

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: October 31, 2022

+ ARB.P. 362/2019

L&T HYDROCARBON ENGINEERING LIMITED

..... Petitioner

Through: Mr. Rajshekhar Rao, Sr. Adv.
with Mr.Dhirendra Negi, Ms.Pragya
Chauhan and Mr. Areeb Amanullah,
Advs.

versus

INDIAN OIL CORPORATION LIMITED

..... Respondent

Through: Mr. V.N. Koura, Ms. Paramjeet
Benipal and Mr. Nirbhay Narain
Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. The petitioner has preferred the instant petition under Section 11(5), (6) and (8) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as, 'Act of 1996') with the following prayer:-

"It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to:-

a) appoint an independent and impartial person, such as a retired judge of the Hon'ble Supreme Court or any High Court, as an arbitrator for adjudication of the disputes between the parties;

b) pass such other or further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."

2. It is the case where the petitioner viz. L & T Hydrocarbon Engineering Limited is a wholly owned subsidiary of Larsen & Toubro Limited (hereinafter referred to as “L&T”). It primarily caters to the Oil and Gas sector around the world under Offshore, Onshore, Construction Services, Modular Fabrication and Engineering Services verticals.

3. Whereas the Respondent viz. Indian Oil Corporation Limited (hereinafter referred to as “IOCL”) is a Public Sector Undertaking, with business interests including, inter alia, refineries, pipeline transportation & marketing of petroleum products, exploration & production of crude oil & gas and marketing of natural gas and petrochemicals.

4. It is the case of the petitioner that on June 11, 2012, the respondent issued a Letter of Award for Mainline works including small HDD works, Civil works, Mechanical works, TCP & Electrical works, OFC laying works and Instrumentation works for Salaya Mathura Pipeline (SMPL) De-bottlenecking Pipeline Project ("Project") to the petitioner and a formal contract (hereinafter referred to as “Contract”) was executed between the parties on July 11, 2012.

5. It has been specifically pleaded that the Contract was particularly awarded to the Hydrocarbon Division of the L&T and the Contract Price was fixed for Rs. 104.5 crores and the same was later reduced to Rs. 103.62 crores. Subsequently, in December 2013, a Scheme of Arrangement was approved by the Hon'ble Bombay High Court as per which the all the assets and liabilities of the Hydrocarbon Division of L&T were transferred as a going concern to the petitioner

and hence, the petitioner became the successor to the Hydrocarbon Division of the L&T.

6. That the project work assigned to the petitioner included the laying of pipeline between Chainages 287 to 667 (381 km) in the State of Rajasthan and between Chainages 0 to 12 (12km) in the State of Haryana. However, the work of 'Major Horizontal Directional Drilling (HDD)', at various locations on the entire length was to be done by a different contractor appointed by the respondent.

7. That the scheduled date for completion of the Contract work was September 10, 2013. However, as per the petitioner, works were delayed for reasons not attributable to L&T Hydrocarbon and could only be completed on 24 February 2016.

8. It is also the case of the petitioner that during the course of the Contract, various claims were raised by L&T Hydrocarbon under and in terms of the Contract and on April 25, 2018, L&T Hydrocarbon had submitted its (revised) final bill to the respondent against the works done by it. However, it has been averred that the respondent has failed to make payment with respect to the claims raised and the final bill submitted by L&T Hydrocarbon.

9. According to the petitioner, the claim amount, totaling to Rs. 72,58,48,058/- (excluding GST) is due and payable by the respondent to L&T Hydrocarbon.

10. Furthermore, the petitioner has asserted that it has already made repeated requests to the respondent to pay L&T Hydrocarbon towards the due amounts however the respondent on one pretext or another defaulted in making any payments.

11. Moreover, according to the petitioner, L&T Hydrocarbon had even submitted a Bank Guarantee, bearing no. 0009BG00038613 dated June 28, 2012 (hereinafter referred to as “BG”) for an amount of Rs.10,45,01,019/-, to the respondent and which was valid till December 11, 2014. It is stated that as per the terms of the Contract, respondent was obliged to return the BG, however, based on the directions and requests of the respondent, L&T Hydrocarbon has been extending the BG from time to time.

12. It is also the case of the petitioner that in March 2019, the respondent had also threatened to fraudulently and illegally invoke the BG issued by L&T Hydrocarbon and as a result of which L&T Hydrocarbon had approached this court by filing a petition under section 9 of the Act of 1996, wherein as per the petitioner, this court gave the following directions:

- (a) L&T Hydrocarbon would extend the BG till a period of 1 year from 31 May 2019, i.e. till 31 May 2020;
- (b) L&T Hydrocarbon would invoke the dispute resolution procedure prescribed under the Contract;
- (c) In case the Respondent intends to invoke and/or encash the subject performance bank guarantee, it shall serve on L&T Hydrocarbon in this behalf a prior written notice at least two (2) weeks before.

13. It is the submission of Mr. Rajshekhar Rao, Ld. Sr. Counsel, appearing on behalf of the petitioner that there is an arbitration agreement which was entered between the parties and as such contains

the following arbitration clauses:-

“SECTION 9

**ARBITRATION AND ALTERNATIVE DISPUTE
RESOLUTION MACHINERY**

9.0.0.0 ARBITRATION

9.0.1.0 *Subject to the provisions of Clauses 6.7.1.0, 6.7.2.0 and 9.0.2.0 hereof, any dispute arising out of a Notified Claim of the CONTRACTOR included in the Final Bill of the CONTRACTOR in accordance with the provisions of Clause 6.6.3.0 hereof, if the CONTRACTOR has not opted for the Alternative Dispute Resolution Machinery referred to in Clause 9.1.1.0 hereof, and any dispute arising out of any Claim(s) of the OWNER against the CONTRACTOR shall be referred to the arbitration of a Sole Arbitrator selected in accordance with the provisions of Clause 9.0.1.1 hereof. It is specifically agreed that the OWNER may prefer its Claim(s) against the CONTRACTOR as counter-claim(s) if a Notified Claim of the CONTRACTOR has been referred to arbitration. The CONTRACTOR shall not, however, be entitled to raise as a set-off defence or counter-claim any claim which is not a Notified Claim included in the CONTRACTOR's Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof.*

9.0.1.1 *The Sole Arbitrator referred to in Clause 9.0.1.0 hereof shall be selected by the CONTRACTOR out of a panel of 3 (three) persons nominated by the OWNER for the purpose of such selection, and should the CONTRACTOR fail to select an arbitrator within 30 (thirty) days of the panel of names of such nominees being furnished by the OWNER for the purpose, the Sole Arbitrator shall be selected by the OWNER out of the said panel.*

9.0.2.0 *Any dispute(s) or difference(s) with respect to or concerning or relating to any of the following matters are hereby specifically excluded from the scope, purview and ambit of this Arbitration Agreement with the intention that any dispute or difference with respect to*

any of the said following matters and/or relating to the Arbitrator's or Arbitral Tribunal's jurisdiction with respect thereto shall not and cannot form the subject-matter of any reference or submission to arbitration, and the Arbitrator or the Arbitral Tribunal shall have no jurisdiction to entertain the same or to render any decision with respect thereto, and such matter shall be decided by the General Manager prior to the Arbitrator proceeding with or proceeding further with the reference.

