

Central Organisation For Railway ... vs M/S Eci Spic Smo Mcml (Jv) A Joint Venture ... on 17 December, 2019

Equivalent citations: AIRONLINE 2019 SC 1904, (2020) 1 ARBILR 19 (2020) 1 SCALE 134, (2020) 1 SCALE 134

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Bench: Hrishikesh Roy, A.S. Bopanna, R. Banumathi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 9486-9487 OF 2019
(Arising out of SLP(C) Nos.24173-74 of 2019)

CENTRAL ORGANISATION FOR
RAILWAY ELECTRIFICATION

...Appell

VERSUS

M/S ECI-SPIC-SMO-MCML (JV)
A JOINT VENTURE COMPANY

...Respondent

JUDGMENT

R. BANUMATHI, J.

Leave granted.

2. These appeals have been preferred against the impugned orders dated 03.01.2019 and 29.03.2019 passed by the High Court of Judicature at Allahabad in Arbitration Application No.151 of 2018 in and by which the High Court rejected the contention of the appellant that the arbitrator is to be appointed as per General Conditions 64 (3)(a)(ii) and 64 (3)(b) of the Contract and appointed Shri Justice Rajesh Dayal Khare as the sole arbitrator for resolving the dispute between the parties.

3. The appellant awarded work contract of Rs.165,67,98,570/- to the respondent-Company by an agreement dated 20.09.2010 which contains the arbitration clause. Subsequently, after coming into force of Arbitration and Conciliation (Amendment) Act, 2015 (w.e.f. 23.10.2015), the Government of India, Ministry of Railways made a modification to Clause 64 of the General Conditions of Contract and issued a notification dated 16.11.2016 for implementation of modification. The modified Clause 64(3)(a)(ii) (where applicability of Section 12(5) has been waived off) inter alia provided that in

cases where the total value of all claims exceeds Rs. 1 crore, the Arbitral Tribunal shall consist of a panel of three gazetted Railway Officers not below JA (Junior Administrative) Grade or two Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of Senior Administrative (SA) Grade officer as arbitrators. The procedure for constitution of the Arbitral Tribunal is provided thereon. Clause 64(3)(b) deals with the appointment of arbitrator where applicability of Section 12(5) of the Arbitration and Conciliation Act has not been waived off. Clause 64(3)(b) stipulates that the Arbitral Tribunal shall consist of a panel of three retired railway officers not below the rank of Senior Administrative Officer as the arbitrators as per the procedure indicated thereon.

4. Since the respondent did not complete the work under the contract within the prescribed period, on 18.10.2017, the appellant issued “Seven days” notice under Clause 62 of the General Conditions of Contract to the respondent. Thereafter on 27.10.2017, the appellant issued a “48 hours’ notice” to the respondent calling upon the respondent to make good the progress of work, failing which the contract will stand terminated. Since the respondent did not make adequate progress in the work, on 01.11.2017, the contract was terminated as per Clause 62 of the General Conditions of the Contract. The respondent was also informed that their security deposit has been forfeited and the performance guarantee submitted by it shall also be encashed.

5. The respondent filed a Petition No.760 of 2017 before the High Court challenging the termination of the contract which came to be dismissed by the High Court vide order dated 28.11.2017 and the High Court directed the respondent to avail the alternative remedy by invoking arbitration clause. The respondent vide its letter dated 27.07.2018 requested the appellant for appointment of an Arbitral Tribunal for resolving the disputes between the parties and settle the claims value of Rs.73.35 crores. In reply dated 24.09.2018, the appellant sent a list of four serving Railway Electrification Officers of JA Grade to act as arbitrators. The respondent was asked to select any two and communicate to the appellant for formation of the arbitration tribunal panel. Vide letter dated 25.10.2018, the respondent was sent a list of another panel comprising four retired Railway officers. In terms of Clause 63(3)(b) of Railway’s General Conditions of Contract, the respondent was asked to select any two from this list and communicate them to the appellant within thirty days for constitution of the arbitration tribunal.

