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

Reserved on: 20.08.2020

Date of Decision:-27.08.2020

\+ ARB.P. 860/2019 & IA No.208/2020

IRB AHMEDABAD VADODARA SUPER EXPRESS TOLLWAY PRIVATE LIMITED ..... Petitioner

Through Mr.Atul Nanda, Mr.Brij Bhushan Gupta, Mr.Darpan Wadhwa, Sr. Advs. with Mr.Saket Sikri, Mr.Jai Sahai Endlaw, Mr.Kapil Midha, Ms.Terresa R Daulat, Mr.Sarthak Sachdev, Mr.Wattan Sharma, Ms.Pritika Juneja, Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Respondent

Through Ms.Maninder Acharya, Sr.Adv. with Ms.Padma Priya, Mr.Dhruv Nayar, Mr.Viplav Acharya, Advs.

CORAM:
HON'BLE MS. JUSTICE REKHA PALLI

JUDGMENT

REKHA PALLI, J

1. The present petition under Section 11 (6)(b) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') seeks appointment of a presiding Arbitrator to the three member Tribunal for adjudication of the disputes between the parties in relation to the Concession Agreement dated 25.07.2011, as the two nominee Arbitrators of the parties have failed to arrive at any consensus on the aspect of such appointment.

2. The primary ground on which the petition has been filed is that once the two nominee arbitrators were unable to appoint the presiding arbitrator, either by consensus or by draw of lots, it implied that there is no further procedure agreed upon between the parties for such appointment and, therefore, the petitioner has no other remedy except to approach this Court under the Act.

3. Before dealing with the rival submissions of the parties, it would be appropriate to briefly note the factual matrix of the matter.

i. The petitioner is a company engaged in infrastructure development in India and the respondent, National Highway Authority of India/NHAI, is a statutory body entrusted with the responsibility of development, maintenance and management of national highways in the country.

ii. On 25.07.2011, the parties entered into a Concession Agreement for conversion of 102.300 km of NH-8 between Ahmedabad and Vadodara into a six lane highway and improvement of existing Ahmedabad-Vadodara Expressway in the state of Gujarat on a design, build, finance, operate and transfer basis (hereinafter referred to as 'the project'). Under the said agreement, the petitioner was required to undertake the entire cost of the project and pay a fixed annual premium of INR 309.60 crores to the respondent to be enhanced by 5% annually till the subsistence of the agreement. In lieu thereof, the petitioner was granted the exclusive rights, license and authority to operate the project for a period of 25 years and satisfy the costs incurred in setting up the project, from the toll collected on this stretch of the highway.

iii. As per the terms of this Concession Agreement, disputes between the parties were required to be first sent for conciliation, failing which the same were to be adjudicated through arbitration decided by reference to arbitration by a Board of Arbitrators to be appointed in accordance with clause 44.3.2. The arbitration clause specifically provided that arbitration would be held in accordance with the rules of arbitration of the International Center for Alternative Disputes Resolution or such other rules as may be mutually decided by the parties and would also be subject to the provisions of the Act. Clauses 44.3.1 and 44.3.2 of the agreement read as under:

> "***44.3 Arbitration***
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> *44.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 44.2, shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 44.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules"), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be Delhi, and the language of arbitration proceedings shall be English.*
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> *44.3.2. There shall be a Board of three arbitrators of whom each party shall select one and the third arbitrator shall be appointed by the two arbitrators so selected, and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.*"

iv. While the project work was underway, on 06.06.2014 the parties executed a supplementary agreement in relation to deferment of premium payment required to be paid by the petitioner. Shortly

thereafter, on 14.07.2014, when disputes between the parties had already started surfacing regarding the petitioner's claims for compensation on account of a competing road constructed by the respondent as also the premium deferment arrangement between the parties, the parties executed another supplementary agreement to the Concession Agreement, for the purpose of substituting the International Center for Alternative Disputes Resolution with the Society for Affordable Redressal of Disputes (SAROD). To that extent, clauses 44.3.1 and 44.3.2 of the Concession Agreement were modified to read as under :-

> ***4. "Amended clauses 44.3.1 & 44.3.2***
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> *(1) That the clause 44.3.1 & 44.3.2 of the Concession Agreement is hereby amended to be read as follows:-*
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> *"Any dispute/difference arising out of aforesaid Concession Agreement which is not resolved amicably as provided in clause 44.2 shall be finally settled by Arbitration as set forth below:-*
>
> *(i) The dispute shall be referred to SAROD for resolution by Arbitration in accordance with Rules of SAROD and Arbitration and Conciliation Act 1996 as amended from time to time (or which is pending with Arbitral Tribunal presided over by ..... shall be referred to SAROD). The Arbitral Tribunal shall consist of Sole Arbitrator in case total claim of dispute is Rs. 3 crores or less and in case the disputed claim is more than Rs. 3 crores, the Tribunal shall consist of odd number of Arbitrators to be nominated by the parties. The Presiding Arbitrator shall be appointed by the Arbitrators nominated by the parties in terms of Rule11.2 of SAROD. Further, the terms of appointment of Arbitrators shall be governed by Rule 11.3 to Rule 11.5, 12.2 and 13 of SAROD.*
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> *(ii) The Arbitral proceeding shall be held at Delhi (India) and the language of Arbitral proceeding and that of all correspondence between the parties shall be in English,*

