OC –47

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

AP-COM/880/2024
M/S THPL-SKE(JV)
VS
UNION OF INDIA

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 20th November, 2025.

Appearance:
Mr. Bhaskar Roy, Adv.
Mr. Megha Chanda, Adv.
…for the petitioner

Mr. Ranjan Kumar Sinha, Adv.
Ms. Priti Jain, Adv.
…for the respondent

The Court:

1. This is an application for appointment of an arbitrator on the strength of Clause 64.(1)(i) of the Indian Standard General Conditions (GCC) of Contract. The petitioner participated in a tender floated by the respondent. The petitioner was the successful bidder. The letter of acceptance was issued on February 1, 2021. The agreement was executed on October 18, 2021. As per the agreement, the work was to be completed within a period of 18 months, that is, within September 29, 2022. The GCC was made applicable to the said contract. The notice inviting tender clearly provided that price verification clause

would be applicable and the petitioner would be entitled to claim price variation.

2. It is submitted that the work could not be completed within the time stipulated and several extensions were granted. The petitioner sent letters for foreclosure as the railway could not give free site, without encumbrances. The foreclosure was accepted. It is submitted that intermittent bills were paid. It is submitted that the security deposit, bank guarantee and personal guarantee were not released and certain claims remained unpaid. The petitioner also claims damages. Thus, disputes arose.

3. Notice invoking arbitration was issued on December 12, 2023. By a letter dated February 7, 2024, the respondent refused to refer the dispute to arbitration on the ground that a 'no objection certificate' had been issued from the end of the petitioner, inter alia, stating that the petitioner did not have any claim against the respondent and would not initiate any legal proceedings.

4. Mr. Sinha, learned advocate for the respondent opposes the application and submits that, price variation cannot be permitted in terms of the Additional Special Conditions of the contract. The provisions clearly state that, all prices quoted by the intending tenderer in the bid document would include the price variation. Mr. Sinha further submits that irrespective of whether the tender document permits price variation, the Additional Special Conditions

will prevail. It is further submitted that after issuance of the 'no claim certificate' from the end of the petitioner, inter alia, accepting that there were no outstanding dues and that the petitioner would not go for any arbitration or legal proceeding before any Court of law, the question of referring the dispute to arbitration does not arise. It is further submitted that the appointment of the Arbitral Tribunal has to be as per the procedure laid down in the GCC.

5. I have considered the rival contentions of the parties.

6. It appears that parties have exchanged several letters trying to resolve the dispute in terms of the provisions of the GCC, but no amicable resolution or reconciliation has taken place. Relegating the parties to a further process of reconciliation will be an empty formality. It also appears that Clause 64.(3)(a)(ii) provides that when the claim is more than Rs. 1 crore, the Arbitral Tribunal will consist of a panel of three Gazetted Railway Officers not below Junior Administrative Grade or 2 Railway Gazetted officers not below Junior Administrative Grade and a retired Railway Officer, not below the rank of Senior Administrative Grade Officer, as the Arbitrators. For this purpose, the Railway is to send a panel of at least four names of Gazetted Railway Officers of one or more departments of the Railway which may include the names of retired Railway Officers empanelled to work as Railway Arbitrators to the Contractor within 60 days from the day when a written and valid demand for arbitration is received by the General Manager. The

Contractor shall suggest to the General Manager at least two names out of the panel for appointment as Contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the Contractor's nominee and will simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the presiding arbitrator amongst them.

7. It appears from the notice invoking arbitration that, apart from price variation the petitioner has other claims. Such claims include damages, return of security deposit, return of the bank guarantee as also the performance guarantee. Thus, Mr. Sinha's contention that the entire claim is based on price variation cannot be taken to be correct at this stage. It is for the arbitrator to decide whether the claims are barred under the provisions of Additional Special Conditions or the GCC or not. The issue of price variation, is triable in this case, inasmuch as, the tender document provides that the petitioner will be entitled to price variation whereas the Additional Special Conditions prohibit such claim. This issue will have to be decided by the learned arbitrator specially because a clarificatary letter had been issued to the petitioner on July 21, 2021 by the Divisional Electrical Engineer, permitting the petitioner to claim price variation. The place of arbitration is either the geographical limit of the Divisional office or at the headquarters. It is submitted that the

headquarters are at Garden Reach and the division of the Railway is at Asansol.

