforceable without affecting the other part of the contract. It is also trite law that only that part, which is void or unenforceable (and no more) would be deleted in order to save the validity of the

contract, without affecting the substratal bargain between the parties. Under the Blue Pencil Doctrine, it is only the bare minimum, which is necessary to make the contract reasonable, is to be deleted or ignored.

13. In the present case, there is no dispute that clause 17.3(iii), which prescribes for qualification of the members of arbitral tribunal, is no longer valid and, therefore, should be deleted / ignored. However, the procedure for appointment of arbitrators as contained in clause 17.3(ii) clearly does not offend any provision of the Act and, thus, the Blue Pencil Doctrine cannot be applied to delete or ignore the said sub-clause.

14. The fact that serving officers of RVNL/Railways cannot be appointed as arbitrators, does not itself frustrate the procedure for constitution of the arbitral tribunal as contained in clause 17.3(ii) of the agreement. Thus, RVNL (Employer) retains the right to forward a panel of five names to the contractor (in this case Afcons) to choose any one to be appointed as an arbitrator. In the facts of the present case, RVNL did forward a panel of five persons for Afcons to choose one, to be appointed as the arbitrator. This procedure was in terms of the agreement between the parties."

23. It is also necessary to add a caveat that merely because an arbitrator is not disqualified under Section 12(5) read with Seventh Schedule of the Act, does not necessarily mean that his appointment cannot be challenged if there are other grounds which give rise to justifiable doubts as to his independence or impartiality.

21. The Court has further held that paragraph 8 of the guidelines which required the General Manager to keep a watch on the performance of the arbitrator and if he found that the arbitrator " does not appear to be fair", he would consider deleting arbitatoir's name from the panel for the subsequent period. It is understandable that such stipulations would also be discomfoting to other party seeking to refer the dispute to arbitration. The arbitration is an adversarial process. It is possible that the impartiality of an arbitrator would appear to be compromised if it is perceived that he does not want to appear as unfair to a particular party (in this case RVNL) for the fear of losing the opportunity to be appointed as an arbitrator in future.

22. The Court concluded that even though the five names suggested by the General Manager are past employees and their relationship does not fall within origin of Section 12(5) of the Act read with 7th Schedule, but undeniably does give rise to an apprehension in the minds of the other party.

23. The learned counsel for the petitioner submits that Section 12 of the Act is intended to provide neutrality of arbitrators and any contract containing clauses in

contravention of the aforesaid clause will not bind either of the parties.

24. There is no difficulty in accepting the above proposition. To the extent the clauses are not in conformity with the amendment to the Act, they are not enforceable.

25. Therefore, to the extent the respondent has serving employees in their panel, they are straight away disqualified to act as arbitrators.

26. As such there is no bar under the Act, from the arbitral tribunal consisting of only non judicial members.

27. Learned counsel learned counsel also drew my attention to the decision of the Honourable Supreme Court in **Bharat Sanchar Nigam Ltd and another versus BPL Mobile Cellular Ltd and others** (2008)13 SCC 597 wherein it was held that once concluded contract was arrived between the parties and they are bound by it and if the parties were to alter or modify the terms thereof it would be required to be done either by express agreement or by necessary implication which would negate the application of the doctrine of "acceptance sub silentio". Therefore, learned counsel stated that

the arbitration clause in the manner in which it was drafted cannot be imposed on the petitioner.

28. The learned counsel submits that section 12 (5) is intended to provide neutrality of arbitrators and any contract containing clauses in contravention of the VII schedule to the Act will not bind either of the parties.

29. Learned counsel drew my attention to the decision of Honourable Supreme Court in. **Voestalpine Schienen GMBH Vs versus Delhi Metro Rail Corporation Ltd.** (2017) 4 SCC 665 which was been rendered after the amendment to the Arbitration and Conciliation Act, 1996 post 2015. Para Nos.18, 28 were referred to which read as under:-

18. Keeping in mind the aforesaid recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, Sub-section (5) of Section 12 lays down that 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, he shall be ineligible to be appointed as an arbitrator. In such an eventuality, i.e., when the arbitration Clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court

to appoint such arbitrator(s) as may be permissible. That would be the effect of non obstante Clause contained in Sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement.

