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

% **Order reserved on: 17 May 2023**
Order pronounced on: 23 May 2023

\+ ARB.P. 222/2023, I.A. 8724/2023 (Direction)

SHAPOORJI PALLONJI AND COMPANY PRIVATE LIMITED ..... Petitioner

Through: Mr. Ciccu Mukhopadhyay, Sr. Adv. with Mr. Saurav Agrawal, Ms. Sonali Jaitley, Mr. Jaiyesh Bakshi, Mr. Ravi Tyagi, Mr. Mayank Mishra, Mr. Chirag Sharma, Ms. Mayuri Shukla and Ms. Sakshi Tibrewal, Advs.

versus

UNION OF INDIA ..... Respondent

Through: Mr. Apoorv Kurup, CGSC with Mr. Ajay Arjun Sharma, Advs. for UOI.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

O R D E R

1. The present petition seeks to invoke the jurisdiction of the Court conferred by Section 11 of the **Arbitration and Conciliation Act, 1996**[1] and for the appointment of a nominee arbitrator of the respondent consequent to an asserted failure on its part to abide by the appointment procedure.

[1] The Act

2. When the present petition was initially taken up for consideration on 10 March 2023, Mr. Kurup, learned CGSC appearing for the respondent, had referred to Clause 25 of the Contract providing for parties approaching the **Dispute Redressal Committee**[2] before seeking reference of disputes to an Arbitral Tribunal. The petitioner had, on the other hand, contended that bearing in mind the composition of the DRC, the relegation of the petitioner to pursue that process would be an empty formality. However, and without prejudice to its rights and contentions, the petitioner ultimately stated that they would participate in any proceedings that may be drawn by the DRC during the pendency of the instant petition.

3. The proceedings before the DRC are stated to have been initiated on 28 April 2023. Since 11 out of the 13 claims raised by the petitioner remained unresolved, the matter was thereafter adjourned to 03 May 2023. The proceedings were thereafter preponed to 02 May 2023. However parties could not resolve their differences in the meeting that was held on that date and consequently the proceedings before the DRC concluded without any settlement being reached. The existence of disputes between the parties and the same being resolved by way of arbitration is essentially not disputed. However, the respondent raised various objections with respect to the prayer made for constitution of the Arbitral Tribunal based not only on an asserted failure on the part of the petitioner to abide by the procedure prescribed under the Contract but also on the ground of it not being

[2] DRC

entitled to nominate an arbitrator otherwise than in accordance with the contract terms.

4. In order to evaluate the merits of the objections which stand raised, the Court firstly deems it apposite to extract Clause 25 of the Contract which reads thus: -

> "**CLAUSE 25**
>
> **Settlement of Disputes & Arbitration**
>
> Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these condition or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:
>
> (i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge or if the Engineer in Charge considers any act or decision of the contractor on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable and is disputed, such party shall promptly within 15 days of the arising of the disputes request the Chief Engineer or where there is no Chief Engineer, the Additional Director General (CE/AOG) who shall refer the disputes to Dispute Reressal Committee (DRC) within 15 days along with a list of disputes with amounts claimed if any in respect of each such dispute. The Dispute Redressal Committee (DRC) shall give the opposing party two weeks for a written response, and, give its decision within a period of 60 days extendable by 30 days by consent of both the parties from the receipt of reference from CE/ADG. The constitution of Dispute

Redressal Committee (DRC) shall be as indicated in Schedule 'F'. Provided that no party shall be represented before the Dispute Redressal Committee by an advocate/legal counsel etc.

If the Dispute Redressal Committee (DRC) falls to give its decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC) or expiry of time limit given above, then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Director General, CPWD (CE/ADG/DG) for appointment of arbitrator on prescribed proforma as per Appendix XV under intimation to the other party.

It is a term of contract that each party invoking arbitration must exhaust the aforesaid mechanism of settlement of claims/disputes prior to invoking arbitration.

