

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.08.2019

C O R A M

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

O.P.Nos.700, 886, 765 and 786 of 2018

RPN Engineers VRC JV,
Rep by its Authroised Signatory
Mr.Luqmman Basha,
M-60, 9th Street, Anna Nagar East,
Chennai – 102.

... Petitioner in OP.No.700/2018

Chinnasamy & Co,
Rep.by its Managing Partner
C.Karthikeyan,
Sivakasi Taluk, Valaipapatti,
Virudhunagar, District – 626127

... Petitioner in OP.No.886/2018

C.Gopalan

... Petitioner in OP.No.765/2018

M/s.TTK Construction,
Rep.by its Managing Partner,
Mr.Thanikodi,
New No.5/1, Mayilagam, Thirumukkulam
South Street, Tallakulam,
Madurai – 625 002.

... Petitioner in OP.No.786/2018

WEB Vs. COPY

1.The Union of India,
Represented by the General Manager,
Southern Railway, Park Town, Chennai – 3.

2.The Chief Engineer (Construction-S&RB),
Southern Railway, Construction Department,
Egmore, Chennai – 8.

- 3.The Deputy Chief Engineer (MAS-II),
Southern Railway, Construction Department,
near My Lady's Garden, Chennai – 3.

... Respondents
OP.No.700/2018

- 1.The Union of India,
Represented by the General Manager,
Southern Railway, Park Town, Chennai – 3.

- 2.Senior Divisional Engineer (South),
Madurai Division, Southern Railway,
Madurai.

... Respondents in
OP.No.886/2018

- 1.The Union of India,
Represented by the General Manager,
Southern Railway, Park Town, Chennai – 3.

- 2.The Chief Administrative Officer (Construction),
Southern Railway, Periyar EVR High Road, Egmore,
Chennai – 8.

- 3.The Chief Engineer (Construction),
Southern Railway, Periyar EVR High Road,
Egmore, Chennai – 8.

- 4.The Deputy Chief Engineer (Construction),
Metropolitan Transport Project (Railways),
Tirumailai Station Building,
Mylapore, Chennai – 4.

... Respondents in
OP.No.765/2018

- 1.The Union of India,
Represented by the General Manager,
Southern Railway, Park Town, Chennai – 3.

- 2.The Chief Administrative Officer (Construction),
Southern Railway, Egmore,
Chennai – 8.

- 3.The Chief Engineer (Construction),
Southern Railway, Periyar EVR High Road,
Egmore, Chennai – 8.

Prayer in OP.No.700/2018: Original Petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 to appoint an independent arbitrator to arbitrate all the claims and disputes between the petitioner and the respondents arising out of the Agreement No.115/CN/2009 dated 16.12.2009.

Prayer in OP.No.886/2018: Original Petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 to appoint an independent arbitrator and refer all Claims arising out of the Contract bearing the Agreement No. MDU/56/2015 dated 05/02/2015 to Arbitration.

Prayer in OP.No.765/2018: Original Petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 to appoint an independent arbitrator to arbitrate all the claims and disputes between the petitioner and the respondents arising out of the Agreement No.MTMY/MTP/Civil/DY.CE/09-16 dated 20.03.2017.

Prayer in OP.No.786/2018: Original Petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 to appoint an independent arbitrator to arbitrate all the claims and disputes between the petitioner and the respondents arising out of the Agreement No.05/DY.CE/GC/MDU/HQ/2009 dated 19.01.2009.

For Petitioners : Mr.Amalraj S.Penikilapatti

For Respondents : Mr.P.T.Ramkumar
[Standing counsel for Southern
Railways]

COMMON ORDER

These Original Petitions revolve around the question as to whether the Retired employees are barred from being appointed as Arbitrators in view of the bar contained in Section 12 (5) and Schedule VII of the Arbitration and Conciliation Act, 1996 (herein after called as "The Act").

2. Considering the above said common issue involved in these original petitions, this Court considers the facts of O.P.No.700 of 2018 as a lead case. The facts in OP.No.700 of 2018, in a nutshell, are as under.