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 number of persons empaneled, discretion is with the 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, the 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 the DMRC. Secondly, with the discretion given to the DMRC to choose five persons, a room for suspicion is created in the mind of the other side that the 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 third arbitrator from the whole panel".

30. The learned counsel also drew my attention to the decision of the Jharkhand High Court in **Senbo Engineering Ltd versus Union of India** 2018 (1) JL J R 81. Under similar circumstances it was held that for names of arbitrators suggested from a panel of ex-employees of the railways cannot be permitted. The Court held that justice should not only be done but also must seem to have been done.

31. Paragraph 26 of the Supreme Court's decision cited supra though cited and relied by the counsel for the railway in the above case, the court held that no retired employees of railway authorities can be appointed as an arbitrator and therefore appointed Honourable Mr Justice D.G.R. Patnaik as a sole arbitrator to resolve the dispute.

32. Countering the submission, the learned counsel for the respondent relied on the following decisions :

i) **The Reliance Infrastructure Ltd Versus Haryana Power generation Corporation Ltd** 2016 (6) AR BLR 480.

ii) **HCL Infotech Ltd., vs. Mahanagar Telephone Nigam Ltd.**, 2017(6) R.A.J.560(Del) HC Delhi High Court.

iii) **In Hindustan Construction Co., Ltd., vs. Ircon International Ltd.**, Arb.P.596 and 652/2016 Delhi High Court.

iv) **Bharat Heavy Electricals Ltd. Vs. M/s.Capital Control India Pvt. Ltd.**, O.M.P.

(Misc.) (COMM.) 1/2017

v) Dibyendu Bose vs. South Eastern Railway
A.P.No.1075 of 2017 Calcutta High Court

vi) Offshore Infrastructure Ltd., vs Bharat Heavy Electricals Limited and one another
2017 (6) CTC 301.

vii) M/s.Rahee Infratech Ltd., vs. The principal Chief Engineer, Southern Railway, Park Town, Chennai, O.P.No.612 of 2017 (Madras High Court)

33. In **HCL Infotech Ltd., vs. Mahanagar Telephone Nigam Ltd.**, 2017(6) R.A.J.560(Del) HC Delhi High Court, the decision of the Hon'ble Delhi High Court in **Hindustan Construction Co. Ltd vs Ircon International Ltd** rendered on 22 November, 2016 in ARB.P. 596/2016 was relied. It was held that a retired employee of the Government of India would not be ineligible under [Section 12\(5\)](#) of the Act for being appointed as an arbitrator in relation to disputes involving a wholly owned company of the Government of India. In this view, the challenge to the appointment of the arbitrator, solely on the ground that he was an employee of the Government of India, fails.

34. In **Hindustan Construction Co., Ltd., vs. Ircon International Ltd.**, Arb.P.596 and 652/2016 the Delhi High Court held that "As far as the threshold disqualification for

being proposed as an Arbitrator is concerned, the VII Schedule to the Act appears to draw a conscious distinction between serving and former officials of an organisation. This is evident from a comparison of Entry 1 of the Seventh Schedule on the one hand and Entries 2,5, 9 and 12 on the other brings out this distinction. Then again, it is not as if any and every person having a present association with an organisation is disqualified. The emphasis seems to be on the position of influence the person has over decision-making in the organisation."

35. In **Bharat Heavy Electricials Ltd. Vs. M/s.Capital Control India Pvt. Ltd.**, O.M.P.(Misc.) (COMM.) 1/2017, it was held that it is not in dispute that the learned arbitrator has retired more than three years ago from the petitioner-company. Hence, it cannot be argued that the appointment of the learned arbitrator can be challenged under [Section 12](#) or his mandate can be terminated under [Section 14](#) of the Act. Hence this plea of the respondent to support his submission that time to extend the mandate of the learned Arbitrator be declined is without merits.

