

Primatel Fibcom Ltd vs Railtel Corporation Of India Limited, on 14 March, 2024

Author: Dinesh Kumar Sharma

Bench: Dinesh Kumar Sharma

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IN THE HIGH COURT OF DELHI AT NEW DELHI
ARB.P. 364/2024, I.A. 5945/2024
PRIMATEL FIBCOM LTD.

RAILTEL CORPORATION OF INDIA LIMITED, ..
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CORAM:
HON'BLE MR. JUSTICE DINESH KUMAR SHARMA
OR

% 14.03.2024

1. By way of the present petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as the „A&C Act), the petitioner seeks appointment of an Arbitral Tribunal comprising of a Sole Arbitrator to adjudicate the disputes between the parties.

2. The briefcase of the petitioner is that M/s. RajCOMP Info Services Limited (hereinafter „RSIL), had issued a Request For Proposal („RFP) for the supply, installation and maintenance of RF Links and outdoor Wi-Fi Access Points across Rajasthan under the Raj Net Project, which included the supply, installation, commissioning of the equipments as specified in BOQ1 and Facility Management Services through the deployment of requisite manpower for a period of five This is a digitally signed order.

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3. The respondent invited Expression of Interest (EOI) from empanelled firms for selection as a System Integrator and Implementation Partner for the aforesaid Raj NET Wi-Fi Project. In terms of the said EOI, the Petitioner submitted its expression of interest along with requisite documents.

4. The petitioner has submitted that in terms of the request of the respondent, the petitioner submitted its quotation for the work only under BOQ1 of the RajNet Wi-Fi Project, which pertains to supply, installation and commissioning of equipment as specified in BOQ 1.
5. Subsequent thereto, the bid was submitted by Railtel for the Raj Net Wi-Fi Project and being the L1, the work under the project was awarded to Respondent. The respondent out of the work awarded to the Railtel by RISL, the respondent awarded part of the work to the petitioner pertaining to BOQ1 and issued the Work Order dated 17.11.2017 and Purchase Order dated 12.12.2017.
6. Subsequently, a Definitive Agreement dated 27.02.2018 was executed between the parties which contains the arbitration clause. The petitioner has further submitted that in terms of the said Work/Purchase Order and Definitive Agreement and in compliance thereof, the petitioner supplied the equipments in requisite quantities to the respondent, to its complete satisfaction.
7. The inspection was duly carried out by the respondent which had also been certified by the third-party auditors appointed by RSIL, namely, Engineers India Ltd.
8. The petitioner had also submitted a Warranty Certificate(s) issued by This is a digitally signed order.

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9. The petitioner submitted that immediately after the supply of equipments, the work of installation was commenced and carried out and installation has been completed for around 90% of the sites. However, despite the fact that commissioning has been carried out UATs (User Acceptance Test) and Go-live certificates have not been issued for all the sites which have been commissioned/Go-live.
10. The petitioner has submitted that in between, the Third Party Auditor (TPA) appointed by RISL i.e. Engineers India Limited (EIL), disassociated itself from the project around August, 2019 and since then no new Third Party Auditor (TPA) has been appointed and/or intimated to the Petitioner.
11. The petitioner has submitted that though it has taken all requisite steps for carrying out the work in the remaining sites also and fulfilled its obligations without delay and default, however, there were and are several issues and failures at the end of Respondent which was brought to the notice of Respondent from time to time. However, the same remained unresponded and unaddressed despite repeated requests and reminders by the petitioner.
12. The petitioner has submitted that obligation of the Respondent to deploy personnel/field engineers at the Go Live BTS sites and commence Facility Management Services (FMS), immediately upon the site being commissioned and being made Go Live, however, till October, 2022

Facility Management Services (FMS) was not commenced by the Respondent and the requisite personnel/field This is a digitally signed order.

