

\$~6 (2020)

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

**Date of Decision: 23<sup>rd</sup> August, 2021**

+ ARB.P. 407/2020 & I.A. 8439/2021.

M/S CMM INFRAPROJECTS LTD. .... Petitioner

Through: Mr. Sachin Chopra, Mr. Daksh Arora  
and Mr. Karan Babuta, Advocates.

versus

IRCON INTERNATIONAL LTD. .... Respondent

Through: Mr. Debarshi Bhadra, Advocate

**CORAM:**  
**HON'BLE MR. JUSTICE SANJEEV NARULA**  
**JUDGMENT**

**[VIA VIDEO CONFERENCING]**

**SANJEEV NARULA, J. (Oral):**

1. The file is taken up today, as Friday, the 20<sup>th</sup> August, 2021 was declared as a public holiday on account of 'Muharram'.
2. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (in short 'the Act') seeks appointment of Respondent's Arbitrator as well as the presiding Arbitrator to adjudicate disputes between the parties arising out of and in relation to the contract dated 30<sup>th</sup> March, 2015 which came into existence as a result of the tender for "Construction of Warm Shell structure for Office Blocks and Auditorium at Plot No.16, Sector-32, Gurgaon (Haryana)" (in short 'the tender') issued by the Respondent.

### **Brief Facts**

3. The relevant facts to be noted for disposing of the present petition, as set out in the petition are as follows:

3.1. The Respondent invited bids for the tender. The bid of the Petitioner was accepted on 19<sup>th</sup> February, 2015 and a contract dated 30<sup>th</sup> March, 2015 was executed.

3.2. The awarded work could not be completed within the stipulated period of 18 months. Disputes and differences arose between the Petitioner and the Respondent. The Petitioner attempted to settle disputes and conciliate in terms of Clause 73.2 of the General Conditions of Contract ('GCC').

3.3. The Respondent refused to hold mutual discussion or conciliation or grant any hearing to the Petitioner. The Respondent terminated the contract on 15<sup>th</sup> May, 2019. The Petitioner then invoked arbitration clause on 30<sup>th</sup> July, 2020 and nominated Shri Ashutosh Gupta as its arbitrator and requested Respondent to nominate their arbitrator. Respondent *vide* its reply dated 26<sup>th</sup> August, 2020 instead of appointing their nominee arbitrator, appointed a conciliator.

3.4. In this background, the Petitioner has filed the instant petition praying for appointment of Respondent's arbitrator as well as the Presiding Arbitrator.

3.5. During the pendency of the present petition, the Petitioner without prejudice to its rights and contentions agreed to participate in the conciliation proceedings initiated by the Respondent as recorded in the order of this Court, dated 11<sup>th</sup> January, 2021.

3.6. On 13<sup>th</sup> July, 2021, conciliation failed, and the conciliator formally

terminated the proceedings.

**Respondent's contentions**

4. Mr. Debarshi Bhadra, counsel for the Respondent, does not dispute the existence of the arbitration agreement, but strongly opposes the present petition on the ground that it is premature as the pre-arbitration conciliation process has not been exhausted; claims of the Petitioner fall in the excepted category. His submissions are summarised as follows:

4.1. Under Clause 73.2.2 of the GCC, only after the efforts to resolve any or all disputes through conciliation fail, the Contractor (Petitioner herein) may refer to the CMD of the Respondent for settlement of disputes by way of arbitration. The appointment of the arbitrator is to take place in terms of Clause 73.4(a)(ii), which provides for a three-member tribunal and that the Contractor must select its nominee arbitrator out of names referred to it from Respondent's panel of arbitrators.

4.2. The order dated 11<sup>th</sup> January, 2021 records the consent of both parties to participate in the conciliation, which was initiated by the Respondent upon receipt of the notice invoking arbitration. The said conciliation has failed as on 13<sup>th</sup> July, 2021. Thus, the time for appointing the arbitral panel has arisen only post 13<sup>th</sup> July, 2021. Names under Clause 73.4(a)(ii) could not be proposed by the Respondent earlier, in view of the present application being *sub-judice*.

