

ITD CEMENTATION INDIA LTD. v. KONKAN RAILWAY CORPORATION LTD. 2019 SCC ONLINE BOM 5349

Bombay High Court; single-judge bench, **G. S. Kulkarni J**; decided on 12 December 2019

Constitution of arbitral tribunal comprising of serving officers of the respondent party is illegal and of no consequence; *Voestalpine*, TRF, *Bharat Broadband* and *Perkins* applied

Under the arbitration clause, a “Standing Arbitral Tribunal” had to be formed within three months of the execution of the contract. The petitioner’s nominee arbitrator had to be from a panel of serving railway officers; the respondent’s nominee arbitrator was also to be from this panel. The Chairman and Managing Director of the respondent was to appoint the presiding member of the tribunal.

The tribunal was constituted on 25 February 2015. One arbitrator was substituted in February 2016. Disputes arose in 2017, and ITD applied to the court for appointment of the tribunal under Section 11 of the ACA.

The court struck down the tribunal constitution provisions of the contract as wholly illegal and of no consequence. It held: –

- (i) There can be no manner of doubt that Section 12 ACA, as amended by the 2015 Amendments read with the Fifth and Seventh Schedule squarely have become applicable, and a neutral, impartial and independent arbitral tribunal was required to be constituted.
- (ii) The standing arbitral tribunal lost its validity and would stand wiped out, considering the clear position in law as laid down by the Supreme Court in *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd.* (2017) 4 SCC 665, *TRF Ltd. v. Energo Engineering Projects Ltd.*, (2017) 8 SCC 377, *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*, (2019) 5 SCC 755 and *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, 2019 SCC OnLine SC 1517.

The Court necessarily would have to exercise jurisdiction under Section 11(6) read with Sections 14 and 15 of the ACA.