



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

ARBITRATION APPLICATION NO. 26 OF 2023

S. N. Naik & Brothers

A proprietary concern, through its
Proprietor, Shri. Kumar S/o Namdeo Naik,
Age: 62 years, Occu.: Business,
Having its office at Herambh Building,
Flat No.003, New Exchange Oil,
Sector-13, New Panvel, Navi Mumbai,
Dist. Raigad – 410217

.. Applicant

Versus

Union of India,
Through, Senior Divisional
Engineer (Co-ord), Nanded Division,
South Central Railway,
Rail Vikas Sadan, Sangvi Naka,
Nanded – 431 605

.. Respondent

...

Advocate for Applicant :

Mr. Namit Sunil Muthiyan h/f. Mr. Shubham M. Agrawal
Standing Counsel for Respondent: Mr. Madhur A. Golegaonkar

...

CORAM : ARUN R. PEDNEKER, J.

Reserved on: 20.03.2024

Pronounced on: 03.04.2024

JUDGMENT:

1. Heard **Mr. Namit Sunil Muthiyan**, learned counsel for the applicant and **Mr. Madhur A. Golegaonkar**, learned counsel for the respondent.

2. The present arbitration application is filed under section 11 (6) of the Arbitration and Conciliation Act, 1996 (*for short “the Arbitration Act”*) for appointment of an arbitrator in a dispute that arose out of an agreement dated 23.09.2019. The said agreement provides for the arbitration, at clause no.64(3)(b)(ii) of the Indian Railways Standard General Conditions of Contract – November, 2018 (*hereinafter referred as “General Conditions of Contract”*).

3. The facts stated in the application for invocation of power of this court under section 11(6) of the Arbitration Act are as under:-

“1. The applicant S. N. Naik & Brothers is a sole proprietary concern having its office at the address specified in the cause title.

2. The respondent is the Union of India, through its Senior Divisional Engineer (Coord) Nanded Division, South Central Railway having its office at the address specified in the cause title.

3. The respondent had published e-tender No. T-201819-1-117 dated 12.03.2019 for the work of “Nanded Division, Parli – Parbhani Section :- Provision of limited height subway in lieu of manned Level Crossing No. 18, 19, 21 and 22” (hereinafter referred to as the “Work” or as the “said Work”). The applicant had submitted its offer for the work.

4. On 05.07.2019, the respondent awarded the said work to the applicant vide Letter of Acceptance dated 05.07.2019, for an amount of Rs.10,37,78,548.23/- (Rupees Ten Crore Thirty-Seven Lakhs Seventy-Eight Thousand Five Hundred Fourty-Eight and Paise Twenty-Three only).

5. On 23.09.2019, that thereafter, formal contract agreement bearing even date, was also entered into by and between the applicant and the respondent.

6. Respondent contended that as there was constant delay in completing the work and work was relating to public safety at large as such a 7 day notice and 48 hours notice was served upon petitioner by the respondent.

7. On 17.12.2022, the applicant was therefore approached the Hon'ble District Judge at Nanded by filing an Application under section 9 of the Arbitration and Conciliation Act bearing Miscellaneous Civil Application No.489/2022 for interim protection against Termination of Contract by the Respondent. The Hon'ble Court was pleased to pass ad-interim order of status-quo in favour of the applicant. On the same day the applicant vide letter dated 17.12.2022, invoked arbitration in respect of the disputes and differences between the parties.

8. The respondent further directed the applicant to submit forms towards waiver of Section 12(5) (ineligibility of serving or retired officers of the respondent to act as an arbitrator) and 31(A)(5) (payments of costs) of the Arbitration and Conciliation Act, 1996, as amended in 2015.

9. On 11.05.2023, as the applicant was not desirous of deviating from the dispute resolution mechanism agreed between the parties, to the extent of the procedure being in consonance with the settled law, in response to the Respondent's letter dated 26.04.2023, the applicant addressed a letter to the respondent and clarified that in accordance with the dispute resolution mechanism agreed between the parties, the applicant had already referred the disputes to the General Manager, Railways and that despite sufficient time being passed since submission of said disputes, the General Manager, respondent has failed to render his decision in writing. The applicant further clarified

that, respondent is not entitled to appoint the arbitrator in the matter despite the existence of any term to the contrary in the contract. The applicant unequivocally refused to waive the applicability of Sections 12(5) and 31(A)(5) of the Arbitration and Conciliation Act, 1996, as amended in 2015.

10. On 01.06.2023, the respondent addressed a letter wherein, the respondent suggested four names of retired officers of the respondent and directed the applicant to select any two names therefrom to act as the nominee arbitrator on behalf of the applicant in terms of request for appointment of arbitrator dated 17.12.2022.

11. On 22.07.2023, the applicant nominated its arbitrator and called upon the respondent to nominate its arbitrator within the statutory period of 30 days.

12. On 18.08.2023, the respondent however failed to either appoint its nominee arbitrator within the statutory period of 30 days or prepare a panel of more than three arbitrators within 60 days from invocation of arbitration by the applicant vide letter dated 22.07.2023. The respondent constituted an arbitral tribunal (including the nominee arbitrator of the applicant) to decide the disputes and differences between the parties.

13. On 13.09.2023, the applicant took objection to the act of respondent to constitute an arbitral tribunal (including the nominee arbitrator of the applicant) to decide the disputes and differences between the parties in view of the alleged request for appointment dated 17.12.2022.

14. On 01.08.2023, in furtherance to the respondent's letter dated 27.07.2023, one of the arbitrators accepted his appointment.

15. *On 29.08.2023, in the meanwhile, the arbitral tribunal entered into the reference and issued a letter to the applicant and respondent.*

16. *On 19.10.2023, the respondent thereafter vide a letter, directed the applicants to raise the objections it has before the Arbitral Tribunal appointed by the respondent.*

17. *On 02.11.2023, the Hon'ble District Judge No.2 at Nanded vide an order bearing even date was pleased to partly allow the Miscellaneous Civil Application No.489/2022 and grant status-quo for a period of 2 months or till the first hearing before the arbitral tribunal constituted in accordance with their agreement, whichever is earlier.*

18. *On 09.11.2023, as the respondent failed to appoint their nominee arbitrator within the statutory period of 30 days, the applicant is left with no other alternative but to approach this Hon'ble Court under Section 11 and other relevant provisions of the Arbitration and Conciliation Act, 1996 for the appointment of a sole arbitrator."*

4. It is the case of the applicant that clause 64(3)(b)(ii) of the Indian Railways Standard General Conditions of Contract – November, 2018, is applicable to the agreement dated 23.09.2019. **Mr. Namit Sunil Muthiyan**, learned counsel for the applicant submits that the above clause 64(3)(b)(ii) of the General Conditions of Contract, provides for a unilateral appointment of arbitration tribunal and the same cannot be sustained in view of section 12 (5) read with Schedule 5 and 7 of the Arbitration Act. The appointment of the arbitral tribunal in terms of clause 64(3)(b)(ii) of the

General Conditions of Contract is in violation of the law laid down in the case of **TRF Ltd. Vs. Energo Engineering Projects Ltd. reported in (2017) 8 SCC 377** and in the case of **Perkins Eastman Architects DPC and another Vs. HSCC (India) Ltd. reported in (2020) 20 SCC 760**.