The CE/ADG/DG shall in such case appoint the sole arbitrator or one of the three arbitrators as the case may be within 30 days of receipt of such a request and refer such disputes to arbitration. Wherever the Arbitral Tribunal consists of three Arbitrators, the contractor shall appoint one arbitrator within 30 days of making request for arbitration or of receipt of request by Engineer-in-charge to CE/ADG/DG for appointment of arbitrator, as the case may be, and two appointed arbitrators shall appoint the third arbitrator who shall act as the Presiding Arbitrator. In the event of

a. A party fails to appoint the second Arbitrator, or

b. The two appointed Arbitrators fail to appoint the Presiding Arbitrator, then

The Director General, CPWD shall appoint the second or Presiding Arbitrator as the case may be.

(ii) Disputes or difference shall be referred for adjudication through arbitration by a Tribunal having sole arbitrator where Tendered amount is Rs. 100 Crore or less. Where Tendered Value is more than Rs. 100 Crore, Tribunal shall

consist of three Arbitrators as above. The requirements of the Arbitration and Conciliation Act, 1996 (26 of 1996) and any further statutory modifications or re-enactment thereof and the rules made there under and for the time being in force shall be applicable.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed, if any, in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the decision of the DRC.

It is also a term of this contract that any member of the Arbitration Tribunal shall be a Graduate Engineer with experience in handling public works engineering contracts at a level not lower than Chief Engineer (Joint Secretary level of Government of India). This shall be treated as a mandatory qualification to be appointed as arbitrator.

Parties, before or at the time of appointment of Arbitral Tribunal may agree in writing for fast track arbitration as per the Arbitration and Conciliation Act, 1996 (26 of 1996) as amended in 2015.

Subject to provision in the Arbitration and Conciliation Act, 1996 (26 of 1996) as amended in 2015 whereby the counter claims if any can be directly filed before the arbitrator without any requirement of reference by the appointing authority, the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/-, the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid as per the Act.

The place of arbitration shall be as mentioned in Schedule F. In case there is no mention of place of arbitration, the arbitral tribunal shall determine the place of arbitration.

The venue of the arbitration shall be such place as may be

> fixed by the Arbitral Tribunal in consultation with both the parties. Falling any such agreement, then the Arbitral Tribunal shall decide the venue. ”

5. As would be evident from a perusal of Clause 25, if the contractor were to raise a dispute arising out of the Contract, it is entitled to raise a dispute before the **Chief Engineer**[3] / **Additional Director General**[4] who are in turn obliged to refer disputes to the DRC. If the DRC fails to render a decision or if any party be dissatisfied with the view taken by it ultimately or if matters remain unresolved, either party is conferred the right to give a notice to the CE or the ADG or the **Director General**[5] for appointment of an arbitrator. Clause 25 further stipulates that where the Arbitral Tribunal is to comprise of three arbitrators, each party shall nominate an arbitrator who shall, in turn, appoint the third or the presiding arbitrator. In the event of the respondent failing to appoint the second arbitrator or the two nominated arbitrators failing to concur on a presiding arbitrator, the DG stands empowered to appoint the second or the presiding arbitrator, as the case may be. Clause 25 confers a right on the contractor to appoint one arbitrator within thirty days of making a request for disputes being referred for the consideration of an Arbitral Tribunal. Undisputedly and since in the facts of the present case the tendered value was more than Rs.100 crores, disputes had to be referred for the consideration of a panel of three arbitrators.

[3] CE
[4] ADG
[5] DG

6. The respondent in terms of the objections which have been filed in these proceedings has firstly urged that the petitioner invoked arbitration without exhausting the procedure prescribed in Clause 25 and which contemplated disputes being referred for settlement before the DRC. Mr. Kurup had contended that it is only if the DRC fails to act in terms of Clause 25 or where its decision be adverse that the right to nominate an arbitrator could be said to possibly arise. It was further submitted by Mr. Kurup that even if it were asserted that one of the parties had failed to appoint a second arbitrator, the right of appointment stands reserved in favour of the DG. The prayers made in the instant petition were thus countered on the aforesaid grounds.