(iii) While the curial law of proceedings shall be Rules of the SAROD and various provisions of Arbitration and Conciliation Act 1996, the dispute shall be governed by substantive law of India e.g The Indian Contract Act 1872 and Arbitration and Conciliation Act 1996, National Highways Act 1956 etc,

(iv) Code of Ethics for Arbitrators shall be governed by Rule 15 of SAROD.

(v) Fee of Arbitrators and expenses incurred in the Arbitration proceeding shall be shared by the parties in equal proportion in terms of Rule 15.10 of SAROD.

(vi) All procedural aspects in Arbitration proceedings shall be conducted in terms the Rules of SAROD.

(vii) The parties shall respect the award in letter and spirit and the award shall be binding upon the parties unless the parties invoke the provision of Section 34of the Arbitral and Conciliation Act 1996 for challenging the award."

v. Since the amended clauses 44.3.1 and 44.3.2 in turn refer to the Arbitration Rules of the SAROD, it would be apposite to note hereinbelow the relevant extracts of Rule 11 thereof which deal with the appointment of Tribunal and form the fulcrum of the present dispute:

"11.Appointment of Tribunal

11.1 The disputes shall be decided by a Sole Arbitrator when the total claim of dispute is Rs.3 crores or less

11.2 In all cases of disputes claimed for more than Rs.3 crores, the tribunal shall consist of odd number of Arbitrators to be nominated by the parties. The Presiding Arbitrator shall be appointed by the Arbitrators nominated by the parties from amongst the panel maintained by SAROD. For deciding the Presiding Arbitrator, a draw of lots can be carried out from amongst the names suggested by the Arbitrators nominated by the Parties. The eligibility criteria for empanelment of Arbitrators will be decided by the Governing Body.

11.3 If a Sole Arbitrator is to be appointed, the Governing Body will appoint the Arbitrator within 21 days from the date the Respondent's Statement of Defence and Counterclaim (if any) is filed or falls due, whichever is earlier. The Governing Body will appoint the Arbitrator from the panel of Arbitrators by draw of lots.

11.4 An Arbitrator/Presiding Arbitrator to be appointed under these Rules shall be a person on the SAROD Arbitration Panel as at the date of the appointment.

11.5 In the event of any party failing to appoint Arbitrator within 30 days of receipt of the notice of Arbitration, the Governing Body shall appoint the Arbitrator or Presiding Arbitrator as the case may be by a draw of lots".

vi. Once disputes grew between the parties and all attempts to conciliate failed, the petitioner invoked arbitration on 03.05.2019 and 01.06.2019 in accordance with the arbitration rules of the SAROD and on 01.06.2019, the petitioner appointed Justice (Retd.) Sh. Amitava Lala, a member of the SAROD panel, as its nominee arbitrator. Though the petitioner had proposed two separate arbitrations in respect of its two different claims, the respondent proposed a single arbitration for adjudication of all the disputes between the parties and on 01.07.2019, nominated a former judge of this court as its nominee arbitrator. However, since the said learned Judge expressed his inability to act in this capacity as he was not a member of the panel of arbitrators of the SAROD, the respondent then nominated Sh. Dedar Singh, IAS (Retd.) as its nominee arbitrator on 28.08.2019.

vii. As previously noted, Clause 11.2 of the SAROD Rules required the two nominee arbitrators to appoint the Presiding Arbitrator. However, since the two nominee arbitrators of the parties were

unable to agree upon a name, the petitioner's nominee arbitrator vide its email dated 04.12.2019 informed the petitioner that no consensus could be arrived at between the two nominee arbitrators as the respondent's nominee Arbitrator was repeatedly suggesting only the names of persons who are directly or indirectly associated with the respondent.

viii. It is in these circumstances, that the present petition under Section 11(6) of the Act came to be filed before this Court on 23.12.2019 on the premise that the procedure agreed upon between the parties for appointment of the presiding arbitrator had failed.

