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

\+ O.M.P. (T) (COMM.) 101/2017 & I.A. No.14596/2017 (stay)
\+ O.M.P. (T) (COMM.) 105/2017 & I.A. Nos.14787-88/2017

Reserved on: 6th February,2018
Date of decision: 21st February, 2018

BHAYANA BUILDERS PVT LTD ..... Petitioner

Through Mr. Gaurav Mitra with Ms. Simran Brar, Ms. Devina Sehgal, Ms. Medhavi Singh, Ms. Deveshi Mishra, Ms. Shriya Ray Chaudhuri & Ms. Anjali Dwivedi, Advs.

versus

ORIENTAL STRUCTURAL ENGINEERS PVT LTD.....Respondent
CENTRAL PARK INFRASTRUCTURE DEVELOPMENT PVT.LTD ..... Respondents

Through Mr.Anil K.Airi, Sr. Adv. with Mr.Sunil Chandwani, Mr.Ravi Chandna, Ms.Bindiya Logawney, Ms.Sadhna Sharma, Ms.Sukanya Lal and Ms.Satyam Bhatia, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. These petitions have been filed under Section 14(2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') praying for termination of the mandate of the Sole Arbitrator appointed by the Managing Director of the respondent.

2. Learned counsel for the petitioner, relying upon the judgment of the Supreme Court in ***TRF Limited v. Energo Engineering Projects Ltd.,*** (2017) 8 SCC 377 has submitted that the Arbitration Agreement between

the parties in so far as that it provides that the Sole Arbitrator shall be nominated by the Managing Director of the respondent, would no longer be enforceable in view of the Section 12(5) of the Act. Though, various other pleas have also been raised in the petition to challenge the Arbitrator so appointed, the learned counsel for the petitioner fairly submits that as these are not relatable to Section 12(5) of the Act, in view of the judgment of the Supreme Court in ***HRD Corporation v. GAIL (India) Limited***, MANU/SC/1066/2017, the petitioner would not press the same in the present petition, reserving its right to agitate the same in its application under Section 34 of the Act, if required.

3. I may at the outset note that the plea that has been raised by the petitioner is no longer *res-integr*a and recently a Coordinate Bench of this Court in ***D.K. Gupta & Anr. v. Renu Munjal,*** 2017 SCC Online Del 12385, considering the effect of Section 12(5) of the Act and the judgment of the Supreme Court in ***TRF (supra)*** has held as under:

> *"8. However the arbitration clause pertaining to this case is on a different note. Here an arbitrator so appointed is not an employee of a party to the agreement. The arbitration clause herein rather gives a choice to one of the parties viz a lender to appoint an arbitrator. Thus perhaps is a striking difference between the two arbitration clauses viz., clause 33 of TRF Ltd. (supra) and clause 8.9.4 of the agreement dated 02.09.2013 herein. In TRF Ltd. (supra) the Managing Director of the buyer, being an employee of the buyer in a way represents the buyer itself, which is not the case here. Admittedly there exist no bar under the Act which restrains a party to appoint an Arbitrator. Rather section 11(2) of the Arbitration and Conciliation*

Act, 1996 empowers the parties to agree on a procedure for appointment of an arbitrator, which exactly is the situation here. Section 11(2) is reproduced as under:-

> *"11. Appointment of arbitrators - ...*
>
> *(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators."*

9. When there exists no prohibition in the Act for a party to appoint an arbitrator, then a lender or a buyer, per any agreement, may have a right to choose an arbitrator, as even noted in para 17 of TRF (supra) as under : -

> *"17. First we shall address the issue whether the Court can enter into the arena of controversy at this stage. It is not in dispute that the Managing Director, by virtue of the amended provision that has introduced sub-section (5) to Section 12, had enumerated the disqualification in the Seventh Schedule. It has to be clarified here that the agreement had been entered into before the amendment came into force. The procedure for appointment was, thus, agreed upon. It has been observed by the designated Judge that the amending provision does not take away the right of a party to nominate a sole arbitrator, otherwise the legislature could have amended other provisions. He has also observed that the grounds including the objections under the Fifth and the Seventh Schedules of the amended Act can be raised*

before the Arbitral Tribunal and further when the nominated arbitrator has made the disclosure as required under the Sixth Schedule to the Act, there was no justification for interference. That apart, he has also held in his conclusion that besides the stipulation of the agreement governing the parties, the Court has decided to appoint the arbitrator as the sole arbitrator to decide the dispute between the parties."

