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

% **Date of Decision: 07.10.2024**

+ **ARB.P. 1493/2024**

(6) **JHAJHARIA NIRMAN LTD.**Petitioner
Through: Mr. Ashish Dholakia, Sr. Adv.
alongwith Mr. Rakesh Kumar, Ms.
Preeti Kashyap, Mr. Ankit Sharma,
Mr. Varun Pandit, Mr. Yash Dhaway
and Mr. Yash Tiwari, Advocates.

versus

SOUTH WESTERN RAILWAYS
THROUGH DY. CHIEF ENGINEER/IV CONSTRUCTION
.....Respondent
Through: Mr. Anurag Ahluwalia, CGSC
alongwith Mr. Tarveen Singh Nanda,
GP.

+ **O.M.P.(I) (COMM.) 280/2024, I.A. 37645/2024, I.A. 40582/2024**
I.A. 41040/2024

(7) **JHAJHARIA NIRMAN LTD.**Petitioner
Through: Mr. Ashish Dholakia, Sr. Adv.
alongwith Mr. Rakesh Kumar, Ms.
Preeti Kashyap, Mr. Ankit Sharma,
Mr. Varun Pandit, Mr. Yash Dhaway
and Mr. Yash Tiwari, Advocates.

versus

UNION OF INDIA THROUGH
MINISTRY OF RAILWAYS & ANR.Respondents
Through: Mr. Anurag Ahluwalia, CGSC
alongwith Mr. Tarveen Singh Nanda,
GP.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

SACHIN DATTA, J. (Oral)



ARB.P. 1493/2024

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as *the A&C Act*) seeks the appointment of a sole arbitrator to adjudicate the disputes between the parties.
2. The disputes between the parties have arisen in the context of a Contract awarded by the respondent to the petitioner for laying down the railway line of 39.906 km from Penukonda to Dharmavaram (Andhra Pradesh), including telecommunication and electrical works. A Request for Proposal (RFP) for the said work was issued on 26.08.2022, pursuant to which the petitioner participated in the tender process and emerged as the lowest bidder.
3. Consequently, a letter of acceptance dated 19.01.2023 was issued in favour of the petitioner, followed by a Contract Agreement dated 05.05.2023.
4. The completion period under the aforesaid Contract was 608 days and four milestones were prescribed under the Contract.
5. The petitioner submitted numerous bank guarantees to the respondent in terms of the relevant Contract conditions. It has been submitted that in terms of the Contract, the respondent was to provide technical drawings/ documents/ land with respect to the execution of the work. However, the respondent was at default in this regard, and in providing timely site clearance to the petitioner. Resultantly, delays were occasioned.
6. It is also the case of the petitioner that numerous clauses of the



Contract were violated/ breached by the respondent and the requisite time extensions were also not provided in a timely manner.

7. The disputes/differences between the parties aggravated when the respondent allegedly sought to impose penalty on the petitioner and also withheld significant amounts from the RA Bills raised by the petitioner on the respondent.

8. The Contract between the parties contains a dispute resolution clause which reads as under:-

“ARTICLE 24

DISPUTE RESOLUTION

24.1 Conciliation of Disputes

24.1.1 All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the Contractor to the "Authority" through "Notice of Dispute" provided that no such notice shall be served later than 30 days after the date of issue of Completion Certificate by the Authority Engineer. Authority shall, within 30 days after receipt of the Contractor's "Notice of Dispute", notify the name of conciliator(s) to the Contractor. In case Authority fails to fix Conciliator within 30 days, Contractor shall be free to approach Dispute Adjudication Board (DAB) for adjudication of Dispute.

24.1.2 The Conciliator(s) shall assist the parties to reach an amicable settlement in an independent and impartial manner within the terms of contract. If the parties reach agreement on a settlement of the dispute, they shall draw up and sign a written settlement agreement duly signed by Authority Engineer, Contractor and conciliator(s). When the settlement agreement is signed, it shall be final and binding on the parties. The conciliators shall be paid fee as fixed by Ministry of Railways time to time, which shall be shared equally by the parties.

24.1.3 The parties shall not initiate, during the conciliation proceedings, any reference to DAB or arbitral or judicial proceedings in respect of a dispute that is the subject matter of the conciliation proceedings.

24.1.4 The conciliation shall be carried out as per 'The Arbitration and



Conciliation Act, 1996' and the proceedings may be terminated as per Section 76 of the above Act.

24.2 Dispute Adjudication Board (DAB)

24.2.1 A dispute/s if not settled through conciliation, shall be referred to DAB. The DAB shall consist of a panel of three Retired Railway Officers not below senior administrative grade (SAG). The DAB shall be formed within 90 days of signing of Contract Agreement. For this purpose, the Authority will maintain a panel of DAB members. The complete panel, which shall not be less than five members, shall be sent by Authority to the Contractor to nominate one member of the DAB from the panel as Contractor's nominee within two weeks of receipt of the panel. On receipt of Contractor's nominee, the Authority shall nominate one member from the same panel as Authority's nominee for the DAB. Both above nominees shall jointly select presiding member of the DAB from the same panel.