4. In support of the petition, Mr. Atul Nanda, learned senior counsel for the petitioner has raised two primary contentions. His first and primary contention is that the amended Clauses 44.3.1 and 44.3.2 of the supplementary agreement dated 14.07.2014 required the presiding arbitrator to be appointed by the parties' nominee arbitrators strictly in terms of Rule 11.2 and no other rule could be applied for appointment of the presiding arbitrator. As per Rule 11.2 the presiding arbitrator was required to be appointed by the parties' nominated arbitrator out of the panel of arbitrators maintained by the SAROD. For this purpose, the rules permitted the two nominee arbitrators to shortlist names from the SAROD panel and then resort to a draw of lots in order to select the presiding arbitrator therefrom, but since they have failed to do so, the prescribed procedure could not be honored. He submits that once the nominee arbitrators expressed their inability to concur upon the name of a presiding arbitrator, the respondent began claiming, contrary to the provisions of Rule 11.2, that the presiding arbitrator could be

chosen by the Governing Body. He urges that this contention and the respondent's reliance on Rule 11.5 in support thereof, is wholly misplaced; once the parties had agreed, by way of the supplementary agreement, to appoint the presiding arbitrator by resorting to Clause 11.2 alone, the Governing Body cannot be said to have any role to play in his appointment. He submits that the respondents have failed to appreciate that the parties had specifically agreed to apply Rules 11.3 to 11.5, 12.2 and 13 of the SAROD Rules to the appointment of the arbitrators but have nothing to do with the procedure of appointment. His contention thus is that even though the presiding arbitrator had to be appointed from the panel of SAROD, the procedure for his appointment has to be as per the provisions of Rule 11.2, without referring to any other Rule. In support of this contention, he places reliance on the decision of the Hon'ble Supreme Court in ***Delta Mechcons (India) Ltd. v. Marubeni Corporation*** *(2008) 15 SCC 772***.** Mr.Nanda, thus, contends that once this mechanism provided under Rule 11.2, which is the only procedure applicable to the parties, has collapsed, it is only this Court which is competent to appoint a presiding arbitrator under Section 11 (6)(b) of the Act.

5. Mr. Nanda further submits that while exercising its power under Section 11(6)(b) of the Act, this Court, after taking into consideration the fact that the dispute between the parties primarily relates to interpretation of a contract, would be justified in appointing any suitable person as the presiding arbitrator, irrespective of whether such person is on the SAROD panel or not. By placing reliance on ***Datar Switchgears Ltd. v. Tata Fiannce Ltd*** *(2000) 8 SCC 151,* he contends that once the agreed mechanism for appointment of an arbitrator has failed, the respondent's insistence on appointing the presiding arbitrator from the SAROD panel stands extinguished.

6. Mr. Nanda further submits that in any event, given the close nexus between the Governing Body of SAROD, in that many of the personnel and key officials of the society are employees of the respondent, allowing the Governing Body of SAROD to appoint the presiding arbitrator would tantamount to the respondent being bestowed with unilateral power of appointment in this case. This would be in violation of the decision of the Hon'ble Supreme Court in ***Perkins Eastman Architects DPC & Another v HSCC (India) Limited*** *2019 SCC Online 1517* whereunder an interested party in a dispute was precluded from unilaterally appointing the arbitrator in order to ensure impartiality and independence of the arbitrator adjudicating the disputes between the parties. He submits that in any event, the respondent's contention regarding the power of the Governing Body to step in and assume powers of appointment in this case, are de-hors the agreement between the parties. Without prejudice to the aforesaid, he submits that the petitioner has no objection to the appointment of a suitable member from the panel of arbitrators maintained by SAROD, as it existed on the date when the cause of action for appointment arose, or on the filing date of the present petition. He submits that even though as recently as on 31.05.2020 the SAROD panel had 177 names and was fairly broad based, the same has been arbitrarily curtailed to almost 1/^{6th} of that number w.e.f. 01.06.2020 and as on date there are only 33 arbitrators on this panel. He further submits that the said panel is even otherwise very lopsided as it has only four legally trained arbitrators and is, therefore, contrary to the law laid down by the Supreme Court in ***Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited*** *(2017) 4 SCC 665*. Without prejudice to his aforesaid submissions, Mr.Nanda urges that in case the respondent's plea that the presiding arbitrator must belong to the panel as it exists today - were to be accepted, then even

the nominee arbitrators of the parties would require to be reconsidered as they are not on the panel as it exists today. He submits that once the two nominee arbitrators failed to appoint a presiding arbitrator, then this Court, while exercising its power under Section 11(6)(b) of the Act, can automatically relate such appointment back to the date on which the two nominee arbitrators failed to agree and the date of filing of the present petition on 19.12.2019. In these circumstances, he prays that the petition be allowed and this Court be pleased to appoint the Presiding Arbitrator.

