

AP-COM/520/2024
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

THE SAHA BUILDING CENTRE PRIVATE LIMITED
VS
CENTRAL PUBLIC WORKS DEPARTMENT

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date : 13th February, 2025.

Appearance:

Mr. Santanu Chatterjee, Adv.

Ms. Divya Chatterjee, Adv.

Mr. Rajendra Kr. Nandi, Adv.

Mr. Srijan Chakraborty, Adv.

Mr. Swarnak Chakraborty, Adv.

. . .for the petitioner.

Ms. Sanjukta Gupta, Adv.

. . .for the respondent.

The Court: Affidavit in opposition filed in Court is taken on record.

This is an application for appointment of a learned Arbitrator. The appointment is sought for in terms of an Arbitration Clause contained in the General Conditions of Contract for Central P.W.D. Works. The petitioner was the successful bidder in a tendering process. The contract entailed Construction of Academic Block for Library and Warden's Room including water supply, sanitary and Internal Electrical installation at IMU, Kolkata Campus Taratala. The letter of intent dated February 8, 2019 indicates that the performance guarantee should be in the form prescribed in the General Conditions of Contract for

C.P.W.D (in short GCC). The present contract was a percentage rate tender. The general guidelines of the CPWD in the GCC provides that the GCC would be applicable in case of percentage rate tenders as also item rate tenders. On the strength of Clause 25 of the said GCC, the petitioner has approached this Court for appointment of a learned Arbitrator. The petitioner has drawn the attention of the court to the notice invoking arbitration. When the petitioner raised its demands before the respondent on various occasions, the respondent released some payments. Thereafter, the matter was sent to the Dispute Redressal Committee (in short DRC), by the authorized representative of the respondent. The Dispute Redressal Committee was constituted and papers were asked from the petitioner. The petitioner claims to have revised the claim upon receipt of notice from the DRC. However, the DRC was required under the provisions of the GCC to conclude the proceeding within 90 days. The DRC failed to do so. The petitioner approached the Chief Engineer. No steps were taken. Then the petitioner issued the notice invoking arbitration.

Ms. Sanjukta Gupta, learned advocate for the respondent, submits that the DRC had the intention to conclude the proceeding and decide the issues involved. However, due to restructuring of the committee, the DRC could not be constituted within the stipulated period in the form and manner as prescribed in the GCC and thus, the delay occurred. The affidavit in opposition also narrates the situation which led to an impasse in the matter.

Heard the parties.

Admittedly, in respect of percentage rate tenders as well, GCC applies.

Clause 25 of the GCC prescribes the method by which a dispute between the contractor and the employer should be resolved. The pre-arbitration mechanism has failed. The dispute with regard to the claims of the petitioner allegedly arising out of unpaid dues remains unresolved. The conduct of the respondent also indicates that there was a dispute which was being considered by the DRC but the decision could not be reached. In terms of the Dispute Resolution Clause, the petitioner also approached the Chief Engineer. Any further attempt at amicable settlement will be an empty formality. Reference is made to the decision of Reference is made to the decisions of ***Demerara Distilleries Private Limited and Another versus Demerar Distillers Limited*** reported in ***(2015)13 SCC 610*** and ***Visa International Ltd. v. Continental Resources (USA) Ltd.***, reported in ***(2009) 2 SCC 55***.

Under such circumstances, the petitioner had no other option but to approach this Court for appointment of an Arbitrator upon invocation of the Arbitration Clause by giving a notice under Section 21 of the Arbitration and Conciliation Act, 1996.

The contention of Ms. Gupta that the Chief Engineer was supposed to appoint an Arbitrator if the DRC failed to resolve the dispute is not accepted by the Court in view of the present legal position. 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*. The Hon'ble Apex

Court clarified the position of the law and held that the unilateral appointment of an Arbitrator was contrary to the very concept of party autonomy. Section 18 of the Arbitration and Conciliation Act, 1996 provided for equal treatment to the parties. Both the parties should have an equal role to play, in the matter of appointment of an arbitrator. The agreed mechanism prescribed by the GCC being contrary to law, the petitioner has rightly approached this Court for appointment of a learned arbitrator. The other contention of Ms. Gupta that persons other than Chief Engineer, CPWD or Additional Director General or Special Director General or Director General, CPWD, as the case may be, could not act as the arbitrator is also not accepted because the Hon'ble Apex Court also laid down that appointment of an arbitrator from a panel curated by the Authority/Government Department was prohibited under the amended provisions of the Act of 1996.