24.2.2 The appointment of DAB shall be effectuated by way of a tripartite agreement among the Authority, Contractor and the respective DAB members. The terms of the remuneration of each member shall be as fixed by Ministry of Railways from time to time. Each party shall be responsible for paying one-half of this remuneration.

24.2.3 If one or more of the members appointed refuses to act as DAB member, or is unable or unwilling to perform his functions as DAB member for any reason whatsoever or dies or in the opinion of the Authority fails to act without undue delay, the parties shall terminate the mandate of such DAB member and thereupon new DAB member shall be appointed in the same manner, as the outgoing DAB member had been appointed.

24.2.4 The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Authority or the Contractor acting alone. Unless otherwise agreed by both the Parties, the appointment of the DAB (including each member) shall expire upon expiry of this Contract Agreement.

24.2.5 Before start of DAB proceedings, each DAB member shall give the following certificate to the Authority and the Contractor: "I have no any past or present relationship in relation to the subject matter in dispute, whether financial, business, professional or other kind. Further, I have no any past or present relationship with or interest in any of the parties whether financial, business, professional or other kind, which is likely to



give rise to justifiable doubts as to my independence or impartiality."

24.2.6 DAB proceedings shall be conducted as decided by the DAB. The DAB shall give its decision within 90 days of a Dispute referred to it by any of the Parties, duly recording the reasons before arriving at the decision. The DAB shall decide the issue within terms and conditions of the contract. This time limit shall be extendable subject to the Parties mutual agreement.

24.2.7 The DAB decision shall not be binding on both the Parties. In case any party is not satisfied by the decision of DAB, then the aggrieved party may approach Standing Arbitral Tribunal for arbitration proceedings. However, even if the aggrieved party had proceeded for Arbitration as per provisions of this agreement, 75% of award amount, pending adjudication by Standing Arbitral Tribunal/Court of Law, shall be made by party to other party, In case payment is to be made by Authority to Contractor, the terms & conditions as incorporated in the Ministry of Railways letter No. 2016/CEC/CT/ARB/3(NITI Aayog)/Pt. dated 08thMar,2017 as amended time to time shall be followed. However, in case Contractor has to pay to the Authority, then 75% of the award amount shall be deducted by the Authority from the running bills or other dues of the Contractor, pending adjudication by Standing Arbitral Tribunal/Court of Law.

24.2.8 No dispute shall be referred to Standing Arbitral Tribunal unless the same has been referred to DAB for adjudication. However, in case DAB is not formed, due to any reason, the disputes can be directly referred to Standing Arbitral tribunal to adjudicate the dispute.

24.2.9 In the specific cases of any misconduct by any of the members of the DAB, the parties shall have the right to specifically bring it to the notice of the DAB such conduct, through a statement filed with necessary documents in proof of such misconduct and the DAB, after taking NOTICE of such conduct initiate the replacement of the member concerned in the same manner the member to be replaced was appointed.

24.2.10 Once the decision is given by DAB, DAB cannot review the decision at its own or on the request of one party, unless both parties agree for review of decision by DAB.

24.2.11 In case DAB decision is not challenged by either party within 180 days of receipt of decision of DAB, the decision shall be considered as final and Parties would be barred for referring the same to Standing Arbitral Tribunal for adjudication.



24.2.12 *The obligation of the Authority and the Contactor shall not be altered by reasons of issue being or under reference to DAB.*

24.2.13 *The DAB shall conduct the proceedings at [Delhi] or any other convenient venue which shall be decided by DAB in consultations with parties.*

24.2.14 *It is a term of this contract that the Parties shall not approach any Court of Law for settlement of such disputes or differences unless an attempt has first been made by the parties to settle such disputes or differences through DAB and Standing Arbitral Tribunal.*

24.3 Standing Arbitral Tribunal

24.3.1 *The arbitration proceedings shall be conducted as per "The Arbitration and Conciliation Act, 1996". The Arbitral Tribunal shall consist of a panel of three Retired Railway Officers not below senior administrative Grade (SAG). The Standing Arbitral Tribunal shall be formed within 90 days of signing of Contract document. For this purpose, the Authority shall maintain a panel of arbitrators. The complete panel, which shall not be less than five members, shall be sent by Authority to the Contractor to nominate one arbitrator from the panel as Contractor's nominee within two weeks of receipt of the panel. On receipt of Contractor's nominee, the Authority shall appoint above contractor's nominee as well as another from the same panel as Authority's nominee as arbitrators, Both above arbitrators shall jointly select presiding arbitrator from the same panel.*

