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

**%** ***Date of Decision: 04.10.2024***

\+ **ARB.P. 703/2023**

M/S. M.V. OMNI PROJECTS (INDIA) LTD. .....Petitioner

Through: Mr. Subodh Kr. Pathak and Mr. Akash Swami, Advocates.

versus

UNION OF INDIA, THROUGH DY.
CHIEF ENGINEER/CONST.-II/NORTHERN RAILWAY

.....Respondent

Through: Mr. Ruchir Mishra, Mr. Sanjiv Kumar Saxena, Mr. Mukesh Kumar Tiwari and Ms. Poonam Shukla, Advocates.

**CORAM:**
**HON'BLE MR. JUSTICE SACHIN DATTA**

**SACHIN DATTA, J. (*Oral*)**

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, seeks the constitution of an Arbitral Tribunal to adjudicate the disputes between the parties.

*2.* Disputes between the parties have arisen in the context of a Contract Agreement bearing No.804-A/Cs/Dy.C.E./C-II-LKO dated 16.06.2016 entered into between the parties, concerning *"Phaphamau-Allahabad Section: Balance earth work in embankment & cutting including mechanical compaction using vibrating roller, laying and compaction of blanketing as*

*per RDSO guidelines for heavy axle load etc. between Km. 144.05 to Km.156.95 (i.e., Phaphamau Railway Station including yard and Allahabad Railway Station excluding yard) in connection with doubling between Phaphamau-Allahabad Section of Lucknow division. (CA No. 74-W/1/1/WA/Misc/LKO dated 16.06.2016)".*

3. The relevant contract conditions between the parties contain the following provisions for dispute resolution:

> "***63. Matters finally determined by the Railway*** *– 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 GM and the GM shall within 120 days after receipt of the contractor's representation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in clauses 8, 18, 22(5), 39, 43(2), 45(a), 55, 55-A(5), 57, 57A,61(1), 61(2) and 62(1) to (xiii) (B) of General Conditions of contract or in any clause of the special conditions of the contract shall be deemed as 'excepted matters' (matters not arbitrable) and decisions of the Railway authority, thereon shall be final and binding on the contractor; provided further that 'excepted matters' shall stand specifically excluded from the purview of the arbitration clause.*
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> ***64 (1) (i) - Demand for Arbitration***
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> *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.*
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> ***64 (1) (ii)*** *- 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(s) or difference(s) 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)** - (a) The Arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway.*

*(b) The claimant shall submit his claim stating the facts supporting the claims along with all the relevant documents and the relief or remedy sought against each claim within a period of 30 days from the date of appointment of the Arbitral Tribunal.*

*(c) The Railway shall submit its defence statement and counter claim(s), if any, within a period of 60 days of receipt of copy of claims from Tribunal thereafter, unless otherwise extension has been granted by Tribunal.*

*(d) The place of arbitration would be within the geographical limits of the Division of the Railway where the cause of action arose or the Headquarters of the concerned Railway or any other place with the written consent of both the parties.*

***64 (1) (iii) -** No new claim shall be added during proceedings by either party. However, a party may amend or supplement the original claim or defence thereof during the course of arbitration proceedings subject to acceptance by Tribunal having due regard to the delay in making it.*

***64 (1) (iv) -** If the contractor(s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Railways that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims.*

***64 (2) - Obligation During Pendancy of Arbitration** - Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the Railway shall be withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal to consider and decide whether or not such work should continue during arbitration proceedings.*

***64 (3) (a) (i) -** In cases where the total value of all claims in question added together does not exceed Rs.10,00,000/- (Rupees ten lakhs*

*only), the Arbitral tribunal shall consist of a sole arbitrator who shall be a gazetted officer of Railway not below JA grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM.*

***64 (3) (a) (ii) -*** *In cases not covered by the clause 64(3) (a)(i), the Arbitral Tribunal shall consist of a Panel of three Gazetted Rly. Officers not below JA grade or 2 Railway Gazetted 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 more than 3 names of Gazetted Rly. Officers of one or more departments of the Rly. 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. Contractor will be asked to suggest to General Manager at least 2 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 either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of thenames of contractor's nominees. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA grade of other departments of the Railway for the purpose of appointment of arbitrator.*