4.3. Clause 73.4(a)(ii) of the GCC, *inter alia*, stipulates that for the purpose of forming the Arbitral Tribunal, the Respondent will send a panel of more than 3 names to the Petitioner, who will be asked to suggest at least 2 names out of the panel for appointment as Petitioner's nominee arbitrator. The Managing Director of the Respondent shall then appoint at least one of

the suggested names as Petitioner's nominee arbitrator apart from balance number of arbitrators, duly indicating the presiding arbitrator. The qualification set for the arbitrator is that they shall not be below the rank of a General Manager by way of ensuring a certain amount of expertise and experience. Also, one arbitrator must be of finance/ accounts department, in which case, they must be an officer of at least AGM rank, as a slight relaxation.

4.4. Clauses 73.4(a)(iii) and 73.4(a)(vi) further lay down minimum qualifications for the arbitrator. The clauses, *inter alia*, stipulate that the arbitrator should not have been associated with the contract, although appointment of such person would not be invalidated merely on that ground alone.

4.5. It is relevant to note that nowhere does the clause make it necessary that only active/ working employees of the Respondent will be appointed as an arbitrator. In fact, a bare perusal of Respondent's panel of arbitrators will show that the same is broad based; it includes at least 5 retired judges of the Supreme Court of India and various High Courts; all other persons in the panel are retired officers from their respective departments.

4.6. Contention of the Petitioner that Respondent is attempting to appoint its own employees is merely a presumption, evidently contrary to the constitution of the panel of arbitrators. In fact, a mere look at the list of arbitrators on the panel will show that the majority of them, although retired, were not even employees of the Respondent.

4.7. Reliance has been placed upon the judgment of the Supreme Court in ***Central Organisation for Railway Electrification v. M/s ECI-SPIC-SMO-***

*MCML (JV) a Joint Venture Company*<sup>1</sup> (in short 'CORE'). The arbitration clause contained therein is squarely identical to the one that is under consideration. Further, reliance is also placed on the judgment of this Court in *iWorld Business Solutions Private Ltd. v. M/s Delhi Metro Rail Corporation Ltd.*<sup>2</sup>. In the said judgment also, the arbitration clause that was the subject matter of dispute is similar to the one in the present case. For claims of more than Rs. 50 Lakhs, the clause envisaged a panel of five arbitrators, which included DMRC Officers. The remaining procedure for appointment of three-member Arbitral Tribunal is identical to the instant case.

#### **Petitioner's contentions**

5. Countering the objections of the Respondent, Mr. Sachin Chopra, counsel for the Petitioner made the following submissions:

5.1. Despite invocation of arbitration by the Petitioner, Respondent has failed to appoint its arbitrator. The right of the Respondent to appoint/nominate arbitrator, has ceased on filing of the present petition. (See: *Datar Switchgears Ltd v. Tata Finance Ltd.*<sup>3</sup>). The objection of the Respondent that the filing of the petition is premature, is fallacious. The Petitioner *vide* letter dated 11<sup>th</sup> May, 2019 tried to initiate the process of Mutual Settlement and Conciliation in terms of Clause 73.1 and 73.2.1 of GCC. Respondent's officials were not willing to meet or hear the Petitioner. As such, insistence on resorting to the conciliation process after filing of Section 11 is a *malafide* attempt to delay the appointment of Arbitral Tribunal.

5.2. The pre-arbitral conciliation process is merely directory and not

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<sup>1</sup> 2020 (14) SCC 712.

<sup>2</sup> 2021 SCC Online Del. 2730.

<sup>3</sup> (2000) 8 SCC 151.

mandatory. Reliance is placed upon the judgments of this Court in *Ravinder Kumar Verma v. BPTP Ltd.*<sup>4</sup> and *Siemens Ltd. v. Jindal India Thermal Power Limited*<sup>5</sup>.