24.3.2 *If the Contractor fails to select the contractor's nominee from the panel within two weeks of the receipt of the said panel, the Authority shall, after giving one more opportunity to contractor to nominate one as contractor's nominee within, next two weeks, appoint two arbitrators from the same panel. Both above arbitrators shall jointly select presiding arbitrator from the same panel.*

24.3.3 *If one or more of the Arbitrators appointed refuses to act as Arbitrator, withdraws from his office as Arbitrator, or vacates his office or is unable or unwilling to perform his functions as Arbitrator for any reason whatsoever or dies or in the opinion of the Authority fails to act without undue delay, the parties shall terminate the mandate of such arbitrator and thereupon new arbitrator shall be appointed in the same manner, as the outgoing arbitrator had been appointed.*

24.3.4 *Before start of arbitration proceedings, each appointed arbitrator shall give the following certificate to the Authority and the Contractor:*



"I have no any past or present relationship in relation to the subject matter in dispute, whether financial, business, professional or other kind. Further, I have no any past or present relationship with or interest in any of the parties whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to my independence or impartiality in terms of The Arbitration and Conciliation Act, 1996."

24.3.5 In the specific cases of any misconduct by any of the members of the TRIBUNAL, the parties shall have the right to specifically bring it to the notice of the TRIBUNAL such conduct, through a statement filed with necessary documents in proof of such misconduct and the TRIBUNAL, after taking NOTICE of such conduct initiate the replacement of the member concerned, in the same manner the member to be replaced was appointed.

24.3.6 Each party has to prepare and furnish to Standing Arbitral Tribunal and other party, once in a every six months, an account giving full and detailed particulars of all claims, which even after decision of DAB are unsettled, to which the parties may consider themselves entitled to during the last preceding six months. If any dispute has arisen as regards execution of the works under the contract, while submitting the said half yearly claims, the parties shall give full particulars of such dispute in the said submission. After signing Contract agreement, within 6 months, the parties shall submit all the claims from date of award of contract in first submission of claims.

24.3.7 The said communication will be the reference of the dispute to the ARBITRAL TRIBUNAL appointed under the present agreement.

24.3.8 The parties shall submit all the relevant documents in support of their claims and the reasons for raising the dispute to the TRIBUNAL.

24.3.9 The said claims of the parties so referred to ARBITRAL TRIBUNAL so far it relates to the disputed claims, shall be treated as Statement of Claims of the parties and the ARBITRAL TRIBUNAL shall call upon the other party to submit its reply. The ARBITRAL TRIBUNAL after giving an opportunity of being heard to both the parties, decide the dispute within a period of Four months from the date of communication of the dispute under clause 24.3.6 above. The Arbitral Tribunal will pass a reasoned award in writing, while deciding the Dispute, Once the award is declared, the Arbitral Tribunal cannot review the same except what is permissible in terms of provisions contained in Arbitration and Conciliation Act. The parties shall be entitled to the remedies under the Arbitration and Conciliation Act 1996 or any amendment thereof.



24.3.10 *The parties agree that all the claims of any nature whatsoever, which the parties may have in respect of the work of the preceding six months, should be made in the said Statements of half yearly claims. If the parties do not raise the claim, if any, arising from the work done in the preceding six months in the statement of half yearly claim, to Standing Arbitral Tribunal, the parties shall be deemed to have waived and given up the claims. The ARBITRAL TRIBUNAL shall not entertain such disputes, which have not been raised in the statement of half yearly Claim before the Standing Arbitral Tribunal and such claims will stand excluded from the scope of arbitration and beyond the terms of reference to the ARBITRAL TRIBUNAL.*

24.3.11 *The parties agree that where the Arbitral award is for payment of money, no interest shall be payable on the whole or any part of the money for any period till the date on which the award is made.*

24.3.12 *The obligation of the Authority and the Contactor shall not be altered by reasons of arbitration being conducted during the progress of work. Neither party shall be suspended the work on account of arbitration and payments to the contractor shall continue to be made in terms of the contract and /or as awarded (except when Award is challenged in the Court in which case the payments would be as per the court's orders)*

24.3.13 *The ARBITRAL TRIBUNAL shall remain in force during the entire period the PRINCIPAL CONTRACT is in force and until the closure of the PRINCIPAL CONTRACT with the final no claim certificate, which will be filed with ARBITRAL TRIBUNAL.*

24.3.14 *The Arbitral Tribunal shall conduct the Arbitration proceedings at [Delhi] or any other convenient venue which shall be decided by Tribunal in consultation with both parties.*

24.3.15 *The cost of arbitration shall be borne equally by the respective parties. The cost shall inter-alia include fee of the arbitrators as per the rates fixed by the Indian Railways from time to time.*

