

REPORTABLE**IN THE SUPREME COURT OF INDIA****CIVIL ORIGINAL JURISDICTION****ARBITRATION PETITION (CIVIL) NO. 50 OF 2016**

M/S. VOESTALPINE SCHIENEN GMBHAPPELLANT(S)

VERSUS

DELHI METRO RAIL CORPORATION LTD.RESPONDENT(S)

J U D G M E N T**A.K. SIKRI, J.**

The petitioner, which is a Company incorporated under the laws of Austria, with its registered office in that country, has its branch office in DLF City, Gurgaon, Phase-II, India as well. It is engaged, inter alia, in the business of steel production with the use of advance technology, like Rolling Technology and Heat Treatment Technology, as well as manufacturing, producing and supplying rails and related products. It claims to be a European market leader and innovation pioneer with a worldwide reputation which has played a decisive role in the

development of modern railway rails. The respondent, Delhi Metro Rail Corporation Ltd. (DMRC) awarded the contract dated 12th August, 2013 to the petitioner for supply of rails. Certain disputes have arisen between the parties with regard to the said contract inasmuch as the petitioner feels that respondent has wrongfully withheld a sum of euro 5,31,276/- (Euro Five Lakhs Thirty One Thousand Two Hundred and Seventy Six only) towards invoices raised for supply of last lot of 3000 MT of rails and has also illegally encashed performance bank guarantees amounting to EURO 7,83,200/- (Euro Seven Lakhs Eighty Three Thousand Two Hundred only). Respondent has also imposed liquidated damages amounting to EURO 4,00,129.397/- (Euro Four Hundred Thousand One Hundred Twenty Nine and Cent Three Hundred Ninety Seven Only) and invoked price variation clause to claim a deposit of EURO 4,87,830/- (Euro Four Lakhs Eighty Seven Thousand Eight Hundred Thirty). Not satisfied with the performance of the petitioner, the respondent has suspended the business dealings with the petitioner for the period of six months. The petitioner feels aggrieved by all the aforesaid actions and wants its claims to be adjudicated upon by an Arbitral Tribunal, having regard to the arbitration agreement between the parties as contained in Clause 9.2 of General Conditions of Contract (GCC) read with Clause 9.2 of Special Conditions of Contract (SCC).

2) It may be pointed out, at the outset, that arbitration agreement between

the parties, as contained in the aforesaid clause of the contract is not in dispute. It may also be pointed out that Clause 9.2(A) of the SCC prescribes a particular procedure for constitution of the Arbitral Tribunal which, inter alia, stipulates that the respondent shall forward names of five persons from the panel maintained by the respondent and the petitioner will have to choose his nominee arbitrator from the said panel. As per the events mentioned in detail hereinafter, the respondent had, in fact, furnished the names of five such persons to the petitioner with a request to nominate its arbitrator from the said panel. However, it is not acceptable to the petitioner as the petitioner feels that the panel prepared by the respondent consists of serving or retired engineers either of respondent or of Government Department or Public Sector Undertakings who do not qualify as independent arbitrators. According to the petitioner, with the amendment of Section 12 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') such a panel, by Amendment Act, 2015, as prepared by the respondent, has lost its validity, as it is contrary to the amended provisions of Section 12 of the Act. For this reason, the petitioner has preferred the instant petition under Section 11(6) read with Section 11(8) of the Act for appointment of sole arbitrator/arbitral tribunal under Clause 9.2 of GCC read with Clause 9.2 of SCC of the Contract dated August 12, 2013.

- 3) With the aforesaid preliminary introduction reflecting the nature of these

proceedings, we may take note of the relevant and material facts in some detail.

Around January, 2013, the respondent had floated a tender for the procurement of 8000 Metric Tons (MT) "Head Hardened Rails of certain specifications for Delhi Metro, Phase-III projects and invited bids from the eligible bidders. The petitioner was one such bidder whose bid was ultimately accepted after tender evaluation process undertaken by the respondent. It resulted in the signing of contract agreement dated August 12, 2013 between the parties for the supply of the aforesaid material. As per the petitioner, it has duly delivered the rails in three lots of 3000MT, 3000MT and 2000MT rails on January 13, 2014, January 19, 2014 and August 03, 2014 respectively at sea port at Mumbai, which delivery, according to the petitioner, was well within the agreed time limits. However, after the delivery of the aforesaid rails at Mumbai, inland transport thereof from Mumbai to Respondent's depots at Delhi was delayed due to various reasons. As per the petitioner, these reasons are not attributed to it and it cannot be faulted for the same. However, the respondent treated it as default on the part of the petitioner and imposed liquidated damages vide its letter dated September 21, 2015. The respondent also called upon the petitioner to submit its final bill so that the liquidated damages could be set off against the said bill. This was the starting point of dispute between the parties, as the

