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

Date of Decision: 07.04.2021

\+ O.M.P. (T) (COMM.) 30/2021

IWORLD BUSINESS SOLUTIONS PRIVATE LTD ..... Petitioner

Through: Ms. Aditi Tomar, Mr. Nikhil Kohli, Mr. Sushmit Mishra & Ms. Ritika Kohli, Advocates.

versus

M/S DELHI METRO RAIL CORPORATION LIMITED ..... Respondent

Through: Mr. Arjun Natarajan & Mr. N. Sasank Iyer, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 14 read with Section 12(5) of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as the '**Act**'*] seeks a declaration that the mandate of the Arbitral Tribunal appointed by the Respondent be terminated and a substitute Arbitrator be appointed in accordance with provisions of the Act.

2. The dispute between the parties arises out of a Licence Agreement dated 07th June, 2016 whereby the commercial property situated at Janpath Metro Station (bearing space ID- Janpath_l) was licenced by the Respondent to the Petitioner. The arbitration agreement is contained in Article 8 of the

said Agreement, which reads as follows:

> *"ARTICLE-8: DISPUTE RESOLUTION*
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> *8.1 Arbitration: All disputes relating to this agreement or claims arising out of or relating to this agreement or breach, termination or the invalidity thereof or on any issue whether arising during the progress of the services or after the completion or abandonment thereof or any matter directly or indirectly connected with this agreement shall be referred to Arbitrator(s) appointed by Director, DMRC on receipt of such request from either party, after signing of the Agreement. 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 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 arbitrators 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.*
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> *8.2. The decision of sole Arbitrator / panel of Arbitrators shall be binding on all the parties. The cost of arbitration shall be borne by respective parties equally. The venue of such arbitration shall be Delhi / New Delhi. The parties agree to comply with the awards resulting from arbitration and waive their rights to any form of appeal insofar as such waiver can validly be made.*
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> *8.3. Rules governing Arbitration proceedings: The Arbitration proceedings shall be governed by Indian Arbitration and Conciliation Act, 1996, as amended from time to time including provisions in force at the time the references are made. During the pendency of arbitration proceedings, the Licensee shall continue to perform and make due payments to DMRC as per the License Agreement.*

3. On account of the nationwide lockdown due to the novel coronavirus COVID-19 pandemic, the Petitioner terminated the Licence Agreement *vide* letter dated 10th April, 2020. The Respondent, in response, sent a communication dated 18th August, 2020 seeking eviction of the Petitioner from the premises.

4. Since disputes arose between the parties, the Petitioner invoked the arbitration clause and *vide* notice dated on 25th August, 2020, nominated one Mr. Ashish Dixit as the sole arbitrator to adjudicate the disputes between the parties.

5. The Respondent *vide* its reply dated 23rd October, 2020, rejected the name suggested by the Petitioner and instead provided a panel of three arbitrators to the Petitioner for nominating a sole arbitrator out of the said panel.

6. At this juncture, it is pertinent to note that Petitioner approached this Court under Section 14 r/w 12 (5) of the Act *vide* O.M.P. (T) (COMM) 71/2020 titled *Iworld Business Solutions Private Limited v. Delhi Metro Rail Corporation Limited*, pertaining to a license agreement also dated 7th June, 2016 in relation to a similarly situated property bearing space ID-Janpath_2. In the said petition, upon finding that issues of the Petitioner are squarely covered by the Supreme Court's decision in ***Central Organisation for Railway Electrification***,[1] [*hereinafter referred to as* '***CORE***'], this Court disposed of the petition *vide* order dated 4th December, 2020, with liberty to the Petitioner to select an arbitrator from the panel of three retired Additional District Judges as provided by the Respondent.[2]

7. The Petitioner contends that, except for the fact that the two petitions arise out of independent and separate license agreements, the factual narrative in the present case is identical to OMP (T) (COMM) 71/2020, and

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[1] *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV),* 2019 SCC Online SC 1635.
[2] *Iworld Business Solutions Pvt Ltd v. Delhi Metro Rail Corporation Ltd*, 276 (2021) DLT 179.

particularly the arbitration clause that formed its subject matter. Under these circumstances, the Petitioner followed the decision in ***Iworld*** (*supra*) in the present facts as well, and while invoking the arbitration clause by way of an e-mail dated 11th December, 2020, Petitioner accepted the panel of the Respondent and, out of the names provided, nominated Mr. Govind Chandrayan as the sole arbitrator.