7. On the other hand, Ms. Maninder Acharya, learned senior counsel for the respondent, vehemently opposes the petition and submits that the same is premature and deserves to be dismissed on this ground alone. She submits that the petitioner's interpretation of the SAROD arbitration rules arises out of an incongruous reading of the provisions and is, therefore, unsustainable. On the aspect of appointing arbitrators, notwithstanding the fact that both Rules 11.2 and 11.5 make provisions in this regard, the petitioner has consciously and myopically laid emphasis only on Clause 11.2 to assert that the Presiding Arbitrator had to be appointed by the agreement of the nominee arbitrators. Yet, in the same breath, the petitioner fails to give due regard to Rule 11.5 which entrusts the Governing Body with the responsibility of appointing the nominee Arbitrators and/or the Presiding Arbitrator in case the parties fail to nominate an arbitrator within 30 days' of invocation of arbitration. In fact, Rule 11.5 cannot be neglected in this discussion considering that it is the only provision which addresses a situation where the parties have failed to reach agreement in respect of appointment. By relying on the decision in ***Radha Sundar Dutta Vs. Mohd. Jahadur Rahim & Ors.*** *1958 SCR 1309* she submits that although it is admitted that the rules do not specifically provide for the instant situation, but the resolution to this dispute

lies in a harmonious construction of Rule 11 in entirety. The very fact that the Governing Body has been granted the power of appointment in a particular situation, that too for appointment of not just the nominee arbitrator but also for the presiding arbitrator, shows that the Governing Body, in essence, possesses the general power of appointing the presiding arbitrator. She submits that when the power has been restricted in a circumstantial fashion and a situation has arisen which has not been specifically envisaged but requires exercise of such power, then surely the rules can be harmoniously interpreted to allow the Governing Body to discharge this power even in this case. She further submits that in view of this position, the SAROD had accordingly issued a letter to the parties on 12.12.2019 to inform them that its Governing Body shall, in pursuance of Rule 11.5 of the SAROD arbitration rules, appoint the Presiding Arbitrator by draw of lots to adjudicate the disputes between the parties. Instead, after a short period of 13 days from the date of SAROD's correspondence, the petitioner chose to institute the present petition without permitting the Governing Body to discharge its duty of appointing the Presiding Arbitrator, as stipulated under the SAROD rules. This implies that, as on date, the prescribed procedure has neither been allowed to conclude and reach fruition nor has there been a departure from the arbitration agreement till date. She submits, by relying on the decisions of the Hon'ble Supreme Court in ***National Highways Authority of India vs. Bumihiway D.D.B. Ltd. (JV)*** *(2006) 10 SCC 763,* ***State Trading Corporation of India Ltd. Vs. Jindal Steel and Power Limited & Ors.*** *C.A. No. 2747/2020,* ***Central Organisation for Railway Electrification Vs. ECI-SPIC-SMO MCML (JV)*** *2019 SCC Online SC 1635* and ***Voestalpine*** *(supra)*, that in such a case, the mechanism which the parties have agreed upon, i.e., the procedure prescribed by the SAROD Rules, cannot be deemed

as having failed and warranting the intervention of this Court. She further submits that in any event, the power of the Governing Body is not arbitrary and is subject to a prescribed procedure to ensure absolute impartiality while doing so, viz. draw of lots. She submits that the provision for draw of lots has been especially made to ensure that no allegations of partiality can ever be invited upon the Governing Body. Therefore, while the petitioner's allegations of a close nexus between the Governing Body and the respondent are entirely baseless, its apprehensions regarding any impartiality in the process of appointment are answered by the provision in the Rules for a draw of lots, which ensures maximum transparency and equality of opportunity. She further submits that ultimately, the petitioner moved this Court with the intent to have a judicial officer appointed as the Presiding Arbitrator, which is completely contrary to the decision of the Hon'ble Supreme Court in ***Bumihiway*** *(supra)*. Since the SAROD arbitration rules do not permit the parties to appoint arbitrators based on their whims, these rules have fallen out of favour with the petitioner, who is now attempting to resile from the agreed upon procedure by seeking this Court's intervention. She contends that since the present petition has been filed even before the procedure, which has been set out under the agreements executed between the parties, could be allowed to complete, the same is premature and not maintainable.

8. Ms. Acharya further submits that this petition is an attempt on the petitioner's part to suppress the respondent's party autonomy. Once the parties executed the contract which laid out a certain process for arbitration and appointment of arbitrators, they have to adhere to the same and, therefore, the petitioner cannot wriggle out of the process simply because the rules are now inconvenient. In fact, the unsustainability of this petition is reflected in the fact that the petitioner's primary argument is not that the

Governing Body has failed to appoint the Presiding Arbitrator under Rule 11.5, but that (1) the panel of arbitrators in the SAROD were restricted which reduced the number of judicial members therein and (2) that the Rules neither specifically provide for this situation nor envisage granting any specific power to the Governing Body to step in. In response to these objections, in addition to the submissions noted hereinabove, she submits that the petitioner knew that all panel of arbitrators are fluid and not cast in stone. In practice, panels often undergo modifications to accommodate the circumstances of the arbitrators included therein and the sudden reduction in the number of judicial members in the panel is a result of the expiry of the tenure of its members. Contrary to the petitioner's arguments, such a reduction in the number of members in the panel is neither malicious, nor intentional, it is only a result of the fact that the terms of empanelment of these arbitrators came to an end on 30.05.2020. She also contends that the reduction of the number of arbitrators in the panel cannot, in any event, be a ground to allow the petitioner to resile from the agreement or deny the Governing Body an opportunity to resolve this issue as per the Rules. In these circumstances, she prays for the present petition to be dismissed.