petitioner refuted the allegations of the respondent and questioned the imposition of liquidated damages as well as calculations thereof. Correspondence ensued and exchanged between the parties but it may not be necessary to state the same in detail here as that would be the subject matter of adjudication before the arbitral tribunal. Suffice it to state that respondents also encashed the bank guarantee and raised claims against the petitioner as balance amount due from the petitioner. On the other hand, the petitioner states that it is the respondent which has to pay substantial amounts to the petitioner and a glimpse of the claims of the petitioner has already been indicated above.

- 4) One thing is clear, there are disputes between the parties giving rise to claims and counter claims against each other and these pertain to and arise out of contract dated August 12, 2013. In view of these disputes and after receipt of communication dated April 28, 2016 whereby respondent had taken a decision to suspend business dealings with the petitioner for a period of six months, and feeling aggrieved thereby, the petitioner issued a legal notice dated May 11, 2016 through his advocates calling upon the respondent to withdraw the suspension orders with a threat to resort to legal proceedings if the same was not done within a period of seven days. The respondent did not succumb to the said demand and this inaction provoked the petitioner to approach the High Court by filing Writ Petition no. 5439 of 2016 challenging

respondent's action of suspending business with the petitioner . In this petition, order dated June 03, 2016 has been passed by the Delhi High Court thereby directing the respondent to keep its decision of suspension with the petitioner, in abeyance.

- 5) The petitioner states that thereafter it invoked the dispute resolution clause and made efforts to amicably resolve the dispute. However, the said attempt failed and on June 14, 2016, the petitioner invoked the arbitration clause.
- 6) At this juncture, we would like to reproduce Clause 9.2 of GCC as well as Clause 9.2 of SCC.

“9.2. If, after twenty-eight (28) days from the commencement of such informal negotiations, the parties have failed to resolve their dispute or difference by such mutual consultation, then either the Purchaser or the Supplier may give notice to the other party of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration , as hereinafter provided, as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given. Any dispute or difference in respect of which a notice of intention, to commence arbitration has been given in accordance with this Clause shall be finally settled by arbitration. Arbitration may be commenced with this Clause shall be finally settled by arbitration. Arbitration may be commenced prior to or after delivery of the Goods under the Contract Arbitration proceedings shall be conducted in accordance 'with the rules of procedure specified in the SCC”

9.2. The rules of procedure for arbitration proceedings pursuant to GCC Clause 9.2 shall be as follows:

ARBITRATION & RESOLUTION OF DISPUTES:

The Arbitration and Conciliation Act – 1996 of India shall be – applicable. Purchaser and the supplier shall make every necessary effort to resolve amicably by direct and informal negotiation any disagreement or dispute arising between them under or in connection with contract.

Arbitration: If the efforts to resolve all or any of the disputes through conciliation fails, then such, disputes or differences, whatsoever arising between the parties, arising but of touching or relating to supply/manufacture, measuring operation or effect of the Contract or the breach thereof shall be referred to Arbitration, in accordance with the following provisions:

(a) Matters to be arbitrated upon shall be referred to a sole Arbitrator where the total value of claims does not exceed Rs. 1.5 million. Beyond the claim limit of Rs. 1.5 million. Beyond the claim limit of Rs. 1.5 million, there shall be three Arbitrators. **For this purpose the Purchaser will make out a panel of engineers with the requisite qualifications and professional experience. This panel will be of serving or retired engineers “Government Departments or of Public Sector Undertakings;**

(b) For the disputes to be decided by a sole Arbitrator, a 'list of three engineers taken the aforesaid panel will be sent to the supplier by the Purchaser from which the supplier will choose one;

(c) For the disputes to be decided by three Arbitrators, the Purchaser will make out a list of five engineers from the aforesaid panel. The supplier and Purchaser shall choose one Arbitrator each, and the two so chosen shall choose the third Arbitrator from the said list, who shall act as the presiding Arbitrator;

(d) Neither party shall be limited in the proceedings before such Arbitrators(s) to the evidence or the arguments put before the Conciliator;

(e) The Conciliation and Arbitration hearings shall be held in Delhi only. The language of the proceedings that of the documents and communications shall be English and the awards shall be made in writing. The Arbitrators shall always give item-wise and reasoned awards in all cases where the total claim exceeds Rs. One million; and

(f) The award of the sole Arbitrator or the award by majority of three Arbitrators as the case may be and shall be binding on all parties.”

