

HIGH COURT OF TRIPURA

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ARB P No.07 of 2024

Sri Arun Kumar Dey, Contractor, son of late Biraj Mohan Dey, resident of A.D. Nagar, Police Line, P.O.-A.D. Nagar-799003, P.S. A.D. Nagar, District- West Tripura.

..... *Petitioner(s)*

V E R S U S

1. The Oil & Natural Gas Corporation Limited (ONGC), represented by its Executive Director, Tripura Asset, Badharghat Complex, Agartala, P.O. ONGC-799014, P.S. Amtali, District- West Tripura.

2. The Chief Engineer (Civil), Oil & Natural Gas Corporation Limited, Tripura Asset, Badharghat Complex, Agartala, P.O. ONGC-799014, P.S. Amtali, District- West Tripura

..... *Respondent(s)*

For Petitioner(s) : Mr. Abhijit Sengupta, Advocate.

For Respondent(s) : Mr. Jyotirmoy Das, Advocate.

HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH

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07/05/2025

Heard Mr. Abhijit Sengupta, learned counsel for the petitioner and Mr. Jyotirmoy Das, learned counsel for the respondents-ONGC.

[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 02.04.2025 which is extracted hereunder:

“Heard Mr. Abhijit Sengupta, learned counsel appearing for the petitioner and also heard Mr. Jyotirmoy Das, learned counsel appearing for the respondents.

The case of the petitioner as captured in order dated 18.12.2024 is reproduced hereunder:

“Petitioner has invoked the jurisdiction of this Court under Section 11(6) of the Arbitration and Conciliation (Amendment) Act, 2015 for appointment of an independent arbitrator. The contract for “construction of retaining structure, road side drain, re-construction of eroded roads, recarpeting and repairing of approach roads of well sites of Baramura, Gojalia, Konaban, Rokhia and ADB GCS, Tripura Asset” was awarded in favour of the petitioner by respondent-Oil and Natural Gas Corporation Limited (ONGC) vide agreement dated 12.11.2020 (Annexure-2). Time of completion of the work is 12 months from the date of issuance of work order i.e. 29.10.2020 (Annexure-1) or handing over of site whichever is later. The estimated cost of the work was Rs.11,93,22,126.42/- inclusive of GST at the petitioner’s quoted percentage 37.01% below the estimated cost.

According to the petitioner, upon completion of the work, dispute arose regarding payment of certain bills. During sanction of second running account bill liquidated damages of Rs.1,19,32,213/- was deducted and an amount of Rs.2,97,39,072/- was paid to the petitioner on 31.07.2023. The final bill of the petitioner was prepared for an amount of Rs.90,70,749/-. The said final bill was paid on 16.07.2024 after deducting liquidated damage amounting to Rs.4,04,482/-. Petitioner represented on 07.08.2024 before the respondent Nos.1 & 2 against the arbitrary and illegal deduction of liquidated damages from the second running account bill and final bill. He prayed for release of the amount failing which he shall have no other option but to approach the court of law (Annexure-5). Thereafter, legal notice dated 20.09.2024 was served upon the Executive Director, ONGC, Tripura (Annexure-6) detailing his grievances. The schedule of claim contained in the legal notice shows that petitioner seeks realization of liquidated damages by ONGC from the gross bill of the petitioner; claim of Rs.1,23,27,695/- said to be illegally realized and claim of interest @ 12% per annum on the claimed amount with effect from 07.08.2024 i.e. date of demand of notice. Petitioner has sought to invoke clause 25.1.12 of the agreement for appointment of an independent arbitrator. However, since no decision was taken thereupon within 30 days period, petitioner has invoked the jurisdiction of this Court for appointment of an independent arbitrator.

Agreement provides for Arbitration and Conciliation under Clause-25 which has a detailed mechanism for reference of the disputes to an arbitrator including the constitution of the arbitral tribunal on a graded scale of the amount claimed.

Mr. A. Sengupta, learned counsel for the petitioner submits that respondents may be asked to furnish their reply as to why an independent arbitrator be not appointed.

Issue notice upon the respondents under ordinary process and speed post for which requisites be filed by Friday (20.12.2024).

Notice is made returnable on 22.01.2025.”

