

**HIGH COURT OF TRIPURA
AGARTALA**

Arb.P. No.05/2024

Riot Narayan Ghosh, Contractor, son of Late Basanta Kr. Ghosh, resident of village of Matri Bhaban, Subhash Palli, P.O. & P.S.-Ambassa, District-Dhalai Tripura, Pin-799289.

..... Petitioner(s).

V E R S U S

1. The State of Tripura, represented by the Secretary & Commissioner, Public Works Department, Government of Tripura, having his office at Secretariat Building, P.O.-Kunjaban, P.S.-New Capital Complex, District-West Tripura, PIN-799006.

2. The Chief Engineer, Public Works Department (R&B), Government of Tripura, having his office at Pandit Nehru Complex, P.O.-Kunjaban, P.S.-New Capital Complex, District-West Tripura, PIN-799006.

3. The Superintending Engineer, 5th Circle, Public Works Department (R&B), Government of Tripura, having his office at Ambassa, District-Dhalai Tripura.

4. The Executive Engineer, Ambassa Division, Public Works Department (R&B), Government of Tripura, having his office at Jawharnagar, District-Dhalai Tripura.

.....Respondent(s).

For Petitioner(s)	: Mr. Koomar Chakraborty, Advocate.
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For Respondent(s)	: Mr. Kohinoor Narayan Bhattacharyya, G.A.
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HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH

Date of hearing and judgment: **28th March, 2025.**

Whether fit for reporting : **YES.**

JUDGMENT & ORDER(ORAL)

Heard Mr. Koomar Chakraborty, learned counsel appearing for the petitioner and Mr. Kohinoor Narayan Bhattacharyya, learned Government Advocate appearing for the respondents-State.

2. Under Agreement No. T/ 09/ CE/ PWD (R&B)/ SE (Project)/ EE/ PWD (R&B)/AMB/2013-14 (Annexure-1) and work order dated 20.11.2013 relating to "Construction of RCC bridge over Gandacherra on the road from

Gandacherra to Raishyabari at Ch. 1.00 km under Ambassa Division, Dhalai Tripura", petitioner claims to have executed the work in all respects by 31.12.2021 and raised his tentative claim before the Executive Engineer/respondent No.4 on 21.05.2024. However, his claim was declined by letter dated 31.05.2024. Thereafter, he approached the Superintending Engineer/respondent No.3 on 11.06.2024 for release of his outstanding dues. But such claims were also rejected on 05.07.2024. Thereafter, petitioner submitted an application before the Chief Engineer/respondent No.2 for reference of the claims/disputes for adjudication under Clause 22 of the Agreement by nomination of an arbitrator. On 02.09.2024 the Chief Engineer/respondent No.2 appointed one Sri P.K. Datta, TJS Grade-I (retired) as the sole arbitrator to adjudicate the disputes between the parties. Thereafter, again on 06.09.2024 another arbitrator namely Sri Subash Sikdar, TJS Grade-I (retired) officer was appointed as the sole arbitrator. Petitioner, on his part, also submitted that a request had been made for appointment of Sri A.K. Nath, retired District Judge, TJS Grade-I as an arbitrator vide letter dated 08.08.2024. However, learned counsel for the petitioner submits that since the Chief Engineer/respondent No.2 is disqualified to appoint an arbitrator in view of the 2015 amendment to the Arbitration and Conciliation Act, 1996, petitioner has approached this Court under Section 11(6) of the Arbitration & Conciliation Act, 1996 (as amended) read with Section 12 thereof, for appointment of a sole arbitrator.

3. A counter affidavit has been filed by the respondents pursuant to the order dated 26.09.2024. The counter affidavit avers in reply to paragraph-

2.4 of the petition on the merits of the dispute urged by the petitioner, *inter alia*, asserting as under:

That, there were 28 days inevitable delay in handing over the site for which the contractor was not eligible for any compensation under clause 39.3.5 of the agreement.

As regards statements made in paragraph-2.5 of the Arbitration Petition, it is stated that various correspondences were made with the petitioner in this respect. The work was completed on 31.12.2021 as per office record but beyond the stipulated period of completion of work by 6 years 6 months approximately.

4. It is further stated that provisional time extensions were given from time to time to keep the agreement alive till completion of the work. As against the claim of certain amount of bills as unpaid, it is stated at paragraph-8 that out of Rs.2,53,30,433/-, Rs.2,50,29,251/- was paid to the agency and balance amount of Rs.3,01,182/- remained unpaid which shall be paid after approval of the time extension with necessary deduction of levy if imposed by the competent authority. The respondents state that petitioner raised certain disputes and vide letter dated 08.08.2024 addressed to the Chief Engineer, PWD (R&B) prayed for appointment of an independent and impartial arbitrator to adjudicate the dispute arising between the parties for the aforesaid work.