- 7) As per the aforesaid procedure, having regard to the quantum of claims and counter claims, three arbitrators are to constitute the arbitral tribunal. The agreement further provides that respondent would make out a panel of engineers with the requisite qualifications and professional experience, which panel will be of serving or retired engineers of government departments or public sector undertakings. From this panel, the respondent has to give a list of five engineers to the petitioner and both the petitioner and the respondent are required to choose one arbitrator each from the said list. The two arbitrators so chosen have to choose the third arbitrator from that very list, who shall act as the presiding arbitrator.
- 8) In the letter dated June 14, 2016, addressed by the petitioner to the respondent while invoking arbitration, the petitioner took the stand that appointment of the arbitral tribunal as per the aforesaid clause from a panel of five persons comprising of serving or retired engineers of government departments or public sector undertakings, if followed, would lead to appointment of 'ineligible persons' being appointed as arbitrators, in view of Section 12(5) of the Act read with Clause 1 of Seventh Schedule to the same Act. The petitioner, thus, nominated a retired judge of this Court as a sole arbitrator and requested the

respondent for its consent.

- 9) The respondent, vide its letter dated July 08, 2016, stuck to the procedure as prescribed for the arbitration clause and asked the petitioner to nominate an arbitrator from the panel of five persons which it forwarded to the petitioner. Thereafter vide letter dated July 19, 2016, the respondent appointed one person as its nominee arbitrator from the said list of five persons who is a retired officer from Indian Railway Service of Engineers (IRSE) and called upon the petitioner to appoint its nominee arbitrator from the remaining panel of four persons. At this juncture, on August 17, 2016 present petition under Section 11 of the Act was filed by the petitioner for constitution of the arbitral tribunal by this Court with the prayer that the arbitrator nominated by the petitioner (i.e. a former Judge of this Court) should be appointed as the sole arbitrator if the respondent consents to it or any impartial and independent sole arbitrator if appointment of the petitioner's nominee is objected to by the respondent. Alternate prayer is made for appointment of an independent and impartial arbitral tribunal comprising of three members under Section 11(6) read with Section 11(8) of the Act for adjudication of the disputes between the parties.
- 10) The respondents have contested the petition by filing its detailed reply, inter alia, taking upon the position that in view of the specific agreement

between the parties containing arbitration clause, which prescribes the manner in which arbitral tribunal is to be constituted, present petition under Section 11(6) of the Act is not even maintainable. The respondent maintains that arbitration agreement as per which arbitral tribunal is to be constituted from the panel prepared by the respondent does not offend provisions of Section 12 of the Act as maintained in the year 2015. It is submitted that the agreement valid, operative and capable of being performed and the arbitrators proposed by the respondent are not falling in the category of 'prohibited clause' as stipulated in under Section 12(5) of the Act read with clause 1 of the 7th Schedule thereto. As per the respondent, since the arbitration involves adjudication of technical aspects, the respondents have proposed the panel of retired engineers of the government having requisite expertise to arbitrate the sub-matter. They are neither serving nor past employees of the DMRC and have no direct or indirect relations with the DMRC. Therefore, they are capable of arbitrating the subject matter without compromising their independence and impartiality.

- 11) In support of the aforesaid plea taken in the petition, Mr. Gopal Jain, learned senior counsel appearing for the petitioner submitted that the entire ethos and spirit behind the amendment in Section 12 by Amendment Act, 2015 were to ensure that the arbitral tribunal consists of totally independent arbitrators and not those persons who are connected

with the other side, even remotely. He submitted that Respondent No. 1, i.e., DMRC was public sector undertaking which had all the trappings of the Government and, therefore, even those persons who were not in the employment of DMRC, but in the employment of Central Government or other Government body/public sector undertakings should not be permitted to act as arbitrators. He submitted that the very fact that the panel of the arbitrator consisted only of 'serving or retired engineers of Government departments or public sector undertaking' defied the neutrality aspect as they had direct or indirect nexus/privity with the respondent and the petitioner had reasonable apprehension of likelihood of bias on the part of such persons appointed as arbitrators, who were not likely to act in an independent and impartial manner.

