

**HIGH COURT OF TRIPURA
AGARTALA**

Arb.P. No.14 of 2023

Sri Salil Acharjee

.....Petitioner(s);

Versus

The State of Tripura, represented by the Commissioner and Secretary & others

.....Respondent(s)

For Petitioner(s) : Mr. Somik Deb, Sr. Advocate,
Mr. H. Sarkar, Advocate.

For Respondent(s) : Mr. Kohinoor N. Bhattacharyya, G.A.,
Ms. Kahina Reang, Advocate.

HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH

Order

17/05/2024

Heard Mr. Somik Deb, learned senior counsel for the petitioner and Mr. Kohinoor N. Bhattacharyya, learned Government Advocate for the respondents-State.

2. Petitioner approached this Court for appointment of an independent Arbitrator in connection with the agreement [Annexure-1] between the parties under Section 11(6) read with Section 12 of the Arbitration and Conciliation Act, 1996 as amended.

3. The case of the petitioner is captured in the order dated 15.03.2024 which is extracted hereunder:

Heard Mr. Somik Deb, learned senior counsel assisted by Mr. H. Sarkar, learned counsel appearing for the petitioner and Mr. Kohinoor N Bhattacharyya, learned Government Advocate appearing for the respondents-State.

2. Petitioner approached this Court for appointment of an independent arbitrator under Section 11(6)(a) read with Section 12 of the Arbitration and Conciliation Act, 1996 to adjudicate the dispute arising out of and in connection with the agreement entered into between the parties. The case of the petitioner as pleaded was captured in the order dated 15.12.2023 which reads as under:

"Learned senior counsel for the petitioner is allowed to make necessary corrections in the designation of respondents No.4 and 5 during course of the day in the array of parties.

Petitioner seeks invocation of Clause 22.2 for appointment of an independent arbitrator in connection with the work order dated 12.11.2010 and the agreement at (Annexure-1). Earlier the petitioner had approached this Court in WP(C) No.372 of 2023 which was disposed of by order dated 31.07.2023 with liberty to the petitioner to approach the Executive Engineer PWD (R&B), Kailashahar, Unakoti, respondent No.5 in respect of his claims for payment of price escalation, refund of security deposit along with interest from due date. The representation was attended by the respondent No.5 but only a sum of Rs.4,99,143/- was found payable to the petitioner by communication at Annexure-10 dated 17.08.2023. Respondent No.5 disputed the admissibility of the price escalation under Clause 44.1 as the work had been delayed for more than 4 years due to fault and on failure on the part of the agency. It was further stated that liquidated damages under clause 46 of the agreement for Rs.39,62,475/- were yet to be deposited by the petitioner. Since the grievances of the petitioner remain unredressed and the dispute relating to claims subsisted, he approached the Executive Engineer PWD (R&B), Kailashahar, Unakoti respondent No.5 by letter dated 23.08.2023 Annexure-11 for payment of the admissible dues against price escalation, security deposit and final bill. Thereafter, the petitioner approached the Superintending Engineer, 1st Circle, PWD(R&B), Kumarghat, respondent No.4 through letter dated 05.09.2023 Annexure-12 and on failing to elucidate any response, he has also represented before the Chief Engineer, PWD(R&B), New Secretariat, Agartala, respondent No.3 through letter dated 28.09.2023 clearly requesting him to appoint an independent arbitrator to adjudicate the dispute within 30 days from the date of receipt of the letter failing which he would be compelled to proceed further as per the arbitration clause.

*Mr. Somik Deb, learned senior counsel for the petitioner submits that by memorandum dated 20.08.2023 issued by the Chief Engineer, PWD(R&B), Tripura which has been received by the petitioner only two days back, the Chief Engineer, respondent No.3 has appointed a retired Grade-I Officer of Tripura Judicial Service Sri Subrata Pal as an Arbitrator. It is submitted that in terms of Section 12, the Chief Engineer, respondent No.3 is disqualified to appoint an independent arbitrator since he heads the very department with which the dispute is existing. The petitioner has not waived of such condition in the agreement or the Arbitration Clause 22.1 and 22.2 for the respondent-Chief Engineer to make such an appointment after coming into force of the amendment in the year 2015 to the Arbitration & Conciliation Act, 1996. Learned senior counsel for the petitioner has relied upon a decision of the Apex Court in case of **TRF Limited versus Energo Engineering Projects Limited** reported in (2017) 8 SCC 377. As such, the jurisdiction of the Court to appoint an arbitrator has not been ousted because of appointment of an arbitrator by the respondent No.3 vide memorandum dated 20.08.2023.*

Mr. K. De, learned Additional Government Advocate is allowed 4(four) weeks' time to seek instructions and file counter-affidavit.

