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REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM ARBITRATION APPLICATION (L) NO. 495 OF 2019**

Lite Bite Foods Pvt Ltd

...Applicants

Versus

Airports Authority of India

...Respondent

**Mr Zal Andhyarujina, with Mr Mehul Shah, Mr Sanjeev Sharma,
Abhishek Nikharge, for the Petitioners.**

Ms Lopa Munim, with Rajesh Kothari, for the Respondent.

CORAM: G.S. PATEL, J.

DATED: 4th December 2019

PC:-

“Naturally, the person who has an interest in the outcome of the decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act 2015 (Act III of 2016)”.

1. This is the principle, enunciated by the Supreme Court in *Perkins Eastman Architect DPC & Anr vs HSSC (India) Ltd*,¹ invoked

1 2019 (9) SCC OnLine SC 1517.

in this application under Section 11 of the Arbitration and Conciliation Act, 1996.

2. The Respondent, the Airports Authority of India (“AAI”), a statutory body constituted under the Airports Authority of India Act 1994, issued two e-tender Requests for Proposal on 3rd January 2018. These were for concessions to develop, market, set up, operate, maintain and manage two restaurants, Restaurant-1 and Restaurant-2 as food and beverage (“F&B”) outlets at the Security Hold Area-1 (“SHA-1”) on the first floor of the Pune Airport. Copies of these RFPs are annexed to the petition. Before quoting, prospective bidders were invited to a site visit to assess the area, location, and anticipated passenger circulation and movement. The Applicant, Lite Bite Foods Pvt Ltd (“Lite Bite”), says the initial representation was that all passengers had to pass through SHA-1. Restaurant-1 and Restaurant-2 were located just adjacent to SHA-1 or were on the way from SHA-1 to all departure gates. Even the other Security Hold Area (“SHA-2”) was so positioned that passengers necessarily passed in front of Restaurant-1 and Restaurant-2. Satisfied with the inspection and the representation, Lite Bite Foods made its e-tender bids. Both succeeded. Lite Bite Foods was awarded the concessions under both RFPs for Restaurant-1 and Restaurant-2. It received possession of these sites sometime in March 2018. The parties then executed two Letters of Intent dated 27th January 2018 and two Concession Agreements both dated 9th July 2018, one each for Restaurant-1 and Restaurant-2.

3. From paragraph 6(g) onwards, there is a detailed narrative of the circumstance in which disputes arose between the parties. I will

summarise these contentions as I do not think it is necessary to examine these in any great detail. For the limited remit of a Court in a Section 11 application, nothing turns on an examination of these disputes; indeed, I believe it is impermissible. According to Lite Bite, AAI shut down the SHA-1 clearing area and moved all screening operations to SHA-2. The two screening areas were merged at some point. Lite Bite maintains that this had a direct adverse impact on the footfalls at the two restaurants. Lite Bite incurred losses. It had already spent over Rs. 10 crores setting up the two restaurants with a seating capacity of about 200. Lite Bite terminated the concession agreements by a letter of 3rd April 2019. By a later e-mail of 17th April 2019, it asked AAI to treat its notice as one of termination in terms of the concession agreement. In response, by its letter of 22nd April 2019, AAI demanded payment of an amount of Rs.12.81 crores as six months' license fees. It also threatened to invoke two bank guarantees for Rs 4.2 crores each. Lite Bite moved the Civil Court in Pune and, on 5th October 2019, was granted an injunction against the AAI from encashing these bank guarantees until the next date of hearing. Then there was a problem about Lite Bite vacating the premises. Lite Bite says that it began this process towards the end of September but AAI denied its employees access. AAI refused to allow the Lite Bite to remove its assets, saying that it would do so only if Lite Bite paid AAI's money demands. AAI also threatened to initiate eviction proceedings and to auction Lite Bite's assets to meet its demands. Lite Bite went back to the Civil Court with a petition under Section 9 seeking urgent interim relief. The Court issued notice.