4. In spite of the above, I am writing my own judgment dealing with the contentions raised by the parties as a submission was made that the quotation from ***TRF (supra)*** in the above judgment was what the Designated Judge in High Court had held and as the order of the Designated Judge has been set aside by the Supreme Court, the same could not have been relied upon by the Single Judge.

5. I may at the outset also take note that this Court in ***Usae Equipment Pvt. Ltd. v. Krishna Shanker Tripathi,*** MANU/DE/2223/2016 has held that if at the time of entering into the contract, the parties agree that one of them would have the right to appoint a Sole Arbitrator, it would not be open for the other party to contest the same at a later stage.

6. In order to answer the issue raised by the petitioner, it would be necessary to first reproduce the Arbitration Agreement between the parties. The same is contained in Clause 9.03 of the Work Order and is reproduced herein below:

"9.03 - ***Settlement of Disputes-***

Any dispute arising of this sub contract work shall be settled terms of this work order. In case of failure to settle amicably, the dispute shall be finally resolved in accordance with the Arbitration and Conciliation Act, 1996 by sole Arbitrator to be nominated (including nomination of replacement of Arbitrator, if necessitated by vacancy by vacancy of the post caused by any reason whatsoever) by the Managing Director of the First Party, New Delhi. The venue shall be New Delhi. This Work Order is governed as per the Law of India and the jurisdiction of New Delhi Courts shall apply."

(emphasis supplied)

7. Therefore, the power to appoint a Sole Arbitrator for adjudication of the disputes has been given to the Managing Director of the respondent alone.

8. Section 12(5) of the Act was introduced in the Act by way of the Arbitration and Conciliation (Amendment) Act, 2015 and is reproduced herein below:

"(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

9. The Seventh Schedule was also introduced in the Act by the same Amendment and is reproduced herein below:

"Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.
2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.
3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.
4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.
5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.
6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.
7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.
8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.
9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.
10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.
11. The arbitrator is a legal representative of an entity that is a party in the arbitration.
12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.
13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.
14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator

or his or her firm derives a significant financial income therefrom.

Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.

Arbitrator's direct or indirect interest in the dispute

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.—The term "close family member" refers to a spouse, sibling, child, parent or life partner.

Explanation 2.—The term "affiliate" encompasses all companies in one group of companies including the parent company.

Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above."

10. It cannot be disputed that the Managing Director of the respondent, due to his relationship with the respondent, shall be ineligible for being appointed as an Arbitrator in terms of Section 12(5) of the Act. The only question is, whether the Managing Director of a party to the Agreement would also be ineligible to nominate an Arbitrator, even though, the

parties to the Arbitration Agreement had vested the power of appointment on him.

11. As much reliance has been placed by the learned counsel for the petitioner on the judgment of ***TRF Ltd (supra)***, I would first deal with the same in *extensio.*

12. The Arbitration Agreement in ***TRF (supra)*** was as under:

> *"33. Resolution of dispute/arbitration*
>
> *(a) In case any disagreement or dispute arises between the buyer and the seller under or in connection with the PO, both shall make every effort to resolve it amicably by direct informal negotiation.*
>
> *(b) If, even after 30 days from the commencement of such informal negotiation, seller and the buyer have not been able to resolve the dispute amicably, either party may require that the dispute be referred for resolution to the formal mechanism of arbitration.*
>
> *(c) All disputes which cannot be settled by mutual negotiation shall be referred to and determined by arbitration as per the Arbitration and Conciliation Act, 1996 as amended.*
>
> *(d) Unless otherwise provided, any dispute or difference between the parties in connection with this agreement shall be referred to sole arbitration of the Managing Director of Buyer or his nominee. Venue of arbitration shall be Delhi, and the arbitration shall be conducted in English language.*
>
> *(e) The award of the tribunal shall be final and binding on both; buyer and seller."*
>
> *(emphasis supplied)*