9. I have heard the learned counsel for the parties and, with their assistance, perused the record.

10. From the rival submissions of the parties, it is evident that both sides are *ad idem* that a petition under Section 11(6) would be maintainable only if the procedure agreed upon in the arbitration clause for appointment of the Arbitrator or the Presiding Arbitrator, as the case may be, has failed or alternatively when a party or the person concerned failed to adhere to the procedure they agreed upon. The parties are also *ad idem* that the procedure

for appointment of a Presiding Arbitrator under Rule 11.2 of the SAROD Rules has failed once the nominee arbitrators were unable to agree upon the name of the Presiding Arbitrator. However, the petitioner has pleaded that in the light of this failure, only this Court is empowered to appoint the Presiding Arbitrator in exercise of its power under Section 11(6) of the Act. Per contra, the respondent has urged that once the procedure under Rule 11.2 failed, the procedure for appointment of the Presiding Arbitrator as set out not only in Rule 11.2 but also in Rule 11.5 would come into effect.

11. As can be seen from a perusal of the rules reproduced in paragraph 3(v) above, Rule 11.2 provided that in all disputes involving a claim exceeding INR 3 crores, the Arbitral Tribunal shall consist of an odd number of Arbitrators; this comprises of arbitrators who are nominated by the parties, and the presiding Arbitrator selected from a list of arbitrators suggested by each nominee arbitrator. All arbitrators and the Presiding Arbitrator are required to be members of the panel of arbitrators maintained by the SAROD, as on the date of their appointment. The Rules further provide that in order to select the presiding arbitrator, resort can be made to a draw of lots in order to finalise a name from the suggestions of the nominee arbitrators. Now, while Rule 11.2 only vests the nominee Arbitrators with the right to appoint the Presiding Arbitrator by consensus or draw of lots, Rule 11.5 vests the Governing Body of the SAROD to appoint arbitrator/Presiding arbitrator, through a draw of lots. The respondent, therefore, does not deny that if it were to be held that only the procedure under Rule 11.2 is applicable to the parties, the Governing Body would have absolutely no role to play in the appointment of the Presiding Arbitrator. However, as per the respondent, the procedure for appointment of the Presiding Arbitrator has to be determined only upon a conjoint reading of Rules 11.2 and 11.5 which implies that as

soon as the procedure under Rule 11.2 fails, Rule 11.5 automatically kicks in and the Governing Body is vested with the power to appoint the Presiding Arbitrator by a draw of lots.

12. The first and foremost question, therefore, which needs to be determined is whether Rule 11.2 has to necessarily be read in conjunction with Rule 11.5, as urged by the respondent or whether, even when the parties have unequivocally agreed to carry out the appointment of the Presiding Arbitrator only as per Rule 11.2, are they still governed by the procedure under Rule 11.5 for appointment of the Presiding Arbitrator.

13. The respondent, while advocating a conjoint reading of Rules 11.2 and 11.5, has vehemently urged that notwithstanding the fact that Rule 11.5 addresses situations where the *parties*, not their nominee arbitrators, have failed to nominate the Presiding Arbitrator, this Rule has to be interpreted pragmatically so that the implied power given to the Governing Body to appoint the Presiding Arbitrator is not rendered nugatory. Although the petitioner has contended that Rule 11.5 does not vest the Governing Body with the power to appoint the Presiding Arbitrator as it refers only to the inability of the *parties* and not that of the *nominee Arbitrators*, I am not persuaded by this argument. Once Rule 11.5 empowers the Governing Body to appoint the Presiding Arbitrator by the method of draw of lots, the provision has to be construed purposively and understood to imply that the Governing Body has the *general power* to carry out appointments of arbitrators and the Presiding Arbitrator once the procedure under Rule 11.2 fails. Thus, I am of the view that even though Rule 11.5 uses the phrase "*In the event of any party failing to appoint Arbitrator within 30 days of receipt of the notice of Arbitration,*", the same has to be read to include a situation where the nominee Arbitrators fail to appoint a Presiding Arbitrator. Merely because

Rule 11.2 does not specifically provide for such a situation or invoke Rule 11.5, the same cannot used to deny the power of the Governing Body to carry out such appointments. Undoubtedly, the attempt of the Court must always be to interpret the terms of a contract in such a manner that it gives effect to all the clauses of the contract and does not render one or more clauses therein meaningless. The respondent is therefore justified in urging that Rules 11.2 and 11.5 ought to be read harmoniously and, notwithstanding the noticeable absence of any stipulation in Rule 11.5 pertaining to the failure of the *nominee Arbitrators* to agree upon a Presiding Arbitrator, conjointly vest the Governing Body with the power to appoint the Presiding Arbitrator by a draw of lots.

