

3-Judge
Bench
2019
Dec. 17

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(BEFORE R. BANUMATHI, A.S. BOPANNA AND HRISHIKESH ROY, JJ.)

CENTRAL ORGANISATION FOR RAILWAY
ELECTRIFICATION

.. Appellant;

Versus

ECI-SPIC-SMO-MCML (JV) A JOINT VENTURE
COMPANY

.. Respondent.

Civil Appeals Nos. 9486-87 of 2019[†], decided on December 17, 2019

A. Arbitration and Conciliation Act, 1996 — S. 11(6) r/w S. 12(5) [as amended w.e.f. 23-10-2015] — Appointment of arbitrator in terms of the arbitration agreement as opposed to the appointment of an independent arbitrator — As in the present case where Cl. 64(3)(b) of the contract stipulated that the Arbitral Tribunal shall consist of a panel of three retired railway officers not below the rank of Senior Administrative Officer as the arbitrators — Necessity of, when procedure for appointment of arbitrators is laid down in the agreement and such arbitrators not ineligible for appointment — When agreement specifically provides for appointment of named arbitrators, the appointment should be in terms of the agreement — In present case, moreover, there had been no waiver of right of appointment of arbitrator as per the arbitration agreement by the party concerned

— Appellant awarded work contract to the respondent-petitioner Company by an agreement containing the arbitration clause — After coming into force of the Amendment Act, 2015, Cl. 64 of the General Conditions of Contract (GCC) was modified, considering the possibility of waiver/non-waiver of S. 12(5) and providing for constitution of Arbitral Tribunal consisting of three arbitrators either serving or retired railway officers — Respondent filed a petition seeking appointment of arbitrator in terms of Cl. 64 of the GCC — Held, the High Court was not justified in appointing an independent sole arbitrator without resorting to the procedure for appointment of the arbitrator as prescribed under the General Conditions of Contract — In the present case, held, when the agreement specifically provides for appointment of the Arbitral Tribunal consisting of three arbitrators from out of the panel of serving or retired railway officers, the appointment of the arbitrators should be in terms of the agreement as agreed by the parties

— Moreover, in the facts of the case, the appellant had not by its alleged default in appointment of arbitrator, waived its right under the agreement to appoint arbitrator, as there was no such default as alleged (Paras 18 to 22 and 31)

Union of India v. Pradeep Vinod Construction Co., (2020) 2 SCC 464 : (2020) 1 SCC (Civ) 579, followed

[†] Arising out of SLPs (C) Nos. 24173-74 of 2019. Arising from the Judgment and Order in *ECI-SPIC-SMO-MCML (JV) v. Central Organisation for Railway Electrification*, 2019 SCC OnLine All 2404 [Allahabad High Court, Arbitration and Conciliation Application Under Section 11(4) No. 151 of 2018, dt. 3-1-2019] and *ECI-SPIC-SMO-MCML (JV) v. Central Organisation for Railway Electrification*, 2019 SCC OnLine All 5271 [Allahabad High Court, Arbitration and Conciliation Application Under Section 11(4) No. 151 of 2018, dt. 29-3-2019]

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- Union of India v. Parmar Construction Co.*, (2019) 15 SCC 682 : (2020) 2 SCC (Civ) 390, affirmed
- a** *Parmar Construction Co. v. Union of India*, 2017 SCC OnLine Raj 4202; *Pradeep Vinod Construction Co. v. Union of India*, 2015 SCC OnLine Del 14571, held, reversed
Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1; *Union of India v. M.P. Gupta*, (2004) 10 SCC 504; *Union of India v. V.S. Engg. (P) Ltd.*, (2006) 13 SCC 240, referred to
- b** **B. Arbitration and Conciliation Act, 1996 — S. 12(5) [as amended w.e.f. 23-10-2015] — Retired officers of the Department — Not ineligible for appointment as arbitrators in a contractual dispute arising between the department and contractor — Held, 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 (Paras 26 and 27)**
- c** **C. Arbitration and Conciliation Act, 1996 — S. 12(5) r/w Sch. VII [as amended w.e.f. 23-10-2015] — Nomination of an arbitrator by a person himself ineligible to act as arbitrator — When permissible — Power given to opposite party to select from amongst names suggested by the department to counterbalance power of department of nomination/appointment of arbitrators — Relevance**
- As per the agreement procedure, the contractor was to suggest to General Manager at least two names out of panel sent by department to contractor, for appointment as contractor's nominee and General Manager had to appoint at least one out of them to three-member Arbitral Tribunal as contractor's nominee — General Manager was to simultaneously appoint balance number of arbitrators from the panel or from outside the panel, duly indicating "Presiding Arbitrator" from amongst the three arbitrators so appointed — Thus, held, since the respondent contractor had been given the power to select two names out of panel of four retired railway officers, at least one of whom had to be appointed as one of the three arbitrators by the General Manager, as per the agreement procedure, held, the right of the General Manager (himself ineligible to act as arbitrator) in formation of the Arbitral Tribunal was counterbalanced by the respondent's abovesaid power to choose any two from out of the four names — Hence, in present case it was permissible for General Manager (though he was himself ineligible to act as arbitrator) to nominate arbitrators as per the agreement procedure (Paras 32 to 38)
- d**
- e**
- f**
- The appellant awarded work contract of Rs 165,67,98,570 to the respondent Company by an agreement dated 20-9-2010 which contained the arbitration clause. Subsequently, after coming into force of the Arbitration and Conciliation (Amendment) Act, 2015 (w.e.f. 23-10-2015), the Government of India, Ministry of
- g** Railways made a modification to Clause 64 of the General Conditions of Contract and issued a Notification dated 16-11-2016 for implementation of modification.
- The modified Clause 64(3)(a)(ii) [where applicability of Section 12(5) has been waived off] inter alia provided that in cases where the total value of all claims exceeds Rs 1 crore, the Arbitral Tribunal shall consist of a panel of three gazetted railway officers not below JA (Junior Administrative) Grade or two
- h** Railway Gazetted Officers not below JA Grade and a retired railway officer, retired not below the rank of Senior Administrative (SA) Grade officer as arbitrators.