13. Considering the effect of Section 12(5) of the Act on the said Arbitration Agreement, the Supreme Court held as under:

> *"50. First, we shall deal with Clause (d). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who*

falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned senior counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned senior counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. 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. But, here is a case where the Managing Director is the "named sole arbitrator" and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction. In this regard, our attention has been drawn to a two-Judge Bench decision in State of Orissa and others v. Commissioner of Land Records & Settlement. In the said case, the question arose can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held:

> *"25. We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act,*

1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in Roop Chand v. State of Punjab. In that case, it was held by the majority that where the State Government had, under Section 41(1) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, delegated its appellate powers vested in it under Section 21(4) to an "officer", an order passed by such an officer was an order passed by the State Government itself and "not an order passed by any officer under this Act" within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revision by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer in his own right and not as a delegate of the State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate."

(emphasis in original)

51. Be it noted in the said case, reference was made to Behari Kunj Sahkari Awas Samiti v. State of U.P., which followed the decision in Roop Chand v. State of Punjab. It is seemly to note here that said principle has been followed in Chairman, Indore Vikas Pradhikaran.

52. Mr. Sundaram, has strongly relied on Firm of Pratapchand Nopaji. In the said case, the three-Judge Bench applied the maxim "Qui facit per alium facit per se". We may profitably reproduce the passage:

> *"9. ... The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim: "Qui facit per alium facit per se" (What one does through another is done by 21 (1997) 7 SCC 37 22 AIR 1963 SC 1503 oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to do the illegal act within the prohibited area. It is immaterial whether, for the doing of such an illegal act, the agent employed is given the wider powers or authority of the "pucca adatia", or, as the High Court had held, he is clothed with the powers of an ordinary commission agent only."*

53. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. According to learned counsel for the appellant, ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee.

54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to

put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."

(emphasis supplied)

14. Relying on the above, it is submitted that the distinction being drawn by the respondent in the Arbitration Agreement in the case of ***TRF (supra)*** and in the present case and the fact that in ***TRF(supra)*** the Managing Director was himself the designated Sole Arbitrator, while it is not so in the present case, is of no consequence. It is submitted that the said judgment should be read to mean that the Managing Director of the respondent can never appoint an Arbitrator, whether he himself was named as an Arbitrator or not in the Arbitration Agreement or whether only a function of appointment was given to him as an Appointing Authority under the Arbitration Agreement.

15. I am unable to accept the above contention of the learned counsel for the petitioner.

16. Section 12 of the Act deals with the grounds to challenge an Arbitrator and not the Appointing Authority. Section 12 of the Act is reproduced herein below:

"12. Grounds for challenge.*—1(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—*

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind,

which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.]

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

17. Section 12(5) of the Act is based on the recommendation of the Law Commission which specifically dealt with the issue of neutrality of Arbitrators and a discussion in this behalf is contained in paragraphs 53 to 60 of the 246th Report, which are reproduced herein below:

*"**NEUTRALITY OF ARBITRATORS***

53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of arbitration, neutrality of arbitrators viz. their independence and impartiality, is critical to the entire process.

54. In the Act, the test for neutrality is set out in Section 12(3) which provides—

*'**12. (3)** An arbitrator may be challenged only if—*

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality.…'

55. The Act does not lay down any other conditions to identify the "circumstances" which give rise to "justifiable doubts", and it is clear that there can be many such circumstances and situations. The test is not whether, given the circumstances, there is any-actual-bias for that is setting the bar too high; but, whether the circumstances in question give rise to any- justifiable apprehensions-of bias.

