

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.02.2020

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

O.P.Nos.446 to 449 of 2019

M/s. JV Engineering Associate
Civil Engineering Contractors
17, Kuttakattu Valasu,
Elumathur (PO), Modakkurichi (via)
Erode - 638 104 (Tamil Nadu)
Represented by its Partner,
Mr.S. Jaikumar

...Petitioner in all OP

Vs

General Manager, CORE, Allahabad,
Represented by
Deputy Chief Engineer, Railway Electrification,
Chennai, Egmore.

...Respondent in all OP

PRAYER: Original Petitions are filed under Section 34(2)(b)(iii) of the Arbitration and Conciliation Act, 1996 to set aside the Awards dated 07.11.2018 passed by Shri V.K. Manoharan, the Sole Arbitrator.

For Petitioner : M/s. P.J. Rishikesh

For Respondent : Mr. P.T. Ramkumar

ORDER

The issue involved in all the petitions involves the validity of an Arbitral award passed by a Arbitrator who is ineligible to be appointed as per the provisions of Section 12 (5) read with schedule VII (1) of the Arbitration and Conciliation Act, 1996, hereinafter called the 1996 Act. The arbitral proceedings is also questioned in the light of the Chief Engineer of the respondent Railways being the authority nominating the Arbitrator which according to the petitioner / claimant, once again attracts the mischief of Schedule VII (1) of the 1996 Act. It is necessary to briefly touch upon the facts which have preceded the filing of the above Petitions under Section 34 of the 1996 Act before proceeding to discuss the issue in detail. Since the issue involved in all the OPs are one and the same a common order is given.

O.P.No.446 of 2019:

2. The claimant who is the petitioner before this Court had invoked the Arbitration clause under the agreement entered into between them and the respondent for recovery of a sum of Rs.3,26,470/- which the petitioner claims is due to them towards price escalation. The petitioner was awarded the contract for the construction of the control room for Traction Sub-Station including earth filling and retaining wall in the Kumbbla-Uppala in Palghat Division of Southern Railway. Although the work was supposed to have been completed within a period of 15 months, the same had been delayed and nearly 5 extensions had been granted. The petitioner would contend that these delays were on account of certain procedural delays on the part of the respondent. For 4 of the extensions, the respondent had granted the extension with PVC by entering into Rider Agreements. However with regard to the disputed claim, the respondent did not allow the escalation and therefore left with no other alternative the claimant had to invoke the Arbitral proceedings. The petitioner had himself represented the case before the Arbitral Tribunal.

O.P.No.447 of 2019:

3. The claimant who is the petitioner before this Court had invoked the Arbitration clause under the agreement entered into between them and the respondent for recovery of amounts which the petitioner claims is due to them under the price escalation. The petitioner was awarded the construction of the Staff Quarters Type II - 4 units in GF, Type III - 1 Unit in SF and Type IV - 1 unit in GF at Tirunelveli Junction in Madurai Division of Southern Railway. Although the work was supposed to have been completed within a period of 15 months, the same had been delayed and nearly 5 extension had been granted. The petitioner would contend that these delays were on account of certain procedural delays on the part of the respondent. The respondent did not allow the price escalation for the extensions though in the other contracts the respondent had granted four extensions with PVC and therefore left with no other alternative the claimant had to invoke the Arbitral proceedings. The petitioner had himself represented the case before the Arbitral Tribunal.

O.P.No.448 of 2019:

4.The claimant who is the petitioner before this Court had invoked the Arbitration clause under the agreement entered into between them and the respondent for recovery of amounts which the petitioner claims is due to them under the price escalation. The petitioner was awarded the construction of Staff Quarter Type II - 20 units, Type III - 9 units and Type IV - 3 units (in ground / first floor) at Various stations between kannur in Palghat Division of Southern Railway. Although the work was supposed to have been completed within a period of 15 months, the same had been delayed and nearly 5 extension had been granted. The petitioner would contend that these delays were on account of certain procedural delays on the part of the respondent. For 4 of the extensions, the respondent had granted the extension with PVC by entering into Rider Agreements. However with regard to the disputed claim, the respondent did not allow the escalation and therefore left with no other alternative the claimant had to invoke the Arbitral proceedings. The petitioner had himself represented the case before the Arbitral Tribunal.