8. Now, the question arises as to whether the arbitral panel can be constituted on the basis of the provisions of the GCC. The law has been well settled that, the contractor cannot be asked to accept constitution of an arbitral panel from the curated panel of the Railways. The Railway is a party to the proceeding and is interested in the outcome of the proceeding. Thus, such appointment will be contrary to principle of equal participation of both the parties as envisaged in Section 18 of the said Act. A party who cannot act as an arbitrator, also cannot appoint the arbitrator. The procedure is contrary to Section 12(5) of the Arbitration and Conciliation Act, 1996. It is an admitted fact that the petitioner has not waived the applicability of Section 12(5) of the said Act by signing any agreement in writing. Thus, the petitioner has rightly approached the Court for constitution of the Arbitral Tribunal. Unilateral appointment of an Arbitral Tribunal is prohibited in law.

Reliance is placed on the following decisions:-

1. ***Bharat Broadband Network Limited vs. United Telecoms Limited : (2019) 5 Supreme Court Cases 755*** ;
2. ***Perkins Eastman Architects DPC and Another vs. HSCC (India) Ltd. ; 2019 SCC OnLine SC 1517***;

3. ***Central Organisation for Railway Electrification vs. ECI SPIC SMO MCML (JV) A Joint Venture Company : 2024 SCC OnLine SC 3219***.

The relevant paragraphs of ***Perkins Eastman (supra)*** 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. 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] , <u>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</u>.
>
> **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.

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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 Organization for Railway Electrification (supra)***the Hon'ble Apex Court ultimately discussed the pros and cons of unilateral appointment and held thus:-

> "**169.** In view of the above discussion, we conclude that:
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> 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;
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> 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."

9. The third issue involved is whether the 'no claim certificate' will bind the petitioner. By a letter dated July 11, 2024, the petitioner had categorically mentioned that the 'no claim certificate' is a cyclostyled/pre-prepared format, which has to be signed mandatorily by the contractor, when the contractor claims the bills. With each bill/demand, such certificate has to be attached or else, payments are not released. Moreover, in order to avail of refund of the security deposit, such no claim certificate has to be signed. The contractor does not have any bargaining power and cannot refuse to sign the said certificate. The Railways demand the same as an established practice. The effect of such issuance of no claim certificate by the petitioner is also a triable issue which has to be decided by the learned Arbitrator. Whether issuance of the same amounts to accord and satisfaction is a mixed question of law and fact.

10. In the decision of ***SBI General Insurance Co. Ltd. v. Krish Spg.,*** reported in ***(2024) 12 SCC 1***, the Hon'ble Apex Court held as follows:-

> "**118.** The dispute pertaining to the "accord and satisfaction" of claims is not one which attacks or questions the existence of the arbitration agreement in any way. As held by us in the preceding parts of this judgment, the arbitration agreement, being separate and independent from the underlying substantive contract in which it is contained, continues to remain in existence even after the original contract stands discharged by "accord and satisfaction".

119. The question of “accord and satisfaction”, being a mixed question of law and fact, comes within the exclusive jurisdiction of the Arbitral Tribunal, if not otherwise agreed upon between the parties. Thus, the negative effect of competence-competence would require that the matter falling within the exclusive domain of the Arbitral Tribunal, should not be looked into by the Referral Court, even for a prima facie determination, before the Arbitral Tribunal first has had the opportunity of looking into it.