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The procedure for constitution of the Arbitral Tribunal is provided thereon. Clause 64(3)(b) deals with the appointment of arbitrator where applicability of Section 12(5) of the Arbitration and Conciliation Act has not been waived off. Clause 64(3)(b) stipulates that the Arbitral Tribunal shall consist of a panel of three retired railway officers not below the rank of Senior Administrative Officer as the arbitrators as per the procedure indicated thereon.

Since the respondent did not make adequate progress in the work, on 1-11-2017, the contract was terminated as per Clause 62 of the General Conditions of the Contract.

The respondent vide its letter dated 27-7-2018 requested the appellant for appointment of an Arbitral Tribunal for resolving the disputes between the parties and settle the claims value of Rs 73.35 crores. In reply dated 24-9-2018, the appellant sent a list of four serving Railway Electrification Officers of JA Grade to act as arbitrators. The respondent was asked to select any two and communicate to the appellant for formation of the Arbitral Tribunal panel. Vide letter dated 25-10-2018, the respondent was sent a list of another panel comprising four retired railway officers. In terms of Clause 63(3)(b) of Railway's General Conditions of Contract, the respondent was asked to select any two from this list and communicate them to the appellant within thirty days for constitution of the Arbitral Tribunal.

The respondent did not send a reply to the above letters of the appellant; but filed Arbitration Petition No. 151 of 2018 before the High Court under Section 11(6) of the Arbitration and Conciliation Act seeking appointment of a sole arbitrator for resolution of differences.

The respondent contended that the provisions of the amended Act apply to the present case. It was submitted that by virtue of the provisions of Section 12(5) read with Schedule VII to the Arbitration and Conciliation Act, 1996 [as amended w.e.f. 23-10-2015], the panel of arbitrators proposed by the appellant vide letter dated 24-9-2018 were statutorily made ineligible to be appointed as arbitrators since they were either serving or retired employees of the appellant. It was contended that as per the provisions of the Amendment Act, 2015, all employees, present or past, are statutorily made ineligible for appointment as arbitrators. It was further contended that the General Manager himself being ineligible to be appointed as an arbitrator under Section 12(5) read with Schedule VII of the Act, the General Manager cannot nominate any of the persons to be arbitrator.

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?

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Allowing the appeal, the Supreme Court held

a *Held :*

Re: Contention: Retired railway officers are not eligible to be appointed as arbitrators under Section 12(5) r/w Schedule VII of the A&C Act [as amended w.e.f. 23-10-2015] and were statutorily made ineligible to be appointed as an arbitrator

b 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) [as amended w.e.f. 23-10-2015] for appointment of a retired employee to act as an arbitrator. (Para 26)

c 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. 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. (Para 27)

Voestalpine Schienen GmbH v. DMRC, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607; *State of Haryana v. G.F. Toll Road (P) Ltd.*, (2019) 3 SCC 505 : (2019) 2 SCC (Civ) 170, *affirmed*

d ***Re: Contention: Failure to act in terms of the contract in not responding within thirty days from the date of the request***

e By the letter dated 25-10-2018, in terms of Clause 64(3)(b) of the GCC [where applicability of Section 12(5) has not been waived off] the appellant has nominated a panel of four retired railway officers to act as arbitrators and requested the respondent to select any two from the list and communicate to the appellant within thirty days from the date of the letter for formation of Arbitral Tribunal. The respondent has neither sent its reply nor selected two names from the list and replied to the appellant. Without responding to the appellant, the respondent has filed petition under Section 11(6) of the Arbitration and Conciliation Act before the High Court on 17-12-2018. When the respondent has not sent any reply to the communication dated 25-10-2018, the respondent is not justified in contending that the appointment of Arbitral Tribunal has not been made before filing of the application under Section 11 of the Act and that the right of the appellant to constitute Arbitral Tribunal is extinguished on filing of the application under Section 11(6) of the A&C Act. (Para 31)

Punj Lloyd Ltd. v. Petronet MHB Ltd., (2006) 2 SCC 638; *Union of India v. Bharat Battery Mfg. Co. (P) Ltd.*, (2007) 7 SCC 684, *impliedly distinguished on facts*

Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151, *cited*

g ***Re: Contention: General Manager himself becoming ineligible by operation of law to be appointed as arbitrator, is not eligible to nominate the arbitrator***

h There may be two categories of cases. The first, 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 authorised to appoint any other person as per the agreement procedure. If both parties have the advantage of nominating an arbitrator of their choice, then in such cases, the advantage of one party

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in appointing an arbitrator may get counterbalanced by equal power with the other party, and it may be permissible for the Managing Director to nominate arbitrators as per the agreement procedure despite being ineligible to be an arbitrator himself. (Paras 33 to 38)

As per the agreement procedure, the contractor will be asked to suggest to the General Manager at least two names out of the panel for appointment as the contractor's nominee and the General Manager shall appoint at least one out of them as the contractor's nominee. The General Manager will also simultaneously appoint the balance number of arbitrators from the panel or from outside the panel, duly indicating the "Presiding Arbitrator" from amongst the three arbitrators so appointed. The appellant thus, duly 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 so that the General Manager might complete the appointment process as per the agreement procedure. 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 counterbalanced by the power of choice given to the respondent. Thus, the power of the General Manager to nominate the arbitrator is counterbalanced 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 nominate the arbitrators and constitute the Arbitral Tribunal as per the agreement procedure. (Paras 33 to 38)

Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2020) 20 SCC 760 : 2019 SCC OnLine SC 1517, affirmed

TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72, explained and distinguished

