



2024:DHC:2355



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

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RESERVED ON – 27.02.2024
PRONOUNCED ON – 22.03.2024+ **ARB.P. 1230/2023, I.A. 23296/2023****M/S TECHNO COMPACT BUILDERS THROUGH MR.**
ZULFIQUAR ALI, SOLE PROPRIETOR Petitioner**Through: Mr.Susmit Pushkar, Mr.Gaurav**
Sharma, Ms.Naina Agarwal and
Mr.Rab Hussain, Advts.**versus****RAILTEL CORPORATION OF INDIA LIMITED Respondent****Through: Mr.Jitendra Kumar Singh, Ms.Anjali**
Kumari and Ms.Harshita Singh,
Advts.**CORAM:****HON'BLE MR. JUSTICE DINESH KUMAR SHARMA****J U D G M E N T****DINESH KUMAR SHARMA,J :**

1. The present petition has been filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (Act).
2. In brief the facts are that the petitioner has sought an appointment of a



Sole Arbitrator for adjudication of the inter se disputes arising out of clause 4.6 of letter of Acceptance (LOA) No.RailTel/ Tender/OT /ER/HQ/2015-2016 /898/392 dated 20.06.2016.

SUBMISSIONS OF PETITIONER

3. The petitioner submits that the disputes arose between the parties in relation to the works performed and payments to be made under the contract. The notice invoking arbitration dated 13.03.2023 was duly served. The petitioner submitted that the respondent vide e-mail dated 27.03.2023 and 01.04.2023 did not object to the fact that a dispute has arisen between the parties which is covered under Clause 4.64 of the Contract and is in principle agreeable for the appointment of a tribunal to arbitrate the disputes. It has been submitted that however, the parties have failed to appoint the arbitrator in terms of the Contract and in compliance of the amended terms of the Act as the respondent has insisted that a sole arbitrator will be appointed by CMD/RailTel out of the panel of arbitrators of the respondent. The petitioner submitted that the CMD/respondent has an interest in the dispute or in the outcome or decision thereof, and therefore is not only ineligible to act as an arbitrator, but is also ineligible to act as the appointing authority.
4. The respondent in its counter affidavit submitted that the RailTel Corporation of India Ltd. has its own broad panel list of arbitrators due to the technical requirement/aspect of the dispute involved in PSU/RailTel. The respondent submitted that the petitioner has not followed the required procedure mentioned in the Arbitral Clause in the Contract Agreement. Along with the affidavit, the list of the arbitrators



prepared by the RailTel was also filed. The respondent relied upon the judgment of Supreme Court in *Voestalpine Schienen Gmbh V. Delhi Metro Rail Corporation Limited* 2017 4 SCC 665 and Central Organisation for *Railway Electrification (in short 'CORE') v. ECI-SPIC-SMO-MCML (JV)* 2020 14 SCC 712 and *Rajnish Kumar Rai v. Union of India & ors*, and submitted that in view of the judgment of the Supreme Court in *CORE(Supra)*, the petitioner has authority to appoint the arbitrator.

5. Learned counsel for the petitioner submitted that in view of the judgment of the Supreme Court in *Perkins Eastman Architects DPC & Anr. v. HSCC (India) Limited* 2019 SCC OnLine SC 1517, the unilateral appointment of the arbitrator is not permissible under the law.

SUBMISSIONS OF RESPONDENT

6. Learned counsel for the respondent submitted that the broad panel of arbitrators has been made by the competent authority due to technical requirements/aspects of the dispute involved in PSU/Railtech. It was further submitted that the petitioner was given the opportunity to choose the arbitrator from the broad panel and hence the appointment of the arbitrator cannot be stated to be biased.
7. Learned counsel has submitted that when the agreement specifically provides for the appointment of an arbitral tribunal consisting of Arbitrators from out of Panel, the appointment of Arbitrators should be in terms of the agreement as agreed by the parties. To buttress his arguments, the learned counsel has placed reliance upon *Central*



Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML(JV) 2020 14 SCC 712.