24.3.16 *It is a term of this contract that the Contractor shall not approach any Court of Law for settlement of such disputes or differences unless an attempt has first been made by the parties to settle such disputes or differences through conciliation, DAB and Standing Arbitral Tribunal.*

24.3.17 *Even in case arbitration award is challenged by a party in the Court of Law, 75% of award amount, pending adjudication by Court of*



Law, shall be made by party to other party. In case payment is to be made by Authority to Contractor, the terms & conditions as incorporated in the Ministry of Railways letter No. 2016/CE(I)/CT/ARB/3(NITI Aayog)/Pt, dated 08th Mar, 2017 as amended time to time shall be followed. However, in case Contractor has to pay to the Authority, then 75% of the award amount shall be deducted by the Authority from the running bills or other dues of the Contractor, pending adjudication by Court of Law.

24.3.18 The contract shall be governed by the law for the time being in force in the Republic of India. In case of any disputes/differences resulting in court Cases between Contractor & Authority, the jurisdiction shall be of Courts at [Delhi] Only”

9. Disputes having arisen between the parties, a “Notice of Dispute” was issued by the petitioner *vide* communication dated 27.07.2024. In terms of the prescription in the dispute resolution clause, the respondent was requested to appoint a conciliator to resolve the disputes between the parties. The respondent sent a communication dated 09.08.2024 to the petitioner stating as under :-

“SOUTH WESTERN RAILWAY

*W.148/ARB/BNC/06/24-25 Office of the Chief Administrative
Officer Construction, Cantonment.
Millers Road, Bangalore - 560 001
August 9, 2024*

*M/s. Jhajharia Nirman Ltd.
Jhajhari Mansion, Jagmal Block,
Bilaspur, Chattisgarh, 495001
Mail Id- Jhajharia_nirman@yahoo.com*

*Sub: Construction of Electrified Double line track between
Penukondo Junction (Km. 136.694) to Dharmavaram (Km. 176.600)
including Telecommunication & Electrical Works EPC Tender No PKD-
DMM-EPC LOA dt. 19/01/2023*

*Ref: (1) GM/SWR/UBL Letter No. G/ A-29/2023/DAB (E 99771 &
GB (ARBT)/ 26/2023 dt. 14/12/2023.*

(2) This office letter of even number dt. 01/02/2024

As per the provisions in the Contract Agreement. Panels of SAT -



2024:DHC:7801



Standing Arbitration Tribunal and DAB - Dispute Adjudication Board have been formed by the Competent Authority vide letter dt. 14/12/2023. Copy of the same was forwarded vide this office letter of even number dt. 01/02/2024 to resolve/ address the disputes between the Contractor and Railways, if any.

As per the letter dt. 14/12/2023 from GM/SWR/UBL for DAB & SAT - on receipt of Contractor's nominee, the Chief Engineer shall nominate one member from the same panel as Railway nominee for the DAB/SAT for EPC Works and process further as per LOA/Contract Agreement.

In view of the above, your nominee from the DAB/SAT Panel may be chosen and forwarded to this office for further necessary action please.

Sd/-

B. V. Baraskar

भी. वी. बरसकर

Chief Materials Manager
Construction/Contonment/SWR”

10. The above letter was responded to by the petitioner on 20.08.2024 stating as follows:-

“Jhajharia Nirman Limited



JNL/PKD-DMM/23-24/DAB&SAT/01 Date: 20.08.2024

*To
Chief Materials Manager
South Western Railway
Bangalore*

Through Authority Engineer (DyCE/IV/BNC)

Subject: *Nominee from DAB & SAT Panel*

Ref.:

- 1. Letter No: W.148/ARB/BNC/DAB dated 01.02.2024.*
- 2. Letter No: W.148/ARB/BNC/06/24-25 dated 09.08.2024.*



Dear Sir,

With reference to the above-mentioned letters, we are hereby nominating the following member from the Panel list provided by your office.

1. For DAB Panel (Dispute Adjudication Board) – Shri. BP Khare, RetdGM/DLW/Varanasi

2. For SAT Panel (Standing Arbitration Tribunal) – Shri. Ajay Kumar Lal, RetdPFA&CAO/NR

Thanking you in anticipation,
For, Jhaharia Nirman Limited

Director

Copy to:

1. Authority (CE/C-II/BNC) for information please.”

11. In view of the emergent situation created on account of the disputes between the parties, particularly on account of the alleged withholding of the RA Bills raised by the petitioner, a communication dated 30.08.2024 was addressed by the petitioner to the Authority Engineer of the respondent stating as under:-

“.....