5. The learned counsel has also submitted that clause 64(3)(b) (ii) of the General Conditions of Contract are in violation of law laid down in the case of **M/s. Voestalpine Schienen GMBH Vs. Delhi Metro Rail Corporation Ltd., (2017) 4 SCC 665**.

6. The learned counsel has also placed reliance in the judgments of the Delhi High Court in the case of **Gangotri Enterprises Ltd. Vs. General Manager Northern Railways, Arbitration Petition No.366 of 2020, dated 31.10.2022** and in the case of **M/s. Ganesh Engineering Works Vs. Northern Railway and another, Arbitration Petition NO.609 of 20023, dated 29.11.2023**, to contend that application under section 11(6) of the Arbitration Act was allowed while interpreting the above clause 64(3)(b)(ii) of the General Conditions of Contract.

7. In response to the notice the respondent has objected to the appointment of the arbitrator under section 11(6) of the Arbitration Act. The objections raised to the appointment to the arbitrator under section 11(6) of the Arbitration Act are as under:-

[I – Issue of Maintainability]

Mr. Madhur A. Golegaonkar, learned counsel for the respondent - Union of India, Through, Senior Divisional Engineer (Co-ord), Nanded Division, South Central Railway, submits that arbitration application under section 11(6) of the Arbitration Act cannot be preferred after obtaining order under section 9 of the Arbitration Act and the party concerned has to proceed to constitute an arbitral tribunal in accordance with the agreement and that there would be a deemed waiver to challenge to the appointment of the arbitrator as stipulated under the contract duly signed by both the parties.

[II] Once the court while exercising powers under section 9(2) of the Arbitration Act provides both the parties to constitute an arbitral tribunal in accordance with the agreement and directed both the parties to appear before them, the parties are bound by it and the same cannot be challenged under application 11 (6) of the Arbitration Act and the Hon'ble High Court cannot sit as an appellate authority to the order passed by the District Court under section 9 of the Arbitration Act. Section 9(2) of the Arbitration Act would prevail and order dated 02.11.2023, passed by the District Court would be binding upon the parties.

[III] The similar arbitration clause has already been upheld in the case of **Central Organization for Railway Electrification Vs. ECI-SPIC-SMO-MCML (JV) a Joint Venture company reported in (2020) 14 SCC 712** (hereinafter referred as “CORE”) and, although, the law laid down in the said judgment is referred to a larger bench yet the judgment is still holding the field and this court is bound by it.

8. From the submissions as canvassed by the petitioner the following issues arise for consideration:-

{1} Whether clauses 64(3)(b)(ii) of the General Conditions of Contract is in violation of section 12(5) read with Schedule 5 and 7 of the Arbitration Act and also the mandate of **TRF** (supra) and **Perkins** (supra) ?

{2} Whether the arbitration application under section 11(6) of the Arbitration Act can be preferred after obtaining an interim order under section 9 of the Arbitration Act without following the process available for appointment of Arbitral Tribunal as provided in the contract and as directed by the court passing interim order under section 9(2) of the Arbitration Act?

{3} In the fact situation, whether, this court can exercise powers under section 11(6) of the Arbitration Act to appoint an arbitrator ?

CONSIDERATION

9. On considering the rival submissions at the outset it is necessary to quote the relevant clause 64(3)(b)(ii) of the Indian Railways Standard General Conditions of Contract – November, 2018, as applicable to the parties. The relevant clause reads as under:-

“64.(3)(b): Appointment of Arbitrator where applicability of Section 12 (5) of Arbitration and Conciliation Act has not been waived off:

(i) ...

(ii) In cases where the total value of all claims in question added together exceed Rs.50,00,000/- (Rupees Fifty Lakh), the Arbitral Tribunal shall consist of a Panel of three (3) retired Railway Officer, retired not below the rank of Senior Administrative Grade Officer, as the arbitrators. For this purpose, the Railway will send a panel of at least four (4) names of retired Railway Officer(s) empanelled to work as Railway Arbitrator duly indicating their retirement date to the Contractor within 60 days from the day when a written and valid demand for arbitration is received by the General Manager.

Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as Contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the Contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'Presiding Arbitrator' from

amongst the 3 arbitrators so appointed. General Manager shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of Contractor's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them has served in the Accounts Department."

- A. The analysis of the above clause would indicate that the arbitral tribunal would consist of panel of 3 retired railway officers not below the rank of senior administrative grade officer, as arbitrators.
- B. For this purpose, the railway will send a panel of at least 4 names of retired railway officers empanelled to work as railway arbitrator duly indicating their retirement date to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the General Manager.
- C. The contractor is asked to select at least 2 names out of the 4 names suggested by the General Manager for appointment as Contractor's nominee within 30 days.
- D. The General Manager shall appoint at least 1 out of the 2 names suggested by the contractor as the Contractor's nominee.
- E. And will also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly

indicating the 'Presiding Arbitrator' from amongst the 3 arbitrators so appointed.

10. Thus, from the above, it is clear that from the 3 arbitrators, 2 will be appointed including the presiding arbitrator by the General Manager and even in the case of third arbitrator, the General Manager will have a final word, as 4 names are suggested by him of which the contractor is required to choose 2 and even amongst the 2 chosen by the contractor the General Manager will select one. Thus, in entirety, the entire tribunal is constituted by the General Manager. The contractor having virtually very little say, even as regards the contractor's nominee.