ECI-SPIC-SMO-MCML (JV) v. Central Organisation for Railway Electrification, 2019 SCC OnLine All 2404; *ECI-SPIC-SMO-MCML (JV) v. Central Organisation for Railway Electrification*, 2019 SCC OnLine All 5271, reversed

ECI-SPIC-SMO-MCML (JV) v. Central Organization for Railway Electrification, 2017 SCC OnLine All 2912, referred to

TRF Ltd. v. Energo Engg. Projects Ltd., 2016 SCC OnLine Del 2532, cited

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Advocates who appeared in this case :

A.N.S. Nadkarni, Additional Solicitor General (Ms Rashmi Malhotra, Jitin Singhal, S.S. Rebello, Ms Priyanka Dass, Ms Arzu Paul, Neeleshwar Pavani, Ms Shivikka Agarwal, Ms Riya Soni, Sumit Upadhyay and Raj Bahadur Yadav, Advocates), for the Appellant; Sridhar Potaraju, Ms Shweta Parihar, Ms G. Usha Sri and Vishnu Thulasi Menon, Advocates, for the Respondent.

Chronological list of cases cited

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1. (2020) 20 SCC 760 : 2019 SCC OnLine SC 1517, *Perkins Eastman Architects DPC v. HSCC (India) Ltd.* 729g, 730a-b, 730d-e
2. (2020) 2 SCC 464 : (2020) 1 SCC (Civ) 579, *Union of India v. Pradeep Vinod Construction Co.* 719f, 721f-g, 724f-g, 724g
3. (2019) 15 SCC 682 : (2020) 2 SCC (Civ) 390, *Union of India v. Parmar Construction Co.* 719f, 721f, 724d-e, 724e, 724f, 724g
4. (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1, *Bharat Broadband Network Ltd. v. United Telecoms Ltd.* 720g

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	5. (2019) 3 SCC 505 : (2019) 2 SCC (Civ) 170, <i>State of Haryana v. G.F. Toll Road (P) Ltd.</i>	726d-e
a	6. 2019 SCC OnLine All 5271, <i>ECI-SPIC-SMO-MCML (JV) v. Central Organisation for Railway Electrification (reversed)</i>	717e, 719b, 732d-e
	7. 2019 SCC OnLine All 2404, <i>ECI-SPIC-SMO-MCML (JV) v. Central Organisation for Railway Electrification (reversed)</i>	717e, 719a, 732d-e
b	8. (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72, <i>TRF Ltd. v. Energo Engg. Projects Ltd.</i>	720b-c, 729a, 729d, 729e, 729g, 730c, 730d, 732b
	9. (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607, <i>Voestalpine Schienen GmbH v. DMRC</i>	720b-c, 720f, 725g, 726a, 726f-g
	10. 2017 SCC OnLine Raj 4202, <i>Parmar Construction Co. v. Union of India (held, reversed)</i>	724e
	11. 2017 SCC OnLine All 2912, <i>ECI-SPIC-SMO-MCML (JV) v. Central Organization for Railway Electrification</i>	718d
c	12. 2016 SCC OnLine Del 2532, <i>TRF Ltd. v. Energo Engg. Projects Ltd.</i>	729c-d
	13. 2015 SCC OnLine Del 14571, <i>Pradeep Vinod Construction Co. v. Union of India (held, reversed)</i>	724f-g
	14. (2007) 7 SCC 684, <i>Union of India v. Bharat Battery Mfg. Co. (P) Ltd.</i>	727g, 728a
	15. (2006) 13 SCC 240, <i>Union of India v. V.S. Engg. (P) Ltd.</i>	724d
	16. (2004) 10 SCC 504, <i>Union of India v. M.P. Gupta</i>	724d
d	17. (2006) 2 SCC 638, <i>Punj Lloyd Ltd. v. Petronet MHB Ltd.</i>	727b-c, 727c, 727f, 728a
	18. (2000) 8 SCC 151, <i>Datar Switchgears Ltd. v. Tata Finance Ltd.</i>	727c-d

The Judgment of the Court was delivered by

R. BANUMATHI, J.— Leave granted. These appeals have been preferred against the impugned orders dated 3-1-2019¹ and 29-3-2019² passed by the High Court of Judicature at Allahabad in Arbitration Application No. 151 of 2018 in and by which the High Court rejected the contention of the appellant that the arbitrator is to be appointed as per General Conditions 64(3)(a)(ii) and 64(3)(b) of the contract and appointed Shri Justice Rajesh Dayal Khare as the sole arbitrator for resolving the dispute between the parties.

2. The appellant awarded work contract of Rs 165,67,98,570 to the respondent Company by an agreement dated 20-9-2010 which contains the arbitration clause. Subsequently, after coming into force of the Arbitration and Conciliation (Amendment) Act, 2015 (w.e.f. 23-10-2015), the Government of India, Ministry of Railways made a modification to Clause 64 of the General Conditions of Contract and issued a Notification dated 16-11-2016 for implementation of modification. The modified Clause 64(3)(a)(ii) [where applicability of Section 12(5) has been waived off] inter alia provided that in cases where the total value of all claims exceeds Rs 1 crore, the Arbitral Tribunal shall consist of a panel of three gazetted railway officers not below JA (Junior Administrative) Grade or two Railway Gazetted Officers not below

¹ *ECI-SPIC-SMO-MCML (JV) v. Central Organisation for Railway Electrification*, 2019 SCC OnLine All 2404

² *ECI-SPIC-SMO-MCML (JV) v. Central Organisation for Railway Electrification*, 2019 SCC OnLine All 5271

JA Grade and a retired railway officer, retired not below the rank of Senior Administrative (SA) Grade officer as arbitrators. The procedure for constitution of the Arbitral Tribunal is provided thereon. Clause 64(3)(b) deals with the appointment of arbitrator where applicability of Section 12(5) of the Arbitration and Conciliation Act has not been waived off. Clause 64(3)(b) stipulates that the Arbitral Tribunal shall consist of a panel of three retired railway officers not below the rank of Senior Administrative Officer as the arbitrators as per the procedure indicated thereon.