36. The above decision is inspired from the reasoning in **Offshore Infrastructure Ltd., vs Bharat Heavy Electricals Limited and one another** 2017 (6) CTC 301 where the opinion of the Chief Justice, S.J. Vazifdar of the Punjab and Haryana High Court in **Reliance Infrastructure Ltd Versus Haryana Power Generation Corporation Ltd** 2016 (6) AR BLR 480 was accepted in the context of Clause (31) of the Fifth Schedule. The learned Counsel drew my attention to the following passages:

26.In this case it was held that "It is common cause that while sub-section (1) of Section 12 of the said Act read with Explanation (1) sets out the circumstances in which there can be justifiable doubts as to the independence or impartiality of an arbitrator, sub-section (5) of Section 12 of the said Act read with the Seventh Schedule prescribes an absolute bar. In a sense, it is presumed that on the existence of the said relationships, it would be not permissible for a person to act as an arbitrator.

27. There are two expressions used in the Fifth and Seventh Schedule. The Fifth Schedule in Clause (31) uses the expression "former employee". The natural corollary is there is a difference between an employee and ex-employee. Thus, while being an employee is sufficient for justifiable doubts, such justifiable doubts would arise in case of an ex-employee only if he is within the window of three years from the date of ceasing to be an employee.

28. The Seventh Schedule does not have any clause for an ex- employee. Clause (1) of

Seventh Schedule is identically worded to Clause (1) of the Fifth Schedule. Thus, the expression "employee" has to be understood similarly at both the places. The absence of any clause for ex-employee in the Seventh Schedule itself implies that there is no prohibition in the appointment of an ex-employee as an arbitrator per se. However, the use of expression "former employee" in Clause (31) of the Fifth Schedule would show that if the proposed arbitrator has ceased to be an employee within the window of three years, there would be justifiable doubts to the independence or impartiality of the arbitrator, though there is no absolute bar as under the Seventh Schedule.

29. It is not as if being an employee implies that the said equation continues for all times to come and as observed in the judgment in *Reliance Infrastructure Ltd.*, case, *supra*, the equations between the parties itself changes, i.e., an employer and an employee and an employer and an ex-employee."

37. Rest of the decisions cited have also taken similar views. Learned Counsel for the respondent further submitted that even as per the decision of the Hon'ble Supreme Court in **VoestalpineSchienn Ambit vs. Delhi Metro Rail Corporation** *supra* quoted by the learned Counsel for the petitioner, the Hon'ble Supreme ultimately directed **VoestalpineSchienn Ambit** to choose arbitrators from the entire panel of the arbitrators of the **Delhi Metro Rail Corporation** instead of restricted choice from few names.

38. I have gone through the documents, affidavit and counter affidavit filed on behalf of the petitioner and the respondent and considered the advanced arguments.

39. Fundamentally, bedrock of any judicial or quasi-judicial proceeding is justice, equity and fair play. This applies in equal vigour to arbitral tribunal.

40. The parties are free to appoint any person to be their arbitrators. There are no qualifications under the Act and parties are free to prescribe the qualification.

41. Under the Act, if any of the contingency prescribed under VII Schedule to the Act are attracted, a person cannot be appointed as an arbitrator.

42. However, if the contingency prescribed in V schedule to the Act are exist, it is for the person who is or is to be appointed as an arbitrator to disclose any of the caluses which according to him may give rise to justifiable doubts as to his independence or impartiality.

43. A party who becomes aware of such grounds, may

challenge the appointment within 15 days of such knowledge and in case the challenge fails, arbitral tribunal shall proceed to pass final award.

44. The only qualification for a person to be appointed as an arbitrator is that such a person does not suffer from any of the disqualification under Section 12(1) and Section 12(5) read with V and VII Schedule to the Act.

45. Therefore, when the power to appoint an arbitrator is absolutely vested with one of the parties to the dispute under the agreement and the stakes involved are very high involving complicated issues, question is whether the arbitral tribunal should solely consists of only non-judicial members drawn from the pool of retired officers of the respondent as per the clause in this case or whether the arbitral Tribunal should have a mix of both judicial and non-judicial members as in the case of tribunals which have come to substitute courts.

46. The question whether a fair-minded and informed observer, would conclude that the tribunal to be constituted will be biased or not? Under a controlled mechanism of appointment.

47. The controlled method of appointment as in the present case where all the three arbitrators are to be practically appointed by the respondent's General Manager from among the pool of its present and former employees is a matter of concern and does raise a reasonable doubt regarding neutrality of the arbitral tribunal constituted even if the persons appointed by them are themselves free from any bias. There is bound to be suspicion as to whether these arbitrator will act as a neutral umpire in the dispute as has been observed by the Court in **Afcons Infrastructure Limited** case supra.