7. It was additionally asserted by Mr. Kurup that Clause 25 prescribes that an arbitrator would have to be a Graduate Engineer with experience in handling public works engineering contracts at a level not lower than that of a CE and equivalent to an officer occupying a post at the level of a Joint Secretary in the Union Government. It was his submission that not only was the nomination made by the petitioner in clear violation of the aforesaid provisions, even if an Arbitral Tribunal were to be ultimately constituted, those arbitrators would have to answer the qualifications as prescribed and as set forth in Clause 25. Stress was laid by Mr. Kurup on the language employed in Clause 25 and which stipulates that the qualifications as prescribed shall be treated as mandatory for the purposes of a person being appointed as an arbitrator.

8. Insofar as the proceedings before the DRC are concerned, as was noted by this Court in its order of 10 March 2023, the petitioner

had questioned the very basis of the DRC undertaking a resolution process contending that since an adverse decision had already been taken by the CE against the petitioner, the drawl of proceedings by the DRC would be meaningless since it is chaired by a person equivalent in rank to the CE and the rest of its members in any case being junior to the CE. This objection was countered by Mr. Kurup who had submitted that neither the Chairperson of the DRC nor its other members had been part of the decision making process and consequently the apprehension as voiced was clearly unfounded.

9. The Court notes that Clause 25 not only contemplates a process of conciliation being undertaken by the DRC, the imperatives of that process being adhered to is underscored with the Contract stipulating that each party invoking arbitration must exhaust the mechanism of settlement before the DRC prior to invoking arbitration. The provision in the Contract then recites that the aforesaid would constitute a term of the Contract itself. As would be evident from the material placed on the record, the petitioner in terms of its Invocation Notice dated 27 January 2023 had proceeded to indicate the name of its nominee arbitrator without going through the procedure as prescribed in Clause 25. That nomination itself was based upon its assertion that since proceedings before the DRC would, in any case, have entailed the involvement of the senior most officials of the department, no useful purpose would be served. However, at the time when the present petition was taken up for final hearing learned counsels for parties urged that now that the process of the DRC had come to an end, the instant petition would have to be heard and

disposed of finally. The aforesaid issue is thus not answered in the present judgment.

10. That takes the Court to deal with the objection taken by Mr. Kurup and based upon the provisions contained in Clause 25 and the powers vested in the CE, ADG or the DG to appoint a second arbitrator or a presiding arbitrator. Undisputedly, neither the CE, ADG nor the DG would be qualified to act as an arbitrator for resolution of disputes in light of the provisions contained in the Seventh Schedule of the Act. If that be so, any power that may be recognized to inhere in those authorities to either nominate a second or a presiding arbitrator would clearly fall foul of the principles enunciated by the Supreme Court in **Perkins Eastman Architects DPC v. HSCC (India) Ltd.**[6]. It would be pertinent to recall the following pertinent observations as were entered by the Supreme Court in *Perkins*: -

> "**16.** However, the point that has been urged, relying upon the decision of this Court in *Walter Bau AG* [*Walter Bau AG* v. *Municipal Corpn. of Greater Mumbai*, (2015) 3 SCC 800 : (2015) 2 SCC (Civ) 450] and *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , requires consideration. In the present case Clause 24 empowers the Chairman and Managing Director of the respondent to make the appointment of a sole arbitrator and said clause also stipulates that no person other than a person appointed by such Chairman and Managing Director of the respondent would act as an arbitrator. In *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , a Bench of three Judges of this Court, was called upon to consider whether the appointment of an arbitrator made by the Managing Director of the respondent therein was a valid one and whether at that stage an application moved under Section 11(6) of the Act could be entertained by the Court.