- 12) Mr. Mukul Rohatgi, learned Attorney General justifying the stand taken by the respondent, with the aid of the provisions of the Act and the case law, also drew attention to a subsequent development. He pointed out that though in its earlier letter dated July 8, 2016 addressed by the respondent to the petitioner, a list of persons was given asking the petitioner to choose its arbitrator therefrom, the respondent has now forwarded to the petitioner the entire panel of arbitrator maintained by it. This fresh list contains as many as 31 names and, therefore, a wide choice is given to the petitioner to nominate its arbitrator therefrom. It was further pointed out that many panelists were the retired officers from

Indian Railways who retired from high positions and were also having high degree of technical qualifications and experience. The said list included five persons who were not from railways at all but were the ex-officers of the other bodies like, Delhi Development Authority (DDA) and Central Public Works Department (CPWD). No one was serving or ex-employee of the DMRC. He further submitted that merely because these person had served in railways or other government departments, would not impinge upon their impartiality.

- 13) From the stand taken by the respective parties and noted above, it becomes clear that the moot question is as to whether panel of arbitrators prepared by the respondent violates the amended provisions of Section 12 of the Act. Sub-section (1) and sub-section (5) of Section 12 as well as Seventh Schedule to the Act which are relevant for our purposes, may be reproduced below.

“Section 12(1), the following sub-section shall be substituted, namely:—

“(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to

complete the entire arbitration within a period of twelve months.

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.”;

(ii) after sub-section (4), the following sub-section shall be inserted, namely:—

“(5) 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 shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

THE SEVENTH SCHEDULE

Arbitrator’s relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

6. The arbitrator’s law firm had a previous but terminated

involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

11. The arbitrator is a legal representative of an entity that is a party in the arbitration.

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.

Arbitrator's direct or indirect interest in the dispute

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.—The term “close family member” refers to a spouse, sibling, child, parent or life partner.

Explanation 2.—The term “affiliate” encompasses all companies in one group of companies including the parent company.

Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.’.”

- 14) It is a well known fact that the Arbitration and Conciliation Act, 1996 was enacted to consolidate and amend the law relating to domestic arbitration, inter alia, commercial arbitration and enforcement of foreign arbitral awards etc. It is also an accepted position that while enacting the said Act, basic structure of UNCITRAL Model Law was kept in mind. This became necessary in the wake of globalization and the adoption of policy of liberalisation of Indian economy by the Government of India in the early 90s. This model law of UNCITRAL provides the framework in order to achieve, to the maximum possible extent, uniform approach to the international commercial arbitration. Aim is to achieve convergence in arbitration law and avoid conflicting or varying provisions in the

arbitration Acts enacted by various countries. Due to certain reasons, working of this Act witnessed some unpleasant developments and need was felt to smoothen out the rough edges encountered thereby. The Law Commission examined various shortcomings in the working of this Act and in its first Report, i.e, 176th Report made various suggestions for amending certain provisions of the Act. This exercise was again done by the Law Commission of India in its Report No. 246 in August, 2004 suggesting sweeping amendments touching upon various facets and acting upon most of these recommendations, Arbitration Amendment Act of 2015 was passed which came into effect from October 23, 2015.

- 15) Apart from other amendments, Section 12 was also amended and the amended provision has already been reproduced above. This amendment is also based on the recommendation of the Law Commission which specifically dealt with the issue of 'neutrality of arbitrators' and a discussion in this behalf is contained in paras 53 to 60 and we would like to reproduce the entire discussion hereinbelow:

“NEUTRALITY OF ARBITRATORS

53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. **In the context of arbitration, neutrality of arbitrators, viz. their independence and impartiality, is critical to the entire process.**

54. In the Act, the test for neutrality is set out in section 12(3) which provides – “An arbitrator may be challenged only if (a) circumstances exist that give rise

to justifiable doubts as to his independence or impartiality...”

55. The Act does not lay down any other conditions to identify the “circumstances” which give rise to “justifiable doubts”, and it is clear that there can be many such circumstances and situations. The test is not whether, given the circumstances, there is any actual bias for that is setting the bar too high; but, whether the circumstances in question give rise to any **justifiable apprehensions of bias**.

56. The limits of this provision has been tested in the Indian Supreme Court in the context of contracts with State entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court (See Executive Engineer, Irrigation Division, Puri v. Gangaram Chhapolia, 1984 (3) SCC 627; Secretary to Government Transport Department, Madras v. Munusamy Mudaliar, 1988 (Supp) SCC 651; International Authority of India v. K.D. Bali and Anr, 1988 (2) SCC 360; S. Rajan v. State of Kerala, 1992 (3) SCC 608; M/s. Indian Drugs & Pharmaceuticals v. M/s. Indo-Swiss Synthetics Germ Manufacturing Co.Ltd., 1996 (1) SCC 54; Union of India v. M.P. Gupta, (2004) 10 SCC 504; Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd., 2007 (5) SCC 304) that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in Indian Oil Corp. Ltd. v. Raja Transport (P) Ltd., 2009 8 SCC 520 carved out a minor exception in situations when the arbitrator “was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute”, and this exception was used by the Supreme Court in Denel Propreitory Ltd. v. Govt. of India, Ministry of Defence, AIR 2012 SC 817 and Bipromasz Bipron Trading SA v. Bharat Electronics Ltd., (2012) 6 SCC 384, to appoint an independent arbitrator under section 11, this is not enough.