The said excluded matters are:

- (i) With respect to or concerning the scope or existence or otherwise of the Arbitration Agreement;*
- (ii) Whether or not a Claim sought to be referred to arbitration by the CONTRACTOR is a Notified Claim;*
- (iii) Whether or not a Notified Claim is included in the CONTRACTOR's Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof;*
- (iv) Whether or not the CONTRACTOR has opted for the Alternative Dispute Resolution Machinery with respect to any Notified Claim included in the CONTRACTOR's Final Bill.*

9.0.3.0 The provisions of the Indian Arbitration & Conciliation Act, 1996 and any re-enactment (s) and/or modification(s) thereof and of the Rules framed thereunder shall apply to arbitration proceedings pursuant hereto subject to the following conditions:

- (a) The Arbitrator shall give his Award separately in respect of each Claim and Counter-Claim; and*
- (b) The Arbitrator shall not be entitled to review any decision, opinion or determination (howsoever expressed) which is stated to be final and/or binding on the CONTRACTOR in terms of the Contract Documents.*

9.0.4.0 The venue of the arbitration shall be New Delhi, provided that the Arbitrator may with the consent of the

OWNER and the CONTRACTOR agree upon any other venue. "

14. According to him, on April 20, 2019, L&T issued a notice of arbitration seeking reference of its claims of about Rs. 72,58,48,052/- to arbitration and informed the respondent that it did not wish to opt for the Alternative Dispute Resolution Machinery set out in Clause 9.1.0.0 of the GCC.

15. Moreover, Mr. Rao submitted that in the afore-said notice the petitioner had also disputed the authority of the General Manager to decide the issues set out in Clause 9.0.2.0. of the General Conditions of the Contract (hereinafter referred to as "GCC"). It was then averred that though Clause 9.0.2.0 of the GCC contemplated the General Manager of the IOCL to give its decision on claims as a step in the dispute resolution process, however, in law, General Manager does not have any authority to decide the issues set out in Clause 9.0.2.0 of the GCC or to bind the parties to his decision. Mr. Rao submitted that the respondent was specifically informed that the issues involved could only be decided by an arbitrator. Nonetheless, L&T called upon the respondent to refer the claims to the General Manager to render his decision in terms of Clause 9.0.2.0 of the GCC. It was further stated that since the Clause 9.0.2.0 did not provide the time period within which General Manager had to render his decision, therefore, L&T stipulated a period of two weeks for the General Manager to render his decision.

16. That the respondent received the said notice on April 20, 2019 and as a result, the petitioner waited for the period of two weeks,

which got expired on May 4, 2019. It is the case of petitioner that it did not receive any reply from the respondent within those two weeks.

17. So, the petitioner on May 8, 2019 addressed a communication to the respondent in which the following two points were specifically made: Firstly, the petitioner stated that though Clause 9.0.1.1 of the GCC contemplates appointment of a sole arbitrator from a panel of three persons nominated by the respondent, the said procedure is not valid in law; Secondly, petitioner suggested the names of Hon'ble Mr. Justice (Retd.) A.K. Patnaik, Former Judge, Supreme Court of India or Hon'ble Mr. Justice (Retd.) B.D. Ahmed, Former Chief Justice, Jammu & Kashmir High Court, for appointment as the sole arbitrator for adjudication of the disputes between the petitioner and the respondent.

18. The respondent replied to both the notices of the petitioner by a common letter dated May 17, 2019. According to the petitioner, the respondent did not accept either of the names of the arbitrators suggested by the petitioner. Instead, the respondent nominated a panel of three persons and called upon the petitioner to select one of them whereas none of the names were acceptable to the petitioner. It is further the case of Mr. Rao that Clause 9.0.1.1 restricts/limits the right of the petitioner to choose its arbitrator only from the panel prepared and forwarded by the respondent and thus this procedure is invalid in law. Therefore, it was submitted that in the absence of a valid procedure in law for the appointment of a tribunal, the parties are left with no other option but to seek appointment of an Arbitrator from this court.

19. To crystallize and substantiate his case, Mr. Rao categorically argued that it is the respondent itself which had waived the requirement of clause 9.0.2.0 of the GCC. In order to weigh this contention, he pointed out the following facts:

(a) That the petitioner had made a specific request to the respondent to refer the issue of Notified Claims to its General Manager on April 20, 2019. However, respondent has not referred the matter to its General Manager till date (i.e. even after the lapse of more than 3 years).

(b) That in the reply to notice of arbitration dated May 17, 2019, the respondent had not opposed reference to arbitration on the ground that petitioner's claims were not Notified Claims. The respondent had also not insisted that the issue of Notified Claims must first be decided by the General Manager before any reference could be made to arbitration.

(c) That instead, in the aforesaid letter dated May 17, 2019, the respondent had itself provided a panel of three proposed arbitrators and left it for the petitioner to choose one amongst them. Further, at the end of the same reply, the respondent had also cautioned that "in the event of M/s L&T's failure to select the Sole Arbitrator in terms of clause 9.0.1.1 of GCC, IOCL shall make the choice of Sole Arbitrator in terms of the said clause".

(d) That also in the reply filed to the present petition, it is not the case of the respondent that the present petition is premature since the General Manager had not taken any decision

under clause 9.0.2.0 of the GCC. To the contrary, in the prayer clause of the Reply, respondent has prayed that the petitioner be directed to act in accordance with Clause 9.0.1.1 of the GCC and to select one name from the panel of three names proposed by the respondent.

(e) That in the rejoinder filed by the petitioner to the respondent's reply to the present petition, the petitioner had specifically pleaded that "Notwithstanding the fact that the claims raised by the petitioner are Notified Claims which are included in the final bill, as stated above, these issues can only be decided by the Arbitrator and do not arise in the present proceedings". Despite such assertion, the respondent did not refer the claims to the General Manager for over 3 years.

(f) That it is only because the Supreme Court has passed the judgment of *Indian Oil Corporation Limited vs. NCC Limited, Civil Appeal No.341, dated July 20, 2022*, that the respondent for the first time raised the argument in its oral submissions that the claims raised by the petitioner are not arbitrable.

20. In reference to the above-contention, Mr. Rao had also submitted that in any event, parties can agree amongst themselves as to which matters are excepted and which are not. According to Mr. Rao, the respondent's reply to the present petition, coupled with its act of not referring the claims to the General Manager clearly manifest that there is a subsequent agreement between the parties and that in the

present case, the arbitrator can decide whether the claims raised are notified or not. It was further urged by Mr. Rao that even in the past, the respondent had filed proceedings under Section 16 of the Act of 1996 before the tribunal for deciding whether claims are notified or not. To substantiate this, Mr. Rao relied upon two judgments viz. ***Triune Energy Services Pvt. Ltd. vs. Indian Oil Petronas Pvt. Ltd., 2018 SCC OnLine Del 9312*** and ***China Petroleum Pipeline Bureau vs. India Oil Corporation Limited, 2020 SCC OnLine Del 122.***

21. Mr. Rao then pleaded that the respondent cannot be permitted to take advantage of its own wrongs. To substantiate this, he relied upon clause 9.0.2.0, which, according to him, mandates that the issue of whether the claims are notified or not shall have to be decided by the General Manager. According to Mr. Rao, the respondent is in clear breach of its obligation under the said clause of the GCC by not referring the issue of Notified Claims to its General Manager.

