IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO. 89 OF 2021

PSP Projects Limited ...Petitioner

Versus

Bhiwandi Nizampur City Municipal Corp., through Municipal Commissioner ...Respondent

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- Mr. Sharan Jagtiani, Senior Counsel, a/w Mr. Rohil Bandekar AND Ms. Sheetal Shah i/by M/s. Mehta & Girdharlal, for Petitioner.
- Mr. Ram S. Apte, Senior Counsel i/by M.J. BhattA, for Respondent.

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CORAM : MANISH PITALE, J
RESERVED ON : 07th DECEMBER, 2022
PRONOUNCED ON : 27th JANUARY, 2023

JUDGMENT :

1. In this petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, two questions arise for consideration. Firstly, as to whether the Petitioner is entitled to seek appointment of Arbitrator by invoking an Arbitration clause contained in an agreement executed between the parties and if so whether the Arbitration Clause is hit by Section 12(5) read with the Seventh Schedule to the said Act. Secondly, whether the Respondent forfeited its right to appoint Arbitrator, having failed to appoint one after expiry of the period specified in the notice invoking Arbitration issued by the Petitioner and upon the Petitioner filing the present petition before this Court.

2. Before discussing the position of law, in order to answer the aforesaid questions, in the light of the judgments brought to the notice of this Court, it would be appropriate to briefly state the facts, leading up to filing of the present petition.

3. The Petitioner is a company engaged in the business of construction and the Respondent is the Bhiwandi Nizampur City Municipal Corporation. The Petitioner was a successful bidder in a tender floated by the Respondent – Corporation for construction of Dwelling Units for Economically Weaker Sections under the Pradhan Mantri Awas Yojana at Bhiwandi. The Petitioner tendered a security deposit, in compliance with the tender document and work order was issued. It appears that the execution of the construction project was delayed due to various issues. In this backdrop the parties exchanged correspondence, in order to find a solution and in the process the parties blamed each other for the delay.

4. On 08th June, 2021, the Commissioner of the Respondent – Corporation issued a show cause notice to the Petitioner, alleging that the project was delayed due to the Petitioner and despite the Respondent – Corporation being ready to consider an extension of 12 months in the backdrop of the Covid-19 pandemic, it was found that the Petitioner was unnecessarily raking up issues, resulting in delay in execution of the project. The notice specifically called upon the

Petitioner to submit explanation within seven days, failing which appropriate action would be taken in the matter.

5. On 14th June, 2021, the Petitioner sent its response to the aforesaid notice, stating the reasons why the execution of the project was delayed. It was stated that the show cause notice was without any justification, particularly when the Engineer-in-charge of the project had not taken any steps against the Petitioner.

6. Since the show cause notice issued by the Commissioner threatened to invoke Clause 3(2) of the Contract against the Petitioner, it was constrained to file an application under Section 9 of the aforesaid Act, before the District Court at Thane. Although initially the aforesaid Court restrained the respondent from invoking of Bank Guarantee, by order dated 09th September, 2021, the application was dismissed. The Petitioner has filed an Appeal against the same under Section 37 of the said Act.

7. In the meanwhile, on 30th July, 2021, the Petitioner issued notice to the Respondent – Corporation stating its grievances, thereby raising disputes and it invoked the Arbitration Clause of the Tender Document read with Work Order and the Agreement executed between the parties. The Petitioner proposed the name of a former Chief Justice of this Court as a sole Arbitrator for resolution of

disputes between the parties.

8. On 11th August, 2021, the Respondent – Corporation sent its reply through Advocate to the invocation notice of the Petitioner. The Respondent – Corporation denied the claims made in the said notice and specifically stated that the Petitioner, by proposing the name of a sole Arbitrator, was seeking to deviate from procedure agreed between the parties for appointment of an Arbitral Tribunal. It is significant that the Arbitration Clause in the present case specified that the Petitioner would appoint its nominee on the Arbitral Tribunal from a panel of five names to be provided by the Respondent and the Respondent would then appoint its nominee from the panel and further that the two Arbitrators would choose the third Arbitrator. The Respondent – Corporation in its reply asked the Petitioner to unconditionally withdraw the said notice.

