

comprising of a panel of four retired railway officers (collectively referred to as **Lists**). ECI did not reply to the letters and filed an application under section 11 of the Act (**Petition 2**) before the High court seeking the appointment of an arbitrator.

In the proceeding before the High Court, ECI submitted that since no neutral arbitrator is contemplated to be appointed in the GCC, it had no other recourse except by filing the petition under Section 11(6) of Act. Accordingly, ECI proposed a name of a retired member from the railway board to be appointed as the sole arbitrator.

By way of an order dated January 3, 2019 the High Court rejected the argument of COFRE that the arbitrator ought to be appointed only from the panel of arbitrators in terms of the GCC and proceeded to appoint a retired judge of a high court as the sole arbitrator subject to the consent of the proposed arbitrator (**Sole Arbitrator**). Under an order dated March 29, 2019 the High Court took the consent of the arbitrator on record and directed the parties to proceed with the arbitration.

Aggrieved by the Orders, COFRE filed a special leave petition before the Supreme Court and challenged the appointment of the Sole Arbitrator by the High Court.

Appointment of an independent arbitrator by the High Court without reference to the GCC was improper

Relying upon *Voestalpine Schienen*² and *Bharat Broadband*³, ECI submitted, that being serving employees of COFRE, the panel of arbitrators proposed by COFRE under the Lists were not eligible to be appointed as arbitrators in view of provisions of Section 12(5) read with Schedule VII of the Act.

Countering ECI's submissions, COFRE submitted that in the present case, appointment of an arbitrator was governed by clauses 64(3)(a)(i) and 64(3)(a)(ii) of the GCC where applicability of Section 12(5) of the Act has been waived off and therefore, the arbitral tribunal shall consist of a panel of three serving Railway Officers or two serving officers and one retired officer. COFRE further drew the Supreme Court's attention to clause 64(3)(b) of GCC where applicability of Section 12(5) of the Act has not been waived off and the clause provided that the arbitral tribunal consist of a panel of three retired railway officers not below the rank of senior administrative officer. Placing reliance on *Parmar Construction*⁴ and *Pradeep Vinod Construction*⁵, COFRE submitted that when the agreement specifically provides for appointment of panel of arbitrators, the appointment should be in terms of the agreement and the appointment of the independent sole arbitrator is in contravention of the GCC which govern the parties for appointment of arbitrators.

After hearing the submissions, the Supreme Court observed that:

- Clause 64(3)(a)(ii) of GCC deals with cases not covered by Clause 64(3)(a)(i) where applicability of Section 12(5) of the Act has been waived off.
- Clause 64(3)(b) of GCC deals with appointment of arbitrator where applicability of Section 12(5) of the Act has not been waived off.
- Upon the coming into force of the Arbitration and Conciliation (Amendment) Act, 2015, Clause 64 of the GCC has been modified *inter alia* providing for constitution of arbitral tribunal consisting of three arbitrators (either serving or retired railway officers), and therefore, the High Court is not justified in appointing an independent sole arbitrator without resorting to the procedure for appointment of the arbitrator as prescribed under Clause 64(3)(b) of the GCC.
- ECI itself had sought for appointment of arbitrator in terms of clause 64 of the GCC.
- Since the value of the work contract was worth more than the stipulated pecuniary amount, the dispute can be resolved only by a panel of three arbitrators in terms of Clause 64(3)(b) of the GCC.

In view of the above, the Supreme Court held that ECI was not right in seeking for appointment of sole arbitrator under clause 64 of the GCC. Further, following the tenets laid down in *Parmar Construction Company* and *Pradeep Vinod Construction*, it held that High Court was not justified in appointing an independent arbitrator without resorting to the procedure for appointment of the arbitrators which has been prescribed under the GCC.