3. Since the respondent did not complete the work under the contract within the prescribed period, on 18-10-2017, the appellant issued “seven days” notice under Clause 62 of the General Conditions of Contract to the respondent. Thereafter on 27-10-2017, the appellant issued a “48 hours’ notice” to the respondent calling upon the respondent to make good the progress of work, failing which the contract will stand terminated. Since the respondent did not make adequate progress in the work, on 1-11-2017, the contract was terminated as per Clause 62 of the General Conditions of the Contract. The respondent was also informed that their security deposit has been forfeited and the performance guarantee submitted by it shall also be encashed.

4. The respondent filed Petition No. 760 of 2017 before the High Court challenging the termination of the contract which came to be dismissed by the High Court vide order dated 28-11-2017³ and the High Court directed the respondent to avail the alternative remedy by invoking the arbitration clause. The respondent vide its letter dated 27-7-2018 requested the appellant for appointment of an Arbitral Tribunal for resolving the disputes between the parties and settle the claims value of Rs 73.35 crores. In reply dated 24-9-2018, the appellant sent a list of four serving Railway Electrification Officers of JA Grade to act as arbitrators. The respondent was asked to select any two and communicate to the appellant for formation of the Arbitral Tribunal panel. Vide letter dated 25-10-2018, the respondent was sent a list of another panel comprising four retired railway officers. In terms of Clause 63(3)(b) of Railway’s General Conditions of Contract, the respondent was asked to select any two from this list and communicate them to the appellant within thirty days for constitution of the Arbitral Tribunal.

5. The respondent did not send a reply to the above letters of the appellant; but filed Arbitration Petition No. 151 of 2018 before the High Court under Section 11(6) of the Arbitration and Conciliation Act seeking appointment of a sole arbitrator for resolution of differences. In its petition, the respondent suggested the name of one Shri Ashwani Kumar Kapoor, retired Member, Electrical from Railway Board to be appointed as an arbitrator in the matter. According to the respondent, there exists a valid and binding arbitration clause between the parties being Clause 1.2.54 of Part I of Chapter 2 and also Clause 64 of the General Conditions of Contract; but since no neutral arbitrator is contemplated to be appointed in the General Conditions of Contract, the respondent has no other recourse except by filing the petition under Section 11(6) of the Arbitration and Conciliation Act, 1996.

³ *ECI-SPIC-SMO-MCML (JV) v. Central Organization for Railway Electrification*, 2017 SCC OnLine All 2912

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6. The High Court vide the impugned order dated 3-1-2019¹ rejected the argument of the appellant that the arbitrator ought to be appointed only from the panel of arbitrators in terms of General Conditions of Contract. The High Court observed that the powers of the Court to appoint arbitrator are independent of the contract between the parties and no fetters could be attached to the powers of the court. With those findings, the High Court appointed Shri Rajesh Dayal Khare, a retired Judge of the Allahabad High Court as the sole arbitrator subject to his consent, under Section 11(8) of the Arbitration and Conciliation Act. Subsequently, vide order dated 29-3-2019², the High Court noted the consent of the arbitrator appointed by the court and directed the arbitrator to proceed with the arbitration proceedings. Being aggrieved, the appellant has preferred these appeals.

7. Mr A.N.S. Nadkarni, learned Additional Solicitor General (“ASG”) appearing for the appellant submitted that in terms of Clause 64(3)(a)(ii) of the General Conditions of Contract [where applicability of Section 12(5) of the amended Act has been waived off], the Arbitral Tribunal shall consist of a panel of three gazetted railway officers not below Junior Administrative Grade or two railway gazetted officers not below Junior Administrative Grade and a retired railway officer retired not below the rank of Senior Administrative Grade Officer as the arbitrators. It was submitted that as per Clause 64(3)(b) of the General Conditions of Contract [where applicability of Section 12(5) of the Act has not been waived off], 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 after compliance of the procedure stipulated in Clause 64(3)(b). It was contended that when the agreement and the General Conditions of Contract provided for appointment of the Arbitral Tribunal consisting of three arbitrators from the Panel, the High Court erred in appointing the sole arbitrator outside the panel of the arbitrators. The learned ASG further submitted that the appointment of an independent arbitrator is in contravention of Clauses 64(3)(a)(i), 64(3)(a)(ii) and 64(3)(b) of the General Conditions of Contract and the impugned judgment appointing a former Judge of the High Court of Allahabad is not sustainable. In support of the contention, the learned ASG inter alia placed reliance upon *Union of India v. Parmar Construction Co.*⁴ and *Union of India v. Pradeep Vinod Construction Co.*⁵ and other judgments.

8. Refuting the above contention, Mr Sridhar Potaraju, learned counsel appearing for the respondent submitted that the Arbitration and Conciliation Act, 1996 was amended with effect from 23-10-2015 and in the present case, the demand for arbitration for resolution of disputes was made by the respondent on 27-7-2018 and hence, the provisions of the amended Act apply to the present case. It was submitted that by virtue of the provisions of Section 12(5)

¹ *ECI-SPIC-SMO-MCML (JV) v. Central Organisation for Railway Electrification*, 2019 SCC OnLine All 2404

² *ECI-SPIC-SMO-MCML (JV) v. Central Organisation for Railway Electrification*, 2019 SCC OnLine All 5271

⁴ (2019) 15 SCC 682 : (2020) 2 SCC (Civ) 390

⁵ (2020) 2 SCC 464 : (2020) 1 SCC (Civ) 579

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read with Schedule VII to the Arbitration and Conciliation Act, 1996, the panel of arbitrators proposed by the appellant vide letter dated 24-9-2018 were statutorily made ineligible to be appointed as arbitrators since they were either serving or retired employees of the appellant. It was contended that as per the provisions of the Amendment Act, 2015, all employees present or past are statutorily made ineligible for appointment as arbitrators.