As per Article 24 of our contract agreement, Vide clause 24.1 “All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the Contractor to the "Authority" through “Notice of Dispute” provided that no such notice shall be served later than 30 days after the date of issue of Completion Certificate by the Authority Engineer. Authority shall, within 30 days after receipt of the Contractor’s “Notice of Dispute”, notify the name of conciliator(s) to the Contractor. In case Authority fails to fix Conciliator within 30 days, Contractor shall be free to approach Dispute Adjudication Board (DAB) for adjudication of Dispute.” It is clear that after request made on 27.07.2024, name of conciliator has not been communicated to us even after 33 days.

We would also like to bring to your attention that as per clause 24.2.1 “A dispute/s if not settled through conciliation, shall be referred to DAB. The DAB shall consist of a panel of three Retired Railway Officers not below senior administrative grade (SAG). The DAB shall be formed



within 90 days of signing of Contract Agreement.” And as per clause 24.2.8 “No dispute shall be referred to Standing Arbitral Tribunal unless the same has been referred to DAB for adjudication. However, in case DAB is not formed due to any reason, the disputes can be directly referred to Standing Arbitral Tribunal to adjudicate the dispute.”

Referring to clauses 24.2.1 and 24.2.8, it is clear that the Dispute Adjudication Board (DAB) was supposed to be established within 90 days following the contract agreement, specifically by August 3, 2023. However, for any number of reasons best known to the Authority, this has not occurred. Therefore, according to clause 24.2.8, the contractor has the right to approach the Standing Arbitral Tribunal instead of proceeding with DAB proceedings.

In light of this clause, we kindly request the establishment of a SAT Panel, and since the panel of the given 5 members does not fulfill the criteria as laid down by the Hon'ble Supreme Court, we request you to provide us a broader panel in terms of the said law or we can proceed to appoint our nominee, so as to proceed urgently with the constitution of the 3 Member Arbitral Tribunal.

We would also like to highlight, as per clause 24.3.12 “The obligation of the Authority and the Contactor shall not be altered by reasons of arbitration being conducted during the progress of work. Neither party shall be suspended the work on account of arbitration and payments to the contractor shall continue to be made in terms of the contract and /or as awarded (except when Award is challenged in the Court in which case the payments would be as per the court's orders).”

In accordance with clause 24.3.12, it is clear that payments are required to be disbursed to the contractor during the Tribunal proceedings. Therefore, we kindly ask that you notify the Accounts department of BNC/SWR, enabling us to submit our invoices and facilitate the release of payment.

Given that the project is currently in a critical phase and our payments have been suspended due to your unilateral decision, we are finding it increasingly challenging to maintain operations. We kindly request your prompt action in appointing the Arbitral Tribunal for early effective adjudication of the dispute and also furthermore advising AFA/BNC on the release of payments for the invoices that will be submitted. Pl note for full disclosure, we have filed proceedings before the Hon'ble Delhi High Court as well, which your good self is well aware and duly represented.”

12. No response to the said communication was sent by the respondent to



the petitioner.

13. In the above backdrop, the present petition has been filed by the petitioner seeking appointment of a sole arbitrator to adjudicate the disputes between the parties.

14. Mr. Anurag Ahluwalia, learned standing counsel for the respondent has sought to oppose the present petition on the following grounds :-

- i. It is submitted that the present petition is not maintainable inasmuch as the petitioner has filed the same without taking the mandatory pre-requisites prior to invocation of the arbitration i.e. reference of the matter to Conciliator and thereafter to the Dispute Adjudication Board (DAB) to resolve the disputes.
- ii. It is also submitted that constitution of the arbitral tribunal has to be in accord with the prescription of the Contract and it is not permitted to deviate therefrom. In this regard, he relies upon the judgment of the Supreme Court in the case of *Central Organization for Railway Electrification v. ECI-SPIC-SMO-MCML (JV) a Joint Venture Company* (2020) 14 SCC 712.

15. Having considered the rival contention of the respective counsel, I find no impediment in constituting an arbitral tribunal to adjudicate the disputes between the parties.

16. As regards, the first objection that the petitioner be compelled to participate in conciliation and in proceedings before DAB before referring the dispute to arbitration, it is notable that the petitioner requested for appointment of a conciliator *vide* letter dated 27.07.2024, in terms of the relevant provisions in the Contract. The concerned Authority of the respondent was obliged to notify the petitioner of the name of the conciliator



within 30 days. The same was admittedly not done, although the Conciliator is stated to have been nominated belatedly after the disputes between the parties had escalated further to a significant extent.

17. Further, the constitution of the DAB in the present case was belated and not within the timeframe stipulated in the Contract Agreement. In terms of the Contract, the DAB was to be formed within the 90 days of signing of the contract agreement. Admittedly, the same was not done.

18. In numerous judicial precedents, this Court has taken the view that any pre-condition in an arbitration agreement obliging one of the contracting parties to either exhaust the pre-arbitral amicable resolution avenues or to take recourse to Conciliation are directory and not mandatory.