² *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Limited*, (2017) 4 SCC 665

³ *Bharat Broadband Network Limited v. United Telecoms Limited*, (2019) 5 SCC 755

⁴ *Union of India v. Parmar Construction Company*, 2019 SCC OnLine SC 442

⁵ *Union of India v. Pradeep Vinod Construction Company*, 2019 SCC OnLine SC 1467

Retired employees who have worked in the Railways, are not rendered ineligible to act as the arbitrators

ECI contended that the panel of arbitrators proposed by COFRE were not eligible to be appointed as arbitrators under Section 12(5) read with Schedule VII of the Act as the panel comprised of retired employees of COFRE and/or railway employees.

Relying upon *Voestalpine Schienen* and *Government of Haryana PWD*⁶, COFRE contended that the appointment of retired employees as arbitrators cannot be assailed merely because an arbitrator is a retired employee of one of the parties.

The Supreme Court concurred with its reasoning in *Voestalpine Schienen* that *“It cannot be said that simply because the person is a retired officer who retired from the government or other statutory corporation or public sector undertaking and had no connection with DMRC (the party in dispute), he would be treated as ineligible to act as an arbitrator... The very reason for empanelling the retired railway officers is to ensure that the technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators”*.

In view thereof, the Supreme Court held that merely because the panel of the arbitrators are the retired employees who have worked in the Railways, it does not make them ineligible to act as the arbitrators.

While ECI contended that the right of COFRE to constitute the arbitral tribunal is extinguished on filing of the Petition 2, the Supreme Court rejected this submission. The Supreme Court observed that upon receiving the request for arbitration, COFRE acted in accordance with the GCC and sent the Lists with the panel of arbitrators. However, when ECI did not respond to the list, ECI cannot contend that the appointment of arbitral tribunal has not been made before filing the Petition 2 and that the right of COFRE to constitute the arbitral tribunal is extinguished on filing of the Petition 2.

The General Manager has not become ineligible to act as the arbitrator and the reliance on TRF Limited is misplaced – the right of the General Manager in formation of Arbitral Tribunal is counter-balanced by Respondent's power to choose any two from out of the four names

Relying upon *TRF Limited*⁷, ECI submitted that when the general manager himself is statutorily ineligible to be appointed as an arbitrator, he cannot nominate any other person to be an arbitrator.

The Supreme Court noted that although in *TRF Limited* it did observe that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator, it had also discussed another situation viz. where both the parties could nominate respective arbitrators of their choice in which case a party's authority to nominate cannot be questioned⁸. The Supreme Court also noted its decision in *Perkins Eastman*⁹, wherein, while considering its ruling in *TRF Limited* it *inter alia* held that where both parties have a right to nominate their respective arbitrators, any advantage to one party which nominates an arbitrator of its choice gets counter balanced by an equal power with the other party.

In view of the foregoing precedents and upon examining clause 64(3)(b) of GCC which provides for appointment of arbitrator (where applicability of Section 12(5) of the Act has not been waived off), the Supreme Court observed that the *right of the General Manager in formation of Arbitral Tribunal is counter-balanced by respondent's power to choose any two from out of the four names and the General Manager shall appoint at least one out of them as the contractor's nominee*. Therefore, the Supreme Court concluded that the general manager has not become ineligible to act as the arbitrator and the reliance on *TRF Limited* is misplaced.

⁶ *Government of Haryana PWD Haryana (B and R) Branch v. G.F. Toll Road Private Limited*, (2019) 3 SCC 505

⁷ *TRF Limited v. Energo Engineering Projects Limited*, (2017) 8 SCC 377

⁸ *TRF Limited v. Energo Engineering Projects Limited*, (2017) 8 SCC 377:

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

⁹ *Perkins Eastman Architects DPC v. HSCC (India) Limited*, 2019 SCC OnLine SC 1517,

Conclusion

Based on the above findings, the SC set aside the Orders passed by the High Court in Petition No.2. The SC directed COFRE to send a fresh panel of four retired officers in terms of Clause 64(3)(b) of the GCC, and expressly set out time frames for both parties to take necessary steps to constitute the tribunal as per the GCC.

In the present case, the SC respecting principles of party autonomy in an arbitral process, has in essence reiterated that the courts shall make efforts to adhere to the agreed procedure for appointment of an arbitrator.