It is further stated that in exercise of the power conferred under Clause 22 of the agreement, the Chief Engineer, PWD (R&B), Tripura appointed Shri Subhas Sikdar, Grade-I Officer of TJS (Retired) to act as a sole arbitrator to adjudicate the dispute between the parties from the panel formed

by the High Court of Tripura vide notification dated 03.04.2023 (Annexure-R/3).

It is further submitted that petitioner vide letter dated 21.05.2024 had raised Tentative Claims under Clause 22.1 of the agreement for compensation amounting to Rs.1,40,27,314/- which is not tenable as per the terms and conditions of the contract. Petitioner was also communicated by letter dated 31.05.2024 that such claims are not acceptable by the department (Annexure-R/5). Petitioner had submitted letter dated 11.06.2024 to the Superintending Engineer, PWD(R&B), 5th Circle raising Tentative Claims under Clause 22.2 of the agreement (Annexure-R/6). The Superintending Engineer, PWD(R&B), 5th Circle vide letter dated 05.07.2024 rejected his claim (Annexure-R/7). Then petitioner submitted a letter to the same Superintending Engineer on 15.07.2024 seeking arbitration in respect of his claim of Rs.1,40,27,314/- which according to the respondents is unjustified (Annexure-R/8). In this sequence of dates vide application dated 08.08.2024 (Annexure-7) addressed to the Chief Engineer, PWD(R&B), Agartala, petitioner sought reference of the dispute for adjudication by an arbitrator (Annexure-R/9).

5. It is further stated that the Chief Engineer, PWD(R&B), Agartala vide memorandum dated 29.08.2024 appointed Sri S. Dasgupta, TJS, Grade-I (Retired) as sole arbitrator (Annexure-R/10). However, the said appointment made vide aforesaid memorandum was cancelled due to administrative reasons by the Chief Engineer vide letter dated 31.08.2024 (Annexure-R/11). Then the respondent-Chief Engineer, PWD(R&B), Agartala vide memorandum dated 02.09.2024 appointed Sri P.K. Datta, TJS Grade-I (Retired) as the sole

arbitrator for adjudication of the dispute raised by the petitioner (Annexure-R/12). Mr. Datta is also nominated in the panel. His name in the panel is prepared vide Notification dated 03.04.2023 issued by the High Court. It is asserted that in place of the said arbitrator, the Chief Engineer, PWD(R&B), Agartala appointed another arbitrator Sri Subash Sikdar, TJS Grade-I (Retired) vide memorandum dated 06.09.2024. The Chief Engineer, PWD(R&B) is the competent authority to issue the order as per the stipulation contained in the agreement. The Fifth and Seventh Schedule of Arbitration and Conciliation Act, 1996 do not stand in the way of such appointment (Annexure-R/13).

6. Further averments have been made in relation to the merits of the dispute. The respondents have vehemently denied that as per the amendment of the Act of 1996 dated 23.10.2015 and 09.08.2019, the Chief Engineer, PWD(R&B) is statutorily disqualified to act as an arbitrator and for appointment of sole arbitrator. Petitioner has raised his claim for payment of dues after promulgation of the Amendment Act of the Arbitration and Conciliation Act, 1996 effected on 09.08.2019. Based on these averments, the respondents have defended their decision to appoint Sri Subash Sikdar, TJS Grade-I, Retired Officer as a sole arbitrator.

7. Learned Government Advocate Mr. Kohinoor Narayan Bhattacharyya appearing for the State has in substance submitted that the majority judgment in the case of ***Central Organisation for Railway Electrification vs. ECI SPIC SMO MCML (JV), A Joint Venture Company*** reported in ***2024 SCC OnLine SC 3219*** does not render the appointment of the sole arbitrator Sri Subash Sikdar, TJS Grade-I (Retired) as ineligible or that it

suffers from lack of appointment of an independent and impartial arbitrator. Though the Clause 22 for appointment of an arbitrator can be said to be unilateral in nature as it confers authority upon the Office of Chief Engineer but such appointment has not been made from any panel curated by the department or by the Chief Engineer. The sole arbitrator has been appointed from a panel constituted by the High Court in exercise of the powers under Section 11(3-A) of the Arbitration and Conciliation Act, 1996 (as amended).

It is submitted that the named arbitrator does not suffer from any ineligibility as prescribed under Section 12(1) read with Section 12(5) of the Amended Act. Moreover, petitioner has not expressed any apprehension as to the independence and impartiality of the named arbitrator apparently since he is not one out of any panel curated by the Chief Engineer or any officer of the department whether sitting or retired.