9. Mr Potaraju, learned counsel further submitted that when the General Manager himself being ineligible to be appointed as an arbitrator under Section 12(5) read with Schedule VII of the Act, the General Manager cannot nominate any of the persons to be arbitrator. The learned counsel for the respondent inter alia placed reliance upon *Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd.*⁶, *TRF Ltd. v. Energo Engg. Projects Ltd.*⁷ and a number of other judgments which would be referred to at the appropriate place.

10. We have carefully considered the submissions and perused the impugned judgment and materials on record. The point falling for consideration is whether the High Court was right in appointing an independent arbitrator in contravention of Clauses 64(3)(a)(ii) and 64(3)(b) of the General Conditions of Contract.

Appointment of an independent arbitrator without reference to the clauses of General Conditions of Contract (GCC) — Whether correct?

11. The learned counsel for the respondent submitted that being serving employees of the appellant, the panel of arbitrators proposed by the appellant vide letter dated 24-9-2018 were not eligible to be appointed as arbitrators in view of the provisions of Section 12(5) read with Schedule VII of the Arbitration and Conciliation Act. The learned counsel further submitted that the panel of arbitrators proposed by the appellant vide letter dated 25-10-2018 comprising of retired employees of the appellant were also not eligible to be appointed as arbitrators under Section 12(5) read with Schedule VII of the Act as the employees of the appellant are expressly made ineligible.

12. In support of the above contention, the learned counsel for the respondent has placed reliance upon *Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd.*⁶ wherein, the Supreme Court held as under: (SCC p. 689, para 24)

“24. ... The amended provision puts an embargo on a person to act as an arbitrator, who is the employee of the party to the dispute. It also deprives a person to act as an arbitrator if he had been the consultant or the advisor or had any past or present business relationship with DMRC.”

13. On behalf of the respondent, reliance was also placed upon *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*⁸ wherein, the Supreme Court held as under: (SCC p. 768, para 15)

⁶ (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607

⁷ (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72

⁸ (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1

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- a* “15. Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be “ineligible” to be appointed as arbitrator. The only way in which this
- b* ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, *subsequent* to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be
- c* appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may *after* disputes have arisen between them, waive the applicability of this sub-section by an “express agreement in writing”. Obviously, the “express agreement in writing” has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a
- d* person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.” (emphasis in original)

- e* 14. Per contra, on behalf of the appellant, Mr A.N.S. Nadkarni, learned ASG has submitted that the appointment of arbitrator is governed as per Clauses 64(3)(a)(i) and 64(3)(a)(ii) of the General Conditions of Contract (GCC) where applicability of Section 12(5) of the Arbitration and Conciliation
- f* Act has been waived off and the Arbitral Tribunal shall consist of a panel of three serving railway officers or two serving officers and one retired officer. The learned ASG submitted that 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. It was further submitted that Clause 64(3)(b) of GCC stipulates that the Arbitral Tribunal shall consist of a panel of three retired railway officers not below the rank of Senior Administrative Officer and the Arbitral Tribunal to be
- g* constituted as per the procedure indicated thereon. Placing reliance upon *Union of India v. Parmar Construction Co.*⁴ and *Union of India v. Pradeep Vinod Construction Co.*⁵, the learned ASG has submitted that when the agreement specifically provides for appointment of panel of arbitrators, the appointment should be in terms of the agreement and the appointment of independent sole arbitrator is in contravention of the General Conditions of Contract which govern the parties for appointment of arbitrators.

15. Clause 64 of the General Conditions of Contract deals with the procedure for resolution of the disputes and provides for “Demand for arbitration” and appointment of the arbitrators. Clause 64 of the General Conditions of Contract (GCC) reads as under:

- h* 4 (2019) 15 SCC 682 : (2020) 2 SCC (Civ) 390
5 (2020) 2 SCC 464 : (2020) 1 SCC (Civ) 579

“64. (1) Demand for Arbitration:

64. (1)(i) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railways of any certificate to which the contractor may claim to be entitled to, or if the Railways fails to make a decision within 120 days, then and in any such case, but except in any of the “excepted matters” referred to in Clause 63 of these Conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.

64. (1)(ii)(a) The demand for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item-wise. Only such dispute or difference, in respect of which the demand has been made, together with counterclaims or set-off, given by the Railways, shall be referred to arbitration and other matters shall not be included in the reference.

64. (1)(ii)(b) The parties may waive off the applicability of Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015. If they agree or such waiver in writing after having arisen between them in the formation under Annexure XII of these conditions.”

16. After coming into force of the Arbitration and Conciliation (Amendment) Act, 2015, the Government of India, Ministry of Railways made a modification to Clause 64 of the General Conditions of Contract and the Railway Board issued a Notification dated 16-11-2016 in this regard. The modified Clause 64(3)(a)(i) [where applicability of Section 12(5) of the Act has been waived off] inter alia provided that in case where the total value of all claims in question added together does not exceed rupees one crore, the Arbitral Tribunal shall consist of a sole arbitrator who shall be a Gazetted Officer of Railways not below JA Grade nominated by the General Manager. In terms of Clause 64(3)(a)(i), the sole arbitrator shall be appointed within sixty days from the day when a written and valid demand for arbitration is received by the General Manager. In the present case, since the value of the work contract is worth more than Rs 165 crores, Clause 64(3)(a)(i) is not applicable.

17. Clause 64(3)(a)(ii) of GCC deals with cases not covered by Clause 64(3)(a)(i) where applicability of Section 12(5) of the Act has been waived off. Clause 64(3)(a)(ii) of the General Conditions of Contract reads as under:

“64. (3) Appointment of arbitrator:

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64. (3)(a)(ii) In case not covered by Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three gazetted railway officers not

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a below JA Grade or two railway gazetted officers not below JA Grade and a retired railway officer, retired not below the rank of SAG officer, as the arbitrators. For this purpose, the Railways will send a panel of at least four (4) names of gazetted railway officers of one or more departments of the Railways which may also include the name(s) of retired railway officer(s) empanelled to work as railway arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM....”.