***64 (3) (a) (iii) -*** *If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator (s).*

***64 (3) (a) (iv) -*** *The Arbitral Tribunal shall have power to call for such evidence by way of affidavits or otherwise as the Arbitral Tribunal shall think proper, and it shall be the duty of the parties*

*hereto to do or cause to be done all such things as may be necessary to enable the Arbitral Tribunal to make the award without any delay. The Arbitral Tribunal should record day to-day proceedings. The proceedings shall normally be conducted on the basis of documents and written statements.*

***64 (3) (a) (v) -*** *While appointing arbitrator(s) under sub-clause (i), (ii) & (iii) above, due care shall be taken that he/they is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Railway servant(s) expressed views on all or any of the matters under dispute or differences. The proceedings of the Arbitral Tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.*

***64 (3) (b) (i) -*** *The arbitral award shall state item wise, the sum and reasons upon which it is based. The analysis and reasons shall be detailed enough so that the award could be inferred there from.*

***64 (3) (b) (ii) -*** *A party may apply for corrections of any computational errors, any typographical or clerical errors or any other error of similar nature occurring in the award and interpretation of a specific point of award to tribunal within 60 days of receipt of the award.*

***64 (3) (b) (iii) -*** *A party may apply to tribunal within 60 days of receipt of award to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award.*

***64(4)*** *In case of the Tribunal, comprising of three Members, any ruling or award shall be made by a majority of Members of Tribunal. In the absence of such a majority, the views of the Presiding Arbitrator shall prevail.*

***64(5)*** *Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.*

***64(6)*** *The cost of arbitration shall be borne by the respective parties. The cost shall inter-alia include fee of the arbitrator(s), as per the rates fixed by the Railway Board from time to time and the fee shall be borne equally by both the parties. Further, the fee payable to the*

> *arbitrator(s) would be governed by the instructions issued on the subject by Railway Board from time to time irrespective of the fact whether the arbitrator(s) is/ are appointed by the Railway Administration or by the court of law unless specifically directed by Hon'ble court otherwise on the matter.*
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> ***64(7):*** *Subject to the provisions of the aforesaid Arbitration and Conciliation Act 1996 and the rules there under and any statutory modifications thereof shall apply to the arbitration proceedings under this clause."*

4. Disputes have arisen between the parties on account of the alleged hindrances faced by the petitioner during the execution of work such as delayed execution of LHS Bridges by other agencies, delayed Ganga Bridge work by other agencies, delayed relocation of cable junction boxes, non-removable of other existing hindering structures, non-availability of blanketing material, additional tax burden owing to implementation of GST and eventually arbitrary and *malafide* termination of the contract by the respondent on 31.12.2018.

5. The petitioner invoked the Dispute Resolution Clause *vide* communication dated 30.09.2022. In the said communication, while setting out the grievances of the petitioner and the claims sought to be raised by the petitioner upon the respondent, it was *inter-alia* sought as under:

> "*Also, as per modified clause 64 of GCC-2014, the Company is submitting herewith duly signed Annexure-XV of modified clause 64 of GCC-2014. The Company further request Railways to refer the dispute to the independent arbitrator, who shall be appointed with the mutual consent of both the parties."*

6. In response, the respondent addressed a communication dated 15.03.2023 to the petitioner, *inter-alia*, stating:

> "*Reference above, the General Manager, Northern Railways, Baroda House, New Delhi has nominated a panel of following four Retired Gazetted officers to suggest at least two names out of panel by you so*

*that G.M. will nominate one out of them to act as Arbitrator/Contractor's nominee. In above referred Arbitration case:*

1. *Shri Arunendera Kumar, Retd. CRB/Railway Board*
2. *Shri Alok Ranjan, AM/CE, Railway Board*
3. *Ms. Saroj Rajware, Retd. AM/Budger, Railway Board*
4. *Shri Anirudh Jain, Retd. AM/Works, Railway Board*

*It is therefore requested to suggest at least two names out of the above panel within 15 days positively, so that further action can be taken into the matter accordingly.*"

