

**HIGH COURT OF TRIPURA
AGARTALA**

Arb.P. No.13 of 2023

Shri Kashinath Bhattacharjee, Contractor

.....Petitioner(s);

Versus

The State of Tripura & others

.....Respondent(s)

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

For Respondent(s) : Mr. Karnajit De, Addl. G.A.

HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH

Order

12/04/2024

Heard Mr. H. Sarkar, learned counsel for the petitioner and Mr. Karnajit De, learned Additional Government Advocate for the respondents-State.

2. Petitioner approached this Court for appointment of an independent arbitrator invoking Clause 22 (i) & (ii) of the agreement [Annexure-2] between the parties under Section 11(6)(a) read with Section 12 of the Arbitration and Conciliation Act, 1996 as amended.

3. Pursuant to the order dated 15.03.2024, the proposed Arbitrator has conveyed his consent and also sent his disclosure statement in terms of Section 12(1) read with the Sixth Schedule of the Arbitration and Conciliation Act, 1996 as amended. The said order dated 15.03.2024 is reproduced 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 under Section 11(6)(a) read with Section 12 of the Arbitration and Conciliation Act, 1996 as amended by the Act of 2015 for appointment of an independent sole arbitrator for adjudication of the dispute as raised by the petitioner in connection with the agreement. The work was allotted to the petitioner vide work order dated 06.01.2016 (Annexure-1) and agreement (Annexure-2). The

agreement contains Clause-22 which is an arbitration clause. Clause-22 of the agreement is quoted in full:

"22. Settlement of disputes:

22.1 If any dispute or difference of any kind whatsoever arises between the department and the Contractor in connection with, or arising out of the Contract at stage, whether during the progress of the works or after their completion and whether before or after the termination, abandonment or breach of the Contract, it shall in the first place, be referred to and settled by the Engineer-in-charge who shall, within a period of twenty days after being requested by the Contractor to do so, give written notice of his decision to the Contractor. Upon receipt of the written notice of the decision of the Engineer-in-Charge the Contractor shall promptly proceed without delay to comply with such notice of decision.

22.2 If the Engineer-In-Charge fails to give notice of his decision in writing within a period of twenty days after being requested or if the Contractor is dissatisfied with the notice of the decision of the Engineer-In-Charge, the Contractor may within fifteen days after receiving the notice of decision appeal to the concerned Superintending Engineer of Department who shall after affording opportunity of being heard shall give notice of his decision within a period of thirty days. After Superintending Engineer has given written notice of his decision to the Contractor and no claim to arbitration, has been communicated to him by the Contractor within a period of fifteen days from receipt of such notice the said decision shall remain final and binding on both side. If the Superintending Engineer fails to give notice of his decision, as aforesaid within a period of thirty days after being requested as aforesaid, or if the Contractor be dissatisfied with any such decision, then and in any such case the contractor within thirty days after the expiration of the first named period of thirty days as the case may be, require that the matter or matters in dispute be referred to arbitration as detailed below:-

SETTLEMENT OF CLAIMS:

All disputes or difference arising of or relating to the Contract shall be referred for the adjudication as follows:

- a) Claims up to a value of Rupees 50,000/-
-Superintending Engineer of another circle in the same department.
- b) Claims above Rs.50,000/-
-Another Chief Engineer or Arbitrator appointed by the Chief Engineer of the same department.

The arbitration shall be conducted in accordance with the provisions of Indian Arbitration and Conciliation Act 1996 or any statutory modification thereof.

The arbitrator shall state his reasons in passing the award.

A reference for adjudication under this clauses shall be made by the contractor within 6 (six) months from the date of intimating the contractor of the preparation of final bill or his having accepted payment whichever is earlier. Only contracts executed in Tripura shall have jurisdiction for any suit arising out of this contract. More particularly no suit shall be instituted or entertained in any court outside the state arising out of contract."

3. Parties are *ad idem* on this issue that this clause is an arbitration clause. This is all the more obvious from the stand of the respondents from the counter affidavit filed by the respondents, as upon request of the petitioner the Chief Engineer, PWD (R&B), New Secretariat Complex, Agartala had appointed an arbitrator Mr. Subrata Pal, Grade-I Officer of Tripura Judicial Service (Retired) from a panel notified under sub-section (3-A) of Section 11 of the Arbitration and Conciliation Act, 1996 by the High Court.