14. In the light of my conclusion that Rule 11.5 does indeed apply to cases involving appointment of the Presiding Arbitrator, it is time to examine the petitioner's plea that, notwithstanding the general application of Rule 11.5 in the appointment of a Presiding Arbitrator, since the agreement between the parties selectively provides for application of Rule 11.2 while appointing the Presiding Arbitrator, only the procedure under Rule 11.2 can be applied. Significantly, this issue will also determine whether the present petition is premature, as contended by the respondent, since the procedure prescribed under the SAROD Rules has not been allowed to conclude. Ordinarily, once I found that Rules 11.2 and 11.5 ought to be read conjointly to meet the gap in the Rules insofar as they fail to provide for such situations where consensus is lacking between the nominee arbitrators, the second question would have found a quick resolution. However, each petition has to be decided on its own facts and circumstances, and I find that there is a crucial point on which the facts of the present case pivot. For this purpose, it may be useful to recollect that the parties had signed a second supplementary agreement on 14.07.2014

which substantially amended the dispute resolution mechanism between the parties as contained in Clauses 44.3.1 and 44.3.2 of the original agreement signed between them, i.e. the Concession Agreement, this amendment read as under:

> *"(1) That the clause 44.3.1 & 44.3.2 of the Concession Agreement is hereby amended to be read as follows:-*
>
> *"Any dispute/difference arising out of aforesaid Concession Agreement which is not resolved amicably as provided in clause 44.2 shall be finally settled by Arbitration as set forth below:-*
>
> *(i) The dispute shall be referred to SAROD for resolution by Arbitration in accordance with Rules of SAROD and Arbitration and Conciliation Act 1996 as amended from time to time (or which is pending with Arbitral Tribunal presided over by ..... shall be referred to SAROD). The Arbitral Tribunal shall consist of Sole Arbitrator in case total claim of dispute is Rs. 3 crores or less and in case the disputed claim is more than Rs. 3 crores, the Tribunal shall consist of odd number of Arbitrators to be nominated by the parties.* ***The Presiding Arbitrator shall be appointed by the Arbitrators nominated by the parties in terms of Rule 11.2 of SAROD.*** *Further, the terms of appointment of Arbitrators shall be governed by Rule 11.3 to Rule 11.5, 12.2 and 13 of SAROD."* (emphasis supplied)

15. A perusal of the aforesaid extract of Clause 1(i) of the second Supplementary Agreement signed between the parties on 14.07.2014 clearly shows their specific intent to limit the procedure of appointment of the Presiding Arbitrator exclusively to Rule 11.2. Had the parties intended to carry out appointment of the Presiding Arbitrator as per Rule 11 in entirety, they would not have restricted the amendment in this manner by solely

referring to Rule 11.2 and would have instead stipulated that such an appointment would be governed by the SAROD Rules in general. I find that such specific reference to Rule 11.2 in Clause 1(i) of the second supplementary agreement is conspicuous and ought to be given full effect. Clearly, the parties had specifically agreed to apply only the procedure under Rule 11.2 for appointment of the Presiding Arbitrator. Although I find merit in the respondent's contention that the procedure to appoint the Presiding Arbitrator ought not to be always restricted to Rule 11.2 but may also include the methodology of draw of lots by the Governing Body as prescribed in Rule 11.5, however, the same would be applicable only in cases where the parties have agreed simpliciter to apply SAROD rules. On the other hand, in situations like the present one where the parties have consciously and explicitly crystallized their intent to restrict the procedure for appointment of the Presiding Arbitrator in terms of Rule 11.2 alone, I find that no resort can be made to Rule 11.5.

16. Conversely, in case the respondent's plea in this regard were to be accepted, the specific phrasing of Clause 1(i) of the supplementary agreement dated 14.07.2014, whereby the parties categorically agreed to vest their nominee arbitrators with the power to appoint the Presiding Arbitrator, would be rendered nugatory and would imply that contrary to their express intent, the Governing Body can still intervene in the process and appoint the Presiding Arbitrator by draw of lots. Rather, a perusal of the aforesaid amended clauses shows that the parties only intended to apply Rules 11.3 to 11.5, 12.2 and 13 for the purpose of determining the terms of appointment of the Arbitrators, but not the appointment of the Presiding Arbitrator which has to be determined with reference to Rule 11.2 alone.