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18. 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. The modified Clause 64(3)(b) inter alia provided that the Arbitral Tribunal shall consist of a panel of three retired railway officers not below the rank of SAO officer as arbitrator. For this purpose, the Railways will send a panel of at least four names of retired railway officer(s) empanelled. The contractor will be asked to suggest to the General Manager at least two names out of the panel for appointment as the contractor’s nominee and the General Manager shall appoint at least one out of them as the contractor’s nominee. The General Manager will also simultaneously appoint the balance number of arbitrators from the panel or from outside the panel. The modified Clause 64(3)(b) of the General Conditions of Contract reads as under:

“64. (3)(b) Appointment of arbitrator where applicability of Section 12(5) of the A&C Act has not been waived off

e The Arbitral Tribunal shall consist of a panel of three retired railway officers retired not below the rank of SAO officer, as the arbitrator. For this purpose, the Railways will send a panel of at least four names of retired railway officer(s) empanelled to work as railway arbitrator indicating their retirement date to the contractor within 60 days from the day when a written and valid demand for arbitrators is received by the GM.

f Contractor will be asked to suggest to General Manager at least two names out of the panel for appointment as contractor’s nominee within 30 days from the date of dispatch of the request by the Railways. 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 three arbitrators so appointed. The GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contract’s nominees. While nominating the arbitrators, it will be necessary to ensure that one of them has served in the Accounts Department.”

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h 19. After coming into force of the Arbitration and Conciliation (Amendment) Act, 2015, when Clause 64 of the General Conditions of Contract has been modified inter alia providing for constitution of Arbitral Tribunal consisting of three arbitrators either serving or retired railway officers, the

High Court is not justified in appointing an independent sole arbitrator without resorting to the procedure for appointment of the arbitrator as prescribed under Clause 64(3)(b) of the General Conditions of Contract.

20. It is pertinent to note that even in the application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, the respondent prayed for appointment of a sole arbitrator in terms of Clause 1.2.54(b)(i) of the Tender Agreement/Clause 64 of the General Conditions of Contract for adjudicating the disputes which have arisen between the parties. In the petition filed under Section 11(6) of the Act, the respondent prayed for appointment of one Shri Ashwani Kumar Kapoor to act as the arbitrator. Thus, the respondent itself sought for appointment of arbitrator in terms of Clause 64 of the General Conditions of Contract. The appointment of Shri Ashwani Kumar Kapoor as arbitrator, of course, was not agreeable to the appellant, since it was found that said Shri Ashwani Kumar Kapoor was not in the panel of arbitrators and therefore, could not be considered for appointment as arbitrator. As the value of the work contract was worth more than Rs 165 crores, the dispute can be resolved only by a panel of three arbitrators in terms of Clause 64(3)(b) of the General Conditions of Contract. The respondent was not right in seeking for appointment of a sole arbitrator in terms of Clause 1.2.54(b)(i) of the tender agreement/Clause 64 of the General Conditions of Contract.

21. Considering the various matters of railway contracts and interference with the appointment of independent arbitrators, after referring to *Union of India v. M.P. Gupta*⁹ and *Union of India v. V.S. Engg. (P) Ltd.*¹⁰ and other judgments, in *Union of India v. Parmar Construction Co.*⁴, the Supreme Court set aside the appointment of an independent arbitrator and directed the General Manager of Railways to appoint arbitrator in terms of Clause 64(3) of the agreement. In para 47 of *Parmar Construction Co.*⁴, the Supreme Court held as under: (*Parmar Construction Co. case*⁴, SCC p. 715)

“47. To conclude, in our considered view, the High Court¹¹ was not justified in appointing an independent arbitrator without resorting to the procedure for appointment of an arbitrator which has been prescribed under Clause 64(3) of the contract under the inbuilt mechanism as agreed by the parties.”

22. Applying ratio of *Parmar Construction Co.*⁴, in *Pradeep Vinod Construction Co.*⁵, the Supreme Court held that the appointment of arbitrator should be in terms of the agreement and the High Court¹² was not right in appointing an independent arbitrator ignoring Clause 64 of the General Conditions of Contract. As held in *Parmar Construction Co.*⁴ and *Pradeep Vinod Construction Co.*⁵, the High Court was not justified in appointing an independent arbitrator without resorting to the procedure for appointment of

⁹ (2004) 10 SCC 504

¹⁰ (2006) 13 SCC 240

⁴ (2019) 15 SCC 682 : (2020) 2 SCC (Civ) 390

¹¹ *Parmar Construction Co. v. Union of India*, 2017 SCC OnLine Raj 4202

⁵ *Union of India v. Pradeep Vinod Construction Co.*, (2020) 2 SCC 464 : (2020) 1 SCC (Civ) 579

¹² *Pradeep Vinod Construction Co. v. Union of India*, 2015 SCC OnLine Del 14571

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a the arbitrators which has been prescribed under the General Conditions of Contract.

