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

% *Date of Decision: 29th July, 2025*

\+ ARB.P. 1829/2024

VILLUPURAM HIGHWAYS CONSTRUCTION PVT LTD .....Petitioner

Through: Mr. Anil K. Airi, Senior Advocate with Ms. Bindiya L. Airi, Mr. Ravi K. Chandna, Mr. Vishal Tyagi, Mr. Mudit Ruhella and Mr. Shayuk Kumar, Advocates.

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA.....Respondent

Through: Mr. Santosh Kumar, Standing Counsel along with Mr. Kartik Gupta, Mr. Aditya Ramani, Mr. Devansh Malhotra, Ms. Nidhi Rani and Mr. Vaibhav Mishra, Advocates.

\+ ARB.P. 2090/2024

SURYAPET KHAMMAM ROAD PVT LTD .....Petitioner

Through: Mr. Arvind Nayar, Senior Advocate with Mr. Nilava Bandyopadhyay, Mr. Rahul Pandey and Ms. Zeel Gondaliya, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA.....Respondent

Through: Mr. Manish K. Bishnoi and Mr. Khubaib Shakeel, Advocates.

\+ ARB.P. 423/2025 and I.A. 7558/2025 and 10248/2025

PANAGARH PALSIT ROAD PVT LTD .....Petitioner

Through: Mr. Arvind Nayar, Senior Advocate with Mr. Nilava Bandyopadhyay, Mr. Rahul Pandey and Ms. Zeel Gondaliya, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA.....Respondent
Through: Mr. Santosh Kumar, Standing Counsel along with Mr. Kartik Gupta, Mr. Aditya Ramani, Mr. Devansh Malhotra, Ms. Nidhi Rani and Mr. Vaibhav Mishra, Advocates.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

1. These petitions are filed by the Petitioners under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('1996 Act') for appointment of Arbitrators to adjudicate the disputes between the parties. On account of similitude of questions of law involved in the three petitions, they were heard together with the consent of the parties and are being decided by this common judgment.

ARB.P. 1829/2024

2. Petitioner and Respondent/National Highway Authority of India (NHAI) entered into a Concession Agreement ('CA') on 23.04.2018 for *'Four Laning of Villupuram - Puducherry Section of NH-45A (New NH-332) from Km 0.000 to Km. 29.000 (Design Chainage) under Bharatmala Pariyojana Phase-I (Residual NHDP Phase-IV works) on HAM'* in the State of Tamil Nadu and Union Territory of Puducherry.

3. Petitioner avers that it performed all its obligations as required under Article 4.1.2 of CA within the stipulated period but NHAI failed to satisfy the conditions precedent under the Agreement and illegally issued letter dated 23.10.2019 claiming deemed termination of the CA. Since CA was

deemed to be terminated, Petitioner vide letter dated 25.11.2019 requested NHAI to reimburse the expenditure incurred by the Petitioner in terms of Article 4.5 of the CA and by a subsequent letter dated 28.04.2022, sought damages, maintenance costs, other expenses and interest on the amounts due and payable by NHAI, followed by reminder letter dated 21.06.2022.

4. It is averred that on 15.09.2022, Regional Officer, Chennai/NHAI issued a letter to CGM (T) TN recommending release of Rs. 8.31 crore and for execution of a settlement agreement. On 16.09.2022, Petitioner notified the dispute to NHAI under Article 38 of CA and once again requested for release of outstanding due, but to no avail. By letter dated 17.10.2022, Petitioner consented to refer the disputes to Conciliation and Settlement Committee of Independent Experts ('CCIE') for conciliation and settlement in terms of Article 38 of CA read with NHAI Policy Circular dated 09.04.2021. In response thereto and in compliance with Article 38.2 of CA, NHAI called a meeting vide letter dated 13.02.2024 to resolve the disputes amicably. However, since all efforts to amicably settle the disputes failed, vide invocation notice dated 23.05.2024, Petitioner informed NHAI of appointment of a retired Judge of Punjab and Haryana High Court as its nominee Arbitrator and called upon NHAI to appoint its nominee Arbitrator.

5. It is further averred that NHAI did not agree to the name of the Arbitrator nominated by the Petitioner and vide letter dated 26.06.2024 insisted that as per applicable Arbitration Rules of the Society for Affordable Redressal of Disputes ('SAROD Rules'), Petitioner was obliged to nominate the Arbitrator only from the list of empanelled Arbitrators maintained by Society for Affordable Redressal of Disputes ('SAROD'). By letter dated 01.08.2024, NHAI again requested the Petitioner to choose its

nominee Arbitrator from the SAROD panel. In this backdrop, present petition was filed.

ARB.P. 2090/2024

6. NHAI invited proposals by its Request for Proposal ('RFP') dated 20.09.2018 for undertaking development and operation/maintenance of Four-laning of the Suryapet (Design Ch. 0.420/Existing Km. 128.500 of NH-65) to Khammam (Design Ch. 59.046/Existing Km 50.750 of Old SH-42) of NH-365BB (Old SH-42) (Design Length 58.626 Km) in the State of Telangana under Bharatmala Pariyojana on Hybrid Annuity Mode. Consortium of Adani Transport Limited (lead member) and Prakash Asphalting's & Toll Highways (India) Ltd. submitted its bid on 11.02.2019 to NHAI for project cost of Rs.1566.30 crores. After evaluation of bids, Letter of Award dated 08.03.2019 was issued by NHAI in favour of lead member of the Consortium, which in turn on 12.04.2019 incorporated Suryapet Khammam Road Private Limited i.e. the Petitioner to carry out the obligations under the Letter of Award ('LOA').

7. It is averred that on 14.06.2019, Petitioner and Respondent entered into the CA for execution of the project with Appointed Date being 06.01.2020 and Scheduled Date of Completion being 24.06.2022. Petitioner states that during construction of the Project Highway, it sent several representations to the concerned officials of NHAI regarding delays, omissions and breaches on NHAI's part. On 23.10.2020, NHAI granted interim extension of 90 days on account of COVID-19 and completion date was extended to 22.09.2022. Despite all failures and breaches by NHAI as also the obstructions and hindrances created, Petitioner completed the construction work on 22.09.2022 and Independent Engineer ('IE') issued the

Provisional Completion Certificate on 04.10.2022 with effect from 22.09.2022 under Article 14.3 of CA. Further Completion Certificate for the project was issued on 13.02.2024 with effect from 10.08.2023.