19. In this regard, reference may be made to *Oasis Projects Ltd. v. National Highway & Infrastructure Development Corporation Limited*(2023) 1 HCC (Del) 525, wherein the Court has observed as under:

*“12. The primary issue to be decided in the present petition is, therefore, as to whether it was mandatory for the petitioner to resort to the conciliation process by the Committee before invoking arbitration. **Though Article 26.2 clearly states that before resorting to arbitration, the parties agree to explore conciliation by the Committee, in my opinion, the same cannot be held to be mandatory in nature.** It needs no emphasis that conciliation as a dispute resolution mechanism must be encouraged and should be one of the first endeavours of the parties when a dispute arises between them. However, having said that, conciliation expresses a broad notion of a voluntary process, controlled by the parties and conducted with the assistance of a neutral third person or persons. It can be terminated by the parties at any time as per their free will. Therefore, while interpreting Article 26.2, the basic concept of conciliation would have to be kept in mind.”*

[Emphasis supplied]



20. In ***Kunwar Narayana v. Ozone Overseas Pvt. Ltd*** 2021:DHC:496, the Court has made the following observations:

“5. Ms. Pahwa, learned Counsel for the respondents submitted that her only objection, to the petition, was that the petitioner has not exhausted the avenue of amicable resolution, contemplated by Clause 12 of the Share Buyback Agreement. I am not inclined to agree with this submission. The recital of facts, as set out in the petition, indicate that efforts at trying to resolve the disputes, amicably were made, but did not succeed. Even otherwise, the Supreme Court in Demarara Distilleries Pvt. Ltd. v. Demerara Distilleries Ltd. and this Court, in its judgment in Ravindra Kumar Verma v. BPTP Ltd., opined that relegation of the parties to the avenue of amicable resolution, when the Court is moved under Section 11(6) of the 1996 Act, would be unjustified, where such relegation would merely be in the nature of an empty formality. The arbitration clause in the present case does not envisage any formal regimen or protocol for amicable resolution, such as issuance of a notice in that regard and completion of any stipulated time period thereafter, before which arbitral proceedings could be invoked. In the absence of any such stipulation, I am of the opinion, following the law laid down in Demarara Distilleries Pvt. Ltd. and Ravindra Kumar Verma v. BPTP Ltd. nothing worthwhile would be achieved, by relegating the parties to explore any avenue of amicable resolution. Besides, the appointment of an arbitrator by this Court would not act as an impediment in the parties resolving their disputes amicably, should it be possible at any point of time.”

21. This Court in ***Subhash Infraengineers (P) Ltd. v. NTPC Ltd.*** 2023 SCC OnLine Del 2177 has held as under:—

“21. In this regard, it is relevant to note that in terms of Section 62(3) of the Act, it is open for a party to reject the invitation to conciliate. Further, in terms of Section 76 of the Act, the conciliation proceedings can be terminated by a written declaration of a party and there is no legal bar in this regard. In the present case, Clause 7.2.5 of the GCC expressly provides that “parties are free to terminate Conciliation proceedings at



any stage as provided under the Arbitration and Conciliation Act, 1996.”

28. In the present case, the clause/pre arbitral mechanism contemplates mutual consultation followed by conciliation. As noticed in Abhi Engg. and Oasis Projects, conciliation is a voluntary process and once a party has opted out of conciliation, it cannot be said that the said party cannot take recourse to dispute resolution through arbitration.”

22. Also, given that the disputes between the parties require urgent adjudication, it would be wholly untenable to compel the parties to go through the motions of conciliation / DAB proceedings before referring the disputes to arbitration. This Court in *Pele Khezhi v. National Highways and Infrastructure Development Corporation Limited* 2023 SCC OnLine Del 5320, while relying upon the aforementioned judgments has made the following observations:

12. In the present case, grave urgency has been expressed by the petitioner in seeking reference of the disputes to the arbitration inasmuch the respondent has issued a notice of intention to terminate the contract. In the circumstances, in view of the urgent adjudication sought by the petitioner, it would be unwarranted to relegate the petitioner to conciliation. As held in Oasis Projects (supra) and Subhash Infraengineers (supra), Section 77 of the A&C Act itself contemplates that notwithstanding any conciliation proceedings, it is open to a party to initiate arbitration proceedings where such proceedings are necessary for preserving its rights.

13. As such, there is no merit in the contentions raised by learned counsel for the respondent that it is not open to the petitioner to seek arbitration till the conciliation process, contemplated in Article 26.2 (supra) is exhausted.”