7. The petitioner *vide* communication dated 29.03.2023 stated that the aforesaid suggestion of the respondent, and the appointment procedure sought to be followed was not in accordance with the judgments of Supreme Court in ***TRF Limited v. Energo Engineering Projects Ltd.*** (2017) 8 SCC 377, ***Bharat Broadband Network Limited v. United Telecoms Limited*** 2019 SCC OnLine SC 547 and Delhi High Court judgment in ***Gangotri Enterprises vs. General Manager, Northern Railway*** (2022) DHC 004520. The petitioner accordingly suggested the names of three persons, one of whom could act as the petitioner's nominee. The petitioner also requested that one of the persons named by the respondent in its communication dated 15.03.2023 not be appointed as a co-arbitrator or a presiding arbitrator since the said person was already acting as the presiding arbitrator/co-arbitrator in three other railway arbitrations. Finally, it was stated in the communication dated 29.03.2023 that "*in case this is not acceptable to you, we will be constrained to take legal action as per section 11 of Indian Arbitration and Conciliation Act, 1996"*.

8. Instead of paying heed to and responding to the petitioner's communication dated 29.03.2023, the respondent addressed another communication dated 10.04.2023, reproducing the contents of its earlier

communication dated 15.03.2023 verbatim. In response, the petitioner addressed a communication dated 11.05.2023, suggesting the names of its nominee arbitrators as per the appointment procedure insisted upon by the respondent.

9. Subsequently, the arbitral tribunal came to be constituted, and the same was intimated to the petitioner *vide* communicated dated 24.05.2023, which *inter-alia* records as under:

> "*The General Manager, Northern Railway, Baroda House, New Delhi appointed the Arbitral Tribunal consisting of following members, to settle the disputes arising out of the subject contract.*"

10. It is also notable that while constituting the arbitral tribunal, the respondent did not refer all of the claims sought to be raised by the petitioner to arbitration; some of the claims were excluded from the purview of arbitration. This was ostensibly on the basis that the said claims fell within the "scope of excepted matters".

11. In the circumstances, the present petition has been filed by the petitioner seeking constitution of an independent arbitral tribunal. Although the prayer in the present petition, as initially framed, raises a grievance as regards exclusion of certain claims from the purview of arbitration and seeks reference of the said claims to the arbitral tribunal as already constituted, during the course of arguments learned counsel for the petitioner has strenuously contended that the procedure envisaged under Clause 63 and Clause 64 of GCC is not a valid appointment procedure, and therefore an independent arbitral tribunal is required to be constituted to adjudicate the disputes between the parties.

12. *Vide* order dated 25.08.2023, this Court recorded the contention of

learned counsel for the petitioner as under:

> *"Learned counsel for the petitioner submits that the arbitration agreement, as incorporated in Clause 64 of the Indian Railway General Conditions of Contract, 1999, enables the respondent to appoint a panel of three Gazetted railway Officers as members of the Arbitral Tribunal. He submits that the same is not in consonance with law and is inoperable in view of the judgment of this Court in Margo Networks Pvt. Ltd. Vs. Railtel Corporation of India Ltd. (2023 SCC OnLine Del 3906).*
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> *It is further submitted that the petitioner raised serious objection/s to the constitution of the arbitral tribunal, as constituted vide communication dated 24.05.2023. It is submitted that an independent arbitral tribunal is required to be constituted to adjudicate the dispute between the parties in view of the settled legal position in a catena of cases.*
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> *In the circumstances, the petitioner does not press Prayer A in the present petition; and seeks that an independent arbitral tribunal be constituted to adjudicate all the claims of the petitioner."*

13. Subsequently, an affidavit dated 29.04.2024 has also come to be filed on behalf of the petitioner in these proceedings wherein it has been, *inter-alia*, stated as under:

> *"4. That I say, by way of the instant petition I pray to this Hon'ble court for appointment of the independent arbitral tribunal for adjudication of the disputes as detailed out in the instant petition rather than referring the claims to the existing arbitral tribunal which is constituted against principles of law.*
>
> *5. That I say, my Ld. Counsel upon my instruction has maintained the same stand before the Hon'ble Court which finds mentioned in the order dated 25.08.2023 as passed by this Hon'ble Court in the instant petition. Copy of the order dated 25.08.2023 as passed by this Hon'ble Court in the instant petition is being annexed herewith and marked as Document-2."*

14. Learned counsel for the petitioner submits that Clause-63 and Clause-64 of the GCC have been the subject matter of examination in numerous judicial pronouncements. It has been held that the procedure contemplated therein for constituting a tribunal does not meet the requirements of law.

