OCD –2

ORDER SHEET

AP-COM/60/2025

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

RA MINING PRIVATE LIMITED

VS

EASTERN COALFIELDS LIMITED

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 12th February, 2025.

Appearance:

Mr. JaydipKar,Sr.Adv.
Mr. Debdeep Sinha, Adv.
.... for the petitioner
Mr. SaunakSengupta, Adv.
Mr. P. Basu, Adv.
...for the respondent

The Court:This is an application for appointment of an arbitrator. According to Mr. Kar, learned senior advocate, the dispute resolution clause provides that the disputes shall be referred to arbitration and the arbitrator shall be appointed by the Chairman cum Managing Director of the subsidiary company or by the competent Authority of Coal India Limited, as the case may be.

According to Mr. Kar, the above mechanism is no longer applicable in view of the statutory bar.

Reliance is placed on the following decisions:-

1. ***Bharat Broadband Network Limited vs. United Telecoms Limited : (2019) 5 Supreme Court Cases 755*** ;
2. ***Perkins Eastman Architects DPC and Another vs. HSCC (India) Ltd. ; 2019 SCC OnLine SC 1517***;
3. ***Central Organisation for Railway Electrification vs. ECI SPIC SMO MCML (JV) A Joint Venture Company : 2024 SCC OnLine SC 3219***.

Mr. Kar urges before this Court that the disputes and differences between the parties arose out of a work order for crushing, loading and transportation of coal from Rajmahal coal stockyard to Rajmahal Wharfwall Siding. By letter dated November 28, 2024, the petitioner was asked by the respondent to close the work order on the ground that, the petitioner had refused to resume the work for the remaining period of the contract. Consent of the petitioner was thereby sought for. The petitioner replied to the said letter, informing the Engineer-in-Charge of the respondent that, the work was hampered due to complete failure on the part of the respondent to discharge its contractual obligation. The details of the objection of the petitioner were recorded in that letter. The petitioner asked for release of the bank guarantee, machineries andall dues on an urgent basis. To this, the respondent replied by informing the petitioner that the closure process was going on and the consent of the petitioner was awaited. Finally, when the petitioner did not give its consent to close the work order, notice of termination dated December 20, 2024, was issued. The termination notice was issued by the Area General Manager, Rajmahal Area. According to Mr. Kar, during the process of execution of the work and before the termination noticewas issued, the matter could be referred to the Engineer-in-Charge in terms of dispute resolution, i.e., clause 13 of the agreement. However, no attempt was made by the respondent to settle the dispute amicably and the letters written by the petitioner, enumerating its claims, were not responded to. Ultimately, the Area General Manager, Rajmahal Area terminated the contract. Thus, the second level towards amicable settlement could not be availed of. It is further submitted that the letters relied on and the correspondences exchanged between the parties, will indicate that chances of amicable settlement were completely non-existent. In terms of Clause 13A of the dispute resolution clause in the agreement, the petitioner issued a notice under Section 21 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 1996 Act) with a request to the respondent to proceed for arbitration. The respondent remained silent. Accordingly, this Court has been approached.The termination notice,the dues payable, non-release of the machineries deployed in the site and non-release of the performance guarantee which was deposited with the respondent were, inter alia, the disputes which are required to be referred to arbitration.

Mr. Sengupta, learned advocate for the respondent submits that the arbitration clause provides for settlement of dispute by a sole arbitrator to be appointed by the competent authority of the Coal India Limited or the

Chairman cum Managing Director of the subsidiary company. The notice invoking arbitration did not contain such a request for appointment as per the clause.Moreover, the petitioner did not exhaust the pre-arbitration dispute resolution mechanism. This application is not maintainable in view of the above objections.

Heard learned advocates for the respective parties.

The documents annexed to the application, clearly indicate that the pre-arbitration resolution mechanism had failed. Moreover, such mechanism was applicable only during the execution of the work, but in this case,the contract had been terminated. Theseries of correspondence between the parties indicate that possibility of amicable settlement is in the negative.Further disputes have arisen on account oftermination of the contract and the consequence of such termination. Any further attempt at amicable settlement of the dispute will be an empty formality.The petitioner had written letters with various claims and requests. Instead of considering those, the termination notice was issued. The conduct of the respondent does not inspire any confidence that the dispute can be resolved amicably. Under such circumstances, the contention of Mr. Sengupta with regard to the non-exhaustion of the clause providing for amicable settlement of the dispute, is not accepted. Reference is made to the following decisions of the Hon'ble Apex Court :

1) ***Visa International Limited vs. Continental Resources (USA) Limited*** : ***(2009) 2 SCC 55***. The relevant paragraph is quoted below:-

> "**38.** It was contended that the pre-condition for amicable settlement of the dispute between the parties has not been exhausted and therefore the application seeking appointment of arbitrator is premature. From the correspondence exchanged between the parties at pp. 54-77 of the paper book, it is clear that there was no scope for amicable settlement, for both the parties have taken rigid stand making allegations against each other. In this regard a reference may be made to the letter dated 15-9-2006 from the respondent herein in which it is inter alia stated "... since February 2005 after the execution of the agreements, various meetings/discussions have taken place between both the parties for furtherance of the objective and purpose with which the agreement and the MoU were signed between the parties. Several correspondences have been made by CRL to VISA to help and support its endeavour for achieving the goal for which the abovementioned agreements were executed". In the same letter it is alleged that in spite of repeated requests the petitioner has not provided any funding schedules for their portion of equity along with supporting documents to help in convincing OMC of financial capabilities of the parties and ultimately to obtain financial closure of the project. The exchange of letters between the parties undoubtedly discloses that attempts were made for an amicable settlement but without any result leaving no option but to invoke the arbitration clause."