O.P.No.449 of 2019:

5. The claimant who is the petitioner before this Court had invoked the Arbitration clause under the agreement entered into between them and the respondent for recovery of amounts which the petitioner claims is due to them under the price escalation. The petitioner was awarded the construction of the control room for Traction Sub-Station including earth filling and retaining wall at Kannur South, Elathur and Tirur in Palghat Division of Southern Railway. Although the work was supposed to have been completed within a period of 15 months, the same had been delayed and nearly 5 extension had been granted. The petitioner would contend that these delays were on account of certain procedural delays on the part of the respondent. For 4 of the extensions, the respondent had granted the extension with PVC by entering into Rider Agreements. However with regard to the disputed claim, the respondent did not allow the escalation and therefore left with no other alternative the claimant had to invoke the Arbitral proceedings. The petitioner had himself represented the case before the Arbitral Tribunal.

6. The respondent had defended the above claims by inter alia contending that with reference to the earlier extensions, the respondent had provided the price variation calculation but however with reference to the claims subject matter of the arbitral proceedings, such a calculation was not given. Further the respondent had also raised a plea that the claimant had rushed into filing the claim without permitting the respondent to negotiate for the price escalation with their finance department. As per the agreement entered into between the petitioner and the respondent, the disputes were to be settled as per the Indian Railway Arbitration Rules. Clause 64 (3)(a)(i) provides for arbitration in respect of claims which do not exceed 25,00,000/- and the case on hand falls into this category. In keeping with the said Clause, the Principal Chief Engineer CORE/Allahabad had nominated one V.K. Manoharam, Deputy Chief Electrical Engineer (P), Railway Electrification-Kannur as the Sole Arbitrator. By his letter dated 19.01.2018, the Arbitrator had intimated the parties about his appointment and had called upon the claimant to submit his claim statements and on receipt of the claim statements the presenting

officer of the respondent was directed to raise his claim/counter claim. Thereafter the Arbitrator had proceeded to hear the matter and had dismissed the claims filed by the petitioner herein. The reason for the dismissal was that the claimant had not submitted the PVC amount despite sufficient time being given to them and further the petitioner had not shown any proof that earlier the respondent had permitted the price escalation. Challenging the said Awards, the claimant is before this Court.

7. Mr.P.J.Rishikesh, learned counsel appearing on behalf of the petitioner would submit that the grounds of challenge are as follows:

a) The Arbitral Tribunal that was constituted was in violation of the provisions of Section 12 (5) of the 1996 Act.

b) The Arbitrator is an employee of the respondent railways who fell within the ambit Clause 1 VII Schedule of the 1996 Act and the person appointing the Arbitrator also came within the mischief Section 12 (5) read with VII Schedule.

c) The Arbitrator had not made a mandatory declaration as contemplated under Section 12 (3) of the 1996 Act.

d) On merits, he would contend that the Arbitrator has erred in coming to the conclusion that the petitioner had not given proof of submission of a similar grant of escalation totally overlooking the fact that the copy of the Rider agreement dated 12.12.2017 was submitted to the Sole Arbitrator who had also taken note of the same in the Minutes dated 04.10.2018. In support of his arguments the counsel had submitted the following judgments:

1. Voestalpine Schienen GMBH Vs. Delhi Metro Rail Corporation Limited reported in (2017) 4 SCC page 665

2. HRD Corporation Vs. GAIL (INDIA) Limited reported (2018) 12 SCC page 471

3. TRF LTD Vs. Energo Engg. Projects Ltd reported in (2017) 8 SCC page 377

4. Perkins Eastman Architects DPC VS. HSCC (India) Ltd. reported in (2019) 8 MLJ page 623

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8. Per contra Mr.P.T.Ramkumar, learned counsel appearing on behalf of the respondent railways would contend that the petitioner

cannot raise the plea of neutrality of the Arbitrator at this stage of the challenge to the award of the Arbitral Tribunal since he has not taken steps to file an application under Section 13 (2) as contemplated under the 1996 Act. He would submit that on the contrary the petitioner had accepted the constitution of the Arbitral Tribunal and had proceeded to participate in the proceedings. On the merits, he would argue that the petitioner had been paid much more than the accepted value in each of the contract and therefore the demand was wrong. He would further contend that the earlier extension was granted with PVC since the delay was on their account. In the claim on hand the PVC bills were not submitted by the petitioner and without doing so the petitioner had rushed to invoke the Arbitral clause.