11. The law on the subject of appointment of arbitrators, i.e. appointment of sole arbitrator or an arbitral tribunal by one of party to the contract notwithstanding the contract to the contrary, is evolved in the judgment of **Voestalpine** (supra), **TRF** (supra) and **Perkins** (supra) etc, wherein the independence and impartiality of the sole arbitrator or the arbitral tribunal is held sacrosanct. The law enunciated is that there cannot be unilateral appointment of sole arbitrator or the majority members of the arbitral tribunal by one of the party to the dispute notwithstanding the prior contract to the contrary. This is to ensure impartiality and independence of the arbitrators. The law as developed is discussed as under:-

12. In the case of Voestalpine (supra), the Hon'ble Supreme Court in paras 21 to 23, 30 and 31 has held as under:-

“21) Similarly, Cour de cassation, France, in a judgment delivered in 1972 in the case of Consorts Ury, 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.

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.

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 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 the DMRC. It, therefore, becomes imperative to have a much broad based 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 broad based panel on the aforesaid lines, within a period of two months from today.

31) Subject to the above, insofar as present petition is concerned, we dismiss the same, giving two weeks' time to the petitioner to nominate its arbitrator from the list of 31 arbitrators given by the respondent to the petitioner. No costs."

13. The Hon'ble Supreme Court in the case of **Perkins Eastman Architects DPC and another Vs. HSCC (India) Ltd.** (supra), considered **TRF** (supra). In **Perkins** (supra), the issues that arose for consideration before the Hon'ble Supreme Court are as under:-

"(i) ...

(ii) Whether a case was made out for exercise of power by the Court to make an appointment of an arbitrator i.e.:

(a) Whether Chairman and Managing Director failed to appoint the sole arbitrator within 30 days of the requisition dated 28-6-2019 and if so its consequences ?

(b) Whether Chairman and Managing Director was ineligible to nominate an arbitrator i.e. whether a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator ?

(c) Whether power can be exercised by the Supreme Court under Section 11 of the Act when the appointment of an arbitrator has already been made by the respondent ?"

While answering the issue the Hon'ble Supreme Court at paras 18, 20 and 21 has held as under:-

“18. The issue was discussed and decided by this Court as under: (TRF case, SCC pp.403-04, paras 50-54)

50. First, we shall deal with Clause (d). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the “named

*sole arbitrator” and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction. In this regard, our attention has been drawn to a two-Judge Bench decision in *State of Orissa v. Commr. of Land Records & Settlement*⁷. In the said case, the question arose, can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held: (SCC p. 173, para 25)*

...

53. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. According to the learned counsel for the appellant, ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee.

54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director

as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.”

“20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited⁴ where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator.”

“21. But, in our view that has to be the logical deduction from TRF Limited. Paragraph 50 of the decision shows that this Court was concerned with the issue, “whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator” The ineligibility referred to therein, was as a result of operation

of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited.”

14. The Hon’ble Supreme Court in the case of **Lombard Engineering Limited Vs. Uttarakhand Jal Vidyut Nigam Limited**, dated 06.11.2023, Arbitration Petition No.43 of 2022, considered whether clause 55 of the GCC containing condition of 7% deposit of the total amount of claim and second relating to the stipulation empowering the Principal Secretary (Irrigation) Government of Uttarakhand to appoint a sole arbitrator was considered and was struck out and the Hon’ble Supreme court held that the appointment of arbitrator notwithstanding the contract to the contrary would be void and that the one of the parties

did not have a bargaining power to modify the contract. The arbitration agreement has to be in conformity with the Contract Act and should satisfy core contractual requirements.

15. In the case of **Lombard Engineering Limited Vs. Uttarakhand Jal Vidyut Nigam Limited**, dated 06.11.2023, Arbitration Petition No.43 of 2022, the 3 Judges bench of the Hon'ble Supreme Court has at paras 81, 82, 83, 84, 88, 93 and 102 has observed as under:-

“81. Thus, in the context of the Arbitration Agreement, the layers of the Grundnorm as per Kelsen's theory would be in the following hierarchy:

(i) Constitution of India, 1950;

(ii) Arbitration and Conciliation Act, 1996 & any other Central/State Law;

(iii) Arbitration Agreement entered into by the parties in light of s. 7 of the Arbitration and Conciliation Act, 1996.

82. Thus, the Arbitration Agreement, has to comply with the requirements of the following and cannot fall foul of:

(i) Section 7 of the Arbitration and Conciliation Act;

(ii) any other provisions of the Arbitration and Conciliation Act, 1996 & Central/State Law;

(iii) Constitution of India, 1950.

83. The observations of this Court in para 236 of Vidya Drolia (supra) should clinch the issue. Para 236 reads thus:

“236. Having established the threshold standard for the court to examine the extent of validity of the arbitration agreement, as a starting point, it is necessary to go back to Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764], which laid down : (SCC p. 759, para 48)

“48. ... From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.” At first blush, the Court seems to have read the existence of the arbitration agreement by limiting the examination to an examination of its factual existence. However, that is not so, as the existence of arbitration agreement does not mean anything unless such agreement is contractually valid. This view is confirmed by Duro Felguera case [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764], wherein the reference to the contractual aspect of arbitration agreement is ingrained under Section 7 analysis. A mere agreement is not legally binding, unless it satisfies the core contractual requirements, concerning consent, consideration, legal relationship, etc.” (Emphasis supplied)

84. The concept of “party autonomy” as pressed into service by the respondent cannot be stretched to an extent where it violates the fundamental rights under the Constitution. For an arbitration clause to be legally binding it has to be in consonance with the “operation of law” which includes the Grundnorm i.e. the Constitution. It is the rule of law which is supreme and forms parts of the basic structure. The argument canvassed on behalf of the respondent that the petitioner having consented to the pre-deposit clause at the time of execution of the agreement, cannot turn around and tell the court in a Section 11(6) petition that the same is arbitrary and falling foul of Article 14 of the Constitution is without any merit.

88. In the aforesaid context, we must look into the amended Section 12 of the 1996 Act. Section 12 reads thus:

“12. Grounds for challenge.