[6] (2020) 20 SCC 760

The relevant clause, namely, Clause 33 which provided for resolution of disputes in that case was under : (SCC p. 386, para 8)

> "*8.* … '33. Resolution of dispute/arbitration
>
> (*a*) In case any disagreement or dispute arises between the buyer and the seller under or in connection with the PO, both shall make every effort to resolve it amicably by direct informal negotiation.
>
> (*b*) If, even after 30 days from the commencement of such informal negotiation, seller and the buyer have not been able to resolve the dispute amicably, either party may require that the dispute be referred for resolution to the formal mechanism of arbitration.
>
> (*c*) All disputes which cannot be settled by mutual negotiation shall be referred to and determined by arbitration as per the Arbitration and Conciliation Act, 1996 as amended.
>
> (*d*) Unless otherwise provided, any dispute or difference between the parties in connection with this agreement shall be referred to sole arbitration of the Managing Director of buyer or his nominee. Venue of arbitration shall be Delhi, and the arbitration shall be conducted in English language.
>
> (*e*) The award of the Tribunal shall be final and binding on both, buyer and seller.' "

17. In *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , the agreement was entered into before the provisions of the Amending Act (3 of 2016) came into force. It was submitted by the appellant that by virtue of the provisions of the Amending Act and insertion of the Fifth and Seventh Schedules in the Act, the Managing Director of the respondent would be a person having direct interest in the dispute and as such could not act as an arbitrator. The extension of the submission was that a person who himself was disqualified and disentitled could also not nominate any other person to act as an arbitrator. The submission countered by the respondent therein was as under : (SCC p. 385, para 7.1)

> "*7.1.* The submission to the effect that since the Managing Director of the respondent has become ineligible to act as an arbitrator subsequent to the amendment in the Act, he could also not have nominated any other person as arbitrator is absolutely unsustainable, for the Fifth and the Seventh

> Schedules fundamentally guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence and impartiality of the arbitrator. To elaborate, if any person whose relationship with the parties or the counsel or the subject-matter of dispute falls under any of the categories specified in the Seventh Schedule, he is ineligible to be appointed as an arbitrator but not otherwise."

18. The issue was discussed and decided by this Court as under : (*TRF case* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , SCC pp. 403-04, paras 50-54)

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

Records & Settlement, (1998) 7 SCC 162] . In the said case, the question arose, can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held : (SCC p. 173, para 25)

> '*25.* We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in *Roop Chand* v. *State of Punjab* [*Roop Chand* v. *State of Punjab*, AIR 1963 SC 1503] . In that case, it was held by the majority that where the State Government had, under Section 41(1) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, delegated its appellate powers vested in it under Section 21(4) to an "officer", an order passed by such an officer was an order passed by the *State Government* itself and "not an order passed by any *officer* under this Act" within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revision by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer *in his own right* and *not as a delegate* of the State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate.'
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> (emphasis in original)

51. Be it noted in the said case, reference was made to *Behari Kunj Sahkari Awas Samiti* v. *State of U.P.* [*Behari Kunj Sahkari Awas Samiti* v. *State of U.P.*, (1997) 7 SCC 37] , which followed the decision in *Roop Chand* v. *State of Punjab* [*Roop Chand* v. *State of Punjab*, AIR 1963 SC 1503] . It is seemly to note here that the said principle has been followed in *Indore Vikas Pradhikaran* [*Indore Vikas Pradhikaran* v. *Pure Industrial Coke & Chemicals Ltd.*, (2007) 8 SCC 705] .

52. Mr Sundaram has strongly relied on *Pratapchand Nopaji* [*Pratapchand Nopaji* v. *Kotrike Venkata Setty & Sons*, (1975) 2 SCC 208] . In the said case, the three-Judge Bench applied the maxim "*qui facit per alium facit per se*". We may profitably reproduce the passage : (SCC p. 214, para 9)

> '*9.* … The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim: "*quifacit per alium facit per se*" (what one does through another is done by oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to do the illegal act within the prohibited area. It is immaterial whether, for the doing of such an illegal act, the agent employed is given the wider powers or authority of the "pucca adatia", or, as the High Court had held, he is clothed with the powers of an ordinary commission agent only.'

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

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

view [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, 2016 SCC OnLine Del 2532] expressed by the High Court is not sustainable and we say so."