9. It is in this backdrop that the Petitioner filed the present petition, specifically praying for appointment of sole Arbitrator in terms of its invocation notice dated 30th July, 2021.

10. Upon notice being served, the Respondent appeared and filed its Affidavit-in-Reply, stating that the present petition deserved to be dismissed. It was submitted that a proper interpretation of the Arbitration Clause in the present case would show that in the light of

the nature of disputes being raised by the Petitioner, it should have placed its grievance before the City Engineer of the Respondent – Corporation and that further procedure in that regard ought to have been followed. It was submitted that the contention of the petitioner that the Arbitration clause violated Section 12 (5) read with the Seventh Schedule of the said Act, was without any substance and that there was no question of the Respondent having forfeited its right to appoint Arbitrator as per the agreed procedure.

11. Mr. Sharan Jagtiani, learned Senior Counsel appearing for the Petitioner submitted that in the present case, the Arbitration Clause i.e. Clause 25 of the Contract provided for a detailed procedure for settlement of disputes through Arbitration. It was submitted that, considering the nature of disputes arising between the parties, the same could not be referred to the City Engineer as per the procedure specified in option (I) of the Arbitration Clause. It was submitted that therefore, option (II) for Arbitration applied in the facts of the present case. It was submitted that even if, assuming for the sake of argument that option (I) applied, the same was rendered redundant, in view of the fact that in the present case the Commissioner of the Respondent – Corporation had issued show cause notice dated 08th June, 2021, to the Petitioner leading to disputes between the parties. It was submitted that the Commissioner, being the highest authority

of the Respondent – Corporation, there was no question of the issue being placed before the City Engineer of the Respondent – Corporation, for the petitioner to exercise option (I).

12. It was further submitted that since option (II) of the Clause applied in the present case, it was necessary to examine whether the said option was hit by Section 12(5), read with the Seventh Schedule of the said Act. It was submitted that by an amendment brought into effect from October, 2015 to the said Act, if either party had the power to appoint an Arbitrator unilaterally, it vitiated the entire clause. The learned Senior Counsel referred to the procedure specified in option (II) of the Arbitration Clause. It was submitted that in the present case the disputes were such that the value of the claims clearly exceeded Rs. 1 Crore and therefore, there would be an Arbitral Tribunal of three Arbitrators. It was submitted that since the Arbitration Clause in such a situation provided that the Respondent – Corporation would make a panel of five Arbitrators, from amongst whom the Petitioner would have to choose one, the other being appointed by the Respondent – Corporation from the panel and the two Arbitrators would choose the third Arbitrator, the said clause was rendered unsustainable in the eyes of law.

13. The learned Senior Counsel for the Petitioner relied upon judgments of the Hon'ble Supreme Court in the cases of *Voestalpine*

Schienen GMBH Vs. Delhi Metro Rail Corporation Ltd.[1], *TRF Ltd vs Energo Engineering Projects Ltd.*[2] and *Perkins Eastman Architects DPC & Anr. vs HSCC (India) Limited*.[3] It was submitted that the judgment of the Hon'ble Supreme Court in the case of *Voestalpine Schienen GMBH Vs. Delhi Metro Rail Corporation Ltd.* (supra) was closest on facts to the present case and it clearly supported the contention of the Petitioner that the Arbitration Clause in the present case was vitiated and hit by Section 12(5) read with the Seventh Schedule to the aforesaid Act. The learned Senior Counsel for the Petitioner brought to the notice of this Court judgment of the Hon'ble Supreme Court in the case of *Central Organization For Railway Electrification vs M/s. ECI-SPIC SMO-MCML (JV) A Joint Venture Company*[4], to contend that although the said judgment did uphold the Arbitration Clause, which provided that one of the parties would forward a panel of Arbitrators, on facts, the said judgment was distinguishable. It was further submitted that in any case, the Hon'ble Supreme Court subsequently in the case of *Union of India M/s. Tantia Constructions Limited* by an order dated 11th January, 2021, passed in Special Leave Petition (C) No. 12670 of 2020, expressed doubt about the correctness of the judgment in the case of *Central Organization For Railway Electrification vs M/s. ECI-SPIC*

1 (2017) 4 SCC 665
2 (2017) 8 SCC 377
3 (2020) 20 SCC 760
4 (2020) 14 SCC 712

SMO-MCML (JV) A Joint Venture Company (supra) and referred the matter to a larger bench. The learned Senior Counsel also relied upon order of the Calcutta High Court in the case of *M/s Tantia Constructions Limited Vs. Union of India* (order dated 12th March, 2020, passed in AP No. 732 of 2018).