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13. The petitioner upon supply of equipments along with requisite documents and certificates had raised invoices in terms of the World Purchase Order. In total 108 invoices have been raised for an amount of Rs. 67,29,83,221/- (Rupees Sixty Seven Crore Twenty Nine Lakhs Eighty Three Thousand Two Hundred Twenty One Only), which have been duly accepted and acknowledged by the Respondent.

14. The petitioner also deposited the GST of Rs. 10,26,58,457/- (Rupees Ten Crore Twenty Lakhs Fifty Eight Thousand Four Hundred Fifty Seven Only) with the GST Department, the benefit/credit of the same has duly been availed by the respondent.

15. The petitioner has submitted that out of the invoice amount of Rs.

67,29,83,221/- (Rupees Sixty Seven Crore Twenty Nine Lakhs Eighty Three Thousand Two Hundred Twenty-One Only), the petitioner has received only Rs.42,12,52,435/- (Rupees Forty-Two Crore Twelve Laksh Fifty-Two Thousand Four Hundred Thirty-Five Only) between 20.03.2018 to 07.11.2019 and the balance principal amount has not been paid, despite lapse of substantial period of time and repeated request.

16. The petitioner has submitted that it has not received even the 60% of the due and payable towards the supply of the equipments. It has further been submitted that the nature amount on account of installation This is a digitally signed order.

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17. Learned counsel for the petitioner submits that the parties had entered into a Definitive Agreement (agreement) dated 27.02.2018. Learned counsel also submits that in terms of Clause-18.2, the efforts were made for an amicable settlement. A notice in this regard was issued dated 16.08.2022 which was responded by the respondent vide an email dated 24.08.2022 the meeting was arranged on 27.08.2022 which was attended by the senior officials of parties, wherein several issues were discussed including the issue of outstanding payment due and payable to the petitioner.

18. Learned counsel submitted that the respondent assured that it shall be commencing FMS and deploying requisite field engineer/personnel and shall be issuing fresh Go Live certificates and shall be releasing payments. It has further been submitted that in terms of an email dated 29.08.2022 of the respondent the petitioner without prejudice and without any obligation, vide its letter dated 08.09.2022, shared the proposed cluster-wise plan along with the proposed date of start of Maintenance Support Services as requested by the respondent.

19. Learned counsel submits that the petitioner had duly issued the notice for resolution of the matter vide its notice. However, despite the expiry of period of thirty days, the respondent failed to make any payment towards the long outstanding dues and had failed to resolve the issues.

20. It has been submitted that the petitioner thereafter issued a notice for invoking arbitration dated 26.09.2022 in terms of Clause 18 of the Definitive Agreement dated 27.02.2018 for appointment of a Sole arbitrator. However, no reply to the said notice was received on behalf This is a digitally signed order.

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21. Learned counsel submits that though on the one hand, the respondent showed keenness to resolve the dispute amicably. However, a letter dated 15.10.2022 directed the petitioner for return the uninstalled material which was available with it for installation and threatened that in case said material is not returned immediately, legal proceedings of a criminal nature shall be initiated against the petitioner.

22. The letter dated 15.10.2022 of the respondent was responded by the petitioner vide letter dated 21.10.2022, whereby the petitioner conveyed its readiness and willingness to handover the material to Respondent and enquired from them that (i) whether Railtel will re- issue the uninstalled material to petitioner for installation and commissioning of 757 New AP sites (ii) whether Railtel will re-issue the equipment to Petitioner for remaining sites for installation and commissioning.

23. However, no response was received. A meeting was again held on 25.10.2022, whereby the respondent represented that they want to resolve the issue and assured to make payments of the long outstanding dues. On the same day, an email was received from the Respondent stating that there is a scope for resolution of issues by joint efforts of both the parties and further requested not to immediately act upon the arbitration notice and keep the same in abeyance till 60 days.

