IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: January 14, 2020

\+ ARB.P. 167/2019

SMS LTD.

..... Petitioner

Through: Mr. Ritin Rai, Sr. Advocate with
Mr. Sandeep Das, Mr. Mridul and
Ms. Surbhi Sharma, Advs.

versus

RAIL VIKAS NIGAM LIMITED

..... Respondent

Through: Mr. Anil Seth and
Mr. Prateek, Advs.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. The present petition has been filed by the petitioner under Section 11(6) read with Section 11(12)(b) of the Arbitration and Conciliation Act, 1996 (in short, 'Act of 1996') with the following prayers:

> *"In light of the facts and circumstances of the case, the Petitioner Company, therefore, most humbly prays that this Hon'ble Court may be pleased to:*
> *(a) Appoint a nominee Arbitrator on behalf of the Respondent Company or alternatively, without prejudice to aforesaid, appoint an independent sole Arbitrator to adjudicate upon and decide all the*

disputes between the Petitioner Company and the Respondent Company in connection with and under the Contract Agreement dated 27.05.2010; and

(b) Pass such further orders as this Hon 'ble Court may deem fit and proper in the facts and circumstances of the case."

2. It is the case of the petitioner that it was incorporated in 1997 at Nagpur and is one of the leading infrastructure companies in Central India. The respondent Company is the Rail Vikas Nigam Limited (RVNL), which is a 100% owned PSU of Ministry of Railways, was incorporated on January 24, 2003 with the objective of raising extra budgetary resources and implementing projects relating to creation and augmentation of capacity of rail infrastructure on fast-track basis.

3. The respondent Company in March, 2009, invited tenders from eligible bidders for "Construction of Roadbed, Supply of Ballast Major and Minor Bridges, Residential and Service Buildings and General Electrical Work etc. for Dallirajhara-Keoti Section in connection with a new rail link between Dallirajhara and Rowghat in Raipur Division of South East Central Railway in the State of Chhattisgarh, India at an estimated cost of ₹115.62 Crores with completion period of 24 months along with 6 months defect liability period. The petitioner Company submitted its bid dated June 16, 2009 to the respondent Company. The respondent Company after evaluation of the same accepted the petitioner Company's bid vide its letter dated October 20, 2009 which was to be treated as the Letter of

Acceptance (LoA). By way of the said LoA the respondent Company called upon the petitioner Company to submit Performance Security. The petitioner Company on receipt of the LoA duly submitted the *"performance security"* and the *"additional performance security"*. The respondent Company thereafter issued another letter dated November 30, 2009 in accordance whereof the work was to be commenced by December 10, 2009. Subsequently, the Contract Agreement dated May 27, 2010 ('Contract Agreement', for short) was executed between the petitioner Company and the respondent Company. Further, as per the Contract Agreement, the work was to be completed by December 09, 2011 which excludes six months as defect liability period.

4. It is the case of the petitioner Company, that due to the respondent Company's failure to adhere to the agreed terms and conditions of the Contract Agreement, the contract has been delayed by many years due to which the petitioner Company had to remain on site for much longer than agreed. On account of such breaches and delays, the work was limited to 0-17.6 kms. instead of 0-42 kms. Further, due to the various breaches on part of the respondent Company, the petitioner Company claimed damages which accrued up to May 31, 2012. These claims were partially allowed in favour of the petitioner Company.

5. It is the case of the petitioner Company that despite the aforesaid, the respondent Company has further delayed the project and breached its obligations under the Contract Agreement on account of which the petitioner Company had to

suffer immense losses. On listing various claims with regard to the delay amounting to ₹62,29,52,659/- in its letter dated April 11, 2018, the Engineer merely denied all the claims made by the petitioner Company and stated *inter alia* that the Engineer had come into operation on September 09, 2017 by taking over from the previous agency and did not have the complete records. The letter further stated that the petitioner Company had made up its mind to settle the issues through the Act of 1996. The petitioner Company in its letter dated April 20, 2018 informed the Engineer that pursuant to Clause 3.5 of the General Conditions of Contract ('GCC', for short), the claim has to be determined by the Engineer and as per Clause 20.1 of the GCC within 42 days of receiving the same. The petitioner Company also submitted all the relevant letters and correspondence for the ready reference of the Engineer so that the unavailability of documents is no longer a hurdle for the Engineer and is able to decide the claims as per the provisions of the GCC. However, vide letter dated May 18, 2018, the Engineer once again denied the claims of the petitioner Company.