4. By its notice dated 11th October 2019, Lite Bite invoked arbitration, citing Article 22.2 of the concession agreements. Lite Bite proposed the name of Mr SU Kamdar, Senior Advocate of this Court, as a sole arbitrator to adjudicate upon the disputes and difference between the parties arising from and in relation to the two concession agreements. In response, AAI by its letter of 11th November 2019 signed by Ajay Kumar, Airport Director of the Pune Airport, appointed one WD Dandage, DGW (Retd) of the Central Public Works Department) as a sole arbitrator. AAI did not specifically either accept or reject Lite Bite's nomination of Mr Kamdar. Lite Bite, however, by its letter of 16th November 2019 rejected the appointment of Mr Dandage. It said this appointment was unworkable. It was also statutorily impermissible given the 2015 amendments to the Arbitration Act. According to Lite Bite, a sole arbitrator could be appointed only (i) by mutual consent of the parties or (ii) by an order of a High Court in a commercial arbitration petition. There was no third option. Since AAI's unilateral appointment of Mr Dandage did not have Lite Bite's consent, it was invalid. Lite Bite also contended that the appointment violated Section 12 of the Arbitration Act read with the Fifth and Seventh Schedules. The response from AAI on 19th November 2019 was only that the appointment of Mr Dandage was valid and per the provisions of Section 11(2) of the Arbitration Act. It now rejected Lite Bite's nomination of Mr Kamdar. It gave no reasons. There was another response to this from Lite Bite on 21st November 2019 reiterating its position. It contended that the airport director, himself an interested party, did not have, and could not have, sufficient neutrality and impartiality to nominate an arbitrator. In any case, following the 2015 amendments, the airport director no longer had authority in law to

make any such unilateral appointment. Lite Bite had not waived any of the mandatory or statutory conditions. Therefore it maintained its position that the appointment of Mr Dandage was bad in law, and that he was ineligible to act as an arbitrator.

5. The submission in the petition is that the choice by the AAI of a person from a panel that it has itself drawn up, and to which Lite Bite never consented, violates Section 12(5) and the Seventh schedule of the Act. Further the non obstante clause in Section 12 overrides any previous agreement permitting a unilateral appointment by one side. Hence the prayer is that this Court should, under Section 11(6), appoint a sole arbitrator.

6. There is an affidavit in reply dated 2nd December 2019 from the AAI affirmed by one Mahesh Kumar Talasila, Deputy General Manager (Commercial) of the Airports Authority of India. In this, without going into the merits, the deponent maintains that the appointment by AAI of Mr Dandage is not only in consonance with the two concession agreements, but also does not run afoul of the law.

7. I have heard Mr Andhyarujina the Lite Bite and Ms Munim for AAI at length. I have considered their submissions and the authorities they place. Before I proceed to consideration of those, I should set out the relevant dispute resolution clause, Article 22 in each concession agreement. It reads thus:

ARTICLE — 22 [DISPUTE RESOLUTION]

22.1 Dispute resolution

22.1.1 Any dispute, differences or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the parties, and so notified in writing by either party to the other party (except those the decision where—

22.1.1 Any dispute, differences or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the parties, and so notified in writing by either party to the other party (except those the decision whereof is otherwise herein before expressly provided for or to which the public premises (eviction of Unauthorized Occupants) Act, 1971 and the rules framed thereunder which are now enforced or which may hereinafter come into force are applicable) (the “Dispute”) shall, in the first instance, be attempted to be resolved amicably through mutual consensus.

22.1.2 The parties agree to use their best efforts for resolving all disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any dispute.

22.2 Arbitration

22.2.1 Any dispute not resolved as provided in clause 22.1.1, shall be finally decided by reference to

arbitration by a Sole Arbitrator to be appointed by the tender approving authority as per AAI delegation of power in vogue. Such arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996 and shall include amendments to or any re-enactments thereof, as in force from time to time. The venue of such arbitration shall be CHQ/ concerned RHQ and the language of arbitration proceedings shall be English. The cost of arbitration shall be borne equally by both the parties.