19. It was thus held that as the Managing Director became ineligible by operation of law to act as an arbitrator, he could not nominate another person to act as an arbitrator and that once the identity of the Managing Director as the sole arbitrator was lost, the power to nominate someone else as an arbitrator was also obliterated. The relevant clause in said case had nominated the Managing Director himself to be the sole arbitrator and also empowered said Managing Director to nominate another person to act as an arbitrator. The Managing Director thus had two capacities under said clause, the first as an arbitrator and the second as an appointing authority. In the present case we are concerned with only one capacity of the Chairman and Managing Director and that is as an appointing authority.

20. We thus have two categories of cases. The first, similar to the one dealt with in *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an arbitrator.

> **21.** But, in our view that has to be the logical deduction from *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Para 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and recognised by the decision of this Court in *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]."

11. *Perkins* thus is an authoritative precedent on the issue of the appointing authority being divested of the power to nominate an arbitrator in case the said authority itself be disqualified under the Act. As was noticed hereinabove, while Clause 25 confers a right on the petitioner here to appoint its nominee arbitrator, the power vested in the CE, ADG or the DG to appoint is in respect of the second or a presiding arbitrator. The powers so vested thus become exercisable in case the respondent here fails to abide by the timelines prescribed in Clause 25 and defaults in nominating its arbitrator. Any appointment of a member of the Arbitral Tribunal by the CE, ADG or the DG

would clearly not sustain in light of the unequivocal exposition of the legal position in *Perkins*.

12. *Perkins* had also noticed with approval the significant observations made by the Supreme Court in **Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd.**[7] where while laying emphasis on the importance of impartiality and independence, the Court had observed as follows: -

> "**20.** Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in *Hashwani* v. *Jivraj* [*Hashwani* v. *Jivraj*, (2011) 1 WLR 1872 : 2011 UKSC 40] in the following words: (WLR p. 1889, para 45)
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> > "*45*. … the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties."
>
> **24.** Keeping in view the aforesaid parameters, we advert to the facts of this case. Various contingencies mentioned in the Seventh

[7] (2017) 4 SCC 665

Schedule render a person ineligible to act as an arbitrator. Entry 1 is highlighted by the learned counsel for the petitioner which provides that where the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with the party, would not act as an arbitrator. What was argued by the learned Senior Counsel for the petitioner was that the panel of arbitrators drawn by the respondent consists of those persons who are government employees or ex-government employees. However, that by itself may not make such persons ineligible as the panel indicates that these are the persons who have worked in the Railways under the Central Government or the Central Public Works Department or public sector undertakings. They cannot be treated as employee or consultant or advisor of the respondent DMRC. If this contention of the petitioner is accepted, then no person who had earlier worked in any capacity with the Central Government or other autonomous or public sector undertakings, would be eligible to act as an arbitrator even when he is not even remotely connected with the party in question, like DMRC in this case. 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. No such case is made out by the petitioner.

25. Section 12 has been amended with the objective to induce neutrality of arbitrators viz. their independence and impartiality. The amended provision is enacted to identify the "circumstances" which give rise to "justifiable doubts" about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, the Seventh Schedule mentions those circumstances which would attract the provisions of sub-section (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in

> Schedule 5 and Schedule 7 and admittedly the persons empanelled by the respondent are not covered by any of the items in the said list."

13. In *Voestalpine*, the Supreme Court had, however, negated the contention that a retired officer of the government or any other statutory or public sector corporation would necessarily be disqualified. This is evident from paragraph 26 of that decision which is extracted hereinbelow: -

> "**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."

14. The aspect of former employees not being *ipso facto* disqualified from acting as arbitrators was one which was also highlighted even in **Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)**[8] as would be evident from the following observations: -

[8] (2020) 14 SCC 712

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

Accordingly, and for the aforesaid reasons, the Court finds itself unable to recognise or uphold a power vesting in the CE, ADG or the DG to appoint a constituent member of the Arbitral Tribunal.

15. That then takes the Court to the issue with respect to qualifications that members of the Arbitral Tribunal are liable to possess. Mr. Kurup had contended that in terms of Clause 25, any member of the Arbitral Tribunal must necessarily be a Graduate Engineer with experience of the nature specified in that clause. According to Mr. Kurup, the word ***"any"*** is liable to be interpreted to mean ***"all"*** members of the Arbitral Tribunal. Stress was also laid upon the language employed in Clause 25 which specified that the aforesaid prescription would be liable to be treated as a mandatory qualification for appointment.