6. The respondent did not send a reply to the above letters of the appellant; but filed Arbitration Petition No. 151 of 2018 before High Court under Section 11(6) of the Arbitration and Conciliation Act seeking appointment of a sole arbitrator for resolution of differences. In its petition, the respondent suggested the name of one Shri Ashwani Kumar Kapoor, retired member Electrical from Railway Board to be appointed as an arbitrator in the matter. According to the respondent, there exists a valid and binding arbitration clause between the parties being clause 1.2.54 of Part I of Chapter 2 and also 64 of the General Conditions of Contract; but since no neutral arbitrator is contemplated to be appointed in the General Conditions of Contract, the respondent has no other recourse except by filing the petition under Section 11(6) of the Arbitration and Conciliation Act, 1996.

7. The High Court vide the impugned order dated 03.01.2019 rejected the argument of the appellant that the arbitrator ought to be appointed only from the panel of arbitrators in terms of General Conditions of Contract. The High Court observed that the powers of the Court to appoint arbitrator are independent of the contract between the parties and no fetters could be attached to the powers of the court. With those findings, the High Court appointed Shri Rajesh Dayal Khare, a retired judge of the Allahabad High Court as the sole arbitrator subject to his consent, under Section 11(8) of the Arbitration and Conciliation Act. Subsequently, vide order dated 29.03.2019, the High Court noted the consent of the arbitrator appointed by the court and directed the Arbitrator to proceed with the arbitration proceedings. Being aggrieved, the appellant has preferred these appeals.

8. Mr. A.N.S. Nadkarni, learned Additional Solicitor General (ASG) appearing for the appellant submitted that in terms of Clause 64(3)(a)(ii) of the General Conditions of Contract (where applicability of Section 12(5) of the Amended Act has been waived off), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below Junior Administrative Grade or two Railway Gazetted Officers not below Junior Administrative Grade and a retired Railway Officer retired not below the rank of Senior Administrative Grade Officer as the arbitrators. It was submitted that as per Clause 64(3)(b) of the General Conditions of Contract (where applicability of Section 12(5) of the Act has not been waived off), the Arbitral Tribunal shall consist of a panel of three retired Railway Officers retired not below the rank of Senior Administrative Grade Officers as the arbitrators after compliance of the procedure stipulated in Clause 64(3)(b). It was contended that when the agreement and the General Conditions of Contract provided for appointment of Arbitral Tribunal consisting of three arbitrators from the Panel, the High Court erred in appointing the sole arbitrator outside the panel of the arbitrators. The learned ASG further submitted that the appointment of an independent arbitrator is in contravention of Clauses 64(3)(a)(i), 64(3)(a)(ii) and 64(3)(b) of the General Conditions of Contract and the impugned judgment appointing a former Judge of the High Court of Allahabad is not sustainable. In support of the contention, the learned ASG inter alia placed reliance upon *Union of India v. Parmar Construction Company* (2019) SCC Online SC 442 and *Union of India v. Pradeep Vinod Construction Company* (2019) SCC Online SC 1467 and other judgments.

9. Refuting the above contention, Mr. Sridhar Potaraju, learned counsel appearing for the respondent submitted that the Arbitration and Conciliation Act, 1996 was amended with effect from 23.10.2015 and in the present case, the demand for arbitration for resolution of disputes was made by the respondent on 27.07.2018 and hence, the provisions of the amended Act applies to the present case. It was submitted that by virtue of the provisions of Section 12(5) read with Schedule VII to the Arbitration and Conciliation Act, 1996, the panel of arbitrators proposed by the appellant vide letter dated 24.09.2018 were statutorily made ineligible to be appointed as arbitrators since they were either serving or retired employees of the appellant. It was contended that as per the provisions of the Amendment Act, 2015, all employees present or past are statutorily made ineligible for appointment as arbitrators. The learned counsel further submitted that when the General Manager himself being ineligible to be appointed as an arbitrator under Section 12(5) read with Schedule VII of the Act, the General Manager cannot nominate any of the persons to be arbitrator. The learned counsel for the respondent inter alia placed reliance upon *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Limited* (2017) 4 SCC 665, *TRF Limited v. Energo*

Engineering Projects Limited (2017) 8 SCC 377 and number of other judgments which would be referred to at the appropriate place.