22.2.2 The Arbitrator shall make an award (the “Award”) for each dispute and/or claim and shall give reasons for the Award. Any award made in any arbitration held pursuant to this Article 22 shall be final and binding on the parties. For avoidance of doubt, the parties hereto agree that the adjudication hereunder shall not be final and binding until an appeal against such adjudication has been decided by an appellate tribunal or judicial court, as the case may be, or no such appeal has been preferred within the time specified in the Applicable Law.

22.2.3 The Concessionaire and the Authority agree that an Award may be enforced against the concessionaire and/or the Authority, as the case may be and their respective assets wherever situated.

22.2.4 This Agreement and the rights and obligations of the parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder. For the avoidance of doubt, the Concessionaire hereto agree that the concessionaire shall pay to the Authority, the Concession Fee, the Space Rent, Common Area Maintenance Charges, Utility Charges and any other payments that may become due and

payable, pending the Award in any arbitration proceedings hereunder.

22.3 Adjudication by Regulatory Authority or Commission

In the event of constitution of a statutory Regulatory Authority or Commission with powers to adjudicate upon disputes between the concessionaire and the Authority, all disputes arising after such constitution shall, instead of reference to adjudication under clause 22.3, be adjudicated upon by such Regulatory Authority or Commission in accordance with the Applicable Law and all reference to Dispute Resolution Procedure shall be construed accordingly. For the avoidance of doubt, the parties hereto agree that the adjudication hereunder shall not be final and binding until an appeal against such adjudication has been decided by an appellate tribunal or judicial court, as the case may be, or no such appeal has been preferred within the time specified in the Applicable Law.”

(Emphasis added)

8. Mr Andhyarujina’s submission is founded almost entirely on the decision of the Supreme Court in *Perkins Eastman*. He says that this very recent decision of 26th November 2019 by the Supreme Court now sets to rest any controversy. It makes it abundantly clear that what the law now requires after the 2015 amendment to the Arbitration Act is neutrality of not only the arbitrator or umpire but of the arbitrator-selection process as well. There are, therefore, he submits, only two modes of appointment of an arbitrator: (i) by mutual consent of the parties or (ii) by an order of a High Court in a

commercial arbitration petition. It makes no difference any longer whether the arbitration agreement nominates a particular officer as the arbitrator or confers on him the power to appoint an arbitrator should he be unable or ineligible to act, or both. That kind of provision has already been held unsustainable, he submits, but the law has travelled much further afield; and, in his submission, in the right direction, which is to say, to ensure complete neutrality and impartiality throughout including in the arbitral tribunal selection or nomination process.

9. Ms Munim would have it otherwise. She submits that the only disqualification recognised by law and undisturbed by orders of the Supreme Court is that if an employee of one of the parties is the named arbitrator, then he is ineligible to act, and equally ineligible to nominate another arbitrator, whether from a panel or otherwise. His ineligibility in such a case is complete and denudes him of any role as an arbitrator or an arbitrator-selector, even if contractually assigned to him. But, she argues, this is the limited disqualification, and, in her submission, *Perkins Eastman* does not disturb this position. If it does, she says, it would be contrary to a previous decision of at least one bench of coordinate strength of the Supreme Court, and *Perkins Eastman* must, she goes on to submit, for that reason be held to be a decision rendered per incuriam, or at least not good law. She submits that the *Perkins Eastman* bench of two judges of Supreme Court (UU Lalit and Indu Malhotra JJ) could not have taken a view contrary to that of a previous two-judge Bench of the Supreme Court (AK Sikri and RK Agrawal JJ) in *Voestalpine Schienen GmbH v Delhi Metro Rail Corporation Ltd.*²

² (2017) 4 SCC 665.

10. I will straightway reject these submissions by Ms Munim as being misconceived. First, there is no contradiction at all between *Perkins Eastman* and *Voestalpine Schienen*, as we shall presently see. There is, therefore, no question of the former being ‘not good law’ for that reason. The argument that *Perkins Eastman* must be held to be a decision rendered per incuriam is equally without merit. For, the *Perkins Eastman* court did not merely refer to the previous decision in *Voestalpine Schienen*. It drew support from it and cited and quoted from it extensively. The submission is not well-founded and is not anchored to a correct understanding of the jurisprudential principle of when a decision can be said to be one rendered per incuriam. Ms Munim simply asks me to hold that the later decision of the Supreme Court is wrong. It is her right to hew to that belief, but her belief, however strongly held, does not permit me in law to subscribe to it.

