



2024:DHC:1831



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

Reserved on: 11.01.2024

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Pronounced on: 05.03.2024

+ ARB.P. 1243/2023, I.A. 24758/2023

KALYAN TOLL INFRASTRUCTURE LTD Petitioner

Through: Mr. Charu Sangwan, Mr. Parth Jain,
Mr. Shubham D., Advs.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Sandeep Kumar Mohapatra,
CGSC with Mr. Tribhuvan, Mr.
Harsh Raj, Mr. Raghav Tandon,
Advs.

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G E M E N T

DINESH KUMAR SHARMA, J.

1. By way of the present petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (the "A&C Act") the petitioner seeks the appointment of an independent sole arbitrator to adjudicate the disputes *inter se* arising between the parties pertaining to the Contract dated 30.10.2015.
2. Briefly stated the facts of the case are that respondent no.2 awarded a

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contract bearing no. *DGMAP/PHASE-II/MHOW/PKG-13(R&C)* of 2015-16 to the petitioner to complete the balance construction works of the residential accommodation at Military Headquarters of War (hereinafter referred to as 'MHOW') valued at 1,63,03,53,010 for which petitioner also furnished a Performance Bank Guarantee to the tune of Rs. 8,15,18,000/- in favor of the respondent no.2.

3. Consequently, the petitioner informed about the various hindrances to respondent No. 5/Project Manager Married Accommodation Project (MAP) for carrying out the work of construction of the residential accommodation at MHOW through various letters.
4. Pursuant to which on 30.05.2019, the petitioner completed the works under the contract and the same was acknowledged to respondent No.2/ Director General (MAP) by way of its letter bearing no. PM/MAP/PH MHOW/PKG-13(R&C) dated 31.05.2019 and the petitioner thereafter submitted a final bill of Rs. 24,06,60,075/- to respondent no.2 on 29.02.2020. The petitioner also stated that various letters were sent to respondent No. 2 to seek payment but no response was received. Therefore, the petitioner invoked arbitration vide notices dated 12.04.2022, 03.05.2022, 23.01.2023, 03.03.2023, 16.03.2023, 27.04.2023 and 04.07.2023, issued under Section 21 of the A&C Act.
5. Learned counsel for the **petitioner** submits that as per the work order dated 30.10.2015, the said Agreement contains an arbitration clause (clause 60 of GCC), which provides that all disputes, with respect to the said agreement, shall be settled by a sole arbitrator to be appointed by the Engineer-in-chief.



6. Learned Counsel for the petitioner further submits that upon failure of appointment of procedure, as provided under the arbitration clause, the petitioner has approached this Hon'ble court seeking appointment of arbitrator under section 11. It has been also submitted that the three names proposed by the respondent for an arbitrator in their reply are from its own panel of arbitrators.
7. It has been further submitted that the proposed arbitrators were firstly nominated by the Respondent who is a party in interest, and secondly, since they are all persons admittedly, retired from the service of the Respondent and continue drawing pension from the Respondent, therefore they are ineligible for appointment as per section 12 read with the Vth and VIIth Schedule of the Act.
8. Learned Counsel for the petitioner has also submitted that the unilateral appointment of an arbitrator is barred by law. Reliance has been placed upon *Perkins Eastman Architects DPC v. HSCC (India) Ltd*¹, *Glock Asia-Pacific Ltd. v. Union of India*.²
9. Learned Counsel for the **respondents** have vehemently opposed the contentions raised by the petitioner and has submitted that the respondent replied to the legal notice dated 04.07.2023, wherein it was intimated to the petitioner that most of their claims attached by way of deviation orders with their Final Bill dated 29.02.2020 were finalised by the Respondent and the amount of "undisputed portion" of Final Bill is in "minus".

¹(2020) 20 SCC 760

²(2023) 8 SCC 226.