6. It is the case of the petitioner Company through its letter dated June 01, 2018 to the respondent Company, it once again raised its claim and after a wait of two months received a response from the respondent Company dated August 02, 2018 in which the respondent Company denied all the claims. Considering that neither the Engineer nor the respondent Company were able to resolve the claims raised by the petitioner Company, the petitioner Company had no option but to invoke

arbitration as per Clause 20.3 of the GCC read with the Act of 1996 as amended by Arbitration and Conciliation (Amendment) Act, 2015, ('Amended Act', for short). The petitioner Company through its letter dated October 17, 2018 to the respondent Company nominated a retired Judge of the High Court as Arbitrator and called upon the respondent Company to nominate its Arbitrator.

7. However, the respondent Company in its response dated November 22, 2018 objected to the Nominee and instead provided its purported *"Broad Based Panel of Proposed Arbitrators"* (Panel) consisting of thirty seven names for the petitioner Company to choose from. It was contended by the respondent Company that pursuant to Clause 20.3(ii) of the GCC, which lays down the procedure for appointment of Arbitrators, entails that the respondent Company would forward a panel of 5 names to the petitioner Company and the petitioner Company would give its consent to any one name out of the panel to be appointed as one of the Arbitrators. The respondent Company would decide on a second Arbitrator from the remaining names and the third Arbitrator would be chosen by the first two Arbitrators.

8. It is the case of the petitioner Company that the names given by the respondent Company in its panel are not acceptable to the petitioner Company and are contrary to the letter and spirit of the Act of 1996, specifically Section 12 read with Schedule VII. The names suggested by the respondent Company are mostly retired officers of either the Railways services or SPVs /

PSUs / organizations of the Railways. Merely eight names suggested in the above mentioned panel seem to have no association with the Railway Ministry but are former government employees of organizations like Border Road Organization, NHPC, CPWD etc.

9. It is their case that in terms of Section 12(1)(a) of the Act of 1996, a former employee of the Railways on the Arbitral Tribunal will give rise to justifiable doubts as to the independence and impartiality of such an Arbitral Tribunal. In other words, it is their case that the appointment of former employees as Arbitrators is in contravention to the letter and spirit of the Act of 1996 as envisaged in Section 12 read with Schedules V and VII and it is under these circumstances that the present petition has been filed.

10. Mr. Ritin Rai, learned Senior Counsel appearing for the petitioner submits that the Clause 20.3(ii) of GCC, which mandates respondent Company maintaining a panel and providing petitioner with an option to choose its nominee Arbitrator from a panel of five Arbitrators is bad in law in the light of the Amended Act, more specifically Section 12 (5) read with Schedule V and VII.

11. According to him, the Supreme Court in the case of ***Voestalpine Schienen GMBH v. DMRC, (2017) 4 SCC 665,*** clearly mandates that there is no illegality in either of the parties maintaining a panel of Arbitrators to be chosen from, however, it should be broad based as well as needs to pass the test of Section 12 read with Schedule V and VII of the Act of 1996. According

to him, only eight names out of thirty seven are of the officers who have no connection with the respondent / Indian Railways. In other words, a panel of eight names to choose from is not in conformity with the judgment of the Supreme Court in ***Voestalpine Schienen GMBH (supra)***.