22. It was then asserted by Mr. Rao that it is a trite law that a party cannot be allowed to take advantage of its own wrong and if under the contract, a party is required to give a certificate as a pre-condition to arbitration and it either fails or delays to do so then the pre-condition must be held to be waived. In this regard, Mr. Rao relied upon the following judgments:

- (a) ***M K Shah Engineers & Contractors vs. State of Madhya Pradesh, (1999) 2 SCC 594;***
- (b) ***Karam Chand Thapar & Bros (Coal Sales) td. vs. Tehri Hydro Development Corporation India Ltd., 2013 (133) DRJ 178;***

(c) ***Kusheshwar Prasad Singh vs. State of Bihar, (2007) 11 SCC 447;***

(d) ***Bharat Sanchar Nigam Limited vs. Motorola India Private Limited, (2009) 2 SCC 337.***

23. According to Mr. Rao that the arguments of the respondent to the extent that the petitioner did not assert that the claims raised by it were notified and included in the final bill and that the petitioner did not refer the claims to the General Manager for declaration, are completely incorrect.

24. He substantiated this by arguing that in the notice of the arbitration, the petitioner duly asserted that the claims raised by L&T were under and in terms of the contract. Furthermore, Mr. Rao stated that the very fact that the petitioner issued the notice of arbitration was obviously because the claims were notified and included in the final bill and thus arbitrable. It is his case that it was for the respondent to object as to whether the claims are notified or not and no such assertion has been made by the respondent as the respondent knew that the claims raised were *per se* notified.

25. As far as argument of the respondent that the petitioner did not refer the claims directly to the General Manager is concerned, Mr. Rao submitted that the petitioner specifically called upon the respondent to refer the claims to the General Manager in its notice of arbitration as the Contract entered between the parties did not contain the name of the concerned General Manager and for this reason only, the notice of the arbitration was issued to the Engineer-in-charge in conformity with Article 6 of the Contract.

26. In reference to the argument of the respondent that the petitioner unilaterally imposed two weeks deadline, Mr. Rao relied upon Clause 9.0.2.0 of the contract. He submitted that such a clause neither prescribes the time period within which the respondent ought to refer the matter to the General Manager nor provides the time period for the General Manager to render a decision. Mr. Rao also relied upon Section 46 of the Indian Contract Act, 1872 to argue that it was incumbent upon the respondent to refer the matter to its General Manager within a reasonable time and the respondent had clearly failed to act within reasonable time.

27. According to Mr. Rao, the respondent has now waived its right to get any decision by the General Manager by not referring the disputes to the him for a period of over three years (which is, as per Mr. Rao, double the period provided under section 29A of the Act of 1996 for the completion of entire arbitration proceedings). Therefore, he contended that, now it cannot be argued that the petition ought to be dismissed because the General Manager did not render his decision.

28. Another argument of Mr. Rao is that the court is also not bound to decide the issue of arbitrability of the claims and for this he relied upon the judgment of the Supreme Court in **Indian Oil Corporation Limited (supra)**. It was submitted by Mr. Rao that in the afore-said judgment, the Supreme Court had held that the court while exercising its jurisdiction under Section 11 of the Act of 1996 is not bound to decide the issue of arbitrability of the claims. He further stated that in the said judgment only, the Supreme Court also followed **Vidya Drolia vs. Durga Trading Corpn, (2021) 2 SCC 1**, to observe

that the issue of arbitrability should only be decided by the courts when the facts of the case are “clear and glaring”.

29. As far as the judgment of *Indian Oil Corporation Limited (supra)* is concerned, Mr. Rao submitted that in the said judgment, the Supreme Court had observed that in 4 out of the 5 references, the General Manager had decided whether the claims were notified or not and therefore, the Court had found this fact to be glaring enough for not referring the parties to the arbitration. It was further submitted that, however, in one reference, where the issue of arbitrability was not clear from the available facts, the court referred the matter to the arbitration.

30. Mr. Rao further contended that the respondent has no right in law to provide a panel of three persons for appointment of a sole arbitrator and the clause 9.0.1.0 insofar as it restricts/limits the right of the petitioner to choose its arbitrator only from that panel is invalid in law. To establish this, Mr. Rao relied upon the judgment of the Supreme Court in *Voestalpine Schienen GmbH vs. Delhi Metro Corporation Limited, (2017) 4 SCC 665*, wherein, as per Mr. Rao, the Supreme Court dealt with such a clause and whilst upholding that the respondent therein has a general right to maintain a panel, it was observed that such a panel must be extensive and broad based, comprising of engineers, judges, lawyers etc. and should not be a restricted one.

31. In the words of Mr. Rao, clause 9.0.1.0 in the present case, insofar as it restricts the petitioner’s right to choose the sole arbitrator from a restricted panel of three persons, is clearly invalid as per

Voestalpine Schienen GmbH (supra). He also relied upon the following cases to argue the same:

- a) *Simplex Infrastructures Ltd. vs. Rail Vikas Nigam Ltd, Arb. P. No. 519/2018;*
- b) *NCCL-Premco (.JV) vs. Rail Vikas Nigam Ltd., Arb. P. No. 627/2018;*
- c) *Larsen & Toubro Ltd. vs. Rail Vikas Nigam Ltd., Arb. P. No.335/2018;*
- d) *Bernard Ingenieure ZT-GmbH vs. Ircon International Ltd., Arb. P. No. 460/2017.*

32. Thereafter, Mr. Rao also argued that even the right of the respondent to unilaterally nominate a panel of members is invalid. For this, Mr. Rao highlighted Clause 9.0.1.1 of the GCC wherein this right has been given to the respondent. To support this contention, he took the aid of the judgment of the Supreme Court of India in *TRF Ltd. vs. Energo Engg. Projects Ltd., (2017) 8 SCC 377* and *Perkins Eastman Architects DPC vs. HSCC (India) Ltd., (2020) 20 SCC 760*. As per Mr. Rao, the Supreme Court in the latter judgment while following the former judgment had held that the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator and therefore, clauses where only one party has a right to appoint a sole arbitrator, are not valid in law.

33. Mr. Rao further argued that the respondent's reliance on the judgment of the Supreme Court in *Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV), (2020) 14 SCC 712*

to contend that right to provide a panel is valid in law, is highly misplaced. To support this argument, Mr. Rao submitted that the correctness of *Central Organisation for Railway Electrification (supra)* has already been doubted by the Supreme Court in *Union of India vs. Tania Constructions Ltd., 2021 SCC Online 271* and urged this court to not rely upon *Central Organisation for Railway Electrification (supra)* .