56. The limits of this provision has been tested in the Indian Supreme Court in the context of contracts with State entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court (See Executive Engineer, Irrigation Division v.Gangaram Chhapolia, (1984) 3 SCC 627, Transport Deptt. v. Munuswamy Mudaliar 1988 Supp SCC 651, International Airports Authority v. K.D. Bali (1988) 2 SCC 360, S. Rajan v. State of Kerala (1992) 3 SCC 608, Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd. (1996) 1 SCC 54, Union of India v. M.P. Gupta (2004) 10 SCC 504 and ACE Pipeline Contracts (P) Ltd. v. Bharat

Petroleum Corpn. Ltd. (2007) 5 SCC 304 that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in Indian Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd., (2009) 8 SCC 520 : (2009) 3 SCC (Civ) 460, carved out a minor exception in situations when the arbitrator 'was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject-matter of the dispute' (SCC p. 533, para 34) and this exception was used by the Supreme Court in Denel (Proprietary) Ltd. v. Ministry of Defence, (2012) 2 SCC 759 : (2012) 2 SCC (Civ) 37 : AIR 2012 SC 817] and Bipromasz Bipron Trading Sa v. Bharat Electronics Ltd., (2012) 6 SCC 384 : (2012) 3 SCC (Civ) 702, to appoint an independent arbitrator under Section 11, this is not enough.

57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the Arbitral Tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles — even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly

dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr P.K. Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous — and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes.

58. Large-scale amendments have been suggested to address this fundamental issue of neutrality of arbitrators, which the Commission believes is critical to the functioning of the arbitration process in India. In particular, amendments have been proposed to Sections 11, 12 and 14 of the Act.

59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his-possible-appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the red and orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed Section 12(5) of the Act and the Fifth Schedule which incorporates the categories from the red list of the

IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be –ineligible- to be so appointed, -notwithstanding - any prior agreement - to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed Explanation to Section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the red and orange lists of the IBA Guidelines), the- ineligibility- to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the red list of the IBA Guidelines).

60. The Commission, however, feels that -real-and-genuine-party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to Section 12(5), where parties may, -subsequent to disputes having arisen between them-, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all other cases, the general rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1) and in which context the High Court or the designate is to have "due regard" to the

contents of such disclosure in appointing the arbitrator."

18. The Law Commission in its Report further added a Note after its recommendation to add the two Explanation(s) to Section 12 (1) of the Act as under:

> *[NOTE: This amendment is intended to further goals of independence and impartiality in arbitrations, and only gives legislative colour to the phrase "independence or impartiality" as it is used in the Act. The contents of the Fourth Schedule incorporate the Red and Orange lists of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration. While Mr.Malhotra was of the view that the said provisions should not apply to the public sector, excluding the public sector will render the provision susceptible to a challenge under article 19 of the Constitution of India.]*

19. The Law Commission added another Note after its recommendation to add the Proviso to Section 12(5) of the Act as under:

> *[NOTE: This amendment is in consonance with the principles of natural justice, that an interested person cannot be an adjudicator. The Fifth Schedule incorporates the provisions of the Waivable and Non-waivable Red List of the IBA Guidelines on Conflict of Interest. However, given that this clause would be applicable to arbitrations in all contexts (including in family settings), it is advisable to make this provision waivable, provided that parties specifically agree to do so after the disputes have arisen between them.]"*

20. The Law Commission therefore, was not dealing with the question whether a party to the contract can appoint the Arbitral Tribunal for the

parties. It was only dealing with the position that the Arbitrator so appointed must have minimum level of independence and impartiality that is required in the arbitral process regardless of the parties' apparent agreement. In fact, paragraph 56 of the Report contains two issues:- (i) State appointing an arbitrator; (ii) Such arbitrator being employee of the State. The Law Commission confined its examination only to the second issue and made no comment/recommendation on the first.

21. It is to be noted that the Arbitration Agreement, where one party to the agreement has been given the power to appoint Arbitral Tribunal for the parties, have been in existence and upheld by Court from much prior to the Law Commission Report:- (i) ***Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Manufacturing Ltd.***, (1996) 1 SCC 54; (ii) ***Datar Switchgears Ltd. vs. Tata Finance Ltd. & Anr. (2000) 8 SCC 151*** (iii) ***Yashwith Construction (P) Ltd. v. Simplex Concrete Piles India Ltd.*** (2006) 6 SCC 204). In its Report, the Law Commission did not recommend any change as far as this aspect of the appointment procedure of an Arbitrator is concerned.