48. For all practical purpose, an arbitral tribunal is a court to decide a particular dispute and owes its existence to the agreement between the parties.

49. Persons of integrity and impartiality are expected to adorn the seat of arbitrators.

50. The constitution of an arbitral tribunal, the fundamental requirements cannot be dispensed with. Otherwise, such arbitral tribunal may tend to violate natural justice.

51. In *Halsbury's Laws of England* [Vol. 29(2), 4th Edn., Re-issue 2002, para 560, p. 379], the test of disqualification due to apparent bias has been elucidated in the following passage:

"Test of disqualification by apparent bias.—The test applicable in all cases of apparent bias, whether concerned with Justices, members of inferior tribunals, jurors or with arbitrators, is whether, having regard to the relevant circumstances, there is a real possibility of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard with favour, or disfavour, the case of a party to the issue under consideration by him. In considering this question all the circumstances which have a bearing on the suggestion that the Judge or Justice is biased must be considered. The question is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. Cases may occur where all the Justices may be affected by an appearance of bias, as, for instance, where a fellow Justice or the Justices' clerk is charged with an offence; where this occurs, it has been recommended that Justices from another petty-sessional division should deal with the case, or, if the offence is indictable, that it should be committed for trial by a jury.

It is because the court in the majority of cases does not inquire whether actual bias exists that the maxim that justice must not only be done but be seen to be done is applied, and the court gives effect to the maxim by examining all the material available and

concluding whether there is a real possibility of bias...."

52. In **P.D.Dinakaran (1) v. Judges Inquiry Committee, (2011) 8 SCC 380** Hon'ble Supreme Court referred to the above principle and reiterated the principle of natural justice as follows:-

32. The traditional English Law recognised the following two principles of natural justice:

"(a) *Nemo debet esse judex in propria causa*: No man shall be a judge in his own cause, or no man can act as both at the one and the same time—a party or a suitor and also as a Judge, or the deciding authority must be impartial and without bias; and

(b) *Audi alteram partem*: Hear the other side, or both the sides must be heard, or no man should be condemned unheard, or that there must be fairness on the part of the deciding authority."

However, over the years, the courts throughout the world have discovered new facets of the rules of natural justice and applied them to judicial, quasi-judicial and even administrative actions/decisions. At the same time, the courts have repeatedly emphasised that the rules of natural justice are flexible and their application depends upon the facts of a given case and the statutory provisions applicable, if any, nature of the right which may be affected and the consequences which may follow due to violation of the rules of natural justice.

53. In para 41 it was observed as under:-

In this case, we are concerned with the application of first of the two principles of natural justice recognised by the traditional English Law i.e. *nemo debet esse judex in propria causa*. This principle consists of the rule against bias or interest and is based on three maxims: (i) No man shall be a judge in his own cause; (ii) Justice should not only be done, but manifestly and undoubtedly be seen to be done; and (iii) Judges, like Caesar's wife should be above suspicion. The first requirement of natural justice is that the judge should be impartial and neutral and must be free from bias. He is supposed to be indifferent to the parties to the controversy. He cannot act as Judge of a cause in which he himself has some interest either pecuniary or otherwise as it affords the strongest proof against neutrality. He must be in a position to act judicially and to decide the matter objectively. A Judge must be of sterner stuff. His mental equipoise must always remain firm and undisturbed. He should not allow his personal prejudice to go into the decision making. The object is not merely that the scales be held even; it is also that they may not appear to be inclined. If the Judge is subject to bias in favour of or against either party to the dispute or is in a position that a bias can be assumed, he is disqualified to act as a Judge, and the proceedings will be vitiated. This rule applies to the judicial and administrative authorities required to act judicially or quasi-judicially.

The Court further observed as follows:-

75. It is true that the Judges and lawyers are trained to be objective and have the capacity to decipher grain from the chaff, truth from the falsehood and we have no doubt that Respondent 3 possesses these qualities.

