ORDER OCD-11

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

AP-COM/315/2025
JOHNSON CONTROLS HITACHI AIR CONDITIONING INDIA LTD.
VS
M/S. SHAPOORJI PALLONJI AND COMPANY PVT LTD.

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 23rd April, 2025.

Appearance:

Mr. Amit Kr. Ghosh, Adv.
Mr. A. Mukherjee, Adv.
...for petitioner.

Ms. Setu Das Roy, Adv.
Ms. Suranjana Nandi, Adv.
...for respondent.

1. This is an application for appointment of a learned arbitrator by way a composite reference in respect of ten work orders, each of which contains a dispute resolution clause. The dispute resolution clause reads as follows:-

"18.1 All disputes or difference of opinions, on account of interpretation of clauses, technical specifications,etc. shall be resolved through direct and mutual discussions at site level. In the case of difference of opinion still persisting then the matter shall be referred to Regional Head of the Contractor. However, in case parties fail to reach amicable settlement, the matter shall be referred to arbitration. However, Contractor reserves the rights to appoint Sole Arbitrator in

the case of dispute and the Arbitration proceedings shall be governed as per Indian Arbitration & Conciliation Act 1996 and shall be held in Kolkata."

2. The petitioner contends that by a single Letter of Intent (LOI), the proposed work for design, supply, installation, testing and commissioning of HVAC System for five hospitals at West Bengal, viz., Jalpaiguri, Gopiballavpur, Egra, Panskura and Ghatal, was offered to the petitioner. A composite value for all the works at the five locations as offered by the petitioner to the tune of Rs.12,35,00,000/- was accepted by the respondent. Thus, it is submitted that although the LOI was followed by ten work orders, for all practical purposes the conduct of the parties would indicate that the works arose out of one LOI and were a part of one single business transaction. The petitioner raised certain disputes with regard to payments and/or delay in payments. The emails sent by the petitioner to the representative of the respondent have been brought to the notice of the Court, in support of the contention that negotiations for composite payments were going on and some payment was received. The various emails relied upon, according to the petitioner, indicate that negotiations were on with regard to the payments due and outstandings as per the petitioner's claim and part of such claims were also paid. Thus, it is submitted by the petitioner that further scope for an amicable settlement is unlikely. A composite notice invoking arbitration was also issued by the petitioner, which was received by the respondent.

3. Ms. Das Roy, learned advocate for the respondent, objects to the prayer for composite reference on the ground that ten separate work orders were issued and each of the work orders contains a specific dispute resolution clause. The sites where the works are to be executed were also different. Under such circumstances, separate references should be made. The learned advocate also objects to the claim on the ground that most of the remaining claims are inadmissible. Reference has been further made to the reply to the notice of invocation. The respondent expressed the desire to appoint an arbitrator as per the terms separately, for each work order.

4. Unilateral appointment of an arbitrator is not permissible in law.

5. Reference is made to the following 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.***

6. 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.

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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."

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. 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. Energo Engg. 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:

'<u>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</u>'.

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…"

7. I have considered the rival contentions of the parties. It is not in dispute that a single LOI was issued on November 16, 2015, whereby and whereunder, the final offer of the petitioner with regard to the execution of the work mentioned in the said LOI was accepted. The letter records that the final offer by the petitioner was furnished by a single offer letter dated November 5, 2015. A composite offer to the tune of Rs.12,35,00,000/- inclusive of material, labourers, taxes, duties, provident fund, freight, transit insurance, handling charges, cess, levies and other incidental charges etc. except VAT and Service Tax was made by the petitioner, in respect of the projects. By the said LOI, the petitioner was also asked by the Project Director of the respondent to start the preliminary activities. Thereafter, item-wise break-up was also asked in respect of individual

hospitals. It is clear from the said LOI that at the very initial stage, a composite price was offered by the petitioner, as the sub-contractor and the said composite price was accepted. Based on the said LOI,which was issued in respect of all the five projects, preliminary activities commenced from the side of the sub-contractor. From the stage of issuance of the said LOI, it is evident that the respondent treated the projects at five different locations as a single business transaction between the parties. The work orders which followed the LOIspecified the terms and conditions of the work orders. In each of the work orders the LOI was mentioned. The e-mails which have been annexed to the application clearly indicate that some consolidated payments were made in respect of some of the projects, in spite of separate bills having been raised for each of the locations. The replies of the respondent via e-mails, do not indicate that the respondent had any objection when the negotiationstook place with regard to the outstanding dues of all the five projects, in a composite manner. A consolidated payment was also made.

8. The petitioner has relied on a decision of this court in the case of *M/s. Sauryajyoti Renewables Pvt. Ltd. vs. VSL RE Power Private Limited* in support of his contention that, this court haddirected such composite reference in the matter, upon noting the communications between the parties.

9. For the reasons which have been mentioned hereinabove, this court is of the view that a composite reference will be beneficial for all the parties and

the same is permissible in the facts and circumstances of the case. The very acceptance of the offer of the petitioner at the consolidated price in respect of the works to be executed at five different locations, clearly indicates that the parties, by conduct, had treated the offer of work as a part of the single transaction and the negotiations were also going on for a consolidated payment of total sum due. In any event, arbitrability of the issues, admissibility of the claims, limitation, etc. should be raised before the learned Arbitrator and the learned Arbitrator shall decide such issues in accordance with law.

10. The application is disposed of by appointing Mr. Shashwat Nayak, Advocate, Bar Library Club [M: 8910251490], 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 remuneration as per the Schedule of the Arbitration and Conciliation Act, 1996.

11. Liberty is granted to the learned advocate for the respondent to file the Vakalatnama within ten days from date.

(SHAMPA SARKAR, J.)

S. Kumar / pkd / JM / R.D. Barua