10. We have carefully considered the submissions and perused the impugned judgment and materials on record. The point falling for consideration is whether the High Court was right in appointing an independent arbitrator in contravention of the Clauses 64(3)(a)(ii) and 64(3)(b) of the General Conditions of Contract. Appointment of an independent arbitrator without reference to the Clauses of General Conditions of Contract (GCC) – Whether correct?

11. Learned counsel for the respondent submitted that being serving employees of the appellant, the panel of arbitrators proposed by the appellant vide letter dated 24.09.2018 were not eligible to be appointed as arbitrators in view of provisions of Section 12(5) read with Schedule VII of the Arbitration and Conciliation Act. Learned counsel further submitted that the panel of arbitrators proposed by the appellant vide letter dated 25.10.2018 comprising of retired employees of the appellant were also not eligible to be appointed as arbitrators under Section 12(5) read with Schedule VII of the Act as the employees of the appellant are expressly made ineligible.

12. In support of the above contention, learned counsel for the respondent has placed reliance upon Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Limited (2017) 4 SCC 665 wherein, the Supreme Court held as under:-

“24.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.....”.

13. On behalf of the respondent, reliance was also placed upon Bharat Broadband Network Limited v. United Telecoms Limited (2019) 5 SCC 755 wherein, the Supreme Court held as under:-

“15. Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be “ineligible” to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an “express agreement in writing”. Obviously, the “express agreement in writing” has reference to a person who is

interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.”

14. Per contra, on behalf of the appellant, Mr. A.N.S. Nadkarni, learned ASG has submitted that the appointment of arbitrator is governed as per Clauses 64(3)(a)(i) and 64(3)(a)(ii) of the General Conditions of Contract (GCC) where applicability of Section 12(5) of the Arbitration and Conciliation Act has been waived off and the Arbitral Tribunal shall consist of a panel of three serving Railway Officers or two serving officers and one retired officer. Learned ASG submitted that Clause 64(3)(b) of GCC deals with appointment of arbitrator where applicability of Section 12(5) of the Act has not been waived off. It was further submitted that Clause 64(3)(b) of GCC stipulates that the Arbitral Tribunal shall consist of a panel of three retired railway officers not below the rank of Senior Administrative Officer and the Arbitral Tribunal to be constituted as per the procedure indicated thereon. Placing reliance upon *Union of India v. Parmar Construction Company* (2019) SCC Online SC 442 and *Union of India v. Pradeep Vinod Construction Company* (2019) SCC Online SC 1467, learned ASG has submitted that when the agreement specifically provides for appointment of panel of arbitrators, the appointment should be in terms of the agreement and the appointment of independent sole arbitrator is in contravention of the General Conditions of Contract which govern the parties for appointment of arbitrators.

15. Clause 64 of the General Conditions of Contract deals with the procedure for resolution of the disputes and provides for “Demand for arbitration” and appointment of the arbitrators. Clause 64 of the General Conditions of Contract (GCC) reads as under:-

“64. (1): Demand for Arbitration:

64. (1) (i) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the "excepted matters" referred to in Clause 63 of these Conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.

64. (1) (ii) (a) The demand for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item-wise. Only such dispute or difference, in respect of which the demand has been made, together with counter claims or set off, given by the Railway, shall be referred to arbitration and other matters shall not be included in the reference.

64. (1) (ii) (b) The parties may waive of the applicability of sub-section 12(5) of Arbitration and Conciliation (Amendment) Act, 2015. If they agree or such waiver in

writing after having arisen between them in the formation under Annexure XII of these conditions.”