16. However, as this Court views the relevant part of Clause 25, it finds itself unable to countenance the aforesaid submission for the following reasons. It becomes pertinent to observe that the aforesaid stipulation forming part of Clause 25 uses the expression ***"any member"***. The said provision while stipulating the prescribed qualifications to be mandatory further uses the expression "*to be appointed as arbitrator*". What the Court seeks to underline is that the said provision does not specify or prescribe that ***"all members"*** of the Arbitral Tribunal must hold the qualifications that are prescribed.

17. The word *"any"* when used in a statute or a contract has always thrown up its fair share of doubts. While in some instances it has been understood to mean "either", in others it was interpreted to mean "all". Decisions as well as lexicons have however collectively desisted from ascribing a definitive meaning to that word entering the cautionary caveat of it being a phrase which is capable of having a flexible meaning and its meaning liable to be gathered from the context in which it is deployed. **Words and Phrases, Permanent Edition** has this to say generally with respect to the word *"any"*: -

> "The term "any" is synonymous with "either" and is given the full force of "every" or "all". Iowa-Illinois Gas & Elec. Co. v. City of Bettendorf, 41 N.W.2d 1, 4, 241 Iowa 349.
>
> ……
>
> "Any" is a word of flexible meaning and must be interpreted in the light of the context. The word is often used as meaning "all". Wachendorf v. Shaver, 78 N.E.2d 370, 375, 149 Ohio St. 231.
>
> ……
>
> The word "any" is, in its ordinary sense, broadly inclusive. City of Phoenix v. Tanner, 161 P.2d 923, 924, 63 Ariz. 278.
>
> "Any" in a plural sense means "all". Doherty v. King, Tex. Civ.App., 183 S.W.2d 1004, 1007.

> The word "any" means indiscriminate or without limitation or restrictions. Com. v. One 1939 Cadillac Sedan, Engine No. 6292665, Manufacturer's No. 6292665, 45 A.2d 406, 409, 158 Pa.Super. 392.
>
> "Any" means one indiscriminately of whatever kind or quantity. Federal Deposit Ins. Corporation v. Winton, C.C.A.Tenn., 131 F.2d 780, 782.
>
> The word "any" is all inclusive but as used in statute its meaning is restricted by the context of the statute. U. S. v. Weil, D.C. Ark., 46 F.Supp. 323, 326.
>
> The word "any" has a diversity of meanings, its meaning in any particular case de-pending on the context or subject matter of the statute or document in which it is used. State ex rel. Womack v. Jones, 10 So.2d 213, 217, 201 La. 637.
>
> **……**
>
> Word "any" is a general word and may have diversity of meanings, its meaning in any particular case depending largely upon context and subject-matter of statute or instrument in which it is used. Catholic Order of Foresters v. State, 271 N.W. 670, 676, 67 N.D. 228, 109A.L.R. 979."

18. Proceeding to notice the decisions in which it was interpreted to mean any one out of a number, it proceeds further to define it as follows: -

> "**Any one out of a number**
>
> The term "any" means to be one indifferently out of a number; one (or as plural, some) indiscriminately of whatever kind. Iowa-Illinois Gas & Elec. Co. v. City of Bettendorf, 41 N.W.2d 1, 4, 241 Iowa 349.
>
> The word "any" implies singularity in number or selectivity among a number and is defined as "one indifferently out of a number" or as "one, no matter what one". U. S. v. St. Clair, D.C.Va., 62 F.Supp. 795, 797.
>
> ……
>
> The word "any" is defined as "one indifferently out of a number; one indiscriminately of whatever kind or quantity," and, as applied to individuals, is used in dialect English pronominally for one of two, but in educated usage applies only to one of three or more, though frequently used in broad, distributive sense of "all,"

> "every," "each," or "each one of all," while word "wholly" means "to the exclusion of other things; totally; fully." The statutory provision, fixing registration fee for motorbusses operated "wholly within the corporate limits of any city or town" at one-tenth of regular fee, applies only to busses operating wholly within corporate limits of one city or town to exclusion of contiguous cities and towns; ordinary and usual meaning of word "any," which is not used in technical or particular sense, denoting an indeterminate one of given category. Burns' Ann.St.1933, §§ 1-201, 47-101, 47-110. Chicago & Calumet Dist. Transit Co. v. Mueller, 12 N.E.2d 247, 249, 213 Ind. 530."