5.3. Without prejudice, the Petitioner had agreed and participated in conciliation proceedings. The said proceedings have failed and therefore, the objection that the petition was filed prematurely, has now become immaterial.

5.4. Procedure for appointment of Arbitral Tribunal as prescribed in Clause 73.4(a)(ii) of GCC is void. Respondent cannot seek reliance upon the judgment in *CORE (supra)*. Clause 73.4(a)(ii) provides that in case where total value of the claim/counter-claim exceeds Rs. 2 Crores, the Arbitral Tribunal has to consist of three members. The Managing Director of the Respondent has to send a panel of more than three names to the contractor from which the contractor would select two names and in turn the Managing Director would appoint any one from the said names as the contractor's nominee. The remainder of the members would be chosen by the Managing Director from the abovementioned panel or otherwise. The Managing Director would also decide the 'presiding arbitrator' out of the three appointees. The Managing Director who has a direct interest in the outcome/decision would not be eligible to appoint two-thirds of the Arbitral Tribunal in view of the judgment of the Supreme Court in *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*<sup>6</sup>. Therefore, Clause 73.4(a)(ii) is now un-enforceable and has to be disregarded by this Court.

5.5. The facts of the present case are distinguishable from the judgment of

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<sup>4</sup> 2015 (147) DRJ 175.

<sup>5</sup> Judgment dated 30<sup>th</sup> January, 2018 in Arb. P. 243/2017.

<sup>6</sup> AIR 2020 SC 59.

the Supreme Court in *CORE (supra)* as in the said matter, the Ministry of Railways had modified their Arbitration Clause prior to initiation of the dispute, which is not so in the instant case. Therefore, the Respondent cannot seek any parity with the afore-noted judgment.

5.6. It is settled law that if circumstances exist giving rise to justifiable doubts as to the independence and impartiality of a person nominated, the Court may disregard the agreed position to secure the appointment of an impartial arbitrator. Reliance is placed on the judgment of the Supreme Court in *Union of India v. U.P. State Bridge Corporation Ltd.*<sup>7</sup>.

#### **Analysis and findings**

6. The Court has considered the contentions of the parties. In view of the objections raised by the Respondent, the issues before the Court are as follows:

- (a) Whether the present petition has been instituted prematurely as pre-arbitration conciliation process has not been exhausted?
- (b) Whether the Petitioner can be compelled to nominate an arbitrator from Respondent's panel in accordance with Clause 73 of the GCC-settlement of disputes?
- (c) Whether the claims of the Petitioner fall in the category of the excepted matters?

7. With respect to issue (c), there is a consensus between the parties as recorded in the order dated 11<sup>th</sup> January, 2021 that the question whether the claims raised by the Petitioner are arbitrable or not, has to be adjudicated by the Arbitral Tribunal in view of the judgment of the Supreme Court in *Vidya*

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<sup>7</sup> 2015 (2) SCC 52.

***Drolia v. Durga Trading Corporation***<sup>8</sup>. In view of the said stance of the parties, the Court need not deal with the objection raised by the Respondent on this issue.

8. As regards issue (a), the objection of the Respondent is without merit. When disputes arose, the Petitioner *vide* letter dated 11<sup>th</sup> May, 2019 tried to initiate the process of mutual settlement and conciliation in terms of Clauses 73.1 and 73.2.1. Clause 73.1 reads as under (Clause 73.2.1 has already been extracted above):

*“73.1 Mutual Settlement*

*All such disputes or differences shall in the first place be referred by the Contractor to the Employer in writing for resolving the same through mutual discussions. negotiations. deliberation etc. associating representatives from both the sides and concerted efforts shall be made for reaching amicable settlement of disputes or differences.*

The relevant portion of the Petitioner’s letter dated 11<sup>th</sup> May, 2019 reads as under:

“ .....