16. After coming into force of Arbitration and Conciliation (Amendment) Act, 2015, the Government of India, Ministry of Railways made a modification to Clause 64 of the General Conditions of Contract and the Railway Board issued a notification dated 16.11.2016 in this regard. The modified Clause 64(3)(a)(i) (where applicability of Section 12(5) of the Act has been waived off) inter alia provided that in case where the total value of all claims in question added together does not exceed rupees one crore, the arbitral tribunal shall consist of a sole arbitrator who shall be a Gazetted Officer of Railways not below JA Grade nominated by the General Manager. In terms of Clause 64(3)(a)(i), the sole arbitrator shall be appointed within sixty days from the day when a written and valid demand for arbitration is received by the General Manager. In the present case, since the value of the work contract is worth more than Rs.165 crores, Clause 64(3)(a)(i) is not applicable.

17. Clause 64(3)(a)(ii) of GCC deals with cases not covered by Clause 64(3)(a)(i) where applicability of Section 12(5) of the Act has been waived off. Clause 64(3)(a)(ii) of General Conditions of Contract reads as under:-

“64. (3) Appointment of Arbitrator:

.....

64. (3) (a) (ii) In case not covered by the Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a Panel of three Gazette Railway Officers not below JA Grade or two Railway Gazette Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG officer, as the arbitrators. For this purpose, the railway will send a panel of at least four (4) names of Gazette Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM.....”.

18. Clause 64(3)(b) of GCC deals with appointment of arbitrator where applicability of Section 12(5) of the Act has not been waived off. The modified Clause 64(3)(b) inter alia provided that the arbitral tribunal shall consist of a panel of three retired railway officers not below the rank of SAO officer as arbitrator. For this purpose, the Railway will send a panel of at least four names of retired railway officer(s) empanelled. The contractor will be asked to suggest to the General Manager at least two names out of the panel for appointment as the contractor’s nominee and the General Manager shall appoint at least one out of them as the contractor’s nominee.

The General Manager will also simultaneously appoint the balance number of arbitrators from the panel or from outside the panel. The modified Clause 64(3)(b) of the General Conditions of Contract reads as under:-

“64. (3)(b) Appointment of Arbitrator where applicability of Section 12(5) of A&C Act has not been waived off.

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

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

19. After coming into force of the Arbitration and Conciliation (Amendment) Act, 2015, when Clause 64 of the General Conditions of Contract has been modified inter alia providing for constitution of Arbitral Tribunal consisting of three arbitrators either serving or retired railway officers, the High Court is not justified in appointing an independent sole arbitrator without resorting to the procedure for appointment of the arbitrator as prescribed under Clause 64(3)(b) of the General Conditions of Contract.

20. It is pertinent to note that even in the application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, the respondent prayed for appointment of a sole arbitrator in terms of Clause 1.2.54(b)(i) of the Tender Agreement/Clause 64 of the General Conditions of Contract for adjudicating the disputes which have arisen between the parties. In the petition filed under Section 11(6) of the Act, the respondent prayed for appointment of one Shri Ashwani Kumar Kapoor to act as the arbitrator. Thus, the respondent itself sought for appointment of arbitrator in terms of Clause 64 of the General Conditions of Contract. The appointment of Shri Ashwani Kumar Kapoor as arbitrator, of course, was not agreeable to the appellant, since it was found that said Shri Ashwani Kumar Kapoor was not in the panel of arbitrators and therefore, could not be considered for appointment as arbitrator. As the value of

the work contract was worth more than Rs.165 crores, the dispute can be resolved only by a panel of three arbitrators in terms of Clause 64(3)(b) of the General Conditions of Contract. The respondent was not right in seeking for appointment of a sole arbitrator in terms of Clause 1.2.54(b)(i) of the Tender Agreement/Clause 64 of the General Conditions of Contract.

21. Considering the various matters of railway contracts and interference with the appointment of independent arbitrators, after referring to Union of India and Another v. M.P. Gupta (2004) 10 SCC 504 and Union of India and Another v. V.S. Engineering (P) Ltd.