8. Learned counsel for the respondent submitted that in the case of *Government of Haryana vs. GF Toll road Pvt.*, the Supreme Court held that the 5th schedule & seventh schedule of 2015 do not bar past employees from being an arbitrator.

ANALYSIS AND FINDINGS

9. Before proceeding further, it is relevant to advert to the relevant clauses 4.6.4.3 of the agreement of GCC.
10. The bare perusal of clause 4.6.4.3 indicates that if the dispute is up to Rs.10,00,000/-, a sole arbitrator shall be appointed by the Managing Director of the respondent. However, if the dispute is more than Rs.10,00,000/-, the matter shall be referred to the arbitral council. The clause further provides that the Chair-cum-Managing Director shall furnish a panel of three names of the petitioner out of which the petitioner will recommend one name to be his nominee and chair-cum-Managing Director/RailTel shall appoint out of the panel one name a RailTel's nominee and these two arbitrators with mutual consent appoint the third arbitrator who shall act as deciding.
11. It is also pertinent to mention here that the e-mail sent by the respondents dated 27.03.2023 reads as under;



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**Arbitration invocation by M/s Techno Compact Builders:
RailTel ER case**

Inbox

**Saransh Bajaj <saransh@railtelindia.com>**Mon, Mar
27, 1:11 PM

to me, jsmarwah

Dear Sir,

Please take reference of your notice of invocation of arbitration in the captioned matter |

Please note that the arbitration clause provides for appointment of three arbitrators in case of claim is more than 10 lakhs. However, since keeping three arbitrators will be a costly affair for both the parties, we propose for a sole arbitrator to be appointed by CMD/RailTel, who will be an independent and impartial arbitrator. The sole arbitrator will be appointed out of the panel of arbitrators maintained by RailTel which includes senior retired government officials. This will save cost of arbitration for both the parties.

If you are agreeable upon the same, kindly give your consent by return email for appointment of sole arbitrator by CMD/RailTel, for adjudication of dispute.

Regards,

संरंश बजाज / Saransh Bajaj

वरिष्ठ प्रबंधक (कानून) / Senior Manager (Legal)

रेलटेल कॉर्पोरेशन ऑफ इंडिया लिमिटेड / RailTel Corporation of India Ltd.

(A Govt. of India Undertaking, under the administrative control of Ministry of Railways)

Tel: +91 11 22900600, VOIP: 2037

Mob: +91 9267210806

Registered & Corporate Office: Plot-A, 6th Floor, Office Block Tower-2, East Kirti Nagar, New Delhi-11002

True Copy
Noted

12. The panel list of the arbitrator filed along with the affidavit is reproduced below and reads as under:



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(ANNEXURE - R-1) G20

**LIST OF ARBITRATORS ON THE PANEL OF RAILTEL AS ON 22nd of November 2023**

Name of the Arbitrator	Educational Qualification	Address of the Arbitrator
(1) Shri. R.K. Agarwal	M.Tech (Soil Mech.) & BE (Civil)	Bungalow No.30, SP Marg, Chanakya Puri, New Delhi - 110021.
(2) Shri Harsh Kumar	B.Sc, M.Sc, PGDM, PGD (Information Technology in Business)	House No. 1 National Institute of Financial Management, Sector 48, Pali Road, Faridabad-121001
(3) Shri ABL Srivastava	B. Com, M.Com, Chartered Accountant, MBF	C-301, Stellar Park Apartments, C-58/24, Sector-62, Noida UP-201301
(4) Shri Mahesh Kumar Gupta	B.E. (Civil), LLb	Chief Engineer Const.& CDPE EC Railways, Patna
(5) Shri Mahesh Mangal	M.Tech	57, 2nd Floor Suraj Nagar east, Civil Lines Jaipur-302006
(6) Shri Vijay Nand Sharma	MA, LLB	35/61 Himalaya Apartment, LP Extension, Delhi-110092
(7) Shri B P Khare	BE/Civil	47, Shree Golden City Phase-1, Jaatkheri, Hoshangabad, Near Vrindavan Road, New Delhi, Bhopal, MP 462026

