

OCD 15

ORDER SHEET
AP-COM/176/2025
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

M/S NEW BUSINESS POINT
VS
ULTRATECH CEMENT LIMITED

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 19th March, 2025.

Appearance:
Mr. Shiv Shankar Banerjee, Adv.
Ms. Anupa Banerjee, Adv.
...for the petitioner

Mr. Piyush Agarwal, Adv.
Mr. Debojyoti Das, Adv.
Ms. Saloni Kumar, Adv.
Mr. Ayan Chatterjee, Adv.
...for the respondent

The Court:

1. This is an application for appointment of a learned Arbitrator in terms of Clause 41 of the Transport Agreement dated March 9, 2018, which was entered into between the parties. The clause provides that the differences and disputes between the parties, arising out of the said agreement, including interpretation thereof, would be first attempted to be settled through mutual discussion, negotiation or conciliation between the parties. If such issues were not settled either by mutual discussion or negotiation, the company may by notice in writing, refer

the dispute or difference for settlement by arbitration. The clause further provides that the sole arbitrator would be appointed by the company, in order to decide such disputes and differences and the transporter would agree to the appointment of the sole arbitrator by the company. The decision of the sole arbitrator would be final.

2. Clause 42 of the agreement provides that courts situated at Kolkata would have exclusive jurisdiction.
3. The disputes and differences between the parties, allegedly arose on account of non-payment of bills of the petitioner and denial of the eligibility of the petitioner to receive such bills. The respondent alleges that the petitioner had committed breach of the terms and conditions of several agreements, including the subject agreement and the respondent was entitled to adjust Rs.2,08,24,214/- against the security deposit and from the bills raised by the petitioner from time to time. With such allegations, a notice dated April 20, 2020 had been issued by the respondent. By a composite notice, the respondent denied that the entitlement of the petitioner to receive the payments in respect of the bills raised. By a letter dated October 27, 2021, the petitioner invoked arbitration in respect of the subject agreement dated March 9, 2018, upon receipt of the notice dated April 20, 2020.
4. Learned advocate for the petitioner submits that the claims were not time barred. The Hon'ble Apex Court had excluded the period between March 15, 2020 and February 28, 2022, in computing of the period of limitation.

5. The respondent failed and neglected to take steps for appointment of the sole arbitrator. The petitioner moved the Bombay High Court for appointment of an arbitrator under Section 11 of the said Act. The application was withdrawn and by an order dated July 31, 2024, liberty was granted to the petitioner to approach the High Court of Calcutta for appointment of a learned Arbitrator as per the jurisdiction clause. Accordingly, the application has been filed.
6. Learned advocate for the respondent has raised various objections. The first objection is that the bills were raised by the petitioner way back in 2019. The claim was thus, time barred. The next contention is that the application is premature. The attempts to solve the disputes amicably, as provided under the Dispute Resolution Clause, have not been made. Under such circumstances, learned advocate prays for dismissal of this application.
7. Heard the parties. The disputes which have been enumerated in the notice invoking arbitration dated October 27, 2021, not only covers the unpaid bills, but also the contents of the notice issued by the respondent on April 20, 2020. The notice contains allegations of breach of all contracts and agreements by the petitioner, including the subject contract. The respondent decided to adjust Rs.2,08,24,214/- from the security deposit and from the bills to be raised by the petitioner from time to time. The notice was issued on April 20, 2020 and the arbitration clause was invoked on October 27, 2021.

8. This Court holds that, even assuming that the claims were of 2019, the notice invoking arbitration was issued on October 27, 2021. Secondly, the invocation was also a response to the dispute raised by the respondent by letter dated April 20, 2020 and the threat of the respondent to adjust Rs.2,08,24,214/- against the security deposit and the bills deposited by the petitioner from time to time. It appears that the notice issued by the respondent was a composite one, with regard to all agreements which have been executed between the parties and it is on record that the subject agreement was also part of the notice.
9. Moreover, the petitioner had approached the Bombay High Court within the period of three years from issuance of the notice invoking arbitration, but the petitioner had to withdraw the said application in view of the jurisdiction clause, that is, Clause 42 of the agreement.
10. Prima facie, this Court finds that the claim is not ex-facie time barred. The advantage of the order passed by the Hon'ble Apex Court with regard to exclusion of the period of limitation in respect of all matters, between March 15, 2020 and February 28, 2022 is also applicable in this case. Under such circumstances, the claim is not deadwood.
11. With regard to the other contention that, the application before this Court is premature, this Court finds that the respondent had also alleged that the petitioner committed breach and violation of the terms and conditions of the agreements, including the subject

contract. While the petitioner complained of non-payment of bills arising out of the subject agreement, the respondent had issued notice to the petitioner, claiming to adjust more than Rs.2 crores against the bills payable to the petitioner. Under such circumstances and based on the conduct of the parties, this court is of the opinion that relegating the petitioner to another round of deliberation and discussion, would be an empty formality. Thus, this Court is of the view that the conduct of the parties and the tenor of the notice issued by the respondent do not give rise to any expectation that the dispute has a chance of being settled amicably. Apart from raising a general objection, the Court does not find that the respondent had actually come up with a reasonable approach or solution, for an amicable settlement. Even after receipt of the notice invoking arbitration and during the proceedings before the Bombay High Court, no approach had been made by the respondent to settle the matter amicably. Under such circumstances, such objection of the respondent also fails.

- 12.** Reference is made to the decision of ***Visa International Ltd. v. Continental Resources (USA) Ltd.***, reported in **(2009) 2 SCC 55**. The relevant portion 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."

13. Thus, the application entertained. The learned Arbitrator shall proceed independently with the adjudication of the matter. The objections as to limitation, admissibility of the claim, arbitrability of the issues etc can be raised before the learned Arbitrator. The arbitration clause provides that the company would unilaterally appoint the sole arbitrator. Such mechanism failed. Moreover, the law is well settled. Unilateral appointment by an interested party, is contrary to the doctrine of competence competence and is also violative of Section 12(5) of the Arbitration and Conciliation Act, 1996. Reference is made to the decision of **Perkins Eastman Architects DPC and Another vs. HSCC (India) Ltd.** reported at **2019 SCC OnLine SC 1517**. The Hon'ble Apex Court held thus :-

..."**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]”

14. Accordingly, the Court appoints Mr. Swatarup Banerjee, learned Advocate, Bar Library Club, 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.
15. The learned Arbitrator shall fix his remuneration as per the Schedule of the Act.
16. AP-COM/176/2025 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)