(2006) 13 SCC 240 and other judgments, in Union of India v. Parmar Construction Company (2019) SCC Online SC 442, the Supreme Court set aside the appointment of an independent arbitrator and directed the General Manager of Railways to appoint arbitrator in terms of Clause 64(3) of the agreement. In Para (44) of Parmar Construction Company, the Supreme Court held as under:-

“44. To conclude, in our considered view, the High Court was not justified in appointing an independent arbitrator without resorting to the procedure for appointment of an arbitrator which has been prescribed under clause 64(3) of the contract under the inbuilt mechanism as agreed by the parties.”

22. Applying ratio of the Parmar Construction Company, in Pradeep Vinod Construction Company (2019) SCC Online SC 1467, the Supreme Court held that the appointment of arbitrator should be in terms of the agreement and the High Court was not right in appointing an independent arbitrator ignoring Clause 64 of the General Conditions of Contract. As held in Parmar Construction Company and Pradeep Vinod Construction Company, the High Court was not justified in appointing an independent arbitrator without resorting to the procedure for appointment of the arbitrators which has been prescribed under the General Conditions of Contract.

RE: Contention:- Retired Railway Officers are not eligible to be appointed as arbitrators under Section 12(5) read with Schedule VII of the Act and were statutorily made ineligible to be appointed as an arbitrator.

23. Vide letter dated 27.07.2018, the respondent made a request for appointment of arbitrator/constitution of Arbitral Tribunal. In response to the same, the appellant sent a letter dated 24.09.2018 nominating the names of four serving railway officers and the respondent was asked to select any two names from the list of the four railway officers and communicate to the appellant. It is seen from the record that the respondent vide their letter dated 26.09.2018 expressed their disagreement in waiving off the applicability of Section 12(5) of the Amendment Act, 2015. Referring to its own earlier letter dated 24.09.2018 and letter of the respondent dated 26.09.2018, the appellant had sent a communication dated 25.10.2018 nominating the panel of four retired railway officers to act as arbitrators and requesting the respondent to select any two names

from the list in terms of Clause 64(3)(b) of GCC and communicate to the appellant within thirty days from the date of the letter for formation of Arbitration Tribunal. According to the appellant, the respondent failed to select any of the nominee from the panel within the stipulated time of thirty days. The respondent neither responded to the appellant's letter dated 25.10.2018 nor suggested the names of two arbitrators from the panel sent by the appellant. Instead the respondent approached the High Court under Section 11(6) of the Act for appointment of an independent sole arbitrator by filing a petition on 17.12.2018.

24. The contention of the learned counsel for the respondent is that the panel of arbitrators proposed by the appellant vide letter dated 25.10.2018 comprising of retired employees of the appellant are not eligible to be appointed as arbitrators under Section 12(5) read with Schedule VII of the Act. Further contention of the learned counsel for the respondent is that the panel of arbitrators drawn by the appellant consist of those persons who were railway employees or Ex-railway employees and therefore, they are statutorily made ineligible to be appointed as arbitrators.

25. Contending that the appointment of retired employees as arbitrators cannot be assailed merely because an arbitrator is a retired employee of one of the parties, learned ASG has placed reliance upon *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Limited* (2017) 4 SCC 665. After referring to various judgments and also the scope of amended provision of Section 12 of the Amendment Act, 2015 and the entries in the Seventh Schedule, the Supreme Court observed that merely because the panel of arbitrators drawn by the respondent-Delhi Metro Rail Corporation are the Government employees or Ex-Government employees, that by itself may not make such persons ineligible to act as arbitrators of the respondent-DMRC. It was observed that the persons who have worked in the Railways under the Central Government or the Central Public Works Department or Public Sector Undertakings cannot be treated as employee or consultant or advisor of the respondent-DMRC. In para (26) of *Voestalpine Schienen GmbH*, the Supreme Court held as under:-

“26. It cannot be said that simply because the person is a retired officer who retired from the government or other statutory corporation or public sector undertaking and had no connection with DMRC (the 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.” [Underlining added]

26. The same view was reiterated in *Government of Haryana PWD Haryana (B and R) Branch v. G.F. Toll Road Private Limited and Others* (2019) 3 SCC 505 wherein, the Supreme Court held that the appointment of a retired employee of a party to the agreement cannot be assailed on the ground that he is a retired/former employee of one of the parties to the agreement. Absolutely, there is no bar under Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015 for appointment of a retired employee to act as an arbitrator.

