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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : 13.10.2022

Decided on: 31.10.2022

+ ARB.P. 765/2022, I.A. 16701/2022

KMA CATERERS

..... Petitioner

Through: Mr. Akshat Bajpai, Mrs. Ishanee
Sharma, Mr.Rishabh Mishra and
Mr.Shobhit Trehan, Advocates

versus

INDIAN RAILWAY CATERING AND TOURISM
CORPORATION (IRCTC), THROUGH
ITS CHAIRMAN

..... Respondent

Through: Mr. Jitendra Kr. Singh,
Ms.Anjali Kumari and
Mr.Rudresh Tripathi,
Advocates

+ ARB.P. 766/2022, I.A. 16700/2022

KMA CATERERS

..... Petitioner

Through: Mr. Akshat Bajpai, Mrs. Ishanee
Sharma, Mr.Rishabh Mishra
and Mr.Shobhit Trehan,
Advocates

versus

INDIAN RAILWAY CATERING AND TOURISM
CORPORATION (IRCTC), THROUGH
ITS CHAIRMAN

..... Respondent

Through: Mr. Jitendra Kr. Singh,
Ms.Anjali Kumari and
Mr.Rudresh Tripathi,
Advocates

CORAM:

HON'BLE MS. JUSTICE MINI PUSHKARNA

JUDGMENT

31.10.2022

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MINI PUSHKARNA, J.

1. The present petitions have been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter called “The Act”) for appointment of a sole arbitrator.
2. Petitioner herein deals in the business of catering and running food outlets/stalls across various railway stations in India. Respondent on the other hand is a Central Public Sector Enterprise under Ministry of Railways, Government of India and a company registered under the Companies Act, 1956 having its registered office at B-148, 11th Floor, Statesman House, Barakhamba Road, New Delhi-110001, providing ticketing, catering and tourism services to the Indian Railways.
3. In ARB. P. 765/2022, petitioner was awarded licence vide letter dated 29.07.2016 for setting up a food plaza at Patliputra Railway Station and operating the same at licence fees of Rs. 21,90,786/- per annum. Subsequently, disputes arose between the parties and petitioner invoked arbitration clause vide letter dated 26.10.2021 and suggested a name for appointment as sole arbitrator.
4. In ARB. P. 766/2022, petitioner was awarded licence vide letter 02.08.2016 to set up and operate food plaza at Tata Nagar Railway Station at licence fees of Rs. 36,50,786/- per annum. Since disputes arose between the parties with respect to the said licence, petitioner invoked arbitration clause vide letter dated 26.10.2021 and suggested a name for appointment as sole arbitrator.
5. The present petitions came to be filed before this Court for

appointment of an independent arbitrator on the ground that the unilateral appointment procedure as envisaged in the arbitration clause is against the law laid down by Supreme Court. It is also submitted that this Court has territorial jurisdiction to entertain the present petition.

6. On the other hand, the present petitions have been opposed vehemently by respondent on the ground that the same are not maintainable before this Court due to lack of territorial jurisdiction. It is submitted that arbitration clause in both the matters itself stipulates that the venue of arbitration shall be the place of Zonal Headquarters. Thus, it is contended that Zonal Headquarters of food plaza in ARB. P. 765/2022 is at Patliputra and in ARB. P. 766/2022 is at Tata Nagar. On this basis, it is submitted that the present petitions are not maintainable in this Court.

7. It is further submitted that the respondent has its own procedure for appointment of arbitrators and its own panel of arbitrators. Hence, it is contended that an arbitrator is to be appointed in terms of the procedure as envisaged in the arbitration clause between the parties and from the list of arbitrators maintained by respondent.