**रेलटेल कॉर्पोरेशन ऑफ इंडिया लिमिटेड, भारत सरकार (रेल मंत्रालय) का उपक्रम**

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(8) Shri Aditya Kumar Mittal		Flat C-2/10, Vanashree CHS Plot 1 & 2, Sector 58A, Palm Beach Road, Nerul (West) Navi Mumbai, Pin 400706
(9) Shri Rakesh Goyal	M.Sc. Civil Engineering (Hons)	2094/Joy Apartments Sector 2 Dwarka - 75
(10) Shri Ajay Kumar Lal	Post Graduate Pol. Science, Certificate in French, IFRS, LLB 2nd Year	DDA, HIG, Block 3A/101, Motiakhn, New Delhi-110055
(11) Shri Rakesh Kumar Mittal	Bachelor of Engineering (Electronics and Comm) from Delhi College of Engg	B-23, Inderpuri, ND-110012
(12) Shri Lokesh Narayan	B.E (Electrical)	C-702, Rail Vihar, Sector Alpha-1, Greater Noida 201310
(13) Shri Ajay Vijayvargiya	BE (EC), M Tech	M-17A, Samsara, Sector 60, Golf Course Ext. Road, Gurugram-122001
(14) Shri Akhil Agarwal	Bachelor of Engineering (Electronics and Comm) from IIT Rurkee, M Tech from IIT Kanpur, PG Diploma in IPR from NLSU Bangalore, LLB from DU	K122, Gulshan Vivante, Sector 137 Noida 201304



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(15) Shri Pramod Kumar Sangewar	B.E (Civil), MBA	Flat 105, Shri Harsha Sethuram Unique Vijaypuri Colony, South Lalguda, Secunderabad.
(16) Shri Anand Prakash	B.E (Civil), MBA	A-42, Pearl Regalia, Mansarovar Extension, Jaipur 302020
(17) Shri Mahesh Kumar Mittal	M.Com, CS, Cost & Management Accountant, Masters of Financial Management	Flat no. 110, Block - K, Sarita Vihar, New Delhi 110076
(18) Shri Din Dayal Singh	B tech	Flat No. C 502, Gandharva Society, Sector Omega 1, Greater Noida 201308
(19) Shri Pradeep Kumar	BE (E&C), ME (Communication Systems), MBA	C-701, Bestech Park View Spa Apartments, Sector 47, Gurugram, Haryana 122018
(20) Shri Alok Kansal	BE (Civil), ME (Structure)	M2/39, 2 nd Floor, DLF Phase 2, Gurugram - 122002.
(21) Shri Anup Kumar Prasad	MA (ECONOMICS)	W-2002, AMRAPALI SAPPHIRE, SECTOR 45, NOIDA, GAUTAM BUDDH NAGAR, UP -201303.
(22) Shri Anil Kumar Dutta	B.sc. (Hons.), BE, Chartered Electrical Engineer (LOND), Fellow IET (London), FIE (India)	329B, Road No.4A, Ashok Nagar, Ranchi - 834002.
(23) Shri K. Vinayak Rao	BA (Hons.), MA, Diploma in Management, Diploma in Marketing Management.	B3/134, Rail Vihar Housing Society, Bijli Nagar, Chinchwad, Pune, Maharashtra - 411033.



