

**IN THE HIGH COURT AT CALCUTTA
ORIGINAL CIVIL JURISDICTION
(Original Side)**

Pronounced on: 21/09/2021

AP 351 of 2021
(Through Video Conferencing)

CENTURY METALS RECYLING LIMITED & ANR.

... .Appellant(s)

Through : Mr. Deepanjan Dutta, Mr. Yashvardhan
Deora and Mr. Amit Tyagi,
Advocates (VC)

v/s

M/s URGO CAPITAL LIMITED & ORS.

....Respondent(s)

Through : Mr. Swatarup Banerjee, Mr. Avishek
Guha and Ms. Ratnadipa Sarkar,
Advocates (VC)

**Coram : HON'BLE MR. JUSTICE RAJESH BINDAL,
CHIEF JUSTICE (ACTING)**

ORDER

1. The present application has been filed by one of the parties to the agreement challenging appointment of arbitrator by the respondent No. 1 and further with the prayer for appointment of an arbitrator to resolve the dispute between the parties.

2. The dispute arises out of a letter of sanction for Supply Chain Finance Facility extended by the respondent No. 1 to the applicant. The agreement was executed by the parties on May 25, 2019. It contains provision for arbitration, in clause 24 thereof. The parties to the agreement namely, the applicant is located in Haryana whereas the respondent No. 1 is in Maharashtra. The aforesaid agreement was renewed on August 13, 2020.

3. It was argued by the learned Counsel for the applicant that it was surprised to receive a communication from Centre for Alternate Dispute Resolution Excellence (CADRE) dated July 17, 2021 intimating that the respondent No. 3 has been appointed as the arbitrator for resolution of dispute between the applicant No. 1 and the respondent No. 1. Time was granted till August 21, 2021 to file response to the statement of claim and documents in support thereof. Relying on a judgment of Hon'ble Supreme Court in **Perkins Eastman Architects DPC and Ors. Vs. HSCC (India) Ltd., AIR 2020 SC 59** it was argued that a party to the agreement having interest in the dispute or the outcome thereof is ineligible to appoint an arbitrator. As in the case in hand, the arbitrator has been appointed by the party to the agreements, the same has to be declared *coram non judice* and a fresh arbitrator deserves to be appointed.

4. On the other hand, learned Counsel for the respondent No. 1 submitted that the present application is barred on account of misjoinder of parties. The arbitrator cannot be impleaded as party to the proceedings. However, still respondent No. 3 has been impeded. He has referred to an order dated April 30, 2007 passed in **Ircon Inter. Natnl. Ltd. V. Vinay Heavy Equipments** reported as **2007 SCC OnLine SC 4** and in **Zonal General Manager, Ircon International Limited vs. Vinay Heavy Equipments (2015) 13 SCC 680**. He further submitted that the common application filed under sections 11(6), 12(5) and 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') is not maintainable. Section 12 provides for grounds of challenge before an arbitrator. None of the conditions as laid down in Section 14 exist in the present case. He further referred to Section 11 of the Act which provides that

in case more than one institution is appointed to deal with the dispute by way of arbitration, the first one approached shall have the jurisdiction. He further referred to a letter dated September 18, 2020 circulated by the Government of India, Ministry of Law and Justice mentioning the list of institutions offering alternate dispute resolution mechanism. The name of CADRE is mentioned therein.

5. While distinguishing the judgment of Hon'ble the Supreme Court in **Perkins Eastman Architects DPC and Ors.'s case (supra)**, it was submitted that in the case in hand the respondent No. 1 has not appointed the arbitrator rather it has merely referred the case to an institution. He further referred to the judgment in **Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company** reported as **(2020) 14 SCC 712**, stating that it is permissible for the party to the agreement to nominate arbitrator as per procedure laid down in the agreement even though he himself may be ineligible to act as an arbitrator.

6. In response, learned Counsel for the applicant submitted that he is not averse to the Institutional Arbitration, however, the forum cannot be chosen by the respondent No. 1 who is party to the agreement and has interest therein. The judgment in **Central Organisation for Railway Electrification's case (supra)** will not come to the rescue of the respondent No. 1 for the reason that in the aforesaid case Arbitral Tribunal was to be appointed in which both the parties had the advantage of nominating an arbitrator of their choice. As a result thereof advantage of one party appointing an arbitrator may get counter balanced by equal power to the

other party. It is not so provided in the agreement signed between the parties herein.