57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from

satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the arbitral tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles – even if the same has been agreed prior to the disputes having arisen between the parties. **There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed.** The Commission hastens to add that Mr. PK Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. **In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous – and the right to natural justice cannot be said to have been waived only on the basis of a “prior” agreement between the parties at the time of the contract and before arising of the disputes.**

58. Large scale amendments have been suggested to address this fundamental issue of neutrality of arbitrators, which the Commission believes is critical to the functioning of the arbitration process in India. In particular, amendments have been proposed to sections 11, 12 and 14 of the Act.

59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. **The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a “guide” to determine whether circumstances exist which give**

rise to such justifiable doubts. On the other hand, in terms of the proposed section 12 (5) of the Act and the **Fifth Schedule which incorporates the categories from the Red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary.** In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed explanation to section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the Red and Orange lists of the IBA Guidelines), the ineligibility to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the Red list of the IBA Guidelines).

60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective “justifiable doubts” regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to section 12 (5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed section 12 (5) by an express agreement in writing. In all other cases, the general rule in the proposed section 12 (5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of section 12 (1) and in which context the High Court or the designate is to have “due regard” to the contents of such disclosure in appointing the arbitrator.

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- 16) We may put a note of clarification here. Though, the Law Commission discussed the aforesaid aspect under the heading “Neutrality of Arbitrators”, the focus of discussion was on impartiality and

independence of the arbitrators which has relation to or bias towards one of the parties. In the field of international arbitration, neutrality is generally related to the nationality of the arbitrator. In international sphere, the 'appearance of neutrality' is considered equally important, which means that an arbitrator is neutral if his nationality is different from that of the parties. However, that is not the aspect which is being considered and the term 'neutrality' used is relatable to impartiality and independence of the arbitrators, without any bias towards any of the parties. In fact, the term 'neutrality of arbitrators' is commonly used in this context as well.

- 17) 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.

- 18) We may mention here that there are number of judgments of this Court even prior to the amendment of Section 12 where courts have appointed the arbitrators, giving a go-by to the agreed arbitration clause in certain contingencies and situations, having regards to the provisions of unamended Section 11(8) of the Act which, inter alia, provided that while appointing the arbitrator, Chief Justice, or the person or the institution designated by him, shall have regard to the other conditions as are likely to secure the appointment of an independent and impartial arbitrator. See *Datar Switchgears Ltd. v. Tata Finance Ltd. & Anr.*¹, *Punj Lloyd Ltd. v. Petronet MHB Ltd.*², *Union of India v. Bharat Battery Manufacturing Co. (P) Ltd.*,³ *Deep Trading Co. v. Indian Oil Corporation*⁴, *Union of India v. Singh Builders Syndicate*⁵ and *Northern Eastern Railway v. Tripple Engineering Works*⁶. Taking note of the aforesaid judgments, this Court in *Union of India and others v. Uttar Pradesh State Bridge Corporation*

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(2008) 8 SCC 151

² (2006) 2 SCC 638

³ (2007) 7 SCC 684

⁴ (2013) 4 SCC 35

⁵ (2009) 4 SCC 523

⁶ (2014) 9 SCC 288

*Limited*⁷ summed up the position in the following manner:

13. No doubt, ordinarily that would be the position. The moot question, however, is as to whether such a course of action has to be necessarily adopted by the High Court in all cases, while dealing with an application under Section 11 of the Act or is there room for play in the joints and the High Court is not divested of exercising discretion under some circumstances? If yes, what are those circumstances? It is this very aspect which was specifically dealt with by this Court in *Tripple Engg. Works [North Eastern Railway v. Tripple Engg. Works, (2014) 9 SCC 288 : (2014) 5 SCC (Civ) 30]*. Taking note of various judgments, the Court pointed out that the notion that the High Court was bound to appoint the arbitrator as per the contract between the parties has seen a significant erosion in recent past. In paras 6 and 7 of the said decision, those judgments wherein departure from the aforesaid “classical notion” has been made are taken note of. It would, therefore, be useful to reproduce the said paragraph along with paras 8 and 9 hereinbelow: (SCC pp. 291-93)