3. The petitioners are the contractors under the respondents. The parties have entered into an agreement on 16.12.2009. On completion of contract, the petitioner in O.P.No.700 of 2018 raised final bill, which was not settled. Hence, they issued a notice on 25.01.2017, calling upon the respondents to appoint independent Arbitrators and to refer the the dispute for Arbitration. It is also notified to the respondents that the appointment of Arbitrators must be strictly in accordance with Section 12 (5) r/w. Provisos 1 and 2 of the VII Schedule of the Act.

4. The respondents, by a letter dated 20.02.2017, called upon the petitioners to express their consent for appointing Retired Railway Officers

as Arbitrators, so that the applicability under Section 12 (5) gets waived, in case, if it is to be processed for Arbitration. Since the request made in the notice dated 25.01.2017 seeking to strictly adhere to Section 12 (5) of the Act r/w Provisos 1 and 2 of the VII Schedule was not complied with by the Respondents, the Petitioner filed Original Petition vide O.P.No.205 of 2017 praying for appointment of an independent Arbitrator. This Court, vide final order dated 01.02.2018, dismissed the petition as pre-mature with a direction to the respondents to consider the request of the petitioner as per their notice dated 25.01.2017, keeping in mind the amendment made to the Act.

5. Thereafter, the respondents issued a letter dated 23.04.2018 furnishing a panel of four retired Railway Officers and instructing the petitioner to select their nominees out of the said panel for constituting Tribunal. The petitioner, stating that the constitution of panel is in utter disregard of the petitioner's repeated demands for appointment of an independent Arbitrator and the letter of the respondents is a surreptitious attempt to defeat the mandatory norms laid down under Section 12 (5) r/w. Provisos 1 & 2 of the VII Schedule of the Act, by letter dated 17.05.2018, demanded appointment of an independent Arbitrator and made it clear that they are not willing to waive applicability of Section 12(5) of the Act. Since the respondents failed to appoint independent

Arbitrator, they approached this Court by way of the above petition.

6. As stated supra, as to whether Section 12 (5) and Provisos 1 and 2 of the VII Schedule of the Act, bar the appointment of Retired Employees as Arbitrators, is to be seen.

7. It is beneficial to extract the relevant proviso as under:-

" 12. Grounds of challenge:

(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 arbitration.

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

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if:

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

(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."

8. It is also relevant to refer to Clauses 1 and 31 of the V Schedule as under:

"1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with

a party."

31. The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner."

9. The learned counsel for the petitioners would rely on the judgment of the Hon'ble Supreme Court reported in **(2015) 5 SCC 377 [TRF Limited Vs. Energo Engineering Projects Limited]**, wherein, it is held as hereunder:-

"13. In TRF Ltd. (supra), this Court referred to Section 12(5) of the Act in the context of appointment of an arbitrator by a Managing Director of a corporation, who became ineligible to act as arbitrator under the Seventh Schedule. This Court held:

"50. First, we shall deal with Clause (d). There is no quarrel that by virtue of [Section 12\(5\)](#) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the

Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the "named sole arbitrator" and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction....."

xxx xxx xxx

"54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator

has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in [Section 12\(5\)](#) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."

10. The learned counsel also relied on the judgments reported in **(2017) 4 SCC 665 [Voestalpine Schienen GMBH Vs. Delhi Metro Rail Corporation Limited]** and submitted that the panel given by the Railways shall contain wider range of persons; the panel should be broadbased and apart from serving or Retired Engineers of Government Departments and Public Sector Undertakings, Engineers by prominence and high repute from Private Sector should also be included. Likewise, panel should comprise persons with legal background, like Judges and Lawyers of repute, as there can be disputes involving purely or substantially legal issues. Likewise, some disputes may have the dimension of accountancy, etc., and so it would be appropriate to include persons from this field as well.

