

ORDER

OD-1

IN THE HIGH COURT AT CALCUTTA
ORIGINAL CIVIL JURISDICTION

AP/275/2022
G R INFRASTRUCTURE PRIVATE LIMITED
VS
BRIDGE AND ROOF COMPANY (INDIA) LIMITED

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date: 5th March 2025.

Appearance:

Mr. Arijit Basu, Advocate
Ms. Sarada Hariharan, Advocate
... for the petitioner.

Ms. Neelina Chatterjee, Advocate
Mr. Suvodeep Chakraborty, Advocate
... for the respondent.

1. This is an application for appointment of a learned arbitrator in accordance with Clause 2.25 of the contract. Clause 2.25 deals with arbitration and conciliation. The clause provides that in case of disputes arising out of rights and obligations under the agreement, parties shall make an endeavour to resolve the dispute amicably by holding a mutual discussion. In case the parties fail to arrive at any settlement through mutual discussion, either party may refer the dispute for conciliation under the Rules of Conciliation and Arbitration under SCOPE Forum of Conciliation and Arbitration (SFCA), by making an application to the Secretariat of SOCPE Forum. The settlement arrived at between the parties in the process of conciliation shall be final. In case the dispute is

not settled by conciliation, the dispute shall be referred to and finally resolved by arbitration in accordance with Rules of Arbitration of SCOPE Forum. The arbitration shall be governed by the Arbitration and Conciliation Act, 1996. The venue shall be decided by the parties. If the parties do not agree to arbitration by SCOPE, the disputing party shall opt for stipulated rules laid down under the Arbitration and Conciliation Act, 1996. The contract of the parties to the agreement shall be governed by the jurisdiction of the Calcutta High Court. In the event of any dispute and difference relating to the interpretation and application of the provisions of the contracts and commercial agreements, such dispute and difference shall be referred by either party to the sole arbitrator in the Department of Public Enterprises to be nominated by the Secretary of the Government of India in-charge of the Department of Public Enterprises. The Arbitration and Conciliation Act, 1996 shall have no applicability. Under such reference, the dispute shall be decided by the Law Secretary or the Special Secretary or the Additional Secretary authorized by the Law Secretary.

2. The facts of the case are that a notice inviting tender was floated by the respondent sometime in December 2017. The petitioner's offer was accepted. The work order was issued on April 19, 2018 and the respondent hired a crane from the petitioner for a period of 20 months. The notice inviting tender and the work order had an arbitration clause, which has been discussed hereinabove. It is alleged by the petitioner that

in the course of business, although the hiring period came to an end on February 3, 2020, substantial money remained unpaid. The petitioner has referred to almost 15 letters between 2019 and 2020, requesting for payment of the outstanding hiring charges. It appears that, the crane was also detained at the site for some time, on the allegation by the respondent that the petitioner had refused to extend the hiring period. Thus, the fact that there was a dispute between the parties over the rights and obligations emanating from the notice inviting tender as also the work order, is available from the record. According to the petitioner, the total due as on April 15, 2022 was more than Rs.56 lakhs. Finding no other alternative, by a letter dated March 17, 2021, the learned advocate of the petitioner invoked the arbitration clause and nominated a learned Advocate as the sole arbitrator. It is submitted that, upon receipt of the said letter of invocation, the respondent did not take any steps.

3. The first contention of the learned advocate for the petitioner is that, the series of communications which were made would indicate that there was neither any chance of mutual settlement or settlement by a conciliator as per the SCOPE Rules. Had the respondent shown any interest to go for conciliation, the respondent would have taken steps upon receiving the notices from the petitioner. The next contention is that the arbitration clause provides that if the parties do not agree for resolution of the dispute through conciliation and arbitration by SCOPE, the disputed party would be entitled to take resort to the provisions of the Arbitration and

Conciliation Act, 1996. Under such circumstances, the petitioner invoked the arbitration clause and nominated a sole arbitrator thereby exercising its choice to be governed by the Arbitration and Conciliation Act, 1996. This was provided for in the dispute resolution mechanism agreed to by the parties. Moreover the provision provides for arbitration by a named arbitrator, to be unilaterally appointed. This is prohibited under the law. In ***Perkins Eastman Architects DPC &anr. vs. HSCC (India) Ltd.*** reported in **2019 SCC OnLine SC 1517**, 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 [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...”

4. The learned advocate for the respondent submits that the dispute resolution clause provides for mutual settlement, failing which, conciliation. The above avenues are yet to be explored. Under such circumstances, the application should not be entertained.
5. This Court has considered the submissions of the respective parties. In the decision of ***Visa International Ltd. v. Continental Resources (USA) Ltd.***, reported in **(2009) 2 SCC 55**, the Hon’ble Apex Court held that if the referral Court finds from the records that despite the parties communicating with each other, the dispute continued, relegating the parties to the process of conciliation and/or amicable settlement would be an empty formality. 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.”

6. In the foregoing paragraphs, this Court has already enumerated the number of letters that the petitioner wrote and the response to those letters by the respondent. Thus, relegating the petitioner to further conciliation, will be a sheer wastage of time which will lead to no fruitful result.
7. Under such circumstances, this Court is of the view that the application should be allowed, leaving all the issues with regard to arbitrability of the dispute, limitation, the admissibility of the claim of the petitioner and any other objection that the respondent may have against the petitioner, open, and to be raised before the learned arbitrator. The learned arbitrator shall decide the entire matter in accordance with law, without being influenced by the observations made hereinabove.
8. Accordingly, the application is disposed of by appointing Mr. Anindya Basu, learned Advocate, Bar Library Club, as the arbitrator, to arbitrate upon the disputes 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 Schedule of the Act.

(SHAMPA SARKAR, J.)

S. Kumar / R.D. Barua