8. In this background, we now proceed to deal with the contentions of the parties. Ms. Aditi Tomar, learned counsel for the Petitioner, makes the following submissions:

i. She invites this Court's attention to a three-judge bench decision of the Supreme Court in ***Union of India v. M/s Tantia Constructions Limited***,[3] wherein the judgment of ***CORE*** *(supra)* was referred to a larger bench, to contend that as the said case is currently under dispute and pending adjudication, the observations made therein cannot be applied to the case at hand. On this basis, she seeks a reconsideration of the question of law pertaining the appointment of arbitrator by the High Court. She also places reliance upon the judgment of this Court in ***VSK Technologies Private Limited and Ors. v. Delhi Jal Board***,[4] to contend that ***CORE*** *(supra)* is no longer good law.

ii. The decision of the Supreme Court in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd***,[5] which has been followed by this Court in, *inter alia*, ***Proddatur Cable TV Digi Services v. SIT Cable Network***

[3] Order dated (11.01.2021 in SLP(C) 12679/2020, also at MANU/SCOR/01433/2021.
[4] MANU/DE/0134/2021.
[5] AIR 2020 SC 59.

Limited,[6] holds that unilateral appointment of an arbitrator by an authority interested in the outcome or the decision of the dispute, is impermissible in law. In view of the above-noted judgments, the appointment of a sole arbitrator by the Respondent in light of Article 8 of the License Agreement, would stand terminated *de jure*.

iii. Respondent is an interested party in the present dispute and accordingly, could not offer the nomination of a panel of arbitrators as the appointment from such a panel will, by association, not be independent or impartial. Reliance is also sought to be placed on ***Bharat Broadband Network Ltd. v. United Telecoms Ltd.***,[7] to assert that the appointment of an arbitrator made by a person himself being ineligible to act as an arbitrator is null and void.

iv. The arbitration clause, as worded, suggests that DMRC officials can also be appointed. However, she very fairly submits that the panel submitted by the Respondent in the instant case did not contain the name of any DMRC official.

9. Mr. Natarajan, learned counsel for the Respondent, on the other hand, counters the arguments made by the Petitioner, on the following grounds:

i. Mere reference of the judgement in ***CORE*** (*supra*) to a larger bench for consideration, in itself, does not make it a bad law, and unless a larger bench expressly strikes down the said judgement, the same is amenable to be followed as the prevailing law of the Supreme Court.

ii. ***VSK Technologies*** *(supra)* was based on a completely different factual

[6] 267 (2020) DLT 51.
[7] (2019) 5 SCC 755.

situation and has been wrongly relied upon by the Petitioner and it does not advance their case.

iii. On a comparison of the arbitration clauses in the three cases - ***CORE*** *(supra)*, ***VKS Technologies*** *(supra)* and the present petition, it is demonstrated that the arbitration clause in the instant case is quite similar to the clause which came up for consideration before this Court in ***CORE*** *(supra)*, and therefore, this Court should follow the view taken by it in ***Iworld*** *(supra)* which relied upon the Supreme Court's decision in ***CORE*** *(supra).*

10. This Court has considered the submissions advanced by the learned counsels.

11. Considering that the arbitration clause in the instant petition is identical to what came up for consideration in ***Iworld*** *(supra),* wherein this Court has already taken a view with respect to the applicability of the decision of the Supreme Court in ***CORE*** *(supra)* vis-à-vis the said arbitration clause, judicial discipline requires that this court first take note of the views expressed in the said case. The relevant portion of the judgment in ***CORE*** *(supra)*, on this issue, reads as under:

> *"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 Contractors. 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 disputes 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.*
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> *xx xx xx*