34. To corroborate the above-stated argument, Mr. Rao submitted that it is a settled law that in case of conflicting decisions, the earlier decision should be followed and not the subsequent one. In this context, he relied upon the judgments of the Supreme Court in *Sundeeep Kumar Bafna vs. State of Maharashtra, (2014) 16 SCC 623* and *National Insurance Company Limited vs. Pranay Sethi, (2017) 16 SCC 680* and of this court in *Bhagwati Devi Gupta vs. Star Infratech Private Limited, 2021SCC Online Del 3995*.

35. Mr. Rao vehemently argued that in the present case, the earlier judgments in *TRF Ltd.(supra)*, *Perkins Eastman Architects DPC(supra)* and *Voestalpine Schienen GmbH (supra)* ought to be followed as the judgment in *Central Organisation for Railway Electrification (supra)* is in conflict with these earlier judgments. To support this contention he submitted the following arguments:

- (a) That *Central Organisation for Railway Electrification (supra)* is in conflict with the *TRF Ltd. (supra)* & *Perkins Eastman Architects DPC (supra)* as already *prima facie* held in the case of *Tania Constructions Ltd. (supra)* while referring it to a larger bench. That even *Central Organisation*

for Railway Electrification (supra) had referred the *TRF Ltd. (supra)* and *Perkins Eastman Architects DPC (supra)* to hold that the advantage of one party in appointing an arbitrator would get counter-balanced by giving equal power to the other party. However, as per Mr. Rao, combined reading of *TRF Ltd. (supra)* & *Perkins Eastman Architects DPC (supra)* makes it clear that there will be a counter-balance only in a situation where the arbitration clause provides both parties a (unlimited) right to nominate their respective arbitrators (and not when one party can select the arbitrator/or itself prepare a limited panel of arbitrators).

(b) That *Central Organisation for Railway Electrification (supra)* is also in conflict with *Voestalpine Schienen GmbH (supra)*. Mr. Rao argued that although in the former judgment the latter was also referred but the Supreme Court did not consider or even refer to the relevant paragraph of the latter judgment wherein the Supreme Court itself had held that restricting or limiting the choice of an arbitrator from a panel of three or five persons give rise to suspicion of bias.

36. He also relied upon the judgment of the Coordinate Bench of this Court in *CMM Infra projects Ltd. vs. Ircon International Ltd., MANU/DE/1982/2021* and the judgment of the High Court of Karnataka in *JMC Atepl Joint Venture vs. Bangalore Metro Rail Corporation Limited, MANU/KA/1062/2021*, to argue that this court as well as other High Courts have also not followed the judgment of

Central Organisation for Railway Electrification (supra) in certain cases and have instead made appointments in exercise of their power under Section 11 of the Act of 1996. This was on the basis that **Central Organisation for Railway Electrification (supra)** did not consider the finding of the earlier judgments and also on the pretext that if selection from such a panel is permitted, it would lead to permitting the interested party to set up a 2/3rd of the tribunal.

37. He further submitted that in any event, immense prejudice would be caused if the judgment of **Central Organisation for Railway Electrification (supra)** is followed despite its correctness being doubted. This is because, if subsequently the said judgment is held to be incorrect in law, the entire proceedings before the arbitrator would have to be set aside and a fresh arbitration would have to be initiated. On the other hand, no prejudice would be caused to the respondent if a retired judge is appointed by this Court as the sole arbitrator.

38. He also submitted that the judgment in **Central Organisation for Railway Electrification (supra)** was passed in a case where the arbitration clause was amended after the 2015 amendment to the Act of 1996 and it provided the parties a right to waive Section 12(5) of the Act of 1996. As such, it has no application to the present case.

39. He also averred that the judgments of this court in **IWorld Business Solutions Private Ltd. vs. Delhi Metro Rail Corporation Limited, Manu/DE/2193/2020** (hereinafter referred to as 'IWorld Business Solutions – I') and **IWorld Business Solutions Private Ltd. vs. Delhi Metro Rail Corporation Limited, Manu/DE/0797/2021** (hereinafter referred to as 'IWorld Business Solutions – II') which have

been relied upon by the respondent, have no relevance in the facts of this case. He crystallized his contention by asserting that the judgment in *IWorld Business Solutions – I (supra)* was passed when *Central Organisation for Railway Electrification (supra)* had not been referred to a larger bench. Whereas *IWorld Business Solutions – II (supra)* was passed in a petition under Section 14 & 15 of the Act of 1996, seeking replacement of tribunal only on the basis that the *Central Organisation for Railway Electrification (supra)* had been referred to a larger bench in *Tantia Constructions Ltd.(supra)*. He also pleaded that in *IWorld Business Solutions – II (supra)*, the court refused to set aside the appointment of an arbitrator merely because *Central Organisation for Railway Electrification (supra)* was referred to a larger bench. Thus, these judgments have no application whatsoever to the facts of the present case.

40. Thus, the petitioner has preferred the instant petition seeking appointment of an arbitrator.

41. Whereas respondent's primary case is that the petitioner cannot seek a declaration from this court to invalidate the clauses of GCC. According to the respondent the same is barred under the scope of section 11 of the Act of 1996.

42. Moreover, it is the case of the respondent that the act of the petitioner inviting this court to re-write the arbitration agreement between the parties is highly impermissible in law. According to him, the petitioner cannot go contrary to terms of the arbitration agreement as incorporated in the GCC.

43. It is also the case of the respondent that as per clause 9.0.1.0

only the Notified Claims of the contractor included in the final bill in accordance with the provisions of 6.6.3.0 thereof and the claims of the owner against the contractor can only be referred to the sole arbitrator and no other claims.

44. According to the respondent, the agreed procedure for selection of the sole arbitrator is specified in clause 9.0.1.1 of the GCC as per which it is the contractor who has to select a sole arbitrator amongst the panel of three arbitrators nominated by the owner for the purposes of selection. In case the contractor would fail to select the sole arbitrator within thirty days, then the sole arbitrator has to be selected by the owner out of the said panel.

45. Mr. V.N. Koura, Ld. Counsel for the respondent then submitted that the arbitration agreement forms the part of the Contract dated July 11, 2012 executed between the parties and thus both the parties have to abide by the terms of the arbitration agreement.

46. He further submitted that the petitioner by writing the letter dated April 20, 2019 went contrary to the provisions of clause 9.0.2.0 of the GCC, as such, it unilaterally sought to impose upon the General Manager a time limit of two weeks to render his decision from the date of the receipt of the said letter. It is also the case of the respondent that the petitioner did not assert that the claims made by the petitioner are Notified Claims as per clause 6.6.1.0 and also that the same are included in the final bill in accordance with 6.6.3.0 of the GCC and thus there was nothing for the General Manager to decide under Clause 9.0.2.0 of the GCC.

47. As far as letter dated April 20, 2019 is concerned, Mr. Koura

submitted that the said letter did not contain the final claims and as such, there is no provision in clause 9.0.2.0 of the GCC for piecemeal or multiple clarifications/declarations by the General Manager.

48. Mr. Koura argued with vigour that the clause 9.0.1.1 of the GCC is completely valid and is also not in contravention to Section s12(1)(b) and 12(5) or Fourth and Seventh Schedule of the Act of 1996.