*In view of all of the above, we once again request you to kindly, withdraw the improper action of issuance of notices sent to us and allow entry to our labour and material at the site. Kindly also consider that we have repeatedly requested your office to settle such disputes through mutual discussions in terms of Clause 73.1 of the Contract. However no mutual discussions have taken place and personal hearing has been given to us to understand or resolve our problems. No attempt has been made at your end to settle such disputes in terms of Clause 73.2.1 and as such it is imperative that we are given a notice pointing out the default committed by us and a personal hearing is given and an attempt to resolve the issue is made, before a final decision is taken by your goodself in this regard. We confirm that in terms of the contract we shall not suspend the work during such process. We would be most obliged for a supportive consideration.”*

9. Since no mutual discussion was held between the parties, the Petitioner invoked arbitration on 30<sup>th</sup> July, 2020 and nominated Shri. Ashutosh Gupta, as its arbitrator, and requested the Respondent to nominate

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<sup>8</sup> (2021) 2 SCC 1.



its arbitrator; Respondent instead *vide* reply dated 26<sup>th</sup> August, 2020, appointed a conciliator. The relevant portion of the said letter reads as under:

*“Reference is invited to your letters cited above whereby while invoking arbitration agreement as provided in contract Clause 73 of the GCC in the captioned agreement, have given your own interpretation in respect of procedure for appointment of arbitrator. In this regard we would like to submit that your endeavor to directly proceed with arbitration & appointing Shri Ashish Gupta, Advocate as your nominee arbitrator is not only contrary to procedure laid down in the contract for appointment of an Arbitral Tribunal but premature as well. Your act has also violated the mechanism of dispute resolution provided in the said Clause 73 of the GCC.*

*You will appreciate that the contract contract/Clause 73 provides for three tier mechanism for settlement of disputes i.e. Mutual Settlement, Conciliation and Arbitration. And to proceed with, the party raising disputes for settlement needs to follow the same in seriatim i.e. 1“ Mutual Settlement, 2”“ Conciliation and 3”“ & Last Arbitration. As has been pointed out in your letter under reference (Sr. No. 1) parties have not reached on a Mutual Settlement, therefore before proceeding for resolution of the alleged disputes by invoking Arbitration (IRCON strongly disputes & deny the procedure attempted in the letters under reference) and you were required to proceed for Conciliation in line with the said Clause 73 of GCC.*

*In view of aforesaid, IRCON with all fairness and in compliance of contractual stipulations, has treated your Letter Dated 30<sup>th</sup> July 2020 (Ref. at Sr. No. 1) addressed to the Managing Director (now Chairman and Managing Director)/IRCON International Ltd as your request for invocation of Conciliation under Clause 73 of GCC.”*

10. At that stage, the Petitioner in its response to said communication insisted that the conciliation was not mandatory and again asked Respondent to appoint its arbitrator.

11. Nevertheless, Petitioner without prejudice to its rights and contentions participated in the conciliation proceedings. The present proceedings were deferred to await the outcome. Unfortunately, the conciliation proceedings did not succeed and were terminated.

12. In the afore-noted background, the Respondent's objection regarding adherence to the conciliation procedure as a precondition for filing the present petition, does not survive as the conciliation proceedings have failed on 13<sup>th</sup> July, 2021.

13. The next objection of the Respondent which merits consideration is that now whether the Petitioner is bound to follow the procedure prescribed under Clause 73 of the GCC. At this juncture, it would be apposite to take note of the relevant clause in question, which reads as under:

**“73.2 Conciliation/Arbitration**

*73.2. It is a term of this contract that Conciliation/ Arbitration of disputes shall not be commenced unless an attempt has first been made by the parties to settle such disputes, within 120 days of submission of monthly statement of such claim, through mutual settlement.*

*73.2.2 In the event of failure to resolve any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Employer of any certificate to which the contractor may claim to be entitled to, through mutual settlement, the Contractor may refer such matters to the Managing Director in writing within 60 days settlement through Conciliation. If the efforts to resolve all or any of the disputes through Conciliation fail, the contractor may refer to the Chairman and Managing Director of the Employer for settlement of such disputes or differences through Arbitration. No disputes or differences shall be referred to Arbitration after expiry of 60 days from the date of notification of the failure of Conciliation.*