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

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

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

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

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

(3) An arbitrator may be challenged only if—

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

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

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

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

89. *The Amendment 2015 is also based on the recommendation of the Law Commission which specifically dealt with the issue of “Neutrality of Arbitrators” and a discussion in this behalf is contained in paras 53 to 60 of the Law Commission’s Report No. 246 published in the August 2004. We reproduce the entire discussion hereinbelow:*

“NEUTRALITY OF ARBITRATORS

53. *It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of arbitration, neutrality of arbitrators viz. their independence and impartiality, is critical to the entire process.*

54. *In the Act, the test for neutrality is set out in Section 12(3) which provides—*

‘12. (3) An arbitrator may be challenged only if—

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

55. *The Act does not lay down any other conditions to identify the “circumstances” which give rise to “justifiable doubts”, and it is clear that there can be many such circumstances and situations. The test is not whether, given the circumstances, there is any actual bias for that is setting the bar too high; but, whether the circumstances in question give rise to any justifiable apprehensions of bias.*

56. *The limits of this provision has been tested in the Indian Supreme Court in the context of contracts with State entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court (see *Executive Engineer, Irrigation Division v. Gangaram Chhapolia* [*Executive Engineer, Irrigation Division v. Gangaram Chhapolia*, (1984) 3 SCC 627] , *Transport Deptt. v. Munuswamy Mudaliar* [*Transport Deptt. v. Munuswamy Mudaliar*, 1988 Supp SCC 651] , *International Airports Authority v. K.D. Bali* [*International Airports Authority v. K.D. Bali*, (1988) 2 SCC 360] , *S. Rajan v. State of Kerala* [*S. Rajan v. State of Kerala*, (1992) 3 SCC 608] , *Indian Drugs &**

Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd. [Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd., (1996) 1 SCC 54] , Union of India v. M.P Gupta [Union of India v. M.P Gupta, (2004) 10 SCC 504] and ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd. [ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd., (2007) 5 SCC 304] that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd. [Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd., (2009) 8 SCC 520 : (2009) 3 SCC (Civ) 460], carved out a minor exception in situations when the arbitrator ‘was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject-matter of the dispute’ (SCC p. 533, para 34) and this exception was used by the Supreme Court in Denel (Proprietary) Ltd. v. Ministry of Defence [Denel (Proprietary) Ltd. v. Ministry of Defence, (2012) 2 SCC 759 : (2012) 2 SCC (Civ) 37 : AIR 2012 SC 817] and Bipromasz Bipron Trading Sa v. Bharat Electronics Ltd. [Bipromasz Bipron Trading Sa v. Bharat Electronics Ltd., (2012) 6 SCC 384 : (2012) 3 SCC (Civ) 702] , to appoint an independent arbitrator under Section 11, this is not enough.

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.

58. Large-scale amendments have been suggested to address this fundamental issue of neutrality of arbitrators, which the Commission believes is critical to the functioning of the arbitration process in India. In particular, amendments have been proposed to Sections 11, 12 and 14 of the Act.

59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the red and orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a “guide” to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed Section 12(5) of the Act and the Fifth Schedule which incorporates the categories from

the red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed Explanation to Section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the red and orange lists of the IBA Guidelines), the ineligibility to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the red list of the IBA Guidelines).

60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective “justifiable doubts” regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to Section 12(5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all other cases, the general rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1) and in which context the High Court or the designate is to have “due regard” to the contents of such disclosure in appointing the arbitrator.” (Emphasis supplied)

93. There was clearly inequality of bargaining power between Uber and Mr. Heller. The arbitration agreement was part of a standard form contract. Mr. Heller was powerless to

negotiate any of its terms. His only contractual option was to accept or reject it...”

“102. In view of the aforesaid discussion, we have reached to the conclusion that we should ignore the two conditions contained in Clause 55 of the GCC, one relating to 7% deposit of the total amount claimed and the second one relating to the stipulation empowering the Principle Secretary (Irrigation) Government of Uttarakhand to appoint a sole arbitrator and proceed to appoint an independent arbitrator.”

16. Before I apply the law enunciated in the case of **Voestalpine** (supra), **TRF** (supra), **Perkins** (supra) and **Lombard** (supra) to the facts of this case it is necessary to consider the judgment of the Hon’ble Supreme Court in the case of **Central Organization for Railway Electrification Vs. ECI-SPIC-SMO-MCML (JV)** a Joint Venture company reported in (2020) 14 SCC 712, [CORE], where the application of the above clause 64(3)(b) (ii) of the General Conditions of Contract came for consideration. The issues before the Hon’ble Supreme Court in the case of **CORE** (supra) were as under:-

“The issues involved in this appeal were:

- 1. Whether the High Court could have appointed an independent arbitrator without reference to the Clauses of General Conditions of Contract (GCC) ?*
- 2. Whether retired railway officers are not eligible to be appointed as arbitrators under Section 12(5) read with Schedule VII of the Act [as amended w.e.f. 23-10-2015] ?*
- 3. Whether General Manager was not eligible to nominate the arbitrator ?*

The Hon'ble Supreme Court in the case of **CORE** (supra), at paras 26 and 27 observed as under:

“26. The same view was reiterated in Government of Haryana PWD Haryana (B and R) Branch v. G.F. Toll Road Private Limited and Others (2019) 3 SCC 505 wherein, the Supreme Court held that the appointment of a retired employee of a party to the agreement cannot be assailed on the ground that he is a retired/former employee of one of the parties to the agreement. Absolutely, there is no bar under Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015 for appointment of a retired employee to act as an arbitrator.

27. By the letter dated 25.10.2018, the appellant has forwarded a list of four retired railway officers on its panel thereby giving a wide choice to the respondent to suggest any two names to be nominated as arbitrators out of which, one will be nominated as the arbitrator representing the respondent-Contractor. As held in Voestalpine Schienen GmbH (2017) 4 SCC 665, the very reason for empanelling the retired railway officers is to ensure that the technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators. Merely because the panel of the arbitrators are the retired employees who have worked in the Railways, it does not make them ineligible to act as the arbitrators.

The Hon'ble Supreme Court in the case of **CORE** (supra) at paras 36, 37, 38 and 39 further observed as under:

“36. As discussed earlier, after Arbitration and Conciliation (Amendment) Act, 2015, the Railway Board vide notification dated 16.11.2016 has amended and notified Clause 64 of the General Conditions of Contract. As per Clause 64(3)(a)(ii) [where applicability of Section 12(5) of the Act has been waived off], in a case not covered by Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below the rank of Junior Administrative

Grade or two Railway Gazetted Officers not below the rank of Junior Administrative Grade and a retired Railway Officer retired not below the rank of Senior Administrative Grade Officer, as the arbitrators. For this purpose, the General Manager, Railway will send a panel of at least four names of Gazetted Railway Officers of one or more departments of the Railway within sixty days from the date when a written and valid demand for arbitration is received by the General Manager. The contractor will be asked to suggest to General Manager at least two names out of the panel for appointment as contractor's nominees within thirty days from the date of dispatch of the request from the Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will also simultaneously appoint balance number of arbitrators from the panel or from outside the panel duly indicating the "Presiding Officer" from amongst the three arbitrators so appointed. The General Manager shall complete the exercise of appointing the Arbitral Tribunal within thirty days from the date of the receipt of the names of contractor's nominees.