14. On this basis, the learned Senior Counsel for the Petitioner submitted that the notice dated 30th July, 2021, issued by the Petitioner for appointment of a sole Arbitrator was valid. The learned Senior Counsel further submitted on the second aspect of the matter that in the light of the law laid down by the Hon'ble Supreme Court on the question of forfeiture by a party of the right to appoint an Arbitrator, in the facts of the present case the Respondent – Corporation had lost its right to appoint an Arbitrator. The learned Senior Counsel placed reliance on judgments of the Hon'ble Supreme Court in the case of *Datar Switchgears Ltd. Vs. Tata Finance Ltd. & Anr.*[5] Punj Lloyd Ltd. vs Petronet MHB Ltd.[6], and *Union of India Vs. M/s. Bharat Battery Manufacturing Co. (P) Ltd.*[7].

15. The thrust of the submission on behalf of the Petitioner on this aspect of the matter was that as per the law laid down by the Hon'ble Supreme Court once notice period for appointment of

5 (2000) 8 SCC 151
6 (2006) 2 SCC 638
7 (2007) 7 SCC 684

Arbitrator pursuant to invocation of Arbitration by one party lapses and the party moves the Court under Section 11(6) of the said Act for appointment of Arbitrator, the other party having right to appoint Arbitrator under the Arbitral Clause loses the right to do so. It was submitted that in the present case, on 30th July, 2021, the Petitioner invoked the Arbitration Clause and proposed appointment of sole Arbitrator. In the said notice, the Petitioner called upon the Respondent – Corporation to amicably settle the dispute within 15 days of receipt of the notice, failing which the sole Arbitrator was proposed on behalf of the Petitioner. Although the Respondent – Corporation replied on 11th August, 2021 and disputed the claims of the Petitioner, it did not exercise its right of appointing an Arbitrator in terms of the Arbitration Clause. Even if the statutory period of 30 days was to be calculated after expiry of 15 days from 30th July, 2021, the said period was over. It was submitted that thereafter, admittedly, till the present petition was filed under Section 11(6) of the said Act, the Respondent – Corporation did not exercise its right under the Clause to appoint an Arbitrator.

16. According to the learned Senior Counsel for the Petitioner, in the face of such admitted facts, as per the aforementioned position of law, the Respondent – Corporation forfeited its right to appoint an Arbitrator and that therefore, the present petition deserved to be allowed in terms of the prayer made therein.

17. On the other hand, Mr. Ram S. Apte, learned Senior Counsel appearing for the Respondent – Corporation submitted that on both aspects of the matter, the contentions raised on behalf of the Petitioner did not deserve consideration. It was submitted that the Arbitration Clause in the present case provided for two options. In the light of the nature of disputes raised by the Petitioner against the Respondent – Corporation, option (I) applied and the Petitioner ought to have raised grievance before City Engineer of the Respondent – Corporation and against the decision of the said Authority, an Appeal was provided to the Municipal Engineer and thereafter, the Petitioner could have invoked Arbitration. Having failed to follow the procedure, the invocation notice itself was premature and stillborn, thereby indicating that the present petition deserved to be dismissed.

