

OCD-3

AP/782/2022
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

G RAJENDRA PRASAD
VS
BHARAT HEAVY ELECTRICALS LIMITED

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date : 14th May, 2025.

Appearance:
Mr. Chayan Gupta, Adv.
Mr. Kausik De, Adv.
Mr. Roshan Pathak, Adv.
Mr. Uday Sharma, Adv.
. . .for the petitioner.

Mr. Aniruddha Bhattacharya, Adv.
Mr. Arnab Roy, Adv.
. . .for the respondent.

The Court:

1. Affidavit in reply is taken on record.
2. This is an application for appointment of a learned Arbitrator to arbitrate upon the disputes between the parties. The disputes arise out of a work order dated May 31, 2013. Clause 42 provides for arbitration and reconciliation. Clause 42.1 provides that in the event of any dispute or difference arising out of the execution of the contract or the respective rights and liabilities of the parties arising out of the said contract/work order, the same would be referred to arbitration. The clause further provides that the sole Arbitrator shall be appointed by the respondent.

3. It is submitted by Mr. Gupta that the petitioner invoked arbitration by a notice dated August 3, 2022. The respondent issued a notice on August 29, 2022 indicating its desire to settle the matter amicably. The petitioner was asked to attend a discussion on September 2, 2022 via video conferences. It is submitted by Mr. Gupta that although the petitioner appeared at the conference, the respondent failed and neglected to dispose of the matter. The delay in reaching the settlement was indicative of the fact that in the facts of the particular case, the matter could not be amicably settled. Hence, the petitioner submits that the disputes must be referred to arbitration upon recording failure of the reconciliation process which was initiated by the respondent, but did not reach to its logical conclusion.
4. Mr. Bhattacharjee, submits that the matter is still pending consideration and the application is premature. Mr. Bhattacharjee further submits that the claims of the petitioner are inadmissible and not as per the terms and conditions of the work order.
5. Having heard the learned advocates for the respective parties, this Court is of the view that the application before this Court for reference of the dispute to arbitration is not premature. The petitioner was called for a settlement by the respondent. The petitioner admittedly attended the meeting, but since then the respondent has not given its decision. Irrespective of the fact that sittings were held, the matter could not be concluded amicably. Thus, this Court holds that referring the matter for further amicable settlement would be an exercise in futility.

Reference is made to the decision of ***Visa International Limited vs. Continental Resources (USA) Limited*** reported in (2009) 2 SCC 55 and ***Demerara Distilleries Private Limited and Anr. vs. Demerara Distillers Limited*** reported in (2015) 13 SCC 610.

6. The law 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.
7. Further, this Court finds that the mechanism provided under Clause 42.1 for appointment of an Arbitrator by the respondent is no-longer permissible in law. Such mechanism has failed, although the existence of the arbitration clause is not in dispute. Unilateral appointment is contrary to Article 14 of the Constitution of India, as it is antithetic to party autonomy.
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. Further, a procedurally impartial adjudication entails equal

participation of parties in all aspects of adjudication for the process to approach legitimacy. Participation in the adjudicatory process is meaningless for a party against whom the arbitrator is already prejudiced. 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. 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.

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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.

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169. In view of the above discussion, we conclude that:

- 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;
- 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 iudex rule;"

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 [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...”

9. Under such circumstances, the petitioner has rightly approached this Court for appointment of a learned Arbitrator. The application is allowed, keeping all points with regard to arbitrability of the disputes, validity of the claims and any other objection that the respondent may have, left open, to be decided by the learned Arbitrator.
10. Under such circumstances, the Court appoints Mr. Ayan Banerjee, learned Advocate Bar Association, Room No.2, High Court at Calcutta, as the Arbitrator, to arbitrate upon the dispute between the parties. This appointment is subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996.
11. The learned Arbitrator shall fix his own remuneration as per the Schedule of the Arbitration and Conciliation Act.

12. AP/782/2022 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)

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