7. In **Perkins Eastman Architects DPC and Ors.’s case (supra)**, Hon’ble the Supreme Court opined that where only one party has the right to appoint sole arbitrator, it’s choice will always have an element of exclusivity in determining or charting the course of dispute resolution. The person who is interested in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator.

8. Section 11 of the Act may not come to the rescue of the respondent No. 1 for the reason that it only refers to the precedence of the institution which may take up the case for arbitration in case there is reference to more than one. The case in hand does not fall in that category.

9. Heard learned Counsel for the parties and perused the paperbook.

10. It is not disputed that an agreement was executed between the parties on May 25, 2019. Relevant clauses of the agreement with reference to the arbitration are extracted below:

“13. GOVERNING LAW, JURISDICTION AND ARBITRATION

13.1 This Agreement shall be construed in accordance with the laws of India and subject to the arbitration clause below, shall be subject to the exclusive jurisdiction of the competent courts in Kolkata.

13.2 In the event of any dispute or difference between the parties under this Agreement, including in relation to the construction or interpretation of the Agreement, the parties shall first endeavour to settle

such dispute or difference by amicable negotiations within 30 days of a written notice issued by one party to the other party. If the negotiations do not result in a resolution of the dispute or difference, either party shall be entitled to submit such dispute or difference to arbitration. If the negotiations do not result in a resolution of the dispute or difference, either party shall be entitled to submit such dispute or difference to arbitration. The Lender shall appoint an arbitrator at its sole discretion or in accordance with the Arbitration and Conciliation act, 1996 (“Arbitration Act”). Arbitration shall be conducted in accordance with the Arbitration Act. The seat of arbitration shall be Kolkata and the arbitration proceeding shall be conducted in English. The decision of the arbitrator shall be final and binding on the parties.”

11. Clause 24 of the Agreement dated August 13, 2020 entered into between the parties is extracted below:

“24. GOVERNING LAW AND ARBITRATION

(a) Any and all disputes, claims differences arising out of or in connection with any Facility Agreement or the performance of any Facility Agreement shall be settled by arbitration to be referred to a sole arbitrator to be appointed by the Lender and the award thereupon shall be binding upon the Parties. The place of the arbitration shall be in Kolkata and the arbitration shall be held in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and any statutory amendments thereof. The proceeding or Arbitration tribunal shall be conducted in English language. Each Party shall bear cost of representing its case before

the Arbitrator. Costs and charges of Arbitrator shall be shared equally unless otherwise provided for in the award.”

12. The primary issue which requires consideration by this Court in the present application is as to whether the arbitration proceedings as initiated by the respondent by referring the dispute to CADRE should be allowed to continue or a fresh arbitrator is to be appointed. The argument raised by the learned Counsel for the respondent is that the respondent being a party to the agreement, who has interest in the outcome thereof, cannot appoint an arbitrator whereas the stand taken by the respondent is that the respondent herein has not appointed an arbitrator rather it has referred the dispute to an institution namely, CADRE, who in turn has appointed the arbitrator from its panel. It is a case in which the parties to the dispute are located at Faridabad and Bombay whereas the seat of arbitration has been chosen at Kolkata.

13. The issue has been considered by Hon’ble the Supreme Court in a recent judgment in **Perkins Eastman Architects DPC & Ors.’s case (supra)**. It has been opined therein that where one party has right to appoint the sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. The person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. The position with regard to appointment of an arbitrator as a member of the Arbitral Tribunal is different. The relevant paragraph thereof is extracted below:

“16. But, in our view that has to be the logical deduction from **TRF Limited** MANU/SC/0755/2017 : (2017) 8 SCC 377. Paragraph 50 of the decision shows that this Court

was concerned with the issue, “whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator” The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognized by the decision of this Court in **TRF Limited** MANU/SC/0755/2017 : (2017) 8 SCC 377.”