8. I have heard counsels for both the parties and perused the record.

9. The arbitration clause in both the cases is contained in Clause 11 respectively of the Tender document in ARB. P. 765/2022 and Master License Agreement dated 27.07.2017 in ARB. P. 766/2022 signed between the parties, which is reproduced as below:-

“11.0 ARBITRATION

In the event of any dispute or difference arising under these conditions of License or in connection with this License (except as to any matters, the decision of which is specifically provided for by these or the special conditions) the same will be resolved by Arbitration, as per the provisions of ‘The Arbitration and Conciliation Act – 1996.’ The venue of the Arbitration shall be place of the zonal headquarters. All questions, disputes and or differences arising under or in connection with this agreement or in touching or relating to or concerning the construction, or affect of presents (excepts as to matters the decision whereof is other-wise herein before, expressly provided for) shall be referred to the sole arbitration of the officer or person nominated by the Chairman and Managing Director whose decision in this regard shall be final and binding on the Licensee.”

10. The arbitration clause between the parties stipulates that venue of the arbitration shall be place of the Zonal Headquarters. Thus, the question to be considered by this Court is whether the said stipulation relates to ‘seat’ of arbitral proceedings or ‘venue’ as geographical location for conducting proceedings.

11. Section 20 of the Act refers to place of arbitration as regards ‘seat’ of arbitration as well as ‘venue’ of arbitration wherein the arbitral tribunal may meet for consultation, hearing witnesses etc. The said Section reads as under:

“20. Place of arbitration.—(1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.”

12. Perusal of the arbitration clause in the present case shows that the same does not specifically lay down which place shall be the juridical seat for the arbitration proceedings in the present cases. All that the arbitration clause specifies is that venue of arbitration shall be the place of the Zonal Headquarters. The clause does not designate any juridical centrality to the said Zonal Headquarters.

13. Supreme Court in the case of ***Mankastu Impex Private Limited Vs AirVisual Limited***, reported as **(2020) 5 SCC 399** held as follows:-

“20. It is well settled that “seat of arbitration” and “venue of arbitration” cannot be used interchangeably. It has also been established that mere expression “place of arbitration” cannot be the basis to determine the intention of the parties that they have intended that place as the “seat” of arbitration. The intention of the parties as to the “seat” should be determined from other clauses in the agreement and the conduct of the parties.”

14. It is material to note that in ARB. P. 765/2022, in the clause regarding jurisdiction, Courts situated in Delhi have been given jurisdiction with regard to award of licence. The provision referring to jurisdiction under Clause 1.0 of the Tender Document under the Head definitions stipulates as under:-

“Jurisdiction: The Jurisdiction of Courts situated at Delhi will govern the award of License.”

15. Further, it is also material to note that the Tender Document in ARB. P. 765/2022 was issued at New Delhi. The entire process for award of tender also took place in New Delhi. The relevant clause of the NIT is reproduced as below:-

“NOTICE INVITING TENDER

Subject: SETTING UP, OPERATION AND MANAGEMENT OF FOOD PLAZAS AT RAILWAY STATIONS

Indian Railway Catering and Tourism Corporation Ltd. (IRCTC) invite sealed bids for setting up, operation and management of Food Plazas at Railway stations.

The bids will consist of two packets – Packet-A and Packet-B. Packet-A will consist of Technical and other conditions as laid down in the Bid document. Packet-B shall consist of the Financial Bid as per conditions laid down in the Bid document.

*Sealed Bids with requisite Earnest Money Deposit (Demand Draft for Rs. 3,00,000/- (Rs. Three Lakhs Only) **drawn on** any scheduled commercial bank payable at New **Delhi** in favour of Indian Railway Catering and Tourism Corporation Limited) shall be received at the office of Indian Railway Catering and Tourism Corporation Limited, 11th/ 12th Floor, Statesman, 148 Barakhamba Road, New Delhi — 110001, on or before **19.05.2016 at 12.00 Hrs.** The same shall be opened in the presence of one representative of bidders who choose to witness the opening on the same day at **12.15Hrs** at the same address.”*

16. The Letter of Award dated 29.07.2016 as issued in ARB. P. 765/2022 stipulates that the licence fees is payable at Headquarters situated at New Delhi. The relevant portion of the Letter of Award dated 29.07.2016 is reproduced as under :-

“INDIAN RAILWAY CATERING AND TOURISM CORPORATION LTD.