List the matter on 19.01.2024.

Petitioner, if so advised, may file rejoinder in the meantime."

3. The respondents have thereafter filed a counter affidavit. It has been averred that as per the Government records and as per the agreement, the work in question was supposed to be completed on 26.11.2013. The agency completed the work on 31.12.2017. After a lapse of 5 years 5 months, the agency approached this Court which is unexplained. Therefore, the application deserves to be dismissed.

4. Under this agreement, any grievance has to be settled under Clause-22 which provides for an alternative dispute resolution mechanism. Petitioner has intentionally bypassed this provision to avoid the limitation part. Further statements have been made in relation to the order dated 31.07.2023 delivered in WP(C) No.372 of 2023 whereunder the Executive Engineer, Kailashahar Division, PWD(R&B) vide his letter dated 17.08.2023 communicated to the claimant that as per official records the total amount payable to him for final bill is Rs.71,519/- and security deposit of Rs.11,00,592/- whereas payment required to be recovered from the claimant is to the tune of Rs.6,72,968/- as cost of material issued to the claimant. After deduction of the cost of material, the net amount payable to the claimant is Rs.4,99,143/-. The claimant was requested to confirm receiving of the payment within 7 days from receipt of the letter. The

respondents have further stated that the Chief Engineer, PWD(R&B) has vide memorandum dated 20.10.2023 already appointed Shri Subrata Pal, Grade-I Officer TJS (Retired) as an independent and impartial arbitrator to adjudicate the dispute from the recommended panel issued by the High Court as per notification dated 03.04.2023. Further averments from paragraphs-5 to 10 relate to the answers on merits of the dispute between the parties. The respondents state that the claimant/contractor failed to complete the work even within the extended period of time and as such, the price escalation is not admissible to him. The security deposit could not be released due to non-finalization of the prayer for granting extension of time. The work was stated to have been completed on 31.12.2017 with provisional time extension granted by the office. The total value of work done was of Rs.3,77,19,054/- out of which an amount of Rs.3,76,47,535/- has already been paid. The balance amount of Rs.71,519/- could not be paid due to non-finalization of the prayer for granting extension of time and non-approval of the deviation statement. An amount of Rs.11,00,592/- is lying in the books of their office which could not be released due to non-finalization of final deviation statement. Further averments have been made regarding the handing over of the site of the work to the claimant on 15.10.2010. The Hindrance Register would show that the contractor had suspended the work from 28.04.2013 to 08.10.2014 and as such, price escalation claimed by him is not admissible.

5. Mr. Kohinoor N Bhattacharyya, learned Government Advocate appearing for the State, submits that in terms of Clause-22.2(b) of the agreement since the claim amount was above Rs.50,000/-, another Chief Engineer or arbitrator could be appointed by the Chief Engineer of the same department to settle the dispute in accordance with the Act of 1996 or any statutory modification thereof. Since an appointment of an independent arbitrator has already been made on the request made by the petitioner through his letter dated 28.09.2023, on 20.10.2023 the application for appointment of an independent arbitrator invoking Section 11(6) of the Act does not deserve to be allowed. There is no question on the independence and impartiality of the appointed arbitrator who has submitted his declaration in terms of Section 12(1)(a) and (1)(b) on 20.11.2023. The bona fide of the petitioner has been questioned.

6. From the averments made in the counter affidavit, one thing is clear that the respondents acknowledge the existence of a dispute as they have proceeded to appoint an arbitrator. Therefore, it appears that the plea of delay also stands waived. The agreement is pre 2015 amendment. However, in view of proviso to Section 12(5) of the amended Act, there has been no express agreement in writing between the parties to waive of the requirement under Section 12(5) of the Act and permit the designated authority to appoint an arbitrator for adjudication of the dispute between the parties.