12. He has heavily relied upon cases involving the same respondent Company herein and similar arbitration clauses, wherein this Court went ahead to appoint nominee Arbitrators holding the arbitration clauses to be bad in law. In this regard, he has relied upon the judgments of this Court in the cases of ***Simplex Infrastructures Ltd. v. Rail Vikas Nigam Limited, 2018 SCC OnLine Del 13122, L&T v. Rail Vikas Nigam Limited, 2018 SCC Online Del 9176*** and ***Afcons Infrastructure Ltd. v. Rail Vikas Nigam Limited, MANU/DE/1557/2017.*** He also relied upon the judgment in the case of ***NCCL-Premco (JV) v. Rail Vikas Nigam Limited, 2018 SCC OnLine Del 11926*** to contend that similar arbitration clause in GCC relating to a similar construction contract decided by the Court whereby this Court appointed nominee Arbitrator for RVNL and further buttresses his contention by stating that the SLPs filed against the judgment in the case of ***Simplex Infrastructures Ltd. (supra), NCCL (supra)*** and ***L&T (supra)*** have been dismissed by the Supreme Court. Therefore, he states that the prayers as made in the petition be granted.

13. The case of the respondent Company and so contended by its counsel is that the arbitration clause lays down the procedure for appointment of arbitrator as per procedure laid

down under Clause 20.3(ii) of the GCC. As per the procedure, the respondent is duty bound to furnish a panel of Arbitrators to the petitioner Company. The petitioner Company is to choose its nominee Arbitrator from the panel. The entire panel of thirty-seven names was given by the respondent Company vide its letter dated November 22, 2018. Therefore, there is no failure at the respondent's end for the petitioner Company to invoke the jurisdiction of this Court under Section 11(6) of the Act of 1996.

14. Mr. Anil Seth, learned counsel appearing for the respondent Company, would submit that the exhaustive procedure for Arbitrator's appointment does not empower the petitioner to unilaterally appoint the nominee Arbitrator. The petitioner's appointment of its nominee Arbitrator vide letter dated October 17, 2018 is contrary to the arbitration clause under the GCC and the position of law. Even otherwise, the nominee Arbitrator thus appointed is already acting as an Arbitrator in two arbitrations where respondent is a party.

15. That apart, it is his submission that the procedure envisaged in the arbitration clause is not vitiated by the Amended Act. Alternatively, he states that even if any provision is contrary to the Act of 1996, only the limited portion of the procedure which is contrary to the Act shall be null and void. This does not affect the procedure envisaged in the arbitration clause of the GCC. In this regard, he would rely on the judgment of the Supreme Court in the case of ***Shin Sattelite Public Co. Ltd. v. Jain Studios Ltd., (2006) 2 SCC 628.***

16. That apart, he has also relied upon the judgment of this

Court in the case of ***Sushil Kumar Bhardwaj v. Union of India, Arbitration Appeal No.389/2006,*** to contend that the cause of action to move the Court under Section 11(6) arises only when the parities fails to act as per the agreed procedure in arbitration clause. He has also relied upon the judgment of the Supreme Court in the cases of ***Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Limited, (2008) 10 SCC 240*** and ***Union of India v. Parmar Construction Company, 2019 SCC OnLine SC 442,*** to contend that in addition to exhausting remedies for appointment of Arbitrators as provided under the arbitration agreement agreed upon by the parties, due regard for the qualification of the Arbitrators as envisaged under Section 11(8) of the Act of 1996 should be given by the Court while dealing with an application under 11(6) of the Act of 1996.

17. Mr. Anil Seth, thus submitted that while appointing the Arbitrator, the Court must have due regard to the qualification criteria contained in arbitration clause 20.3(iii) of the GCC as per Section 11(8) of the Act of 1996. He also stated that the judgment as relied upon by the learned Senior Counsel appearing for the petitioner in ***Voestalpine Schienen GMBH (supra)*** is distinguishable as in the said case, there is no qualification / eligibility criteria contained in the arbitration clause. Similarly, he stated that the judgment as relied upon by Mr. Ritin Rai in the case of ***Simplex Infrastructures Ltd. (supra)*** is overlooking the distinguishing feature. Even the said judgment is distinguishable on facts as, the respondent in the said case did not forward the

broad-based panel before filing of the case before this Court, unlike the case herein.