27. By the letter dated 25.10.2018, the appellant has forwarded a list of four retired railway officers on its panel thereby giving a wide choice to the respondent to suggest any two names to be nominated as arbitrators out of which, one will be nominated as the arbitrator representing the respondent-Contractor. As held in *Voestalpine Schienen GmbH* (2017) 4 SCC 665, the very reason for empanelling the retired railway officers is to ensure that the technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators. Merely because the panel of the arbitrators are the retired employees who have worked in the Railways, it does not make them ineligible to act as the arbitrators.

RE: Contention:- Failure to act in terms of the Contract in not responding within thirty days from the date of the request.

28. Learned counsel for the respondent has submitted that vide letter dated 27.07.2018, the respondent requested for referring the dispute to arbitration but, no steps were taken by the appellant within thirty days from the date of request dated 27.07.2018. It was submitted that on 17.12.2018, respondent filed application under Section 11(6) of the Act before the High Court for appointment of a sole arbitrator, by which time, no steps were taken by the appellant under the Contract, except sending two lists of persons by letters dated 24.09.2018 and 25.10.2018 who were de jure ineligible to be appointed as the arbitrators. In this regard, reliance was placed upon *Punj Lloyd Ltd. v. Petronet MHB Ltd.* (2006) 2 SCC 638. Considering the applicability of Section 11(6) of the Act, in *Punj Lloyd Ltd.*, the Supreme Court held as under:-

“5. Having heard the learned counsel for the parties, we are satisfied that the appeal deserves to be allowed. The learned counsel for the appellant has placed reliance on the law laid down by this Court in the case of *Datar Switchgears Ltd. v. Tata Finance Ltd.* (2000) 8 SCC 151, wherein this Court has held as under:

“[S]o far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases.” As held in *Punj Lloyd*

Ltd., if the opposite party has not made any application for appointment of the arbitrator within thirty days of demand, the right to make appointment is not forfeited but continues; but the appointment has to be made before the former files application under Section 11 of the Act seeking appointment of an arbitrator. Only then the right of the opposite party ceases.

29. In *Union of India v. Bharat Battery Manufacturing Co. (P) Ltd.* (2007) 7 SCC 684, on 30.03.2006, the respondent thereon filed petition under Section 11(6) seeking appointment of an arbitrator. Union of India-the appellant thereon appointed Dr. Gita Rawat on 15.05.2006 as a sole arbitrator in terms of Clause 24 of the agreement. In such facts and circumstances of the case, considering the decision in *Punj Lloyd Ltd.*, the Supreme Court held that “once a party files an application under Section 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. The right to appoint arbitrator under the clause of agreement ceases after Section 11(6) petition has been filed by the other party before the Court seeking appointment of an arbitrator.....”.

30. As discussed earlier, as per the modified Clause 64(3)(b) of GCC, when a written and valid demand for arbitration is received by the General Manager, the Railway will send a panel of at least four names of retired railway officers empanelled to work as arbitrators. The contractor will be asked to suggest to the General Manager at least two names out of the panel for appointment as contractor’s nominee within thirty days from the date of dispatch of the request by the Railway. Vide letter dated 27.07.2018, the respondent has sought for appointment of an arbitrator for resolving the disputes. The appellant by its letter dated 24.09.2018 (which is well within the period of sixty days) in terms of Clause 64(3)(a)(ii) (where applicability of Section 12(5) of the Act has been waived off) sent a panel of four serving railway officers of JA Grade to act as arbitrators and requested the respondent to select any two from the list and communicate to the office at the earliest for formation of Arbitration Tribunal. By the letter dated 26.09.2018, the respondent conveyed their disagreement in waiving the applicability of Section 12(5) of the Amendment Act, 2015. By the letter dated 25.10.2018, in terms of Clause 64(3)(b) of GCC (where applicability of Section 12(5) has not been waived off) the appellant has nominated a panel of four retired railway officers to act as arbitrators and requested the respondent to select any two from the list and communicate to the appellant within thirty days from the date of the letter for formation of Arbitration Tribunal. The respondent has neither sent its reply nor selected two names from the list and replied to the appellant. Without responding to the appellant, the respondent has filed petition under Section 11(6) of the Arbitration and Conciliation Act before the High Court on 17.12.2018. When the respondent has not sent any reply to the communication dated 25.10.2018, the respondent is not justified in contending that the appointment of Arbitral Tribunal has not been made before filing of the application under Section 11 of the Act and that the right of the appellant to constitute Arbitral Tribunal is extinguished on filing of the application under Section 11(6) of the Act.

