

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

AP/130/2024
BHARAT PETROLEUM CORPORATION LTD.
VS
SHRI DHANANJAY KUMAR

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

*Appearance :-
Mr. P. Chakraborty, Adv.
...for petitioner*

The Court :- Affidavit in opposition is taken on record. Insertions in English and Hindi newspapers had been made within the jurisdiction of the respondent. Despite substituted service, none appears. The Court proceeds ex parte.

This is an application for appointment of a learned Arbitrator in accordance with clause 38 of the Bharatgas (Liquefied Petroleum Gas) Distributorship (Domestic & Commercial) Agreement dated 13th August, 2012.

According to the petitioner, the respondent was appointed as a distributor for carrying on the business of LPG Distributorship under the name and style of M/s. Ganga Bharat Gas Gramin Vitrak, at Chhatgtarpur (Dali/Orkaha/Chengbaha), District Palamau, Jharkhand.

Reliance has been placed on the various clauses of the agreement in support of the contention that the distributor was required to comply with and abide by the stipulations under the said clauses. Clause 5 of the agreement provided that the LPG Cylinders with Valves, Caps, Security Nuts, Regulators and any other

equipment as determined by the petitioner/Corporation, shall remain the property of the Corporation.

It is contended that the Corporation from time to time entrusted the distributor with the use of those equipments in the usual course of business and the distributor was to exercise due care and protection of all the properties so handed over to the distributor, under the Distributorship Agreement.

The distributor was also required to provide adequate storage facility under clause 7. Clause 11 of the Agreement, mandated that the distributor was to faithfully and diligently observe and carry out all directions and orders of the Corporation, which were part of the Corporation's LP Gas Manual. Clause 16 provided that the distributor was to maintain adequate trained and competent staff to do the installation work, connect the appliances to the cylinders, re-fill the cylinders and pressure regulators, etc. The Agreement permitted the Corporation to make periodic visits, inspect the documents, accounts, cause an inventory of the stocks etc. Clause 28(g) of the Agreement permitted the Corporation to terminate the agreement if the distributor committed default in payment to the Corporation in full and Clause 28(a) of the Agreement permitted the Corporation to terminate the agreement in the event the distributor committed any delay, breach or default of the terms and conditions of the agreement.

According to the petitioner, the distributor was not operating from May 15, 2025. Numerous complaints were received from the local administration, when the public was facing difficulty. The District Magistrate of the concerned District wrote several letters about the closure of the LPG distributorship.

In this background, a show-cause notice was issued on October 9, 2017, asking the distributor to show cause as to why the distributorship should not be terminated. On December 19, 2017, another show-cause notice was issued. By a

letter dated January 11, 2018, the respondent answered to the show-cause notice, inter alia, contending that due to a threat situation in the locality, daughter's marriage and son's illness, the respondent could not pick up the cylinders on time and deliver them to the customers. An inspection was held in the godown of the respondent by the Assistant Manager, LPG Cells, Hazaribagh, to retrieve the stock and assess the status of the distributorship. The inspection was held in the presence of the respondent. Upon inspection of the godown, it was found that 233 empty cylinders were available. There was no showroom from which the business was being carried out. Another show-cause notice was issued on December 18, 2019, by the petitioner, enumerating the various irregularities and abnormalities which were found upon such inspection. They are quoted below :-

1. Distributorship Agreement has expired on 12.08.2017. Till date no request has been received from you for its renewal.
2. Godown not maintained properly, long grass growing within the premises.
3. Approved plan/licence not displayed at godown.
4. Electrical/telephone connection not provided.
5. Fire extinguishers not provided at godown.
6. Clean dry sand not kept near the storage shed in sand buckets.
7. No smoking sign board has gone faded.
8. Godown keeper was not available.
9. Fenced protected area surrounding the storage has long grass.
10. Godown walls are faded and fence and gate are rusted.
11. Soap solution and brush not available in the godown.
12. Weighing scales of accuracy Class III (Max.50 Kg E=10GM) not available in the godown.

13. On random check it was observed that empty cylinders did not have security caps.
14. Licence and other necessary documents, safety signs, stock board etc. not displayed in godown.
15. Godown display not as per VM standards, no documents shown during inspection.
16. No register or documents available at godown.
17. Showroom/office for the distributorship was not shown during inspection.
18. Registers/documents not produced by the distributor for showroom too.
19. During stock check following difference was observed in stock.

By a letter dated February 26, 2021, the respondent was put on notice that on February 2, 2020, 291 empty cylinders and 103 Domestic Pressure Regulators were retrieved from the godown as per the records of the Corporation. The respondent had failed to return 814 filled up full LPG cylinders, 153 empty cylinders along with 308 Regulators. Those were all properties of the petitioner as per the agreement.

Thus, the petitioner alleged that the total amount of money recoverable from the respondent on account of unreturned equipments/cylinders amounted to Rs.23,01,100/-. A demand notice was sent and the respondent was asked to return the equipments within 15 days thereof or make payment of an amount of Rs.23,04,049.90.

By a letter dated July 13, 2021, the respondent expressed his intention to pay out the money and requested whether the payment could be spaced out over the next five years.

By a notice dated August 2, 2021, the petitioner invoked arbitration and nominated the Scope Forum as the authority to appoint the arbitrator. The respondent did not reply to the said notice, despite receipt thereof.