10. Learned Counsel of the respondent has also submitted that the petitioner was called upon to review the final bill by taking into account finalised deviation orders and submitted the corrected final bill in two parts i.e “Undisputed Portion” and “Disputed Portion” in terms of Condition 55 and 56 of GCC so that payment of “undisputed portion” of the final bill could be processed and for “Disputed portion” of the final bill, reference could be made to Sole Arbitrator for adjudication.
11. It has been further submitted that in terms of the contract, the sole arbitrator should possess the requisite qualification i.e. degree in Engineering or equivalent or have passed the Final/ Direct Final Examination of Sub Division II of the Institution of Surveyors (India) recognised by Govt. of India, so the Arbitrator required to be appointed need to be having aforesaid qualifications.
12. Learned counsel for the respondent submits that the Ministry of Defence has constituted an independent panel of arbitrators named ‘Mod Panel of Arbitrators’ wherein 21 empanelled arbitrators, who are retired officers of various central govt, and none of them are serving employees of the respondent.
13. Lastly, it has been submitted that there is no bar upon the appointment of the arbitrator proposed by the Respondent from the ‘Mod Panel of Arbitrators’ as specified in column 31 of the Fifth Schedule of the Arbitration and Conciliation Act, 1996. Therefore, the present petition filed by the Petitioner does not sustain and is pre-mature thus, liable to



be dismissed.

FINDING AND ANALYSIS

14. It is pertinent to mention that the Arbitration clause for adjudication of disputes having arisen between the parties and also stating the process for appointment of an arbitral tribunal is mentioned under Clause 60 of the GCC. Clause 60 of the GCC reads as under:

“60. Arbitration

All disputes, between the parties to the contract (other than those for which the decision of the DG MAP or any other person is by the contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of serving officer having degree in Engineering or equivalent or having passed Final/Direct Final Examination of Sub Division II of Institution of Surveyors (India) recognised by the Govt of India to be appointed by the Engineer-in-Chief, Army Headquarters, New Delhi or in his absence, the officer officiating as Engineer-in- Chief or Director General of Works If specifically delegated in writing by Engineer-in-Chief, Army Headquarters, New Delhi whose decision shall be final, conclusive and binding. The Arbitration shall be governed by Arbitration and Conciliation Act, 1996.

Unless both parties agree in writing, such reference shall not take place until after the completion or alleged completion of the Works or termination or determination of the Contract under Condition Nos.49 and 50 hereof.

Provided that in the event of abandonment of the works or cancellation of the Contract under Condition Nos. 46, 47 or 48 hereof, such reference shall not take place until alternative arrangements have been finalised by the Government to get the works completed by or through any other Contractor or Contractors or Agency or Agencies. Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in condition 57 hereof.



Provided that in the event of abandonment of the works or cancellation of the Contract under Condition Nos. 46, 47 or 48 hereof, such reference shall not take place until alternative arrangements have been finalised by the Government to get the works completed by or through any other Contractor or Contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in condition 57 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place:

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of case and pleading in defence.

The Arbitrator may proceed with the arbitration, exparte, if either party, inspite of a notice from the Arbitrator, fails to take part in the proceedings.

The Arbitrator shall give his reasoned award in writing on all matters referred to him and shall indicate his findings, Along with sums awarded, separately on each individual item of dispute.

The venue of arbitration shall be such place or places as may be fixed by the Arbitrator in his discretion

The award of the Arbitrator shall be final and binding on both the parties to the Contract.”

15. The respondent in their reply has taken the plea that the petitioner has not submitted the corrected final bill nor the list of claims stated that the Ministry of Defence has constituted an independent panel of arbitrators named ‘Mod Panel of Arbitrators’. It was further submitted that in this panel of arbitrators, all the 21 numbers empanelled arbitrators are retired officers of various central govt, and none of them are serving employees



of the respondent. It was further stated that besides this they all meet the qualifications as agreed during the arbitration agreement. The respondent stated that they have no objection if the arbitrator is appointed from the MOD panel of the arbitrators. It was further stated that any other arbitrator is not acceptable to the respondents.

16. The respondents also took a plea that the fee as prescribed in IV Schedule of the Arbitration and Conciliation Act is also not acceptable to the respondent. Reliance has been placed on ***G.S. Developers at Contractors Pvt. Ltd. vs Alpha Corp. Development Pvt. Ltd.***³ and ***NHAI vs Gammon Engineers and Contractors Pvt. Ltd.***⁴ Reliance has also been placed on ***Oil and Natural Gas Corporation Ltd. Vs Afcons Gunanusa JV.***⁵
17. The petitioner has taken the plea that before filing the petition he made various requests for appointment of arbitrator. However, the respondents did not respond to the same. It has been submitted that only thereafter the present application was filed. The petitioner has further submitted that in the written submissions filed on behalf of the respondents they have proposed the names of three arbitrators from the MOD Panel of arbitrators and have stated that the arbitrator may be appointed from the three names. Learned counsel submitted that this plea is totally in teeth to the law laid down by the Supreme Court in ***Perkins*** (Supra).
18. Learned counsel for the respondent submitted that legal notice 04.07.2023 was duly replied wherein it was intimated most of their