Consequently, while dealing with the petition under Section 11 of the Arbitration and Conciliation Act, 1996, this Court and also several other High Courts have appointed independent Arbitral Tribunals in identical context.

15. In this regard, reliance has been placed on the judgments in the case of ***Margo Networks Pvt. Ltd. &Anr. v. Railtel Corporation of India Ltd.,*** 2023:DHC:4596 and ***Gangotri Enterprises Ltd. v. General Manager Northern Railway (Supra).***

16. On the contrary, learned counsel for the respondent has contended that the arbitral tribunal having already been constituted, there is no occasion for this Court to substitute/appoint another tribunal to adjudicate the disputes between the parties. Further, it is contended that the respondent has not referred certain claims to arbitration since the same fall in the category of 'excepted matters'. Learned counsel for the respondent has relied upon the cases of ***M/s Emaar India Ltd. v. Tarun Aggarwal Projects LLP &Anr.*** 2022 SCC OnLine SC 1328, ***Mitra Guha Builders (India) Company v. Oil and Natural Gas Corporation Limited*** (2020) 3 SCC 222 and ***General Manager, Northern Railway & Anr. v. Sarvesh Chopra*** (2002) 4 SCC 45, to justify the same.

**REASONS AND CONCLUSION**:

17. At the outset, it is noted that this Court has had occasion to examine the validity of the procedure for appointment/constitution of an arbitral tribunal in the backdrop of contractual stipulations identical to those in the present case.

18. In the case of ***Margo Networks Pvt. Ltd.*** (Supra), it has been held

that:

(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, and in such a situation an independent arbitral tribunal is required to be appointed by this Court. Referring to ***Voestalpine Schienen Gmbh vs. Delhi Metro Rail Corporation Ltd,*** (2017) 4 SCC 665, held that an arbitrator panel must be broad-based and not restrictive. This requirement was not fulfilled when the panel was 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 regarding the constitution of the arbitral tribunal. An appointment procedure that contemplates that one party appoints two out of three members of the arbitral tribunal contravenes this requirement.

19. In the present case, the procedure contemplated under Clauses 63 and 64 for appointing/constituting an arbitral tribunal is also vulnerable on both the above counts.

20. 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.***
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> *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.*
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> ***
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> *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****."*

21. The observations made in ***Margo Networks Pvt. Ltd.*** (Supra) have been referred with approval 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.

22. Consequently, in terms of the said judgment in ***Margo Networks Pvt. Ltd.*** (Supra) and other judgments of the Coordinate Bench of this Court, it is incumbent on this Court to appoint an independent arbitral tribunal to adjudicate the disputes between the parties.

23. Learned counsel for the petitioner has also drawn attention to the fact that in identical context, this Court, having found that the appointment

procedure did not meet the requirements of law, appointed a Sole Arbitrator 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 confirmity 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.*
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> *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 incapcity 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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> *xxx xxx xxx*
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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 confirmity 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:-*
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> *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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> *xxx xxx xxx*
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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."*

24. 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.*
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> *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…. "*

25. There is also no merit in the contention that the present petition is not maintainable because an arbitral tribunal already stands constituted in terms of the contractual provisions. It has been consistently held in a series of

judgments that where the appointment procedure is invalid, any proceedings before an improperly constituted arbitral tribunal are *non-est*, and the same would not preclude this Court from exercising jurisdiction under Section 11 of the A&C Act, 1996.