19. Recognising the changing shades and hues that the said word may take, the Supreme Court in **Shri Balaganesan Vs. M.N. Shanmugham Chetty**[9] observed as under: -

> **18.** In construing Section 10(3)(*c*) it is pertinent to note that the words used are "any tenant" and not "a tenant" who can be called upon to vacate the portion in his occupation. The word "any" has the following meaning:
>
> > "some; one of many; an indefinite number. One indiscriminately or whatever kind or quantity.
> >
> > Word 'any' has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject-matter of the statute.
> >
> > It is often synonymous with 'either', 'every' or 'all'. Its generality may be restricted by the context;" (*Black's Law Dictionary*, 5th Edn.)

20. The complexities surrounding the meaning to be ascribed to the word *"any"* was again highlighted by the Supreme Court in **Union of India Vs. A.B. Shah**[10] in the following terms: -

> **12.** If we look into Conditions 3 and 6 with the object and purpose of the Act in mind, it has to be held that these conditions are not only relatable to what was required at the commencement of depillaring process, but the unstowing for the required length must exist always.

[9] (1987) 2 SCC 707

[10] (1996) 8 SCC 540

> The expression "at any time" finding place in Condition 6 has to mean, in the context in which it has been used, "at any point of time", the effect of which is that the required length must be maintained all the time. The accomplishment of object of the Act, one of which is safety in the mines, requires taking of such a view, especially in the backdrop of repeated mine disasters which have been taking, off and on, heavy toll of lives of the miners. It may be pointed out that the word 'any' has a diversity of meaning and in *Black's Law Dictionary* it has been stated that this word may be employed to indicate 'all' or 'every', and its meaning will depend "upon the context and subject-matter of the statute". A reference to what has been stated in *Stroud's Judicial Dictionary* Vol. I, is revealing inasmuch as the import of the word 'any' has been explained from pp. 145 to 153 of the 4th Edn., a perusal of which shows it has different connotations depending primarily on the subject-matter of the statute and the context of its use. A Bench of this Court in *Lucknow Development Authority* v. *M.K. Gupta* [(1994) 1 SCC 243] , gave a very wide meaning to this word finding place in Section 2(*o*) of the Consumer Protection Act, 1986 defining 'service'. (*See* para 4)

21. The aforesaid discussion leads the Court to arrive at the conclusion that the phrase "any member" must be interpreted in the context in which it is used in Clause 25. The Court firstly notes that the phrase is structured in the singular with the word *"arbitrator"* and *"member"* being used. It would be pertinent to recall that Clause 25 contemplates both a solitary as well as a panel of arbitrators. The penultimate part of the qualification clause then again reiterates the singular approach stating that the mandatory qualification is for a person *"....to be appointed as arbitrator."* The submission of Mr. Kurup if accepted would then raise further conflicts as would be evident from the discussion which ensues. If the interpretation canvassed by the respondent were to be accepted it would essentially amount to the petitioner also being held bound to appoint a Graduate Engineer. This would clearly deprive it of its right to appoint a person of its choice having qualifications that it may deem appropriate and

relevant. Additionally it also binds the petitioner to choose a Graduate Engineer whose experience necessarily is with respect to work discharged in a government contract. That does not appear to be the intent of the qualification clause at all. The Court thus finds itself unable to hold that the word *"any"* in the qualification clause is liable to be read as *"all members"*.