³ OMP (Comm) 54 of 2019

⁴ OMP (T) (Comm) 39 of 2018.



claims attached by way of deviation orders with their Final Bill dated 29.02.2020 were finalised by the Respondent and the amount of “undisputed portion” of Final Bill is in “minus”. It was further stated that the petitioner was called upon to review the final bill by taking into account finalised deviation orders and submitted the corrected final bill in two parts i.e “Undisputed Portion” and “Disputed Portion” in terms of Condition 55 and 56 of GCC so that payment of “undisputed portion” of the final bill (though worked out in negative) could be processed and for “Disputed portion” of the final bill, reference could be made to Sole Arbitrator. It has further been submitted that the petitioner has not submitted the corrected final bill. It was further submitted that the respondents have no objection if the sole arbitrator is appointed from the MOD panel.

19. In the written submissions, the respondents proposed the names of three arbitrators for the appointment of Sole Arbitrator.
20. The law regarding the appointment of the arbitrator from the panel of the respondents came up for consideration before this court in ***Margo Networks Pvt Ltd & Anr. Vs. Railtel Corporation of India Ltd***⁶. It is pertinent to mention that the relevant clause in ***Margo Networks Pvt Ltd*** (supra) was as under:

3.37. Appointment of Arbitrator

a.

b. In cases not covered by the paragraph (a) above, the Tribunal shall consist of a panel of 3 (three) arbitrators. For this purpose,

⁵ AIR 2022 SC 4413.

⁶ Arb. P. 637/2023



the Railway will send a panel of more than 3 (three) names within 60 (sixty) days from the day when a written and valid demand for arbitration is received by the Authority. The Bidder/DESP will be asked to suggest to the Authority at least 2 names out of the panel for appointment as Bidder/DESP 's nominee within 30 (thirty) days from the date of dispatch of the request by the Authority. The Authority shall appoint at least one out of them as the Bidder/DESP'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 (three) arbitrators so appointed. The authority shall complete this exercise of appointing the tribunal within 30 (thirty) days from the receipt of the names of the bidder/DESP's nominees.

21. At the outset, if we compare the clause in ***Margo Networks Pvt. Ltd.*** (supra) with the clause in the present case, the situation in the present case is far worse. In the present case as per clause 60, the sole arbitrator could be appointed by the Engineer-in-Chief, Army Headquarters, New Delhi or in his absence, the officer officiating as Engineer-in-Chief or Director General of Works If specifically delegated in writing by Engineer-in-Chief, Army Headquarters, New Delhi whose decision shall be final, conclusive and binding.
22. The respondent has also placed on record the list of 'MOD panel of arbitrators' which is reproduced as under:

Serial No.	Name	Post/Rank Held at Retirement	Deptt
1.	Shri Akhilesh Kumar	Spl DG	CPWD



2.	Shri Sorabh Mathur	Jt DG	MES
3.	Shri Vijander Kumar Jain	Pr. Chief Material Manager	RAILWAYS
4.	Shri Raj Kumar Sarkar	CE	RAILWAYS
5.	Shri Prakash Makhijani	Jt. DG(C)	MES
6.	Shri MCT Pareva	Addl DG	CPWD
7.	Shri Rameshwar Dayal Gupta	Jt DG	MES
8.	Shri Nand Lal Singh	Spl DG	CPWD
9.	Shri Rakesh Kumar Agarwal	ADG	CPWD
10.	Maj Gen K Gajria	ADGTE	ARMY(Corps of Engrs)
11.	Shri Raghunath Prasad Tripathi	ADG	MES
12.	Shri Anil Kumar Agrawal	Addl Member Railway Board	RAILWAYS
13.	Shri B Poiyaamozhi	Development Advisor (Ports)	MINISTRY OF SHIPPING
14.	Shri Satish Chander	ADG	MES
15.	Shri Arvind Kumar Arora	DG(Pers)	MES
16.	Shri WIdyoot Kumar Pradhan	Chief Mech Engg (DRM)	Railways
17.	Shri Upendra Malik	Sp DG	CPWD
18.	Shri Jagdish Raj Garg	DG(Pers)	MES
19.	Shri Sukesh Kumar Sharma	AGM	Railways
20.	Shri Bhuvnesh Prakash Khare	GM	Railways
21.	Shri Ramesh Chandra	GM	Railways



23. The Co-ordinate Bench of this Court in *Margo Networks Pvt Ltd* (*supra*) after taking into account the judgment of the Supreme Court in *Central Organization for Railway Electrification vs. ECI-SPIC-SMO-MCMI (JV) (CORE)* *inter alia* held as under:

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?