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13. It is pertinent to mention here that the panel of arbitrators includes senior retired government officials and mostly included technical persons except one person from a legal background. The claim amount



in the present case is approximately Rs.9,66,87,000/- which is apparently more than Rs.10,00,000/-. Thus, as per the clause, an arbitral council is required to be appointed. However, the respondent vide the e-mail dated 27.03.2023 reproduced herein above, offered a proposal for an appointment of Sole Arbitrator by CMD/RailTel. The Sole Arbitrator was to be appointed out of the panel of arbitrators maintained by RailTel which includes senior retired government officials. In the written submissions, the respondent has offered the petitioner to choose their nominee from the entire panel list. The question i.e. to be determined in the present case is that whether the panel prepared by the respondent is “broad-based” and whether the appointment procedure meets the pre-requisite of “counter-balancing”.

14. The Coordinate Bench of this Court in ***Sri Ganesh Engineering Works (Supra)*** discussed in detail the implication of the ***CORE (supra)*** judgment and after relying upon various judgments of this Court and the Supreme Court it inter alia held as under:

"18. Both these questions need not detain this Court as they have been considered and answered by the Co-ordinate Benches of this Court. In this context, I may first refer to the judgment in Steelman (supra), wherein relying upon the judgment in Margo (supra), the Court held as follows:-

"20. The validity of an appointment procedure which contemplates appointment of arbitrator/s from a panel of persons maintained by one of the contracting parties, was upheld in Central Organisation (supra) subject to actual counterbalancing being achieved between the right of a party to draw up a panel vis-a-vis the power of choice conferred on the other contracting party to choose from that panel. This is, however, subject to the further requirement as laid down in Voestalpine (supra) that the



panel of arbitrators drawn up for this purpose must be broad based."

15. The test regarding broad-based was laid down in ***Voestalpine*** (supra) wherein it was inter-alia held as under:—

"28. Before we part with, we deem it necessary to make certain comments on the procedure contained in the arbitration agreement for constituting the Arbitral Tribunal. Even when there are a number of persons empanelled, discretion is with DMRC to pick five persons therefrom and forward their names to the other side which is to select one of these five persons as its nominee (though in this case, it is now done away with). Not only this, DMRC is also to nominate its arbitrator from the said list. Above all, the two arbitrators have also limited choice of picking upon the third arbitrator from the very same list i.e. from remaining three persons. This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by DMRC. Secondly, with the discretion given to DMRC to choose five persons, a room for suspicion is created in the mind of the other side that DMRC may have picked up its own favourites. Such a situation has to be countenanced. We are, therefore, of the opinion that sub-clauses (b) & (c) of Clause 9.2 of SCC need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator from the whole panel.

29. Some comments are also needed on Clause 9.2(a) of GCC/SCC, as per which DMRC prepares the panel of "serving or retired engineers of government departments or public sector undertakings". It is not understood as to why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is imperative that panel should be



broadbased. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like Judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy, etc. Therefore, it would also be appropriate to include persons from this field as well.

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.”

16. The concept of broad-based panel has also been emphasized in the judgments of this Court in BVSR-KVR (Joint Ventures) v. Rail Vikas Nigam Ltd., 2020 SCC OnLine Del 456, Singh Associates v. Union of India, 2022 SCC OnLine Del 3419, Gangotri Enterprises Ltd. v. General Manager Northern Railways, 2022 SCC OnLine Del 3556 and L&T Hydrocarbon Engineering Limited v. Indian Oil Corporation Limited, 2022 SCC OnLine Del 3587.



17. The Coordinate Bench of this Court in *Margo Networks (P) Ltd. v. Railtel Corpn. of India Ltd.*, 2023 SCC OnLine Del 3906, inter-alia held that in the light of the specific issues dwelt upon in Central Organisation (supra), the same does not derogate from the principles laid down in Perkins (supra). As noticed hereinabove, in Central Organisation (supra) the Supreme Court upheld the validity of an appointment procedure that involves the appointment of arbitrator/s out of a panel prepared by one of the contracting parties.
18. In *Margo (supra)* it was further inter alia held that the Supreme Court in Central Organisation (supra) did not specifically go into the issue as to whether the particular panel in that case was truly broad-based, in consonance with Voestalpine (supra); and/or the circumstances in which a panel based appointment procedure can be said to achieve genuine “counter balancing” as contemplated in Perkins (supra).
19. Further in *Margo (supra)* it was inter alia held as under:—
- “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). 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.”*