7. Learned counsel for both the parties have placed reliance on the following decisions:

(i) **TRF Limited vs. Energo Engineering Projects Limited** reported in (2017) 8 SCC 377;

(ii) **Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV), a Joint Venture Company** reported in (2020) 14 SCC 712; and

(iii) The order dated 16.08.2022 passed by the Apex Court in the case of **JSW Steel Limited vs. South Western Railway and another** reported in 2022 SCC OnLine SC 1973, whereby the matter has been referred to a larger Bench on an apparent conflict between the above two decisions, both by three-Judge Bench of the Apex Court.

8. Mr. Somik Deb, learned senior counsel for the petitioner, has further drawn the attention of this Court to a recent decision rendered in the case of **Glock Asia-Pacific Limited vs. Union of India** reported in (2023) 8 SCC 226. He submits that despite being conscious of the conflict in the above two decisions, the Apex Court in the case of **Glock Asia-Pacific Limited** (supra) by a three-Judge Bench has chosen to follow the ratio in the case of **TRF Limited** (supra).

Learned Government Advocate Mr. Kohinoor N Bhattacharyya appearing for the State has also placed the order of the Constitution Bench dated 17.01.2024 in the case of ***Central Organisation for Railway Electrification vrs. M/S ECI SPIC SMO MCML (JV), a Joint Venture Company*** [Civil Appeal No.9486-9487/2019] wherein the matter has been posted for 05.04.2024.

9. The only legal issue contested between the parties is whether in view of the provisions under Section 12(5) read with Schedule-V and VII of the Amendment Act, 2015, the Chief Engineer is ineligible or technically disqualified to appoint an arbitrator under Clause-22.2(b) of the agreement in question.

10. The issue of ineligibility of the designated authority, a party to the dispute, to appoint an arbitrator was squarely in question in the case of ***TRF Limited*** (supra). The Apex Court held that once the designated authority becomes ineligible to act as an arbitrator by virtue of the 2015 amendment, the arbitrator appointed by him also becomes ineligible by operation of law since he cannot nominate another person as an arbitrator. The Apex Court also held that ineligibility of appointment of an arbitrator can only be waived in terms of the proviso to Section 12(5) read with Schedule-V and VII of the Amendment Act, 2015 if the parties have chosen to waive the condition by an express agreement in writing only after the dispute has arisen between the parties. The principle embedded in the maxim *qui facit per alium facit per se* (what one does through another is done by oneself) gets attracted in such a case.

11. There has been a divergent opinion by the Apex Court in the case of ***Central Organisation for Railway Electrification*** (supra) wherein it was held that the designated authority General Manager of the Appellant was not ineligible to appoint a retired Railway Officer from the panel in terms of modified Clause-64(3) of the General Conditions of Contract. The respondent had failed to select any two railway electrification officers out of a panel of 4 suggested by the appellant. It, however, appears that noticing the divergence in view between the two Benches of co-equal strength, the Apex Court in the case of ***JSW Steel Limited*** (supra) referred the matter to a larger Bench. The matter is still sub judice. However, there is no restraint upon the High Court in the meantime to appoint an arbitrator in such circumstances under Section 11(6)(a) of the Act as amended. It further appears that in the case of ***Glock Asia-Pacific Limited*** (supra), a three-Judge Bench of the Apex Court presided by Hon'ble the Chief Justice of India has found that the arbitration clause in that case enabled a serving employee of the Union of India, a party to the contract, to nominate a serving employee of the Union of India as the sole arbitrator. Such an authorization was clearly distinct from the arbitration clause in ***Voestalpine Schienen GmbH vrs. Delhi Metro Rail Corporation Ltd.*** reported in (2017) 4 SCC 665 and ***Central Organisation for Railway Electrification*** (supra). The Apex Court also took note of the reference to the larger Bench and held that it will have no bearing on the outcome of the said case. Accordingly, the Apex Court proceeded to appoint an independent arbitrator, a former Judge of the Supreme Court, as a sole arbitrator to adjudicate the disputes arising under and in connection with the conditions of tender entered into between the parties, subject to mandatory disclosures under the amended Section 12 of the Arbitration and Conciliation Act, 1996.