21. The Supreme Court in *Voestalpine* (*supra*), considers in detail, an arbitration agreement which contemplates that one of the parties thereto shall provide a panel to the other side for the purpose of appointment of arbitrator(s).

22. The appointment procedure that fell for consideration in *Voestalpine* (*supra*) was noted therein as under :

“..... 8. As per the aforesaid procedure, having regard to the quantum of claims and counter claims, three arbitrators are to constitute the arbitral tribunal. The agreement further provides that respondent would make out a panel of engineers with the requisite qualifications and professional experience, which panel will be of serving or retired engineers of government departments or public sector undertakings. From this panel, the respondent has to give a list of five engineers to the petitioner and both the petitioner and the respondent are required to choose one arbitrator each from the said list. The



two arbitrators so chosen have to choose the third arbitrator from that very list, who shall act as the presiding arbitrator.

.....”

23. In the context of the above procedure, Voestalpine (*supra*) proceeds to hold that bias or even real likelihood of bias cannot be attributed to persons of the panel simply on the ground that they were retired government or PSU employees. The Supreme Court further notes in **Voestalpine** that during the course of proceedings in that case, DMRC had forwarded a list of all 31 persons on its panel to the petitioner therein for the purpose of nomination by the petitioner of its nominee arbitrator, thereby giving a very wide choice to the petitioner. However, with regard to the stipulation in the concerned arbitration agreement in terms of which a list of 5 engineers from the panel was to be given to the petitioner from which the petitioner was obliged to nominate its arbitrator, the Supreme Court 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. ”

24. The Supreme Court in *Voestalpine* (supra) also proceeded to observe as under:-

“

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.

.....”

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.

28. In the present case, the respondent has shared a panel of ten arbitrators with the petitioner, all being ex-employees of the Railways/RailTel. Apart from the ex-employees of the railways, no other person has been included in the panel. Such a panel is clearly restrictive and is manifestly not “broadbased” and therefore, impinges upon the validity of the appointment procedure prescribed in clause 3.37 of the RFP.

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. Vs Rail Vikas Nigam Limited**¹⁴, 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 judgement in the case of **Simplex Infrastructures Ltd. Vs. Rail Vikas Nigam Limited**¹⁵ 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 judgements were relied upon in the case of **Overnite Express Limited Vs. Delhi Metro Rail Corporation**¹⁶, 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.”

24. While examining the aforesaid clause, it was inter alia held that bias or even real likelihood of bias cannot be attributed to persons of the panel simply on the ground that they were retired government or PSU employees. The apex court also noted in **Voestalpine** (supra) that during the course of proceedings in that case, DMRC had forwarded a list of all



31 persons on its panel to the petitioner therein for the purpose of nomination by the petitioner of its nominee arbitrator, thereby giving a very wide choice to the petitioner. It is pertinent to mention here that in the present case though in the reply the respondent had stated that the sole arbitrator can only be appointed out of empanelled 21 arbitrators, however, in their written submission the choice was restricted to three arbitrators. It is also relevant to note that in *Voestalpine* (supra) the clause provided that the respondent shall give a list of 5 engineers to the petitioner and both the petitioner and respondent were required to choose one arbitrator each from the said list and then two arbitrators shall appoint the presiding arbitrator. Even this procedure did not find favour with the Supreme Court and it was inter alia held that 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 and there is no free choice to nominate a person out of the entire panel prepared by DMRC. It was further inter alia held that secondly, with the discretion given to DMRC to choose five persons, room for suspicion is created in the mind of the other side that DMRC may have picked up its own favourites and such a situation has to be countenanced. The Supreme Court further in *Voestalpine* (supra) inter alia stated that the panel should be broad-based and such panel apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from the private sector should also be included. It was further stated that likewise panel should comprise persons with legal backgrounds like Judges and



lawyers of repute as it is not necessary that all disputes that arise, would be of a technical nature. The apex court stated that it is therefore imperative to have a broad-based panel, so that there is no misapprehension that the principle of impartiality and independence would be discarded at any stage of the proceedings, especially at the stage of the constitution of the Arbitral Tribunal.