49. It was also pleaded that the procedure for certifying Notified Claims under clause 9.0.2.0 is also completely valid and in any manner cannot be circumvented by the petitioner.

50. Whereas in the rejoinder filed by the petitioner, it was categorically submitted that the petitioner had never sought any declaration from this court to render clauses 9.0.1.0 and 9.0.1.1 of the GCC as invalid. The case of the petitioner is that procedure for the appointment of tribunal under such clauses is invalid in law and such procedure cannot be given effect to and thus, in absence of any other legally valid procedure, the appointment has to be made by this court.

51. On the other hand, Mr. Koura, in his written submissions, vigorously stood by his stand to contend that the arbitration agreement incorporated in clause 9.0.0.0 of the GCC duly provides that the arbitration, so far as claims of the petitioner are concerned, is confined to Notified Claims included in the petitioner's final bill as declared/certified by the General Manager and also that the sole arbitrator shall have to be selected by the petitioner from a panel of three persons proposed by the respondent.

52. Mr. Koura, placed his reliance upon the following judgments

to contend that the procedure embodied in clause 9.0.2.0 of the GCC has already been upheld by this court in:

- (a) ***IOT Infrastructure & Energy Service Ltd. vs. Indian Oil Corporation Ltd., Arb. P. 334/2014;***
- (b) ***Institute of Geoinformatics (P) Ltd. vs. Indian Oil Corporation Ltd., 2015 SCC Online Del 9562;***
- (c) ***Srico Projects Pvt. Ltd vs. Indian Oil Foundation, 2017 SCC OnLine Del 6446.***

53. He then argued at length to assert that the petitioner can neither ignore the arbitration agreement executed between the parties at its sweet-will nor can it ask the court to re-write the arbitration agreement. He relied upon the following judgments to plead that it is a duty of the court while exercising jurisdiction under section 11(6) Act of 1996 to give effect to the arbitration agreement executed between the parties:

- (a) ***Union of India vs. Parmar Construction, 2019 SCC Online 442;***
- (b) ***Kadimi International Pvt. Ltd. vs. Emaar MGF Land Ltd., Arb.P.485/2019.***

54. He also emphasized that the liberty of the parties to the contract cannot be taken away unless the contract itself is “illegal”. To crystallize this argument, Mr. Koura relied upon the following judgments:

- (a) ***DLF Universal Ltd. vs. Director Town & Country Planning, (2010) 14 SCC 1;***
- (b) ***Rajasthan State Industrial Development and***

Investment Corporation vs. Diamond and Gem Development Corporation Ltd., (2013) 5 SCC 470.

55. To demonstrate and explain, “what is illegality”, Mr. Koura took the aid of the judgment of the Supreme Court in ***Manna Lal Khetan vs. Kedar Nath Khetan, AIR 1977 SCC 556.***

56. He argued that though the petitioner had unilaterally provided two weeks’ time for the General Manager to render his decision, the panel of arbitrators submitted by the respondent was well within thirty days of the receipt of the petitioner’s alleged arbitration notice.

57. It is the case by Mr. Koura that the facts of the instant/present case do not meet out with facts of the ***Voestalpine Schienen GmbH (supra)*** relied upon by Mr. Rao. According to Mr. Koura, in the afore-said case, there was a stipulation in the arbitration agreement, whereby the DMRC was authorized to forward the names of five persons from a prepared panel maintained by it comprising of serving or retired engineers of DMRC or of government department or of PSUs and three arbitrators were to be selected from that panel, one by the DMRC, one by the contractor and the third was to selected by the appointed arbitrators.

58. He further submitted that in ***Voestalpine Schienen GmbH (supra)***, it was only the panel given by the DMRC was challenged by the petitioner on the ground that in terms of amended Section 12 of the Act of 1996 such a panel was not valid as it was comprising of persons who did not qualify as an independent arbitrators.

59. So, Mr. Koura contended, that in-fact, the afore-said case upholds the right of one party to maintain and give the panel from

which the arbitrators can be selected provided that such a panel could not be comprised of persons who are ineligible to act as arbitrator.

60. Furthermore, Mr. Koura, took his argument one-step forward and contended that judgment in *Voestalpine Schienen GmbH (supra)* was even considered by the Supreme Court in *Aravali Power Company Pvt. Ltd vs. Era Infra Engineering Ltd., 2017 15 SCC 32*. According to Mr. Koura, in this judgment, the Supreme Court had clarified that the panel comprising of five names originally proposed by the DMRC in the former case had serving officers in it and for this reason such a panel was held to be invalid under the amended Section 12(5) read with Clause 1 of schedule VII of the Act of 1996.

61. To plead that such a clause which gives a party the right to maintain a panel of arbitrators, is valid in law, Mr. Koura relied upon the judgment of this court in *SP. Singla Construction Pvt. Ltd. vs. DMRC, 2017 SCC OnLine Del 10689*. According to him, this case had also dealt with the same arbitration agreement which is the subject matter of the present case and the court while relying upon the dictum of *Voestalpine Schienen GmbH (supra)* held that *Voestalpine Schienen GmbH (supra)* never invalidates an arbitration agreement wherein the right is given to one party to suggest a panel of names to other party. To this effect, Mr. Koura also relied upon the judgment of this court in *Bhayana Builders Pvt. Ltd. vs. Oriental Structural Pvt. Ltd., (2018) SCC OnLine Del 7634*.

62. Mr. Koura then emphasized that Clause 9.0.1.1 of the GCC does not require the respondent to maintain and prepare a panel of arbitrators and the only requirement is that the owner has to propose

three names to the contractor and thus this clause is completely valid and legal.

63. He then took the following judgments at his disposal to show that this court has, time and again, recognized the right of a party under the arbitration agreement to appoint/nominate the arbitrator and such a procedure cannot be invalidated by the amended Act:

- (a) ***USAE Equipment vs. Krishna Shankar Tripathi, (2016) SCC OnLine Del 4758;***
- (b) ***Bhayana Builders Pvt. Ltd. vs. Oriental Structural Pvt. Ltd., (2018) SCC Online Del 7634;***
- (c) ***Sriram Electrical Works vs. Power Grid Corporation of India, Arb.P.381/2019;***
- (d) ***Kadimi International Pvt. Ltd. vs. Emaar MGF Land Ltd., Arb.P.485/2019.***

Thus, according to Mr. Koura, the procedure agreed by the parties i.e., to select a sole arbitrator from a panel of three persons, is a valid procedure, when none amongst these three persons are ineligible for appointment under Section 12(1), 12(5) and schedule VII of the Act of 1996.

64. Mr. Koura has also extensively argued that the contention of Mr. Rao to the extent that the judgment of ***Indian Oil Corporation Limited (supra)***, is not applicable in the facts and issues of the present case is highly unsustainable. According to Mr. Koura, the petitioner has not alleged, either in its letter invoking arbitration or in the present Petition or in the amended petition that the claims of the petitioner are Notified Claims and/or that the Notified Claims had been included in

the Final Bill of the petitioner in accordance with Clause 6.6.3.0 of the GCC. According to him, in the absence of any such allegation or averment, *ex-facie*, there does not exist any arbitration agreement between the petitioner and the respondent which covers the petitioner's claims as the arbitration agreement embodied in Clause 9.0.1.0 of the GCC is confined only to the Notified Claims of the petitioner included in the Final Bill by the petitioner in accordance with Clause 6.6.3.0 of the GCC.