11. The learned counsel for the petitioners also took support of the judgment of Delhi High Court in **Afcons Infrastructure Limited Vs. Rail Vikas Nigam Limited** reported in 2017 Supreme (Del) 1744, wherein it is observed as under:-

"30. There is yet another aspect that needs to be considered. Afcons had also referred to the guidelines issued by the Railway Board for appointment of retired railway officers as arbitrators - which is admittedly followed by RVNL - and drew the attention of this court to paragraph 8 of the said 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 arbitrator'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.

33. Second, that RVNL has only suggested the names of former employees of Railways/RVNL for appointment of an arbitrator. Thus, all persons have a past relationship (however remote) with RVNL/Railways. Such relationship may not fall within the rigour of Section 12(5) of the Act read with the Seventh Schedule to the Act, but undeniably does give rise to apprehensions (whether justifiable or not)

in the minds of the other party. It is essential that all parties have full confidence with the arbitral process."

12. The learned counsel for the petitioners would rely on the judgment of **Gauhati High Court in Bikash Enterprises Vs. UOI reported in 2017 Supreme (Gau) 1376**, wherein, it is held as under:

"12. Under Clause 64(3)(a)(ii) of the General Conditions of Contract, as was noticed earlier, Arbitral Tribunal is to consist of a panel of three gazetted Railways officers and therefore, in view of Section 12(5) of the Act read with Item No. 1 of the 7th Schedule of the Act, the employees of the Railways will be ineligible to be appointed as arbitrator and this was the reason why the Railways had requested the petitioner to sign the agreement to waive of the provision of Section 12(5). Section 31(5), which was also referred to in the letter dated 10.04.2017 (Annexure-7), seems to be not at all connected with the issue as it provides that after the arbitral award is made, a signed copy shall be delivered to each party and, perhaps, reference was sought to be made to Section 31A(5), which reads as follows: "An agreement which has the effect that a party has to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen."

14. Since the petitioner did not agree for waiver of Section 12(5) of the Act, the respondent has no right to appoint arbitrator from amongst its officers."

13. Per contra, the learned counsel for the respondents would contend that as per Section 12 (5) and Provisos 1 and 2 of the VII Schedule of the Act, it is not a bar for appointing Retired Employee. In support of his submission, he relied on the following judgments:

" (i) (2017) 6 CTC 301 [*Offshore Infrastructure Limited Vs. Bharat Heavy Electricals Limited*],

(ii) (2017) 6 R.A.J 560 (Del) [*HCL Infotech Limited Vs. Mahanagar Telephone Nigam Limited*],

(iii) MANU/DE/3139/2016 [*Hindustan Construction Co.Ltd Vs. Ircon International Ltd*],

(iv) (2017) 2 R.A.J 480 (Punjab & Hariyana) [*Reliance Infrastructure Ltd., Vs. Haryana Power Generation Corporation Ltd*],

(v) (2018) 1 – L.W. 420 [*HRD Corporation (Marcus Oil and Chemical Division Vs. Gail (India) Limited (Formerly Gas Authority of India Ltd.))*], and

(vi) The unreported judgment of Hon'ble Supreme Court in *The Government of Haryana PWD Vs. G.F. Toll Road Private limited* dated 03.01.2019."

14. I have considered the rival submissions.

15. It is relevant to note that the judgment of the Hon'ble Supreme Court in the case of *TRF Limited* reiterated the circumstances under which the Managing Director and a person, nominated by him, can act as an Arbitrator.

16. It will be relevant to extract the model Arbitration Clause, as extracted in the judgment reported in **2019 (6) KL 291 of [Bharat Broadband Network Limited Vs. United Telecoms Limited]**, which reads as under:-

"III.20 ARBITRATION III.20.1 In the event of any question, dispute or difference arising under the agreement or in connection therewith (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the CMD, BBNL or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CMD, BBNL or by whatever designation such an officer may be called (hereinafter referred to as the said officer), and if the CMD or the said officer is unable or willing to act as such, then to the sole arbitration of some other person appointed by the CMD or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act 1996. There will be no object to any such appointment on the ground that the arbitrator is a Government Servant or that he has to deal

with the matter to which the agreement relates or that in the course of his duties as a Government Servant/PSU Employee he has expressed his views on all or any of the matters in dispute. The award of the arbitrator shall be final and binding on both the parties to the agreement. In the event of such an arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason whatsoever, the CMD, BBNL or the said officer shall appoint another person to act as an arbitrator in accordance with terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors.”

