

ORDER

OCD-5

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION

ORIGINAL SIDE

AP-COM/113/2025

M/S. BPCPL –AND- ARETPL (JV)
VERSUS
EASTERN COALFIELDS LIMITED

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date: 27th February, 2025.

Appearance:

Mr. Debajyoti Basu, Sr. Advocate
Mr. Diptomoy Talukder, Advocate
Mr. D. Ghosh, Advocate
... for the petitioner.

Mr. Sarosij Dasgupta, Advocate
. . . for the respondent.

1. This is an application for appointment of a learned Arbitrator to arbitrate upon the disputes which arose between the parties and led to the termination of the contract which was awarded to the petitioner.
2. Mr. Basu, learned Senior Advocate refers to the arbitration clause and also the notice invoking arbitration. Clause 12A of the General Terms and Conditions of the Notice Inviting Tender deals with the arbitration clause which provides that all disputes and differences which cannot be settled by the in-house mechanism, will be referred to a sole Arbitrator to

be appointed by the competent authority of the CIL or the Chairman cum Managing Director of a subsidiary company. It is the specific pleading of the petitioner that the in-house mechanism failed and the sequence of events will indicate that there is neither any chance for amicable settlement nor settlement by way of an in-house mechanism.

3. Thus, this Court has been approached for appointment of a sole Arbitrator. It is submitted that, the clause provides for unilateral appointment of an arbitrator, but unilateral appointment of an Arbitrator by a party interested in the consequence of the arbitration is prohibited by law. Reference is made to the decision of ***Perkins Eastman Architects DPC and Another vs. HSCC (India) Ltd.*** reported in ***2019 SCC OnLine SC 1517*** and ***Central Organisation for Railway Electrification vs. ECI SPIC SMO MCML (JV) A Joint Venture Company*** reported in ***2024 SCC OnLine SC 3219***.
4. Mr. Sarosij Dasgupta, learned Advocate for the respondent submits that the application should be dismissed on the following grounds:-
 - a) A suit on the self-same cause of action was withdrawn without any liberty.
 - b) The petitioner, thereafter, filed a writ petition wherein the issues were adjudicated. The liberty granted by the Writ Court to approach the appropriate forum was subject to the provisions of law.

- c) The application should be dismissed on the principles of res judicata and/or constructive res judicata, as the claims were denied by another forum.
 - d) The referral court should apply the principles of Order 23 Rule (1)(4) of the Code of Civil Procedure and reject the prayer for appointment of an Arbitrator on the ground that leave was not granted to the petitioner to move afresh on the self-same claim or cause of action.
5. Mr. Dasgupta relies on the decision of the Hon'ble Apex Court in the matter of ***HPCL Bio-Fuels Ltd. Vs. ShahajiBhanudasBhad*** reported in ***2024 SCC OnLine SC 3190***.
 6. Heard learned advocates for the respective parties.
 7. This court finds that the in-house mechanism which has been provided under Clause 12 of the GCC covers disputes which arise during the execution of the contract. Moreover, the background of the case indicates that a dispute with regard to the completion of the work originated long ago. Ultimately, stop work notices and show cause notices were issued. Thereafter, the contract was terminated.
 8. Under such circumstances, this court is of the view that referring the parties to settle the dispute by the in-house mechanism, will be an empty formality. Reference is made to the decisions of ***Demerara Distilleries Private Limited and Another v. Demerar Distillers Limited*** reported in ***(2015)13 SCC 610*** and ***Visa International Ltd. v. Continental Resources (USA) Ltd.***, reported in ***(2009) 2 SCC 55***.

9. The question is whether this court should refer the disputes to an Arbitrator, upon considering the objections of Mr. Dasgupta.
10. While disposing of WPA/9099/2024, this Court had observed that the order of termination was not a part of the plaint. The steps taken by the tendering authority, the show cause notice and the proposed actions to be taken including termination, banning etc. were subject matters of the suit. The petitioner withdrew the suit after having failed to obtain any order of temporary injunction. In the order of temporary injunction, the learned Civil Judge (Senior Division) took into account the facts leading to the issuance of the show cause notice which culminated in the order of termination. While making the observation that the termination was justified, the learned trial Judge had rejected the application for injunction, finding the same to be misconceived. Thereafter, the suit was withdrawn. The petitioner filed a writ petition.
11. This writ court took note of the above order, but did not express any opinion that, the termination of the contract was the subject matter of challenge in the suit. Rather, it was observed that, the plaint did not disclose that the cause of action in the suit, arose out of the termination. In any event, observations in the order rejecting the application for injunction are tentative findings in an interlocutory application. The writ court came to the conclusion that, prima facie, there were sufficient reasons to justify the termination of the contract but, further investigation into the correctness of the steps taken by the respondent

vis-à-vis the rights and liabilities of the petitioner arising out of the contract, were left open to be adjudicated by the competent forum, as per the agreement. The court was of the view that, weighing of evidence was beyond the power of judicial review. Thus, the writ petition was held to be not maintainable and was disposed of along with the connected application.