37. In the present matter, after the Respondent had sent the letter dated 27.07.2018 calling upon the Appellant to constitute Arbitral Tribunal, the Appellant sent the communication dated 24.09.2018 nominating the panel of serving officers of Junior Administrative Grade to act as arbitrators and asked the Respondent to select any two from the list and communicate to the office of the General Manager. By the letter dated 26.09.2018, the Respondent conveyed their disagreement in waiving the applicability of Section 12(5) of the Amendment Act, 2015. In response to the Respondent's letter dated 26.09.2018, the Appellant has sent a panel of four retired Railway Officers to act as arbitrators giving the details of those retired officers and requesting the Respondent to select any two from the list and communicate to the office of the General Manager. Since the Respondent has been given the power to select two names from out of the four names of the panel, the power of the Appellant nominating its arbitrator gets counter-balanced by the power of choice given to the Respondent 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 counterbalanced by the power of the respondent to select any of the two nominees from out of the four names suggested from the panel of the retired officers****. The decision in TRF Limited is not applicable to the present case." (emphasis supplied)*

12. In ***Iworld*** *(supra)*, it can further be easily be seen that this Court has already taken a view on ***CORE*** *(supra)*, as extracted below:

"8. Mr. Arjun Natarajan, learned counsel for the respondent, submits, per contra, that the issue raised by the petitioner is no longer res integra and as it stands concluded by the judgment of three Hon'ble Judges of the Supreme Court in Central Organization for Railway Electrification v. ECI-SPIC-SMO-MCML (JV) read with Section 12(5) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act")
Xx xx xx

19. Faced with this decision, Ms. Tomar seeks to place reliance on Voestalpine Schienen GMBH, (2017) 4 SCC 665. In the first place, Voestalpine Schienen GMBH, (2017) 4 SCC 665 was a judgment of two Hon'ble Judges of the Supreme Court, which was considered and appreciated in Central Organization for Railway Electrification which was rendered by three Hon'ble Judges. As such, on the face of it, no reliance could be placed on Voestalpine Schienen, (2017) 4 SCC 665, which would derogate from the law laid down in Central Organization for Railway Electrification.
Xx xx xx

23. Para 27 of the judgment, on which Ms. Tomar relied, follows after the above enunciation of the law by the Supreme Court. It is clear, from a plain reading of para 27, that it does not constitute part of the ratio decidendi in Voestalpine Schienen (2017) 4 SCC 665 but is in the nature of observations made by the Supreme Court. Having said that, all observations of the Supreme Court are entitled, in the hierarchical court system in this country, to high presidential value and cannot be ignored. In para 27, the Supreme Court has observed that, even where a number of persons were empanelled, the DMRC was conferred the discretion to pick any five persons out of the panel and forward their names to the other side, who had to select one as its nominee. Even while so observing, the Supreme Court noted that this practice had been done away with, in the case before it. The DMRC was also required to nominate its arbitrator from the same list, and the two arbitrators so nominated had to pick the third arbitrator also from the same list, i.e. from the remaining three persons. Where there was an exhaustive panel with the DMRC, the Supreme Court observed that it may not have been justified to limit the choice, to the opposite party, to choose one out of five names handpicked by the DMRC from its panel. Where such handpicking took place, the Supreme Court observed that a suspicion could arise, regarding the impartiality of the person picked by the DMRC out of its panel. As such, it was opined, by way of a suggestion, that the clauses 9.2(b)(c) in the Special Conditions of Contract, which permitted for such an arrangement, needed to be deleted, and the opposite party ought to have been extended the choice to select the arbitrator out of the entire panel maintained by the DRMC. Similarly, it was opined that the two arbitrators, so appointed, ought also to have been permitted the liberty to appoint the third arbitrator from the entire panel of arbitrators maintained by the DMRC.

24. Significantly, in the succeeding paragraph (para 28), the Supreme Court observed that, in order to instill confidence in the mind of the opposite party, the panel maintained by the DMRC ought not to have been limited to its own serving or retired officers but ought to have been broad based, including engineers of prominence and high repute from the private sector, as well as "persons with legal background like judges and lawyers of repute". As such, it was observed that it would be appropriate to include, in the panel maintained by the DMRC, such persons as well.