22. In ***Mithilesh Kumari & Anr. v. Prem Behari Khare***, AIR 1989 SC 427 Supreme Court observed as under:

> *"Is it permissible to refer to the Law Commission's Report to ascertain the legislative intent behind the provision? We are of the view that where a particular enactment or amendment is the result of the recommendation of the Law Commission of India, it may be permissible to refer to the relevant law report as in this case. What importance can be given to it will depend on the facts and circumstances of each case."*

23. In fact, in ***Voestalpine Schienen Gmbh v. Delhi Metro Rail Corporation Ltd.*** AIR 2017 SC 939, the Supreme Court placed reliance on the Law Commission Report while considering the effect of Section 12 of the Act. This judgment is also important for the fact that after considering the Law Commission Report as also the general requirement of independence and impartiality of the Arbitrator as a hallmark of the arbitration proceedings, the Supreme Court upheld the Arbitration Agreement which, in that case, provided the Arbitral Tribunal to be constituted from the panel made by the respondent therein, while merely directing that the part of the Agreement which restricted the rights of the other party to pick an Arbitrator from the five names from the panel of the Arbitrators forwarded by the respondent therein to be deleted and instead a choice be given to nominate any person from the entire panel of the Arbitrators. It was further directed that such panel should be made broadbased so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, especially at the stage of constitution of the Arbitral Tribunal. It is re-emphasized that the Supreme Court did not hold that the Arbitration Agreement which provided that the Arbitral Tribunal will be constituted only by the persons put in the panel by the respondent therein, would no longer be valid due to insertion of Section 12(5) of the Act.

24. As noted above, the Agreements that provide for one of the party to choose the Arbitral Tribunal for the parties have been in existence even prior to the insertion of the Section 12(5) of the Act. If this was the mischief that the Law Commission as also the amendment by way of

insertion of Section 12(5) of the Act sought to remedy, it would have said so in clear and unambiguous terms. The legislature, however, did not make such contracts unenforceable but only proceeded to safeguard the parties against appointment of Arbitrators against whom circumstances exist that can give rise to a justifiable doubt as to their independence or impartiality.

25. It is a cardinal rule of the interpretation of Statute that the Court is bound to interpret a provision according to the plain meaning of the language used in the Statute. The Court cannot add to the Statute. The Court cannot be permitted to legislate in garb of the interpretation of the Statute.

26. It is also of some relevance to note that no amendment has been made to Section 11(2) of the Act which holds that the parties are free to agree on the procedure for appointing the Arbitrator or Arbitrators. Section 11(3) also provides that in any Arbitration with three Arbitrators, each party shall appoint one Arbitrator. Therefore, in that case also, the party is appointing an Arbitrator. Section 11(4) of the Act applies to a case of Arbitration of three Arbitrators. Section 11(5) of the Act applies only where the parties fail to agree on a procedure for appointing the Arbitrator. Section 11(6) of the Act applies where, under an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure. If the intention of the Legislature was that the procedure for appointing the Arbitrator cannot provide for one of the party alone making the appointment of the Arbitrator, it would have provided so in the amendment. In ***Aravali Power Company Pvt. Ltd. vs. Era Infra Engineering Ltd. (MANU/SC1139/2017),*** Supreme Court has

held that it is only on failure of a party to act as required under the agreed procedure, that the Court will be exercising power under sub-section (6) of Section 11 to the Act.

27. One of the foundational pillars of the Arbitration is the party autonomy in the choice of the procedure. It is virtually the backbone of the Arbitration. Recently, the Supreme Court has discussed this principle in detail in ***Centrotrade Minerals and Metal Inc. v. Hindustan Copper Limited,*** (2017) 2 SCC 228. I quote from the judgment as under:

> ***"Party autonomy***
>
> *38. Party autonomy is virtually the backbone of arbitrations. This Court has expressed this view in quite a few decisions. In two significant passages in Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc. this Court dealt with party autonomy from the point of view of the contracting parties and its importance in commercial contracts. In paragraph 5 of the Report, it was observed: (SCC p.130)*
>
> > *"Party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract — (1) proper law of contract, (2) proper law of arbitration agreement, and (3) proper law of the conduct of arbitration, which is popularly and in legal parlance known as "curial law". The interplay and application of these different laws to an arbitration has been succinctly explained by this Court in Sumitomo Heavy Industries Ltd. v. ONGC Ltd.,which is one of the earliest decisions in that direction and which has been consistently followed in all the subsequent decisions including the recent Reliance*

Industries Ltd. v. Union of India."
[Emphasis supplied by us].