37. Clause 64(3)(b) of GCC deals with appointment of arbitrator where applicability of Section 12(5) of the Act has not been waived off. In terms of Clause 64(3)(b) of GCC, the Arbitral Tribunal shall consist of a panel of three retired Railway Officers retired not below the rank of Senior Administrative Grade Officers as the arbitrators. For this purpose, the Railway will send a panel of at least four names of retired Railway Officers empanelled to work as arbitrators indicating their retirement date to the contractor within sixty days from the date when a written and valid demand for arbitration is received by the General Manager. The contractor will be asked to suggest the General Manager at least two names out of the panel for appointment of contractor's nominees within thirty days from the date of dispatch of the request of the Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will simultaneously appoint the remaining

arbitrators from the panel or from outside the panel, duly indicating the “Presiding Officer” from amongst the three arbitrators. The exercise of appointing Arbitral Tribunal shall be completed within thirty days from the receipt of names of contractor’s nominees. Thus, the right of the General Manager in formation of Arbitral Tribunal is counter-balanced by respondent’s power to choose any two from out of the four names and the General Manager shall appoint at least one out of them as the contractor’s nominee.

38. In the present matter, after the respondent had sent the letter dated 27.07.2018 calling upon the appellant to constitute Arbitral Tribunal, the appellant sent the communication dated 24.09.2018 nominating the panel of serving officers of Junior Administrative Grade to act as arbitrators and asked the respondent to select any two from the list and communicate to the office of the General Manager. By the letter dated 26.09.2018, the respondent conveyed their disagreement in waiving the applicability of Section 12(5) of the Amendment Act, 2015. In response to the respondent’s letter dated 26.09.2018, the appellant has sent a panel of four retired Railway Officers to act as arbitrators giving the details of those retired officers and requesting the respondent to select any two from the list and communicate to the office of the General Manager. Since the respondent has been given the power to select two names from out of the four names of the panel, the power of the appellant nominating its arbitrator gets counter-balanced by the power of choice given to the respondent. Thus, the power of the General Manager to nominate the arbitrator is counter-balanced by the power of the respondent to select any of the two nominees from out of the four names suggested from the panel of the retired officers. In view of the modified Clauses 64(3)(a)(ii) and 64(3)(b) of GCC, it cannot therefore be said that the General Manager has become ineligible to act as the arbitrator. We do not find any merit in the contrary contention of the respondent. The decision in TRF Limited is not applicable to the present case.

39. There is an express provision in the modified clauses of General Conditions of Contract, as per Clauses 64(3)(a)(ii) and 64(3)(b), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers [Clause 64(3)(a)(ii)] and three retired Railway Officers retired not below the rank of Senior Administrative Grade Officers [Clause 64(3)(b)]. When the agreement specifically provides for appointment of Arbitral Tribunal consisting of three arbitrators from out of the panel serving or retired Railway Officers, the appointment of the arbitrators should be in terms of the agreement as agreed by the parties. That being the conditions in the agreement between the parties and the General Conditions of the Contract, the High Court was not justified in appointing an independent sole arbitrator ignoring Clauses 64(3)(a)(ii) and 64(3) (b) of the General Conditions of Contract and the impugned orders cannot be sustained.”

17. The view taken in the case of **CORE** (supra) is subsequently doubted by the Hon'ble Supreme Court in the case of **Union of India Vs. M/s. Tania Constructions Limited**, SLP No.12670/2010, vide order dated 11.01.2021 and is referred to the larger bench, the order of reference is quoted below:-

“Having heard Mr. K. M. Nataraj, learned ASG for sometime, it is clear that on the facts of this case, the judgment of the High Court cannot be faulted with. Accordingly, the Special Leave Petition is dismissed. However, reliance has been placed upon a recent three-Judge Bench decision of this court delivered on 17.12.2019 in Central Organisation for Railway Electrification vs. M/s ECI-SPIC-SMO-MCML (JV) A Joint Ventrure Company, 2019 SCC OnLine 1635. We have perused the aforesaid Judgment and prima facie disagree with it for the basic reason that once the appointing authority itself is incapacitated from referring the matter to

arbitration, it does not then follow that notwithstanding this yet appointments may be valid depending on the facts of the case.

We therefore request the Hon'ble Chief Justice to constitute a larger Bench to look into the correctness of this judgment.

Pending application stands disposed of.”

18. Thus, in the case of **CORE** (supra), the Hon'ble Supreme Court has applied the above clause 64(3)(b)(ii) and held that the High Court could have not appointed independent sole arbitrator. However, in the case of **CORE** (supra) as discussed hereinafter, the Hon'ble Supreme Court was not called upon to decide whether clause 64(3)(b)(ii) is in confirmity of principles laid down in **TRF** (supra) i.e. whether the arbitral panel is broad based and in **Perkins** (supra), more particularly, whether the counter balance is achieved in appointing the arbitral panel. The Hon'ble Supreme Court in the case of **CORE** (supra) has not whittled down the principles laid down in **TRF** and **Perkins** (supra). The issues answered in the judgment of **CORE** (supra) are, whether the retired railway officers are eligible to be appointed as arbitrators and whether the General Manager is eligible to nominate the arbitrators.

19 In **Tantia Constructions** (supra) the Hon'ble Supreme Court has doubted the view taken in the case of **CORE** (supra) observing that once the appointing authority itself is incapcity from referring the matter to arbitrator it does not follow that notwithstanding this yet appointments

may be valid depending upon the facts of the case. However, **CORE** (supra), has not dealt with the issue of counter balance achieved in terms of **Perkins** (supra). As such, the law laid down in the judgment of **CORE** (supra) is limited to the issues answered in **CORE** (supra). The same is the view taken by the Delhi High Court in the below discussed judgments.

20. The Delhi High Court in the case of **Gangotri Enterprises** (supra) has considered the judgment of the **CORE** (supra) at para 23, 24 and 25, as under:-

“23. Judgment in the case of Central Organisation for Railways Electrification (supra), as relied upon by respondent, cannot come to the aid of respondent. It is pertinent to note here that the said judgment has been referred to larger Bench in order to look into the correctness of the said judgment in the case of Union of India vs. M/s Tania Constructions Ltd., SLP (Civil) No. 12670/2020.”