2) ***Demerara Distilleries Private Limited and Anr. vs. Demerara Distillers Limited*** : ***(2015) 13 SCC 610***. The relevant paragraph is quoted below:-

> "**5.** Of the various contentions advanced by the respondent Company to resist the prayer for appointment of an arbitrator under Section 11(6) of the Act, the objections with regard the application being premature; the disputes not

> being arbitrable, and the proceedings pending before the Company Law Board, would not merit any serious consideration. The elaborate correspondence by and between the parties, as brought on record of the present proceeding, would indicate that any attempt, at this stage, to resolve the disputes by mutual discussions and mediation would be an empty formality. The proceedings before the Company Law Board at the instance of the present respondent and the prayer of the petitioners therein for reference to arbitration cannot logically and reasonably be construed to be a bar to the entertainment of the present application. Admittedly, a dispute has occurred with regard to the commitments of the respondent Company as regards equity participation and dissemination of technology as visualised under the Agreement. It would, therefore, be difficult to hold that the same would not be arbitrable, if otherwise, the arbitration clause can be legitimately invoked. Therefore, it is the objection of the respondent Company that the present petition is not maintainable at the instance of the petitioners which alone would require an in-depth consideration."

With regard to the other contention of Mr. Sengupta that, the notice inviting was not proper, as the respondent was not asked to appoint the learned arbitrator, is also not accepted. The amended provisions of 1996 Act provides for party autonomy and equal treatment in arbitral proceedings.Equal participation, starts from the stage of appointment of an arbitrator. Section 18 of the arbitration clause is relevant for such purpose. In ***Perkins Eastman (supra)***the Hon'ble Apex Court held that appointment of an arbitrator by an official of a particular party was contrary to the requirement of an impartial and independent arbitrator. Unilateral appointment of an arbitrator was contrary to law.

The relevant paragraphs of ***Perkins Eastman (supra)*** are quoted below:-

> "**20.** We thus have two categories of cases. The first, similar to the one dealt with in TRF Ltd. [TRF Ltd. v. EnergoEngg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Ltd. [TRF Ltd. v. EnergoEngg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , <u>all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an arbitrator</u>.
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> **21.** But, in our view that has to be the logical deduction from TRF Ltd. [TRF Ltd. v. EnergoEngg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Para 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 (3 of 2016) and recognised by the decision of this Court in TRF Ltd. [TRF Ltd. v. EnergoEngg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]

…

24. In Voestalpine [VoestalpineSchienen GmbH v. DMRC, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , this Court dealt with independence and impartiality of the arbitrator as under : (SCC pp. 687-88 & 690-91, paras 20 to 22 & 30)

"20. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in Hashwani v. Jivraj [Hashwani v. Jivraj, (2011) 1 WLR 1872 : 2011 UKSC 40] in the following words : (WLR p. 1889, para 45)

'45. … the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.'

> 21. Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in Consorts Ury [Fouchard, Gaillard, Goldman on International Commercial Arbitration, 562 [Emmanuel Gaillard & John Savage (Eds.) 1999] {quoting Cour de cassation [Cass.] [Supreme Court for judicial matters] Consorts Ury v. S.A. des Galeries Lafayette, Cass.2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France)}.] , underlined that:
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> 'an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator'.
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> 22. Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings.
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> ***
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> 30. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by DMRC. It, therefore, becomes imperative to have a much broadbased panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. We, therefore, direct that DMRC shall prepare a broadbased panel on the aforesaid lines, within a period of two months from today…"

In the decision of ***Central Organization for Railway Electrification (supra)***the Hon'ble Apex Court ultimately discussed the pros and cons of unilateral appointment and held thus:-

"**169.** In view of the above discussion, we conclude that:

a. The principle of equal treatment of parties applies at all stages of arbitration proceedings, including the stage of appointment of arbitrators;

b. The Arbitration Act does not prohibit PSUs from empanelling potential arbitrators. However, an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by PSUs;

c. A clause that allows one party to unilaterally appoint a sole arbitrator gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further, such a unilateral clause is exclusive and hinders equal participation of the other party in the appointment process of arbitrators;

d. In the appointment of a three-member panel, mandating the other party to select its arbitrator from a curated panel of potential arbitrators is against the principle of equal treatment of parties. In this situation, there is no effective counterbalance because parties do not participate equally in the process of appointing arbitrators. The process of appointing arbitrators in *CORE* (supra) is unequal and prejudiced in favour of the Railways;

e. Unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution;

f. The principle of express waiver contained under the proviso to Section 12(5) also applies to situations where the parties seek to waive the allegation of bias against an arbitrator appointed unilaterally by one of the parties. After the disputes have arisen, the parties can determine whether there is a necessity to waive the *nemo judex* rule; and

g. The law laid down in the present reference will apply prospectively to arbitrator appointments to be made after the date of this judgment. This direction applies to three-member tribunals."

Under such circumstances, the application is allowed.Clause 13A of the contract provides for settlement of dispute by a sole arbitrator. The mechanism prescribed with regard to the procedure for appointment of the learned arbitrator has failed.

Accordingly, the application is disposed of by appointing Justice Pinaki Chandra Ghose, former Judge of the Supreme Court of India as the sole arbitrator, to arbitrate upon the dispute between the parties.

The learned Arbitrator shall comply with the provisions of Section 12 of the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall be at liberty to fix his remuneration as per the schedule of Arbitration and Conciliation Act, 1996.

This Court has not considered the merits of the claim of the petitioner. The objection with regard to the claim, can be urged before the learned Arbitrator.

(SHAMPA SARKAR, J.)

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