18. On the question of the Arbitration Clause being hit by Section 12(5) read with the Seventh Schedule of the said Act, the learned Senior Counsel appearing for the Respondent – Corporation placed reliance on the aforementioned judgment of the Hon'ble Supreme Court in the case of *Central Organization For Railway Electrification vs M/s. ECI-SPIC SMO-MCML (JV) A Joint Venture Company* (supra). It was emphasized that it being a judgment rendered by a bench of three Hon'ble Judges of Supreme Court

holding the field, the earlier judgment of a bench of two Hon'ble Judges of the Supreme Court in the case of *Voestalpine Schienen GMBH Vs. Delhi Metro Rail Corporation Ltd.* (supra), was no longer good law. It was further submitted that the judgments in case of *TRF Ltd vs Energo Engineering Projects Ltd.* and *Perkins Eastman Architects DPC & Anr. vs HSCC (India) Limited* (supra) assisted the Respondent – Corporation, for the reason that the option available to the Petitioner to nominate its Arbitrator on the panel counterbalanced the advantage that the Respondent – Corporation may have in nominating its Arbitrator.

19. It was further submitted that merely because the Hon'ble Supreme Court in a subsequent order had referred the Judgment in the case of *Central Organization For Railway Electrification vs M/s. ECI-SPIC SMO-MCML (JV) A Joint Venture Company* (supra) for consideration of a larger bench, that in itself cannot come to the aid of the Petitioner.

20. On the aspect of forfeiture of the right of the Respondent – Corporation to appoint its nominee on the Arbitral Tribunal, the learned Senior Counsel for the Respondent – Corporation submitted that in the present case, a perusal of the notice dated 30th July, 2021, sent on behalf of the Petitioner invoking Arbitration would show that such invocation itself was in the teeth of the Arbitration Clause. It

was submitted that while the Arbitration Clause permitted the Petitioner to nominate its Arbitrator on the Arbitral Tribunal, by the invocation notice dated 30th July, 2021, the Petitioner chose to nominate a sole Arbitrator. In the reply dated 11th August, 2021, sent on behalf of the Respondent – Corporation, it was specifically submitted that the notice itself was defective and *mala fide* as the Petitioner did not have authority to nominate a sole Arbitrator under the Arbitration Clause. It was submitted that when the invocation itself was defective, the alleged failure on the part of the Respondent – Corporation to exercise its right of nominating Arbitrator on the Arbitral Tribunal was of no consequence. Hence, there was no question of forfeiture of the right of the Respondent – Corporation to appoint its Arbitrator on the Arbitral Tribunal, in terms of the Arbitration Clause. On this basis, the learned Senior Counsel appearing for the Respondent – Corporation submitted that the present petition deserved to be dismissed.

21. Having heard the learned Counsel for the rival parties, this Court is of the opinion that before examining the position of law laid down by the Hon'ble Supreme Court in the context of the two questions that arise for consideration in this petition, it would be necessary to peruse the Arbitration Clause. Clause 25 of the Contract executed between the parties provides for Arbitration and it reads as

follows:

CLAUSE 25 :

Settlement of Disputes & Arbitration :

A. Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter.

I. If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the City Engineer in writing for written instruction or decision. Thereupon the City Engineer shall give his

written instructions or decision within a period of one month from the receipts of the contractor's letter.

If the City Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the receipt of Additional Municipal Engineer's decision appeal to the Municipal Engineer who shall afford an opportunity to the contractor to be heard, if the later so desires, and to offer evidence in support of his appeal. The Municipal Engineer shall give his decision within 03 months of receipt of the Contractor's Appeal. If the contractor is dissatisfied with his decision, the contractor shall within a period of 03 months from receipt of the decision, give notice to the BNCMC for appointment of Arbitrator, failing which, the said decision shall be final, binding and conclusive and not referable to adjudication by the Arbitrator.

II. Except where the decision has become final, binding and conclusive in terms of Sub Para (I) above, disputes or difference shall be referred for adjudication to an arbitrator, who shall be a technical person having knowledge and experience of the trade, appointed by the Municipal

Commissioner, BNCMC. Matters to be arbitrated upon shall be referred to a sole Arbitrator where the total value of claims does not exceed INR ONE Crore. Beyond the claim limit of INR ONE Crore, there shall be three arbitrators. For this purpose the BNCMC will make out a panel of Engineers with the requisite qualifications and professional experience relevant to the field to which the contract relates. This panel will be from serving or retired Engineers of Central / State Government, BNCMC's or of Public sector. In case of a single arbitrator, the Panel will be of three Engineers, out of which the Contractor will choose one. In case three arbitrators are to be appointed, the BNCMC will make out a panel of five. The Contractor and the BNCMC will choose one arbitrator each and the two so chosen will choose the third arbitrator. Neither party shall be limited in the proceedings before such arbitrator(S) to the evidence nor did arguments put before the City Engineer for the purpose of obtaining his decision. The arbitration proceedings shall be held in Bhiwandi only. The language of proceedings that of documents and communication shall be English.