(A Govt. of India Enterprise-Mini Ratna)

No. 2016/IRCTC/FP/PPTA

Date: 29.07.2016

M/s. K M A Caterers

No. 20, Mubeena House,

Robertson Road, Frazer Town,

Bangalore-560005, Karnataka.

Sh. T.S. Khader Ahmed-

9448059221/9886606977

E-Mail- kmacaterers@yahoo.com/

Azhar 045@yahoo.com

Sub: Letter of Award of setting up of Food Plaza at Patliputra Railway Station.

Ref: NIT No. 2016/IRCTC/CO/LCS-01 dated 08.04.2016.

*With reference to your technical bid dated 19.05.2016 and financial bid opened on 08.07.2016 for the above project, it has been decided to award you the licence to set up and operate Food Plaza at **Patliputra** Railway Station, as per site mentioned in order document @ **Rs. 21,90,786/-** (Rs. Twenty One Lakh Ninety Thousand Seven Hundred Eighty Six Only) per annum towards annual licence fee.*

*The above award is subject to all terms and conditions mentioned in the bid document. You are required to convey your acceptance of the terms and conditions of the licence and required to remit the amount as detailed below in favour of IRCTC Ltd. Payable at IRCTC/Corporate office, New Delhi through a demand draft by date **04.08.2016**.*

Payment details

Sl. No	Head of Account	Amount (Rs.)
1.	Security Deposit	3,63,000/-

A format of the acceptance letter is enclosed.”

17. Similarly, in ARB. P. 766/2022, the Master Licence Agreement was signed and executed in New Delhi. The relevant portion of the Master Licence Agreement dated 24.06.2017 is reproduced as below:-

“An agreement made this 27 day of July, 2017 between the Indian Railway Catering and Tourism Corporation Ltd. (IRCTC) having its Registered Office at 11th Floor, Statesman House, 148 Barakhamba Road, New Delhi, acting through DGM/LCS (herein after called “THE LICENSOR”) which expression shall where the context so admits include its successor and assigns of the ONE PART.”

18. Similarly, the licence fees was payable to the Headquarters at New Delhi in ARB. P. No. 766/2022 also, as in evidenced by the Letter of Award of tender dated 02.08.2016, relevant portion of which is reproduced as below:-

“INDIAN RAILWAY CATERING AND TOURISM CORPORATION LTD.

(A Govt. of India Enterprise-Mini Ratna)

No. 2016/IRCTC/FP/TATA

Date: 02.08.2016

M/s. K M A Caterers

**No. 20, Mubeena House,
Robertson Road, Frazer Town,
Bangalore-560005, Karnataka.**

**Sh. T.S. Khader Ahmed-
9448059221/9886606977**

**E-Mail- kmacaterers@yahoo.com/
azhar_045@yahoo.com**

Sub: Letter of Award of setting up of Food Plaza at Tata Nagar Railway Station.

Ref: NIT No. 2016/IRCTC/CO/LCS-01 dated 08.04.2016.

With reference to your technical bid dated 19.05.2016 and financial bid opened on 01.08.2016 for the above project, it has been decided to award you the licence to set up and operate Food Plaza at Tata Nagar Railway Station, as per site mentioned in order document @ Rs. 36,50,786/- (Rs. Thirty Six Lakh Fifty Thousand Seven Hundred Eighty Six Only) per annum towards annual licence fee.

*The above award is subject to all terms and conditions mentioned in the bid document. You are required to convey your acceptance of the terms and conditions of the licence and required to remit the amount as detailed below in favour of IRCTC Ltd. Payable at IRCTC/Corporate office, New Delhi through a demand draft by date **09.08.2016**.*

Payment details

<i>Sl. No</i>	<i>Head of Account</i>	<i>Amount (Rs.)</i>
<i>1.</i>	<i>Security Deposit</i>	<i>1,08,000/-</i>

A format of the acceptance letter is enclosed.”