65. To further assert that the right of the respondent to maintain and provide a panel of three persons is not invalid in law, Mr. Koura had submitted that the provision for the nomination of a panel of persons who are not covered by the VII Schedule to the Act of 1996 is a valid provision in view of ***Central Organisation for Railway Electrification (supra)***.

66. It is pertinent to mention here that both Mr. Rao as well as Mr. Koura, have relied upon the recent judgment of the Supreme Court in ***Indian Oil Corporation Limited (supra)***, however in different contexts. It is the case of Mr. Koura that the judgment of the Supreme Court has the direct bearing upon the present case whereas on the other hand Mr. Rao has argued differently and vehemently opposed the applicability of this judgment in the facts of the present case.

67. Mr. Rao has unequivocally argued that it is well settled that 'excepted matters' cannot be referred to arbitration. He asserted that even the interpretation of clause 9.0.2.0 of the GCC is not in dispute.

68. To demonstrate that the afore-said judgment passed by the Supreme Court has no relevance to the facts of the present case, Mr. Rao submitted that the said judgment was passed in a fact situation where there existed a prior decision by the General Manager on whether the claims were ‘Notified or not’. It was in this context that the Supreme Court held that-

“Therefore, once the General Manager, on the basis of the material on record takes a conscious decision that a particular claim sought to be referred to arbitration is not a Notified Claim, such a claim thereafter cannot be referred to arbitration.”

According to Mr. Rao, this judgment of the Supreme Court did not consider the question (as in the present case) as to what would be the situation if, (i) IOCL does not refer the question of claim being Notified to the General Manager and/or (ii) the General Manager does not take any decision. Therefore, as per Mr. Rao, the said judgment has no application to the present case.

69. It is also the case of Mr. Rao that in the present case, unlike the judgment of the Supreme Court in ***Indian Oil Corporation Limited (supra)***, there is no decision rendered by the General Manager to the effect that the claims of the petitioner are not ‘Notified Claims’. Therefore, as per him, the Court has to *inter-alia* determine the following issues:

(a) Whether in the facts of the present case (i.e. on petitioner calling upon IOCL to refer the claims to the General Manager), IOCL was obliged to refer the claims to its General

Manager to decide whether claims were Notified Claims?;

(b) What is the effect of not referring the claims to the General Manager?;

(c) What is the effect of there being no decision by the General Manager for more than three years?;

(d) Was the General Manager bound to give a decision within a reasonable time?;

(e) Did IOCL, in the present facts, waive the requirement of a decision by General Manager [particularly in view of the settled law in *M.K. Shah Engineers vs. State of MP, (1992) 2 SCC 594*];

(f) Is the petitioner correct in saying that IOCL was in breach by not referring the issue of Notified Claims to the General Manager and consequently, IOCL cannot take advantage of its own wrong by now claiming that the claims are not arbitrable in the absence of a decision by General Manager?;

(g) Once IOCL had agreed to refer the matter to arbitration, has there been a subsequent agreement that issue of Notified Claim is arbitrable? Can IOCL now after more than three years go back on this consent merely because of *Indian Oil Corporation Limited (supra)*?

70. According to Mr. Rao, all the afore-said issues manifest that the facts are not clear or glaring so as to enable this court under Section 11 of the Act of 1996 to give a finding on arbitrability of the petitioner's claim. Therefore, in the present case, it is best left to the

arbitrator to decide the above issues.

ANALYSIS:

71. Having heard the learned counsel for the parties and perused the record, two issues arise for consideration in this petition; (i) relating to the claims required to be notified and; (ii) with regard to appointment of an Arbitrator from the panel of names submitted by the respondent.

72. On the first issue, the submissions of Mr. Rao are primarily the following:-

(i) The General Manger does not have any authority to decide the issues set out in Clause 9.0.2.0 of the GCC or to bind the parties to his decision;

(ii) The issues involved could only be decided by an Arbitrator;

(iii) Nonetheless, the petitioner had called upon the respondent to refer the claims to the General Manager for him to render a decision in terms of Clause 9.0.2.0 of the GCC;

(iv) As the Clause 9.0.2.0 of the GCC does not stipulate the time period, the petitioner suggested a period of two weeks for the General Manger to take a decision;

(v) The period of two weeks having expired on May 04, 2019, the petitioner in its letter dated May 08, 2019 stated that unilateral appointment of Arbitrator under Clause 9.0.1.1 of the GCC by the respondent or the panel of three Arbitrators provided by the respondent to the petitioner is not valid in law. So, the petitioner proposed the names of two retired Judges for appointment as Sole Arbitrator, which was not accepted by the respondent.

(vi) It is not the plea of the respondent that as the General Manger has not taken any decision under Clause 9.0.2.0 of the GCC, the petition is premature. Rather, the respondent had called upon the petitioner to act in accordance with Clause 9.0.1.1 of the GCC and select one name from the panel of three Arbitrators;

(vii) The respondent having not referred the claims of the petitioner to the General Manager makes it clear that the Arbitrator can decide whether the claims are notified or not;

(viii) Even under Section 16 of the Act of 1996, the Arbitrator can decide whether the claims are notified or not. The respondent not having referred the claims to the General Manager, now cannot plead that only the claims notified by the General Manager be referred to arbitration. Even otherwise, the notice of arbitration was issued because the claims were included in the final bills and thus arbitrable;

(ix) Even otherwise, three years have elapsed, as such the respondent has waived its right to get any decision by the General Manager.

73. Though the submissions of Mr. Rao look appealing on a first blush, but in view of the clear exposition of law by the Supreme Court in *Indian Oil Corporation Limited (supra)*, wherein the Court in paragraph 13.2 has held as under, it is clear as day light that it is only the claims notified by the General Manager which are arbitrable and rest of the claims (not notified) are excepted matters and thus cannot be referred to arbitration:-

“Now, so far as the Civil Appeal No.342/2022 arising out of SLP (C) No.13816/2019 is concerned, the General

Manager in exercise of powers under Clause 9.0.2.0 had declared that none of the claims of the respondent is a Notified Claim. From the communication dated 22.06.2018, it appears that the General Manager, after elaborately dealing with all the alleged Notified Claims of the respondent has thereafter found that none of the claims made by the respondent is a Notified Claim. On a conjoint reading of the relevant clauses of the GCC viz. Clauses 9.0.1.0 and 9.0.2.0, the dispute arising out of Notified Claims only, which is included in the Final Bill of the contractor can be referred to arbitration. However, as per Clause 9.0.2.0, any dispute or difference on whether or not a claim sought to be referred to arbitration by the contractor is a Notified Claim falls within the excluded matters and the Arbitrator or Arbitral Tribunal shall have no jurisdiction and/or authority with respect thereto. The dispute or difference whether or not a claim sought to be referred to arbitration by the contractor is a Notified Claim shall not and cannot form the subject matter of any reference or submission to arbitration. Therefore, on a fair and conjoint reading of Clause 9.0.1.0 and 9.0.2.0, it can safely be concluded that (i) only the Notified Claims of the contractor included in the Final Bill of the contractor in accordance with the provisions of Clause 6.6.3.0 shall have to be referred to arbitration; (ii) whether or not a claim sought to be referred to arbitration by the contractor is a Notified Claim or not, the Arbitrator or Arbitral Tribunal shall have no jurisdiction at all; (iii) whether or not a claim is a Notified Claim or not shall have to be decided by the General Manager and that too, prior to arbitration proceeding with or proceeding further with the reference. Therefore, once the General Manager, on the basis of the material on record takes a conscious decision that a particular claim sought to be referred to arbitration is not a Notified Claim, such a claim thereafter

cannot be referred to arbitration. The language used in Clauses 9.0.1.0 and 9.0.2.0 is very clear and unambiguous.