8. It is stated that Petitioner sent a letter dated 25.10.2023 to NHAI seeking resolution of several pending issues including but not limited to failure of NHAI to approve EOT-2, reimbursement of additional costs, losses and damages on account of non-supply of fly/pond ash for construction works, reimbursement of additional cost incurred due to amendment in the rate of excise duty and consequential increase in VAT for High-Speed Diesel, release of GST relating to annuity payments due to change of law, compensation for additional costs due to lockdown guidelines etc. NHAI, however, failed to resolve the disputes and vide notice dated 29.04.2024 under Article 38.1 of CA, Petitioner conveyed its intention to amicably settle the disputes with respect to claims worth Rs.830 crores, approximately. NHAI took no initiative to amicably settle the disputes and thus the Petitioner sent Notice of Conciliation on 10.05.2024 under Article 38.2 of CA, calling for a conciliation meeting within 7 days. However, even these meetings remained unfruitful and unproductive and Petitioner nominated its Arbitrator invoking arbitration Article 38.3 incorporated in the CA and vide notice dated 18.06.2024 called upon NHAI to nominate its Arbitrator.

9. It is further averred that vide letter dated 01.07.2024, NHAI objected to the nominee Arbitrator of the Petitioner on the ground that he was not from SAROD's list of Arbitrators. This position was refuted by the Petitioner in the response dated 08.07.2024 pointing out that its nominee Arbitrator was validly appointed in consonance with Article 38.3 and more

particularly, the proposed Arbitrator was on the panel of Arbitrators maintained by SAROD. However, NHAI continued to insist that the nominee Arbitrator was not on the panel of SAROD and Petitioner needed to take recourse to Rule 4 of SAROD Rules for commencement of arbitration and propose the name of the nominee Arbitrator from the panel. On 31.07.2024, nominee Arbitrator of the Petitioner withdrew his nomination with due intimation to the Petitioner. Conciliation proceedings were resumed but to no avail and after the judgment of the Supreme Court in ***Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) a Joint Venture Company***, ***2024 SCC OnLine SC 3219***, Petitioner issued second invocation notice on 13.11.2024 and nominated former Judge of the Supreme Court as its nominee Arbitrator *albeit* he was not on the panel of SAROD. NHAI did not agree to the nominee Arbitrator even on the second occasion and Petitioner approached this Court.

ARB.P. 423/2025

10. NHAI invited proposals by RFP dated 23.12.2020 for short listing bidders for construction, operation and maintenance of Six Laning of National Corridor NH-19 from Panagarh to Palsit from Km. 521.120 to Km. 588.870 (total design length 67.750 Km.) in the State of West Bengal under Bharatmala Pariyojana to be executed on Build Operate Transfer (Toll) basis for an estimated cost of Rs. 2,020.93 crore. A consortium comprising of M/s. Adani Road Transport Ltd. and M/s Prakash Asphalting's & Toll Highways (India) Ltd. submitted its bid on 04.03.2021. After evaluation of the bids, NHAI accepted the proposal of the Consortium and issued LOA dated 30.03.2021 in favour of the Consortium. Subsequently, the Consortium incorporated M/s Panagarh Palsit Road Private Limited i.e., the

Petitioner on 13.04.2021 as a Special Purpose Vehicle to undertake and perform the obligations under the LOA as also to exercise the rights of the selected bidder including entering into a CA for executing the Project.

11. It is stated that Petitioner and NHAI entered into a CA dated 14.06.2021 for executing the Project for a concession period of 20 years from the Appointed Date, which was declared as 02.04.2022. During execution of the Project, Petitioner encountered several hindrances and suffered significant delays, losses and damages, solely due to NHAI's continued acts and omissions, material breaches and failure to fulfil its obligations under the CA. Disputes having arisen between the Petitioner and NHAI, Petitioner invoked the Dispute Resolution mechanism under Article 44.1 of CA and issued Notice of Dispute on 29.07.2023 requesting NHAI to call for a meeting for amicable settlement of the disputes within 15 days of the receipt of the said Notice, however, there was no response. Aggrieved by this, Petitioner referred the disputes to Dispute Resolution Board ('DRB') in accordance with procedure set forth in Article 44.2(a) of CA read with Schedule-W, vide notice dated 26.10.2023. DRB decided against the Petitioner, save and except, Claim No. 2 and sent its recommendation on 09.06.2024 followed by Corrigendum dated 25.06.2024.

12. It is stated that vide letter dated 18.06.2024, Petitioner sought conciliation under Article 44.2 by reference to CCIE. No constructive steps were taken by NHAI to resolve the disputes amicably and having no other option, Petitioner sent notice invoking arbitration under Section 21 of the 1996 Act on 09.12.2024 envisaged under Article 44.3 of CA and nominated a former Judge of the Supreme Court as its nominee Arbitrator and requesting NHAI to nominate its Arbitrator within 30 days from the receipt

of the notice. On failure of NHAI to respond to the invocation notice, this petition was filed by the Petitioner.

COMMON CONTENTIONS ON BEHALF OF THE PETITIONERS

13. Arbitration Clauses being 38.3 in CAs dated 23.04.2018 in ARB.P. 1829/2024 and ARB.P. 2090/2024 as also Arbitration Clause 44.3 in ARB.P. 423/2025 provide that arbitration shall be conducted as per SAROD Rules but the Rules do not carry an additional obligation or mandate that parties shall nominate their respective Arbitrators from the panel curated and maintained by SAROD. SAROD is an organisation which is not only incorporated by NHAI *albeit* along with National Highways Builders Federation ('NHBF') for settlement of disputes, but Office of SAROD is the same as that of NHAI. Further, Governing Body of SAROD is headed by President of SAROD, who was also Member (PPP) of NHAI till August, 2025. Moreover, members of the Governing Body are all related to NHAI in some manner or the other and it is this Governing Body which regulates empanelment of Arbitrators in SAROD. Therefore, while Petitioners have no control over SAROD, NHAI has a direct relationship and stake in SAROD. Being a party to the present *lis* in its individual capacity, there is little doubt that NHAI will be in a dominating position if SAROD Rules are made applicable and Arbitral Tribunal is constituted from Arbitrators on the panel of SAROD. This would give rise to justifiable doubts as to the independence or impartiality of the members of the Arbitral Tribunal.