*73.2.3 The demand for Conciliation or Arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item wise. Only such dispute(s) or difference(s) in respect which the demand has been made, together with counter claims or set off, given by the Employer, shall be referred to Conciliation or Arbitration and other matters shall not be included in the reference.*

xxxxx

xxxxx”

For the purposes of the upcoming discussion, it may also be pertinent to

highlight the relevant portions of Clause 73.4:

**“73.4(a)(ii) Arbitration Tribunal:**

*In case where the total value of all claims/counter-claims exceeds Rs.2.00 Crore, the Arbitral Tribunal shall consist of a panel of three Officer not below GM level. For this purpose, the Employer will send a panel of more than 3 names to the contractor, within 60 days from the day when a written and valid demand for arbitration is received by the Employer. Contractor will be asked to suggest to the Managing Director at least 2 names out of the panel for appointment as contractor’s nominee within 30 days from the date of dispatch of the request by the Employer. The Managing Director shall appoint at least one out of them as the contractor’s nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the ‘presiding arbitrator’ from amongst the 3 arbitrators so appointed. The Managing Director shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor’s nominees. While nominating the arbitrator sit will be necessary to ensure that one of them is from the Accounts Department. An officer of AGM rank of the Accounts Department shall be considered of equal status to the GM of the other departments of IRCON for the purpose of appointment of arbitrator.*

**73.4(a)(iii)** *The minimum qualifications of Conciliator/Arbitrator shall be graduate in the respective field. He will be a working officer with a minimum of 20 years’ service. He should be clear from the vigilance angle and should be a person with reputation of high technical/commercial ability and integrity. Also, he should not have associated with the contract to which the dispute pertains.*

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**73.4(a)(vi)** *While appointing arbitrator(s) under sub clause 73.4(a)(i), 73.4(a)(ii), 73.4(a)(iii), 73.4(a)(iv) above, due care shall be taken that he/they is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as IRCON employee expressed views on all or any of the matters under disputes or differences. The proceedings of*

*the Arbitral Tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.”*

14. In the instant case, since the nature of claims is above Rs. 2 Crores, Clause 73.4(a)(ii) is applicable. This clause stipulates that for the purpose of forming the Arbitral Tribunal, Respondent will send a panel of more than three names to the Petitioner who will be asked to suggest at least two names out of the panel for appointment as Petitioner’s nominee arbitrator. The Managing Director of the Respondent shall then appoint at least one of the suggested names as Petitioner’s nominee arbitrator apart from the balance number of arbitrators (either from the panel or from outside) duly indicating the ‘presiding arbitrator’. The qualification set for the arbitrators are that they shall not be officers below the rank of General Manager. Also, one arbitrator must be of finance/ accounts department, in which case they must be an officer of at least AGM rank, as a relaxation.

15. Clauses 73.4(a)(iii) and 73.4(a)(vi) lay down minimum qualification of the arbitrators. These clauses, *inter alia* stipulate that the arbitrators shall not be associated with the contract, although appointment of such panel will not be invalidated merely on that ground.

16. Having regard to the language of the afore-noted clauses, the Respondent has relied upon the judgment of the Supreme Court in **CORE** (*supra*) and judgment of this Court in **iWorld Business Solutions** (*supra*) to insist that the Petitioner should now resort to the afore-noted arbitration clause for appointment of arbitrator and afford the Respondent an opportunity to suggest names for the Petitioner to select its nominee.

17. Be that as it may, the fundamental question is whether the procedure for appointment prescribed under Clause 73.4(a)(ii) of the GCC can be insisted upon by the Respondent.

18. On this aspect, since much reliance has been placed upon the judgment of the Supreme Court in *CORE (supra)*, it would be essential to take note of the arbitration clause which was the subject matter of the said judgment and compare it to the one that is in focus.

