OCD –5

ORDER SHEET

AP-COM/79/2025

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

BYGGING INDIA LTD.

VS

BHARAT HEAVY ELECTRICALS LIMITED POWER SECTOR

– EASTERN REGION

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

Appearance:

Mr. S.K. Maniktala,Adv.
Mr. Unit Maniktala, Adv.
Mr. Fasiur Rahman Molla, Adv.
.... for the petitioner
Mr. Soumya Ray, Adv.
Mr. A.A. Chakraborty, Adv.
Ms. Anwesha Saha, Adv.
Mr. Pramit Panda, Adv.
...for the respondent

The Court:This is an application for appointment of an arbitrator for settlement of a dispute arising out of a contract for the works :-"Package A – Civil Works of Air-Colled Condenser of 50% of unit 1, 2 & 3 For 3X660MW North Karanpura STPP, Jharkhand". The letter of award was issued to the petitioner on May 2017. The estimated value of the contract was Rs.38,83,00,000/-. The entire work was to be completed within 20 months with effect from May 5, 2017 and ending on January 5, 2019. The contract was signed by the parties on July 31, 2018. The contract was subject to the terms and conditions of the General Conditions of Contract (GCC) and the Special Conditions of Contract (SCC).

According to the petitioner, both the parties had reciprocal obligations. The first obligation of the respondent, was to hand over a hindrance-free site. On account of delay caused in handing over hindrance free site, the period of the contract was extended from time to time and lastly upto July 31, 2024. As part of the site had not handed over and the work in respect of the other part that was made available to the petitioner was completed on 2.4.2021, the petitioner requested the respondent to short close the contract. Several notices were issued. The respondent failed to do so. According to the petitioner, clause 2.7.8 of the G.C.C. provided for foreclosure. The petitioner also requested for payment of Rs.19,67,15,816/- on account of damages suffered due to the delay in handing over the site and for prolongation of the contract. The petitioner was compelled to keep his labourers and machines deployed at the site, which allegedly caused loss of business. The said loss of business was computed at approximately Rs.20 crore. By a letter dated November 8, 2023, the petitioner clearly enumerated the different heads of the claims. The said letter also recorded that cost of arbitration would be payable by the respondent, in the event the disputes were not resolved. The letter went unheeded. Thereafter, a notice was issued on November 24, 2023 invoking the arbitration clause. Mr. Maniktala, learned advocate for the petitioner submits that clause 2.21 of the contract clearly provided for resolution of the disputes arising therefrom, by an arbitrator. According to Mr. Maniktala, the demand notices were issued on a regular basis. Several requests were made, but the respondent did not refer the matter to the designated engineer for amicable settlement. Not a single piece of paper was forthcoming in the affidavit-in-opposition filed by the respondent, which would indicate that the respondent had proposed to settle the matter amicably. The notice invoking arbitration was also received by the respondent, but the respondent, remained silent.

The continuous silence maintained by the respondent despite the letters written by the petitioner, would clearly indicate that there was no chance for an amicable settlement and any further reference to the said mechanism would be an empty formality.

Mr.Maniktala submits before this Court that, the procedure for appointment of the Arbitrator by the head of BHEL, Power Sector Region, the officer who issued the contract, was also legally barred. Unilateral appointment of an Arbitrator was no longer permissible in law. Reference is made to the decisions of Bharat Broadband Network Limited vs. United Telecoms Limited reported at (2019) 5 SCC 755; Perkins Eastman Architects DPC and Another vs. HSCC (India) Ltd. reported at 2019 SCC OnLine SC 1517, and Central Organisation for Railway Electrification vs. ECI SPIC SMO MCML (JV) A joint Venture Company reported at 2024 SCC OnLine SC 3219. Finding no other alternative, and as the respondent did not take any step for amicable settlement, the petitioner issued the notice dated November 24, 2023, invoking the arbitration clause.

Mr. Roy, learned advocate for the respondent submits that the notice was defective. By a composite notice, the petitioner requested for amicable settlement, failing which the petitioner reserved the right to initiate legal proceedings and stated that the said notice should be treated as a statutory notice under the Arbitration and Conciliation Act, 1996. According to Mr. Roy, a composite notice was not permissible in law. It is further submitted by Mr. Roy that, the notice itself was confusing as to what the petitioner actually intended to do. His contention is that, a notice under Section 21 has to be unambiguous, crisp and the intention of the party refer the dispute to arbitration should be clear.

Mr. Roy has relied on the following decisions:-

a) ***D.P. Construction vs. Vishvaraj Environment Pvt. Ltd. reported at 2022 SCC Online Bom1410***.

b) Alupro Building Systems Pvt. Ltd. vs. Ozone Overseas Pvt. Ltd.