74. It is true that the respondent despite Clause 9.0.2.0 had not referred the claims of the petitioner to the General Manager, because of which the General Manager could not render its decision as to whether the claims forwarded by the petitioner are notified or not, but, merely because that process has not been gone into, it would not mean that all the claims have to be referred to arbitration. That cannot be the effect, in view of the clear stipulation of Clause 9.0.2.0 and also of the law expounded by the Supreme Court in ***Indian Oil Corporation Limited (supra)***. In short, the Arbitrator gets the jurisdiction only if the claims are notified and not otherwise. If the claims are not notified then they do not form subject matter of arbitration.

75. The plea of Mr. Rao that omission on the part of the respondent in referring the claims to the General Manager clearly manifests that there is a subsequent agreement between the parties and the Arbitrator can decide whether the claims raised are notified or not, is unmerited. Such an eventuality is not contemplated under the agreement. The claims have to be considered by the General Manager. The Supreme Court in ***Indian Oil Corporation Limited (supra)***, has clearly held “*unless there is a decision of the General Manager on whether or not a claim sought to be referred to arbitration by the Contractor is a notified claim or not, the Arbitrator or Arbitral Tribunal shall have no jurisdiction to entertain such a dispute*”. The Supreme Court also held “*the aforesaid clause of the GCC are part of*

the contract between the parties herein and both the parties are bound by the aforesaid clause”.

76. The argument of Mr. Rao, if under the contract a party is required to give a certificate as a pre-condition to arbitration and it either fails or delays to do so, then the pre-condition must be held to be waived, is also unmerited for the reason stated above.

77. One of the submissions of Mr. Rao is that the respondent was obliged to refer the claims to the General Manager, who was bound to give a decision within a reasonable time. But since, the claims were not referred to General Manager and no decision was taken by the General Manager for three years, the delay shall have the effect of a waiver. The Court while exercising its jurisdiction under Section 11 of the Act of 1996, is not bound to decide the issue of arbitrability of the claims. According to him, the Supreme Court in the case of ***Vidya Droila (supra)*** has held that the issue of arbitrability should be decided by the Courts when the facts of the case are clear and glaring.

78. The conclusion of the Supreme Court in ***Indian Oil Corporation Limited (supra)*** on which much reliance has been placed by Mr.Rao is primarily with regard to the issue of ‘*accord and satisfaction*’ in the background of acceptance of ₹4,53,04,021/- by the respondents NCC. The Supreme Court has held that if it is an ‘*open and shut*’ case then the aspect of ‘*accord and satisfaction*’ can be considered at the stage of deciding a petition filed under Section 11 of the Act of 1996 and in case of debatable and disputable facts, the same should be left to the Arbitral Tribunal. The Supreme Court also held if in the factual situation, the aspect of accord and satisfaction and

notified claims are interlinked then the same can be decided by the Arbitral Tribunal as is seen in paragraph 13.1 of the judgment. It is not such a case here. Hence, the claims need to be looked into by the General Manager.

79. Mr. Rao, in support of his submissions that the issue of arbitrability of the claims can be decided under Section 16 of the Act of 1996 and that if under a Contract a party is required to give a certificate as a pre-condition to arbitration and it either fails or delays to do so, then the pre-condition must be held to be waived, has relied upon the judgments in the cases of *Triune Energy Services Pvt. Ltd. (supra)*, *China Petroleum Pipeline Bureau (supra)*, *M K Shah Engineers & Contractors (supra)*, *Karam Chand Thapar & Bros (Coal Sales) Ltd. (supra)*, *Kusheshwar Prasad Singh (supra)* and *Bharat Sanchar Nigam Limited (supra)*. Suffice to state, the reliance is unmerited in view of the clear position of law in *Indian Oil Corporation Limited (supra)*.

80. Having said that, this Court is of the view that the matter need to be remanded back for the General Manager for him to consider whether the claims of the petitioner are required to be notified or not, so that the same can become the subject matter of arbitration.

81. The second issue, which I have noted above though does not really fall for consideration in this case in view of my above conclusion, but since the counsel for the parties have extensively argued the said issue, I deem it appropriate, for the purpose of clarity and certainty, to decide the same.

82. On the second issue, the submissions of Mr. Rao are primarily

the following; (i) that the right of the respondent to unilaterally nominate a panel of members is invalid i.e., the right of one party to appoint a Sole Arbitrator is not valid and; (ii) the respondent has no right in law to provide a panel of three persons out of whom, one should be appointed as a sole Arbitrator and Clause 9.0.1.0 insofar as it restricts / limits the right of the petitioner to chose its Arbitrator only from that panel of three persons is invalid.

83. On the other hand, Mr.Koura would submit the following:-

(i) The petitioner cannot ignore the arbitration agreement executed between the parties, which contemplates a particular procedure for the appointment of a sole arbitrator and this Court cannot rewrite the same;

(ii) It is not the case of the petitioner that the three names given by the petitioner did not qualify as independent Arbitrators;

(iii) The clause which gives right to a party to maintain a panel a Arbitrators is valid in law.

84. At the outset, I may state, the clause of contract conferring right of appointment to one party cannot be challenged unless the stipulation is invalid on the anvil of Section 12(5) of the Act of 1996.

85. Having noted the challenge of the petitioner, it is to be seen whether the nomination of one person from a panel of three Members is invalid. Mr. Rao had opposed the procedure by relying upon the judgment in the case of *Simplex Infrastructures Ltd. (supra)*, *NCCL-Premco (.JV) (supra)*, *Larsen & Toubro Ltd. (supra)* and *Bernard Ingenieure ZT-GmbH (supra)*. In these judgments, the Courts have heavily relied upon the judgment in *Voestalpine Schienen GmbH*

(*supra*). In the said judgment, the Supreme Court has considered the issue whether the panel of arbitrators prepared by the respondent (in that case) violates the amended provisions of Section 12 of the Act of 1996. The issue has been answered in paragraphs 23 to 29, which I reproduce as under:

“23. It also cannot be denied that the Seventh Schedule is based on IBA guidelines which are clearly regarded as a representation of international based practices and are based on statutes, case law and juristic opinion from a cross-section on jurisdiction. It is so mentioned in the guidelines itself.