17. As per the terms of above model agreement, the CMD or an officer discharging the duties of the office of CMD by whatever designation, if transferred, the incoming CMD, in cases where the CMD is not willing, person appointed or nominated by him will act as an arbitrator, which means a serving officer or his nominee will act as an arbitrator. In other words, the prosecutor himself will act as a Judge of his own cause. In such circumstances, it cannot be denied that the proceedings are not free of element of bias. For that purpose only clauses 1 and 2 of Fifth Schedule to the Act disqualifies and prohibits an employee or consultant or advisor or currently represents or advises one of the parties or an affiliate of one of the parties from being appointed and acting as an arbitrator. In the illustrated case, the Chairman and

Managing Director who currently holds the post of controlling the entire organisation, being an employee currently advising the organisation is disqualified to be an Arbitrator as per Section 12 (5) of the Act. But, in the instant case, the respondents have referred a panel of four Retired Employees of Railways to the petitioners for selecting the nominee Arbitrator.

18. A reading of Clauses 1 and 31 of the Fifth schedule will further clarify the position. With the risk of repetition, Clauses 1 and 5 of the Fifth Schedule are reproduced hereunder:

" 1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

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"

19. As per Clauses 1 and 5 of the VII Schedule, a person, who is an Employee or Consultant or advisor, cannot be appointed as Arbitrator. The insistence is made on his highest quality to show that Arbitrator shall not be a present employee. The second limb of Clause 1 mandates that the Arbitrator should not have any other past or present business relationship with the party. Insofar as the relationship between arbitrator and party

and others involved in arbitration is concerned, it is further clarified in Clause 31 of the Fifth Schedule as under:

" 31. The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner."

It stipulates that the Arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner is disqualified to be appointed as an arbitrator. The above Clause puts some restrictions for the former employees to be appointed as Arbitrators. According to the said Clause, an employee who retired within three years before the appointment as arbitrator, is disqualified and he should not have any business relationship, like a partner or in a professional capacity. Hence the past/retired employees retired prior to three years of appointment are not disqualified to be appointed as arbitrators. This aspect has been analysed by the Hon'ble Supreme Court in the judgment reported in **2018 (1) LW 420 [HRD Corporation (Marcus Oil and Chemical Division Vs. Gail (India) Limited (Formerly Gas Authority of India Ltd.))** has observed thus:-

"On reading Item 1 of the Seventh Schedule, it is clear that the item deals with "business relationships". The words

"any other" show that the first part of Item 1 also confines "advisor" to a "business relationship". The arbitrator must, therefore, be an "advisor" insofar as it concerns the business of a party. Howsoever widely construed, it is very difficult to state that a professional relationship is equal to a business relationship, as, in its widest sense, it would include commercial relationships of all kinds, but would not include legal advice given."

20. As per the above judgment, the term "business relationship" has a wider ambit. The past employee or retired employee cannot be construed of having any business relationship in its wider sense. The relationship between the employee and a retired employee is further explained in the judgment of **Reliance Infrastructure Limited Vs. Haryana Power Generation Corporation Ltd., reported in 2017 (2) R.A.J. 480 (P & H)**, wherein it is held as under:-

18. As I noted earlier, item 1 in the Fifth Schedule is identical to item 1 to the Seventh Schedule. Each of them reads as under:-

"Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party."