9. The learned counsel for the petitioner made the following submission in reply to the contentions raised by the counsel for the respondent. He would contend that on four earlier occasions in respect of the claims in O.P.Nos.446, 448 & 449 of 2019 the respondent railway had granted escalation by entering into a Rider agreements. Only in the case of the claim, subject matter of

arbitration, the respondent had turned down the request on the ground that while granting previous extension, it was made clear that further extensions would be granted without PVC applicability. He would further contend that since the claim had been made before the Arbitral proceedings had commenced it was a dispute that could be considered by the Arbitral Tribunal. In support of his arguments the counsel would rely upon the judgment **McDermott International INC Vs. Burn Standard Co. Ltd reported in (2006) 11 SCC 181.** He also relied upon the judgment in **K.N.Sathyapalan Vs. State of Kerala reported in (2007) 13 SCC Page 43,** where the Hon'ble Supreme Court had decided the issue as to whether a person could make a claim on account of the escalation of cost in the absence of any clause for price escalation in the original agreement and a specific prohibition to the contrary in the supplemental agreement and whether the Arbitrator had exceeded his jurisdiction in favour of the claimant.

10. Heard the counsels and perused the records as well as judgements cited on either side.

11. The petitioner has raised a preliminary objection with reference to the very initiation of the Arbitral Proceedings by contending that the Arbitral Tribunal appointed in the instant case falls foul of the newly inserted Section 12 (5) of the 1996 Act. Before proceeding to discuss the preliminary objection it is necessary to first consider Section 12 of the Act which is herein below extracted:

*"12. Grounds for challenge.— 1 [(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.]

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. 2

[(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.] "

12. A reading of Section 12 would indicate that as soon as a person is approached with a request to act as an Arbitrator, he is bound to disclose any circumstances which in his opinion would affect his neutrality and which he has to disclose to the parties. With the amendment of the 1996 Act by Act 3 of 2016, the Arbitrator is also bound to make a mandatory disclosure as per the form specified in the VI schedule of the Act. The V schedule to the Act would narrate the circumstances which could give rise to a justifiable doubt about the Arbitrator's neutrality. The further amendment which has been introduced by the amending Act 3 of 2016 to Section 12 is the introduction of sub section 5. Sub section 5 opens with a non obstante clause which stipulates that although parties have entered into an agreement giving right to one party to appoint an Arbitrator, even in such cases, the relationship of the Arbitrator with any of the parties or counsel or subject matter of the dispute comes within the VII Schedule, he becomes ineligible for being appointed as a Arbitrator. Unlike Section 12 Sub section 1 (a), Sub section 5 is a clear bar.

However the proviso to this sub section makes an exception, provided the following three circumstances exist namely:

- a) The disputes have arisen between the parties;
- b) Parties have waived the bar under the sub section;
- c) Such waiver should be by an express indication in writing.

It is now necessary to extract clause 64 (3) (a) (i) of the agreement which is the provision under which the Arbitrator in all these disputes had been appointed. It reads as follows:

"In cases where the total value of all claims in question added together does not exceed Rs.25,00,000/- (Rupees twenty five lakhs only), the Arbitral tribunal shall consist of a sole arbitrator who shall be a gazetted officer of Railway not below JA grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM."

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13. The Judgment of the Honorable Supreme Court post the amendment in "**Voestalpine Schienen GMBH Vs. Delhi Metro Rail**

Corporation Limited reported in (2017) 4 SCC page 665" was a case where an arbitration agreement had contained a clause which prescribed the procedure for the constitution of the Arbitral Tribunal. The matter related to the agreement which the applicant had with the Delhi Metro Rail Corporation Limited (DMRC). As per the said arbitration clause since the claimant therein had requested the dispute to be referred to Arbitration, names of five persons were forwarded to the party requesting the reference from out of the panel which was maintained by the respondent and out of this the petitioner had to choose one Arbitrator. In the said case since the request was post the amendment, the claimant therein had refused to accept the Arbitral Tribunal nominated by the respondent. The claimant therein approached the Court for appointing a sole Arbitrator under Section 11 (6) read with Section 11 (8) of the 1996 Act. While considering the arguments, the Hon'ble Supreme Court had observed that the very purport of the introduction of Section 12 (5) to the Arbitration Act was the reiterate the twin features of the arbitrator - impartiality and independence, which assumes great significance in the international spheres. The learned Judge had observed so in paragraph 18

extracted herein below:

"18. Keeping in mind the afore-quoted 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."

14. The learned Judges had also observed that Section 12 was amended to bring it in line with the above referred need. The Bench had further held as follows:

"20. 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 rationale 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. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in Hashwani v. Jivraj Hashwani v. Jivraj, 2011 1 WLR 1872 in the following words: (WLR p. 1889, para 45)"

“45. ... the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.””