24. Perusal of the aforesaid order dated 11.01.2021 passed by the Supreme Court in the case of Union of India vs. M/s Tania Constructions Ltd., (2021) SCC Online SC 271, shows that Supreme Court has given a prima facie view, wherein it has disagreed with the judgment in the case of Central Organisation for Railways Electrification (supra).

25. Similarly, in a recent case, in the case of Steel Ltd. vs. South Western Railway and Anr., Special Leave to Appeal (C)No. 9462/2022, by order dated 16.08.2022, Supreme Court by a Bench headed by Chief Justice of India directed for constitution of a larger Bench to consider the correctness of the judgment in the case of Central Organisation for

Railways Electrification (supra). Thus, Supreme Court held as follows:

“1. The basic issue involved in the instant matter is whether the appointment of the Arbitrator was in conformity with the law laid down by this Court in TRF Ltd. V. Energo Engineering Projects Ltd, (2017) 8 SCC 377; and, Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2020) 20 SCC 760.

2. The High Court has gone by the decision rendered by a Bench of three-judges of this Court in Central Organisation For Railway Electrification v. ECL- SPIC-SMO-MCML (JV), A Joint Venture Company, (2020) 14 SCC 712, which decision had distinguished the applicability of TRF Ltd. (supra) and Perkins Eastman Architects DPC (supra) to the fact situation involved therein.

3. It has been brought to our notice that subsequently, a Bench of three-Judges of this Court in Union of India v. M/s. Tania Constructions Ltd., [SLP (Civil) No. 12670 of 2020], vide its order dated 11.01.2021, prima facie expressed its disagreement with the view taken in Central Organisation For Railway Electrification (supra) and requested the Hon'ble the Chief Justice of India to constitute a larger Bench to look into the correctness of the decision in Central Organisation For Railway Electrification (supra).

4. ...

5. ...

6. ...It is however, quite clear that the correctness of the decision in Central Organisation For Railway Electrification (supra), based on which the appointment of the Arbitrator was made and the matter had proceeded before the Arbitrator, was doubted by a subsequent Bench of three Judges.

7. In the circumstances, we direct that the papers of the present matter be placed before the Hon'ble the Chief Justice of India for constituting a larger Bench.

8. Since the issue has been re-occurring, we may observe that it would be in the fitness of things that the question is resolved at an early date.

9. Pending such consideration, the effect and operation of the Award dated 30.03.2022 shall remain stayed."

21. The Delhi High Court in the case of **Gangotri Enterprises** (supra) at para 31 has further held as under:-

"31. In the present cases, it is seen that the panel of arbitrators as sent by the respondent contained only four names, which cannot be considered to be broad based by any extent of imagination. Thus, the said panel as given by the respondent does not satisfy the concept of neutrality of arbitrators as held by Supreme Court in the case of Voestalpine Schienen GMBH (supra). Further, as already noted, Supreme Court has already given a prima facie view with respect to correctness of the judgment in the case of Central Organisation for Railway Electrification (supra), wherein a similar clause was considered and has passed reference order for constituting a larger Bench to look into the correctness of the said judgment. In view thereof, it is held that the petitioner herein was within its right to nominate its Arbitrator."

22. The Delhi High Court in the case of **M/s. Ganesh Engineering Works Vs. Northern Railway and another**, Arbitration Petition NO.609 of 2023, dated 29.11.2023, considering the same clause 64(3)(b) and after considering the judgment of **TRF** (supra) and **Perkins** (supra)

and also the judgment of **CORE** (supra), held at paras 21 and 22 as under:-

“21. Question No.(iv), as noted above, i.e. eligibility of the General Manager to nominate an arbitrator is really the heart of the dispute in the present case. Having noted the questions arising in CORE, the Co-ordinate Bench in Margo (supra), observed that although the CORE judgment has been referred to a Larger Bench of the Supreme Court, but the operation of the judgment has not been stayed and continues to hold the field but observed further that the judgment in CORE is an authority only in respect of the propositions identified and carved out therein and its applicability cannot ipso facto be extended for the purpose of adjudication of other aspects which have not been purported to be answered in CORE. Two fundamental issues arising for its consideration were flagged by the Court and answered as follows:-

“20. Two fundamental issues which fall for consideration in this case and which were not specifically answered in CORE, are as under:—

- i. When appointment of arbitrator/s is to be made out of a panel prepared by one of the parties, whether the said panel is required to be “broad- based”, in conformity with the principle laid down in Voestalpine (supra), and if so, what is the consequence where the panel is not sufficiently “broad based”?*
- ii. Whether “counter balancing” [as contemplated in Perkins (supra)] is achieved in a situation where one of the parties has a right to choose an arbitrator from a panel whereas the remaining (2 out of 3) members of the arbitral tribunal are appointed by the other party?*

XXXX

XXXX

XXXX

25. Thus, it was held by the Supreme Court in Voestalpine (supra) that:

- i. Affording a panel of five names to the petitioner from which the petitioner was required to nominate its nominee*

arbitrator, was restrictive in nature; the same created room for suspicion that DMRC may have picked up its own favourite;

ii. Choice should be given to the concerned party to nominate any person from the entire panel of arbitrators;

iii. The two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator;

iv. The panel ought not to be restricted/limited to retired engineers and/or retired employees but should be broad based and apart from serving or retired employees of government departments and public sector undertakings, the panel should include lawyers, judges, engineers of prominence from the private sector etc.

26. CORE does not in any manner overrule Voestalpine (supra) or narrow down the scope thereof, although it does not deal specifically with the issue as to whether the panel afforded by the Railways in that case was in conformance with the principles laid down in Voestalpine (supra).

27. The difficulties which were found to have inflicted the panel afforded to the petitioner in Voestalpine (supra) also squarely apply to the present case.

29. The principle laid down in Voestalpine (supra) has been followed in a large number of cases to adjudge upon validity of appointment procedure involving appointment from a panel. Thus, In SMS Ltd. v. Rail Vikas Nigam Limited, out a panel of 37 names, only eight names had no connection with the Railways. It was held that even though the panel comprised as many as 37 names, it was not sufficiently broadbased. In that case, a previous judgment in the case of Simplex Infrastructures Ltd. v. Rail Vikas Nigam Limited was also taken note of, in which a panel of 26 names (out of which only 9 were unconnected with the Railways) was held to be not sufficiently broad based inasmuch as the same did not comprise independent persons such as judges, lawyers, engineers of prominence from the private sector etc. The said judgments were relied upon in the case of Overnite

Express Limited v. Delhi Metro Rail Corporation, this court went to the extent of holding that “the procedure of forwarding a panel of five names to the other contracting party to choose its nominee Arbitrator is now held to be no longer a valid procedure.”