The relevant paragraphs of ***Perkins Eastman Architects DPC and Another vs. HSCC (India) Ltd.*** reported in **2019 SCC OnLine SC 1517** are quoted below:-

...“**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. Energo Engg. 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. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]

...

24. In Voestalpine [Voestalpine Schienen 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...”

In the decision of ***Central Organisation for Railway Electrification vs. ECI SPIC SMO MCML (JV) A Joint Venture Company*** reported in **2024 SCC OnLine SC 3219**, the Hon’ble Apex Court considered the issues with regard to ineligibility of an arbitrator by operation of law under the amended Act of 1996. It was held that unilateral appointment of an arbitrator was violative of Section 18 of the said Act. The law mandated that the parties should be treated equally. The relevant paragraphs are quoted below:-

“133. Many PSUs are regularly involved in arbitration disputes and constantly need the services of arbitrators. Such institutions often maintain a pool of potential arbitrators with the sole object of having a ready pool of qualified professionals who have committed their time and consented to act as arbitrators for fixed fees. The Arbitration Act does not prohibit parties to an arbitration agreement from maintaining a curated panel of potential arbitrators. However, the problem arises when the PSUs make it mandatory for other parties to select their nominees from the curated panel of arbitrators. When a PSU exercises its discretion to curate a panel, the very factor that the PSU is choosing only a certain number of persons as potential arbitrators and not others will raise a reasonable doubt in the mind of a fair-minded person. The PSUs may conceivably have nominated a person on the panel of potential arbitrators because they have a certain predisposition in favour of the former. This doubt is reinforced when the other party is given no choice but to select its arbitrator from the curated panel.

134. In *CORE* (supra), the three-member tribunal was sought to be constituted in the following manner : (i) the Railways would suggest at least four names of retired railway officers; (ii) the contractor would select two names out of the panel for appointment as their arbitrator; (iii) The General Manager (of the Railways) would thereafter choose at least one person out of the two to be appointed as the contractor's arbitrator; and (iv) The General Manager would proceed to appoint the balance arbitrators from the panel or outside the panel and also indicate the presiding arbitrator.

135. Such an arbitrator-appointment clause is likely to give rise to justifiable doubts as to the independence and impartiality of arbitrators for two reasons : (i) the contractor is restricted to choosing its arbitrator from the panel of four arbitrators nominated by the party who is a disputant; and (ii) the contractor's choice is further constrained because it is made subject to the decision of the General Manager who will choose one among the two persons suggested by the party. Since the contractor has to select its arbitrator from a curated panel, the arbitration clause does not allow the contractor equal participation in the appointment of their arbitrator. Moreover, the clause allows the General Manager to appoint the balance arbitrators from either the panel or outside the panel. Thus, the process of appointing the arbitrators is unequal because the General Manager can go beyond the panel of four potential arbitrators, while the contractor is bound by the names enlisted in the panel.

136. In a three-member tribunal, the independence and impartiality of a third or presiding arbitrator are prerequisites to the integrity of the arbitral proceedings. In *CORE* (supra), the arbitration clause allowed the General Manager to unilaterally nominate the presiding officer out of the panel of three arbitrators. The clause does not countenance any participation from the contractor in the process of appointing or nominating the presiding officer. Thus, the process of appointing and nominating the presiding officer is unequal and prejudiced in favour of the Railways. The fact that the General Manager is nominating the presiding officer gives rise to a reasonable doubt about the independence and impartiality of the entire arbitration proceedings.

137. Given the above discussion, it needs reiteration that 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. The PSUs can give a choice to the other party to select its arbitrators from the curated list provided the other party expressly waives the applicability of the *nemo judex* rule.”

In paragraph 169 of the majority view, the Hon’ble Apex Court concluded 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.”

Under such circumstances, the prayer for appointment of an arbitrator is allowed. The objection raised by the respondent with regard to the claim of the petitioner shall be decided before the learned arbitrator. The points relating to limitation etc. shall also be urged before the learned Arbitrator.

Under such circumstances, the Court appoints Mr. Subir Sanyal, [Mob. No. 9830399487] learned Senior Advocate as the arbitrator, to arbitrate upon the dispute between the parties. 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 provisions of the Arbitration and Conciliation Act.

AP-COM/520/2024 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)

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