It is a term of this contract that the

party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the City Engineer of the appeal.

It is also a term of this contract that no person other than a person appointed by the Municipal Commissioner, BNCMC, as aforesaid, should act as arbitrator and, if, for any reason that is not possible; the matter shall not be referred to arbitration at all. It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for the payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the BNCMC shall be discharged and released of all liabilies under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made

there under and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority to him and, in all cases, where the total amount of the claims by any party exceeds INR 100,000/-, the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties. It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date be issue the notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator, shall, if required, to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any

part thereof shall be paid and fix or settle the amount of costs to be so paid.

B. The decision of the City Engineer regarding the quantum of reduction as well as justification thereof in respect of rates for substandard work which may be limited 25% decided to be accepted will be final and could not be open to Arbitration.

22. It is the case of the Petitioner that, considering the show cause notice dated 08th June, 2021, issued by the Commissioner of the Respondent – Corporation levelling allegations against the Petitioner, the disputes arising between the parties were not covered under option (I) contained in the above quoted clause. This is disputed on behalf of the Respondent – Corporation. A perusal of the Arbitration Clause shows that option (I) pertains to a dispute that may arise between the parties when the Contractor i.e. the Petitioner considers any work to be outside the requirements of the contract or disputes any drawings, record or decision given in writing by the Engineer-in-charge of the Respondent – Corporation, which is unacceptable to the Petitioner. In such a situation, he would have to place a request before the City Engineer in writing within 15 days for a decision in the matter. Thereafter, avenue of Appeal is provided and ultimately if the Petitioner is not satisfied with the decision on Appeal given by the Municipal Engineer, it would have to give notice to the Respondent – Corporation for appointment of Arbitrator within three months of

decision on such Appeal.

23. It is significant that Clause 25 opens with the words, "except where otherwise provided in the contract" and thereafter refers questions and disputes that may arise between the parties and also mentions any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract. These are crucial words, for the reason that in the facts of the present case, the Petitioner was not aggrieved by any decision given by the Engineer-in-charge of the Respondent – Corporation on the aspect as to whether the work was outside the requirements of the contract or that the dispute pertained to drawings etc., but the Petitioner was aggrieved by the show cause notice dated 08th June, 2021, issued by the Commissioner of the Respondent – Corporation alleging delay in execution of the project. The response on the part of the Petitioner raised issues on mutual obligations between the parties and such disputes clearly fell within the realm of other questions, claims, rights and matters arising out of the contract.

24. Therefore, the Petitioner is justified in contending that in the facts of the present case, option (II) of aforementioned clause applied and arbitration could be invoked by issuing notice to the Respondent – Corporation. Therefore, the contention raised on behalf of the Respondent – Corporation that the invocation notice dated 30th

July, 2021 was stillborn or premature, is not sustainable. Even otherwise, the Petitioner is justified in contending that option (I) was not available to the Petitioner in the facts of the present case, because the disputes arose on the basis of show cause notice issued by the highest authority of the Corporation i.e. the Commissioner and such disputes could not have been adjudicated before a City Engineer and even in Appeal before the Municipal Engineer, as such Authorities are clearly inferior to the Commissioner of the Respondent – Corporation. Thus, viewed from any angle, the contention raised on behalf of the Petitioner is justified that the invocation notice was issued in terms of the Arbitration Clause and it could not be said to be stillborn or premature.

25. Having reached the conclusion that the Petitioner could have invoked the Arbitration Clause in the light of the disputes arising between the parties in pursuance of show cause notice dated 08th June, 2021, issued by the Respondent – Corporation through its Commissioner, it needs to be examined as to whether the Arbitration clause and the procedure prescribed therein is hit by Section 12(5) read with the Seventh Schedule to the said Act. In order to examine the said aspect of the matter, it would be appropriate to refer to the position of law clarified in the judgments of the Hon'ble Supreme Court.

