OCD-1

AP-COM/243/2025
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISON

JANA CONSTRUCTION
VS
UNION OF INDIA AND ANR

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date : 29th April, 2025.

<u>Appearance:</u>
Mr. S.N. Dhuria, Adv.
. . .for the petitioner.

Mr. Dhruv Surana, Adv.
Ms. Sumita Sarkar, Adv.
. . .for the respondent.

The Court:

1. This is an application for appointment of a learned Arbitrator in terms of the Clause 25 of the General Conditions of Contract For Central P.W.D. Works, 2014.
2. The petitioner submits that, being an enlisted government contractor of the C.P.W.D., some work was awarded to the petitioner by the respondent no.2 by letter dated May 3, 2019. Pursuant to allotment of work, an agreement was entered into between the parties. The petitioner started the work as per the specifications in the agreement. Allegedly, the work was completed on January 28, 2021 and the final completion certificate was recorded and duly signed by the respondent no.2.

3. According to the petitioner, his third and final bill for an amount of Rs.30,64,408/- was due and payable. An ad hoc amount of Rs.11 lakhs was paid against the said due. By a letter dated November 11, 2022 the petitioner explained the status of the work to the respondent no.2 and requested him to pay the final bill. Again, by a letter dated April, 6, 2023, the petitioner made a similar prayer. The petitioner was taken aback by a show cause notice dated April, 13, 2023. The petitioner objected to the same and once again requested the respondent no.1 to release the payment of his outstanding third and final bill. Such letter was written on July 18, 2023. The respondent no.2 by a letter dated July 21, 2023, informed the petitioner that some of the claims were pending finalization and some of the claims were not acceptable. By a letter dated August 25, 2023 the petitioner informed the respondent no.2 that in spite of several rounds of meetings, his third and final bill was not paid and the dispute remain unsolved. By a letter dated September 12,2023, the respondent No. 2 assured the petitioner that the final will was being scrutinized. By a letter dated October, 6 2023, the petitioner sought the intervention of the respondent no. 1. Instead of addressing the issue, a compensation for amount of Rs.58,629/- was imposed upon the petitioner, after lapse of two years from the date of completion of the work. The petitioner objected to the same by a letter dated November 20, 2023. Again, the petitioner wrote to the respondent no.2 for issuance of a reframed copy of the third and final bill. After prolonged persuasion, when the dispute continued to remain unsolved,

the petitioner requested the respondent no.1 to refer the dispute to Dispute Redressal Committee (In short DRC) in terms of Clause 25(i) of the agreement for adjudication of the disputes. Instead of referring the dispute to the DRC, the respondent no.2 by a letter dated March 28, 2024 submitted a claim wise response to each of the petitioner's claims. Some of the claims were accepted and some were rejected. Therefore, the dispute remained unresolved. Again, by a letter dated April 24, 2024, the respondent no.1 was requested to release the payment and resolve the issues. Another letter was issued on September 9, 2024 by the petitioner. By a letter dated August 11, 2024, the respondent no.2 unilaterally reduced the amount payable to the petitioner to Rs.26,36,727/-. By a letter dated October 28, 2024, the petitioner requested the Special Director General, CPWD for his intervention as a conciliator, in order to settle the dispute. The petitioner submitted a revised claim of Rs.12,49,645/-, but the Special Director General did not take any initiative to act as a Conciliator. After pursuing the respondents by the letters which have been mentioned hereinabove, the petitioner was left with no other alternative, but to issue the letter dated January 18, 2025, thereby, invoking arbitration. The respondent no.1 was requested to appoint an in house Arbitrator. The respondent no.2 refused to appoint such Arbitrator and disputed the amount claimed by the petitioner.

4. Under such circumstances, having failed in all his attempts to get the dispute resolved either by conciliation or through a DRC, the petitioner approached this Court for appointment of an Arbitrator.
5. On the last occasion, this Court had directed the learned advocate for the respondent to produce the General Conditions of Contract in order to ascertain the exact nature of the arbitration Clause. Today, the same has been produced before the Court and it appears that while Clause 25 of the GCC provides a mechanism for settlement of dispute by conciliation and thereafter by a Dispute Redressal Committee, Clause 25(ii) provides that except in cases where the decisions are binding in terms of Clause 25(i), the other disputes and differences shall be referred for adjudication by a sole Arbitrator, to be appointed by the Chief Engineer CPWD or by the Additional Director General or Special Director General as the case may be.
6. The discussions in the aforementioned paragraphs would clearly indicate that the petitioner left no stone unturned in approaching the authority time and again for resolution of the dispute. This in my view, is sufficient compliance of pre-arbitration resolution of clauses. The correspondence between the parties also indicate that the dispute is alive. The respondents do not admit that there are dues.
7. When negotiations were going on, some payments were made to the petitioner.
8. In my view, this application cannot be treated to be premature. The petitioner attempted to exhaust the process of conciliation and asked for