We also agree with the Committee that objection by both sides perhaps "alone apart from anything else is sufficient to confirm his impartiality". However, the issue of bias of Respondent 3 has not to be seen from the viewpoint of this Court or for that matter the Committee. It has to be seen from the angle of a reasonable, objective and informed person. What opinion would he form? It is this apprehension which is of paramount importance. From the facts narrated in the earlier part of the judgment it can be said that the petitioner's apprehension of likelihood of bias against Respondent 3 is reasonable and not fanciful, though, in fact, he may not be biased.

54. In **Secy. to Govt., Transport Deptt. v. Munuswamy Mudaliar** [1988 Supp SCC 651] the Hon'ble Supreme Court considered the question as to whether a party to the arbitration agreement could seek change of an agreed arbitrator on the ground that being an employee of the State Government, the arbitrator will not be able to decide the dispute without bias. While reversing the judgment of the High Court which had confirmed the order of the learned Judge, City Civil Court directing appointment of another person as an arbitrator, the Court observed as under:

"12. Reasonable apprehension of bias in the mind of a reasonable man can be a ground for removal of the arbitrator. A predisposition to decide for or against one party, without proper regard to the true merits of the dispute is bias. There must be reasonable

apprehension of that predisposition. The reasonable apprehension must be based on cogent materials. See the observations of Mustill and Boyd, *Commercial Arbitration*, 1982 Edn., p. 214. Halsbury's *Laws of England*, 4th Edn., Vol. 2, para 551, p. 282 describe that the test for bias is whether a reasonable intelligent man, fully apprised of all the circumstances, would feel a serious apprehension of bias."

55. The Hon'ble Supreme Court in **P.D Dinakaran case** *supra* has further observed that in India, the courts have, by and large, applied the "real likelihood test" for deciding whether a particular decision of the judicial or quasi-judicial body is vitiated due to bias.

56. In **Manak Lal v. Dr. Prem Chand Singhvi** [AIR 1957 SC 425] it was observed:

"5. ... every member of a tribunal that [sits to] try issues in judicial or quasi-judicial proceedings must be able to act judicially; and it is of the essence of judicial decisions and judicial administration that Judges should be able to act impartially, objectively and without any bias. In such cases the test is not whether in fact a bias has affected the judgment; **the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal.** It is in this sense that it is often said that justice must not only be done but must also appear to be done.

47. In fact, this principle has been extended to even administrative bodies and is all the more relevant in the case of alternate method of dispensation of justice under the Act by way of Arbitration. In **A.K.Kraipak v. Union of India**, (1969) 2 SCC 262, the Hon'ble Supreme Court observed as under:-

"20. The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely: (1) no one shall be a judge in his own case (Nemo debet esse judex in propria causa) and (2) no decision shall be given against a party without affording him a reasonable hearing (audi alteram partem). Very soon thereafter a third rule was envisaged and that is that **quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably.** But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative

enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. **Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries.** An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in **Suresh Koshy George v. University of Kerala** [AIR 1969 SC 198] the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case."

58. The question whether a fair-minded and informed observer, would conclude that the tribunal to be constituted will be biased or not?

59. In **Union of India v. Madras Bar Assn.**, (2010) 11 SCC

1,. The Court held " Impartiality, independence, fairness and reasonableness in decision making are the hallmarks of the judiciary. If "Impartiality" is the soul of the judiciary,

"Independence" is the lifeblood of the judiciary. Without independence, impartiality cannot thrive. Independence is not the freedom for Judges to do what they like. It is the independence of judicial thought. It is the freedom from interference and pressures which provides the judicial atmosphere where he can work with absolute commitment to the cause of justice and constitutional values. It is also the discipline in life, habits and outlook that enables a Judge to be impartial. Its existence depends however not only on philosophical, ethical or moral aspects but also upon several mundane things—security in tenure, freedom from ordinary monetary worries, freedom from influences and pressures within (from others in the judiciary) and without (from the executive)" .