18. Mr. Anil Seth also justifies the panel of thirty-seven names given by the respondent Company being conformity with the law and the arbitration clause. According to him, the panel consists of technically qualified persons.

19. That apart, he stated that the panel consists of persons who retired from their respective government service over three years ago and have passed their *"cooling off period"*. In other words, he stated that past / retired employees cannot be brought within the ambit of entry 1 of Schedule V and VII of the Amended Act. In this regard, he has relied upon the judgment in the case of ***Government of Haryana, PWD Haryana (B&R) Branch v. GF Toll Road Pvt. Ltd. & Ors., 2019 SCC Online SC 2.***

20. Additionally, he stated, bias on part of the Arbitrator can be alleged before the Arbitrator. In any case, if in the event that an Arbitrator thus appointed falls under anything contained in Schedule V or VII of the Act, the aggrieved party will have remedy under Section 12, 13 and 14 respectively. In this regard, he has relied upon the judgment of the Supreme Court in the case of ***HRD Corporation v. GAIL, (2018) 12 SCC 471.*** Thus, he seeks the dismissal of this present petition.

21. Having noted the stand of the parties and heard the learned counsel appearing for them, the issue which arises for consideration is whether the arbitration clause i.e. Clause 20.3 of the GCC has become invalid, in view of the provisions of Section

12(5) of the Arbitration and Conciliation Act, 1996 which was inserted in the Act of 1996 by way of amendment w.e.f. October 23, 2015. The Clause 20.3 of the GCC reads as under:

> *"Any dispute in respect of which amicable settlement has not been reached arising between the Employer and the Domestic or Foreign contractor related to any matter arising out of or connected with this contract, the disputes shall be settled in accordance with the Indian Arbitration Act, 1996 and any statutory modification or re-enactment thereof. Further, it is agreed between the parties as under:*
>
> *(i) Number of Arbitrators: The arbitral tribunal shall consist of 3 (Three) arbitrators.*
>
> *(ii) Procedure for Appointment of Arbitrators: The arbitrators shall be appointed as per the following procedure:*

a. *Employer will forward a panel of 5 names to the contractor and contractor will give his consent for any one name out of the panel to be appointed as one of the Arbitrators.*
b. *Employer will decide the second arbitrator out of the remaining four names in the panel as mentioned in para (a) above.*
c. *The third Arbitrator shall be chosen by the two Arbitrators so appointed by the parties and shall act as Presiding Arbitrator. In case of failure of the two Arbitrators appointed by the parties to reach upon*

consensus with a period of 30 days from the appointment of the Arbitrators subsequently appointed, then, upon the request of either or both parties, the presiding Arbitrator shall be appointed by the Managing Director, Rail Vikas Nigam Limited, New Delhi.

(iii) Qualification and Experience of Arbitrators: the arbitrators to be appointed shall have minimum qualification and experience ass under:-

(a) One member of the tribunal shall be necessarily and working (not below the rank of SAG) or a retired officer (retired not below the rank of SAG, age not exceeding 70 years and in reasonably good mental and physical fitness) of Indian Railway Accounts Service having experience in financial matters related to construction contracts.

(b) On member shall be a technical person having decree in Engineering and may be working (not below the rank of SAG) or retired officer (retired not below the rank of SAG, age not exceeding 70 years and in reasonably good mental and physical fitness) of any Engineering service of Indian Railways or equivalent service in RVNL, and having knowledge and experience of the Railway working.

(c) The Presiding Arbitrator shall necessarily be a serving railway / RVNL officer and he shall have

some minimum qualification and experience as specified above for either of the two arbitrators.

(d) Out of 3 Arbitrators not more than One shall be a retired officer.