26. In the case of *Perkins Eastman Architects DPC & Anr. vs HSCC (India) Limited* (supra), this Court considered a situation where one of the parties had the right to appoint an Arbitrator. The other party claimed that such unilateral authority to appoint an Arbitrator fell foul of Section 12(5) read with the Seventh Schedule to the said Act. The Hon'ble Supreme Court referred to its earlier judgment in the case of *TRF Ltd vs Energo Engineering Projects Ltd.* (supra), wherein it was held that the Managing Director of one party acting as the Arbitrator in terms of the Arbitration Clause was in the teeth of Section 12(5) read with the Seventh Schedule to the said Act. After referring to the said judgment, in the case of *Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Limited* (supra), the Hon'ble Supreme Court held that the prohibition contained in the said provision equally applied to a situation where one of the parties had unilateral authority to appoint the Arbitrator. The Hon'ble Supreme Court in the said judgment of *Perkins Eastman Architects DPC & Anr. vs HSCC (India) Limited* (supra) held as follows:

> 20. We thus have two categories of cases. The *first*, similar to the one dealt with in *TRF Limited* where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to

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

21. But, in our view that has to be the logical deduction from *TRF Limited*. Paragraph 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator" The ineligibility referred to

> therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in *TRF Limited*.

27. Thus, it was held that if one party had the Authority to appoint a sole Arbitrator, such unilateral appointment vitiated the

arbitration clause, but if the two parties had a right to nominate an Arbitrator each and the two Arbitrators then appointed a third Arbitrator, the unilateral nature of the clause ceased, as the rights of the parties stood counterbalanced.

28. But, in an earlier judgment rendered in the case of *Voestalpine Schienen GMBH Vs. Delhi Metro Rail Corporation Ltd.* (supra), which appears to be closer on facts to the present case, the Hon'ble Supreme Court was called upon to decide the validity of an identical Arbitration Clause where the Respondent – Corporation was to provide a panel of five persons, from amongst whom the Petitioner was to choose its nominee as an Arbitrator. In the context of such a clause, the Hon'ble Supreme Court, while applying Section 12(5) read with the Seventh Schedule of the said Act held as follows:

> "28. Before we part with, we deem it necessary to make certain comments on the procedure contained in the arbitration agreement for constituting the arbitral tribunal. Even when there are number of persons empaneled, discretion is with the DMRC to pick five persons therefrom and forward their names to the other side which is to select one of these five persons as its nominee (Though in this case, it is now done away with). Not only this, the DMRC is also to nominate its arbitrator from the said list. Above all, the two arbitrators have also limited choice of picking upon the third arbitrator

> from the very same list, i.e. from remaining three persons. This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by the DMRC. Secondly, with the discretion given to the DMRC to choose five persons, a room for suspicion is created in the mind of the other side that the DMRC may have picked up its own favourites. Such a situation has to be countenanced. We are, therefore, of the opinion that sub-clauses (*b*) & (*c*) of clause 9.2 of SCC need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose third arbitrator from the whole panel."

29. It is a different matter that on facts, in the said case the Respondent – Corporation, instead of restricting the panel to only five persons, forwarded the entire list of 31 persons on the panel to the Petitioner to nominate its Arbitrator and in that light, the Hon'ble Supreme Court passed its operative order. Nonetheless, the law crystallized in paragraph no. 28 of the said judgment quoted above, clearly indicates that when the choice for the Petitioner in the present case similarly stood restricted to choose an Arbitrator from a panel of

five names forwarded by the Respondent – Corporation, the arbitration clause stood vitiated and fell foul of Section 12(5) read with the Seventh Schedule to the said Act.