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24. Learned counsel submits that the petitioner relying upon the same did not take any steps. Learned counsel submits that without prejudice to the fact that the sites were commissioned and Go-Live for which certificates have also been issued and though it was not obligatory upon the petitioner to re-activate/re-commission the sites. However, on the request of the respondent, the petitioner by incurring further substantial expenses attempted re-activation/re-commission of all 20 BTS sites for which cluster-wise plan was submitted on 08.09.2022.

25. Learned counsel submits that out of the said 20 sites, 12 BTS sites were re-activated/re-commissioned along with connected APs/CPE, the remaining 8 BTS sites could not be re-activated/re-commissioned despite the efforts/attempts of the petitioner due to non-availability of bandwidth/power on the said sites, which was the obligation of the Respondent.

26. Learned counsel submits that in terms of the directions of the respondent and the wrongful threat of criminal proceedings, the petitioner started the process of handing over of the uninstalled material and handed over the same vide letters dated 13.03.2023, 30.03.2023 and 08.05.2023 to the respondent.

27. Learned counsel submits that the petitioner had followed up with the respondent for the release of the aforesaid outstanding dues and several meetings have taken place between the parties. However, the respondent despite repeated assurances failed to release the amount.

28. The petitioner again issued an email dated 15.01.2024 calling upon the respondent to make the payment of the long outstanding dues. The petitioner informed that it was left with no other option and is This is a digitally signed order.

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29. Learned counsel for the petitioner submits that in terms of Clause 18.2 the parties have already made all efforts for the amicable settlement of the dispute. However, the dispute could not be settled. Learned counsel has further submitted that in the judgment of the Supreme Court in Perkins Eastman Architects DPC & Anr. v. HSCC (India) Limited 2019 SCC OnLine SC 1517, the unilateral appointment of the Sole Arbitrator is not permissible.

30. Issue notice.

31. Mr. Naman Tandon, learned counsel for the respondent has accepted the notice.

32. Learned counsel for the respondent has fairly submitted that the respondent has no objection to the appointment of an Arbitrator. However, learned counsel submits that the respondents have constituted a panel of 23 persons which includes 4 persons from legal backgrounds.

33. Learned counsel submits that an Arbitrator may be appointed out of the list of 23 Arbitrators.

34. The list handed over by the learned counsel for the respondent is as follows:

Name of the Educational Qualification Address of the Arbitrator Arbitrator This is a digitally signed order.

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110021.

Shri Harsh
Kumar

B.Sc, M.Sc,, PGD
PGD(Information
Technology in Bu

Shri ABL
Srivastava

B. Com, M. Com,
Chartered
Accountant, MBF

Shri
Mahesh
Kumar
Shri Mahesh
Mangal

Gupta B.E. (Civil), LLb

M.Tech

Shri Vijay
Nand Sharma
Shri B P Khare BE/Civil

MA, LLB

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400706 Shri Rakesh M.sc Civil Engineering 2094/Joy Apartments Sector Goyal
(Hons) 2 Dwarka New Delhi-

110055 Shri Ajay Post Graduate Pol. Science, DDA, HIG, Block 3A/101, Kumar Lal
Certificate in French, IFRS, Motiakhan, New Delhi-

LLB 2nd Year.

Shri Rakesh
Kumar Mittal

Bachelor of Engi
(Electronics and
from
Delhi College of
B.E (Electrical)

Shri Lokesh
Narayan

Shri Ajay
Vijayvargiya

BE (EC), M TECH

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by scanning the QR code shown above. The Order is downloaded from the DHC
Server on 20/03/2024 at 20:48:56 Shri Akhil Bachelor of Engineering K-122,
Gulshan Viavante, Agarwal (Electronics and Comm) Sector 137 Noida 201304 From
IIT Roorkee, M TECH from IIT Kanpur, PG Diploma in IPR from NLSU Bangalore,
LLB from DU.