14. Party autonomy and independence and impartiality of Arbitrators are the founding pillars of any arbitration and cannot be compromised. The Supreme Court in ***CORE (supra)*** has observed that where the list of Arbitrators is curated exclusively by one party to the arbitration agreement

and consequently, the other party is excluded from making a choice of its nominee Arbitrator, appointment of the Arbitrator becomes untenable as this restricts the freedom/autonomy of a party, which it must enjoy at every stage of arbitral proceeding. No doubt the Supreme Court observed that 1996 Act does not prohibit PSUs from empanelling potential Arbitrators, however, no arbitration clause can mandate the party to select its Arbitrator from a panel which is curated by the other party and hence restricted. The insistence of NHAI that Petitioners must appoint their nominee Arbitrators from the SAROD panel is contrary to and violative of the binding dictum of the Supreme Court in ***CORE (supra).***

15. NHAI construes Rule 11 of SAROD Rules to mean and connote that not only the Presiding Arbitrator of the Arbitral Tribunal comprising of odd number of Arbitrators has to be appointed from the SAROD panel but even the nominee Arbitrators must be from the panel. This is an erroneous and flawed reading of Rule 11.2, which only postulates that Presiding Arbitrator shall be appointed by Arbitrators nominated by the parties from the panel of SAROD. There is no rule mandating appointment of nominee Arbitrators of the parties from the SAROD panel and hence, NHAI cannot argue and/or take a stand contrary to Rules 11.2 and 11.4. If the Rules are to be construed as restricting the choice of the Petitioners to nominate their Arbitrators from the SAROD panel, as is being urged by NHAI, this would be violative of the principle of party autonomy and consequently, be in the teeth of the judgment of the Supreme Court in ***CORE (supra).***

CONTENTIONS ON BEHALF OF NHAI:

16. Scope of judicial intervention under Section 11 of 1996 Act is confined to determination of existence of an arbitration agreement and once

this question is answered in the affirmative, the sanctity of the arbitration clause, as agreed between the parties, must be maintained. Arbitration Clauses 38.3 and 44.3 clearly stipulate that arbitration shall be held in accordance with SAROD Rules or such other rules as may be neutrally agreed by the parties. In the absence of any procedure to the contrary, agreed between the parties, SAROD Rules will govern the field for appointing the Arbitrators.

17. Rule 11 of SAROD Rules provides for appointment of the Arbitral Tribunal. Rule 11.2 of SAROD Rules provides that for disputes pertaining to claims of more than Rs. 3 crores, Arbitral Tribunal shall consist of odd number of Arbitrators to be appointed by the parties and the Arbitrators nominated by the parties will appoint the Presiding Arbitrator from amongst the panel maintained by SAROD. Rule 11.4 stipulates that Arbitrator/ Presiding Arbitrator appointed under these Rules must be on the arbitration panel as on the date of appointment. Conjoint reading of the two Rules inevitably leads to only one conclusion that having agreed to be governed by SAROD Rules, Petitioners have to nominate their Arbitrators from the SAROD panel. Rules 11.2 and 11.4 are unambiguous and need no interpretation. If the interpretation of the Petitioners that their nominee Arbitrators can be outside the SAROD panel is accepted, it will make Rule 11.4 redundant.

18. Section 11 of 1996 Act is only to facilitate constitution of the Arbitral Tribunal as per contractually agreed terms between parties to the arbitration agreement and Scheme of the said Act envisions minimum judicial interference by referral Courts. Petitioners are unable to give any plausible or justifiable reason to deviate from the agreed procedure of appointments of

Arbitrators envisaged in the CAs, which in turn refers to the SAROD Rules. Moreover, the argument that the SAROD panel is curated by NHAI and/or is restricted, is also misconceived. Firstly, the panel is not curated by NHAI. The panel of Arbitrators is prepared and maintained by SAROD, which is an independent arbitral institution run by a society formed by NHAI and NHBF, where the latter is an organisation of contractors/builders of National and State Highways and Bridges in organised sectors all over the country. It is not an Organization of NHAI and is an entity functioning independently and impartially. The panel of Arbitrators is a very broad-based panel with Arbitrators from diverse fields, comprising of former Judges of the Supreme Court and High Courts, Bureaucrats, Engineers, Secretaries to the Government of India etc., and is formed by a Committee of both NHAI and NHBF, with equal participation and voice in the selection procedure. The Committee is formed by the Governing Body of SAROD with Office Bearers from NHAI and NHBF, in equal proportion.

19. The empanelment procedure of Arbitrators by SAROD is extremely transparent and fair and furthers the objective of 1996 Act, more particularly, Section 12 thereof as also principles laid down by the Supreme Court in ***Perkins Eastman Architects DPC and Another v. HSCC (India) Limited, (2020) 20 SCC 760*** and ***Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited, (2017) 4 SCC 665*** and since the panel from which Petitioners have to make a choice is a broad-based panel, the procedure is not hit by the judgment of the Supreme Court in ***CORE (supra).*** Moreover, Rule 16 of SAROD Rules provides for a mechanism to a party to challenge the impartiality or independence of an Arbitrator and therefore, if the Petitioners find that there are justifiable doubts against any

particular Arbitrator so appointed, recourse can be taken to challenge the appointment. Reliance was placed on the judgments in ***National Highways Authority of India and Another v. Bumihiway DDB Ltd. (JV) and Others, (2006) 10 SCC 763; You One Engineering & Construction Co. Ltd. and Another v. National Highways Authority of India (NHAI), (2006) 4 SCC 372;*** and ***M/s Simplex Infrastructures Ltd. v. National Highways Authority of India and Another, 2024 SCC OnLine Del 1.***