“6. The ‘classical notion’ that the High Court while exercising its power under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter for short ‘the Act’) must appoint the arbitrator as per the contract between the parties saw a significant erosion in *ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd. [(2007) 5 SCC 304]*, wherein this Court had taken the view that though the contract between the parties must be adhered to, deviations therefrom in exceptional circumstances would be permissible. A more significant development had come in a decision that followed soon thereafter in *Union of India v. Bharat Battery Mfg. Co. (P) Ltd. [(2007) 7 SCC 684]* wherein following a three-Judge Bench decision in *Punj Lloyd Ltd. v. Petronet MHB Ltd. [Punj Lloyd Ltd. v. Petronet MHB Ltd., (2006) 2 SCC 638]*, it was held that once an aggrieved party files an application under Section 11(6) of the Act to the High Court, the opposite party would lose its right of appointment of the arbitrator(s) as per the terms of the contract. The implication that the Court would be free to deviate from the terms of the contract is obvious.

⁷ (2015) 2 SCC 52

7. The apparent dichotomy in *ACE Pipeline* [(2007) 5 SCC 304] and *Bharat Battery Mfg. Co. (P) Ltd.* [(2007) 7 SCC 684] was reconciled by a three-Judge Bench of this Court in *Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd.* [*Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd.*, (2008) 10 SCC 240] , wherein the jurisdiction of the High Court under Section 11(6) of the Act was sought to be emphasised by taking into account the expression 'to take the necessary measure' appearing in sub-section (6) of Section 11 and by further laying down that the said expression has to be read along with the requirement of sub-section (8) of Section 11 of the Act. The position was further clarified in *Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.* [(2009) 8 SCC 520 : (2009) 3 SCC (Civ) 460] Para 48 of the Report wherein the scope of Section 11 of the Act was summarised may be quoted by reproducing sub-paras (vi) and (vii) hereinbelow: (*Indian Oil case* [(2009) 8 SCC 520 : (2009) 3 SCC (Civ) 460] , SCC p. 537)

'48.(vi) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 *shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.*

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded, ignore the designated arbitrator and appoint someone else.'

8. The above discussion will not be complete without reference to the view of this Court expressed in *Union of India v. Singh Builders Syndicate* [*Union of India v. Singh Builders*

Syndicate, (2009) 4 SCC 523 : (2009) 2 SCC (Civ) 246] , wherein the appointment of a retired Judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that the arbitration proceedings had not concluded for over a decade making a mockery of the process. In fact, in para 25 of the Report in *Singh Builders Syndicate [Union of India v. Singh Builders Syndicate*, (2009) 4 SCC 523 : (2009) 2 SCC (Civ) 246] this Court had suggested that the Government, statutory authorities and government companies should consider phasing out arbitration clauses providing for appointment of serving officers and encourage professionalism in arbitration.

9. A pronouncement of late in *Deep Trading Co. v. Indian Oil Corpn.* [(2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449] followed the legal position laid down in *Punj Lloyd Ltd. [Punj Lloyd Ltd. v. Petronet MHB Ltd., (2006) 2 SCC 638]* which in turn had followed a two-Judge Bench decision in *Datar Switchgears Ltd. v. Tata Finance Ltd.* [(2000) 8 SCC 151] The theory of forfeiture of the rights of a party under the agreement to appoint its arbitrator once the proceedings under Section 11(6) of the Act had commenced came to be even more formally embedded in *Deep Trading Co.* [(2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449] subject, of course, to the provisions of Section 11(8), which provision in any event, had been held in *Northern Railway Admn. [Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd., (2008) 10 SCC 240]* not to be mandatory, but only embodying a requirement of keeping the same in view at the time of exercise of jurisdiction under Section 11(6) of the Act.”

(emphasis in original)

14. Speedy conclusion of arbitration proceedings hardly needs to be emphasised. It would be of some interest to note that in England also, Modern Arbitration Law on the lines of UNCITRAL Model Law, came to be enacted in the same year as the Indian law which is known as the English Arbitration Act, 1996 and it became effective from 31-1-1997. It is treated as the most extensive statutory

reform of the English arbitration law. Commenting upon the structure of this Act, Mustill and Boyd in their *Commercial Arbitration*, 2001 companion volume to the 2nd Edn., have commented that this Act is founded on four pillars. These pillars are described as:

- (a) The first pillar: Three general principles.
- (b) The second pillar: The general duty of the Tribunal.
- (c) The third pillar: The general duty of the parties.
- (d) The fourth pillar: Mandatory and semi -mandatory provisions.