11. On merits, too, I cannot accept Ms Munim’s argument. The starting point for our discussion on this aspect of the must be the three-judge decision of the Supreme Court in *TRF Ltd v Energo Engineering Products Ltd*.³ This considered a question under Section 12(5) read with Schedules V and VII after the 2015 amendment to the Arbitration Act. The arbitration clause in *TRF Ltd* said that the managing director or his nominee would be the sole arbitrator. The 2015 amendment, the *TRF Ltd* court held, rendered the managing director wholly ineligible to act as a sole arbitrator. It was nonetheless argued that that ineligibility only attached to his functioning as an arbitrator, but not to his contractual power to nominate a neutral third party as a sole arbitrator. The Court disagreed. It held that courts would, under Section 11, exercise jurisdiction to nullify

3 (2017) 8 SCC 377.

appointments made whenever there is an ex facie contravention of the inherent facets of the arbitration clause. Absent a specific waiver (in our case there is none), once a named arbitrator is rendered ineligible by operation of law, he cannot himself nominate another person as an arbitrator. Once he loses his authority to function as a sole arbitrator, with it goes his power to nominate someone else. In the words of the Supreme Court that power stands 'obliterated'.

12. *Voestalpine Schienen* was differently positioned. There, the relevant clause required the respondent to forward five names from a panel it had drawn up. The petitioner was to choose its nominee arbitrator from that panel; and only from that panel. The panel itself was unilaterally drawn up by the respondent. Those empanelled were not employees of the respondent. The reference was to a three-member tribunal. The question before the Supreme Court was whether the panel of arbitrators prepared by the respondents (and only by the respondents) violated the amended provisions of Sections 12(1) and 12(5) and the Seventh Schedule of the Act.

13. I believe that these should now be reproduced. Sections 12(1) and 12(5) read:

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or

other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.

(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.

14. This is the Seventh Schedule:

THE SEVENTH SCHEDULE

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, adviser or has any other past or present business relationship with a party.
2. The arbitrator currently represents or advises one of the parties or an affiliate or one of the parties.
3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.
4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.
5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.
6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.
7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.
8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.
10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.
11. The arbitrator is a legal representative of an entity that is a party in the arbitration.
12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.
13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.
14. The arbitrator regularly advises the appointing party or an affiliate of the appointing part, and the arbitrator or his or her firm derives a significant financial income therefrom.

Relationship of the arbitrator to the dispute.

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.
16. The arbitrator has previous involvement in the case.

Arbitrator's direct or indirect interest in the dispute

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.
18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.—The term “close family member” refers to a spouse, sibling, child, parent or life partner.

Explanation 2.—The term “affiliate” encompasses all companies in one group of companies including the parent company.

Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.”

15. Citing recommendations of the law commission, the *Voestalpine Schienen* court held that the amendment to Section 12 was intended to provide for arbitrator neutrality. It specifically said that Section 12(5) contained a non-obstante clause rendering ineligible any person whose relationship with parties or counsels or the subject matter of the dispute falls under any of the categories specified in the Seventh schedule. If the arbitration clause in question lies on the wrong side of those provisions, the appointment of the arbitrator by one of the parties would be contrary to law and would allow the Court to appoint such arbitrators as satisfied the statutory mandate. This, the Supreme Court said is the effect of the non-obstante clause (“notwithstanding any prior agreement to the contrary”) in Section 12(5).

16. The Court then went on to hold that independence and impartiality are essential to arbitration. These principles must be understood with that even more fundamental principle of natural justice, the rule against bias. Even if the relationship between the parties is contractual, the lack of independence or impartiality of any arbitrator, even if contractually agreed, would render him statutorily ineligible. The law requires that an arbitrator, albeit appointed in terms of the contract and by the parties to the contract, be independent of the parties. The arbitrator does not act under the direction of the parties. While his service is personal, it is not rendered under the direction of either or even both the parties. The Court went on to highlight the distinction between the more objective concept of independence, and the more subjective one of impartiality.