Shri Pramod
Kumar
Sangewar

B.E(Civil), MBA

Shri Anand
Prakash

B.E(Civil), MBA

Shri Mahesh
Kumar Mittal

M. Com, CS, Cost
Management Accou
Masters of Finan
Management
B tech

Shri Din Dayal
Singh

Shri Pradeep
Kumar

BE
(E&C),ME(Communi

Shri Alok

Systems), MBA
BE(Civil), ME (

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The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 20/03/2024 at 20:48:56 Kansal 2, Gurugram- 122002 Shri Anoop MA (ECONOMICS) W-2002. Amrapali sapphire, Kumar Prasad sector 45, Noida, Gautam buddh Nagar, up-201303 Shri Anil B sc. (Hons), BE, 329B Road No. 4A, Ashok Kumar Dutta Chartered Electrical Nagar, Ranchi- 834002 Engineer (LOND), fellow IET (London), FIE(India) Shri K. BA (Hons.), MA, Diploma B3/134 Rail Vihar Housing Vinayaka Rao in Management, Diploma in Society , Bijli Nagar, Marketing Management Chinchwad, Pune, Maharashtra- 411033

35. Learned counsel for the respondent submits that this matter is of a technical nature therefore it would be in the fitness of the case if an Arbitrator may be appointed out of the list. Learned counsel for the respondent has also submitted that none of the empanelled arbitrators are/were the employees of the respondent.

36. Learned counsel for the petitioner has objected to the same and has submitted that the proposed list is not broad-based and an independent Arbitrator is required to be appointed.

37. The appointment of a Sole Arbitrator has come up for discussion before the Hon ble Supreme Court and before this court in various cases. As far as the unilateral appointment of an arbitrator is concerned, the Hon ble Supreme Court in Perkins Eastman Architects DPC & Anr. v.

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The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 20/03/2024 at 20:48:56 HSCC (India) Limited 2019 SCC OnLine SC 1517 inter alia held as under:

"This application under Section 11(6) read with Section 11(12)(a) of the Arbitration and Conciliation Act, 1996 ("the Act") and under the Appointment of Arbitrators by the Chief Justice of India Scheme, 1996 ("the Scheme") prays for the following principal relief:

(a) appoint a sole arbitrator, in accordance with Clause 24 of the contract dated 22-5-2017 executed between the parties and the sole arbitrator so appointed may adjudicate the disputes and differences between the parties arising from the said contract."

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21. But, in our view that has to be the logical deduction from TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 :

(2017) 4 SCC (Civ) 72] Para 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter- balanced by equal power with the other party. But, in a case where only one party has a right to appoint a This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 20/03/2024 at 20:48:56 sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and recognised by the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]"

38. Similarly in TRF Ltd. V. Energo Engineering Projects Ltd. (2017) 8 SCC 377 also the Hon ble Supreme Court has inter alia 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."

39. The Co-ordinate Bench of this Court in Margo Networks Pvt Ltd & Anr. Vs. RailTel Corporation of India Ltd Arb.P. 637/2023 after This is a digitally signed order.

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"20. Two fundamental issues which fall for consideration in this case and which were not specifically answered in CORE, are as under:-

i. When appointment of arbitrator/s is to be made out of a panel prepared by one of the parties, whether the said panel is required to be "broad-based", in conformity with the principle laid down in Voestalpine (supra), and if so, what is the consequence where the panel is not sufficiently "broad based" ?

ii. Whether "counter balancing" [as contemplated in Perkins (supra)] is achieved in a situation where one of the parties has a right to choose an arbitrator from a panel whereas the remaining (2 out of 3) members of the arbitral tribunal are appointed by the other party?

21. The Supreme Court in Voestalpine (supra), considers in detail, an arbitration agreement which contemplates that one of the parties thereto shall provide a panel to the other side for the purpose of appointment of arbitrator(s).

22. The appointment procedure that fell for consideration in Voestalpine (supra) was noted therein as under :

"..... 8. 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 This is a digitally signed order.

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list, who shall act as the presiding arbitrator."