60. In the same judgment Court observed that *"Let us now refer to the dilution of independence. If any member of the tribunal is permitted to retain his lien over his post with the parent cadre or ministry or department in the civil service for his entire period of service as member of the tribunal, he would continue to think, act and function as a member of the civil services. A litigant may legitimately think that such a member will not be independent and*

impartial. We reiterate that our observations are not intended to cast any doubt about the honesty and integrity or capacity and capability of the officers of civil services in particular those who are of the rank of Joint Secretary or for that matter even junior officers. **What we are referring to is the perception of the litigants and the public about the independence or conduct of the members of the tribunal. Independence, impartiality and fairness are qualities which have to be nurtured and developed and cannot be acquired overnight. The independence of members discharging judicial functions in a tribunal cannot be diluted.**

61. The Court held that "Only if continued judicial independence is assured, tribunals can discharge judicial functions. In order to make such independence a reality, it is fundamental that the members of the tribunal shall be independent persons, not civil servants. They should resemble the courts and not bureaucratic Boards. Even the dependence of tribunals on the sponsoring or parent department for infrastructural facilities or personnel may undermine the independence of the tribunal (vide Wade & Forsyth: Administrative Law, 10th Edn., pp. 774 and 777)".

62. The Court further observed that "But in India, unfortunately tribunals have not achieved full independence. The Secretary of the "sponsoring department" concerned sits in the Selection Committee for appointment. When the tribunals are formed, they are mostly dependent on their sponsoring department for funding, infrastructure and even space for functioning. The statutes constituting tribunals routinely provide for members of civil services from the sponsoring departments becoming members of the tribunal and continuing their lien with their parent cadre. Unless wide ranging reforms as were implemented in United Kingdom and as were suggested by L. Chandra Kumar [(1997) 3 SCC 261 : 1997 SCC (L&S) 577] are brought about, tribunals in India will not be considered as independent."

63. The Court further held "If tribunals are to be vested with judicial power hitherto vested in or exercised by courts, such tribunals should possess the independence, security and capacity associated with courts. If the tribunals are intended to serve an area which requires specialised knowledge or expertise, no doubt there can be technical members in addition to judicial members. Where however jurisdiction to try certain category of cases are transferred

from courts to tribunals only to expedite the hearing and disposal or relieve from the rigours of the Evidence Act and procedural laws, there is obviously no need to have any non-judicial technical member. In respect of such tribunals, only members of the judiciary should be the Presiding Officers/Members. Typical examples of such special tribunals are Rent Tribunals, Motor Accidents Claims Tribunals and Special Courts under several enactments. Therefore, when transferring the jurisdiction exercised by courts to tribunals, which does not involve any specialised knowledge or expertise in any field and expediting the disposal and relaxing the procedure is the only object, a provision for technical members in addition to or in substitution of judicial members would clearly be a case of dilution of and encroachment upon the independence of the judiciary and the rule of law and would be unconstitutional.

64. Though the above passages are in the context of the validity amendment to the Parts IB and IC of the Companies Act, 1956 under the National Tax Tribunal Act, 2005 which sought to substitute and transfer the jurisdiction of the High Courts to the National Company Law Tribunal , are nevertheless relevant.

65. In the present case, since the appointment of the arbitrators is highly controlled and leaves no choice to the petitioner except to choose two out of four person raise serious a doubt as to whether the arbitraal Tribunal will be free from bias, even if the arbitrators are themselves free of bias.

66. The facts of the case in the present case is that the respondent has forwarded only four names. The petitioner has been asked to choose two of them and one among will be appointed as petitioner's nominee arbitrator by the respondent's General Manager.

67. This is contrary to the decision of the Hon'ble Supreme court in para-20, **VoestalpineSchienn Ambit vs. Delhi Metro Rail Corporation** *supra* wherein it has been clearly specified that the respondent cannot insist, the appointment of arbitrators who are their former employees.

68. In para-28 it has been clearly mentioned "**that the respondent has given only five names and there is no free choice to nominate a person out of the entire panel prepared by DMRC. It has also observed that the discretion given 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. 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."

69. The decision of the Hon'ble Supreme Court in **Voestalpine Schienen case** supra relied upon by either of the parties, held that Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even

when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. However, appointment of arbitrator has to be fair and not constricted.

70. In the present case, even though, the above decision of the Hon'ble Supreme Court was available as early as 10.12.2017, the respondent has persisted with its choice of the arbitrator from a limited panel by limiting the option to the petitioner. The arbitral Tribunal to be constricted by the respondent would appear to a bureaucratic board.