The language of entry 1 indicates a clear division. The bar in [section 12\(5\)](#) is to a person who is an employee,

consultant or advisor. In other words, the bar is against a person who is, at the time of appointment, an employee, consultant or advisor of the party concerned. There is no bar against a former employee, consultant or advisor. The words "or has any other past or present business relationship with a party" do not include a former employee, consultant or advisor of the party. I will assume that the word "other" indicates that the engagement of a person as an employee, consultant or advisor constitutes a business relationship within the meaning of entry 1 with the party concerned. The word "other", however, refers to a relationship other than that of an employee, consultant or advisor. Thus, the bar applies in respect of a person who has had a business relation with a party other than as an employee, consultant or advisor. Any other construction would militate against the language of the section. If the intention was to bar even former employees, advisors or consultants, item 1 in both the Schedules would have been worded entirely differently. It would not then have been necessary to employ the opening words "The arbitrator is an employee, consultant, advisor or". The clause makes a clear distinction between an arbitrator who "is" an employee, consultant or advisor and a person who has had any other business relationship past or present with a party. The embargo against a past business relationship does not refer to a relationship of an employee, consultant or advisor.

19. The mere fact that a person was a Chief Secretary or held any other office with the Government, does not disqualify him/her from being appointed as an

arbitrator. The contention that former employees are disqualified from being appointed because they receive pension and post-retiral benefits from the Government is irrelevant. These benefits are not conferred upon them as a favour. These are benefits that they are entitled to by right by virtue of their employment/past employment. If they are denied the same otherwise than in accordance with law, they are entitled to adopt proceedings to recover the same. Thus, for instance, if an employee receives a post-retiral benefit conferred subsequently but as a matter of policy to other similarly situated persons, it would make no difference. An employer including the Government does not do its former employees any favour by disbursing post-retiral benefits which they are entitled to in law. If a special favour is extended to a particular employee out of the ordinary course, it may be a different matter altogether. That would depend upon the facts of each case.

I appreciate that an employer does an employee no favour even by paying his salary and other emoluments in respect of a contract of an employment. The Legislature, however, sought to draw a distinction between a past employee and an employee in service. It is probably for good reason for the obligation to pay the retiral dues to a person constitutes an entirely different relationship between an ex-employee and an employer from an existing relationship of master and servant. The nature of control over an employee in service is entirely different from the nature of relationship between an employer and a former employee. A former employee's retiral dues are specified and crystallized for all time to come. If they are altered in

the normal course, it would make no difference either. However, the relationship between an employer and an employee in service is entirely different. In such a case, the employer has, for instance, a right to terminate the services of the employee, to take disciplinary action against him and to grant a promotion. It is probably for these reasons that the Legislature did not think it necessary to bar a former employee from being appointed as an arbitrator.

21. I have already indicated the distinction between sub- section (1) and (2) of [section 12](#) on the one hand and sub-section (5) of [section 12](#) and held that a past employment by itself does not render a person ineligible from being appointed an arbitrator. The mere existence of a doubt justifiable, as it may be, does not render him ineligible either. That is only for the purpose of sub-sections (1) and (2) of [section 12](#) to ascertain further if the arbitrator also had any connection with the contract in question.

22. There is no bar, therefore, to a former employee, consultant or advisor of a party being appointed as an arbitrator merely by virtue of his/her past engagement.”

21. Therefore, a Retired employee, who was serving in an organisation, cannot be said to be obliged or biased in favour of his past employer. The pension received by him is a matter of his right and it is not a bounty. Therefore, as held by the Hon'ble High Court of Punjab and Haryana, the bar under Section 12 (5) cannot be put against the Retired employees.

22. The Hon'ble Supreme Court in **SLP.No.23598 of 2018** arising out of order dated 11.5.2018 in SBARA No.133/2017 passed by the High Court of Rajasthan at Jaipur, **(Sanjay Matai Vs. Senior Divisional Commercial Manager and another)** held as under:-

"In the instant case, retired employee has been appointed as Arbitrator thus could have been questioned. In any case, objection has been raised in reference to clause (1) of Seventh Schedule which is also quoted hereunder for ready reference:-

"Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party."

It is submitted that a retired employee is having interest in the party thus as per Clause 1 he could not have been appointed.

I have considered rival submissions of the parties and find that clause 1 of the Seventh Schedule does not debar appointment of retired employee. It is moreso when there is nothing on record to show any past or present business relationship with the party. The bar for appointment of Arbitrator is of an employee but not of retired employee.

