

**HIGH COURT OF TRIPURA
AGARTALA**

Arb.P. No.02 of 2025

Kashinath Bhattacharjee, Contractor, son of Late Dinesh Chandra Bhattacharjee, resident of village of Thakurpally Road, Ker Chowmuhani, near Skylark Club, PO-Agartala, PS-West Agartala, District-West Tripura, PIN-799001

.....Petitioner(s);

Versus

3. Bharat Sanchar Nigam Limited, a Govt. of India undertaking, represented by its General Manager, having his office at CTO Building, North-East-1, Telecom-Circle, BSNL, Shillong.

The Chief Engineer, Public Works Department (R&B), Government of Tripura, having his office at Pandit Nehru Complex, PO- Kunjaban, PS- New Capital Complex, District- West Tripura, PIN-799006

4. The Divisional Engineer, BSNL, Core Network (Tx), NER, BSNL, Kaman Chowmuhani, Agartala-799001

.....Respondent(s).

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

For Respondent(s) : Ms. Saswati Nag, Advocate.

HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH

Order

09/04/2025

Heard Mr. Haradhan Sarkar, learned counsel for the petitioner and Ms. Saswati Nag, learned counsel for the respondents.

2. Petitioner approached this Court for appointment of an independent Arbitrator in connection with the agreement [Annexure-2] 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 19.03.2025 which is extracted hereunder:

“Heard Mr. Somik Deb, learned senior counsel assisted by Mr. Haradhan Sarkar, learned counsel for the petitioner and Mr. Ratan Datta, learned counsel for the respondents-BSNL.

Petitioner has approached this Court under Section 11(6) of the Arbitration & Conciliation Act, 1996 as amended for appointment of an

independent arbitrator. He has invoked the arbitration clauses i.e. Clause 34 and 35 under the agreement [Annexure-2].

Petitioner was awarded work orders dated 03.02.2023, 17.02.2023 and 25.02.2023 being the lowest bidder for carrying out the execution of civil works namely "carrying out underground 24.72 KMS OFC Patch works under Divisional Engineer, Core Network Tx NER, BSNL, Agartala Division". Petitioner contends that after successful completion of work, he handed over the site and raised his final bills. However, the respondents-BSNL has imposed 10% as liquidated damages of the estimated cost of work by order dated 13.05.2024. He preferred WP(C) No. 541/2024 seeking refund of taxes illegally and unlawfully withheld from his bills. The said writ petition was disposed of on 19.11.2024 with a direction to the respondent No.4 to consider the representations of the petitioner and pass a reasoned order. Vide order dated 03.01.2025, the Divisional Engineer, Core Network (TX), NER, BSNL, Agartala communicated that since petitioner has violated the terms of the contract, there is no basis to challenge the imposition of liquidated damages. All actions taken by the BSNL are in accordance with provisions of the agreement and the applicable laws.

Mr. Somik Deb, learned senior counsel for the petitioner, submits that as per the amended Section 12(1) read with Seventh Schedule of the Arbitration & Conciliation Act, 1996 and the recent Constitution Bench decision rendered by the Apex Court in the case of **Central Organization for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Company** reported in (2024) SCC OnLine SC 3219, the General Manager, who is the nominated person, as per Clause 35 of the agreement is ineligible to act as an arbitrator or to appoint any other officer authorized by him. Therefore, petitioner has invoked the jurisdiction of this Court under Section 11(6) of the Arbitration & Conciliation Act, 1996 as amended.

Annexure-4 dated 15.06.2024 has been referred to by learned senior counsel for the petitioner as containing the claim of the petitioner as regards the liquidated damages of 10% illegally deducted and refund of the amount of Rs.7,80,456/- from the bill amount.

After passing of the order dated 19.11.2024, the claim of the petitioner was rejected by a reasoned order dated 03.01.2025. The reasoned order contains point wise reply on the representation of the petitioner dated 05.12.2024. In substance, the stand of the respondents contained in the Counter Affidavit also reflects the same.

The respondents have taken a plea that petitioner failed to commence the work within the stipulated ten days' from each work order violating Section 39 of the Indian Contract Act, 1872 which justifies termination of the agreement. He was served with reminder letters dated 31.03.2023 and 06.04.2023 [Annexure-R/2 & R/3]. Since petitioner made huge delay in completion of each of these works, the liquidated damages have been imposed instead of terminating the contract in terms with Section 74 of the Indian Contract Act, 1872 which allows for pre-determined compensation in case of a breach. Respondents further contend that the claim of wrong withholding of GST amount of Rs.4,88,411.23/- is false. It occurred due to petitioner's failure to update invoices correctly. Respondents have found a GST amount of Rs.2,78,135/- which was withheld by the system as being admissible to the petitioner. The same has already been released for payment. However, this does not absolve the petitioner of contractual obligations under Section 73 of the Indian Contract Act, 1872. The respondents have answered each and every point by the reasoned order dated 03.01.2025. Since the petitioner failed to perform the contract within the agreed timelines, petitioner is bound to face deduction of liquidated damages as per the terms of the agreement. Therefore, the prayer for appointment of an independent arbitrator is not maintainable.

Mr. Deb, learned senior counsel for the petitioner, submits that since the claim raised by the petitioner is being disputed by the respondents-BSNL, the matter is an arbitrable dispute. Parties have agreed to incorporate arbitration clause 34 & 35 in agreement. However, the General Manager, BSNL is ineligible to act as an arbitrator or appoint any other officer authorized by him in view of the Constitution Bench decision rendered in the case of **Central Organization for**

Railway Electrification (supra). Therefore, this Court may appoint an independent arbitrator.

I have considered the submission of learned counsel for the parties and taken note of the materials placed from record. This Court in exercise of the powers under Section 11(6) of the Arbitration & Conciliation Act, 1996 as amended is not required to get into the merits of the dispute or contentions raised between the parties. *Prima facie* a dispute exists as the claim raised by the petitioner against deduction of liquidated damages has been refuted by passing a reasoned order and also reiterated through their stand in the Counter Affidavit. Whether the deductions were rightly made or not lies within the domain of the arbitrator since the parties have agreed to an alternative dispute resolution mechanism under Clause 34 & 35 of the agreement which read as under:

“34. In case of dispute in respect of any clause, the case will be referred to the Arbitrator. The decision of the arbitrator will be final and binding to both parties.

35. The arbitrator for the purpose of this agreement will be the General Manager, CNTx, NER Shillong or any other officer authorized by him.”

However, in view of the Constitution Bench decision rendered by the Apex Court in the case of ***Central Organization for Railway Electrification*** (supra)**Error! Bookmark not defined.**, the nominated authority i.e. the General Manager, BSNL is rendered ineligible to make an appointment on the principle of *qui facit per alium facit per se*.

In such circumstances, this Court proposes to appoint Hon’ble Mr. Justice S.C. Das, a former Judge of this Court to act as an independent arbitrator in respect of the dispute raised by the petitioner. 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.

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.”

4. Pursuant to the order dated 19.03.2025, this Court proposed to appoint Hon’ble Mr. Justice S.C. Das, a former Judge of this 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 S.C. Das, a former Judge 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 stand disposed of.

(APARESH KUMAR SINGH), CJ



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