Insofar as the first pillar is concerned, it contains three general principles on which the entire edifice of the said Act is structured. These principles are mentioned by an English Court in its judgment in *Deptt. of Economics, Policy and Development of the City of Moscow v. Bankers Trust Co.* [2005 QB 207 : (2004) 3 WLR 533 : (2004) 4 All ER 746 : 2004 EWCA Civ 314] In that case, Mance, L.J. succinctly summed up the objective of this Act in the following words: (QB p. 228, para 31)

“31. ... Parliament has set out, in the Arbitration Act, 1996, to encourage and facilitate a reformed and more independent, as well as private and confidential, system of consensual dispute resolution, with only limited possibilities of court involvement where necessary in the interests of the public and of basic fairness.”

Section 1 of the Act sets forth the three main principles of arbitration law viz. (i) speedy, inexpensive and fair trial by an impartial tribunal; (ii) party autonomy; and (iii) minimum court intervention. This provision has to be applied purposively. In case of doubt as to the meaning of any provision of this Act, regard should be had to these principles.

15. In the book *O.P. Malhotra on the Law and Practice of Arbitration and Conciliation* (3rd Edn. revised by Ms Indu Malhotra), it is rightly observed that the Indian Arbitration Act is also based on the aforesaid four foundational pillars.

16. First and paramount principle of the first pillar is “fair, speedy and inexpensive trial by an Arbitral Tribunal”. Unnecessary delay or expense would frustrate the very purpose of arbitration. Interestingly, the second principle which is recognised in the Act is the party autonomy in the choice of procedure. This means that if a particular procedure is prescribed in the arbitration agreement which the parties have agreed to, that has to be generally resorted to. It is because of this reason, as a normal practice, the court will insist the parties to adhere to the procedure to which they have agreed upon. This would apply even while making the appointment of substitute arbitrator and the general rule is that such an appointment of a substitute arbitrator should also be done in accordance with the provisions of the original agreement applicable to the appointment of the arbitrator at the initial stage. [See *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd.* [(2006) 6 SCC 204] However, this principle of party autonomy in the choice of procedure has been deviated from in those cases where one of the parties have committed default by not acting in accordance with the procedure prescribed. Many such instances where this course of action is taken and the Court appoint the arbitrator when the persona designata has failed to act, are taken note of in paras 6 and 7 of *Tripple Engg. Works [North Eastern Railway v. Tripple Engg. Works, (2014) 9 SCC 288 : (2014) 5 SCC (Civ) 30]* . We are conscious of the fact that these were the cases where appointment of the independent arbitrator made by the Court in exercise of powers under Section 11 of account of “default procedure”. We are, in the present case, concerned with the constitution of substitute Arbitral Tribunal where earlier Arbitral Tribunal has failed to perform. However, the above principle of default procedure is extended by this Court in such cases as well as is clear from the judgment in *Singh Builders Syndicate [Union of India v. Singh Builders Syndicate, (2009) 4 SCC 523 : (2009) 2 SCC (Civ) 246]*.

17. In the case of contracts between government corporations/State-owned companies with private parties/contractors, the terms of the agreement are usually drawn by the government company or public sector undertakings. Government contracts have broadly two kinds of arbitration clauses, first where a named officer is to act as sole arbitrator; and second, where a senior officer like a Managing Director, nominates a designated officer to act as the sole arbitrator. No doubt, such clauses which

give the Government a dominant position to constitute the Arbitral Tribunal are held to be valid. At the same time, it also casts an onerous and responsible duty upon the persona designata to appoint such persons/officers as the arbitrators who are not only able to function independently and impartially, but are in a position to devote adequate time in conducting the arbitration. If the Government has nominated those officers as arbitrators who are not able to devote time to the arbitration proceedings or become incapable of acting as arbitrators because of frequent transfers, etc., then the principle of "default procedure" at least in the cases where Government has assumed the role of appointment of arbitrators to itself, has to be applied in the case of substitute arbitrators as well and the Court will step in to appoint the arbitrator by keeping aside the procedure which is agreed to between the parties. However, it will depend upon the facts of a particular case as to whether such a course of action should be taken or not. What we emphasise is that Court is not powerless in this regard."

- 19) Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the

parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in *Jivraj v. Hashwani*⁸ in the following words:

“the dominant purpose of appointing an arbitrator is the impartial resolution of dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.”

- 20) Similarly, Cour de cassation, France, in a judgment delivered in 1972 in the case of *Consorts Ury*⁹, underlined that “an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator.”
- 21) Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset

⁸ (2011) UKSC 40,

⁹ FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 575 (Emmanuel Gaillard & John Savage eds., 1999) (quoting Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Apr. 13, 1972, JCP 1972, II, 17189 (Fr.)).

of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings.