Later in paragraph 10 of the Report, it was held: (SCC pp.131-32)

"10. In the matter of interpretation, the court has to make different approaches depending upon the instrument falling for interpretation. Legislative drafting is made by experts and is subjected to scrutiny at different stages before it takes final shape of an Act, Rule or Regulation. There is another category of drafting by lawmen or document writers who are professionally qualified and experienced in the field like drafting deeds, treaties, settlements in court, etc. And then there is the third category of documents made by laymen who have no knowledge of law or expertise in the field. The legal quality or perfection of the document is comparatively low in the third category, high in second and higher in first. No doubt, in the process of interpretation in the first category, the courts do make an attempt to gather the purpose of the legislation, its context and text. In the second category also, the text as well as the purpose is certainly important, and in the third category of documents like wills, it is simply intention alone of the executor that is relevant. In the case before us, being a contract executed between the two parties, the court cannot adopt an approach for interpreting a statute. The terms of the contract will have to be understood in the way the parties wanted and intended them to be. In that context, particularly in agreements of arbitration, where party autonomy is the grund norm, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions and the use of the expressions at the proper places in the agreement."

[Emphasis supplied by us].

39. In Union of India v. Uttar Pradesh State Bridge Corporation Ltd. this Court accepted the view that the

A&C Act has four foundational pillars and then observed in paragraph 16 of the Report that: (SCC p.64)

> *"16. First and paramount principle of the first pillar is "fair, speedy and inexpensive trial by an Arbitral Tribunal". Unnecessary delay or expense would frustrate the very purpose of arbitration. Interestingly, the second principle which is recognised in the Act is the party autonomy in the choice of procedure. This means that if a particular procedure is prescribed in the arbitration agreement which the parties have agreed to, that has to be generally resorted to."*
>
> *[Emphasis supplied by us].*

40. This is also the view taken in Law and Practice of International Commercial Arbitration wherein it is said: "Party autonomy is the guiding principle in determining the procedure to be followed in an international arbitration. It is a principle that is endorsed not only in national laws, but also by international arbitral institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law."

41. However, the authors in Comparative International Commercial Arbitration go a step further in that, apart from procedure, they say that party autonomy permits parties to have their choice of substantive law as well. It is said:

> *"All modern arbitration laws recognise party autonomy, that is, parties are free to determine the substantive law or rules applicable to the merits of the dispute to be resolved by arbitration. Party autonomy provides contracting parties with a mechanism of avoiding the application of an unfavourable or inappropriate law to an*

international dispute. This choice is and should be binding on the arbitration tribunal. This is also confirmed in most arbitration rules."

[Emphasis supplied by us].

42. Be that as it may, the legal position as we understand it is that the parties to an arbitration agreement have the autonomy to decide not only on the procedural law to be followed but also the substantive law. The choice of jurisdiction is left to the contracting parties. In the present case, the parties have agreed on a two tier arbitration system through Clause 14 of the agreement and Clause 16 of the agreement provides for the construction of the contract as a contract made in accordance with the laws of India. We see nothing wrong in either of the two clauses mutually agreed upon by the parties."

28. This principle of party autonomy is also found in various provisions of the Act including Section 10: which leaves the parties free to determine the number of Arbitrators; Section 11: which leaves the parties free to agree on a procedure for appointing a Arbitrator; Section 13 (1): where the parties are left free to agree on procedure to challenge the Arbitrator; Section 19(2): which leaves the parties free to agree on a the procedure to be followed by the Arbitral Tribunal in conducting its proceedings; Section 20: which leaves the party free to agree on the place of Arbitration; Section 22 :which leaves the parties free to agree upon the language or languages to be used in the Arbitration Proceedings and so on.