25. In *SMS Ltd. vs. Rail Vikas Nigam Limited*⁷ it was held that out of a panel of 37 names, only eight names had no connection with the Railways and though the panel comprised as many as 37 names, it was not sufficiently broad-based. Similarly, the reliance was placed on *Simplex Infrastructures Ltd. Vs. Rail Vikas Nigam Limited*⁸. Also, the coordinate bench of this court in *BVSR-KVR (Joint Ventures) Vs. Rail Vikas Nigam Ltd.*⁹ has held that the panel should satisfy the concept of neutrality of arbitrators.
26. It is relevant to mention here that the courts have not disapproved of the procedure of preparing a panel of arbitrators for appointing the arbitrators to adjudicate the dispute between the parties. The rule of caution is that a party must have an independent/free choice for nominating its arbitrator from the panel. The coordinate bench of this court in *L&T Hydrocarbon Engineering Limited Vs. Indian Oil Corporation Limited* 2022/DHC/004531 wherein also a panel of three arbitrators was given, it was inter alia held as under:

“..... 96. In the present case, the stipulation requires

⁷ (2020) SCC Online Del 77

⁸ 2018 SCC Online Del 13122

⁹ 2020 SCC OnLine Del 456



forwarding three names (even if they are retired employees from other organizations and not IOCL) to the petitioners, for it to choose one name amongst them to act as the Sole Arbitrator. It cannot be overlooked that the list of three names is a restrictive panel limiting the choice of the petitioner to only three options. I have noted that the three persons named in the panel forwarded to the petitioner are retired officers of different organisations like ONGC, SAIL and GAIL. The integrity and impartiality of these officers could not be normally doubted. However, in the absence of a free choice given to the petitioner to choose the arbitrator from a broad and diversified panel, and the power conferred upon the respondent to forward any three names as the panel at its discretion, there is a possibility of apprehension arising on part of the petitioner about the impartiality of the persons in the panel so forwarded. Whether such an apprehension is justified or not, is not for this Court to decide, and is, in any case, immaterial. It is settled law that even an apprehension of bias of an arbitrator in the minds of the parties would defeat the purpose of arbitration, and such a situation must be avoided. Therefore, I declare that the procedure for appointment of the arbitrator (if any) shall necessarily be in terms of the observations of the Supreme Court in Voestalpine Schienen GmbH (supra). 98. It is directed that in view of my conclusion in paragraph 80, the General Manager concerned shall consider the claims of the petitioner and take a decision whether they are to be notified or not, within eight weeks from today. Thereafter, the parties shall proceed in accordance with law.”

27. In **Margo Networks Pvt Ltd** (supra) after taking into account several judgments, it was *inter alia* held as under:

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 judgement of the Supreme Court in **CORE** does not alter the position in this regard.*

*36. In the facts of the present case, applying the principles laid down in **Voestalpine** (supra) and in view of the aforesaid judgments of this Court, including in **L&T Hydrocarbon Engineering Limited** (supra), it is evident that the panel offered by the respondent to the petitioner in the present case is restrictive and not broadbased. The same adversely impinges upon the validity of the appointment procedure contained in clause 3.37 (supra), and necessitates that an independent Arbitral Tribunal be constituted by this Court.*

28. I consider that the panel of arbitrators as offered by the respondent in the present case is highly restrictive in nature. It is neither broad-based nor is there any “counter-balancing”. It is also pertinent to mention that entire panel of MOD is consisting of senior retired officers. There is no person from the legal background. In the circumstances, panel is restrictive and not broad-based. In such cases, the jurisdiction of the court to appoint a sole arbitrator cannot be taken.
29. Considering the facts and circumstances of the case, the matter is referred to the arbitral tribunal with the following directions:
- i) The disputes between the parties under the said agreement are referred to the arbitral tribunal.
 - ii) Justice G. S. Sistani, Former Judge, High Court of Delhi is nominated an Arbitrator to adjudicate the disputes between the parties.



- 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').
 - iv) The remuneration of the learned Arbitrator shall be as the parties may agree.
 - v) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
 - vi) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, 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.
 - vii) The parties shall approach the learned arbitrator within two weeks from today.
30. The petition along with the pending application is disposed of in the above terms.

DINESH KUMAR SHARMA, J

MARCH 05, 2024

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