17. In this regard, I find merit in the petitioner's plea that while the original concession agreement executed between the parties had specifically stipulated that appointment of the Presiding Arbitrator, in the event of disagreement between the two nominee Arbitrators, shall be determined as per the rules of International Centre for Alternate Dispute Resolution, but the supplementary agreement bearing the amended arbitration clause shows the parties' conscious decision to depart therefrom by specifically stating that the appointment of the Presiding Arbitrator could be made by the two nominee arbitrators only in accordance with Rule 11.2. Although it is not for this Court to comment on the reasons for the parties to choose the procedure set out in Rule 11.2, but I find that these reasons are fairly obvious. To begin with, Rule 11.2 is significant in that it authorises only the nominee arbitrators to select their preferred Presiding Arbitrator from the panel maintained by SAROD, in which case only the two nominee Arbitrators on whom the parties have reposed their faith would have a say. On the other hand Rule 11.5 leaves this decision to chance, in that the Governing Body can simply select the Presiding Arbitrator by resorting to a draw of lots conducted out of the names of all the arbitrators in the SAROD panel which, at the time when the present petition was filed, contained around 177 names. Evidently, the parties did not desire to abandon the crucial act of appointing the Presiding Arbitrator to chance, and therefore entered into a specific agreement to decide on a Presiding Arbitrator as per Rule 11.2. In these circumstances, I have no hesitation in holding that in the facts of the present case, Rule 11.5 cannot be applied in the process of selecting the Presiding Arbitrator.

18. As noted hereinabove, the respondent has not disputed that the procedure under Rule 11.2 has collapsed and on this aspect, I have considered the respondent's reliance on the decisions in ***Central***

Organisation for Railway Electrification *(supra),* ***Voestalpine*** *(supra),* and ***Bumihiway*** *(supra).* I find that the ratio of these decisions reiterate that the jurisdiction of this Court under Section 11(6) can be invoked only once the procedure for appointment of the Presiding Arbitrator provided in the contract has been exhausted and has failed. Once I have come to the conclusion that it is only the procedure under Rule 11.2 which was applicable for appointment of the Presiding Arbitrator in the present case, it is evident that the agreed procedure has failed and the only remedy available to the parties is to approach the Court under Section 11(6) of the Act.

19. In view of my aforesaid conclusion that the agreed procedure for appointment of Presiding Arbitrator as set down in Rule 11.2 has collapsed, the only surviving question is as to who should be appointed as the Presiding Arbitrator. The petitioner has argued, rightly so in my view, that once the mechanism to appoint the Presiding Arbitrator failed, there is no reason to restrict such appointment to an arbitrator present in the panel maintained by the SAROD. On this aspect, the respondent has contended that, notwithstanding the collapse of Rule 11.2, Rule 11.4 which strictly mandates appointment of arbitrators/Presiding Arbitrator from the SAROD panel shall still survive and determine any appointment for resolution of these disputes. The reason behind the respondent's insistence on appointing the Presiding Arbitrator out of the panel maintained by SAROD is not difficult to surmise since, admittedly, the fee structure applicable to arbitrators/Presiding Arbitrators on the SAROD panel is much lower than the fee ordinarily charged by the Arbitrators. However, admittedly, when these disputes came to be referred for arbitration to SAROD, there were 177 arbitrators in the SAROD panel, which number has been drastically reduced to 33 w.e.f. 01.06.2020. I am unable to fathom the reason behind the decision of the

SAROD to constrict its panel of arbitrators from the broad based existence of 177 Arbitrators, as on 31.05.2020 to 33 arbitrators and that too with only four members with legal training. The need of having a broad based panel of arbitrators, containing persons possessing technical qualifications as also persons of a legal background, has been greatly emphasized over time. In ***Voestalpine (****supra)* the Apex Court, while dealing with the panel of Arbitrators maintained by the DMRC, had emphasized the necessity to maintain a broad based panel of arbitrators. Following the ratio in ***Voestalpine*** *(supra),* a Coordinate Bench of this Court in ***Bernard Ingenieure ZT-GMBH vs. IRCON International Ltd.,*** *2018 SCC Online Delhi 7941,* after noticing the observations of the Hon'ble Supreme Court that arbitration clauses restricting the parties' right to appoint an arbitrator of their choice ought to be deleted, had allowed the nomination of an arbitrator who was not on the DMRC panel. Paragraphs 9 to 11 of the decision in ***Bernard Ingenieure*** (*supra*) read as under:-.

> *"9. In Voestalpine Schienen GMBH vs. Delhi Metro Rail Corporation Limited AIR 2017 SC 939, the Supreme Court was considering a similar Arbitration Agreement as in the present case. After considering the effect of Section 12(5) being introduced into the Act, the Supreme Court passed the following directions:-*
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> > *"27. As already noted above, DMRC has now forwarded the list of all 31 persons on its panel thereby giving a very wide choice to the petitioner to nominate its arbitrator. They are not the employees or ex-employees or in any way related to DMRC. In any case, the persons who are ultimately picked up as arbitrators will have to disclose their interest in terms of amended provisions of Section 12 of the Act. We, therefore, do not find it to be a fit case for exercising our*

jurisdiction to appoint and constitute the Arbitral Tribunal.