29. On the other hand, the Act, by way of the amendment, has also specifically restricted such party autonomy where it found it just to do so. Reference in this regard can be drawn to Section 31A (5) of the Act.

30. Even Section 12(5) of the Act restricts the party autonomy as it provides that any person, whose relationship with the party or counsel or the subject matter of the disputes falls under any of the categories specified in the Seventh Schedule, notwithstanding any prior agreement, shall be ineligible to be appointed as an Arbitrator.

31. Party autonomy, therefore, has been taken away only to a limited extent and circumstances and it is not for this Court to expand such exclusion in the garb of interpretation of the Act.

32. As far as the judgment of the Supreme Court in ***TRF Ltd.(supra)*** is concerned, I have already quoted the Arbitration Agreement that came up for interpretation in that case. The Arbitration Agreement provided that the disputes shall be referred to "sole arbitration of the Managing Director of buyer or his nominee". The Supreme Court held that in view of Section 12(5) read with Seventh Schedule of the Act, Managing Director has become ineligible for acting as an Arbitrator. The question before the Supreme Court thereafter was: the Managing Director having become ineligible, does he also become ineligible to nominate an Arbitrator in his place. The Supreme Court relying upon the judgment in ***State of Orissa v. Commissioner of Land Record and Settlement,*** (1998) 7 SCC 162, held that a person who is statutorily ineligible cannot nominate a person to act for him. For reaching this conclusion, the Supreme Court also relied upon the maxim of *"Qui facit per alium facit per se" (What one does through another is done by oneself).* Therefore,

the principle followed by the Supreme Court was that where a person has himself become ineligible to act an Arbitrator, he cannot delegate such power to another as such delegatee would also suffer from the same ineligibility. The judgment of the Supreme Court, in my opinion, cannot be read to say that even if the parties agree that one of the party to the Agreement shall appoint an Arbitrator, the said power has been taken away and such Agreement should be rendered void due to Section 12(5) of the Act.

33. Learned counsel for the petitioner has also relied upon the judgment of this Court in ***C.P.Rama Rao v. National Highways Authority of India,*** 2017 SCC Online Del 9039. In the said case also the Arbitration Agreement provided that the Chairman of the Authority or his nominee shall be the Sole Arbitrator. The said judgment is therefore distinguishable on the same reasoning as ***TRF Ltd. (supra).***

34. One must also take note of the principle that the Arbitrator appointed is not the delegatee of any party. In fact, he has to act independent of the parties. The Arbitrator so appointed is not the agent of the party appointing him. In that view, the judgment of ***TRF Ltd. (supra)*** would not be applicable to the facts of the present case.

35. An arguments has been raised by the learned counsel for the petitioner that as the Arbitration Agreement in the present case also uses the words "*sole Arbitrator to be* ***nominated*** *(including nomination of replacement of Arbitrator, if necessitated by vacancy by vacancy of the post caused by any reason whatsoever) by the Managing Director of the First Party",* the person so appointed would become the delegatee of the Managing Director of the respondent and therefore, in terms of the

judgment in ***TRF Ltd (supra),*** would become ineligible for being appointed as a Sole Arbitrator. This argument is also fallacious. The word "nominated" in the Arbitration Agreement, in my opinion, is not in the nature of a delegation of power as was in the case of ***TRF Ltd. (supra)***.

36. In Black's Law Dictionary, Eighth Edition, the word 'nominate' has been described as under:-

> *"**nominate, vb.** 1. To propose (a person) for election or appointment . < Steven nominated Jane for president > [Cases: Elections ⇔ 122–147; Officers and Public Employees ⇔ 8. C.J.S. Elections §§ 93, 95, 97–110, 111(1), 112–114, 115(1), 116, 118(1), 119(1), 135–137, 162; Officers and Public Employees§ 47.]* 2. To name or designate (a person) for a position < the testator nominated an executor, who later withdrew because he couldn't perform his duties >. [Cases: Executors and Administrators ⇔ 14, 17(7) C.J.S. Executors and Administrators §§ 17-21, 43.]