17. Turning to the facts of the case before it, the Court then examined the provisions of the Fifth schedule which list the grounds that might lead to justifiable apprehensions or doubts about arbitrator neutrality.

18. What the *Voestalpine Schienen* court had before it was (1) a large panel of 31 names; (2) a selection by the respondent of five of those names, from which the respondent picked one; (3) a clause and a demand by the respondent that the petitioner must pick one of those short-listed names; and (4) a requirement that the two nominee arbitrators must pick an umpire only from that short-list. The Court returned these findings (paragraphs 25 to 30). I take the liberty of summarizing these for brevity.

- (i) Amended Section 12 aims to provide for arbitrator neutrality, i.e. independence and impartiality.
- (ii) The Fifth Schedule lists the grounds that may give rise to justifiable doubts about arbitrator independence and impartiality;
- (iii) The Seventh Schedule lists those circumstances that would attract Section 12(5) to nullify any prior agreement to the contrary, i.e. providing for arbitrator ineligibility.
- (iv) The respondents' full (long-list) panel names did not contravene the Seventh Schedule.
- (v) A person is not ineligible within the meaning of the Seventh Schedule and Section 12(5) merely on account of having previously been in government service or with a statutory corporation or public sector undertaking. The Seventh Schedule does not cover such persons; and no bias or likelihood of bias can be attributed to such persons only for that reason (past service). They are empanelled for their expertise in the field.
- (vi) Initially, the respondent had forwarded a short-list. It then reverted to its full list and gave the petitioner the full choice. None of these persons were employee or ex-employees of the respondent or in any way related to it. In any case, they would have to make their disclosure.
- (vii) The contractual provision allowing the respondent to prepare a short list from its full panel and to then restrict the petitioner to making its nomination from that short-

list, and to further restrict the two nominees to choose an umpire from that further pared short-list has two adverse consequences: First, it limits the choice of the opponent. There is no free choice from the full panel. Second, the respondent is the one with the discretion to prepare the short-list in the first place. This creates suspicion in the mind of the opponent. The relevant clauses were, therefore, to be deleted. The opponent had to be given the fullness of choice from the entire panel, as did the two nominee arbitrators.

- (viii) The Supreme Court said there was no cogent reason why the full panel the respondent prepared should be itself limited to ‘serving or retired engineers of government departments or public sector undertakings’. On the contrary, the panel should be broad-based and should include, ideally, experienced private-sector engineers, judges, lawyers, and accountants. No arbitration could be said to involve only technical questions. There could be questions of law or accounting too. This need for a broad-based panel was essential to dispel all apprehensions of a lack of impartiality and independence. The Supreme Court directed the respondent to prepare just such a broad-based panel within two months.

19. Thus, while the Supreme Court did not interfere in *Voestalpine Schienen*, this was on the facts of the case. Among other things, the respondent, the Delhi Metro Rail Corporation, gave up its short-list

and went back to its full list for both the petitioner and the two nominee arbitrators. But even this, the Supreme Court said, was not enough. That full panel was insufficiently broad-based. It ordered DMRC to reconfigure or reconstitute it.

20. This was the jurisprudential background (in *TRF Ltd* and *Voestalpine Schienen*) when the *Perkins Eastman* case came before the Supreme Court. This was an application under Section 11(6) read with Section 12(a). The dispute resolution clause required the arbitrator to be a person appointed by the chairman and managing director of the respondent and no other. There were two questions before the Court. The first was whether this was a domestic or an international arbitration. Had it been a domestic arbitration, the Supreme Court held that it would not have any jurisdiction and the parties would, under Section 11(6), need to approach the High Court. After examining the material before it, the Court concluded that what it had before it was indeed an international arbitration.