(iv) No other person other than the persons appointed as per above procedure and having above qualification and experience shall act as arbitrator.

(v) Neither party shall be limited in the proceedings before such arbitrators to the evidence nor did arguments previously put before.

(vi) The reference to arbitration may proceeding, notwithstanding that the Works shall not then be of the alleged to be complete, provided always that the obligations of the Employer, the Engineer and he contractor shall not be altered by the reason of the arbitration being conducted ruing the progress of the Works. Neither party shall be entitled to suspend the Works, nor shall payment to the Contractor be continued to be made as provided by the Contract.

(vii) Arbitration proceedings shall be held at New Delhi, India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be in English.

(viii) The decision of the majority of the arbitrators shall be final and binding upon both the parties. The expenses of the conciliator / arbitrators shall be as per the scales fixed by the employer from time to time and shall be share equally by the Employer and the Contractor. However, the expenses incurred by each party in connection with the preparation, presentation will be borne by itself.

(ix) All arbitration awards shall be in writing and shall state the reasons of the award."

22. The dispute having arisen, the petitioner Company invoked the arbitration agreement vide its letter dated October 17, 2018 and nominated Justice (Retd.) A.K. Patnaik as their nominee Arbitrator and called upon the respondent Company to nominate its Arbitrator. However, the respondent Company in its response dated November 22, 2018 objected to the nomination proposed by the petitioner Company and provided its purported "Broad Based Panel of Proposed Arbitrators" consisting of thirty-seven names for the petitioner Company to choose from.

23. It is the case of the respondent Company that pursuant to Clause 20.3(ii) of the GCC which lays down the procedure for appointment of Arbitrators, entails that the respondent Company would forward a panel of five names to the petitioner Company and the petitioner Company would give its consent to any one name out of the panel to be appointed as one of the Arbitrators. The respondent Company would then decide on a second

Arbitrator from the remaining names and the third Arbitrator would be chosen by the first two Arbitrators. The petitioner Company had objected to the names proposed by the respondent Company vide its panel as not acceptable to the petitioner Company.

24. It is the case of the petitioner Company that the names given in its panel are not acceptable to the petitioner Company and are contrary to the spirit of the Act of 1996, specifically Section 12 read with Schedule VII.

25. On the other hand, it is the case of the respondent Company that the procedure does not permit unilateral appointment of the nominee Arbitrator and the Amended Act does not render the procedure for appointment of Arbitrator null and void.

26. Mr. Ritin Rai had relied upon the judgment of the Supreme Court in the case of ***Voestalpine Schienen GMBH (supra)*** to contend that the effect of Arbitration and Conciliation (Amendment) Act, 2015, is on the emphasis of neutrality of Arbitrators and according to him the panel of thirty-seven names given by the respondent Company, only eight names are of such Officers, who were working in places other than the Railways and the Railways' PSUs, thus the said panel also does not meet the test of neutrality of Arbitrators. In this regard, he has relied upon paragraph 18 of the judgment which I reproduce as under:

> *"18. Keeping in mind the afore-quoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the*

Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In such an eventuality, i.e., when the arbitration Clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non-obstante Clause contained in Sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement.

27. According to Mr. Rai, the Supreme Court has categorically held that the panel should not be limited to persons associated with Government departments and other public sector undertakings. He relied upon paragraph 28 of the judgment which reads as under:

"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 number of persons empanelled, discretion is with the 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, the 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 the DMRC. Secondly, with the discretion given to the DMRC to choose five persons, a room for suspicion is created in the mind of the other side that the 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 third arbitrator from the whole panel.