RE: Contention:- General Manager himself becoming ineligible by operation of law to be appointed as arbitrator, is not eligible to nominate the arbitrator.

31. Stand of the learned counsel for the respondent is that by virtue of Section 12(5) read with Schedule VII of the Act, General Manager himself is made ineligible to be appointed as an arbitrator and hence, he cannot nominate any other person to be an arbitrator. The essence of the submission is “that which cannot be done directly, may not be done indirectly”. In support of his contention, the learned counsel for the respondent placed reliance upon TRF Limited v. Energo Engineering Projects Limited (2017) 8 SCC 377 wherein the Supreme Court held as under:-

“54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.”

32. In TRF Limited, though the court observed that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator, in para (50), the Court has discussed about another situation where both the parties could nominate respective arbitrators of their choice and that it would get counter-balanced by equal power with the other party. In para (50) of TRF Limited, the Supreme court held as under:-

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

33. Considering the decision in TRF Limited, in Perkins Eastman Architects DPC and another v. HSCC (India) Limited (2019) SCC Online SC 1517, the Supreme Court observed that there are two categories of cases. The first, similar to the one dealt with in TRF Limited where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself; but is authorized to appoint any other person of his choice or discretion as an arbitrator. Observing

that if in the first category, the Managing Director was found incompetent similar invalidity will always arise even in the second category of cases, in para (20) in Perkins Eastman, the Supreme Court held as under:-

“20.If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator.”

34. After referring to para (50) of the decision in TRF Limited, in Perkins Eastman, the Supreme Court referred to a different situation where both parties have the advantage of nominating an arbitrator of their choice and observed that the advantage of one party in appointing an arbitrator would get counter-balanced by equal power with the other party. In para (21), it was held as under:-

“21.The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party.....”

35. As discussed earlier, after Arbitration and Conciliation (Amendment) Act, 2015, the Railway Board vide notification dated 16.11.2016 has amended and notified Clause 64 of the General Conditions of Contract. As per Clause 64(3)(a)(ii) [where applicability of Section 12(5) of the Act has been waived off], in a case not covered by Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below the rank of Junior Administrative Grade or two Railway Gazetted Officers not below the rank of Junior Administrative Grade and a retired Railway Officer retired not below the rank of Senior Administrative Grade Officer, as the arbitrators. For this purpose, the General Manager, Railway will send a panel of at least four names of Gazetted Railway Officers of one or more departments of the Railway within sixty days from the date when a written and valid demand for arbitration is received by the General Manager. The contractor will be asked to suggest to General Manager at least two names out of the panel for appointment as contractor's nominees within thirty days from the date of dispatch of the request from the Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will also simultaneously appoint balance number of arbitrators from the panel or from outside the panel duly

indicating the “Presiding Officer” from amongst the three arbitrators so appointed. The General Manager shall complete the exercise of appointing the Arbitral Tribunal within thirty days from the date of the receipt of the names of contractor’s nominees.