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

29. Some comments are also needed on Clause 9.2(a) of GCC/SCC, as per which DMRC prepares the panel of "serving or retired engineers of government departments or public sector undertakings". It is not understood as to

why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is imperative that panel should be broadbased. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like Judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy, etc. Therefore, it would also be appropriate to include persons from this field as well."

10. The above judgment was passed by the Supreme Court as far back, as 10th February, 2017. More than a year has passed, however, even now the so-called broadbased panel of the respondent still does not contain names of Engineers of prominence and high repute from private sector, persons with legal background like Judges and lawyers of repute, people having knowledge and expertise in accountancy etc. The panel of Arbitrators now framed by the respondent is, therefore, in my opinion, still not in conformity with the judgment of the Supreme Court in Voestalpine Schienen GMBH (supra) and, therefore, in my opinion, the respondent has failed to act in accordance with the procedure prescribed under the arbitration agreement between the parties. It is again emphasised that even the Supreme Court in the above judgment had suggested, if not directed, that a clause in the arbitration agreement restricting the right of the contracting party to appoint/nominate his own Arbitrator should be deleted.

11. Learned Senior Counsel for the respondent submits that the respondent has already nominated Mr.Sushil

Kumar Malik, Ex.- Addl. Member Civil, Railway Board as its nominee arbitrator. As suggested by the counsel for the petitioner, I appoint Mr.Anand Kumar, Retired Chief Engineer, Haryana Water Resources and Irrigation Department as nominee arbitrator for the petitioner. The two Arbitrators now appointed shall appoint the Presiding Arbitrator." (emphasis supplied)

20. Even though no justification has been placed on record for this drastic downsizing of the panel of arbitrators maintained by the SAROD, the respondent has sought to explain this reduction in the number of panel members as an ordinary consequence of the arbitrators' failure to seek extension of their terms which expired on 31.05.2020, on account of the ongoing pandemic. It has thus been contended that the downsizing of the panel was not a result of any deliberate attempt attributable to the SAROD, but is merely a result of change in circumstances. I am unable to appreciate this explanation as, in my view, once the SAROD is discharging an important duty of providing affordable options for arbitration to those who need it, it is incumbent for it to ensure the existence of a broad based panel in accordance with the directions issued by the Supreme Court in ***Voestalpine*** *(supra)*. Steps in this direction could have been easily taken by inviting applications for extension of term from those persons who were already members of its panel and whose terms had expired during the pandemic. The conduct of the SAROD appears to be in complete disregard of the decision of the Hon'ble Supreme Court in ***Voestalpine*** (*supra)*. Thus, even though I am inclined to appoint an Arbitrator who would be agreeable to accept the fee schedule prescribed by the SAROD, the choice cannot be limited to the present panel of SAROD which is hardly broad based, with only 4 empanelled arbitrators from a legal background viz. the other 29 arbitrators possessing administrative experience/engineering qualifications. Compared to that, the

erstwhile panel, which continued to exist till 31.05.2020, was broad based in nature and was scaled down not because of any deliberate, malicious or willful removal of the arbitrators by the SAROD but on account of the expiry of the panel members' terms, which were never extended on account of the extenuating circumstances ushered in by the global pandemic.

21. At this stage, it may be noted that the petitioner has objected to appointment of the Presiding Arbitrator from the SAROD panel before this Court. It has been averred that the SAROD is a society formed by the respondent along with the National Highways Builder Federation and, as per the petitioner, is run under the aegis of the respondent. By relying on the decision in ***Perkins Eastman (****supra)*, the petitioner has urged that since the secretary and other Office bearers of the governing body of SAROD are serving employees of the respondent, an independent person not related to SAROD be appointed as the Presiding Arbitrator. The petitioner apprehends that in case an arbitrator is appointed from the SAROD panel, they may not be impartial while adjudicating the disputes. I am of the view that this apprehension of the petitioner can be addressed by appointing a person from a legal background out of the erstwhile panel of arbitrators maintained by SAROD, as it existed on the date of filing of the present petition. Though the respondent has urged, by relying on the decision in ***Bhumihiway*** (*supra*), that the petitioner cannot insist on the appointment of a Presiding Arbitrator hailing from a legal background, I do not deem it necessary to delve into this aspect as the petitioner has not pressed its submissions on this aspect. I therefore deem it appropriate to appoint a person from the erstwhile panel maintained by the SAROD, as it existed on the date of filing of the present petition since it was the date on which the petitioner sought the intervention of this Court in the process of appointing the Presiding Arbitrator.

22. The petition is accordingly allowed and Justice (Retd.) Iqbal Ahmed Ansari (+91 99739 99900) is appointed as the Presiding Arbitrator to decide the disputes between the parties arising out of the Concession Agreement dated 25.07.2011. It is further directed that his fee will be governed by the SAROD Rules.

23. Needless to say, before commencing arbitration, the learned Presiding Arbitrator will ensure compliance with Section 12 of the Act.

(REKHA PALLI)
JUDGE

AUGUST 27, 2020