4. Petitioner by way of this application seeks appointment of an independent Arbitrator by invoking Clause 22.2 of the work order dated 06.01.2016 (Annexure-1) and agreement at (Annexure-2) for adjudication of the dispute between the parties relating to execution of the work of "Construction of Chief Minister's Bungalow i/c frisking & barrack, Type-II quarter [1 unit] and boundary wall at Agartala, West Tripura/SH: building portion including internal water supply, sanitary installation & internal electrification works (laying of concealed conduct pipe only)."

5. According to the petitioner, the stipulated date of commencement of work was 21.01.2016 and the completion date was 20.01.2018. The estimated amount value of work was Rs.3,57,61,206/-. However, the structural drawings were handed over on

06.10.2016 and sites were handed over for dismantling of the existing structure on 05.10.2016. On account of indecision of the departmental authority, the works remained stalled. There was delay in handing over the drawings of septic tank, boundary wall etc. for over one year and also the electrical drawing for ground floor etc. for certain period. Petitioner raised a grievance regarding non-payment of dues vide letter dated 11.06.2018. He also intimated vide letter dated 20.02.2020 that completion of the balance work was not possible. The work was finally executed on 09.02.2021. It led to price escalation of the tendered value of work which rose up to Rs.5,47,66,425/- approximately. Petitioner first represented before the Executive Engineer, P.W.D (R&B), Agartala Division No.III, Agartala, West Tripura (respondent No.3) on 29.08.2023. Subsequently, following the procedure prescribed under Clause 22.1, he also represented before the Superintending Engineer, P.W.D (R&B), 2nd Circle, Agartala on 20.09.2023 and finally approached the Chief Engineer, P.W.D (R&B), New Secretariat Complex, Agartala on 03.11.2023 for appointment of an independent Arbitrator under Clause 22.2. However, though the Chief Engineer is disqualified to appoint an Arbitrator due to the amendment introduced in 2015 to the Act of 1996, being an officer of the department, he has appointed one retired Judicial Officer, Grade-I of Tripura Judicial Service, Mr. Subrata Pal as an Arbitrator to adjudicate the dispute between the parties by letter dated 30.11.2023 which has been brought on record through an additional affidavit. This petition has been filed on 06.12.2023. However, since the Chief Engineer was disqualified to appoint an independent Arbitrator in view of Section 12 of the Act of 1996, any pre-emptive action by appointment of an Arbitrator before filing of the instant petition could not oust the jurisdiction of this Court in appointment of an independent Arbitrator.

6. By order dated 21.12.2023 the respondents-State was allowed four weeks' time to file counter affidavit. The counter affidavit is in two parts. One part relates to averments in reply to the merits of the case which need not be gone into in detail. In substance, the respondents have contended that though the date of commencement of the work was 21.01.2016 and stipulated date of completion was 20.01.2018 but the work was completed by 30.10.2020. According to the department, the petitioner was unable to complete the whole work within time. Averments have been made at paragraphs-4 to 13 regarding the correspondences made between the parties in relation to the execution of the work.

7. Respondents, however, do not dispute that certain disputes regarding the contract work have been raised by the petitioner. He has approached the Chief Engineer, PWD(R&B), Tripura on 03.11.2023 (Annexure-5) for appointment of an independent and impartial arbitrator within 30 days to adjudicate the disputes arising between the parties for the aforesaid work. The Chief Engineer as per Clause-22.2(b) of the agreement appointed an independent and impartial arbitrator on 30.11.2023 from the recommended panel by this Court. After the appointment of the arbitrator, the claimant has with an ulterior motive filed this arbitration petition on 06.12.2023. The arbitrator has also submitted his declaration in terms of Schedule-VI read with Section 12(1)(b) of the Act of 1996 as amended by the Act of 2015 disclosing that he has no direct or indirect relationship with the parties in dispute or in relation to the subject matter in dispute which may give rise to justifiable doubts as to his independence or impartiality.

8. On behalf of the respondents, learned Government Advocate has questioned the bona fide of the petitioner to doubt the impartiality and independence of an arbitrator appointed under the agreed mechanism by the Chief Engineer under Clause-22.2(b) of the agreement. He, therefore, submits that this Court may refrain from appointing another arbitrator to adjudicate the dispute between the parties.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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 four 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.

14. 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 this 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 present 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. It is pertinent to mention that the instant agreement is post 2015 amendment.

15. As such, this Court proposes to appoint Hon'ble Mr. Justice Akil Kureshi, a former Chief Justice of this Court, as an arbitrator to adjudicate the dispute between the parties. 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. 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. The proposed arbitrator has submitted his consent along with declaration which is at Flag-A & Flag-B respectively.
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 Akil Kureshi, a former Chief Justice of this 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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