Re: Contention: Retired railway officers are not eligible to be appointed as arbitrators under Section 12(5) read with Schedule VII of the Act and were statutorily made ineligible to be appointed as an arbitrator

b 23. Vide letter dated 27-7-2018, the respondent made a request for appointment of arbitrator/constitution of Arbitral Tribunal. In response to the same, the appellant sent a letter dated 24-9-2018 nominating the names of four serving railway officers and the respondent was asked to select any two names from the list of the four railway officers and communicate to the appellant. It is seen from the record that the respondent vide their letter dated 26-9-2018 expressed their disagreement in waiving off the applicability of Section 12(5) of the Amendment Act, 2015. Referring to its own earlier letter dated 24-9-2018 and letter of the respondent dated 26-9-2018, the appellant had sent a communication dated 25-10-2018 nominating the panel of four retired railway officers to act as arbitrators and requesting the respondent to select any two names from the list in terms of Clause 64(3)(b) of GCC and communicate to the appellant within thirty days from the date of the letter for formation of Arbitral Tribunal. According to the appellant, the respondent failed to select any of the nominee from the panel within the stipulated time of thirty days. The respondent neither responded to the appellant's letter dated 25-10-2018 nor suggested the names of two arbitrators from the panel sent by the appellant. Instead the respondent approached the High Court under Section 11(6) of the Act for appointment of an independent sole arbitrator by filing a petition on 17-12-2018.

e 24. The contention of the learned counsel for the respondent is that the panel of arbitrators proposed by the appellant vide letter dated 25-10-2018 comprising of retired employees of the appellant are not eligible to be appointed as arbitrators under Section 12(5) read with Schedule VII of the Act. Further contention of the learned counsel for the respondent is that the panel of arbitrators drawn by the appellant consist of those persons who were railway employees or ex-railway employees and therefore, they are statutorily made ineligible to be appointed as arbitrators.

f 25. Contending that the appointment of retired employees as arbitrators cannot be assailed merely because an arbitrator is a retired employee of one of the parties, the learned ASG has placed reliance upon *Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd.*⁶ After referring to various judgments and also the scope of amended provision of Section 12 of the Amendment Act, 2015 and the entries in the Seventh Schedule, the Supreme Court observed that merely because the panel of arbitrators drawn by the respondent, Delhi Metro Rail Corporation are the government employees or ex-government employees, that by itself may not make such persons ineligible to act as arbitrators of the respondent DMRC. It was observed that the persons who have worked

h ⁶ (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607

in the Railways under the Central Government or the Central Public Works Department or public sector undertakings cannot be treated as employee or consultant or advisor of the respondent DMRC. In para 26 of *Voestalpine Schienen GmbH*⁶, the Supreme Court held as under: (SCC p. 689, para 26)

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

26. The same view was reiterated in *State of Haryana v. G.F. Toll Road (P) Ltd.*¹³ 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*⁶, 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.

⁶ *Voestalpine Schienen GmbH v. DMRC*, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607
¹³ (2019) 3 SCC 505 : (2019) 2 SCC (Civ) 170

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Re: Contention: Failure to act in terms of the contract in not responding within thirty days from the date of the request

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28. The learned counsel for the respondent has submitted that vide letter dated 27-7-2018, the respondent requested for referring the dispute to arbitration but, no steps were taken by the appellant within thirty days from the date of request dated 27-7-2018. It was submitted that on 17-12-2018, the respondent filed application under Section 11(6) of the Act before the High Court for appointment of a sole arbitrator, by which time, no steps were taken by the appellant under the Contract, except sending two lists of persons by letters dated 24-9-2018 and 25-10-2018 who were de jure ineligible to be appointed as the arbitrators. In this regard, reliance was placed upon *Punj Lloyd Ltd. v. Petronet MHB Ltd.*¹⁴

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29. Considering the applicability of Section 11(6) of the Act, in *Punj Lloyd Ltd.*¹⁴, the Supreme Court held as under: (SCC p. 640, para 5)

“5. Having heard the learned counsel for the parties, we are satisfied that the appeal deserves to be allowed. The learned counsel for the appellant has placed reliance on the law laid down by this Court in *Datar Switchgears Ltd. v. Tata Finance Ltd.*¹⁵, wherein this Court has held as under: (SCC p. 158, para 19)

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‘19. ... [S]o far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but *before the first party has moved the court under Section 11*, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases.’ ” (emphasis in original)

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As held in *Punj Lloyd Ltd.*¹⁴, if the opposite party has not made any application for appointment of the arbitrator within thirty days of demand, the right to make appointment is not forfeited but continues; but the appointment has to be made before the former files application under Section 11 of the Act seeking appointment of an arbitrator. Only then the right of the opposite party ceases.

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30. In *Union of India v. Bharat Battery Mfg. Co. (P) Ltd.*¹⁶, on 30-3-2006, the respondent thereon filed petition under Section 11(6) seeking appointment of an arbitrator. The Union of India, the appellant thereon appointed Dr Gita Rawat on 15-5-2006 as a sole arbitrator in terms of Clause 24 of the agreement.

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¹⁴ (2006) 2 SCC 638

¹⁵ (2000) 8 SCC 151

¹⁶ (2007) 7 SCC 684

In such facts and circumstances of the case, considering the decision in *Punj Lloyd Ltd.*¹⁴, the Supreme Court held that: [*Bharat Battery Mfg. Co. (P) Ltd. case*¹⁶, SCC p. 689, para 12]

“12. ... Once a party files an application under Section 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. The right to appoint arbitrator under the clause of agreement ceases after Section 11(6) petition has been filed by the other party before the Court seeking appointment of an arbitrator.”