They finally held that the amended provisions places an embargo on a person who is an employee of the party to the dispute to act as an Arbitrator. They have held so in paragraph 24 which is extracted herein below:

“24. Keeping in view the aforesaid parameters, we advert to the facts of this case. Various contingencies mentioned in the Seventh Schedule render a person ineligible to act as an arbitrator. Entry 1 is highlighted by the learned counsel for the petitioner which provides that where the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with the party, would not act as an arbitrator. What was

argued by the learned Senior Counsel for the petitioner was that the panel of arbitrators drawn by the respondent consists of those persons who are government employees or ex-government employees. However, that by itself may not make such persons ineligible as the panel indicates that these are the persons who have worked in the Railways under the Central Government or the Central Public Works Department or public sector undertakings. They cannot be treated as employee or consultant or advisor of the respondent DMRC. If this contention of the petitioner is accepted, then no person who had earlier worked in any capacity with the Central Government or other autonomous or public sector undertakings, would be eligible to act as an arbitrator even when he is not even remotely connected with the party in question, like DMRC in this case.

The amended provision puts an embargo on a person to act as an arbitrator, who is the employee of the party to the dispute. It also deprives a person to act as an arbitrator if he had been the consultant or the advisor or had any past or present business relationship with DMRC. No such case is made out by the petitioner. "

The learned Judges were only considering the ineligibility of the Arbitrator as per the provision of Section 12 (5).

15. The said view has once again been reiterated in the Judgment of the Hon'ble Supreme Court in **TRF LTD Vs. Energo Engg. Projects Ltd** reported in **(2017) 8 SCC 377**. This Judgement also dealt with the validity of the appointment made by the named person who is also an employee of the respondent Railways.

16. The issue in question is encapsulated in the opening paragraph of the judgment which reads as follows:

" In this batch of appeals, by special leave, the seminal issues that emanate for consideration are; whether the High Court, while dealing with the applications under [Section 11\(6\)](#) of the Arbitration and Conciliation Act, 1996 (for brevity, "the Act"), is justified to repel the submissions of the appellants that once the person who was required to arbitrate upon the disputes arisen under the terms and conditions of the contract becomes ineligible by operation of law, he would not be eligible to nominate a person as an arbitrator, and second, a plea that pertains to statutory disqualification of the nominated arbitrator can be raised before the court in application preferred under [Section 11\(6\)](#) of the Act, for such an application is not incompetent. For the sake of clarity, convenience and apposite appreciation, we

shall state the facts from Civil Appeal No. 5306 of 2017. "

17. The learned Judges went further ahead and held that if the person nominating the Arbitrator himself is ineligible on account of him being an employee of the party in dispute then the Arbitrator appointed by him squarely came within the mischief of Schedule VII (1) of the 1996 Act.

18. The learned Judges in paragraph 12 had also discussed the question of ineligibility of an Arbitrator and the existence of a justifiable doubt as follows:

"12.After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become "ineligible" to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with

the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible". In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts

as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under [Section 13](#). If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under [Section 13\(4\)](#) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with [Section 34](#) on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice

Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal. "

19. In a Judgement of the Hon'ble Supreme Court **Perkins Eastman Architects DPC VS. HSCC (India) Ltd. reported in (2019) 8 MLJ page 623**, the Supreme Court once again held that if the appointing authority is himself ineligible by operation of the law to a Arbitrator he cannot nominate an Arbitrator. The Bench had held as follows in Paragraph 15 extracted hereinbelow

"15. It was thus held that as the Managing Director became ineligible by operation of law to act as an arbitrator, he could not nominate another person to act as

an arbitrator and that once the identity of the Managing Director as the sole arbitrator was lost, the power to nominate someone else as an arbitrator was also obliterated. The relevant Clause in said case had nominated the Managing Director himself to be the sole arbitrator and also empowered said Managing Director to nominate another person to act Arbitration Application No.32 of 2019 Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd. 22 as an arbitrator. The Managing Director thus had two capacities under said Clause, the first as an arbitrator and the second as an appointing authority. In the present case we are concerned with only one capacity of the Chairman and Managing Director and that is as an appointing authority. We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited⁴ 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 Limited⁴, all cases having clauses similar to that with which we are presently concerned, Arbitration Application No.32 of 2019 Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd. 23 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. 16. But, in our view that has to be the logical deduction "

The Bench had relied on the Judgement of **TRF Limited** supra.

20. In the Judgements in the case of **TRF Limited** and **Perkins Eastman**, of the Honourable Supreme Court had held that where the appointing authority is himself ineligible by operation of law to act as an Arbitrator then his nominating another person to act as an arbitrator would become invalid. However, a later Judgement of the Honourable Supreme Court in the Judgement reported in **2019 SCC OnLine SC 1635 - Central Organisation for Railway Electrification Vs. ECI-SPIC-SMO-MCML**, has struck a different note in so far as it related to the eligibility of person nominating the arbitrator.