ANALYSIS AND FINDINGS

20. The short issue that arises for consideration in the three petitions is whether Petitioners are obliged to nominate their respective Arbitrators under Rule 11 of SAROD Rules from the panel maintained by SAROD or have the autonomy to nominate from outside the said panel. Broadly understood, Petitioners contend and highlight that no restriction can be imposed on the Petitioners to nominate their Arbitrators from the SAROD panel as this would be antithesis to the principle of 'party autonomy' underscored by the Supreme Court in ***Perkins (supra)*** and ***CORE (supra)*** and moreover, plain reading of Rule 11 of SAROD Rules does not cast any such obligation on the Petitioners. NHAI, *per contra,* contends that read conjointly, Rules 11.2 and 11.4 require the Petitioners to nominate their Arbitrators from the SAROD panel and the nominee Arbitrators are also obliged to appoint the Presiding Arbitrator from the panel so as to constitute the Arbitral Tribunal, as the respective claims are over Rs.3 crores. In the context of the judgment of the Supreme Court in ***CORE (supra),*** it was urged by NHAI that the SAROD panel in not curated by NHAI i.e. party to the *lis* and the panel is a broad-based panel, comprising of former Judges of the Supreme Court and High Courts, retired Bureaucrats, Secretaries to the

Government of India and CIC, Chairman, Railway Board, Chief Advisors of State Planning Boards, former DGs and Engineer-in-Chief/Chief Engineers of PWD, CPWD etc. with no conflict of interest with NHAI, allaying any apprehension of justifiable doubts as to the impartiality and independence of the Arbitrators so appointed.

21. Before proceeding to examine the rival submissions of the parties, it would be useful to examine the relevant SAROD Rules and the same are extracted hereunder, for ease of reference:-

> ***"Rule 4 – Commencement of Arbitration***
>
> *4.1 Any Party wishing to commence an arbitration under these Rules ("the Claimant") shall file with the Secretary and serve on the other Party ("the Respondent"), a written Notice of Arbitration ("the Notice of Arbitration") which shall include the following:*
>
> *a. a request that the dispute be referred to arbitration;*
>
> *b. the names, addresses, telephone numbers, fax numbers and email addresses of the Parties to the dispute;*
>
> *c. a reference to the arbitration clause or any separate arbitration agreement that is invoked and provide a copy of the arbitration clause or arbitration agreement;*
>
> *d. a reference to the contract out of which the dispute arises and provide a copy of the contract where possible;*
>
> *e. a brief statement describing the nature and circumstances of the dispute;*
>
> *f. the relief or remedy sought, including the amount of claim if quantifiable at the time the Notice or Arbitration is filed;*
>
> *g. a proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed on the number; and*
>
> *h. the name of the Claimant's nominated arbitrator.*
>
> *4.2 The date of filing of the Notice of Arbitration with the Secretary is the date of commencement of the arbitration for the purpose of these Rules.*
>
> *4.3 A filing fee of ₹ 25,000/- (Twenty Five Thousand) (plus 18% GST) or any amount decided by Governing Body from time to time is payable at the time of filing the Notice of arbitration.*

4.4 The Party may acquire Primary Membership of SAROD as per prescribed fee and procedure. It is not a pre-requisite for invoking arbitration under these Rules.

Rule 5 – Response by Respondent

5.1 Within 14 days of receipt of the Notice of Arbitration, the Respondent shall file with the Secretary and serve upon on the Claimant, a Response including

a. A confirmation or denial of all or part of the claims;

b. Brief statement of the nature and circumstances of any envisaged counterclaims;

c. A comment in response to any proposals contained in the Notice of Arbitration; and

d. The name of the respondent's nominated arbitrator.

5.2 A filing fee of ₹ 25,000/- (plus 18% GST) or any amount decided by Governing Body from time to time is payable at the time of filing the Response.

5.3 In case any party has objection to the jurisdiction of Arbitral Tribunal, such objection shall be raised not later than 15 days of the commencement of Arbitration proceedings failing which it will be deemed that party has waived the right to object.

xxx xxx xxx

Rule 11 – Appointment of Tribunal

11.1 The disputes shall be decided by a Sole Arbitrator when the total claim of dispute is of ₹ 3,00,00,000/- (Rs. Three Crores) or less.

11.2 In all cases of disputes claimed for more than ₹ 3,00,00,000/- (₹ Three Crores), the tribunal shall consist of odd number of Arbitrators to be nominated by the Parties. The Presiding Arbitrator shall be appointed by the Arbitrators nominated by the Parties from amongst the panel maintained by SAROD. For deciding the Presiding Arbitrator, a draw of lots can be carried out from amongst the names suggested by the Arbitrators nominated by the Parties. The eligibility criteria for empanelment of Arbitrators will be decided by the Governing Body.

11.3 If a Sole Arbitrator is to be appointed, the Governing Body will appoint the Arbitrator within 21 days from the date the Respondent's Statement of Defence and Counterclaim (if any) is filed or falls due, whichever is earlier. The Governing Body will appoint the Arbitrator from the panel of Arbitrators by draw of lots.

11.4 An Arbitrator/Presiding Arbitrator to be appointed under these Rules shall be a person on the SAROD Arbitration Panel as on the date of the

appointment.

11.5 In the event of any Party failing to appoint Arbitrator within 30 days of receipt of the notice of Arbitration, the Governing Body shall appoint the Arbitrator or Presiding Arbitrator as the case may be by a draw of lots.