26. In ***J. S. R. Constructions v. National Highways Authority of India and Anr.***, 2023: DHC: 8641, this Court has observed as under -

> *"19. In answer to question (ii), this Court finds that the present petition is maintainable. There is no merit in the argument of the respondents that since an Arbitral Tribunal has been constituted to adjudicate the disputes between the parties, the present petition is not maintainable. In Perkins (supra), the Supreme Court in exercise of the powers under Section 11(6) of the A&C Act, appointed a Sole Arbitrator, even when appointment of an Arbitrator was already made; the Supreme Court, inter-alia, held as under:*
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> > *"26. The further question that arises is whether the power can be exercised by this Court under Section 11 of the Act when the appointment of an arbitrator has already been made by the respondent and whether the appellant should be left to raise challenge at an appropriate stage in terms of remedies available in law. Similar controversy was gone into by a Designated Judge of this Court in Walter Bau AG and the discussion on the point was as under : (SCC pp. 805-06, paras 9-10)*
> >
> > *"9. While it is correct that in Antrix and Pricol Ltd., it was opined by this Court that after appointment of an arbitrator is made, the remedy of the aggrieved party is not under Section 11(6) but such remedy lies elsewhere and under different provisions of the Arbitration Act (Sections 12 and 13), the context in which the aforesaid view was expressed cannot be lost sight of. In Antrix, appointment of the arbitrator, as per the ICC Rules, was as per the alternative procedure agreed upon, whereas in Pricol Ltd., the party which had filed the application under Section 11(6) of the Arbitration Act had already submitted to the jurisdiction of the arbitrator. In the present case, the situation is otherwise.*
> >
> > *10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act,*

*acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law. In the present case, the agreed upon procedure between the parties contemplated the appointment of the arbitrator by the second party within 30 days of receipt of a notice from the first party. While the decision in Datar Switchgears Ltd. may have introduced some flexibility in the timeframe agreed upon by the parties by extending it till a point of time anterior to the filing of the application under Section 11(6) of the Arbitration Act, it cannot be lost sight of that in the present case the appointment of Shri Justice A.D. Mane is clearly contrary to the provisions of the Rules governing the appointment of arbitrators by Icadr, which the parties had agreed to abide by in the matter of such appointment. The option given to the respondent Corporation to go beyond the panel submitted by Icadr and to appoint any person of its choice was clearly not in the contemplation of the parties. If that be so, obviously, the appointment of Shri Justice A.D. Mane is non est in law. Such an appointment, therefore, will not inhibit the exercise of jurisdiction by this Court under Section 11(6) of the Arbitration Act. It cannot, therefore, be held that the present proceeding is not maintainable in law. The appointment of Shri Justice A.D. Mane made beyond 30 days of the receipt of notice by the petitioner, though may appear to be in conformity with the law laid down in Datar Switchgears Ltd., is clearly contrary to the agreed procedure which required the appointment made by the respondent Corporation to be from the panel submitted by Icadr. The said appointment, therefore, is clearly invalid in law."*

*27. It may be noted here that the aforesaid view of the Designated Judge in Walter Bau AG was pressed into service on behalf of the appellant in TRF Ltd. and the opinion expressed by the Designated Judge was found to be in consonance with the binding authorities of this Court. It was observed : (TRF case, SCC p. 397, paras 32-33)*

*"32. Mr Sundaram, learned Senior Counsel for the appellant has also drawn inspiration from the judgment passed by the Designated Judge of this Court in Walter Bau AG, where the learned Judge, after referring to Antrix Corpn. Ltd., distinguished the same and also distinguished the authority in Pricol Ltd. v. Johnson Controls Enterprise Ltd. and came to*

*hold that : (Walter Bau AG case, SCC p. 806, para 10)*

> *10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law.…"*

> *33. We may immediately state that the opinion expressed in the aforesaid case is in consonance with the binding authorities we have referred to hereinbefore."*

*28. In TRF Ltd., the Managing Director of the respondent had nominated a former Judge of this Court as sole arbitrator in terms of the aforesaid Clause 33(d), after which the appellant had preferred an application under Section 11(5) read with Section 11(6) of the Act. The plea was rejected by the High Court and the appeal therefrom on the issue whether the Managing Director could nominate an arbitrator was decided in favour of the appellant as stated hereinabove. As regards the issue about fresh appointment, this Court remanded the matter to the High Court for fresh consideration as is discernible from para 55 of the judgment. In the light of these authorities there is no hindrance in entertaining the instant application preferred by the applicants.*

*xxx xxx xxx*

*30. In the aforesaid circumstances, in our view a case is made out to entertain the instant application preferred by the applicants. We, therefore, accept the application, annul the effect of the letter dated 30-7- 2019 issued by the respondent and of the appointment of the arbitrator.…"*