(Emphasis supplied)

23. As such, this Court finds no merit in the first objection raised by the learned counsel for the respondent.



24. Even as regards the second objection, it is notable that this Court has had occasion to consider the arbitration agreement involving an appointment procedure similar to the one prescribed in the present case. The arbitration Clause in the present matter stipulates that the Arbitral Tribunal will consist of three retired railway officers of at least Senior Administrative Grade (SAG) and the Authority will maintain a panel of at least five arbitrators. The panel will be sent to the contractor, who must choose one arbitrator as their nominee within two weeks. The Authority will then appoint the contractor's nominee and another from the same panel as its own nominee. These two arbitrators will jointly select a presiding arbitrator from the same panel. Further, it is provided that the contractor does not select a nominee within the given two weeks, the Authority will give an additional two weeks. If the contractor still fails to nominate, the Authority will appoint two arbitrators from the panel, and they will jointly select the presiding arbitrator.

25. It has been held in a catena of judgments that the above mentioned appointment procedure does not meet with the requirement of law. In *Margo Networks Pvt. Ltd. & Anr. v. Railtel Corporation of India Ltd.*, 2023:DHC:4596, it was held as under :

- (i) In the context of appointment procedure contemplating appointment out of panel of arbitrators maintained by one of the contracting parties, it is mandatory that the panel should be sufficiently broad-based, failing which the appointment procedure does not meet with the requirements of law. Referring *Voestalpine Schienen GmbH vs. Delhi Metro Rail Corporation Ltd.*, (2017) 4 SCC 665, it was held that an arbitrator panel must be broad-based, and not restrictive. This requirement was found to be not fulfilled where the panel comprised



solely of ex-employees of a party.

(ii) A valid appointment procedure must be balanced and not confer excessive say or authority on one of the parties to the arbitration, as regards constitution of the arbitral tribunal. An appointment procedure which contemplates that one party appoints two out of three members of the arbitral tribunal, the appointment procedure contravenes this requirement.

26. The relevant observations made by this Court in *Margo Networks Pvt. Ltd.* (supra) are as follows -

“35. Thus, in an appointment procedure involving appointment from a panel made by one of the contracting parties, it is mandatory for the panel to be sufficiently broad based, in conformity with the principle laid down in Voestalpine (supra), failing which, it would be incumbent on the Court, while exercising jurisdiction under Section 11, to constitute an independent and impartial Arbitral Tribunal as mandated in TRF (supra) and Perkins (supra). The judgement of the Supreme Court in CORE does not alter the position in this regard.

*36. In the facts of the present case, applying the principles laid down in Voestalpine (supra) and in view of the aforesaid judgments of this Court, including in L&T Hydrocarbon Engineering Limited (supra), **it is evident that the panel offered by the respondent to the petitioner in the present case is restrictive and not broadbased. The same adversely impinges upon the validity of the appointment procedure contained in clause 3.37 (supra), and necessitates that an independent Arbitral Tribunal be constituted by this Court.***

37. This brings us to the next issue that arises in the context of the arbitration clause in the present case, viz. whether “counter balancing” is achieved in a situation where one of the parties has a right to choose an arbitrator from a panel whereas 2/3rd of the members of the arbitral tribunal are appointed by the other party.

*42. **The “counter balancing” as contemplated in Perkins (supra) cannot be said to have been achieved in a situation where one of the parties has a right to choose an arbitrator from a panel and where the remaining (2 out of 3) arbitrators are appointed by the other party.***



27. The observations made in *Margo Networks Pvt. Ltd.* (Supra) have been further referred by this Court in *Taleda Square Private Limited v. Rail Land Development Authority* 2023 SCC OnLine Del 6321, *Kalyan Toll Infrastructure Ltd v. Union of India and Others* 2024 SCC OnLine Del 1525 and *Techno Compact Builders through Mr. Zulfiquar Ali, Sole Proprietor v. RAILTEL Corporation of India Limited*, 2024 SCC OnLine Del 2166.

28. Consequently, in terms of the said judgment in *Margo Networks Pvt. Ltd.* (Supra) and other judgments of the Co-ordinate Bench of this Court, it is incumbent on this Court to appoint an independent arbitral tribunal to adjudicate the disputes between the parties. In this regard, reference may be made to *S.N. Naik & Brothers v. Union of India* 2024 SCC OnLine Bom 995, wherein, it has been observed as under :-

“18. Thus, in the case of CORE (supra), the Hon’ble Supreme Court has applied the above clause 64(3)(b)(ii) and held that the High Court could have not appointed independent sole arbitrator. However, in the case of CORE (supra) as discussed hereinafter, the Hon’ble Supreme Court was not called upon to decide whether clause 64(3)(b)(ii) is in conformity of principles laid down in TRF (supra) i.e. whether the arbitral panel is broad based and in Perkins (supra), more particularly, whether the counter balance is achieved in appointing the arbitral panel. The Hon’ble Supreme Court in the case of CORE (supra) has not whittled down the principles laid down in TRF and Perkins (supra). The issues answered in the judgment of CORE (supra) are, whether the retired railway officers are eligible to be appointed as arbitrators and whether the General Manager is eligible to nominate the arbitrators.