11.6 No arbitrator will have more than 03 cases simultaneously."

22. Indisputably, the CAs executed between the parties contain arbitration clauses envisaging resolution of disputes through mechanism of arbitration, once efforts to amicably resolve the disputes and/or conciliation fails. In ARB.P. 1829/2024 and ARB.P. 2090/2024, the arbitration clause is 38.3 while in ARB.P. 423/2025, the arbitration clause is 44.3. With slight difference in the language of the Clauses, the common thread that runs in the arbitration Clauses is that any dispute which is not resolved amicably by Conciliation shall be finally settled by arbitration. For the sake of reference, Clause 44.3 is extracted hereunder:-

*"**44.3 Arbitration***

44.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 44.2, shall be finally settled by arbitration as set forth below:

i. The Dispute shall be finally referred to Society for Affordable Resolution of Disputes (hereinafter called as SAROD). a Society registered under Society's Act, 1860 vide Registration no. S/RS/SW1049/2013 duly represented by Authority and National Highways Builders Federation (NHBF). The dispute shall be dealt with in te1ms of Rules of SAROD. The detailed procedure for conducting Arbitration shall be governed.by the Rules of SAROD and provisions of Arbitration & Conciliation Act, 1996, as amended from time to time. The Dispute shall be governed by Substantive Law of India.

ii. The appointment of Tribunal, Code of conduct for Arbitrators and fees and expenses of SAROD and Arbitral Tribunal shall also be governed by the Rules of SAROD as amended from time to time. The rules of SAROD are placed at Appendix-III.

iii. Subject to the provisions of THE LIMITATION ACT, 1963, as amended from time to time, Arbitration may be commenced during or

after the Concession Period, provided that the obligations of Authority and the Concessionaire shall not be altered by reason of the Arbitration being conducted during the Concession Period.

iv. The seat of Arbitration shall be New Delhi or a place selected by governing body of SAROD and the language for all documents and communications between the parties shall be English.

The expenses incurred by each party -in connection with the preparation, presentation, etc., of arbitral proceedings shall be shared by each party itself.

44.3.2 There shall be a Board of three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected, and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.

44.3.3 The arbitrators shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 44 shall be final and binding on the Parties as from the date it is made, and the Concessionaire and the Authority agree and undertake to carry out such Award without delay.

44.3.4 The Concessionaire and the Authority agree that an Award may be enforced against the Concessionaire and/or the Authority, as the case may be, and their respective assets wherever situated. Further, the parties unconditionally acknowledge and agree that notwithstanding any dispute between them, each party shall proceed with the performance of its respective obligations, pending resolution of Dispute in accordance with this Article.

44.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder."

23. From the aforementioned arbitration clause, it is clear that parties agreed that their *inter se* disputes shall be referred to SAROD, a society registered under the Societies Registration Act, 1860 duly represented by NHAI and NHBF and will be dealt in terms of Rules of SAROD. Concededly, Petitioners agreed that the arbitral proceedings, commencing from appointment of the Arbitrator till the passing of the award will be regulated by SAROD Rules read with the 1996 Act. Therefore, the rival

stands of the parties will have to be tested on the anvil of the SAROD Rules with regard to constitution of the Arbitral Tribunal under Rule 11.

24. Rule 4 of SAROD Rules deals with *'commencement of arbitration'* and provides that any party wishing to commence arbitration under SAROD Rules shall file with the Secretary and serve on the other party a written notice of arbitration which shall include details enumerated in sub-Rules 4.1 (a) to (g), as also the name of claimant's nominated Arbitrator under sub-Rule (h). Rule 5 deals with *'Response by Respondent'* and stipulates that within 14 days of receipt of arbitration notice, Respondent shall file with the Secretary and serve on the claimant, a response including details required under sub-Rules (a) to (c) of Rule 5.1 along with name of Respondent's nominated Arbitrator as required under sub-Rule (d).

25. The Rule that deals with appointment of the Arbitral Tribunal is Rule 11, which is in two parts. Rule 11.1 provides for appointment of a Sole Arbitrator where the total claim of the claimant is Rs.3 crores or less. Rule 11.2 deals with appointment of a Tribunal consisting of odd number of Arbitrators to be nominated by the parties, where the value of claims is more than Rs.3 crores. It further provides that the Tribunal shall consist of odd number of Arbitrators to be appointed by the parties and the Presiding Arbitrator shall be appointed by the Arbitrators nominated by the parties from amongst the panel maintained by SAROD. It is palpably clear that Rule 11.2 does not separately or specifically provide that nominee Arbitrators of the parties shall be from the SAROD panel. The word 'panel' has been used only in reference to appointment of the Presiding Arbitrator by the Arbitrators nominated by the parties. Therefore, if Rule 11.2 is read in isolation, there may be merit in the contention of the Petitioners that

Petitioners are under no obligation under the SAROD Rules to nominate their Arbitrators from the panel. However, what the Petitioners clearly overlook is Rule 11.4, which in no uncertain terms provides that '*an Arbitrator/Presiding Arbitrator to be appointed under these Rules shall be a person on the SAROD arbitration panel on the date of the appointment'*. What is the connotation of the words '*an Arbitrator/Presiding Arbitrator'*, is really the heart of dispute in these petitions.

26. Insofar as appointment of Presiding Arbitrator is concerned, Rule 11.4 fortifies Rule 11.2 and there is little doubt that the appointment has to be from the SAROD panel by the Arbitrators nominated by the parties and thus this expression throws no challenge. Insofar as the expression 'an Arbitrator' in Rule 11.4 is concerned, no doubt in the first blush it appears that the reference is to a sole Arbitrator. However, on a holistic reading, I am unable to construe the term 'Arbitrator' in Rule 11.4 as being restricted to the sole Arbitrator for the reason that wherever the Rule maker intended to restrict the Rule to a sole Arbitrator, it was specifically so provided, as in Rules 11.1 and 11.3. Harmonious and purposive reading of Rule 11.4 inevitably leads me to conclude that the word 'Arbitrator' in this Rule means and includes sole Arbitrator under Rules 11.1 and 11.3 as also nominee Arbitrators in Rule 11.2 and thus Petitioners cannot choose their nominee Arbitrators from outside the SAROD arbitration panel. Expression '*under these Rules'* supports the view that appointment of the sole Arbitrator as also nominee Arbitrators of the contracting parties have to be on the panel of SAROD on the date of appointment and any other interpretation will defeat the objective of incorporating Rule 11.4 under Rule 11 relating to appointment of the Arbitral Tribunal.