19. In both the cases, perusal of various clauses of the Tender Document and the Master Licence Agreement show that the Zonal offices of the respondent have to effectively confer with the IRCTC Headquarters in New Delhi or seek confirmation from them for any effective decision sought to be made. The following clauses of the Tender Document in ARB. P. 765/2022, are reproduced which show that effective administrative decisions pertaining to the contract between the parties were made at Headquarter in New Delhi:

Clause 2.4 – Extent of Operation by the Licensee/ Service

Provider.: Normally the licensee should himself operate the Food Plaza. If the licensee intends to engage service provider(s), he may engage maximum of three (3) service providers for various cuisines with the approval of IRCTC. A maximum of 50% of the available space excluding common area may be operated by the service provider(s) and the remaining 50% may be operated by the licensee. However, the above % of distribution of space may be changed with the approval of IRCTC/Corporate office on receipt of report of IRCTC, Zonal Heads. No sub-licensing is permitted.

.....
Clause 4.1 – *Payment of Licence Fee: 50% of annual licence fee of Rs. _____ and applicable service tax, shall be payable before the handing over of the site. Remaining 50% of the annual licence fee with applicable service tax and other taxes shall be payable before the commissioning of the unit. The annual licence fee including service tax and other applicable taxes, for the second year shall be payable in advance before the commencement of second business year. Similar payment cycle will be followed for each of the subsequent year of service. However, payment of licence fee can be relaxed with the approval of Director/IRCTC in view of site related conditions etc on receipt of report from Zonal Offices.*

.....
Clause 4.9- *Mode of payment: Licence fee, Security Deposit and any other dues shall be payable through Demand Draft/Banker's Cheque or Cheque drawn at the City of respective Zonal Offices in favour of IRCTC Ltd.*

.....
Clause 12.11- *General: The licensor reserves the right to amend any of the clauses of the agreement and also to add fresh clauses from time to time. The rider agreement in this regard shall be executed between the parties within 15 days of the amendment/changes. Further, IRCTC reserves the right to extend or reduce the*

stipulated clause in the tender/License conditions herein above, in order to meet operational exigencies. The decision of Chairman and Managing Director of IRCTC in this regard will be final. ”

20. Similarly, in ARB. P. 766/2022, the following clauses of the Master Licence Agreement dated 24.06.2017 are material:-

*“**Clause 2.4** – Extent of Operation by the Licensee/ Service Provider.: Normally the licensee should himself operate the Food Plaza. If the licensee intends to engage service provider(s), he may engage maximum of three (3) service providers for various cuisines with the approval of IRCTC. A maximum of 50% of the available space excluding common area may be operated by the service provider(s) and the remaining 50% may be operated by the licensee. However, the above % of distribution of space may be changed with the approval of IRCTC/Corporate office on receipt of report of IRCTC, Zonal Heads. No sub-licensing is permitted.*

.....
***Clause 4.1** – Payment of Licence Fee: 50% of annual licence fee of Rs. 36,50,786/- and applicable service tax, shall be payable before the handing over of the site. Remaining 50% of the annual licence fee with applicable service tax and other taxes shall be payable before the commissioning of the unit. The annual licence fee including service tax and other applicable taxes, for the second year shall be payable in advance before the commencement of second business year. Similar payment cycle will be followed for each of the subsequent year of service. However, payment of licence fee can be relaxed with the approval of Director/IRCTC in view of site related conditions etc on receipt of report from Zonal Offices.*

.....
***Clause 4.9-** Mode of payment: Licence fee, Security Deposit and any other dues shall be payable through Demand Draft/Banker’s Cheque or Cheque drawn at the*

City of respective Zonal Offices in favour of IRCTC Ltd.