(Emphasis supplied)

14. In the case in hand, the arbitration clause does not provide for appointment of an Arbitral Tribunal. In fact the lender, namely, the respondent has been given right to appoint sole arbitrator at its discretion. In view of the law laid down by Hon’ble the Supreme Court in **Perkins Eastman Architects DPC & Ors.’s case (supra)**, in my opinion, the

respondent did not have any right even to refer the dispute to CADRE for appointment of an arbitrator for the reason that the respondent is a party interested in the outcome of the dispute. It will not matter if the dispute is referred to a sole arbitrator or an institution as it is charting the course for dispute resolution. It is not a case in which Arbitral Tribunal was to be appointed. The judgment in **Central Organisation for Railway Electrification's case (supra)**, as relied upon by learned Counsel for the respondent deals with an issue where an Arbitral Tribunal was to be appointed. There Hon'ble the Supreme Court opined that both the parties having advantage of nominating an arbitrator each, their rights are counter-balanced.

15. As far as the argument raised by learned Counsel for the respondent regarding misjoinder of parties is concerned, the respondent no. 3, who was appointed as an arbitrator by the CADRE has been impleaded as the respondent in the petition. Reference has been made by the respondent to an order passed by Hon'ble the Supreme Court in **Ircon Inter. Natnl. Ltd.'s case (supra)**, where the name of the arbitrator was directed to be deleted on the request of the parties to the dispute. In my opinion, the present application does not deserve to be dismissed on that score. Rather the name of the respondent no. 3 can be ordered to be deleted from the memo of the Parties. Ordered accordingly.

16. The argument raised by learned Counsel for the respondent that in view of Section 11(11) of the Act, any institution which has been approached first is competent to appoint the arbitrator, is to be noticed and rejected. At the time of hearing, none of the Counsel pointed out that the aforesaid provision in the Act has not been enforced, though amendment

was carried out in the Act vide Arbitration and Conciliation (Amendment) Act, 2019 (for short, ‘the 2019 Amendment Act’). The matter was listed in the cause-list on September 16 and 17, 2021 in the category of “TO BE MENTIONED” to enable the Counsel for the respondent to clarify the aforesaid fact. He insisted that vide notification dated August 30, 2019, amendment in Section 11 of the 2019 Amendment Act has been notified. The argument is misconceived. The 2019 Amendment Act having 16 sections, was notified on August 09, 2019. Section 1(2) of aforesaid Amendment Act provides that it shall come into force on such date as the Central Government may by notification in the gazette appoint and different dates may be appointed for enforcement of different provisions of the Act. The same reads as under.

“(1) This Act may be called Arbitration and Conciliation (Amendment) Act, 2019.

(2) Save as otherwise provided in this Act, it shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.”

17. Subsequent thereto, notification was issued on August 30, 2019 by Ministry of Law and Justice, in exercise of powers conferred under Section 1(2) of the Amendment Act. The Central Government appointed August 30, 2019 as the date on which the specified provisions of the 2019 Amendment Act were to come into force. These are Sections 1, 4-9, 11-13 and 15 thereof. The notification reads as under:

“S.O. 3154(E). – In the exercise of the powers conferred by sub-section (2) of the Section 1 of the Arbitration and Conciliation (Amendment) Act, 2019 (33 of 2019), the Central Government hereby appoints the 30th August, 2019 as the date on which the provisions of the following sections of the said Act shall come into force:-

- (1) section 1;
- (2) section 4 to section 9 [both inclusive];
- (3) section 11 to section 13 [both inclusive];
- (4) section 15.”

18. The amendment of Section 11 of the Act is contained in Section 3 of the 2019 Amendment Act. Under Section 3 has not yet been enforced. The argument raised by learned Counsel for the respondent that Section 11 is mentioned in the notification is totally misconceived as this Section 11 mentioned at serial no. 3 in the notification dated August 30, 2019 refers to Sections as contained in the 2019 Amendment Act.

19. For the reasons mentioned above, in my opinion, the appointment of CADRE as the institution for resolution of dispute at the sole discretion of the respondent, who is a party to the agreement and interested in its result, cannot be legally sustained. Hence, set aside. Hon’ble Justice G.S. Singhvi, retired Judge of Hon’ble the Supreme Court, resident of K-27 (Ground Floor), Hauz Khas Enclave Aurobindo Marg, New Delhi – 110016 (Mobile No. 9958677088), is appointed as an arbitrator to resolve the dispute between the parties.

RAJESH BINDAL
Chief Justice (Acting)

KOLKATA
21.09.2021

PA(SS/RB)