Arbitration clause in <i>CORE (supra)</i>	Arbitration clause in present case
<p>The modified arbitration clause(s) therein provided for two different types of arbitration for amounts above 1 crore. (The clause was modified after the 2015 Amendment to the Arbitration and Conciliation Act, 1996).  <b>First, was when applicability of Section 12(5) of the Act was waived off [Clause 64(3)(a)(ii)] and second, when it was not waived off [Clause 64(3)(b)].</b> The former stated that the AT would be comprising of 3 gazetted Railway Officers not below JA Grade or two Railway Gazetted Officers not below JA Grade and a retired Railway Officer (not below SA Grade). In the latter, the AT would comprise of three retired officers (not below SA Grade). The relevant portion of the clauses reads as under-  <b>Clause 64(3)(a)(ii) in detail-</b> <i>In case not covered by the Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a Panel of three Gazette Railway Officers not below JA Grade or two Railway Gazette Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG officer, as the arbitrators. For this purpose, the railway will send a panel of at least four (4) names of Gazette Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is</i></p>	<p>Clause 73.4(a)(ii)- Applicable for amounts more than Rs. 2 crores. AT to constitute of 3 officers not below GM level.            Process of selection- Employer to send a panel of more than 3 names to contractor within 60 days of receipt of written and valid demand for arbitration. Contractor to suggest two names from panel within 30 days. One of them would be appointed as the contractor's nominee and the other two would be appointed by MD from the panel or outside. The relevant portion of the clause reads as under-  <b>Clause 73.4(a)(ii) in detail-</b> <i>In case where the total value of all claims/counter-claims exceeds Rs.2.00 Crore, the Arbitral Tribunal shall consist of a panel of three Officer not below GM level.</i>  <i>For this purpose, the Employer will send a panel of more than 3 names to the contractor, within 60 days from the day when a written and valid demand for arbitration is received by the Employer.</i>  <i>Contractor will be asked to suggest to the Managing Director at least 2 names out of the panel for appointment as contractor's nominee</i></p>

received by the GM.....”.

**Clause 64(3)(b) in detail-** *The Arbitrator Tribunal shall consist of a Panel of three retired Railway Officer retired not below the rank of SAO officer, as the arbitrator. For this purpose, the Railway will send a panel of at least four names of retired Railway Officer(s) empanelled to work as Railway. Arbitrator indicating their retirement date to the contractor within 60 days from the day when a written and valid demand for arbitrators is received by the GM.*

*Contractor will be asked to suggest to General Manager at least two names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators other from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the three arbitrators so appointed CM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contract's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them has served in the Accounts Department.”*

*within 30 days from the date of dispatch of the request by the Employer. The Managing Director shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. The Managing Director shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrator sit will be necessary to ensure that one of them is from the Accounts Department. An officer of AGM rank of the Accounts Department shall be considered of equal status to the GM of the other departments of IRCON for the purpose of appointment of arbitrator.*

In **CORE** (*supra*), Clause 64 of the GCC which dealt with the procedure of resolution of disputes and provided for demand for arbitration, underwent a change, subsequent to the coming into force of the Arbitration and Conciliation (Amendment) Act, 2015. The Ministry of Railways made a modification to Clause 64 of the GCC, and the Railway Board issued a notification to that effect. The modified clauses which were applicable to the facts of the said case on account of the value of the work contract being more than Rs. 1 Crore, were Clauses 64(b)(a)(ii) and 64(3)(b) of the GCC.

As noted above, the former pertained to situations wherein the applicability of Section 12(5) was waived off and the latter pertained to situations where there was no waiver.