22. The Court further finds that if the clause were to accorded the meaning as suggested by Mr. Kurup, it would essentially lead to the Arbitral Tribunal consisting of only Graduate Engineers who may have had past experience of handling public works engineering contracts. This would clearly violate the fundamental precept of party autonomy on which the entire adjudicatory process itself is founded. The Court is further fortified in its view that the word *"any"* is not liable to be read as *"all"* for the following additional reasons. *Ex facie*, the clause does not take into consideration or contemplate any Graduate Engineers with experience in works and contracts other than those relating to the government. The said clause also stipulates that the Graduate Engineer's experience must be equivalent to and be at par with that of a CE (Joint Secretary, Government of India). This would essentially result in the said prescription in Clause 25 being liable to be understood as restricting the nominated arbitrator to be a Graduate Engineer who may have had experience of handling public works engineering contracts under the government or its entities and agencies only.

23. This in the considered opinion of this Court would clearly render the said clause unworkable and unjust. On an overall

consideration of the aforesaid, the Court is of the opinion that the aforesaid stipulations as contained in Clause 25 must consequently be read down and understood to mean that at least one or more of the members of the Arbitral Tribunal must possess the qualifications as prescribed in Clause 25. However, Clause 25 cannot be interpreted to require all members of the Arbitral Tribunal to possess the qualifications as prescribed therein.

24. There is one other aspect which arises from the article specifying qualifications in Clause 25. It would be *ex facie* evident that the article specifying qualifications does not clarify whether the nominee arbitrator who is to be a Graduate Engineer is to be a serving or a retired employee of the Government. The clause also does not specify whether the nominated arbitrator could be drawn from departments or ministries other than those with which the respondent is affiliated. Therefore, in order to sustain and uphold Clause 25 and insofar as it specifies qualifications, it would necessarily have to be read down to mean a retired government employee. This would save the appointment of a person who holds those qualifications and who would not otherwise fall foul of the prohibitions contained in the Seventh Schedule of the Act.

25. On a due consideration of the aforesaid issues which arose and in light of the conclusions recorded hereinabove, the Court proceeds to consider the formulation of ultimate directions. As was noticed hereinbefore, while the petitioner had initially questioned the drawl of proceedings before the DRC, the said issue was neither pressed nor urged at the time of final hearing. Both sides had then proceeded to

address submissions on lines aforenoted. The completion of proceedings before the DRC assumes significance since the rights of parties to nominate gets triggered only once the DRC takes a decision or concludes proceedings upon a failure on the part of parties to reach a settlement. The petitioner proceeded to name its nominee arbitrator on 27 January 2023. It was in response to the aforesaid communication that the respondent had taken the objection that such a nomination would not sustain till such time as the mechanism of settlement as constructed under Clause 25 has been pursued and completed. The nomination thus made by the petitioner would clearly be liable to be viewed as being premature. Similarly, the right of the respondent to name an arbitrator independently and / or its failure to abide by the appointment procedure would also be directly relatable to the completion of proceedings before the DRC. While by the time the instant petition came to be filed before this Court, the respondent had failed to nominate an arbitrator, its right to do so cannot be said to have been forfeited since the DRC reported a failure of conciliation only on 02 May 2023. Consequently, the right of both the petitioner and the respondent to nominate their respective arbitrators would spring into existence only thereafter.

26. In view of the aforesaid, the Court disposes of the instant petition in the following terms: -

> A. It shall be open to the petitioner to address a fresh communication indicating the name of its nominee arbitrator. While doing so, it would also be open to the petitioner to reiterate the name as suggested and contained in its

communication of 27 January 2023.

B. Upon receipt of the said intimation, it would be open to the respondent to nominate its arbitrator. The two nominated arbitrators may, in turn, then proceed to appoint a presiding arbitrator.

C. The Court further clarifies that it shall be open to the respondent to nominate an arbitrator who possesses the qualifications as prescribed in Clause 25. However, if it chooses not to do so, the two nominated arbitrators would then be entitled to appoint a presiding arbitrator who meets the qualifications as stipulated in Clause 25.

YASHWANT VARMA, J.

May 23, 2023
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