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.

25. Section 12 has been amended with the objective to induce neutrality of arbitrators viz. their independence and impartiality. The amended provision is enacted to identify the “circumstances” which give rise to “justifiable doubts” about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, the Seventh Schedule mentions those circumstances which would attract the provisions of sub-section (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empanelled by the respondent are not covered by any of the items in the said list.

26. It cannot be said that simply because the person is a retired officer who retired from the government or other statutory corporation or public sector undertaking and

had no connection with DMRC (the party in dispute), he would be treated as ineligible to act as an arbitrator. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. The very reason for empanelling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators. It may also be mentioned herein that the Law Commission had proposed the incorporation of the Schedule which was drawn from the red and orange list of IBA guidelines on conflict of interest in international arbitration with the observation that the same would be treated as the guide “to determine whether circumstances exist which give rise to such justifiable doubts”. Such persons do not get covered by red or orange list of IBA guidelines either.

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

28. *Before we part with, we deem it necessary to make certain comments on the procedure contained in the arbitration agreement for constituting the arbitral tribunal. Even when there are number of persons empaneled, discretion is with the DMRC to pick five persons therefrom and forward their names to the other side which is to select one of these five persons as its nominee (Though in this case, it is now done away with).*

Not only this, the DMRC is also to nominate its arbitrator from the said list. Above all, the two arbitrators have also limited choice of picking upon the third arbitrator from the very same list, i.e., from remaining three persons. This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by the DMRC. Secondly, with the discretion given to the DMRC to choose five persons, a room for suspicion is created in the mind of the other side that the DMRC may have picked up its own favourites. Such a situation has to be countenanced. We are, therefore, of the opinion that sub-clauses (b) & (c) of clause 9.2 of SCC need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose third arbitrator from the whole panel.

29 Some comments are also needed on the clause 9.2(a) of the GCC/SCC, as per which the DMRC prepares the panel of 'serving or retired engineers of government departments or public sector undertakings'. It is not understood as to why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is imperative that panel should be broad based. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension

of accountancy etc. Therefore, it would also be appropriate to include persons from this field as well.”

86. It is not known whether the respondent has prepared the panel of Arbitrators in terms of ***Voestalpine Schienen GmbH (supra)***. The case of the respondent, as highlighted above is that they have forwarded a panel of three persons for the petitioner to nominate one person amongst them as the arbitrator. The three persons appear to be employees, who have retired from Government Organisations. The Supreme Court in ***Voestalpine Schienen GmbH (supra)*** has suggested that a clause in the arbitration agreement therein, restricting the right of the contracting party to appoint / nominate his own Arbitrator should be deleted.

87. Mr. Koura on the other hand has relied upon the judgment in the case of ***USAE Equipment (supra)*** wherein the arbitration clause conferred the right on a party to appoint an Arbitrator, which clause was held to be justified. In fact, the Court held the petitioner had given up the said clause by approaching the Court for appointment of an Arbitrator.

88. Similar is the position in ***Bhayana Builders Pvt. Ltd. (supra)*** wherein the Court has upheld the power of a party to appoint an Arbitrator.

89. Even in ***Sriram Electrical Works (supra)*** this Court has upheld the power of a party to appoint an Arbitrator.

90. There is no contest on the above proposition that the parties having agreed for appointment of an Arbitrator by one party, the appointment cannot be invalidated if it is not in violation of Section

12(5) of the Act of 1996.

91. The issue is, can the arbitrator be appointed by one party by asking the other party to choose a sole Arbitrator from a panel of three Arbitrators without forming the panel in conformity with the judgment of the Supreme Court in ***Voestalpine Schienen GmBH (supra)***.

92. Mr. Koura has sought to justify the appointment of an Arbitrator from a panel of three persons by relying upon ***Central Organisation for Railway Electrification (supra)***. Mr. Rao has contested this on the ground that the correctness of the said judgment has been doubted by the Supreme Court in its subsequent judgment in ***Tantia Constructions Ltd.(supra)***, thereby referring the said judgment to a larger Bench. I am informed that the issue is yet to be decided.

93. Mr. Koura has also relied upon the judgments in the cases of ***IWorld Business Solutions – I (supra) and IWorld Business Solutions – II (supra)***. I have seen the judgments. In ***IWorld Business Solutions – I (supra)*** this Court refused to interfere with the decision of the respondent to provide a panel of three arbitrators to the petitioner as the said panel consisted of three retired Additional District Judges whose impartiality could not have been doubted. Similarly, in ***IWorld Business Solutions – II (supra)*** this Court held that the mandate of the Arbitrator who was nominated by the petitioner from the panel provided by the respondent cannot be terminated merely on the ground that ***Central Organisation for Railway Electrification (supra)*** has been referred to a larger Bench. The above two judgments have been rendered in the facts and circumstances of those cases where this Court did not think it appropriate to interfere with the impugned

action.

94. In *Voestalpine Schienen GmbH (supra)*, the Supreme Court in paragraph 28 (which I have already reproduced above), while dealing with a panel consisting of the names of five persons, observed that the procedure of choosing the arbitrator from a panel of five names has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out the entire panel prepared by the DMRC. Secondly, with a discretion given to DMRC to choose five persons from its panel, room for suspension is created in the mind of the other party, that the DMRC may have picked up its own favourites. Such a situation has to be countenanced. The Supreme Court was therefore, of the opinion that choice should be given to the parties to nominate any person from the entire panel of arbitrators.

95. So, from the above, it is noted that the procedure of forwarding a panel of five names to the other contracting party to choose its nominee arbitrator from amongst them, is no longer a valid procedure.

96. In the present case, the stipulation requires forwarding three names (even if they are retired employees from other organizations and not IOCL) to the petitioners, for it to choose one name amongst them to act as the Sole Arbitrator. It cannot be overlooked that the list of three names is a restrictive panel limiting the choice of the petitioner to only three options. I have noted that the three persons named in the panel forwarded to the petitioner are retired officers of different organisations like ONGC, SAIL and GAIL. The integrity and

impartiality of these officers could not be normally doubted. However, in the absence of a free choice given to the petitioner to choose the arbitrator from a broad and diversified panel, and the power conferred upon the respondent to forward any three names as the panel at its discretion, there is a possibility of apprehension arising on part of the petitioner about the impartiality of the persons in the panel so forwarded. Whether such an apprehension is justified or not, is not for this Court to decide, and is, in any case, immaterial. It is settled law that even an apprehension of bias of an arbitrator in the minds of the parties would defeat the purpose of arbitration, and such a situation must be avoided.

97. Therefore, I declare that the procedure for appointment of the arbitrator (if any) shall necessarily be in terms of the observations of the Supreme Court in *Voestalpine Schienen GmBH (supra)*.

98. It is directed that in view of my conclusion in paragraph 80, the General Manager concerned shall consider the claims of the petitioner and take a decision whether they are to be notified or not, within eight weeks from today. Thereafter, the parties shall proceed in accordance with law.

99. The petition is disposed of. No costs.

V. KAMESWAR RAO, J

OCTOBER 31, 2022/aky