120. By referring disputes to arbitration and appointing an arbitrator by exercise of the powers under Section 11, the Referral Court upholds and gives effect to the original understanding of the contracting parties that the specified disputes shall be resolved by arbitration. Mere appointment of the Arbitral Tribunal does not in any way mean that the Referral Court is diluting the sanctity of “accord and satisfaction” or is allowing the claimant to walk back on its contractual undertaking. On the contrary, it ensures that the principle of arbitral autonomy is upheld and the legislative intent of minimum judicial interference in arbitral proceedings is given full effect. Once the Arbitral Tribunal is constituted, it is always open for the defendant to raise the issue of “accord and satisfaction” before it, and only after such an objection is rejected by the Arbitral Tribunal, that the claims raised by the claimant can be adjudicated.

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124. In a case with similar facts but where an arbitration agreement is not in existence, the claimant would have the recourse to approach a civil court with its claims. Even in such proceedings before the civil court, it would be open to the defendant to put forward the defence of “accord and satisfaction” on the basis of the discharge voucher. Similarly, it would be open to the claimant to allege that the voucher had been obtained under fraud, coercion or undue influence. In such a scenario, the civil court would consider the evidence as to whether there was any fraud, undue influence or coercion. If the civil court finds that there was none, then it would reject the claims at the outset. However, if its finds that the allegations of fraud are true, then it would reject the discharge voucher and proceed to adjudicate the claims on merit.

125. Once an arbitration agreement exists between parties, then the option of approaching the civil court becomes unavailable to them. In such a scenario, if the parties seek to raise a dispute, they necessarily have to do so before the Arbitral Tribunal. The Arbitral Tribunal, in turn, can only be constituted as per the procedure agreed upon between the parties. However, if there is a failure of the agreed upon procedure, then the duty of appointing the Arbitral Tribunal falls upon the Referral Court under Section 11 of the 1996 Act. If the Referral Court, at this stage, goes beyond the scope of enquiry as provided under the section and examines the issue of "accord and satisfaction", then it would amount to usurpation of the power which the parties had intended to be exercisable by the Arbitral Tribunal alone and not by the national courts. Such a scenario would impeach arbitral autonomy and would not fit well with the scheme of the 1996 Act."

11. In the decision of ***M/s. Pampar Ovenfresh Foods Pvt. Ltd. vs United India Insurance Company Limited & Ors.*** decided in ***AP-COM 455 of 2024***, this Court held as follows:-

"**20.** Therefore, this court is of the view that, this application cannot be rejected even by applying the eye of the needle test. Accord and satisfaction of the claim as alleged by the respondent, is an arbitrable dispute, which fall strictly within the domain of the arbitrator.
21. Reference is made to the decision of **SBI General Insurance *Co. Ltd. vs Krish Spinning* (supra)**.
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* * *
25. Paragraph 125 is specifically referred to in support of the contention that, if the referral court is able to see the frivolity and dishonesty in the claim of the petitioner, the same can also be detected by the arbitral tribunal, and the tribunal can arrive at an informed reasoned decision, upon appreciation of evidence adduced by the parties.
26. In the case in hand, evidence is required to be led to establish that the decision of the Board of the claimant company displayed accord and satisfaction and that the resolution was not taken as an interim measure, to tide over financial hardship, as contended by the petitioner. It is available from the records that, several meetings and communications took place. Thus, whether the petitioner lodged the objections at each and every stage, as pleaded in this application, are also to be ascertained from the evidence to be adduced by the parties."

12. Under such circumstances the application is allowed. All the objections raised by Mr. Sinha, and available to the respondents are kept open. The Court constitutes the Tribunal as hereunder :-

(i) Ms. Sangita Das Gupta (8910675986), learned Advocate, will act the petitioner's nominee, Mr. Rajarshi Dutta, learned Advocate, Bar Library Club will act as the respondent's nominee and Justice Samapti Chaterjee, a former Judge of this court will act as the presiding Arbitrator.

13. The learned Arbitral Tribunal 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 Arbitration and Conciliation Act, 1996.

(SHAMPA SARKAR, J.)

B.Pal/TR