27. It is a settled position of law that effect must be given to every word in the Rule or a Statute. A construction which reduces a Rule or a Statute to futility must be avoided. An endeavour must be made by the Court to construe a provision to make it effective and operative on the principle expressed in the maxim *ut res magis valeat quam pereat* i.e. liberal construction should be put so as to uphold all provisions, if possible, to further the intention of the parties. A construction that defeats plain intention of the Legislature/Rule maker, even though there may be some inexactitude must be rejected. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation or the Rules, the bolder construction ought to be accepted so that the Rules are not reduced to a futility. ***[Ref.: Commissioner of Income Tax v. Hindustan Bulk Carriers, (2003) 3 SCC 57].*** It is a basic rule of interpretation that no part of a Statute or Rule should be rendered nugatory or superfluous and should be construed as a coherent whole, ensuring that each part has meaningful content. Where two provisions appear to be in tension, proper course is to adopt a construction that reconciles them allowing both to operate and giving effect to the underlying intent of the Legislature and/or framer of the Rule. It is the duty of the Court to avoid head on clash between two provisions and a construction that reduces one provision to a 'useless lumber' or 'dead letter' is not a harmonised construction and to harmonise is not to destroy. ***[Ref.: Municipal Corporation of Greater Mumbai and Others v. Century Textiles and Industries Limited and Others, (2025) 3 SCC 183]***

28. Indisputably, parties agreed to take recourse to mechanism of arbitration for resolution of their disputes in consonance with the SAROD

Rules and agreed to accept institutional arbitration. There is no challenge to the SAROD Rules before this Court. Harmoniously reading Rules 11.2 and 11.4 and treading cautiously to ensure that Rule 11.4 does not become a dead letter, I cannot but hold that in respect of disputes pertaining to claims of value over Rs. 3 crores, the Arbitral Tribunal shall comprise of odd number of Arbitrators wherein the nominee Arbitrators of the parties are to be appointed from the SAROD panel who in turn will appoint the Presiding Arbitrator from the panel.

29. Having so held, I may now turn to the concern of Petitioners that appointment of their nominee Arbitrators from the curated SAROD panel will compromise and destroy the ethos and hallmarks of arbitration i.e. 'party autonomy' and 'impartiality and independence of Arbitrators' highlighted and emphasised upon by the Supreme Court in ***Perkins (supra)*** and ***CORE (supra).*** In my view, this apprehension is taken care of by SAROD, by ensuring that the panel is broad-based as also making the procedure for appointment of Arbitrators to constitute the panel transparent through a Committee appointed by the Governing Body of SAROD which has equal participation from NHAI and NHBF. NHAI has placed on record the list of Arbitrators maintained by SAROD as on 16.01.2025 valid for a period of two years, which shows that as many as 92 Arbitrators are empanelled and belong to diverse fields. As rightly flagged by counsel for NHAI, the list of Arbitrators includes former Judges of the Supreme Court and High Courts of different States; retired Bureaucrats such as Secretaries to Government of India having served in different Ministries/CVC/CIC/ Parliamentary Affairs; Chairman, Railway Board; Chief Advisor, Bihar State Planning Board; Member, NHRC; Special Director General, CPWD;

Engineer-in-Chief/Chief Engineer, PWD; DG, CPWD etc. as also former officers of NHAI. The panel is broad-based with people of considerable standing, experience and repute in diverse fields and offers a free and wide choice to the Petitioners to choose from.

30. The apprehension of any bias or impartiality is further allayed by the fact that the panel is not curated by NHAI and as explained by counsel for NHAI, is prepared and maintained by SAROD, which is an independent arbitral institution run by the society formed by NHAI and NHBF, where NHBF is an organisation of all contractors/builders of National Highways, State Highways and Bridges in organised sectors across the country in a representative capacity, with approximately 108 members. Management of affairs of SAROD is entrusted to a Governing Body which comprises of office bearers and members with the President being nominated by NHAI, Vice President by NHBF from its members and amongst the members, three are nominated by NHAI while the other three by NHBF. Clause 23.2 of Articles of Association of SAROD provides for formation of a Committee to prepare a panel of Arbitrators which examines and evaluates applications for empanelment/re-empanelment of Arbitrators with four members having equal representation of NHAI and NHBF. SAROD invites applications from candidates/Arbitrators desirous of being empanelled and after careful scrutiny of the applications, credentials etc. of the applicants, prepares the panel in a transparent manner. The endeavour is to take Arbitrators from diverse fields with experiences in law, administration, engineering etc. The panel therefore cannot be held to be hit by the judgment in ***CORE (supra).***

31. It is pertinent to mention that in ***Voestalpine Schienen GMBH (supra),*** while noting that independence and impartiality of an Arbitrator are

hallmarks of any arbitration proceedings and rule against bias is one of the fundamental principle of natural justice, the Supreme Court did not disapprove of a procedure where a panel is formed for appointment of Arbitrators and in fact held that bias or even likelihood of bias cannot be attributed to persons on the panel simply on the ground that they were retired Government or PSU employees. In the said case, the arbitration clause enabled DMRC to forward a panel of five members for the Petitioner to choose from and it is this procedure which was condemned by the Supreme Court and the clause was struck down on the ground that even though there were number of persons empanelled, DMRC had the discretion to pick five persons therefrom and forward their names to the other party to select one of these five as its nominee and not only this, DMRC was also to nominate its Arbitrator from the said list. This procedure according to the Supreme Court limited the choice to five names forwarded by DMRC with no free choice to nominate out of the entire panel prepared by DMRC. Such a situation certainly could not be countenanced. The Supreme Court further observed that the relevant clauses needed to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of Arbitrators and likewise, the two Arbitrators nominated by the parties should be given full freedom to choose the third Arbitrator from the whole panel. Relevant paragraphs from the judgment are as follows:-

> ***"18.*** *Keeping in mind the aforequoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, sub-section (5) of Section 12 lays down that 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, he shall be ineligible to*

be appointed as an arbitrator. In such an eventuality i.e. when the arbitration clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of the arbitration agreement.

xxx *xxx* *xxx*

20. *Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in Hashwani v. Jivraj [Hashwani v. Jivraj, (2011) 1 WLR 1872 : 2011 UKSC 40] in the following words : (WLR p. 1889, para 45)*

> *"45. ... the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties."*

21. *Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in Consorts Ury [Fouchard, Gaillard, Goldman on International Commercial Arbitration 562 (Emmanuel Gaillard & John Savage eds., 1999) {quoting Cour de cassation [Cass.] [Supreme Court for judicial matters] Consorts Ury v. S.A. des Galeries Lafayette, Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France)}.] , underlined that:*