Counter-affidavit was filed by the respondent-ONGC thereafter. Mr. Jyotirmoy Das, learned counsel for the respondents has referred to the contents of the counter affidavit. At the outset, it is contended that after receipt of the second running account bill along with statement of payment details through registered Email ID of the petitioner on 31.07.2023, almost one year thereafter, petitioner has invoked the arbitration clause with respect to an ostensible dispute regarding withholding of amount against liquidated damages as per the contract. The reason was specifically mentioned in the payment details “withheld for LD @ 10% for delay of 558 days”. Petitioner quietly acknowledged the delay in execution of the work which in turn attracted Clause 2(a) of the agreement for imposition of ascertained pre-estimated liquidated damages @ ½% of contract price for each week of delay subject to 12.20% (Annexure-A). It is further stated that though petitioner received letter of acceptance dated 29.10.2020 and work order was issued on 12.11.2020 with the handing over of the site on the same date, he received handing over of the site on 04.01.2021 to start and complete the work within 12 months by 03.01.2022 (Annexure-B). Petitioner failed to complete the work within the stipulated time and also enjoyed time extension for delayed execution of the contract on his repeated prayers vide letters dated 25.02.2022 and 26.06.2022 (Annexure-C & D). Finally, when there was no prayer for exemption of delay with justified grounds and period wise hindrances, the contract was finalized by withholding maximum

12.20% of the total contract price as per Clause 2(a) of the agreement for levy of liquidated damages and the final bill was prepared and passed for payment on 16.07.2024. The respondents cannot entertain such attempt by the petitioner to raise unjustified disputes for reference to arbitration when there is already a provision in the contract for conciliation through Outside Expert Committee (OEC) and also available in-house Procurement Evaluation Committee (PEC) competent to deal with such post contract issues.

Petitioner has invoked Clause 25.1 of the agreement and the matter was placed before the General Manager (Civil)-LM Works of ONGC along with the statement of circumstances of the delay and the calculation of LD withheld. As per the statement, it is clear that the work started on 04.01.2021 and the stipulated date of completion was 03.01.2022. Therefore, petitioner was requested to refer the matter for mediation/conciliation vide letter dated 14.11.2024 but without communicating his decision, he has submitted this petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an impartial arbitrator. The matter is within the purview of ONGC's in-house Procurement Evaluation Committee (PEC). The Committee shall analyze the prospect of the refuted claim of LD as per the terms of the contract. The matter is still under consideration for reduction of LD burden on obtaining the advice from the committee and the ONGC Corporate Indirect Tax Department guidelines. Based on these averments, respondents prayed for dismissal of the petition as according to them they had not acted in violation of the terms of the contract.

When the matter was taken up on 12.02.2025, Mr. Jyotirmoy Das, learned counsel for the respondents-ONGC vehemently submitted that since the claim is under active consideration of the Procurement Evaluation Committee, the in-house mechanism may be allowed to take a decision. In that view of the matter, the case was adjourned for more than four weeks. The respondents were directed to bring on record the outcome of the Procurement Evaluation Committee proceedings on the next date.

Additional affidavit has been filed by the respondents thereafter on 18.03.2025. It is stated that PEC after considering the total aspect of the circumstances, the hindrances in execution of the work and after examining the case in detail and considering possible relaxation, has recommended time extension for delay in execution of work and also recommended reduction of LD amount from 12.2% as envisaged under the contract to 10% of the contract value subject to approval of L-1 (highest authority of the asset). The minutes PEC have been enclosed along with the calculations. The amount refundable would be Rs.22,24,649.82 after effecting the revised reduction of LD as per recommendation of the PEC.

Learned counsel for the respondents submits that in fact as per the terms of the agreement there is no merit in the claim raised by the petitioner. Learned arbitrator would be left with nothing to decide. It would be an idle formality. If reference of such alleged disputes is made to an arbitrator in a routine manner, it would give a wrong message in the organization. Petitioner has been unnecessarily invoking arbitration clause though there is an existing in-house mechanism contemplated under the agreement between the parties through OEC and PEC. He submits that in such circumstances, this Court may refuse to refer the matter for arbitration. It is further submitted that in case the Court is inclined to refer the matter to arbitrator the same may be referred to a technical person.