19. On considering the afore-noted clauses, the Supreme Court observed that since after coming into force of the Amendment Act of 2015, Clause 64 of GCC had been modified, the High Court was not justified in appointing an independent Sole Arbitrator. Accordingly, the parties were relegated to the procedure of appointment under Clause 64(3)(b) of the GCC, which was found to be a valid clause. The crux of the Supreme Court's reasoning is that *".....Since the respondent has been given the power to select two names from out of the four names of the panel, the power of the appellant nominating its arbitrator gets counter-balanced by the power of choice given to the respondent. Thus, the power of the General Manager to nominate the arbitrator is counter-balanced by the power of the respondent to select any of the two nominees from out of the four names suggested from the panel of the retired officers. In view of the modified Clauses 64(3)(a)(ii) and 64(3)(b) of GCC, it cannot therefore be said that the General Manager has become ineligible to act as the arbitrator."*

20. In contrast, in the instant case the relevant arbitration clause has not been modified. Thus, if we were to do a conjoint reading of Clauses 73.4(a)(ii) and 73.4(a)(vi), it is manifest that the arbitration clause contemplates appointment of serving officials of the Respondent as arbitrators. The clause therefore as worded currently, runs foul with Section 12(5) and Schedule VII of the Act. Thus, **CORE** (*supra*) is distinguishable on facts and is not applicable.

21. The other anomaly which merits consideration is that the Managing

Director of the Respondent, who has a direct interest in the outcome of the case, is directly appointing 2/3<sup>rd</sup> of the members of the Arbitral Tribunal. And also plays a role in the appointment of the 3<sup>rd</sup> arbitrator i.e., the contractor's nominee. This is against the spirit of the judgment in *Perkins Eastman* (*supra*). This argument was perhaps not raised in *CORE* (*supra*).

22. In cases where the arbitration clause provides a genuine counter-balancing of power of appointment between the two parties i.e., when one party appoints its nominee and the other party does the same and the two nominees together decide the presiding arbitrator the Court would not find any imbalance impinging upon the concept of party autonomy. This was the sentiment expressed by the Supreme Court in *TRF Limited v. Energo Engineering Projects Limited*<sup>9</sup>, particularly para 50 which reads as under: -

*“50.....We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto.”*

The said view was also endorsed in *Perkins Eastman* (*supra*) [para 21] to the following effect:

*“21. But, in our view that has to be the logical deduction from TRF Limited<sup>4</sup>. Paragraph 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*

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<sup>9</sup> (2017) 8 SCC 377.



*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 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited<sup>4</sup>.”*

The clause in the present case does not provide for any effective counter balancing. The process starts with selection of a panel by the Respondent and this restricts the element of choice that the contractor may exercise in choosing its nominee. Nonetheless, it allows the Respondent to ultimately choose the contractor’s nominee from the two names suggested by the contractor. However, the clause also entitles the Respondent to choose the balance two arbitrators from the panel or even outside. This undeniably indicates that the scales are tipped in favour of the Respondent when it comes to the appointment process. In effect, 2/3<sup>rd</sup> strength of the Arbitral Tribunal is nominated by the Respondent. This leads to the inexorable conclusion that the clause in its current state may not be workable. Thus, the reliance of the Respondent upon the judgment in **CORE** (*supra*) is misplaced.

23. Similarly, the judgment in **iWorld Business Solutions** (*supra*) would be of no assistance to the Respondent as the arbitration clause therein was starkly different. The following may be considered:

Arbitration Clause in <b>iWorld Business Solutions</b> ( <i>supra</i> )	Arbitration clause in present case
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<p>Clause 8.1.- ..... <i>Matters to be arbitrated upon shall be referred to a sole arbitrator if the total value of the claim is up to Rs. 50 lakhs and a panel of three arbitrators, if total value of claims is more than Rs. 50 lakhs. DMRC shall provide a panel of three Arbitrators which may also include DMRC officers for the claims up to Rs. 50 lakhs and a panel of five Arbitrators which may also include DMRC officers for claims of more than Rs. 50 lakhs. Licensee shall have to choose the sole Arbitrator from the panel of three and/or one Arbitrator from the panel of five in case three Arbitrators are to be appointed. DMRC shall also choose one Arbitrator from this panel of five and the two so chosen will choose the third arbitrator from the panel only. The Arbitrators shall be appointed within a period of 30 days from date of receipt of written notice/demand of appointment of Arbitrator from either party.</i></p>	<p>Clause 73.4(a)(ii)- <i>Applicable for amounts more than Rs. 2 crores. AT to constitute of 3 officers not below GM level.</i></p> <p><i>Process of selection- Employer to send a panel of more than 3 names to contractor within 60 days of receipt of written and valid demand for arbitration. Contractor to suggest two names from panel within 30 days. One of them would be appointed as the contractor's nominee and the other two would be appointed by MD from the panel or outside.</i></p> <p><b>Clause 73.4(a)(ii) in detail-</b> <i>In case where the total value of all claims/counter-claims exceeds Rs.2.00 Crore, the Arbitral Tribunal shall consist of a panel of three Officer not below GM level.</i></p> <p><i>For this purpose, the Employer will send a panel of more than 3 names to the contractor, within 60 days from the day when a written and valid demand for arbitration is received by the Employer.</i></p> <p><i>Contractor will be asked to suggest to the Managing Director at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by the Employer. The Managing Director shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. The Managing Director shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrator sit will be necessary to ensure that one of them is from the Accounts Department. An officer of AGM rank of the Accounts Department shall be considered of equal status to the GM of the other departments of IRCON for the purpose of appointment of arbitrator</i></p>
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24. At the outset, it must be noted that the factual scenario in ***iWorld Business Solutions (supra)*** pertained to a dispute of less than Rs. 50 lakhs (para 4 of the said judgment) which, as per the arbitration clause, extracted

above, would have to be adjudicated by a Sole Arbitrator. This is the first point of difference between the two cases. Keeping this factual distinction aside, the arbitration clause in *iWorld Business Solutions (supra)*, provided that in case of a three-member Arbitral Tribunal, the contractor would have to pick its nominee from a panel to be provided by DMRC and DMRC would also pick a name from the said panel and the third member would be decided by the two out of the said panel. The panel did not have to be restricted to DMRC officers so outsiders could be introduced. This is in line with the observation of the Supreme Court in paras 28 and 29 of *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Limited*<sup>10</sup> whereby it was recommended that the panel created by DMRC should be broad-based so as to avoid any questions of independence or impartiality of the arbitrators. Thus, there was a greater degree of autonomy and choice in the arbitration clause envisaged in *iWorld Business Solutions (supra)* as compared to that in the present case. The adjustment made by DMRC as seen from the clause in *iWorld Business Solutions (supra)* seems to be missing from the instant case. The Respondent cannot seek parity with the said judgment.

25. In view of the foregoing, the clause as worded, is contrary to the scheme of the Act. Accordingly, Shri Ashutosh Gupta is appointed as Petitioner's nominee Arbitrator and Mr. Justice Manmohan Sarin (Retd.), former Chief Justice of Jammu and Kashmir High Court, [Contact No.: +91 9818000210], is appointed as the nominee Arbitrator of the Respondent. The two arbitrators shall now concur to appoint the third Arbitrator/ presiding Arbitrator within 30 days from the date of service of this order.

26. In case the learned Arbitrators are unable to agree upon the third

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<sup>10</sup> (2017) 4 SCC 665.

arbitrator, the parties shall be at liberty to approach this Court.

27. The parties are directed to appear before the Arbitral Tribunal as and when notified. This is subject to the members of the Arbitral Tribunal making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

28. The members of the Arbitral Tribunal will be paid their fees in terms of the provisions of the Fourth Schedule appended to the Act.

29. It is clarified that the Court has not examined any of the claims of the parties and all rights and contentions on merits are left open. Both the parties shall be free to raise their claims/counter claims before the Arbitral Tribunal in accordance with law.

30. The present petition is allowed and stands disposed of. The application also stands disposed of. A copy of the order be sent to the counsel for the parties.

**AUGUST 23, 2021**

*as*

*(corrected and released on 13<sup>th</sup> September, 2021)*

**SANJEEV NARULA, J**