Thus, this application has been filed before this Court as the prescribed procedure under Clause 38 of the Agreement is no longer good law. According to the prescribed procedure, the dispute was to be referred to the sole arbitration of the Director (Marketing) of the Corporation or any other Officer of the Corporation to be nominated by the Director (Marketing). By the amendment of the said Act in 2015 and insertion of Section 12(5), an embargo has been created for any person interested in the ultimate outcome of the arbitral proceeding to either act as an arbitrator or nominate an arbitrator. The arbitration clause is quoted below :-

“38. (a) Any dispute or difference of any nature whatsoever any claim, cross-claim, counter-claim or set off of the Corporation against the Distributor or regarding any right, liability, act, omission or account of any of the parties hereto arising out of or in relation to this Agreement shall be referred to the sole Arbitration of the Director(Marketing) of the Corporation or of some officer of the Corporation who may be nominated by the Director (Marketing). The Distributor will not be entitled to raise any objection to any such arbitrator on the ground that the arbitrator is an officer of the Corporation or that he has dealt with the matters to which the contract relates or that in the course of his duties as an officer of the Corporation he had expressed views on and or any other matters in dispute or difference. In the event of the arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, the Director(Marketing) as aforesaid at the time of such transfer, vacation of office or inability to act may in the discretion of the Director(Marketing) designate another person to act as arbitrator in accordance with the terms of the agreement to the end and intent that the original arbitrator shall be entitled to continue the arbitration proceedings notwithstanding his transfer or vacation of office as an officer of the Corporation if the director (Marketing) does not designate another person to act as arbitrator on such transfer, vacation of office or inability of original arbitrator. Such persons shall be entitled to proceed with the reference from the point at which it was left by

his predecessor. It is also a term of this contract that no person other than the director (Marketing) or a person nominated by such Director (marketing) of the Corporation as aforesaid shall act as arbitrator hereunder. The award of the arbitrator so appointed shall be final conclusive and binding on all parties to the agreement subject to the provisions of the Arbitration & Conciliation Act, 1996 or any statutory modification or re-enactment thereof and the rules made thereunder for the time being in force shall apply to the arbitration proceedings under this clause.

(b) The arbitrator shall have power to order and direct either of the parties to abide by, observe and perform all such directions as the arbitrator may think, fit having regard to the matters in difference ie. dispute, before him. The arbitrator shall have all summary powers and may take such evidence oral and/or documentary, as the arbitrator in his absolute discretion thinks fit and shall be entitled to exercise all powers under the Indian Arbitration & Conciliation Act 1996 including admission of any affidavit as evidence concerning the matter in difference i.e. dispute before him

(c) The parties against whom the arbitration proceedings have been initiated that is to say, the respondents in the proceeding, shall be entitled to prefer a cross-claim, counter-claim or set off before the arbitrator in respect of any matter in issue arising out of or in relation to the agreement without seeking a formal reference of arbitration to the Director (Marketing) for such counter-claim, cross-claim, or set off and the arbitrator shall be entitled to consider and deal with the same as if the matters arising therefrom has been referred to him originally and deemed to form part of the reference made by the Director(Marketing).

(d) The arbitrator shall be at liberty to appoint, if necessary any accountant or engineering or other technical person to assist him, and to act by the opinion so taken.

(e) The arbitrator shall have power to make one or more awards whether interim or otherwise in respect of the dispute and difference and in particular will be entitled to make separate awards in respect of claims or cross-claims of the parties.

(1) The arbitrator shall be entitled to direct any one of the parties to pay the costs of the other party in such manner and to such extent as the arbitrator may in his discretion determine and shall also be entitled to require one or both the parties to deposit funds in such proportion to meet the arbitrators expenses whenever called upon to do so.

(e) The parties hereby agree that the courts in the city of Kolkata alone shall have jurisdiction to entertain any application or other proceedings in respect of anything arising under this agreement and any award on awards made by the sole arbitrator hereunder shall be filed (if so required) in the concerned courts in the city of Kolkata only.”

Reference is made to the decisions of **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**. The person who cannot act as an arbitrator, also cannot appoint an arbitration. 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 :-

...“**20.** We thus have two categories of cases. The first, similar to the one dealt with in TRF Ltd. [TRF Ltd. v. EnergoEngg. 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. EnergoEngg. 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 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...”

Thus, the petitioner has rightly approached this Court for appointment of the sole arbitrator. Clause 37 of the Agreement provides the jurisdiction clause. It states that, Courts at Kolkata shall have exclusive jurisdiction to entertain any suit, application or proceeding. Moreover, the execution of the Agreement was within the State of West Bengal.

Under such circumstances, the application AP No. 751 of 2022 is allowed and disposed of by referring the disputes to arbitration of the sole Arbitrator Mr. Abhidipto Tarafdar learned Advocate, Bar Library Club.

The issues with regard to the jurisdiction of the learned Arbitrator, non-arbitrability of the disputes, limitation etc. are left open, to be decided by the Arbitrator at the appropriate stage, if raised by the respondent.

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 his remuneration as per the Schedule of the Arbitration and Conciliation Act, 1996.

(SHAMPA SARKAR, J.)