21. The second question was on the validity or legality of this unilateral arbitrator-nomination clause. It was argued before the Court that the clause gave complete discretion to the respondent's chairman and managing director and only to him to appoint an arbitrator of his choice. On this, the Court held that there are two possible categories of cases. The first is the *TRF Ltd* category where a managing director or some other officer is himself named as an arbitrator with the additional power to appoint someone else as an arbitrator. The Court held that this category was completely covered by *TRF Ltd* since the managing director was interested in the outcome and therefore his choice of arbitrator was also rendered

unsuitable. The second category is where the managing director or officer is not to himself act as an arbitrator but is solely empowered or authorised to appoint a person of his choice. *Perkins Eastman* fell within the second category. In paragraph 20 (of the SCC Online report), the Supreme Court said that the element of invalidity is always directly relatable to an interest in the outcome. It makes no difference whether the officer is himself an arbitrator with the additional power to appoint or merely has the power to appoint. That interest in the outcome, if taken to be the basis of a possible bias, is always present irrespective of whether the matter is in the first (the *TRF Ltd*) category or the second category. The Supreme Court went on to say that if a person was disentitled to appoint under the *TRF Ltd* category, then it was equally valid to argue that such a person was also disentitled or ineligible *merely* to make an appointment. This, the *Perkins Eastman* Court said in paragraph 21 was the logical deduction from *TRF Ltd*. Where only one party has the right to appoint a sole arbitrator its choice always has an element of exclusivity in determining or charting the course for dispute resolution. This is followed by the observations with which I began this Judgment. I will, therefore, reproduce now paragraphs 20 and 21 of *Perkins Eastman*.

20. We thus have two categories of cases. The first, similar to the one dealt with in *TRF Limited* where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or

result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator.

21. But, in our view that has to be the logical deduction from *TRF Limited*. Paragraph 50 of the decision shows that this Court was concerned with the issue, “whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator” The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. **The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by**

equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited.

(Emphasis added)

22. Then *Perkins Eastman* says in paragraph 24 that in light of the principles it sets out, the reports of the law commission and the decision in *Voestalpine Schienen* the imperatives of a healthy arbitration environment demand that the instant application i.e. for appointment by Court of an arbitrator, deserved acceptance.

23. The present case may not be within the confines of *TRF Ltd*, i.e. the tender approving authority is not both arbitrator and, if disqualified, the sole repository of arbitrator-appointing power. He is only the latter. But that now matters at all. *Perkins Eastman* clearly holds the field and it covers a situation precisely such as the present one where AAI — and only AAI — has the exclusive right of appointed (not merely nominating) an arbitrator. The question is not, as Ms Munim would have it, the perceived bias or impartiality of the arbitrator. He may well be an unknown entity. The question is of one-sidedness in the arbitral tribunal appointment procedure itself. This is the destination to which *Perkins Eastman* takes us for it requires

that there be neutrality in the dispute resolution process throughout. If I might be permitted a license, in my reading of it, what *Perkins Eastman* says is this: that you cannot have an impartial arbitration free from all justifiable doubt if the manner in which the arbitral tribunal is constituted itself is beset by justifiable doubt.

24. There is also little point in Ms Munim now showing me a list of empanelled officers and saying that Lite Bite may choose from any of them, presumably to bring it into line with her reading of *Voestalpine Schienen*. But that is a misreading of *Voestalpine Schienen*, as we have seen. The Supreme Court specifically deprecated the preparation of narrowly-tailored panel and required the drawing up of a far more broad-based one. It specifically required that the petitioner and the two nominee arbitrators be given the freedom of choice not from a short-list or any bespoke panel of retired engineers, etc., but from a much wider spectrum.

25. Ms Munim's last submission is that the only prohibition is against a *named* person being the arbitrator or empowered to appoint an arbitrator. This is clearly incorrect. The interdiction runs against any one party being given unilateral or one-sided power in the matter of constitution of the arbitral tribunal.

26. In summary, the legal principles are these:

- (a) An officer or employee of one party cannot be the arbitrator or, upon eligibility, the person empowered to appoint an arbitrator. This is the *TRF Ltd* category or rule.