*20. In BVSR-KVR v. Rail Vikas Nigam Ltd., 2020 SCC OnLine Del 456 this Court has held as under:*

> *"26. Having heard the learned counsel for the parties, the foremost issue, which has arisen for consideration is whether, as submitted by Mr. Seth, this petition is not maintainable as there is already an Arbitral Tribunal in place.*
>
> *xxx xxx xxx*
>
> *33. Mr. Seth has also relied upon the judgment of the Supreme Court in Grid Corpn. of Orissa Ltd. (supra) to contend that once Arbitral Tribunal has come into existence a petition under Section*

> *11(6) of the Act was not an appropriate remedy and it was upon for the party to raise objections as to the constitution and jurisdiction of the Arbitral Tribunal itself under the provisions of the Act.*
>
> *34. Similarly, he had also relied upon the judgment of this Court in Newton Engineering & Chemicals (supra) to contend that there was no provision under the Act empowering the Court to terminate the mandate of the Arbitrator appointed in terms of the agreement between the parties and the remedy to any challenge against the appointment of Arbitrator was under Section 13 of the Arbitration and Conciliation Act before the Arbitrator. I am not in agreement with the submissions made by Mr. Seth by relying upon aforesaid two judgments for the simple reason that in Perkins Eastman Architects DPC (supra), the Supreme Court while dealing with an application under Section 11(6) read with Section 11(12)(a) of the Act of 1996 held that as per the scheme of Section 11 of the Act, if there are justifiable doubts as to the independence and impartiality of the persons nominated, and if other circumstances warrant appointment of an independent Arbitrator by ignoring the procedure prescribed, such appointment can be made by the Court.*
>
> *35. If that be so, there is no impediment for this Court to appoint an independent Arbitrator for adjudicating the dispute and difference between the parties…."*
>
> *21. In view of the aforesaid, there is no impediment in entertaining the present petition. This Court therefore annuls the effect of the letter dated 12.07.2023 issued by the respondent no.1; and the letter dated 19.07.2023 issued by the presiding arbitrator, whereby it was purported to be informed that the Arbitral Tribunal stood constituted."*

27. A Division Bench of this Court in ***Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat***, 2023 SCC OnLine Del 3148, has also held that an arbitral tribunal, which inherently lacks jurisdiction, cannot validly conduct any arbitral proceedings. It was observed therein as under:

> ***"4.*** *In TRF Ltd. v. Energo Engineering Projects Ltd., (2017) 8 SCC 377, the Supreme Court held that once the Arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. In Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2020) 20 SCC 760, the Supreme Court, following the earlier decision in TRF Ltd. (supra), held that the Chairman-cum-Managing*

> *Director of a party was ineligible to appoint an arbitrator. Following the aforesaid decisions, this court in Proddatur Cable TV Digi Services v. Siti Cable Network Limited, (2020) 267 DLT 51 held that it is not permissible for a party to unilaterally appoint an arbitrator without the consent of the other party(ies). It is important to note that the aforesaid decisions were rendered in the context of Section 12(5) of the A&C Act.*
>
> ***
>
> ***14.*** *This Court finds no infirmity with the aforesaid view. A person who is ineligible to act an Arbitrator, lacks the inherent jurisdiction to render an Arbitral Award under the A&C Act. It is trite law that a decision, by any authority, which lacks inherent jurisdiction to make such a decision, cannot be considered as valid. Thus, clearly, such an impugned award cannot be enforced."*

28. There is also no merit in the respondent's contention that certain claims are not liable to be referred to arbitration because they fall within the scope of excepted matters. Whether or not any particular claim is precluded from arbitration on account of being an excepted matter is an aspect that can be gone into by a duly constituted arbitral tribunal. Reference in this regard is apposite to ***N.K. Sharma v. General Manager Northern Railway*** 2023 SCC OnLine Del 7576 wherein it was observed as under –

> *"This Court has also perused the invocation letter dated 01.06.2022 and prima facie, none of the claims raised therein falls within 'excepted matters'. However, this aspect would require an in depth examination of the factual matrix which can be done by a duly constituted Arbitral Tribunal, as contemplated in the judgment of the Supreme Court in Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1."*