.....

Clause 12.11- General: *The licensor reserves the right to amend any of the clauses of the agreement and also to add fresh clauses from time to time.*

The rider agreement in this regard shall be executed between the parties within 15 days of the amendment/changes.

Further, IRCTC reserves the right to extend or reduce the stipulated clause in the tender/License conditions herein above, in order to meet operational exigencies. The decision of Chairman and Managing Director of IRCTC in this regard will be final. ”

21. Considering the aforesaid clauses, it is clear that the disputes so raised by the petitioner with respect to the licence, are primarily within the jurisdiction of the Headquarters at New Delhi. As such, the cause of action clearly arises, either wholly or in part, in New Delhi in terms of Section 20 of Code of Civil Procedure.

22. It is apparent that the Tender Document and the Master Licence Agreement give jurisdiction to Courts in Delhi with respect to the award of the licence. The effective control in the institutional hierarchy vests with the Headquarters at New Delhi office. Further, all meaningful dealing with respect to the contract is being done with the Headquarters at New Delhi. Thus, the designation of the Zonal Headquarters as the venue of arbitration is merely an indication as to the possible geographical location of the arbitration proceedings, and not to the juridical seat of the arbitration. It is an inescapable conclusion that New Delhi is the juridical seat for arbitration proceedings in the present cases. As such, Courts in Delhi would be

“Court” in terms of Section 2(1) (e) of the Arbitration and Conciliation Act, 1996.

23. Even if one were to hold that there is some cause of action arising at the Zonal Headquarters, it does not oust the jurisdiction of the Courts in New Delhi, as the cause of action arises wholly or in part in New Delhi.

24. On the aspect of ‘venue’ for holding the sittings of arbitral tribunal and ‘seat’ of arbitration, Supreme Court in the case of ***Ravi Ranjan Developers Pvt. Ltd. V. Aditya Kumar Chatterjee, 2022 SCC OnLine SC 568***, held as follows:

“43. This Court has perused the Development Agreement. The contention of the Respondent in the Affidavit in Opposition, that the parties to the arbitration agreement had agreed to submit to the jurisdiction of Calcutta High Court, is not correct. The parties to the arbitration agreement only agreed that the sittings of the Arbitral Tribunal would be in Kolkata. Kolkata was the venue for holding the sittings of the Arbitral Tribunal.

44. In Union of India v. Hardy Exploration and Production (India) Inc.⁶ a three Judge Bench of this Court held that the sittings at various places are relatable to venue. It cannot be equated with the seat of arbitration or place of arbitration, which has a different connotation.

45. In Mankastu Impex Private Limited v. Airvisual Limited⁷ a three Judge Bench of which one of us (Hon. A.S. Bopanna, J) was a member, held:

“19. The seat of arbitration is a vital aspect of any arbitration proceedings. Significance of the seat of arbitration is that it determines the applicable law when deciding the arbitration proceedings and arbitration procedure as well as judicial review over the arbitration award. The situs is not just about where an institution is

based or where the hearings will be held. But it is all about which court would have the supervisory power over the arbitration proceedings. In Enercon (India) Ltd. v. Enercon GmbH [Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59], the Supreme Court held that : (SCC pp. 43 & 46, paras 97 & 107)

“[T]he location of the seat will determine the courts that will have exclusive jurisdiction to oversee the arbitration proceedings. It was further held that the seat normally carries with it the choice of that country's arbitration/curial law.”

20. It is well settled that “seat of arbitration” and “venue of arbitration” cannot be used interchangeably. It has also been established that mere expression “place of arbitration” cannot be the basis to determine the intention of the parties that they have intended that place as the “seat” of arbitration. The intention of the parties as to the “seat” should be determined from other clauses in the agreement and the conduct of the parties.”