37. In Stroud's Judicial Dictionary of Words and Phrases, Forth Edition, Vol.3, the word 'nominate' has been defined as under:-

> *"NOMINATE*
> *xxxxxx*
> *(5) A power given in partnership articles to one of the parties to "nominate and INTRODUCE into the firm" another person, involves as valid contract by the other parties to the articles that the new partner, when nominated and introduced, shall come in with their consent as entirely as if they had adopted him by name (Lovegrove v. Nelson, 3My. & K. 20, applied by Stirling L.J., Byrne v. Reid (1902) 2 Ch. 742,743)."*

38. In Major Law Lexicon by P. Ramanatha Aiya, 4th Edition, 2010, the word 'nominate' had been defined to mean as under:-

> *"Nominate: To select a candidate to be voted for a public officer; or as a member of a legislative or representative assembly; to name or to recommend for confirmation. To name or designate a person for some position or office. In a will the words "I nominate" may be used as the equivalent of the more formal and usual words, "I bequeath."*
> *The word "nominate" means to recommend for confirmation. To propose formally for an election; to appoint by name.*
> *TO NOMINATE, NAME. To nominate and to name are both to mention by name; but the former is to mention for a specific purpose: the latter is to mention for general purpose: persons only are nominated, things as well as persons are named; one nominates a person in order to propose him, or appoint him, to an office, but one names a person casually, in the course of conversation, or one names him in order to make some inquiry respecting him. To be nominated is a public act; to be named is generally private; to be nominated is always an honour; to be named is either honourable, or the contrary, according to the circumstances under which it is mentioned : a person is nominated as member of parliament; he is named whenever he is spoken of."*

39. In ***Datar Switchgears Ltd. (supra)***, the Supreme Court had explained the meaning of word "nomination" as under:-

> *"25. Lastly, the appellant alleged that "nomination" mentioned in the arbitration clause gives the 1st respondent a right to suggest the name of the arbitrator to the appellant and the appointment could be done only with the concurrence of the appellant. We do not find any force in the contention.*

> *26. In P.Ramanatha Aiyar's Law Lexicon (2nd Edn.) at pp. 1310-11, the meaning of the word ""nomination" is given as follows:*
>
> *"1. The action, process or instance of nominating; 2. the act, process or an instrument of nominating; an act or right of designating for an office or duty.*
>
> *'Nominations' is equivalent to the word 'appointments', when used by a mayor in an instrument executed for the purpose of appointing certain persons to office."*
>
> *27. Nomination virtually amounts to appointment for a specific purpose and the 1st respondent has acted in accordance with clause 20.9 of the agreement. So long as the concurrence or ratification by the appellant is not stated in the arbitration clause, the nomination amounts to selection of the arbitrator."*

40. In my view, therefore, the word "nominated" as used in Clause 9.03 of the Work Order in the present case only means to select a Sole Arbitrator for the parties. Person appointed/selected as an Arbitrator would not become the delegates or agent or representative of the Managing Director of the respondent or the respondent itself.

41. While I am upholding the power of a party to appoint a Sole Arbitrator if so agreed and provided for in the Arbitration Agreement, I must emphasise that the burden of ensuring that the person so appointed shall not fall foul of any of the provisions of the Fifth or the Seventh Schedule of the Act will be even higher and open to a greater scrutiny. The spirit behind the amendment to the Act shall always have to be kept in mind while appointing the Arbitrator or considering any challenge

thereto. The Arbitrator so appointed should also remain alive to the great responsibility being vested on him due to such appointment and must not even leave an iota of doubt on his neutrality or impartiality.

42. In view of the above, I find no merit in the present petitions and the same are accordingly dismissed, however, leaving it open to the petitioner to agitate all other contentions regarding the impartiality or independence of the Arbitrator before the Arbitrator himself or in such other proceedings as may be open to it in law. There shall be no order as to cost.

NAVIN CHAWLA, J

FEBRUARY 21, 2018/Arya