23. In the context of the above procedure, Voestalpine (supra) proceeds to hold that bias or even real likelihood of bias cannot be attributed to persons of the panel simply on the ground that they were retired government or PSU employees. The Supreme Court further notes in Voestalpine that during the course of proceedings in that case, DMRC had forwarded a list of all 31 persons on its panel to the petitioner therein for the purpose of nomination by the petitioner of its nominee arbitrator, thereby giving a very wide choice to the petitioner. However, with regard to the stipulation in the concerned arbitration agreement in terms of which a list of 5 engineers from the panel was to be given to the petitioner from which the petitioner was obliged to nominate its arbitrator, the Supreme Court held as under:

".....

28. Before we part with, we deem it necessary to make certain comments on the procedure contained in the arbitration agreement for constituting the Arbitral Tribunal. Even when there are a number of persons empanelled, discretion is with 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, 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 DMRC. Secondly, with the discretion given to DMRC to choose five persons, a room for suspicion is created in the mind of the other side that DMRC This is a digitally signed order.

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24. The Supreme Court in Voestalpine (supra) also proceeded to observe as under:- ".....

29. Some comments are also needed on Clause 9.2(a) of GCC/SCC, as per which 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.

30. 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, This is a digitally signed order.

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25. Thus, it was held by the Supreme Court in Voestalpine (supra) that:

- i. Affording a panel of five names to the petitioner from which the petitioner was required to nominate its nominee arbitrator, was restrictive in nature; the same created room for suspicion that DMRC may have picked up its own favourite;
- ii. Choice should be given to the concerned party to nominate any person from the entire panel of arbitrators;
- iii. The two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator;
- iv. The panel ought not to be restricted/limited to retired engineers and/or retired employees but should be broad based and apart from serving or retired employees of government departments and public sector undertakings, the panel should include lawyers, judges, engineers of prominence from the private sector etc.

26. CORE does not in any manner overrule Voestalpine (supra) or narrow down the scope thereof, although it does not deal specifically with the issue as to whether the panel afforded by the Railways in that case was in conformance with the principles laid down in Voestalpine (supra).

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27. The difficulties which were found to have inflicted the panel afforded to the petitioner in Voest Alpine (supra) also squarely apply to the present case.

28. In the present case, the respondent has shared a panel of ten arbitrators with the petitioner, all being ex-employees of the Railways/RailTel. Apart from the ex-employees of the railways, no other person has been included in the panel. Such a panel is clearly restrictive and is manifestly not "broadbased" and therefore, impinges upon the validity of the appointment procedure prescribed in clause 3.37 of the RFP.

29. The principle laid down in Voest Alpine (supra) has been followed in a large number of cases to adjudge upon validity of appointment procedure involving appointment from a panel. Thus, In SMS Ltd. Vs Rail Vikas Nigam Limited, out a panel of 37 names, only eight names had no connection with the Railways. It was held that even though the panel comprised as many as 37 names, it was not sufficiently broadbased. In that case, a previous judgement in the case of Simplex Infrastructures Ltd. Vs. Rail Vikas Nigam Limited was also taken note of, in which a panel of 26 names (out of which only 9 were unconnected with the Railways) was held to be not sufficiently broad based inasmuch as the same did not comprise independent persons such as judges, lawyers, engineers of prominence from the private sector etc. The said judgements were relied upon in the case of Overnite Express Limited Vs. Delhi Metro Rail Corporation, this court went to the extent of holding that "the procedure of forwarding a panel of five names to the other contracting party to choose its nominee Arbitrator is now held to be no longer a valid procedure."