19 In Tantia Constructions (supra) the Hon’ble Supreme Court has doubted the view taken in the case of CORE (supra) observing that once the appointing authority itself is incapacity from referring the matter to arbitrator it does not follow that notwithstanding this yet appointments may be valid depending upon the facts of the case. However, CORE (supra), has not dealt with the issue of counter balance achieved in terms of Perkins (supra). As such, the law laid down in the judgment of CORE (supra) is limited to the issues answered in CORE (supra). The same is



the view taken by the Delhi High Court in the below discussed judgments.

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23. I am in respectful agreement with the view expressed by the Delhi High Court in the case of Gangotri (supra) and Ganesh Engineering (supra) that the judgment of CORE (supra) of the Hon'ble Supreme Court does not deal with the issue, whether the arbitral panel appointed is broad based in conformity with voelstapine (supra) and whether the counter balancing is achieved as laid down in Perkins (supra). Coming to the facts of the present case, 2/3 arbitral panel is appointed by the respondent so also for the 3rd member of the arbitral tribunal 4 names are suggested by the respondent from which the petitioner is required to choose 2 names and from the 2 names chosen by the petitioner, the respondent will appoint one. Thus, the respondent has a complete say in the appointment of the tribunal.

24. Having considered the law on the subject the question as raised at para 8(1) can be answered as under:-

Clause 64(3)(b)(ii) of the General Conditions of Contract provides for unilateral appointment of arbitral tribunal at the hands of one of the parties and, thus, is in violation of the principles laid down in Voestalpine (supra), TRF (supra) and Perkins (supra) and also in violation of the law laid down in the case of Lombard (supra) and the said clause is ex-faice invalid and the tribunal constituted thereunder is non-est and void ab initio.

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29. In view of this, in exercise of the powers under section 11(6) of the Arbitration Act, I appoints Hon'ble Shri Naresh H. Patil (Retired Chief Justice, Bombay High Court) as sole arbitrator in the matter to decide the disputes arising between the parties in terms of agreement dated 23.09.2019. The sole arbitrator's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

29. Also, a Coordinate Bench of this Court in *M/S Twenty-Four Secure Services Pvt. Ltd. v. M/S Competent Automobiles Company Limited* 2024/DHC/4601, observed as under :-

"22. In Union of India (UOI) vs. Singh Builders Syndicate (2009) 4 SCC 523 the High Court rejected the contention on behalf of the Government that the Court was not vested with any powers to appoint a Sole



Arbitrator in distinction to the Arbitration Agreement which provided for the Tribunal of three members. The Apex Court upheld the order of this Court appointing a Sole Arbitrator by observing that the appointment of the Sole Arbitrator was valid.

23. *In view of the submissions made as well as Clause 7 of the Services Agreement dated 16.08.2021 which provides for arbitration and the petitioner has raised the arbitrable disputes and without prejudice to the rights and contentions of the parties, the present petition is allowed..... .”*

30. Accordingly, this Court finds no impediment in appointing a sole arbitrator to adjudicate the disputes between the parties.

31. Accordingly, Mr. Justice (Retd.) Pradeep Nandrajog, Former Chief Justice, Bombay High Court (Mobile No.:9818000130), is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

32. The respondent shall be entitled to raise preliminary objections as regards jurisdiction/arbitrability, which shall be decided by the learned arbitrator, in accordance with law.

33. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as required under Section 12 of the A&C Act.

34. The learned Sole Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

35. The parties shall share the arbitrator’s fee and arbitral costs, equally.

36. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.

37. Needless to say, nothing in this order shall be construed as an expression of this court on the merits of the case.



38. The present petition stands disposed of in the above terms.

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39. This is a petition under Section 9 of the A&C Act seeking urgent interim orders.

40. It is averred in the petition that an emergent situation has been created on account of actions of the respondents in imposing unreasonable penalty on the petitioner and withholding excessive amounts from the RA Bills raised by the respondents.

41. It is submitted by the learned senior counsel for the petitioner that the same is having a crippling impact on the petitioner and on the work in question, necessitating urgent interim orders.

42. Since a learned sole arbitrator has been appointed to adjudicate the disputes between the parties, it would be apposite if the present petition under Section 9 of the A&C Act is treated as an application under Section 17 of the A&C Act and accordingly dealt with by the learned sole Arbitrator. It is directed accordingly.

43. In view of the urgency emphasized by the learned senior counsel, the petitioner shall be at liberty to request the learned sole Arbitrator for expeditious consideration thereof.

44. The present petition is disposed of with the aforesaid directions. The pending applications are also disposed of.

SACHIN DATTA, J

OCTOBER 7, 2024

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