12. In the present case, the dispute is between the Contractor and the State of Tripura, in particular the PWD (R&B) Department. Under Clause-22.2(b) the disputes are referable for adjudication for claims above Rs.50,000/- to another Chief Engineer or arbitrator appointed by the Chief Engineer of the same department. The Chief Engineer of the department, i.e. a party to the dispute, has nominated an arbitrator on the request of the petitioner following the mechanism prescribed under Clause-22.2. However, he becomes ineligible to appoint an arbitrator even if the named arbitrator is from a panel constituted by the High Court vide notification dated 03.04.2023 in exercise of powers under Section 11(3-A) of the Arbitration and Conciliation Act, 1996 as amended, in view of the provision of Section 12(5) read with Schedule V & VII of the Act of 1996 as amended. The arbitration clause in the first case is in similar terms as in the case of ***TRF Limited*** (supra) where the Managing Director of the Corporation was named as the sole arbitrator to adjudicate the dispute between the parties or by

his nominee. Therefore, this Court deems it proper to follow the decision rendered by the Apex Court in the case of *TRF Limited* (supra). The terms of the arbitration clause herein are quite distinct from that in the case of *Central Organisation for Railway Electrification* (supra). It is also important to mention here that a three-Judge Bench of the Apex Court in the case of *Glock Asia-Pacific Limited* (supra) has after noticing the apparent divergence in the two decisions proceeded to appoint an independent arbitrator to adjudicate the dispute between the parties since the arbitrator appointed by the Secretary, Ministry of Home Affairs, was ineligible to make such appointment. In the present case, the independence and impartiality of the arbitrator appointed by the Chief Engineer is not an issue. It is the ineligibility of the designated authority, i.e. the Chief Engineer of the department, a party to the dispute, to appoint an independent arbitrator in view of the amended provisions of the Arbitration and Conciliation Act, 2015, in particular Section 12(5) read with Schedule-V and VII.

13. As such, this Court proposes to appoint Hon'ble Mr. Justice Tapen Sen, a former Judge of Calcutta High Court, as an arbitrator to adjudicate the dispute between the parties arising out of and in connection with the agreement in question. The proposed arbitrator is requested to submit his consent along with a declaration in form Schedule-VI of the Arbitration and Conciliation Act, 1996 as amended by the Act of 2015. The Registry is directed to communicate this order to the proposed arbitrator. The matter be placed after three weeks upon receipt of the consent and declaration by the proposed arbitrator.

List the matter on **12.04.2024**.”

4. Pursuant to the order dated 15.03.2024, this Court proposed to appoint Hon'ble Mr. Justice Tapen Sen, a former Judge of Calcutta High Court, as an Arbitrator. However, he conveyed his inability to accept the request. Thereafter, by order dated 02.05.2024, this Court proposed to appoint Hon'ble Mr. Justice Subhasis Talapatra, former Chief Justice of Orissa High Court, as an Arbitrator. The proposed Arbitrator has submitted his consent along with a declaration under Schedule-VI of the Arbitration and Conciliation Act, 1996 as amended.

5. Learned counsel for the parties, therefore, submit that this Court may appoint him as an arbitrator to adjudicate the dispute between the parties.

6. In view of the consent and declaration submitted by the proposed Arbitrator, I, hereby, appoint Hon'ble Mr. Justice Subhasis Talapatra, former Chief Justice of Orissa High Court, as an Arbitrator to adjudicate the dispute between the parties. Learned Arbitrator is requested to take into consideration

the Schedule of Model Fee prescribed under Schedule IV and the timeline prescribed under Section 29-A of the Arbitration and Conciliation Act, 1996 as amended.

7. Registry is directed to communicate the instant order along with a copy of the entire pleadings of the instant application to the learned Arbitrator forthwith.

8. The instant petition stands allowed. Pending application(s), if any, shall also stand disposed of.

(APARESH KUMAR SINGH), CJ

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