

OCD-14

AP-COM/283/2025
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

JANA CONSTRUCTION
VS
UNION OF INDIA AND ANR

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date : 29th April, 2025.

Appearance:

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 an arbitrator under Clause 25(ii) of the General Conditions of Contract For Central P.W.D. Works 2014. The petitioner is a registered CPWD's enlisted government contractor. Work was allotted to the petitioner by a letter dated September 12, 2018. An agreement was entered into by and between the parties pursuant to the said letter of allotment.
2. According to the petitioner, the work was allegedly completed on April 30, 2019. The petitioner submitted his third and final bill for an amount of Rs.51,57,125/- on October 21, 2019. By a letter dated April 19, 2022 the petitioner requested the respondent no.2 to release the third and final bill. The petitioner also submitted a statement of claim.

Once again the petitioner requested the respondent no.2 vide letter dated May 17, 2022 for release of the amount claimed under the third and final bill. The respondent no.2 did not take any steps. Thereafter, by a letter dated June 16, 2022 the petitioner requested the respondent no.1 to refer the dispute to the Dispute Resolution Committee (in Short DRC). A revised claim was submitted before the respondent no.1. By a letter dated June 21, 2022, the respondent no.1 referred the matter to the Dispute Resolution Committee. The petitioner wrote a letter to the respondent no.1, reminding him that the DRC should deliver the decision within sixty days from the date of reference, and that not a single meeting had been held by the DRC. Later, an amount of Rs.11,19,360/- was released against the final bill and the petitioner accepted the same under protest. Thereafter, the petitioner requested for release of the security deposit. By a letter dated October 14, 2022, the respondent no. 2 informed the petitioner that the claims have been settled. Again the petitioner requested for release of the security deposit, reimbursement of ESI and PF, compensation for increase in labour charges, interest for delayed payment etc., by a letter dated November 11, 2022. Another claim was made by a letter dated November 14, 2022, for escalation of labour charges. The petitioner submitted a brief statement of claim of Rs.16,80,013/- before the DRC. The first meeting of the DRC was to be held on November 17, 2022. The DRC delivered its final decision on November 30, 2022 and made recommendations. According to the petitioner, he was not heard by the

DRC. The recommendation of the DRC was objected to and by a letter dated April 6, 2023 the petitioner requested the DRC to recall the decision. The petitioner filed objections to the final recommendation of the DRC before the Special Director General. The petitioner wrote to the respondent no.1 and 2, pointing out the discrepancies in the decision of the final recommendation and served a notice on March 7, 2024 along with a statement of claim, with a request for appointment of an in house Arbitrator. No steps were taken.

3. The petitioner once again requested the respondent no.1 to appoint an in house Arbitrator. Thereafter, on January 18, 2025 the petitioner issued a notice invoking arbitration. The above correspondence clearly indicate that the pre-arbitration mechanism as required to be exhausted by the petitioner had been exhausted. The decision of the DRC was not accepted by the petitioner. The petitioner alleges of not being heard. The DRC was requested to recall the final recommendation. The DRC did not take any steps. Thus, the petitioner waited for some time before issuing the notice for appointment of a learned Arbitrator.
4. The petitioner also approached the Special Director General for appointment of an in house Arbitrator in terms of Clause 25(ii) but no such appointment was made. In any event, the mechanism provided for appointment of an Arbitrator under the GCC is no-longer permissible in law. The said clause provides that disputes which are not settled by the DRC or if the decision of the DRC does not become final and binding,

the same shall be settled by arbitration. The petitioner did not accept the decision of the DRC.

5. A person who is unable to act as an Arbitrator, cannot appoint an Arbitrator. That is the settled principal 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**.
6. 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.

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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.

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

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...“**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.

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...”

7. Under such circumstances, the petitioner has rightly approached this Court for appointment of an Arbitrator.
8. Under such circumstances, the Court appoints Mr. Shounak Mukhopadhyay, learned Advocate (Mobile No. 8981772268) as the 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.
9. The learned Arbitrator shall fix his own remuneration as per the provisions of the Arbitration and Conciliation Act.
10. AP-COM 283 of 2025 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)

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