

HIGH COURT OF TRIPURA
AGARTALA

Arb. P. No.9/2021,
Arb. P. No.10/2021,
Arb. P. No.11/2021,
Arb. P. No.12/2021.

Sri Gathan Datta.

..... *Petitioner(s)*.

Vs.

The State of Tripura and Ors.

..... *Respondent(s)*.

For Petitioner(s) : Mr. Somik Deb, Sr. Advocate,
Ms. Riya Chakraborty, Advocate.

For Respondent(s) : Mr. K De, Addl. Govt. Advocate.

HON'BLE THE CHIEF JUSTICE MR. INDRAJIT MAHANTY

_O_R_D_E_R_

22/12/2021

Heard learned counsel for the parties.

The application has been filed before this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator in terms of the arbitration clause contained in Clause 22 of the agreement dated 22nd March 2019. The said clause is quoted hereunder :

“22. Settlement of disputes:

22.1 If any dispute or difference of any kind whatsoever arises between the department and the Bidder in connection with,

or arising out of the Contract at stage, whether during the progress of the works or after their completion and whether before or after the termination, abandonment or breach of the contract, it shall in the first place, be referred to and settled by the Engineer-in-charge who shall, within a period of twenty days after being requested by the Bidder to do so, give written notice of his decision to the Bidder. Upon receipt of the written notice of the decision of the Engineer-in-charge the Bidder shall promptly proceed without delay to comply with such notice of decision.

22.2 If the Engineer-in-charge fails to give notice of his decision in writing within a period of twenty days after being requested or if the Bidder is dissatisfied with the notice of the decision of the Engineer-in-charge, the Bidder may within fifteen days after receiving the notice of decision appeal to the concerned Superintending Engineer of Department who shall after affording opportunity of being heard shall give notice of his decision within a period of thirty days. After Superintending Engineer has given written notice of his decision to the Bidder and no claim to arbitration, has been communicated to him by the Bidder within a period of fifteen days from receipt of such notice the said decision shall remain final and binding on both side. If the superintending engineer fails to give notice of his decision, as aforesaid within a period of thirty days after being requested as aforesaid, or if the Bidder be dissatisfied with any such decision, then and in any such case the Bidder within thirty days after the expiration of the first named period of thirty days as the case may be, require that the matter or matters in dispute be referred to arbitration as detailed below :-

SETTLEMENT OF CLAIMS:

All disputes or difference arising of or relating to the Contract shall be referred for the adjudication as follows:

- a) Claims up to a value of Rupees 50,000/-
 - Superintending Engineer of another circle in the same department.
- b) Claims above Rs.50,000/-
 - Another Chief Engineer or Arbitrator appointed by the Chief Engineer of the same department.

The arbitration shall be conducted in accordance with the provisions of Indian Arbitration and Conciliation Act 1996 or any statutory modification thereof.

The arbitrator shall state his reasons in passing the award.

A reference for adjudication under this clauses shall be made by the Bidder within 180 (one hundred eighty) days from the date of intimating the Bidder of the preparation of final bill or his having accepted payment whichever is earlier. Only contracts executed in Tripura shall have jurisdiction for any suit arising out of this contract. More particularly no suit shall be instituted or entertained in any court outside the state arising out of contract.”

Objections have come to be filed by the respondents. However, this Court takes note of the fact that the Hon’ble Supreme Court in case of *N. N. Global Mercantile Private Ltd. Vs. Indo Unique Flame Ltd. and Ors.* reported in (2021) 4 SCC 379 in paragraph 5.2 had quoted from the 2015

amendments inserting sub-section 6-A in Section 11 and thereafter concluded as follows :

“10. In view of the legislative mandate contained in Section 11(6-A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the kompetenz-kompetenz principle.”

It is also relevant herein to take into consideration the fact that Hon’ble the Supreme Court in the case of ***Perkins Eastman Architects DPC and Ors. Vs. HSCC(India) Ltd.*** reported in ***AIR 2020 SC 59*** has held as follows :

“16. But, in our view that has to be the logical deduction from TRF Limited MANU/SC/0755/2017: (2017) 8 SCC 377. Paragraph 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 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited.”

In view of the aforesaid judgments cited hereinabove although the appointing authority under the Clause of the agreement is vested with the Chief Engineer, the said authority being obviously interested party cannot go ahead and appoint an arbitrator.

Consequently, this Court hereby appoints Sri Subhas Sikdar, retired District Judge, to act as a sole Arbitrator to resolve the disputes between the parties. Parties are at liberty to raise all such contentions/claims before the learned Arbitrator, as they may be advised. Nothing stated in this order shall prejudice either side in raising their claims and/or counter-claims before the Hon’ble Arbitrator.

Within a period of 2(two) weeks from today, the parties shall obtain a declaration from him in terms of Section 12(1)(b) of the Arbitration

and Conciliation Act, 1996 and file it before the Registry of this High Court.

Learned counsel for the petitioner is permitted to take back the original agreement subject to condition that he will replace the same with a Xerox copy duly authenticated by him.

Arbitration petition is disposed of accordingly. Pending application(s), if any, also stands disposed of.

(**INDRAJIT MAHANTY, CJ**)



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