> *"an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator."*

22. *Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings.*

xxx *xxx* *xxx*

24. *Keeping in view the aforesaid parameters, we advert to the facts of this case. Various contingencies mentioned in the Seventh Schedule render a person ineligible to act as an arbitrator. Entry 1 is highlighted by the learned counsel for the petitioner which provides that where the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with the party, would not act as an arbitrator. What was argued by the learned Senior Counsel for the petitioner was that the panel of arbitrators drawn by the respondent consists of those persons who are government employees or ex-government employees. However, that by itself may not make such persons ineligible as the panel indicates that these are the persons who have worked in the Railways under the Central Government or the Central Public Works Department or public sector undertakings. They cannot be treated as employee or consultant or advisor of the respondent DMRC. If this contention of the petitioner is accepted, then no person who had earlier worked in any capacity with the Central Government or other autonomous or public sector undertakings, would be eligible to act as an arbitrator even when he is not even remotely connected with the party in question, like DMRC in this case. The amended provision puts an embargo on a person to act as an arbitrator, who is the employee of the party to the dispute. It also deprives a person to act as an arbitrator if he had been the consultant or the advisor or had any past or present business relationship with DMRC. No such case is made out by the petitioner.*

xxx *xxx* *xxx*

26. *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. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. The very reason for empanelling these persons is to ensure that technical aspects of the dispute are suitably*

resolved by utilising their expertise when they act as arbitrators. It may also be mentioned herein that the Law Commission had proposed the incorporation of the Schedule which was drawn from the red and orange list of IBA guidelines on conflict of interest in international arbitration with the observation that the same would be treated as the guide "to determine whether circumstances exist which give rise to such justifiable doubts". Such persons do not get covered by red or orange list of IBA guidelines either.

xxx *xxx* *xxx*

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 a number of persons empanelled, discretion is with 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, 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 DMRC. Secondly, with the discretion given to DMRC to choose five persons, a room for suspicion is created in the mind of the other side that 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 the third arbitrator from the whole panel.*

29. *Some comments are also needed on Clause 9.2(a) of GCC/SCC, as per which DMRC prepares the panel of "serving or retired engineers of government departments or public sector undertakings". It is not understood as to why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is imperative that panel should be broadbased. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like Judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy, etc.*

Therefore, it would also be appropriate to include persons from this field as well.

30. *Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by DMRC. It, therefore, becomes imperative to have a much broadbased panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. We, therefore, direct that DMRC shall prepare a broadbased panel on the aforesaid lines, within a period of two months from today."*

32. In ***Consortium of Autometers Alliance Ltd. and Canny Elevators Co. Ltd. v. Chief Electrical Engineer/Planning, Delhi Metro Rail Corporation and Others, 2021 SCC OnLine Del 4042,*** this Court was deciding a petition under Section 11 of the 1996 Act for appointment of the Arbitrator in the context of a broad-based panel of Arbitrators with 51 names including 26 retired Judges, 22 public sector engineers and 3 public sector accountants/financial professionals *albeit* this panel was enlarged and formulated only during the pendency of the petition and prior thereto, only 5 names were offered to the Petitioner to choose from. Directing the Petitioner to nominate a name from the panel comprising of 51 Arbitrators prepared by the Respondents, this Court observed as follows:-

"30. *Having heard the learned counsels for the parties and perused the record, at the outset, I may state that in substance the challenge in this petition is to Clause 17.9 of the GCC on the ground, it is void and unenforceable as it provides for appointment of all three arbitrators from a panel proposed by the Respondent. The submission was that this process stipulated by the Respondent fall foul of the judgment of the Supreme Court in Voestalpine Schienen GMBH (supra) and the judgment of this*

Court in SMS Limited (supra). I may also state on the said premise, the petitioner has, de hors the provisions of Clause 17.9 of the GCC, proposed the name of Justice M.M.S. Bedi (Retd.) to act as a sole arbitrator or alternatively he be treated as a nominee arbitrator on behalf of the petitioner and had also called upon the Respondent to nominate its arbitrator. Similar is the prayer made in this petition as well. It is not in dispute that the Respondent had prepared a panel consisting of five names. The five names consisted of names of an Additional District and Sessions Judge (Retd.) and other retired employees from reputed organizations such as RVNL, NHPC etc. Whereas in the reply filed by the Respondent, they have taken a stand that they have enlarged/broad-based the list of panel of arbitrators to include the names of 26 retired Judges, 22 public sector engineers (serving/retired) and 3 public sector accountants/finance professionals (serving). In other words, it was submission of Mr. Johri that the Respondent has no objection if the petitioner chooses its nominee arbitrator from the panel of 51 names now prepared by the Respondent.

***31.** It is also the case of the Respondent; they will choose its nominee arbitrator from the said panel to enable the nominee arbitrators appoint a Presiding Arbitrator.*

***32.** I find most of the arguments of Mr. Wadhwa were on the basis of the panel of five names as existed earlier at the time of the filing of the petition. In view of the constitution of a new panel by the Respondent, the arguments as put forward by Mr. Wadhwa will not survive. He has also challenged the constitution of the new panel consisting of 51 names by contending that the same is not broad-based being in violation of the judgment of the Supreme Court in Voestalpine Schienen GMBH (supra). To put it precisely it was his submission that there are no private sector engineers or accountants, lawyers in the panel.*

***33.** There is no dispute that out of the 51 names provided, there are 26 retired Judges, 22 public sector engineers and three public sector accountants/financial professionals. No doubt, the panel do not have persons like lawyers of repute or accountants/financial professionals or engineers from the private sector but the panel consisting of 51 names is ten times the initial panel of five names provided by the Respondent. The dispute between the parties is with regard to the Service Tax. Surely, with 26 retired Judges on the panel and also persons, who are serving/retired from public sector undertakings like Railways/RITES/RVNL other than the respondent Delhi Metro Rail Corporation and it was held by the Supreme Court in Voestalpine Schienen GMBH (supra) that panel consisting of names of persons, who have retired from other public sector undertakings will not be a ground to challenge it under Section 12(5) of the Act or relevant Schedules therein, this Court is of the view that arguments as advanced by Mr. Wadhwa are not sustainable in the facts of this case. Further, I note that the petitioner has nominated a retired Judge of the*

High Court as its nominee arbitrator and not a person with finance background. Merely because the Respondent could have further broad based the panel cannot be a ground to hold that the current panel of 51 names is not broad based when it consists of names of 26 retired High Court/District/Additional District Judges and serving/retired officers of the other Public Sector Undertakings.