28. That apart, Mr. Ritin Rai had relied upon the judgment of a Coordinate Bench of this Court in the case of ***Simplex Infrastructures Ltd. (supra),*** wherein according to him, a similar arbitration Clause as the present one was challenged and the Court in paragraphs 13 and 15 held as under:

> *"13. As noted in the above judgments, this Court has held that the respondent cannot insist upon the procedure prescribed in Clauses similar to Clause 17.3 (ii) of the Agreement by forwarding only a panel of five names for the other contracting party to choose its nominee Arbitrator from. This procedure is no longer valid and the respondent must broad base its panel of Arbitrators by including names of Engineers of prominence and high repute from the private sector, persons with legal background like Judges and lawyers of repute, people having knowledge and expertise in accountancy etc.*
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> *xxx xxx xxx*
>
> *15. The respondent in its reply has now forwarded a complete so called broad-based panel of Arbitrators prepared by it. The same has 26 names with only nine being officers who are not connected with the Railways or other railway organizations/companies. In this panel there is no person with any legal background or with background of accountancy and other fields. Clearly, in spite of repeated judgments of this Court relying upon the judgment of the Supreme Court in*

Voestalpine Schienen GMBH (supra), the respondent has blatantly refused to comprehensively broad base its panel of Arbitrators."

29. Mr. Rai had also relied upon judgments in ***Afcons Infrastructure Ltd. (supra), Larsen & Toubro Ltd. (supra), Simples Infrastructures Ltd (supra)*** and ***NCCL-Premco (JV),*** where the procedure for appointment, similar in terms to the present case, was held to be invalid. According to him the Supreme Court in SLP (C) No. 21118/2018, SLP (C) No. 5992/2019 and SLP (C) No. 13499/2019 has upheld the judgments of this Court in ***Larsen & Toubro Ltd. (supra), Simples Infrastructures Ltd (supra)*** and ***NCCL-Premco (JV)*** respectively.

30. I may state here, while dismissing the aforesaid SLPs, the Supreme Court had left the question of law open.

31. Be that as it may, the question which would arise is whether the panel of thirty seven names would satisfy a concept of neutrality of Arbitrators as stated by the Supreme Court in ***Voestalpine Schienen GMBH (supra).***

32. There is no dispute that there are only eight members out of thirty seven in the panel provided by the respondent Company who are Officers retired from organizations other than the Railways and PSUs not connected with the Railways. The Supreme Court in ***Voestalpine Schienen GMBH (supra)*** had observed as to why the panel should not be limited to Government departments or public sector undertakings; and went on to hold that in order to instill confidence in the mind of the

other party, it is imperative that 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 the disputes that arise would be technical in nature. In fact, I find in the judgment of the Coordinate Bench of this Court in ***Simplex Infrastructures Ltd. (supra)***, the respondent Company had provided 26 names with only nine being Officers who were not connected with Railways or other Railways organizations / Companies, still there being no persons with any legal, accountancy backgrounds or from other diverse fields, the Court went ahead to hold clearly that in spite of repeated judgments relying upon the judgment of the Supreme Court in ***Voestalpine Schienen GMBH (supra)***, the respondent refused to comprehensively broad base its panel and had appointed the nominee Arbitrator on behalf of the respondent in the said case. So, it must follow, that the panel of thirty seven names given by the respondent Company, also, does not satisfy the concept of neutrality of Arbitrators as it is not broad based.

33. The plea of Mr. Anil Seth is primarily that there is no cause of action for the petitioner to move this Court under Section 11(6) of the Act of 1996 by relying upon the judgment of this Court in ***Sushil Kumar Bhardwaj (supra).*** I am not in agreement with the submission made by Mr. Anil Seth for the simple reason that when the arbitration Clause itself is invalid for the reasons stated above and the petitioner having nominated its

Arbitrator and called upon the respondent to appoint its nominee Arbitrator, the respondent by stating that the appointment of nominee Arbitrator by the petitioner is in violation of Clause 20.3(ii) of the GCC and that he also does not possess qualification as provided in Clause 20.3(iii) of the GCC and by providing a panel of thirty seven names having called upon the petitioner to withdraw its nominee Arbitrator, the petitioner was well within its right to invoke the jurisdiction of this Court seeking a prayer for appointment of a nominee Arbitrator on behalf of the respondent.