- 22) It also cannot be denied that the Seventh Schedule is based on IBA guidelines which are clearly regarded as a representation of international based practices and are based on statutes, case law and juristic opinion from a cross-section on jurisdiction. It is so mentioned in the guidelines itself.
- 23) Keeping in view the aforesaid parameters, we advert to the facts of this case. Various contingencies mentioned in the Seventh Schedule render a person ineligible to act as an arbitrator. Entry no. 1 is highlighted by the learned counsel for the petitioner which provides that where the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with the party, would not act as an arbitrator. What was argued by the learned senior counsel for the petitioner was that the panel of arbitrators drawn by the respondent consists of those persons who are government employees or ex-government employees. However, that by itself may not make such persons ineligible as the panel indicates that these are the persons who have worked in the railways under the Central Government or Central Public Works Department or public sector undertakings. They cannot be

treated as employee or consultant or advisor of the respondent – DMRC. If this contention of the petitioner is accepted, then no person who had earlier worked in any capacity with the Central Government or other autonomous or public sector undertakings, would be eligible to act as an arbitrator even when he is not even remotely connected with the party in question, like DMRC in this case. The amended provision puts an embargo on a person to act as an arbitrator, who is the employee of the party to the dispute. It also deprives a person to act as an arbitrator if he had been the consultant or the advisor or had any past or present business relationship with DMRC. No such case is made out by the petitioner.

- 24) Section 12 has been amended with the objective to induce neutrality of arbitrators, viz., their independence and impartiality. The amended provision is enacted to identify the 'circumstances' which give rise to 'justifiable doubts' about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, Seventh Schedule mentions those circumstances which would attract the provisions of sub-section (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an

employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empaneled by the respondent are not covered by any of the items in the said list.

- 25) 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 empaneling 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.

- 26) As already noted above, DMRC has now forwarded the list of all 31 persons on its panel thereby giving a very wide choice to the petitioner to nominate its arbitrator. They are not the employees or ex-employees or in any way related to the DMRC. In any case, the persons who are ultimately picked up as arbitrators will have to disclose their interest in terms of amended provisions of Section 12 of the Act. We, therefore, do not find it to be a fit case for exercising our jurisdiction to appoint and constitute the arbitral tribunal.
- 27) 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 empaneled, 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) Some comments are also needed on the clause 9.2(a) of the GCC/SCC, as per which the DMRC prepares the panel of 'serving or retired engineers of government departments or public sector undertakings'. It is not understood as to why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is

imperative that panel should be broad based. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy etc. Therefore, it would also be appropriate to include persons from this field as well.

- 29) Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in Government contracts, where one of the parties to dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by the DMRC. It, therefore, becomes imperative to have a much broad based panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the

stage of constitution of the arbitral tribunal. We, therefore, direct that DMRC shall prepare a broad based panel on the aforesaid lines, within a period of two months from today.

30) Subject to the above, insofar as present petition is concerned, we dismiss the same, giving two weeks' time to the petitioner to nominate its arbitrator from the list of 31 arbitrators given by the respondent to the petitioner.

No costs.

.....J.
(A.K. SIKRI)

.....J.
(R.K. AGRAWAL)

**NEW DELHI;
FEBRUARY 10, 2017.**

ITEM NO.1B
(FOR JUDGMENT)

COURT NO.8

SECTION XVIA

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Arbitration Case (Civil) No(s). 50/2016

M/S VOESTALPINE SCHIENEN GMBH

Petitioner(s)

VERSUS

DELHI METRO RAIL CORPORATION LTD

Respondent(s)

Date : 10/02/2017 This petition was called on for pronouncement of judgment today.

For Petitioner(s) Mr. Gopal Jain, Sr. Adv.
Ms. Vanita Bhargava, Adv.
Mr. Ajay Bhargava, Adv.
Mr. Jeevan B. Panda, Adv.
Ms. Kudarat Dev, Adv.
For M/s. Khaitan & Co.

For Respondent(s) Mr. Mukul Rohtagi, AG
Ms. Shashi Kiran, Adv.
Mr. Abhiuday Chandra, Adv.

Hon'ble Mr. Justice A.K. Sikri pronounced the judgment of the Bench comprising His Lordship and Hon'ble Mr. Justice R.K. Agrawal.

The petition is dismissed in terms of the signed reportable judgment.

Pending application(s), if any, stands disposed of accordingly.

(Ashwani Thakur)
COURT MASTER

(Mala Kumari Sharma)
COURT MASTER

(Signed reportable judgment is placed on the file)