46. In this case, the Development Agreement provided that the sittings of the Arbitral Tribunal would be conducted in Kolkata. As observed above, the parties never agreed to submit to the jurisdiction of Calcutta High Court in respect of disputes, nor did the parties agree upon Kolkata as the seat of arbitration. Kolkata was only the venue for sittings of the Arbitral Tribunal.”

25. This Court while bringing out the distinction between ‘venue’ and ‘seat’ of arbitration, held in the case of ***Isgec Heavy Engineering Ltd. Vs Indian Oil Corporation Limited, 2021 SCC OnLine Del 4748*** as follows:-

“8. There can be no doubt on the proposition that the word ‘seat’ and ‘venue’ have different connotations. They are not synonymous, in so far as the arbitration proceedings are concerned, although, they have often been used

interchangeably. The law on 'seat' and 'venue' of arbitration proceedings is fairly well-defined in view of several judgments of the Supreme Court. The Supreme Court has clearly held that where the parties have determined the 'seat' in their agreement, the same is akin to conferring exclusive jurisdiction on the court(s) thereof⁵. The expression venue and 'seat' do not find any mention under the Act. The expression used under the Act is 'place', which finds mention under Section 20 of the Act. In BALCO v. Kaiser Aluminium Technical Services Inc.⁶ the Apex Court made it clear that sub-sections (1) and (2) of Section 20, where the word 'place' is used, refer to juridical 'seat'; whereas, in sub-section (3) of Section 20, the word 'place' is equivalent to 'venue', i.e., the location of the meeting of arbitral proceedings.

.....

12. To answer the afore-mentioned question - What constitutes the 'seat' of arbitral proceedings - the intention of the parties is germane and that can be gathered from the terms of the Contract. Let's have a closer look at the clause. The clause provides a general stipulation that the 'venue' so designated can be changed by the Arbitrators, with the consent of the parties. This, prima facie, suggests that the 'venue' specified is not really envisaged as the 'seat' of the proceedings, which should be specified in certain terms. This interpretation is also in sync with Section 20(3) of the Act, which provides that notwithstanding anything contained in Section 20(1) and (2) - the Arbitral Tribunal can meet at any place it considers appropriate for hearing witnesses, experts, etc. In fact, the language used in the present clause seems to be a replication of the language used in Section 20(3). For this reason, as well, the Court is inclined to agree that in the present case, Clause 9.1.2.0 of the GCC specifies New Delhi only as a geographically convenient place where Arbitral Tribunal can hold meetings. "

26. In view of the aforesaid discussion, it is held that the present petition is maintainable in this Court as Courts in Delhi have territorial jurisdiction to deal with the present petitions.

27. This brings us to the second contention raised on behalf of the respondent with respect to the authority of the respondent to appoint arbitrator from the panel of arbitrators maintained by the respondent as per the procedure given in the arbitration clause.

28. The arbitration clause between the parties contemplates unilateral appointment of arbitrator by respondent, which is impermissible in law in view of the various judgments of Hon'ble Supreme Court. Thus, any appointment done by respondent in terms of the procedure as given in the arbitration clause, will be *de jure void ab initio*.

29. Supreme Court in the case of ***Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd.***, reported as ***2019 SCC Online SC 1517*** categorically laid down that a person who has an interest in the outcome or decision in respect of dispute must not have power to appoint a sole arbitrator. Further, Supreme Court has been very categorical in its finding in the said case that a party cannot unilaterally appoint an arbitrator notwithstanding anything contained in the arbitration clause in view of amendments brought in the Act. Supreme Court, thus, held as follows:-

“23. Sub-para (vii) of the aforesaid para 48 lays down that if there are justifiable doubts as to the independence and impartiality of the person nominated, and if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, such

appointment can be made by the Court. It may also be noted that on the issue of necessity and desirability of impartial and independent arbitrators the matter was considered by the Law Commission in its Report No. 246. Paras 53 to 60 under the heading “Neutrality of Arbitrators” are quoted in the judgment of this Court in Voestalpine Schienen GmbH v. DMRC [Voestalpine Schienen GmbH v. DMRC, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , while paras 59 and 60 of the Report stand extracted in the decision of this Court in Bharat Broadband Network Ltd. v. United Telecoms Ltd. [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] . For the present purposes, we may rely on para 57, which is to the following effect : (Voestalpine case [Voestalpine Schienen GmbH v. DMRC, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , SCC p. 681, para 16)