25. I do not see how the petitioner can seek to obtain any advantage from paras 27 and 28 of the judgment of the Supreme Court in Voestalpine Schienen GMBH vs. Delhi Metro Rail Corporation Limited (2017) 4 SCC 665, or the observations and suggestions contained therein. In any event, on facts, those observations and suggestions have no application to the present case, as the persons included in the panel forwarded by the respondent to the petitioner, are, admittedly, retired Additional District Judges. In fact, therefore, the panel forwarded by the respondent to the petitioner is eminently in accord with the suggestions contained in para 28 of the judgment in Voestalpine (2017) 4 SCC 665. Para 28 of the

judgment in Voestalpine (2017) 4 SCC 665, therefore, would seem to militate against, rather than support, the stand adopted by the petitioner.

26. As the issue stands squarely covered by the judgment in Central Organisation for Railway Electrification, it is not necessary for me to burden this judgment with any further observations or findings. The panel of arbitrators, forwarded by the respondent to the petitioner, consisted of three Retired Additional District Judges. The impartiality of such a panel cannot, by the farthest stretch of imagination, be doubted or questioned. Indeed, to be fair to Ms. Tomar as well as to the averments in the petition, there is no suggestion that the impartiality of the Judges included in the panel forwarded by the respondent is open to any kind of question or any kind of doubt. The petitioner, moreover, had the option of choosing any one arbitrator from the said panel.

27. In view thereof, I am of the opinion that the objection, of Mr. Natrajan, counsel for the respondent, is justified and that his reliance on the judgment of the Supreme Court in Central Organisation for Railway Electrification is also well taken."

13. In view of the above, the only argument that merits consideration is regarding the decision in ***Tantia Constructions*** *(supra)*, wherein observations were made by the Supreme Court in respect of ***CORE*** *(supra)*. The question arises whether these observations require this Court to reconsider the issue and take a different view in the facts of the present case. First, lets examine the relevant observation in ***Tantia Constructions*** *(supra)*, as extracted hereunder:

"Having heard Mr. K.M. Nataraj, learned ASG for sometime, it is clear that on the facts of this case, the judgment of the High Court cannot be faulted with. Accordingly, the Special Leave Petition is dismissed. However, reliance has been placed upon a recent three-judge Bench decision of this Court delivered on 17.12.2019 in Central Organisation for Railway Electrification v. M/s ECI-SPIC-SMO-MCML (JV) A Joint Venture Company. We have perused the aforesaid judgment and prima facie disagree with it for the basic reason that once the appointing authority itself is incapacitated from referring the matter to arbitration, it does not then follow that notwithstanding this yet appointments may be valid depending on the facts of the case. We therefore request the Hon'ble Chief Justice to constitute a larger Bench to look into the correctness of this judgment."

14. From the aforesaid observation, it emerges that in ***Tantia***

Constructions *(supra),* the Bench has taken a *prima facie* view with respect to the decision in ***CORE*** *(supra),* and has requested the Chief Justice of India to constitute a larger Bench to look into the correctness of the said decision. This court has been informed that the larger Bench has not been constituted as of now. Nevertheless, it cannot be said that the decision in ***CORE*** *(supra),* has been overturned by ***Tantia Constructions*** (*supra*). Until a larger bench answers the reference made to it one way or the other, the decision of the three-judge bench in ***CORE*** *(supra)* will continue to be operative. Moreover, in the present case, ***CORE*** *(supra*) has already been followed by a coordinate bench of this Court, and appointment of the Arbitral Tribunal out of the panel of arbitrators maintained by the Respondent has been found to be in compliance with law. Judicial discipline requires for this court to follow the said view and therefore the afore-said observations in ***Tantia Constructions*** *(supra),* do not call for the termination of the mandate of the Arbitral tribunal.