40. Similarly in Shri Ganesh Engineering Works v. Northern Railway and Anr 2023 SCC OnlineDel 7574, It was inter alia held as under;

"24. The aforementioned judgments of this Court, as rightly contended by the learned counsel for the Petitioner squarely apply This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 20/03/2024 at 20:48:56 to the present case and this Court is not persuaded to take a different view. The choice given to the Petitioner is from a panel of four Retired Railway officials, out of whom Petitioner has to choose two, is a „restricted choice and cannot be countenanced in law, being in contravention of the party autonomy principle. In Voest Alpine (supra), an identical situation had arisen where there was a stipulation in the concerned arbitration agreement whereby a list of five engineers from the panel was to be given to the Petitioner and he was obliged to nominate its Arbitrator from amongst those five. The Supreme Court condemned the procedure and observed that it had two adverse consequences. In the first place,

the choice given was limited and there was no free choice to nominate from outside the entire panel prepared by DMRC and secondly, with the discretion given to DMRC to choose five persons, room for suspicion was created in the mind of the other side that DMRC may have picked up its own favourites. Therefore, according to the Supreme Court, the purpose of independent appointment would not be served if the Petitioner was given choice to nominate any person from the panel. The Supreme Court further observed that it is imperative to have a broad-based panel so that there is no misapprehension that principle of impartiality and independence has been discarded at any stage of the Constitution of the Arbitral Tribunal. Applying these observations, the choice to the Petitioner to choose two amongst a panel of four Arbitrators cannot be termed as an effective counter balancing and would amount to giving a restricted choice in terms of the judgment in Voestalpine (supra), compromising on impartiality and independence of the appointed Arbitral Tribunal. The procedure envisaging appointment of 2/3rd strength of the Arbitral Tribunal by the Respondents, to my mind, tilts the scale in favour of the Respondents and is directly hit by the judgments in Perkins (supra), TRF Limited (supra) and Voestalpine (supra). Therefore, it is incumbent that this Court appoints an independent This is a digitally signed order.

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41. This court also in Kalyan Toll Infrastructure Ltd. v. Union of India & Ors. in ARB. P. 1243/2023 has the opportunity to deal with the issue and has inter alia held as under:

"24. While examining the aforesaid clause, it was inter alia held that bias or even real likelihood of bias cannot be attributed to persons of the panel simply on the ground that they were retired government or PSU employees. The apex court also noted in Voestalpine (supra) that during the course of proceedings in that case, DMRC had forwarded a list of all 31 persons on its panel to the petitioner therein for the purpose of nomination by the petitioner of its nominee arbitrator, thereby giving a very wide choice to the petitioner. It is pertinent to mention here that in the present case though in the reply the respondent had stated that the sole arbitrator can only be appointed out of empanelled 21 arbitrators, however, in their written submission the choice was restricted to three arbitrators. It is also relevant to note that in Voestalpine (supra) the clause provided that the respondent shall give a list of 5 engineers to the petitioner and both the petitioner and respondent were required to choose one arbitrator each from the said list and then two arbitrators shall appoint the presiding arbitrator. Even this procedure did not find favour with the Supreme Court and it was inter alia held that 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 and there is no free choice

to nominate a person out of the entire panel prepared by DMRC. It was further inter alia held that secondly, with the discretion given to DMRC to choose five persons, room for suspicion is created in the mind of the other side that DMRC may This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 20/03/2024 at 20:48:56 have picked up its own favourites and such a situation has to be countenanced. The Supreme Court further in Voestalpine (supra) inter alia stated that the panel should be broad-based and such panel apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from the private sector should also be included. It was further stated that likewise panel should comprise persons with legal backgrounds like Judges and lawyers of repute as it is not necessary that all disputes that arise, would be of a technical nature. The apex court stated that it is therefore imperative to have a broad-based panel, so that there is no misapprehension that the principle of impartiality and independence would be discarded at any stage of the proceedings, especially at the stage of the constitution of the Arbitral Tribunal. In SMS Ltd. vs. Rail Vikas Nigam Limited (2020) SCC Online Del 77 it was held that out of a panel of 37 names, only eight names had no connection with the Railways and though the panel comprised as many as 37 names, it was not sufficiently broad-based. Similarly, the reliance was placed on Simplex Infrastructures Ltd. Vs. Rail Vikas Nigam Limited 2018 SCC Online Del 13122. Also, the coordinate bench of this court in BVS-R-KVR (Joint Ventures) Vs. Rail Vikas Nigam Ltd. 2020 SCC OnLine Del 456 has held that the panel should satisfy the concept of neutrality of arbitrators.