31. As discussed earlier, as per the modified Clause 64(3)(b) of GCC, when a written and valid demand for arbitration is received by the General Manager, the Railways will send a panel of at least four names of retired railway officers empanelled to work as arbitrators. The contractor will be asked to suggest to the General Manager at least two names out of the panel for appointment as contractor's nominee within thirty days from the date of dispatch of the request by the Railways. Vide letter dated 27-7-2018, the respondent has sought for appointment of an arbitrator for resolving the disputes. The appellant by its letter dated 24-9-2018 (which is well within the period of sixty days) in terms of Clause 64(3)(a)(ii) [where applicability of Section 12(5) of the Act has been waived off] sent a panel of four serving railway officers of JA Grade to act as arbitrators and requested the respondent to select any two from the list and communicate to the office at the earliest for formation of the Arbitral Tribunal. By the letter dated 26-9-2018, the respondent conveyed their disagreement in waiving the applicability of Section 12(5) of the Amendment Act, 2015. By the letter dated 25-10-2018, in terms of Clause 64(3)(b) of GCC [where applicability of Section 12(5) has not been waived off] the appellant has nominated a panel of four retired railway officers to act as arbitrators and requested the respondent to select any two from the list and communicate to the appellant within thirty days from the date of the letter for formation of Arbitral Tribunal. The respondent has neither sent its reply nor selected two names from the list and replied to the appellant. Without responding to the appellant, the respondent has filed petition under Section 11(6) of the Arbitration and Conciliation Act before the High Court on 17-12-2018. When the respondent has not sent any reply to the communication dated 25-10-2018, the respondent is not justified in contending that the appointment of Arbitral Tribunal has not been made before filing of the application under Section 11 of the Act and that the right of the appellant to constitute Arbitral Tribunal is extinguished on filing of the application under Section 11(6) of the Act.

Re: Contention: General Manager himself becoming ineligible by operation of law to be appointed as arbitrator, is not eligible to nominate the arbitrator

32. Stand of the learned counsel for the respondent is that by virtue of Section 12(5) read with Schedule VII of the Act, General Manager himself is made ineligible to be appointed as an arbitrator and hence, he cannot nominate any other person to be an arbitrator. The essence of the submission is “that which cannot be done directly, may not be done indirectly”. In support of his

14 *Punj Lloyd Ltd. v. Petronet MHB Ltd.*, (2006) 2 SCC 638

16 *Union of India v. Bharat Battery Mfg. Co. (P) Ltd.*, (2007) 7 SCC 684

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a contention, the learned counsel for the respondent placed reliance upon *TRF Ltd. v. Energo Engg. Projects Ltd.*⁷ wherein the Supreme Court held as under: (SCC pp. 404-405, para 54)

b “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 view¹⁷ expressed by the High Court is not sustainable and we say so.”

d 33. In *TRF Ltd.*⁷, though the Court observed that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator, in para 50, the Court has discussed about another situation where both the parties could nominate respective arbitrators of their choice and that it would get counterbalanced by equal power with the other party. In para 50 of *TRF Ltd.*⁷, the Supreme Court held as under: (SCC p. 403)

e “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.” (emphasis supplied)

g 34. Considering the decision in *TRF Ltd.*⁷, in *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*¹⁸, the Supreme Court observed that there are two categories of cases. The first, similar to the one dealt with in *TRF Ltd.*⁷ 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

h ⁷ (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72

¹⁷ *TRF Ltd. v. Energo Engg. Projects Ltd.*, 2016 SCC OnLine Del 2532

¹⁸ (2020) 20 SCC 760 : 2019 SCC OnLine SC 1517

Managing Director is not to act as an arbitrator himself: but is authorised to appoint any other person of his choice or discretion as an arbitrator. Observing that if in the first category, the Managing Director was found incompetent similar invalidity will always arise even in the second category of cases, in para 20 in *Perkins Eastman*¹⁸, the Supreme Court held as under:

“20. ... 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 Ltd.*⁷, 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.”

35. After referring to para 50 of the decision in *TRF Ltd.*⁷, in *Perkins Eastman*¹⁸, the Supreme Court referred to a different situation where both parties have the advantage of nominating an arbitrator of their choice and observed that the advantage of one party in appointing an arbitrator would get counterbalanced by equal power with the other party. In para 21, it was held as under:

“21. ... 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.”

36. As discussed earlier, after the 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,

⁷ *TRF Ltd. v. Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72

¹⁸ *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, (2020) 20 SCC 760 : 2019 SCC OnLine SC 1517

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- a* Railways will send a panel of at least four names of gazetted railway officers of one or more departments of the Railways 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 the 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 Railways. The General Manager shall appoint at least one out of them as the contractor's nominee and
- b* 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.

- c* **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 Railways 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
- d* 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 Railways. 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
- e* panel or from outside the panel, duly indicating the "presiding officer" from amongst the three arbitrators. The exercise of appointing the 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 the Arbitral Tribunal is counterbalanced by the respondent's power to choose any two from out of the four names and the General Manager shall appoint at least one out
- f* of them as the contractor's nominee.

- g* **38.** In the present matter, after the respondent had sent the letter dated 27-7-2018 calling upon the appellant to constitute the Arbitral Tribunal, the appellant sent the communication dated 24-9-2018 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 26-9-2018, 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 26-9-2018, 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
- h* 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 counterbalanced by the power of choice given to the respondent. Thus, the power of the General Manager to nominate the arbitrator is counterbalanced 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 (*sic* nominate) the arbitrator. We do not find any merit in the contrary contention of the respondent. The decision in *TRF Ltd.*⁷ 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 the Arbitral Tribunal consisting of three arbitrators from out of the panel of 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.

40. In the result, the impugned orders dated 3-1-2019¹ and 29-3-2019² passed by the High Court of Judicature at Allahabad in Arbitration Application No. 151 of 2018 are set aside and these appeals are allowed. The appellant is directed to send a fresh panel of four retired officers in terms of Clause 64(3)(b) of the General Conditions of Contract within a period of thirty days from today under intimation to the respondent contractor. The respondent contractor shall select two from the four suggested names and communicate to the appellant within thirty days from the date of receipt of the names of the nominees. Upon receipt of the communication from the respondent, the appellant shall constitute the Arbitral Tribunal in terms of Clause 64(3)(b) of the General Conditions of Contract within thirty days from the date of the receipt of the communication from the respondent. The parties to bear their respective costs.

⁷ *TRF Ltd. v. Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72

¹ *ECI-SPIC-SMO-MCML (JV) v. Central Organisation for Railway Electrification*, 2019 SCC OnLine All 2404

² *ECI-SPIC-SMO-MCML (JV) v. Central Organisation for Railway Electrification*, 2019 SCC OnLine All 5271