- (b) Where the arbitration clause provides for nomination by each side, and for the appointment of an umpire by the two nominee arbitrators, of a person from a panel: (i) that panel cannot be hand-picked by one side; and (ii) it must be broad-based and inclusive, not narrowly tailored to persons from a particular category. The opponent and the two nominee arbitrators must have the plenitude of choice. This is the rule in *Voestalpine Schienen*. Conceivably, a broad-based panel commonly agreed in the contract by both sides would serve the purpose.
- (c) A clause that confers on one party's employee the sole right to appoint an arbitrator, though that employee is himself not to the arbitrator, is also not valid, and this is a logical and inescapable extension of the *TRF Ltd* doctrine. It makes no difference whether this power is to be exercised by choosing from a panel or otherwise. This is the rule in *Eastman Perkins*.

The guiding principle is neutrality, independence, fairness and transparency even in the arbitral-forum selection process.

27. I see no means to separate or distinguish the case at hand from *Perkins Eastman* at all. It is entirely within the frame of that decision. For that reason must succeed.

28. I am therefore required to exercise my discretion under Section 11 and make an appointment of a sole arbitrator. I nominate the Hon'ble Mr Justice Mohit S Shah, former Chief Justice of this Court, to act as sole arbitrator to decide the disputes and differences

between the parties arising from the two concession agreements dated 9th July 2018 read with the two Letters of Intent dated 27th January 2018.

(a) **Appointment of Arbitrator:** Mr Justice Mohit S Shah, Former Chief Justice of this Court, is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties arising from the two concession agreements dated 9th July 2018 read with the two Letters of Intent dated 27th January 2018.

(b) **Communication to Arbitrator of this order:**

(i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the Applicant within one week from today of the order being uploaded.

(ii) In addition, within one week of this order being uploaded, the Registry will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses:

Arbitrator	The Hon'ble Mr Justice Mohit Shah, former Chief Justice, Bombay High Court
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<i>Address</i>	218 Commerce House 140 Nagindas Master Road Kala Ghoda Mumbai 400 001
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<i>Mobile</i>	+91 2269 3954
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Email justiceshah.office@gmail.com

- (c) **Disclosure:** The learned Sole Arbitrator is requested to forward his statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to the Prothonotary and Senior Master of this Court, referencing this arbitration application, as soon as possible, and in any case sufficiently in advance of his entering upon the reference to his arbitration. That statement will be retained by the Prothonotary & Senior Master on the file of this application. Copies will be given to both sides.
- (d) **Appearance before the Arbitrator:** Parties will appear before the learned Sole Arbitrator on such date and at such place as he nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.
- (e) **Contact/communication information of the parties:** Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator within one week of this order being uploaded. The information is to include a valid and functional email address.
- (f) **Application under Section 16:** Liberty to either side to file an application before the learned Sole Arbitrator under Section 16 in regard to any matter or claim and its

arbitrability, jurisdiction and the arbitral tribunal competence.

(g) Interim Application/s:

- (i) Liberty to both sides parties to make an interim application or interim applications including (but not limited to) interim applications under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator.
- (ii) Any such application will be decided in such manner and within such time as the learned Sole Arbitrator deems fit.

(h) Fees: The arbitral tribunal's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

(i) Sharing of costs and fees: Parties agree that all arbitral costs and the fees of the arbitrator will be borne by the two sides in equal shares in the first instance.

(j) Consent to an extension if thought necessary. Parties immediately consent to a further extension of up to six months to complete the arbitration should the learned Sole Arbitrator find it necessary.

(k) Venue and seat of arbitration: Clause 22.2.1 says that the venue will be at the Central Headquarters or the Regional Headquarters. Mr Andhyarujina points out

that the Regional Headquarters are in Mumbai and, therefore, parties agree that the arbitration will be seated in Mumbai.

(1) Contentions kept open. All contentions before the learned Sole Arbitrator are specifically kept open.

29. It is clarified that it is open to the Respondent, the AAI, to file a counter-claim, if so advised, before the learned Sole Arbitrator within such time and subject to such terms as the learned Sole Arbitrator may direct.

30. The application is disposed of in these terms. Costs of the arbitration application may be included by both sides in their claims before the learned Sole Arbitrator.

(G. S. PATEL, J)