It is relevant to mention here that the courts have not disapproved of the procedure of preparing a panel of arbitrators for appointing the arbitrators to adjudicate the dispute between the parties. The rule of caution is that a party must have an independent/free choice for nominating its arbitrator from the panel. The coordinate bench of this court in L&T Hydrocarbon Engineering Limited Vs. Indian Oil Corporation Limited 2022/DHC/004531 wherein also a panel of three arbitrators was given, it was inter alia held as under:

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The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 20/03/2024 at 20:48:56 "..... 96. In the present case, the stipulation requires forwarding three names (even if they are retired employees from other organizations and not IOCL) to the petitioners, for it to choose one name amongst them to act as the Sole Arbitrator. It cannot be overlooked that the list of three names is a restrictive panel limiting the choice of the petitioner to only three options. I have

noted that the three persons named in the panel forwarded to the petitioner are retired officers of different organisations like ONGC, SAIL and GAIL. The integrity and impartiality of these officers could not be normally doubted. However, in the absence of a free choice given to the petitioner to choose the arbitrator from a broad and diversified panel, and the power conferred upon the respondent to forward any three names as the panel at its discretion, there is a possibility of apprehension arising on part of the petitioner about the impartiality of the persons in the panel so forwarded. Whether such an apprehension is justified or not, is not for this Court to decide, and is, in any case, immaterial. It is settled law that even an apprehension of bias of an arbitrator in the minds of the parties would defeat the purpose of arbitration, and such a situation must be avoided. Therefore I declare that the procedure for appointment of the arbitrator (if any) shall necessarily be in terms of the observations of the Supreme Court in Voest Alpine Schienen GmbH (supra). 98. It is directed that in view of my conclusion in paragraph 80, the General Manager concerned shall consider the claims of the petitioner and take a decision whether they are to be notified or not, within eight weeks from today. Thereafter, the parties shall proceed in accordance with law....."

27. In Margo Networks Pvt Ltd (supra) after taking into account several judgments, it was inter alia held as under:

35. Thus, in an appointment procedure involving appointment from a panel made by one of the contracting parties, it is This is a digitally signed order.

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I consider that the panel of arbitrators as offered by the respondent in the present case is highly restrictive in nature. It is neither broad-based nor is there any "counter-balancing". It is also pertinent to mention that entire panel of MOD is consisting of senior retired officers. There is no person from the legal background. In the circumstances, panel is restrictive and not broad-based. In such cases, the jurisdiction of the court to appoint a sole arbitrator cannot be taken.

42. The court considers that the panel proposed by the respondent is not "broad based". I consider that this issue need not be discussed by this court any further and there is no reason to differ from the settled preposition of law as laid down by the coordinate benches of this court.

43. Considering that both the parties have consented to the reference to the arbitral tribunal, the present petition is disposed of with the following directions:

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i) The disputes between the parties under the said agreement are referred to the arbitral tribunal.

ii) Mr. Siddharth Sharma, Advocate (Mobile No. 7400111111), email Id: Siddharthsharma047@gmail.com is appointed as an arbitrator under the aegis of DIAC to adjudicate the disputes between the parties.

iii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi hereinafter, referred to as the „DIAC). The remuneration of the learned Arbitrator shall be in terms of fee rules of the DIAC Schedule or as the parties may agree.

iv) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.

v) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.

vi) The parties shall approach the learned arbitrator within two weeks from today.

44. The present petition along with pending application stands disposed of.

DINESH KUMAR SHARMA, J MARCH 14, 2024/AR/AK This is a digitally signed order.

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