36. Clause 64(3)(b) of GCC deals with appointment of arbitrator where applicability of Section 12(5) of the Act has not been waived off. In terms of Clause 64(3)(b) of GCC, the Arbitral Tribunal shall consist of a panel of three retired Railway Officers retired not below the rank of Senior Administrative Grade Officers as the arbitrators. For this purpose, the Railway will send a panel of at least four names of retired Railway Officers empanelled to work as arbitrators indicating their retirement date to the contractor within sixty days from the date when a written and valid demand for arbitration is received by the General Manager. The contractor will be asked to suggest the General Manager at least two names out of the panel for appointment of contractor’s nominees within thirty days from the date of dispatch of the request of the Railway. The General Manager shall appoint at least one out of them as the contractor’s nominee and will simultaneously appoint the remaining arbitrators from the panel or from outside the panel, duly indicating the “Presiding Officer” from amongst the three arbitrators. The exercise of appointing Arbitral Tribunal shall be completed within thirty days from the receipt of names of contractor’s nominees. Thus, the right of the General Manager in formation of Arbitral Tribunal is counter- balanced by respondent’s power to choose any two from out of the four names and the General Manager shall appoint at least one out of them as the contractor’s nominee.

37. In the present matter, after the respondent had sent the letter dated 27.07.2018 calling upon the appellant to constitute Arbitral Tribunal, the appellant sent the communication dated 24.09.2018 nominating the panel of serving officers of Junior Administrative Grade to act as arbitrators and asked the respondent to select any two from the list and communicate to the office of the General Manager. By the letter dated 26.09.2018, the respondent conveyed their disagreement in waiving the applicability of Section 12(5) of the Amendment Act, 2015. In response to the respondent’s letter dated 26.09.2018, the appellant has sent a panel of four retired Railway Officers to act as arbitrators giving the details of those retired officers and requesting the respondent to select any two from the list and communicate to the office of the General Manager. Since the respondent has been given the power to select two names from out of the four names of the panel, the power of the appellant nominating its arbitrator gets counter-balanced by the power of choice given to the respondent. Thus, the power of the General Manager to nominate the arbitrator is counter-balanced by the power of the respondent to select any of the two nominees from out of the four names suggested from the panel of the retired officers. In view of the modified Clauses 64(3)(a)(ii) and 64(3)(b) of GCC, it cannot therefore be said that the General Manager has become ineligible to act as the arbitrator. We do not find any merit in the contrary contention of the respondent. The decision in TRF Limited is not applicable to the present case.

38. There is an express provision in the modified clauses of General Conditions of Contract, as per Clauses 64(3)(a)(ii) and 64(3)(b), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers [Clause 64(3)(a)(ii)] and three retired Railway Officers retired not below the rank of Senior Administrative Grade Officers [Clause 64(3)(b)]. When the agreement specifically provides for appointment of Arbitral Tribunal consisting of three arbitrators from out of the panel serving or

retired Railway Officers, the appointment of the arbitrators should be in terms of the agreement as agreed by the parties. That being the conditions in the agreement between the parties and the General Conditions of the Contract, the High Court was not justified in appointing an independent sole arbitrator ignoring Clauses 64(3)(a)(ii) and 64(3)

(b) of the General Conditions of Contract and the impugned orders cannot be sustained.

39. In the result, the impugned orders dated 03.01.2019 and 29.03.2019 passed by the High Court of Judicature at Allahabad in Arbitration Application No.151 of 2018 are set aside and these appeals are allowed. The appellant is directed to send a fresh panel of four retired officers in terms of Clause 64(3)(b) of the General Conditions of Contract within a period of thirty days from today under intimation to the respondent-contractor. The respondent- contractor shall select two from the four suggested names and communicate to the appellant within thirty days from the date of receipt of the names of the nominees. Upon receipt of the communication from the respondent, the appellant shall constitute the Arbitral Tribunal in terms of Clause 64(3)(b) of the General Conditions of Contract within thirty days from the date of the receipt of the communication from the respondent. Parties to bear their respective costs.

.....J. [R. BANUMATHI]J. [A.S. BOPANNA]J.
[HRISHIKESH ROY] New Delhi;

December 17, 2019.