...

35. Thus, in an appointment procedure involving appointment from a panel made by one of the contracting parties, it is mandatory for the panel to be sufficiently broad based, in conformity with the principle laid down in *Voestalpine (supra)*, failing which, it would be incumbent on the Court, while exercising jurisdiction under Section 11, to constitute an independent and impartial Arbitral Tribunal as mandated in *TRF (supra)* and *Perkins (supra)*. The judgment of the Supreme Court in *CORE* does not alter the position in this regard.

...

37. This brings us to the next issue that arises in the context of the arbitration clause in the present case, viz. whether “counter balancing” is achieved in a situation where one of the parties has a right to choose an arbitrator from a panel whereas 2/3rd of the members of the arbitral tribunal are appointed by the other party.

41. The fulcrum of *CORE* is that the right of one of the parties to prescribe a panel of persons from which the parties would appoint their nominee arbitrators is counter balanced by the power of other contracting party to choose therefrom. However, whether counter balancing can be achieved in a situation where one of the contracting parties has a right to appoint the remaining 2/3rd of the members of the arbitral tribunal, was not specifically considered in *CORE*....

“.....

21. The other anomaly which merits consideration is that the Managing Director of the Respondent, who has a direct interest in the outcome of the case, is directly appointing 2/3rd of the members of the Arbitral Tribunal. And also plays a role in the appointment of the 3rd arbitrator i.e., the

contractor's nominee. This is against the spirit of the judgment in Perkins Eastman (supra). This argument was perhaps not raised in CORE (supra).

22. In cases where the arbitration clause provides a genuine counterbalancing of power of appointment between the two parties i.e., when one party appoints its nominee and the other party does the same and the two nominees together decide the presiding arbitrator the Court would not find any imbalance impinging upon the concept of party autonomy. This was the sentiment expressed by the Supreme Court in TRF Limited v. Energo Engineering Projects Limited, particularly para 50 which reads as under:—

“50.....We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto.”

...

The clause in the present case does not provide for any effective counter balancing. The process starts with selection of a panel by the Respondent and this restricts the element of choice that the contractor may exercise in choosing its nominee. Nonetheless, it allows the Respondent to ultimately choose the contractor's nominee from the two names suggested by the contractor. However, the clause also entitles the Respondent to choose the balance two arbitrators from the panel or even outside. This undeniably indicates that the scales are tipped in favour of the Respondent when it comes to the appointment process. In

*effect, 2/3rd strength of the Arbitral Tribunal is nominated by the Respondent. This leads to the inexorable conclusion that the clause in its current state may not be workable. Thus, the reliance of the Respondent upon the judgment in CORE (supra) is misplaced.
.....”*

42. The reasoning and the conclusion in CMM (supra) on the above aspect was followed by this court in Pankaj Mittal v. Union of India, Order dated 16.12.2021 in ARB.P 607/2021 where in it was observed as under:

“.....

*4. This Court has considered the afore-noted clause in a recent judgment passed in ARB.P 407/2020 dated 23rd August, 2021 titled - ‘CMM Infraprojects Ltd. v. IRCON International Ltd.’, wherein an identical clause has been considered by this Court. The clause herein as worded, permits the Respondent to make nomination of 2/3rd strength of the Arbitral Tribunal, which tilts the scales in favour of the Respondent in the appointment process. For this reason and others as noted in the afore-noted judgment, the Court found the case of Central Organisation for Railway Electrification (supra) distinguishable. The said reasons apply to this case as well.
.....”*

22. Therefore, from a reading of the aforementioned judgments, it palpably emerges that the judgment of the Supreme Court in CORE, did not deal with two specific questions i.e. (a) when appointment of an Arbitrator(s) is made out of a panel prepared by one of the parties, whether the said panel is required to be ‘broad-based’ in conformity with the principles laid down in Voestalpine (supra) and if so, what is the consequence where the panel is not sufficiently ‘broad-based’; and (b) whether counter balancing, as contemplated in Perkins (supra) is achieved in a situation where one of the parties has a right to choose an arbitrator from a panel where 2/3rd members of the Arbitral Tribunal are appointed by the other party and these

questions have been answered in Margo (supra), relying on the judgments of the Supreme Court in Voestalpine (supra), TRF Limited (supra) and Perkins (supra), by holding that the said appointment procedure fails to pass muster. It was held that the 'counter balancing' contemplated in Perkins (supra) cannot be said to be achieved in a situation where one of the parties has a right to choose an arbitrator from a panel where the remaining 2 out of 3 arbitrators are appointed by the other party. To come to this conclusion, Court referred to the judgments of this Court in SMS Limited v. Rail Vikas Nigam Limited, 2020 SCC OnLine Del 77; BVS-R-KVR (Joint Ventures) v. Rail Vikas Nigam Ltd., 2020 SCC OnLine Del 456; Consortium of Autometers Alliance Ltd. and Canny Elevators Co. Ltd. v. Chief Electrical Engineer/Planning, Delhi Metro Rail Corporation and Others, 2021 SCC OnLine Del 4042 and Gangotri Enterprises Ltd. (supra)."

23. I am in respectful agreement with the view expressed by the Delhi High Court in the case of **Gangotri** (supra) and **Ganesh Engineering** (supra) that the judgment of **CORE** (supra) of the Hon'ble Supreme Court does not deal with the issue, whether the arbitral panel appointed is broad based in conformity with **voelstapine** (supra) and whether the counter balancing is achieved as laid down in **Perkins** (supra). Coming to the facts of the present case, 2/3 arbitral panel is appointed by the respondent so also for the 3rd member of the arbitral tribunal 4 names are suggested by the respondent from which the petitioner is required to choose 2 names and from the 2 names chosen by the petitioner, the respondent will appoint one. Thus, the respondent has a complete say in the appointment of the tribunal.

24. Having considered the law on the subject the question as raised at para 8(1) can be answered as under:-

Clause 64(3)(b)(ii) of the General Conditions of Contract provides for unilateral appointment of arbitral tribunal at the hands of one of the parties and, thus, is in violation of the principles laid down in **Voestalpine** (supra), **TRF** (supra) and **Perkins** (supra) and also in violation of the law laid down in the case of **Lombard** (supra) and the said clause is ex-faice invalid and the tribunal constituted thereunder is non-est and void ab initio.