29. Also, in ***Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re***, 2023 SCC OnLine SC 1666, the Supreme Court has reiterated that the scope of inquiry in a petition under Section 11 of the A&C is limited to examination of the existence of an arbitration agreement. It has been

observed therein as follows:

> ***"G. The doctrine of competence-competence***
>
> ***…***
>
> *162. The legislature confined the scope of reference under Section 11(6A) to the examination of the existence of an arbitration agreement. The use of the term "examination" in itself connotes that the scope of the power is limited to a prima facie determination. Since the Arbitration Act is a self-contained code, the requirement of "existence" of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In DuroFelguera (supra), this Court held that the referral courts only need to consider one aspect to determine the existence of an arbitration agreement - whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. Therefore, the scope of examination under Section 11(6A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by arbitral tribunal under Section 16. We accordingly clarify the position of law laid down in Vidya Drolia (supra) in the context of Section 8 and Section 11 of the Arbitration Act.*
>
> *163. The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. In jurisdictions such as India, which accept the doctrine of competence-competence, only prima facie proof of the existence of an arbitration agreement must be adduced before the referral court. The referral court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the arbitral tribunal. This position of law can also be gauged from the plain language of the statute."*

30. In the recent case of ***SBI General Insurance Co. Ltd. v. Krish Spinning,*** 2024 INSC 532, the Supreme Court has clarified that at the stage

of appointing an arbitrator, the Court's role is limited to determining the *prima facie* existence of an arbitration agreement, and "nothing else". It was observed therein as follows:

> *"113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in In Re: Interplay (supra) that the High Court and the Supreme Court at the stage of appointment of arbitrator shall examine the existence of a prima facie arbitration agreement and not any other issues. The relevant observations are extracted hereinbelow:*
>
> > *"209. The above extract indicates that the **Supreme Court or High Court at the stage of the appointment of an arbitrator shall "examine the existence of a prima facie arbitration agreement and not other issues". These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings**. Accordingly, the "other issues" also include examination and impounding of an unstamped instrument by the referral court at the Section 8 or Section 11 stage. The process of examination, impounding, and dealing with an unstamped instrument under the Stamp Act is not a timebound process, and therefore does not align with the stated goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators. […]"*
> >
> > *(Emphasis supplied)*
>
> *114. In view of the observations made by this Court in In Re. Interplay, it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in Vidya Drolia and adopted in NTPC v. SPML Infra Ltd. that the jurisdiction of the referral court when dealing with the issue of "accord and satisfaction" under Section 11 extends to weeding out ex-facie non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in In Re. Interplay."*
>
> *123. The power available to the referral courts has to be construed in the light of the fact that no right to appeal is available against any order passed by the referral court under Section 11 for either appointing or refusing to appoint an arbitrator. Thus, by delving into the domain of the arbitral tribunal at the nascent stage of Section 11, the referral courts also*

*run the risk of leaving the claimant in a situation wherein it does not have any forum to approach for the adjudication of its claims, if it Section 11 application is rejected."*

31. Thus, it is not open for the respondent to resist arbitration based on their assertion that some of the claim/s fall within the scope of "expected matters". However, the respondent would be well within its right to move an appropriate application under Section 16 of the Arbitration and Conciliation Act, 1996, raising appropriate objections in this regard.

32. Consequently, in view of the aforesaid facts and circumstances and the legal position as noted hereinabove, it is incumbent on this Court to appoint an independent arbitral tribunal to adjudicate the disputes between the parties.

33. Accordingly, Mr. Justice (Retd.) Dinesh Maheshwari, Former Judge, Supreme Court of India (Mobile No.:9485006617) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

34. It is clarified that the respondent shall be entitled to raise appropriate jurisdictional objections/move application under Section 16 of the Arbitration and Conciliation Act, 1996, *inter-alia*, on the ground that the claim/s sought to be raised fall within the scope of excepted matters. Needless to say, in the event of any such application being filed, the same shall be dealt with and adjudicated upon by the learned Sole Arbitrator in accordance with law. It is made clear that this Court has not expressed any opinion with regard thereto.

35. 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.

36. 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.

37. The parties shall share the arbitrator's fee and arbitral costs, equally.

38. 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.

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

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

**SACHIN DATTA, J**

**OCTOBER 4, 2024/*cl, sv***