“16. ... ‘57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the Arbitral Tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles — even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr P.K. Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee

arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous — and the right to natural justice cannot be said to have been waived only on the basis of a “prior” agreement between the parties at the time of the contract and before arising of the disputes.’ ”

(emphasis in original)

24. *In Voestalpine [Voestalpine Schienen GmbH v. DMRC, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , this Court dealt with independence and impartiality of the arbitrator as under : (SCC pp. 687-88 & 690-91, paras 20 to 22 & 30)*

“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 rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. 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 : 2011 UKSC 40] 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.’

21. Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in Consorts Ury [Fouchard, Gaillard, Goldman on International Commercial Arbitration, 562 [Emmanuel Gaillard & John Savage (Eds.) 1999] {quoting Cour de cassation [Cass.] [Supreme Court for judicial matters] Consorts Ury v. S.A. des Galeries Lafayette, Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France)}.], underlined that:

‘an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator’.

22. Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings.

30. Time has come to send positive signals to the international business community, in order to create

healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by DMRC. It, therefore, becomes imperative to have a much broadbased panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. We, therefore, direct that DMRC shall prepare a broadbased panel on the aforesaid lines, within a period of two months from today.”

30. This Court in the case of ***Janajal Yatri Gana Vs Indian Railway Tourism and Corporation***, ARB. P. No. 601/2020 vide order dated 05.03.2021, decided similar issue against the present respondent and appointed an arbitrator in the light of law laid down by Supreme Court in the case of Perkins Eastman (supra). This Court held as follows:-

“13. Although, the Arbitration Clause provides that the Managing Director of the respondent would nominate the Arbitrator, the same is not permissible in view of the decision of the Supreme Court in Perkins Eastman Architects DPC and Anr. V. HSCC (India) Limited : Arbitration Application No. 32 of 2019, decided on 26.11.2019 and is followed by this Court in Proddatur Cable TV Digi Services v. Citi Cable Network Limited : (2020) 267 DLT 51.”

31. The position of law after amendment of the Act is that an employee of the respondent or even a retired employee would be ineligible to be appointed as an arbitrator. Any person whose relationship with the parties or the counsel or the subject matter of the dispute falls under the Seventh Schedule shall not be eligible to be appointed as arbitrator in view of Section 12(5) of the Act.

32. Thus, it is not permissible for the respondent to appoint an arbitrator in terms of the procedure as laid down in the arbitration clause in the present case from its own panel, as the same would be in complete violation of the law as it exists today after amendment to the Act and law as laid down by Supreme Court in a catena of judgments.

33. Thus, there is no legal impediment for appointment of an arbitrator by this Court.

34. During the course of hearing, it was submitted on behalf of the petitioner that it has approximate claims of Rs. 2 to 3 crores in each of the case.

35. Considering the aforesaid discussion, the present petition is allowed and Mr. Abhijat, Advocate, Mobile No. 9811800833, email: abhijat.bal@gmail.com, is appointed as sole arbitrator to adjudicate the disputes in the present cases.

36. The learned arbitrator shall ensure the compliance of Section 12 read with 5th, 6th and 7th Schedule of the Act before commencing the arbitration.

37. The learned Sole Arbitrator shall be entitled to fee as stipulated in the Fourth Schedule to the Act.

38. All rights and contentions of parties are left open for

consideration by the learned Sole Arbitrator.

39. The present petition is disposed of in the aforesaid terms. All the pending applications are also disposed of.

**(MINI PUSHKARNA)
JUDGE**

OCTOBER 31, 2022

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