It is submitted that the whole intent of the Act of 1996 is to see that the Arbitration Proceedings are undertaken by an independent and impartial arbitrator. This Court also while exercising the powers under Section 11 is required to ensure that the appointment is of an independent and impartial arbitrator. The objection raised by the petitioner is just for the sake of objection. Moreover, the petitioner has also proposed the name of an arbitrator out of the same panel curated by this Court vide notification dated 03.04.2023. In such circumstances, this Court on principle may not like to interfere in the appointment of an arbitrator by the Chief Engineer in terms of Clause 22 invoked by the petitioner himself if the named arbitrator does not suffer from any ineligibility on account of any of the conditions enumerated under Section 12(1) read with Schedule-V or Schedule-VII of the Act.

8. Learned counsel for the petitioner has also placed reliance upon the case of ***Central Organisation for Railway Electrification*** (supra) to support his submission. It is submitted that the Apex Court in the said decision has held that principle of equal treatment of parties applies at all stages of arbitration proceedings, including the stage of appointment of arbitrators. However, 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. It hinders equal participation of the other party in the appointment process of arbitrators. He has referred to paragraph-169 containing the majority judgment in ***Central Organisation for Railway Electrification*** (supra). He submits that on the principles of *Qui facit per alium facit per se* if the arbitration clause provides for appointment of an arbitrator by one of the party, i.e. the Chief Engineer who is ineligible to act as an arbitrator in view of the amendment to the Act of 1996 made effective from 15.10.2015, such authority could also be ineligible to appoint an arbitrator whether an officer of the same department or from any other panel. He submits that the decision of the Apex Court in the case of ***TRF Limited vrs. Energo Engineering Projects Limited*** reported in ***(2017) 8 SCC 377*** applies to such a scenario. Such an appointment is likely to give justifiable doubts as to the independence and impartiality of the arbitrator since the contractor is restricted from choosing its arbitrator and moreover, the appointed arbitrator would be presumed to owe allegiance to the authority who has appointed him. However, learned counsel for the petitioner does not dispute that no apprehension has been expressed by the petitioner in clear terms as to lack of independence or impartiality on the part of learned arbitrator appointed by the respondent-Chief Engineer as required under

Schedule-V or Schedule-VII of the Act of 1996 read with Sections 12(1) and 12(5) thereof. In such circumstances, learned counsel for the petitioner submits that this Court may instead of permitting the respondents to make such an appointment, appoint any independent arbitrator as per its discretion which will be acceptable to the petitioner.

9. I have considered the submissions of learned counsel for the parties. I have referred to the relevant necessary details, both on merits and the legal issue raised for consideration before this Court on the question of appointment of an arbitrator by the respondent authority-Chief Engineer in terms of Clause-22 of the agreement.

10. The ratio of the majority judgment in ***Central Organisation for Railway Electrification*** (supra) as summarized at paragraph-169 of the judgment is extracted hereunder:

"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

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."

11. The Apex Court in the majority judgment has dealt with the legislative scheme under Section 11 of the Act which provides that parties are free to agree on a procedure for appointing the arbitrator or arbitrators. The procedure for appointment agreed by the parties is subject to the power of the Supreme Court or the High Court under Section 11(6) to appoint an arbitrator in cases where the parties do not agree on a procedure or if the parties or the arbitrator fail to act following the agreed procedure. Section 11(6) allows judicial involvement as a default mechanism and not as an independent basis for choosing the arbitrators irrespective of the parties' agreement. Further, parties can invoke Sections 11(3), 11(4) or 11(5), as the case may be, only upon the failure of the agreed procedure for appointment of arbitrators.

12. When appointing an arbitrator under Section 11, the appointing authority has to ensure the appointment of independent and impartial arbitrators in terms of Section 11(8). At paragraph-37 of the majority judgment, the Apex Court has referred to Section 11(8) which prescribes that the High Court shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of Section 12 having due regard to (a) any qualifications required for the arbitrator by the agreement of the parties; and (b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

13. Section 11 is based on Article 11 of the Model Law. Before the 2015 amendment, the Apex Court upheld arbitrator appointment clauses which

gave one party "unfettered discretion" to appoint a sole arbitrator. It was also held that there was no bar under the Arbitration Act for an employee of a government or Public Sector Undertaking, which is a party to an arbitration agreement to act as an arbitrator. However, it was observed that there could be justifiable apprehension about the independence or impartiality of an employee arbitrator who was the "controlling or dealing authority" regarding the subject contract or if the arbitrator was a direct subordinate to the officer whose decision was the subject matter of the dispute.

14. The 2015 amendment mandates arbitrators to make disclosures before their appointment in terms of the categories specified under the Fifth Schedule. The Fifth Schedule prescribes thirty-four categories that give rise to justifiable doubts as to the independence or impartiality of arbitrators. These categories are classified as follows: (i) the relationship of the arbitrator with the parties or counsel; (ii) the relationship of the arbitrator to the dispute; (iii) the arbitrator's direct or indirect interest in the dispute; (iv) previous services rendered by the arbitrator to one of the parties or other involvement in the case; (v) relationship between an arbitrator and another arbitrator or counsel; (vi) relationship between arbitrator and party and others involved in the arbitration, and (vii) other circumstances.

