OCD –12

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

AP-COM/253/2025
M/S KRISHNA CONSTRUCTON
VS
THE CHIEF GENERAL MANAGER METRO RAILWAY AND ORS

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 22nd April, 2025.

Appearance:
Mr. Bhagbat Chaudhuri,Adv.
Mr. Rittick Chowdhury, Adv.
Mr. Bhaskar Chakraborty, Adv.
Mr. Subrata Mukherjee, Adv.
…. for the petitioner
Mr. Asis Mukherjee, Adv.
Mrs. Priti Jain, Adv.
…for the respondents

The Court: This is an application for appointment of an arbitrator on the strength of clause 3.2.8.1 of the agreement dated March 21, 2018. The petitioner was awarded a contract for up-keeping and cleaning of sub-stations, AV section, Pump section and the Conductor Rail section, of the electrical department under control of Dy. CEE/Maintenance of Metro Railway, Kolkata. The contract was terminated by the authority sometime in November, 2018. The petitioner contends that bills of Rs. 54,31,514.22 were due and payable to the petitioner. The contract was terminated. The security deposit and bank guarantee were not returned. Thus, disputes cropped up between the parties. The petitioner submits that the disputes have to be resolved by a learned

Arbitrator, to be appointed by this Court in view of the fact that the appointment by the General-Manager of the Metro Railways from a panel of Engineers maintained by them, was no longer permissible in law.

It is submitted by the learned advocate for the Metro Railway that the Metro Railway was always willing to pay an amount of Rs. 11 lakhs, which according to the Railways was due. The petitioner did not comply with the required formalities for disbursal of the said amount. With regard to the claim for return of bank guarantee and security deposit, it is submitted that once the contract was terminated on failure on the part of the petitioner to complete the work, the question of refund of security deposit and return of bank guarantee did not arise. It is submitted that the petitioner did not approach the Metro Railways for appointment of a learned Arbitrator, by following the proper procedure.

The fact that there is an arbitration clause is not in dispute. The petitioner approached the Writ Court sometime in 2022, thereby challenging the actions of the Metro Railway authorities by filing WPA 6886 of 2022. The writ petition was disposed of by the Court on September 4, 2024, inter alia, holding that the same was not maintainable in view of the arbitration clause. The petitioner was granted liberty to take steps in accordance with law in terms of the said clause. Upon disposal of the writ petition, the petitioner issued a notice invoking arbitration on November 20, 2024 for appointment of a learned arbitrator. The notice invoking arbitration clearly indicated the nature of claim

and the disputes which the petitioner seeks to be adjudicated by the learned arbitrator. The petitioner also suggested the name of a learned arbitrator.

4. By a letter dated December 16, 2024, the CEE/HQ, Metro Railway, Kolkata requested the Principal Chief Engineer, Metro Railway, Kolkata to process the demand for arbitration. Thus, it is available from the records that the Metro Railway Authority also accepted that there is an arbitration clause and the dispute should be adjudicated by a learned arbitrator. The claim of the petitioner is around Rs. 54 lakhs. The clauses provide that a sole arbitrator shall decide the matter. The respondent, however, wanted to appoint an Arbitrator from a panel maintained by it. The relevant portion of the letter is quoted below:-

> "M/s. Krishna Construction, Vill & Post-Hansuri, P.S-Magrahat, Dist-24 PGS(S)-743609 demanded for arbitration as advised by High Court Order dated, 27.09,2024 vide ref (ii)above.
> The letter has been received by office of PCEE. In the last paragraph, it is observed that the firm have appointed/nominated their arbitrator in this regard vide ref.(i) above. However, as per Cause number 3.2.8.3(a)(i) of agreement the arbitrator shall be appointed/ nominated by General Manager, Metro Railway Kolkata.
> Arbitration for Metro Railway cases are handled by Engineering Department.
> Therefore, kindly process appointment of arbitrator as demanded by M/s. Krishna Construction, Vill & Post-Hansuri, P.S-Magrahat, Dist-24 PGS(S)-743609 vide letter under reference (i)."

5. The law is well-settled that, an arbitrator cannot be appointed by a party or an officer of a party, as the same would be contrary to the doctrine of competence competence. Clause 3.2.8.3(a)(i) is quoted below :-

"3.2.8.3 Appointment of Arbitrator :-

(a) Appointment of Arbitrator where applicability of section 12(5) of arbitration and co0nciliation Act has been waived off :

(a)(i)- In cases where the total value of all claims in question added together does not exceed Rs. 1,00,00,000/- (Rupees One Crore Only), the Arbitral tribunal shall consist of a sole arbitrator who shall be a gazetted officer of Railway not below JA grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM."

6. A person who cannot act as an Arbitrator, also cannot appoint an Arbitrator. Thus, the General Manager can neither act as an arbitrator nor appoint an arbitrator, who is an officer of the respondent. Moreover, the clause provides that such procedure can be followed only if the applicability of section 12(5) of the said Act is waived.

7. 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.***

8. The General Manager cannot appoint an Arbitrator as he has interest in the outcome of the proceeding. Moreover, a Gazetted Officer of the Railways also, cannot act as a learned Arbitrator, as he is de jure unable to perform.

9. The Hon'ble Apex Court in ***Central Organization for Railway Electrification (supra),*** held thus:-

"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 judex rule; and

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.
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> **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. <u>The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its</u>

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:
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> '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'.
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> 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…"

10. With regard to the objections as to the arbitribility of the issues, admissibility of the claim, the claim being barred by limitation, justification of the termination, non-refund of the security deposit and bank guarantee etc.,

this Court is of the view that the matter should be adjudicated by the learned arbitrator, to be appointed by Court, independently. Whether the period spent in the litigation before the Writ Court should be exempted in computing limitation, whether the exemption granted by the Hon'ble Apex Court during the Covid period while computing limitation, are also left to the learned Arbitrator to decide.

11. Under such circumstances, the application is disposed of by appointing Mr. Nayan Chand Bihani, learnedSenior Advocate, Bar Library Club as the sole arbitrator, to arbitrate upon the disputes between the parties. The learned Arbitrator 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.)

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