25. Coming to the next question, whether in arbitration application under section 11(6) of the Arbitration Act can be granted after the party has obtained an interim order under section 9 of the Arbitration Act without following the process available for appointment of arbitral tribunal as provided in the contract and as directed by the court granting interim order under Section 9(2) of the Arbitration Act. As discussed above, the arbitral tribunal appointed under clause 64 (3)(b) (ii) of the General Conditions of Contract would be ineligible to conduct arbitration. Clause 64 (3)(b)(ii) of the General Conditions of Contract being invalid, whether this court can invoke the powers under section 11(6) of the Arbitration Act to appoint an arbitrator.

26. In the case of **Perkins** (supra) at para 21, 22 and 23, the Hon'ble Supreme Court has observed as under:-

“21. The further question that arises is whether the power can be exercised by this Court under Section 11 of the Act when the appointment of an arbitrator has already been made by the respondent and whether the appellant should be left to raise challenge at an appropriate stage in terms of remedies available in law. Similar controversy was gone into by a Designated Judge of this Court in Walter Bau AG3 and the discussion on the point was as under:-

“9. While it is correct that in Antrix16 and Pricol Ltd.17, it was opined by this Court that after appointment of an arbitrator is made, the remedy of the aggrieved party is not under Section 11(6) but such remedy lies elsewhere and under different provisions of the Arbitration Act (Sections 12 and 13), the context in which the aforesaid view was expressed cannot be lost sight of. In Antrix16, appointment of the arbitrator, as per the ICC Rules, was as per the alternative procedure agreed upon, whereas in Pricol Ltd.17., the party which had filed the application under Section 11(6) of the Arbitration Act had already submitted to the jurisdiction of the arbitrator. In the present case, the situation is otherwise.

10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law. In the present case, the agreed upon procedure between the parties contemplated the appointment of the arbitrator by the second party within 30 days of receipt of a notice from the first party. While the decision in Datar Switchgears Ltd.18 may have introduced some flexibility in the time frame agreed upon by the parties by extending it till a point of time anterior to the filing of the application under Section 11(6) of the Arbitration Act, it cannot be lost sight of that in the present case the appointment of Shri Justice A.D.

Mane is clearly contrary to the provisions of the Rules governing the appointment of arbitrators by ICADR, which the parties had agreed to abide by in the matter of such appointment. The option given to the respondent Corporation to go beyond the panel submitted by ICADR and to appoint any person of its choice was clearly not in the contemplation of the parties. If that be so, obviously, the appointment of Shri Justice A.D. Mane is non est in law. Such an appointment, therefore, will not inhibit the exercise of jurisdiction by this Court under Section 11(6) of the Arbitration Act. It cannot, therefore, be held that the present proceeding is not maintainable in law. The appointment of Shri Justice A.D. Mane made beyond 30 days of the receipt of notice by the petitioner, though may appear to be in conformity with the law laid down in Datar Switchgears Ltd¹⁸, is clearly contrary to the agreed procedure which required the appointment made by the respondent Corporation to be from the panel submitted by ICADR. The said appointment, therefore, is clearly invalid in law.”

22. It may be noted here that the aforesaid view of the Designated Judge in Walter Bau AG³ was pressed into service on behalf of the appellant in TRF Limited⁴ and the opinion expressed by the Designated Judge was found to be in consonance with the binding authorities of this Court. It was observed:-

“32. Mr Sundaram, learned Senior Counsel for the appellant has also drawn inspiration from the judgment passed by the Designated Judge of this Court in Walter Bau AG³, where the learned Judge, after referring to Antrix Corpn. Ltd¹⁶, distinguished the same and also distinguished the authority in Pricol Ltd. v. Johnson Controls Enterprise Ltd.¹⁷ and came to hold that: (Walter Bau AG case³, SCC p. 806, para 10) “10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar

the jurisdiction under Section 11(6) cannot be countenanced in law. ...”

33. We may immediately state that the opinion expressed in the aforesaid case is in consonance with the binding authorities we have referred to hereinbefore.”

23. In TRF Limited⁴, the Managing Director of the respondent had nominated a former Judge of this Court as sole arbitrator in terms of aforesaid Clause 33(d), after which the appellant had preferred an application under Section 11(5) read with Section 11(6) of the Act. The plea was rejected by the High Court and the appeal therefrom on the issue whether the Managing Director could nominate an arbitrator was decided in favour of the appellant as stated hereinabove. As regards the issue about fresh appointment, this Court remanded the matter to the High Court for fresh consideration as is discernible from para 55 of the Judgment. In the light of these authorities there is no hindrance in entertaining the instant application preferred by the Applicants.”

27. The Hon’ble Supreme Court in the case of **Perkins** (supra) has considered the argument, whether it can exercise jurisdiction under section 11(6) of the Arbitration Act, when the clause providing for appointment of arbitrator is ex-facie invalid or direct the parties to invoke the remedies available within the Arbitration Act by raising the appropriate defense as available in the Arbitration Act. The Hon’ble Supreme Court has held that prima facie when the court is satisfied that the clauses for appointment of arbitrator are ex-facie invalid, the court can exercise powers under section 11(6) of the Arbitration Act and appoint an arbitrator.

28. In the instant case, I have held that the agreement 64(3)(b) (ii) of the General Conditions of Contract is in violation of the principles laid down in **TRF** (supra), **Perkins** (supra) and **Lombard Engineering** (supra) and that clause 64 (3)(b)(ii) of the General Conditions of Contract provides for unilateral appointment of arbitrator at the hands of one party and it breaches the principle of impartiality and neutrality of the arbitrators. Thus, this court under section 11(6) of the Arbitration Act can exercise its powers of appointment of arbitrator and need not relegate the parties to raise such defences before the arbitral tribunal constituted under the aforesaid clause 64(3)(b)(ii) of the General Conditions of Contract.

29. In view of this, in exercise of the powers under section 11(6) of the Arbitration Act, I appoints Hon'ble Shri Naresh H. Patil (Retired Chief Justice, Bombay High Court) as sole arbitrator in the matter to decide the disputes arising between the parties in terms of agreement dated 23.09.2019. The sole arbitrator's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

30. The Arbitration Application stands allowed and disposed of accordingly.

[ARUN R. PEDNEKER, J.]