71. The manner in which appointment procedure has been provided in the railway contract of the respondent cannot be allowed and I am therefore of the opinion that the request of the petitioner is legitimate.

72. Ends of justice will be met, if the nominee for the petitioner is appointed from panel of retired Judge of this court, while giving option to the respondent to choose one of their senior retired officers as their nominee arbitrator.

73. This will balance the composition of the Arbitral Tribunal. The respondent may therefore appoint their nominee

arbitrator within a period of 15 days from the date of receipt of this order. Two arbitrators shall proceed further to appoint a Presiding Arbitrator preferably a retired Judge of this Court or Supreme Court within a period of 30 days thereafter and start the proceeding.

74. In view of the above discussions, the original petitions are disposed with the following orders:

- i) Hon'ble Mr. Justice E. Padmanabhan (Retd.) residing at Plot No. 47, Olive Avenue, Injambakkam, Chennai 18 of this Court is appointed as nominee arbitrator on behalf of the petitioner.
- ii) The respondent shall nominate their arbitrator preferably a retired Senior Officer from their panel within a period of 15 days from the date of receipt of this notice.
- iii) Within 15 days thereafter the two arbitrators shall appoint presiding arbitrator and commence the proceedings.
- iv) The arbitral Tribunal shall proceed to pass an award within a period of one year from the date on which the Presiding Arbitrator also enters upon reference.

iv) The proceedings may be conducted under

the aegis of the Madras High Court Arbitration Centre and in accordance with the Madras High Court Arbitration Rules.

v) In case of any difficulty, parties may approach the Court for appropriate directions

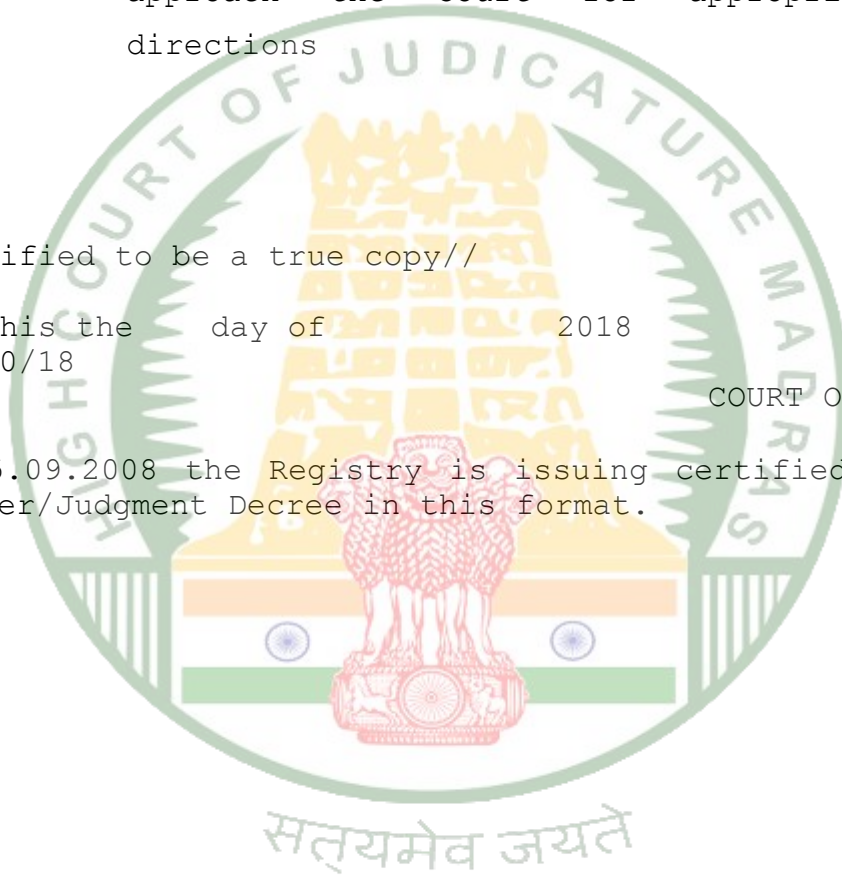
Sd/-C.S.N.J
09.10.2018

//Certified to be a true copy//

Dated this the day of 2018
JJ 16/10/18

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.



WEB COPY