20. Even at the cost of repetition, it may be recorded that Clause 4.6.4 confers power upon the Managing Director to appoint the sole Arbitrator and in the case of the Arbitral Tribunal each of the party has the power to appoint their nominee and these two nominees have been authorized to appoint the presiding officer. In the case of the arbitral council, there seems to be no difficulty as the concept of “counter balancing” has been taken care. However, the question is whether the panel proposed by the respondent is “broad based”
21. In *Sms Ltd. vs Rail Vikas Nigam Limited*; AIR ONLINE 2020 DEL 15, it was inter-alia held as under:

"32. There is no dispute that there are only eight members out of thirty seven in the panel provided by the respondent Company who are Officers retired from organizations other than the Railways and PSUs not connected with the Railways. The Supreme Court in Voestalpine Schienen GMBH (supra) had observed as to why the panel should not be limited to Government departments or public sector undertakings; and went on to hold that in order to instill confidence in the mind of the other party, it is imperative that apart from serving or retired engineers of government departments and public sector undertakings, Engineers of prominence and high repute from private sector should also be included, likewise panel should comprise of persons with legal background like Judges and Lawyers of repute as it is not necessary that all the disputes that arise would be technical in nature. In fact, I find in the judgment of the Coordinate Bench of this Court in Simplex Infrastructures Ltd. (supra), the respondent Company had provided 26 names with only nine being Officers who were not connected with Railways or other Railways organizations / Companies, still there being no persons with any legal, accountancy backgrounds or from other



diverse fields, the Court went ahead to hold clearly that in spite of repeated judgments relying upon the judgment of the Supreme Court in Voestalpine Schienen GMBH (supra), the respondent refused to comprehensively broad base its panel and had appointed the nominee Arbitrator on behalf of the respondent in the said case. So, it must follow, that the panel of thirty seven names given by the respondent Company, also, does not satisfy the concept of neutrality of Arbitrators as it is not broad based."

22. The bare perusal of **SMS Ltd. (Supra)** makes it clear that even the panel of 37 names given by the respondent company did not satisfy the concept of neutrality of arbitrators. The panel also did not fulfill the requisite of being "broad based". The problem in the present case is also similar. The panel given by the respondent cannot be termed as broad based in any manner. It includes senior retired government officials, there are few persons from legal backgrounds, however, it does not indicate their experience and their expertise in any manner. Thus, the panel being proposed by the respondent not being "broad based" cannot be accepted.
23. It is now a settled proposition that the appointment procedure involving appointment from a panel made by one of the contracting parties, it is necessary that such panel should be sufficiently broad based in conformity with the principle laid down in **Voestalpine (supra)**, In case if the panel is not broad based, it would be incumbent on the Court in the exercise of its jurisdiction under Section 11 to constitute an independent and impartial arbitral tribunal as directed in **TRF Limited v. Energo Engineering Projects Limited**, (2017) 8 SCC 377 and **Perkins (supra)**. Since, the respondent has agreed to the appointment by himself offering to appoint a sole arbitrator, this Court deems it fit



to appoint the sole arbitrator.

24. The present petition is disposed of with the following directions:

- i) The disputes between the parties under the said agreement are referred to the arbitral tribunal.
- ii) Mr. Justice Kurian Joseph, Former Judge of the Supreme Court of India Mobile No.9999775444 is appointed as a sole Arbitrator to adjudicate the disputes between the parties in all the petitions.
- iii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of the fees Schedule of DIAC.
- iv) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act before entering into the reference.
- v) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claims, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
- vi) The parties shall approach the learned arbitrator within two weeks from today.

15. In view of the above, the present petition stands disposed of.

DINESH KUMAR SHARMA, J

MARCH 22, 2024

Pallavi