12. The relevant portions of the order of passed in the writ petition are quoted below :-

“ 20. Whether the reasons are correct, justified or borne out from the evidence, are matters which the writ court cannot delve into because such procedure would require scanning and appreciation of evidence. The veracity and the correctness of the reasons provided cannot be gone into by the writ court, in view of the disputed questions of fact. Scanning of evidence is not permissible under the writ jurisdiction.

21. In State of U.P. v. Bridge & Roof Co. (India) Ltd. (State of U.P. v. Bridge & Roof Co. (India) Ltd., (1996) 6 SCC 22), the Apex noted that the contract in question contained articles providing, inter alia, for settlement of disputes by reference to arbitration and the very resort to Article 226 was found to be misconceived in the circumstances. The Court also laid down as follows:-

"16. Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, may be, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Whether any amount is due to the respondent from the appellant Government under the contract and, if so, how much and the further question whether retention or refusal

to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition viz. to restrain the Government from deducting a particular amount from the writ petitioner's bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer."

22. *The Hon'ble Apex Court, in Jaipur VidyutVitrان Nigam Ltd. v. MB Power (M.P.) Ltd., reported in 2024 SCC OnLine SC 26 held the following:--*

"137. This Court in the case of Reliance Infrastructure Limited v. State of Maharashtra has held that while exercising its power of judicial review, the Court can step in where a case of manifest unreasonableness or arbitrariness is made out.

138. In the present case, there is not even an allegation with regard to that effect. In such circumstances, recourse to a petition under Article 226 of the Constitution of India in the availability of efficacious alternate remedy under a statute, which is a complete code in itself, in our view, was not justified.

139. No doubt that availability of an alternate remedy is not a complete bar in the exercise of the power of judicial review by the High Courts. But, recourse to such a remedy would be permissible only if extraordinary and exceptional circumstances are made out. A reference in this respect could be made to the judgments of this Court in the cases of Radha Krishan Industries v. State of Himachal Pradesh and South Indian Bank Ltd. v. Naveen Mathew Philip."

23. *This writ petition should not be entertained. There appears to be an efficacious remedy under the terms and conditions of the contract, for settlement of disputes, including an arbitration clause. The petitioners are at liberty to take appropriate steps in accordance with law.*

24. It also prima facie appears that the show cause notice and the order impugned were issued by the same authority as per the terms and conditions.

25. The observations made hereinabove, are tentative and restricted to the disposal of the writ petition. If the petitioners avail of the remedy under the contract, all points raised by either party, including the maintainability of the proceeding shall be decided by the competent authority without being influenced by this order.

26. The writ petition is accordingly disposed of. There shall be no order as to costs.

27. In view of such disposal of the writ petition, the connected application of././being CAN 1 of 2024 is also disposed of.”

13. Under such circumstances, although Mr. Dasgupta’s contention that the principles of Order 23(1)(4) would apply even to a referral court, to weed out non-arbitrable claims, this court observes that, the termination of the contract per se, was not the subject matter of the suit although the termination was the ultimate outcome of the show cause notices which were subject matters of the suit. Moreover, the writ court had granted liberty to the petitioner to approach the appropriate forum, in accordance with the dispute resolution clause. Thus, the issue raised by Mr. Dasgupta with regard to the bar of any proceeding before any court or forum on account of withdrawal of the suit without any liberty, is left open to be decided by the learned Arbitrator. All other objections which Mr. Dasgupta has raised with regard to the merits of the claim and the mode and manner in which the petitioner had proceeded in the execution of the work, which ultimately led to the termination of the

contract, are also to be adjudicated by the learned Arbitrator. The respondent also submits that the petitioner is liable to compensate the respondent.

14. Accordingly, this application is disposed of by appointing Hon'ble Justice Tapan Kumar Dutt, retired Judge of this Court, as the learned Arbitrator, to arbitrate upon the disputes between the parties. This order is subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall fix his own remuneration as per the schedule of the Act.
15. All points on the merits of the claim is kept-open.
16. AP-COM/113/2025 is accordingly, disposed of.

(SHAMPA SARKAR, J.)