In view of the above, I do not find any illegality for appointment of the retired employee having no past or present business relationship with the party thus I do not find any merit in the application. It is accordingly dismissed."

23. The very same view has been expressed by the Hon'ble Supreme Court in the latest judgment in **Government of Haryana PWD Vs. G.F. Toll Road Pvt, Ltd.** reported in **(2019) 3 SCC 505**, as under:-

3.7. *The objection raised by Respondent No. 2 – ICA to the arbitrator nominated by the Appellant – State, was that the nominee arbitrator was a retired employee of the Appellant – State, and as such there may be justifiable doubts to his independence and impartiality to act as an arbitrator.*

3.8. *The said objection was refuted by the Appellant – State on the ground that the nominee arbitrator was a Chief Engineer who retired over 10 years ago from the services of the State. The apprehension of the Respondents was hence unjustified since the test to be applied for bias is whether the circumstances are such as would lead to a fair-minded and informed person to conclude that the arbitrator was infact biased.*

3.10. *The present case is governed by the pre-amended 1996 Act. Even as per the 2015 [Amendment Act](#) which has inserted the Fifth Schedule to the 1996 Act which contains grounds to determine whether circumstances exist which give rise to justifiable doubts as to the 3 2002 (1) All ER 465 independence or impartiality of an arbitrator. The first entry to the Fifth Schedule reads as under :*

"Arbitrator's relationship with the parties or counsel

1. The Arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a

party.” (Emphasis supplied) Entry 1 of the Fifth Schedule and the Seventh Schedule are identical. The Entry indicates that a person, who is related to a party as an employee, consultant, or an advisor, is disqualified to act as an arbitrator. The words “is an” indicates that the person so nominated is only disqualified if he/she is a present/current employee, consultant, or advisor of one of the parties.

An arbitrator who has “any other” past or present “business relationship” with the party is also disqualified. The word “other” used in Entry 1, would indicate a relationship other than an employee, consultant or an advisor. The word “other” cannot be used to widen the scope of the entry to include past/former employees.”

24. Therefore, the judgment of the Hon'ble Supreme Court in **(2015) 5 SCC 377 [TRF Limited Vs. Energo Engineering Projects Limited]** is not applicable to the present case on hand. On the other hand, as found by the Honourable Supreme Court in **SLP.No.23598 of 2018** arising out of order dated 11.5.2018 in SBARA No.133/2017 passed by the High Court of Rajasthan **(Sanjay Matai Vs. Senior Divisional Commercial Manager and another)** at Jaipur and The Government of Haryana PWD Vs. G.F. Toll Road Private limited dated 03.01.2019, the retired employees having no past or present business relationship with Railways are not disqualified from being appointed as Arbitrator as per clause 1 and 2 of Schedule V and VII under Section

12(5) of the Act. In the present case, the arbitrators are appointed from a panel of retired employees who retired more than three years prior to their appointment and that they do not have any past or present business relationship with the respondents. Therefore, I do not find any illegality for appointment of retired employees having no past or present business relationship with Railways for being appointed as arbitrators. In such circumstances, the petitioner cannot insist that only an independent Arbitrator should be appointed contrary to the terms of the contract between the parties. It is no doubt that the parties to the contract are bound by the terms and conditions of the contract and they cannot demand appointment of independent arbitrators contrary to the same.

In view of the above discussions, the Original Petitions are dismissed. No costs.

सत्यमेव जयते

20.08.2019

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Index:Yes/No

Internet:Yes/No

Speaking Order/Non Speaking Order

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To

- 1.The Union of India,
Represented by the General Manager,
Southern Railway, Park Town, Chennai – 3.
- 2.The Chief Engineer (Construction-S&RB),
Southern Railway, Construction Department,
Egmore, Chennai – 8.
- 3.The Deputy Chief Engineer (MAS-II),
Southern Railway, Construction Department,
near My Lady's Garden, Chennai – 3.
- 4.The Senior Divisional Engineer (South),
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- 5.The Deputy Chief Engineer (Construction),
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