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21. The learned Judges, in the above Judgement, have raised the following issue based on the contentions of the parties

"General Manager himself becoming ineligible by operation of law to be appointed as an arbitrator is not eligible to nominate the arbitrator".

Answering this contention the Bench referring to the Judgements in **TRF Limited** and **Perkins Eastman**, had observed that the decision in **TRF Limited** was not applicable to the case before them. This view stems from the fact that the GCC rules of the Railways had undergone modification in the light of Section 12 (5) being inserted to the 1996 Act. The Bench went on to hold that the power of the General Manager to nominate the arbitrator was counter balanced by the power of the respondent to select their nominees in view of the modified clauses, namely, 64 (3) (a) (ii) and 64 (3) (b) of the GCC which also contemplates a waiver of the applicability of Section 12 (5) with the execution of Annexure XII to the conditions. The learned Judges went on to hold that the General Manager had not become ineligible to appoint the arbitrator. Ultimately, the Bench directed the appellant therein to send a fresh panel of four retired

Officers in keeping with clause 64 (3) (b) of the General Conditions of Contract. They therefore differed from the view taken in **TRF Limited** and **Perkins Eastman**. However, in the case on hand the clauses of the General Conditions of the Contract continue to remain the same and has not been modified as per the amended Section 12 (5) of the 1996 Act. Therefore, the Judgement in **TRF Limited** and **Perkins Eastman** would apply to the instant case. Therefore, the Chief Engineer who had appointed the arbitrator was clearly ineligible to nominate the arbitrator.

22. In yet an another Judgment "**HRD Corporation Vs. GAIL (INDIA) Limited reported in (2018) 12 SCC page 471**", the Hon'ble Supreme Court was dealing with the applicability of Section 12 and 14 of the 1996 Act with particular reference to Section 12 (5) introduced by the amendment Act 3 of 2016. Although ultimately the Hon'ble Supreme Court had upheld the appointment of the Arbitrator, however, while considering the same they had stated that after 2016 amendment Act a dichotomy had arisen between the persons who become ineligible to be appointed as Arbitrator and persons about

whom justifiable doubts exist with reference to independence and impartiality. The learned judges had drawn the distinction in paragraph 12 of the Judgment which reads as follows:

"12. After the 2016 [Amendment Act](#), a dichotomy is made by the Act between persons who become "ineligible" to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, [Section 12\(5\)](#) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under [Section 14\(1\)\(a\)](#), he then becomes de jure unable to perform his functions

inasmuch as, in law, he is regarded as "ineligible". In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under [Section 13](#). Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under [Section 14\(2\)](#) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts

of the particular challenge by the Arbitral Tribunal under [Section 13](#). If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under [Section 13\(4\)](#) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with [Section 34](#) on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of

Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal."

The learned Judges have drawn a distinction between challenge to an award on the ground of ineligibility and on the ground of justifiable doubts about the Arbitrator.

23. From the discussion of the above judgments it is amply clear that neutrality of the Arbitrator is the touchstone of the arbitral proceedings. It is this concept that had led to the amendment of Section 12 in the 1996 Act particularly with the

insertion of Section 12 (5) read with the VII Schedule.

24. The amendments introduced to Section 12 by Act 3 of 2016 reiterated this concept more stringently. Therefore taking into consideration the legislative intent and the judicial pronouncements narrated supra it is clearly evident that the Arbitrator who had entered the reference in the instant case is ineligible on three grounds:

a) The general conditions of the contract does not contain the amendments which have been brought about to clauses 64 (3) (a) (ii) and 64 (3) (b) as contemplated in the Judgement in **2019 SCC OnLine SC 1635 - Central Organisation for Railway Electrification Vs. ECI-SPIC-SMO-MCML** and therefore the authority appointing the arbitrator was also ineligible.

b) The arbitrator is an employee of the respondent Railways and therefore falling within the bar contemplated under Section 12 (5) read with schedule VII (1) of the 1996 Act.

c) There is no express waiver in writing by the petitioner of the bar imposed under Section 12 (5) of the 1996 Act.

25. In the above circumstances the Award in question having been passed by an Arbitrator who is ineligible to be an Arbitrator deserves to be set aside more particularly since there is no express waiver in writing as contemplated under the proviso to Section 12 (5).

26. Since the award is being set aside on the ground of the competence of the Arbitral Tribunal to enter reference, this court is not traversing into the merits of the Case. In fine, the O.P.Nos.446 to 449 of 2019 are allowed and the arbitral awards therein are set aside. No costs.

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Speaking order/non-speaking order

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