30. The subsequent judgment of a bench of three Hon'ble Judges of the Supreme Court in the case of *Central Organization For Railway Electrification vs M/s. ECI-SPIC SMO-MCML (JV) A Joint Venture Company* (supra) is distinguishable on facts. In the said judgment, the Hon'ble Supreme Court upheld the validity of an Arbitration Clause where one party was to choose its nominee on the Arbitral Tribunal from amongst a panel forwarded by the other party. The difference on facts was that the first party, under the Arbitration Clause could choose two names from the panel of four names forwarded by the other party and thereafter, the other party would have to appoint an Arbitrator as the nominee of the first party from amongst the two chosen by the first party. In such facts, the Hon'ble Supreme Court held that the power to choose was counterbalanced and therefore, such an Arbitration Clause was not vitiated.

31. In the facts of the present case and the specific Arbitration Clause executed between the parties, quoted hereinabove, the Petitioner is mandated to choose a name from a panel of five Arbitrators forwarded by the Respondent – Corporation. As in the case of *Voestalpine Schienen GMBH Vs. Delhi Metro Rail Corporation*

Ltd. (supra) the said clause has to be held as having fallen foul of Section 12(5) read with the Seventh Schedule to the said Act. It is brought to the notice of this Court that the judgment of a bench of three Hon'ble Judges of the Supreme Court in the case of *Central Organization For Railway Electrification vs M/s. ECI-SPIC SMO-MCML (JV) A Joint Venture Company* (supra), has been referred to a larger bench by a subsequent order passed in the case of *Union of India M/s. Tantia Constructions Limited* (supra) by another bench of three Hon'ble Judges of the Supreme Court. While there can be no quarrel with the proposition, that merely because the issue is referred to a larger bench, it cannot be said that the ratio of the judgment of the Hon'ble Supreme Court in the case of *Central Organization For Railway Electrification vs M/s. ECI-SPIC SMO-MCML (JV) A Joint Venture Company* (supra) is not binding. But, as observed hereinabove, the said judgment of the Hon'ble Supreme Court is clearly distinguishable on facts from the present case. The ratio of the judgment of the Hon'ble Supreme Court in the case of *Voestalpine Schienen GMBH Vs. Delhi Metro Rail Corporation Ltd.* read with *Perkins Eastman Architects DPC & Anr. vs HSCC (India) Limited* (supra) covers the matter completely in favour of the Petitioner herein. Therefore, it is held that the Arbitration Clause in the present case is hit by Section 12(5) read with Seventh Schedule to the said Act.

32. Insofar as the second aspect of the matter, pertaining to forfeiture of the right of the Respondent to nominate its nominee on the Arbitral Tribunal, is concerned, in the light of the finding rendered on the first question, the discussion on the second question can be said to be rendered academic. Yet, it would be appropriate to consider the rival contentions raised in respect of the said question.

33. In support of the said contention pertaining to the question of forfeiture, the Petitioner relied upon judgements of the Hon'ble Supreme Court in the case of *Datar Switchgears Ltd. Vs. Tata Finance Ltd. & Anr.* (supra), Punj Lloyd Ltd. vs Petronet MHB Ltd (supra) and *Union of India M/s. Bharat Battery Manufacturing Co. (P) Ltd.* (supra). In the said judgments, it is authoritatively laid down by the Hon'ble Supreme Court that once notice invoking Arbitration is issued by one party wherein both parties have a right to propose their nominees on the Arbitral Tribunal and a period of 30 days elapses, after which the first party files a petition under Section 11 of the said Act before the Court, the other party forfeits its right to appoint its nominee on the Arbitral Tribunal as per the procedure agreed under such an Arbitration Clause.

34. In the present case, the Respondent – Corporation has opposed the aforesaid contention on the ground that the Petitioner, in

its invocation notice dated 30th July, 2021, proposed appointment of a sole Arbitrator, which was in the teeth of the agreed procedure in the Arbitration Clause and therefore, the Respondent – Corporation cannot be said to have forfeited its right to appoint its nominee on the Arbitral Tribunal.