15. Further, the Petitioner's reliance on ***VSK Technologies*** *(supra),* is wholly misplaced. The said case is distinguishable on facts. The arbitration clause that came for consideration in the said decision reads as under:

> *"8.1. DISPUTE RESOLUTION*
> *1.) Any dispute arising out of or in connection with this Agreement shall in the first instance be dealt with in accordance with the escalation procedure as set out in the Governance Schedule.*
> *2.) Any dispute or difference whatsoever arising between to this Contract out of or relating to the construction, meaning, scope, operation or effect of this Contract or the validity of the breach thereof, which cannot be resolved through the application of the provision of the Governance Schedule, shall be referred to a sole arbitrator to be appointed by mutual consent of both the parties herein. If the parties cannot agree on the appointment of the Arbitrator within a period of one month from the notification by one party to the other of existence of such dispute, then the Arbitrator shall be nominated*

by DJB. The provisions of the Arbitration and Conciliation Act, 1996 will be applicable and the award made there under shall be final and binding upon the parties hereto, subject to legal remedies available under the law. Such differences shall be deemed to be a submission to arbitration under the Indian Arbitration and Conciliation Act, 1996 or of any modification, Rules or re-enactments thereof. The Arbitration proceedings will be held at Delhi, India."

16. The said arbitration clause does not, in any manner, suggest a reference to a panel of arbitrators, which forms the subject matter of dispute in the instant case. In the above-stated case, the Respondent – Delhi Jal Board, sought to appoint an Arbitrator from its panel. Further, relying upon the arbitration clause, Delhi Jal Board sought to defend the appointment by contending that since the appointment has been done from a panel of arbitrators maintained by them, the question of an arbitrator being ineligible under Section 12(5) of the Act does not arise. Besides, the Delhi Jal Board also relied upon the decision of the Supreme Court in ***Standard Corrosion Controls Pvt. Ltd. v. Sarku Engineering Services SDN BHD***,[8] and contended that a party could not approach the Court under Section 11 of the Act without following the procedure as agreed upon. In these circumstances, the Court negated the contentions of Delhi Jal Board, and relying upon the decision in ***Perkins*** *(supra)* and the decision of a co-ordinate bench of this Court in ***Proddatur Cable TV Digi Services v. Citi Cable Network Limited***,[9] proceeded to appoint an Arbitrator. However, what prevailed upon the Court to reject the appointment done by the Respondent is evident from the following observations in ***VSK Technologies*** *(supra)*:

[8] 2009 (1) SCC 303.
[9] (2020) 267 DLT 51.

> *"21. The reliance placed by Mr. Singh on the decision in the case of Central Organization for Railway Electrification v. ECI (supra) is misplaced. In that case, the Arbitration Clause provided for the Arbitral Tribunal to be constituted by Gazetted Railway Officers or three retired Railway Officers above a certain rank. The petitioner (Railways) was required to send names of four empanelled retired Railway Officers and the contractor was required to suggest two names out of the said panel for appointment as its nominee. The General Manager was required to appoint one of the names out of the two names as suggested by the contractor as the contractor's nominee and the remaining Arbitrator from the panel or outside the panel. The Supreme Court noted that the procedure adopted also took into account the option of the contractor. The Court was of the view that since the agreement provided for the appointment of an Arbitral Tribunal out of the panel of serving/retired officers, the procedure as agreed by the parties ought to have been followed.* ***In the present case, the Clause does not entail any such procedure for suggesting any names out of the panel of Arbitrators maintained by the DJB. Therefore, the contention that the decision of the DJB to nominate an Arbitrator must be sustained since the Arbitrator appointed was one from the panel maintained internally, is unpersuasive. The question whether the DJB maintains a panel of Arbitrators is its internal matter. The Arbitration Clause does not contemplate the appointment of any Arbitrator from the panel of Arbitrators maintained by the DJB and therefore, the decision in the case of Central Organization for Railway Electrification v. ECI (supra) is, wholly inapplicable in the facts of the present case.****"***
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> *(emphasis supplied)*

17. In view of the above, this Court is of the opinion that there is no merit in the case advanced by the Petitioner. There is no ground to terminate the mandate of the Arbitral Tribunal. Merely on the basis of the observation made by the Supreme Court in ***Tantia Constructions*** *(supra)* with respect to the decision in ***CORE*** *(supra)*, it cannot be held that the appointment of the Arbitral tribunal in the present case stands terminated *de jure*.

18. Accordingly, the present petition is dismissed.

19. Copy of judgment be emailed to the counsels.

SANJEEV NARULA, J

APRIL 7, 2021
as
(corrected and released on 28th April, 2021)