Learned counsel for the petitioner in reply has reiterated his submission. He submits that as per the Clause 25.1.12 if the parties are not able to resolve the dispute through OEC or do not opt for conciliation through OEC, the party may invoke arbitration clause as provided in the contract. He further submits that if the claim is above Rs.50,00,000/- the agreement Clause 25.2.2 stipulates that sole arbitrator be appointed from a panel of retired Jurists. Since the respondents have failed to appoint an arbitrator this Court may appoint an arbitrator for adjudication of the dispute between the parties.

On consideration of rival submissions of learned counsel for the parties and after taking note of the materials on record, this Court is of the opinion that the claim of the petitioner on the question of deduction of liquidated damages has been contested by the respondents on the ground that the same are in terms of Clause 2(a) of the agreement for the delay in execution of the work. However, in exercise of the jurisdiction under Section 11(6) of the Act of 1996 as amended, this Court is not required to form an opinion on the merits of the dispute between the parties.

While on the one hand, the petitioner contends that the third site was not handed over to him, the respondents contend that the third site was not handed over to him because of delay in execution of two drill sites on the part of the petitioner. The correctness of the stand of the rival parties in a contract bound by terms and conditions agreed between them cannot be gone into in this jurisdiction. Prima facie there is a dispute since the parties are not at ad idem on the claim raised by the petitioner or on the stand of the respondents either. In a petition under Section 11(6) of the Act of 1996, this Court is required to see whether there is an arbitration agreement in existence, whether the claim is not a dead or stale claim beyond the period of limitation and whether the procedure for appointment of an arbitrator has been followed by the respondents, or not. [See *Aslam Ismail Khan Deshmukh Vs. ASAP Fluids Pvt. Ltd. & Anr. reported in (2025) 1 SCC 502*].

Clause 25.1.12 of the agreement is quoted hereunder: “If the parties are not able to resolve the dispute through OEC or do not opt for conciliation through OEC, the party may invoke arbitration clause as provided in the contract.

Clause 25.2.2 agreement is also extracted hereunder:

Claim amount(excluding claim)	Number of arbitrators	Appointing authority
For interest and counter claim, if any)		
Upto Rs.50 lakhs	Sole Arbitrator to be appointed from a panel of retired officers from ONGC/other PSU/Non-PSU organizations	ONGC (Note:- ONGC will forward a list containing names of five retired officers from ONGC/other PSU/Non-PSU organizations for selecting one from the list who will be appointed as sole arbitrator by ONGC)
Above Rs.50 lakhs to Rs.5 Crores	Sole Arbitrator to be appointed from a panel of retired Jurists	ONGC (Note:- ONGC will forward a list containing names of five jurists to the other party for selecting one from the list who will be appointed as sole arbitrator by ONGC)
Above Rs.5 Crores	3 Arbitrators	One arbitrator by each party and the 3 rd arbitrator, who shall be the presiding arbitrator by the two arbitrators. ONGC will appoint its arbitrator from the panel of jurists.

In the present case, the in-house mechanism agreed between the parties also has been carried out during the pendency of this petition on the suggestion of the respondents under which the PEC has recommended reduction of the LD amount from 12.2% to 10% with which the petitioner is not satisfied. As such, the mechanism laid down for adjudication of the arbitral dispute under Clause 25 of the agreement has been satisfied. Therefore, this Court proposes to appoint Hon’ble Mr. Justice Subhasis Talapatra, former Chief Justice of Orissa High Court to act 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. Registry is directed to communicate this order to the proposed Arbitrator. Matter be placed after three weeks upon receipt of the consent and declaration by the proposed arbitrator.”

[4] Mr. Abhijit Sengupta, learned counsel for the petitioner submits that the instant dispute does not relate to the third site. However, inadvertently in the order dated 2nd April, 2025 at page 6, a reference has been made to the third site which is unconnected with the present dispute.

[5] By an order dated 02.04.2025, 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-VII of the Arbitration and Conciliation Act, 1996 as amended.

[6] Learned counsels for the parties, therefore, submit that this Court may appoint him as an arbitrator to adjudicate the dispute between the parties.

[7] 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.

[8] Registry is directed to communicate the instant order along with a copy of the entire proceedings of the instant petition to the learned Arbitrator forthwith.

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

(APARESH KUMAR SINGH) CJ

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