34. Insofar as the judgments as relied upon by Mr. Anil Seth are concerned, the same shall not be applicable in the facts of this case when the very arbitration clause has been held to be invalid.

35. Similarly, the plea that the procedure does not permit the unilateral appointment of nominee Arbitrator is concerned; the same is without merit in view of my conclusion above i.e., when the arbitration Clause is invalid, the petitioner Company is within its right to nominate its Arbitrator.

36. The plea taken by Mr. Anil Seth that the Court shall have due regard to qualification requirement in the arbitration Clause as per Section 11(8) of the Act of 1996, by relying upon ***Northern Railway Administration, Ministry of Railway, New Delhi (supra)*** and ***Union of India (supra)*** as well as by distinguishing the judgment in ***Voestalpine Schienen GMBH (supra)*** is concerned, the said plea would be unsustainable in view of the conclusion arrived at by me in holding the arbitration Clause as invalid. In other words, the Arbitrators of Railways

and PSU's related to Railways even though possessing the said qualification cannot meet the requirement of neutrality of the Arbitrators and further persons having similar qualifications in Engineering can also be available outside, the Railways / PSU's, in private sector.

37. During the course of his submissions Mr. Anil Seth had relied upon the judgment of the Supreme Court in the case of ***Government of Haryana (supra)*** to contend that the past / retired government employees cannot be brought within ambit of entry 1 of Schedule V and VII of the Amended Act and therefore, the allegation of bias are farfetched and hypothetical.

38. There is no dispute on the proposition and in fact; observations in this regard have been made by the Supreme Court in ***Voestalpine Schienen GMBH (supra)*** in paragraph 26, which read as under:

> *"26. It cannot be said that simply because the person is retired officer who retired from the government or other statutory corporation or public sector undertaking and had no connection with DMRC (party in dispute), he would be treated as ineligible to act as an arbitrator. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. The very reason*

for empanelling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators. It may also be mentioned herein that the Law Commission had proposed the incorporation of the Schedule which was drawn from the red and orange list of IBA guidelines on conflict of interest in international arbitration with the observation that the same would be treated as the guide 'to determine whether circumstances exist which give rise to such justifiable doubts'. Such persons do not get covered by red or orange list of IBA guidelines either. ....."

39. But the aforesaid does not mean that the panel should only consist of the retired Officers who retired from Government or statutory corporation or PSUs but it must also be broad based as stated above, which is not the case herein. Hence, the plea is rejected.

40. The plea that in the event, Arbitrator thus appointed falls under Schedule V or VII of the Act of 1996 and the aggrieved party will still have a remedy under Section 12, 13 and 14 respectively by relying upon the judgment in the case of ***HRD Corporation (supra)*** is concerned, the same is without merit in view of the conclusion arrived at by me, that the arbitration Clause itself is invalid. Further, even in paragraph 13, the Supreme Court has held as under:

13. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become

> *"ineligible" to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, Under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible". In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal Under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed Under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground.*
>
> (emphasis supplied)

41. It is also pertinent to note that in the case of ***Perkins Eastman Architects DPC & Anr v. HSCC(India) Ltd, 2019(6)ArbLR132(SC)***, the Supreme Court while dealing with an application under Section 11(6) read with 11(12)(a) of the Act of 1996, held that as per the scheme of Section 11 of Act of 1996 if there are justifiable doubts as to the independence and impartiality of the person nominated , and if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, such an appointment can be made by the Court.

42. In view of the above, it follows that a petition preferred under Section 11 of the Act of 1996 is maintainable and I see no impediment in appointing a nominee Arbitrator on behalf of the

respondent. Accordingly, I nominate Justice D.K. Jain, former Judge of the Supreme Court.

43. The two learned Arbitrators shall also expeditiously appoint a Presiding Arbitrator, preferably within four weeks from the receipt of copy of this order.

44. The petition is disposed of with the above directions. No costs.

V. KAMESWAR RAO, J

JANUARY 14, 2020*/aky*