reference to the DRC, but the respondents did not take any steps in furtherance of the provisions of Clause 25(i) of the GCC.

9. ***Visa International Limited vs. Continental Resources (USA) Limited*** : ***(2009) 2 SCC 55*** is referred to. 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."

10. ***Demerara Distilleries Private Limited and Anr. vs. Demerara Distillers Limited*** : ***(2015) 13 SCC 610*** is referred to. 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.

11. Any further direction upon the petitioner, to go before the authority for conciliation, will be an exercise in futility. Clearly, the respondents have indicated their stand. They have turned down the remaining claim of the petitioner. Clause 25(ii) states that except where the decision has become final, binding and conclusive in terms of Sub Para (i) of Clause 25, all disputes and differences shall be referred to arbitration and will be resolved by a sole Arbitrator, to be appointed by the authorities prescribed herein. Although the petitioner did approach the authorities for appointment of an Arbitrator and the authorities refused to do so, the law does not permit such process of appointment any longer. A person who is unable to act as an Arbitrator, cannot appoint an arbitrator. That is the settled principle of law, as laid down in the decisions ***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.***

12. The Hon'ble Apex Court in ***Central Organization for Railway Electrification (supra),*** held thus:-

"73. The 2015 amendment has introduced concrete standards of impartiality and independence of arbitrators. One of the facets of impartiality is procedural impartiality. Procedural impartiality implies that the rules constitutive of the decision-making process must favour neither party to the dispute or favour or inhibit both parties equally.137 Further, a procedurally impartial adjudication entails equal participation of parties in all aspects of adjudication for the process to approach legitimacy.138 Participation in the adjudicatory process is meaningless for a party against whom the arbitrator is already prejudiced.139 Equal participation of parties in the process of appointment of arbitrators ensures that both sides have an equal say in the establishment of a genuinely independent and impartial arbitral process.

74. Under Sections 12(1) and 12(5), the Arbitration Act recognises certain mandatory standards of independent and impartial tribunals. The parties have to challenge the independence or impartiality of the arbitrator or arbitrators in terms of Section 12(3) before the same arbitral tribunal under Section 13.140 If the tribunal rejects the challenge, it has to continue with the arbitral proceedings and make an award. Such an award can always be challenged under Section 34. However, considerable time and expenses are incurred by the parties by the time the award is set aside by the courts. Equal participation of parties at the stage of the appointment of arbitrators can thus obviate later challenges to arbitrators.

75. Independence and impartiality of arbitral proceedings and equality of parties are concomitant principles. The independence and

impartiality of arbitral proceedings can be effectively enforced only if the parties can participate equally at all stages of an arbitral process. Therefore, the principle of equal treatment of parties applies at all stages of arbitral proceedings, including the stage of the appointment of arbitrators.

* * *

124. The doctrine of bias as evolved in English and Indian law emphasizes independence and impartiality in the process of adjudication to inspire the confidence of the public in the adjudicatory processes. Although Section 12 deals with the quality of independence and impartiality inherent in the arbitrators, the provision's emphasis is to ensure an independent and impartial arbitral process.

13. In ***Perkins Eastman (supra),*** the Hon'ble Apex Court held thus :-

…"**20.** We thus have two categories of cases. The first, similar to the one dealt with in TRF Ltd. [TRF Ltd. v. Energo Engg. 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. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , 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.

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:

'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'.

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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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…"

14. Under such circumstances, the petitioner has rightly approached this Court for appointment of an Arbitrator.

15. The Court appoints Mr. Shounak Mukhopadhyay, learned Advocate (Mobile No. 8981772268) as the Arbitrator, to arbitrate the dispute. This order is subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996.

16. The learned Arbitrator shall fix his own remuneration as per the provisions of the Arbitration and Conciliation Act.

17. AP-COM 243 of 2025 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)

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