Heard the parties. Admittedly, there is a clause in the contract which provides for settlement of disputes by way of arbitration, if the pre arbitral mechanism for amicable settlement fails. The petitioner raised the demands and issued letters for closure of the contract by writing several letters. The respondent ought to have referred the matter to the designated engineer for an amicable settlement, if it wished to do so. The second volume of the application, from pages 156 to 164 contain the letters which were written by the petitioner to the respondent. The letter dated November 8, 2023 referred to the earlier letters, reminders and demand notices which were written by the petitioner. Meetings between the parties were also referred to. The petitioner mentioned the details of the claims which included costs of arbitration. The letter dated August 11, 2023 also referred to several letters and reminders made by the petitioner, including the meetings held between the parties. None of these letters were responded to, although the petitioner had raised the dispute long ago. Thus, the contention of Mr. Roy that, without approaching the respondent for an amicable settlement, the petitioner could not have invoked the arbitration clause, is not accepted. In my view, from the conduct of the respondent and the continuous silence maintained by the respondent to the letters of the petitioner,it can be clearly inferred that the respondent did not have any intention to settle the matter amicably. Meetings were also held between the parties, which yielded no result. Under such circumstances, relegating the petitioner to undertake a further exercise for amicable settlement, in my view, will be an empty formality. The affidavit-in-opposition also discloses that the petitioner's demands are not acceptable to the respondent. Even today, it is not submitted on behalf of the respondent that, it has the intention to settle the dispute amicably. An objection has been raised before this court with regard to non-exhaustion of the procedure for amicable settlement. The petitioner requested that, a designated engineer should be appointed for the settlement, which was not done by the respondent at any point of time.

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."

The next contention of Mr. Roy is that, the notice dated November 24, 2023, is not a proper invocation. It is a settled proposition of law that the notice under Section 21 of the Arbitration and Conciliation Act, 1996 is not required to be in a particular form. In my view, the party invoking arbitration is free to make all claims and also make a demand for amicable settlement, by reserving a right to proceed in terms of the Arbitration and Conciliation Act, 1996. All that the notice had to indicate was that, there was an intention on the part of the petitioner to refer the dispute to arbitration. The contents of the notice clearly indicated the terms and conditions of the contract, the disputes which had arisen, the claims of the petitioner etc. Paragraph 8 of the notice enumerated the claims in detail, which included cost of the arbitration proceedings. Paragraph 9 indicated that, in view of the persisting default and breach, the petitioner had raised the demand-cum-dispute by invoking the arbitration clause. Clause 2.21.1 of the said contract, which mandated that at first, the aforesaid disputes should be referred to the designated engineer. In paragraph 10, the petitioner called upon the competent authority to appoint the designated engineer as per the arbitration clause. In paragraph 11, the petitioner had stated that, on failure of the respondent to take action within 15 days, the letter should be treated as a notice invoking the arbitration clause. It had been mentioned that, the notice must be considered and construed as a statutory notice under the Arbitration and Conciliation Act, 1996.

The decisions cited by Mr. Roy, do not apply in this facts and circumstances of this case. In *DP Construction (Supra),* the issue was whether the notice invoking arbitration under Section 21 of the Act was to be in clear terms or not. In the said context, the Hon'ble Apex Court held that a notice by a party to another party, calling upon the said party to do certain things, failing which the party issuing the notice would be constrained to approach a Court of law, was not a notice under Section 21 of the Arbitration and Conciliation Act, 1996. In the facts of this case, the petitioner indicated that in terms of the arbitration Clause 2.21.1, either the designated engineer must be appointed to settle the dispute amicably within 15 days, or in case of failure thereof, the notice should be treated as a notice under the Arbitration and Conciliation Act, 1996. The other parts of the notice had clearly indicated the exact nature of the dispute, exact nature of the claim and the petitioner has also made the respondent liable for the costs and consequences of the arbitral proceeding. The intention of the petitioner to refer the dispute to arbitration is clear from the above notice. The decision in ***Alupro Building Systems Pvt. Ltd. (supra)*** is also not relevant in the facts of the case. In the said case, the mandatory nature of the notice under Section 21 of the said Act was decided.

With regard to the submissions of Mr. Roy that, the notice should have contained a request to appoint an Arbitrator as per the clause, is no longer available, in view of the present legal position. The clause provides that the arbitrator will be appointed by head of BHEL, Power Section, Eastern Region. The clause provides for unilateral appointment of an Arbitrator. The Hon'ble Apex Court in ***Central Organization for Railway Electrification (supra),*** 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.

170. The reference is answered in the above terms.

171. Pending application(s), if any, shall stand disposed of."

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. <u>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]</u>

…

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…"

Thus, the petitioner was not required under the said notice to request the respondent to appoint the learned Arbitrator as had been provided for in the Dispute Resolution Clause. The mechanism provided under the said clause, failed. Unilateral appointment of an arbitrator is statutorily barred.

Thus, the petitioner rightly approached this Court for appointment of a learned Arbitrator, and the notice rightly did not contain the request for appointment by the respondent. The venue of arbitration as per the contract is Kolkata.

Under such circumstances, the Court appoints Hon'ble Justice Subhro Kamal Mukherjee, former Chief Justice of the High Court of Karnataka, as the Arbitrator, to arbitrate upon the dispute. This appointment 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.

It is made clear that this order shall not be construed as an observation on the merits of the claim of the petitioner. The respondent denies the claim of the petitioner. The respondent is entitled to raise all objections before the learned Arbitrator.

AP-COM/79/2025 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)

TR/B.Pal