

OCD-10

AP-COM/1062/2024
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

M/S B DEVCHAND AND SONS SHIPPING PVT LTD
VS
M/S MULTIAXIS VENTURES PVT LTD AND ANR.

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date : 25th March, 2025.

Appearance:

Mr. Debnath Ghosh, Sr. Adv.

Mr. Sarosij Dasgupta, Adv.

Ms. Usha Doshi, Adv.

. . .for the petitioner.

Mr. Deepak Kumar Singh, Adv.

. . .for the respondent No.1.

The Court: This is an application for appointment of a substitute Arbitrator upon termination of the mandate of the learned arbitrator who was unilaterally appointed by the respondent no.1, although the clause provided that each of the parties would appoint their nominee/arbitrator.

The parties agree before this Court that the clause mentioned for settlement of the dispute in the subject agreement, is accepted as the arbitration clause.

It had been submitted on behalf of the resolution professional on the earlier occasion that the respondent no.2 was undergoing Corporate Insolvency Resolution Process (CIRP) and moratorium had set in. In my view, there is no use in keeping the matter pending. The disposal of this application is not likely to

create any disadvantage to the respondent no.2. The respondent No.2 is not represented today. The provisions of the Insolvency and Bankruptcy Code shall automatically be applicable to the arbitration proceeding, in case the moratorium has set in. This application is restricted to the prayer for termination of the mandate of the learned Arbitrator who was unilaterally appointed by the respondent no.1 and appointment of another arbitrator for adjudication of the dispute. Parties submit that a sole arbitrator be appointed and agree on such score before this court. Both submit that appointment of a sole arbitrator would be beneficial to all.

In view of the provisions of Section 12(5) read with the 5th and the 7th Schedule of the Arbitration and Conciliation Act, 1996, unilateral arbitration is not permissible in law. The unilateral appointment of the arbitrator by the respondent no.1 is contrary to the doctrine of competence competence. The parties to the agreement have a right to appoint the arbitrator or be involved in the process of such appointment. An interested party cannot unilaterally appoint a person. The question of impartiality will arise.

In ***Perkins Eastman Architects DPC and Another vs. HSCC (India) Ltd.*** reported at **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. 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 [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...”

Moreover, in the case in hand, the respondent No.1 appointed its nominee, who proceeded with the arbitration. Such appointment was totally contrary to the dispute resolution clause.

Under such circumstances, the application is allowed, upon recording termination of the mandate of the learned arbitrator.

Mr. Abhijit Chatterjee, learned senior advocate [Mobile No. 9831023558], is appointed as a substitute Arbitrator to arbitrate upon the disputes between the parties. The proceeding shall continue before the learned substituted arbitrator from the stage it was last held. The parties are at liberty to take back the documents from the erstwhile learned Arbitrator, so that the same may be filed before the learned substitute arbitrator.

The resolution professional shall also be at liberty to take appropriate steps in the matter and it is left open to the learned Arbitrator to deal independently with regard to the fate of the proceeding in view of the fact that the respondent no.2 is undergoing CIRP.

AP COM 1062 of 2024 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)

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