

OCD -21

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

AP-COM/328/2025

RAJESH SINGH

VS

WEST BENGAL LIVE STOCK DEVELOPMENT CORPORATION
LIMITED

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date: 29th April, 2025.

Appearance:

Ms. Sweta Gandhi, Adv.

Mr. Sounak Bhattacharya, Adv.

.... for the petitioner

Mr. Sanjay Mukherjee, Adv.

Mr. Balarko Sen, Adv.

Mr. Suvradal Choudhury, Adv.

Ms. Anjali Das, Adv.

Ms. Rupsa Ganguly, Adv.

...for the respondent

The Court: **1.** This is an application for appointment of a learned arbitrator, in terms of clause 2 of the Agreement of Contract dated April 4, 2022. Clause 4 of the said Agreement mentions that all disputes shall be subject to the jurisdiction of the Calcutta High Court.

2. The petitioner was awarded the work of setting up of a Commercial Layer Farm for 2.4 lakhs birds. The work order was issued upon acceptance of a lumpsum price quoted by the petitioner to the tune of Rs. 32,83,00,000/-.

According to the petitioner, the work was near completion, but the respondent raised objection with regard to the delay in completion. The respondent debarred the petitioner from continuing with the work any further, and engaged a third party to complete the work. Aggrieved, the petitioner moved an application under Section 9 of the said act for a order of injunction restraining the respondent from encashing the bank guarantee, thereby treating the said debarment as a termination. The petitioner was favoured with an order of injunction. The petitioner has thereafter invoked arbitration, by a letter dated February 28, 2025, to which the respondent replied on April 10, 2025.

3. Mr. Sanjoy Mukherjee, learned advocate for the respondent submits that clause 54 of the notice inviting tender dated December 21, 2021, did away with the provision for arbitration. The clause is quoted below:-

“54. There shall no provision of Arbitration. Hence clause 25 of the West Bengal Form No. 2911(ii) shall not be allowed vide memo no. 558/SPW dated 13.12.2011 of P.W.D. Establishment Branch.”

4. It is urged that the matter should not be referred to arbitration.

5. This Court finds that pursuant to the notice inviting tender, the petitioner's bid was accepted. He was the successful bidder. The petitioner was awarded the work and an agreement was entered into on April 4, 2022. The agreement provided that in case of a dispute with regard to the rights and liabilities of the parties arising from the contract, the aggrieved party may refer

the matter to the sole arbitrator as may be appointed by the Government of West Bengal, ARD Department.

6. Under such circumstances, this Court finds that the agreement provided an option to a party aggrieved by the terms and conditions of the agreement or in case of any dispute and difference arising out of the said agreement, to refer the dispute to arbitration. The term 'may' is neither definitive nor binding. Admittedly, there is no binding arbitration clause in the agreement. However Section 7 of the Act defines an arbitration agreement in the following manner :

“7. Arbitration agreement.—(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in— (a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication ¹ [including communication through electronic means] which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

Clause 7(2) provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Clause

7(4) provides that the arbitration agreement would be treated to be in writing if it is contained in (a) a document signed by the parties (b) an exchange of letters, telex, telegrams or other means of telecommunication (c) an exchange of statements of claim and defence in which the existence of arbitration clause alleged by one party is not denied.

7. Under clause 2 of the subject agreement, the petitioner has a right to request for arbitration or to refer the dispute for arbitration. This clause in the context will prevail over the NIT. The petitioner exercised such choice and issued a notice invoking arbitration and named an arbitrator. In response, the respondent's advocate by letter dated April 10, 2025 denied the claims and the allegation leveled against the respondent. According to the respondent, the arbitration clause must precede an attempt at mutual resolution of the dispute and on failure of such attempt, the matter should be referred to the sole arbitrator to be appointed by the Government of West Bengal, ARD Department. A detailed response to the notice invoking arbitration was issued. The thrust of the objections of the respondent was on non-admissibility of the claim, baseless allegations made by the petitioner and the petitioner misleading the learned Commercial Court at Rajarhat, in order to obtain an order of injunction etc. The respondent refused to refer the dispute to the arbitration of the named arbitrator in the letter issued by the petitioner, but proposed the

name of a learned senior advocate of the Bar Library Club, High Court, Calcutta. Paragraph 25 of the letter is relevant which is observed as follows :

“25. Since the NIT and Contract provides that to resolve the disputes between the parties, the aggrieved party may refer the matter to the sole arbitrator as may be appointed by the Government of West Bengal, ARD Department on reference from either party for arbitration and the decision of the arbitrator shall be final and binding on both the parties, our Client proposes the name of Mr. Suman Dutt, Senior Advocate, Bar Library Club, Calcutta High Court, as the Sole Arbitrator to adjudicate the dispute between the parties and we expect that you will convey the acceptance your name which is proposed in terms of the extant arbitration clause (considering that you are no longer interested in settlement of dispute through mutual discussion) within 15 days from the date of receipt of this communication failing which our clients will refer the matter to the proposed Arbitrator for adjudication of the disputes.”

Thus, the option under clause 2 of the agreement was exercised by the petitioner, seeking reference of dispute to arbitration and two named arbitrators were nominated in the notice. The respondent alternatively recorded that as the NIT and the contract provided that a dispute between the parties may be referred to a sole arbitrator to be appointed by the Government of West Bengal whose decision shall be final and binding, the dispute should be referred to the arbitrator suggested by the respondent. The contention of Mr. Mukherjee that it was the prerogative of the Government/respondent to appoint an arbitrator is not accepted by the Court. The petitioner has rightly approached this Court in view of the provisions of Section 12(5) read with schedule 5 and 7 which prohibits unilateral appointment of an arbitrator by interested parties. Reference is made to 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**.

8. 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.”

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 [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

Galleries 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...”

9. Under such circumstances, this Court is persuaded to hold that such communication of the respondent is covered by the definition of an arbitration clause in terms of clause 7(4)(b) of the said Act. The petitioner exercised the option of reference to arbitration. The respondent was agreeable to refer the dispute, but to an arbitrator of their choice. In the letter, the respondent

accepts the arbitration clause. Further deliberation on this, is a question with regard to arbitrability or jurisdiction of the learned arbitrator, which the respondent is entitled to raise before the learned arbitrator. Objections with regard to the admissibility of the claims or otherwise, are also to be decided by the learned Arbitrator. The prayer for appointment of a learned arbitrator is allowed.

10. Justice Pradipta Ray (Retired), former Judge of this Court (Mobile No.9830986136), is appointed as the sole arbitrator, to arbitrate upon the dispute between the parties.

11. The learned Arbitrator shall comply with the provisions of Section 12 of the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall be at liberty to fix her remuneration as per the Schedule of Arbitration and Conciliation Act, 1996.

(SHAMPA SARKAR, J.)