34. *In fact, the Supreme Court in Voestalpine Schienen GMBH (supra) has not disapproved the procedure of preparing a panel of arbitrators, for appointing arbitrators to adjudicate the disputes between the parties. The ratio of the judgment of the Supreme Court in Voestalpine Schienen GMBH (supra) is that a party must have a wider choice for nominating its arbitrator from the panel. I am of the view, the panel now prepared by the Respondent having 51 names is broad based and the petitioner has a wider choice to choose its nominee arbitrator. If the plea of Mr. Wadhwa has to be accepted and the prayers made in the petition are granted, it shall make the panel and the procedure contemplated in the GCC redundant, which is impermissible. I also state that the reliance placed by Mr. Wadhwa on the judgment of SMS Ltd. (supra) is misplaced. The said judgment is clearly distinguishable as the subsequent panel produced by the respondent therein was clearly not broad-based owing to the presence of only 8 members out of 37 in the panel provided, who were officers retired from organization other than Railways (respondent therein) and Public Sector Undertakings connected with Railways whereas in the panel in hand, the 26 names include retired Additional District Judges/District Judges/High Court Judges.*

35. *Accordingly, the petitioner is directed to nominate a name from the panel from 51 names prepared by the Respondent, who shall act its nominee arbitrator, within four weeks. Thereafter the parties shall proceed in accordance with the Contract and law."*

33. In ***Margo Networks Pvt. Ltd. and Another v. Railtel Corporation of India Ltd., 2023 SCC OnLine Del 3906,*** Co-ordinate Bench of this Court, relying on the judgment of the Supreme Court in ***Voestalpine Schienen GMBH (supra)*** and of this Court in ***Consortium of Autometers Alliance Ltd. (supra),*** amongst other judgments held that in an appointment procedure involving appointment from a panel made by one of the contracting parties, it is mandatory for the panel to be sufficiently broad-based and in conformity with principles laid down in ***Voestalpine Schienen***

GMBH (supra). Broadly understood, in ***Voestalpine Schienen GMBH (supra),*** Supreme Court held that: (a) a panel of 5 names from which the other party is required to nominate its nominee Arbitrator is restrictive in nature and creates room for suspicion and bias; and (b) there is no embargo in preparing a panel but the panel ought to be broad-based with persons as far as possible from diverse fields and not curated by the party to the *lis.* In my view and as held by the Co-ordinate Bench in ***Margo Networks Pvt. Ltd. (supra)***, following the judgement in ***Voestalpine Schienen GMBH (supra),*** a procedure envisaging appointment from a broad-based panel does not compromise the party autonomy or destroy the hallmarks of arbitration i.e. impartiality and independence of Arbitrators.

34. The judgement of the Supreme Court in ***CORE (supra),*** heavily relied upon by the Petitioners, in my understanding, does not lay down that even if the panel of arbitrators is broad based and not curated by one of the contracting party, asking the other party to choose therefrom will impact the party autonomy. The Supreme Court in the said judgement emphasised that principle of equality applies at the stage of appointment of Arbitrators and independence and impartiality of arbitral proceedings and equality of parties are concomitant principles. The principle that justice must not only be done but should be seen to be done applies to arbitral proceedings was also highlighted. In fact, the Supreme Court referred to the judgment in ***Voestalpine Schienen GMBH (supra),*** more particularly, the observations that an individual who had previously served Government or PSU or statutory corporation but had no connection to the party in dispute could not be held to be ineligible for appointment as an Arbitrator. What was frowned upon by the Supreme Court was constitution of a three member Tribunal

such as in the case of Railways, where Railways would suggest four names of retired railway officers from which the contractor was required to select two names and the General Manager of the Railways after choosing one of the two proposed names was to appoint the balance two Arbitrators from the panel or outside the panel including the Presiding Arbitrator. This procedure was held to be restrictive in nature since contractor had to select its Arbitrator from a curated and restricted number without equal participation in the appointment process. It was also held to be unequal since the General Manager appointed two-thirds of the Tribunal giving rise to justifiable doubts as to the independence and impartiality of Arbitrators.

35. Therefore, what was disapproved by the Supreme Court in ***CORE (supra)*** was a procedure where one contracting party curates a limited panel of Arbitrators and restricts the choice of the other party to appoint from the said panel. It bears repetition to state that in the present case, SAROD panel is not a restricted panel but broad-based and Petitioners have a free choice to nominate the nominee Arbitrators from the entire panel and of their choice. The nominated Arbitrators in turn have to appoint the Presiding Arbitrator and therefore as held in ***CORE (supra),*** any perceived tilt of an Arbitrator in favour of a party which nominated that Arbitrator is offset by the appointment of third Arbitrator. As observed in ***Perkins (supra),*** whatever advantage a party may derive by nominating an Arbitrator of its choice would get counterbalanced by equal power with the other party. Thus, from a reading of the SAROD Rules as also considering that the SAROD panel is a broad-based panel in consonance with the principles elucidated in ***Voestalpine Schienen GMBH (supra),*** I am unable to agree with the Petitioners that by nominating their Arbitrators from the SAROD panel,

party autonomy is compromised and Court should accept their nominations made and appoint the nominee arbitrators of NHAI.

36. For all the aforesaid reasons, these petitions are dismissed giving liberty to the Petitioners and NHAI to nominate their respective Arbitrators from the panel maintained by SAROD and the Arbitrators so appointed shall appoint the Presiding Arbitrators from the said panel.

37. It is made clear that this Court has expressed no opinion on the merits of the cases and all rights and contentions of the parties are left open.

38. Pending applications also stand disposed of.

JYOTI SINGH, J

JULY 29, 2025/*Shivam*