35. This Court is of the opinion that in the face of admitted facts, which show that the law laid down by the Hon'ble Supreme Court in this context is clearly applicable, forfeiture cannot be avoided on the basis that the Petitioner proposed appointment of a sole Arbitrator. The parties agreed for resolution of disputes through Arbitration, as is evident from the Arbitration Clause. The Petitioner raised dispute in the backdrop of the show cause notice dated 08th June, 2021, issued by the Commissioner of the Respondent – Corporation and in that context specifically invoked Arbitration. The Respondent – Corporation ought to have responded by nominating its Arbitrator on the Arbitral Tribunal either within 30 days of the notice issued by the Petitioner or at least before the Petitioner filed the present Petition under Section 11 of the aforesaid Act. Therefore, there is substance in the contention raised on behalf of the Petitioner that the Respondent – Corporation forfeited its right to nominate its nominee on the Arbitral Tribunal.

36. But, this Court is not in agreement with the contention

sought to be raised on behalf of the Petitioner that in the light of the Respondent – Corporation having forfeited its right to appoint its Arbitrator on the Arbitral Tribunal as per the procedure prescribed under the Arbitration Clause, this Court must necessarily accede to the prayer of the Petitioner for appointment of a sole Arbitrator. This Court is of the opinion that by applying the law laid down by the Hon'ble Supreme Court in such circumstances, concerning forfeiture of right by the Respondent – Corporation, although it can be held that the Respondent – Corporation forfeited its right, but it would not *ipso facto* lead to a conclusion that even the Court must necessarily appoint only a sole Arbitrator on the insistence of the Petitioner. In other words, the forfeiture of the right of the respondent would not render this Court powerless to appoint an appropriate Arbitral Tribunal, in the interest of justice.

37. Considering the nature of disputes raised between the parties in the context of the contract concerning construction of Dwelling Units, necessarily involving technical matters, this Court is of the opinion that an Arbitral Tribunal of three members ought to be constituted. On 07th December, 2022, this Court recorded the statement made by the learned Senior Counsel for the Petitioner, on instructions, that instead of the nominee proposed on behalf of the Petitioner in its invocation notice, the Petitioner was now proposing

the name of one Mr. Subhash I. Patel, a technically qualified professional, as its nominee on the Arbitral Tribunal. On the other hand, learned Senior Counsel appearing for the Respondent – Corporation submitted that if the petition was to be allowed, this Court may appoint a nominee on the Arbitral Tribunal on behalf of the Corporation, who is having technical and professional background. The two arbitrators could then appoint the third arbitrator. This statement made on behalf of the Respondent – Corporation further takes care of the apprehensions of the Petitioner. This Court is of the opinion that it would be in the interest of justice that such a course is adopted.

38. In view of the above, the petition is partly allowed. Mr. Subhash I. Patel, is appointed as the nominee of the Petitioner on the Arbitral Tribunal. The details of the said Arbitrator are as follows:

Mr. Subhash I. Patel,
Plot No. 86, Sector – 19,
Gandhinagar – 382021
Mob. No. 9909984321
Email : subhashipatel@gmail.com

39. In the light of the statement made on behalf of the Respondent – Corporation that this Court could appoint a technical and professionally qualified person as nominee on behalf of the Respondent – Corporation on the Arbitral Tribunal, this Court is

inclined to choose a name from the list of the Arbitrators of the institution of Engineers. Accordingly, Mr. S.C. Shrivastava, retired Executive Engineer (Civil), P & T Civil Wign, Mumbai, is appointed as the nominee of the Respondent – Corporation on the Arbitral Tribunal. The details of the learned Arbitrator are as follows:

Mr. S.C. Shrivastava,
704 Grace, "E", Vasant Oscar, L B S Road,
Mulund (W), Mumbai.
Tel. : 26413415 (O), 25652874 (I)
Email : scshrivastava@rediffmail.com

40. The parties shall immediately inform the learned Arbitrators about the order passed today.

41. The learned Arbitrators are requested to communicate their consent and Disclosure Statements as per Section 11(8) r/w Section 12(1) of the said Act, within four weeks to the Registrar (Judicial) of this Court.

42. The two Arbitrators shall appoint the third Arbitrator at the earliest, so that the Arbitral Tribunal can initiate proceedings for resolution of the disputes between the parties.

43. The petition stands disposed of in above terms.

(MANISH PITALE, J.)