15. The 2015 amendment has incorporated Section 12(5) to provide for ineligibility of a person to be appointed as an arbitrator whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule.

Section 12(5) provides that notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator. Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

16. The Seventh Schedule to the Arbitration Act divides the specified categories based on three factors: (i) arbitrator's relationship with the parties or counsel; (ii) the relationship of the arbitrator to the dispute; and (iii) arbitrator's direct or indirect interest in the dispute.

17. In the case of ***Central Organisation for Railway Electrification*** (supra), the Apex Court at paragraph-46 of the judgment referred to the categories that are relevant for the said reference as under:

"1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party;

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration."

18. Section 12(5) overrides any prior procedure for appointing the arbitrators agreed upon between the parties under Section 11(2) due to the non obstante clause. However, the proviso to Section 12(5) allows parties to waive the applicability of that provision after the dispute has arisen. This proviso secures "real and genuine party autonomy" by allowing parties to waive the applicability of Section 12(5).

19. In this background of the observations made by the Apex Court and in the light of the ratio rendered by the majority judgment in ***Central Organisation for Railway Electrification*** (supra), the question which arises for consideration is whether appointment of an arbitrator not out of a panel curated by the Chief Engineer but from a panel curated by the High Court in exercise of the power under Section 11(3-A) of the Act of 1996 vide notification dated 03.04.2023 would still render the appointment bad in the eye of law on the grounds of lack of independence or impartiality of the arbitrator or hitting the principles of party autonomy. In the conclusion drawn by the Apex Court in the majority judgment at paragraph-169, the Apex Court has on the one hand held that the principle of equal treatment of parties applies at all stages of arbitration proceedings including the stage of appointment of arbitrators. At the same time, it has held at sub-paragraph (b) that 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.

20. The question in the present case is whether if the Arbitration Act does not prohibit PSUs from empanelling potential arbitrators and the arbitrator named in the present case is not one who is one from a panel curated by the PSU or by the Chief Engineer concerned but from a panel constituted by the High Court comprising of retired Judicial Officers and others, could it be still said that the other party has been forced to select an arbitrator from the panel curated by the Chief Engineer. Had that been a case, it could have raised justifiable doubts as to the independence and impartiality of the arbitrator on

the counts which have been discussed in the ***Central Organisation for Railway Electrification*** judgment (supra) and referred to in the foregoing paragraphs as well as per the categories enumerated under Fifth Schedule or Seventh Schedule of the Act of 1996. In fact, the petitioner himself has proposed the name of an arbitrator out of the same panel constituted by the High Court under Section 11(3-A) of the Act of 1996 (as amended). The petitioner has not expressed any apprehension as to the independence or impartiality of the arbitrator nominated by the respondent-Chief Engineer from the panel constituted by the High Court under Section 11(3-A) of the Act.

It appears that the contention of the petitioner is more academic than real being guided by the principle that if the Chief Engineer is himself ineligible to act as an arbitrator between the parties, he is equally ineligible to appoint an arbitrator. The petitioner has not been compelled to accept an arbitrator out of a panel curated by the Chief Engineer. The petitioner had himself invoked Clause-22 for appointment of an arbitrator. The independence or impartiality of the nominated arbitrator has not been raised by the petitioner. In such a situation, when the parties have agreed to a procedure for appointment of an arbitrator and the choice of arbitrator is not from a panel curated by one of the parties, the nomination of an arbitrator from a panel constituted by this Court cannot be said to be improper. Moreover, when the Chief Engineer has exercised due caution and discretion in not nominating any officer from the same department whether sitting or retired or a person from a panel curated by him.

21. Viewed in this perspective, this Court is of the considered view that appointment of an arbitrator may be from the same panel constituted under Section 11(3-A) of the Act by the High Court vide notification dated 03.04.2023 by substituting another person as an arbitrator would be an exercise more of formality rather than of any purpose or substance. The entire object of the Act is to ensure that arbitration proceedings are held by independent and impartial arbitrators. On that issue, no apprehension has been raised by the petitioner. As such, petitioner should not have any grudge if the arbitrator appointed from the panel curated by this Court under Section 11(3-A) of the Act vide notification dated 03.04.2023 by the respondent is to adjudicate the dispute between the parties.

22. Therefore, this Court does not find any reason to interfere in the matter. The instant petition is dismissed.

Pending application(s), if any, shall also stand disposed of.

(APARESH KUMAR SINGH), CJ

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