

IN THE HIGH COURT AT CALCUTTA
[CIRCUIT BENCH AT PORT BLAIR]

AP/1/2025

M/s Rochem Separation Systems (India)

Vs.

The Chief Secretary and another

Ms. Anjili Nag, Sr.Adv
Ms.Anoushka Singh for the petitioner

Mr. Shatadru Chakraborty, Sr.Adv.
[through virtual mode]
Mr. Rakesh Kumar
Mr. Dibesh Dwivedi ... for the respondents

March 24, 2025
[SR]
Item No.6

1. *Prima facie* it appears that the appointment of the sole arbitrator unilaterally is contrary to the decision of the Constitution Bench in **Central Organization for Railway Electrification vs. M/s ECI SPIC SMO MCML (JV) A Joint Venture Company**, reported at **2024 SCC OnLine SC 3219 corresponding to 2024 INSC 857**, I may refer to the following observations of the Constitution Bench in paragraphs 162, 163 and 169 (c) and(e) :-

“162. The possibility of bias is real in situations where an arbitration clause allows a government company to unilaterally appoint a sole arbitrator or control the majority of the arbitrators. Since the government has control over the arbitral tribunal, it can chart the course of the arbitration proceedings to the prejudice of the other party. Resultantly, unilateral appointment clauses fail to provide an effective substitute for judicial proceedings in India. Further, a unilateral appointment clause is inherently exclusionary and violates the principle of equal treatment of parties and procedural equality.

163. Unilateral appointment clauses in a public-private contract fail to provide the minimum level of integrity required in authorities performing quasi-judicial functions such as arbitral tribunals. Therefore, a unilateral appointment clause is against the principle of arbitration,

that is, impartial resolution of disputes between parties. It also violates the nemo judex rule which constitutes the public policy of India in the context of arbitration. Therefore, unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution for being arbitrary in addition to being violative of the equality principle under the Arbitration Act.

169 (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;

..
169 (e) Unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution;”

2. However, Mr. Shatadru Chakraborty, learned senior advocate appearing on behalf of the Administration submits that the arbitrator is not an employee of the APWD and it cannot be perceived by reason of such appointment that he would be biased, moreover, no allegation of bias has been attributed to the arbitral tribunal.

3. The petitioner has filed an application under section 16 of the Arbitration and Conciliation Act, 1996. The said application has been decided against the petitioner.

4. The said decision can be challenged in an application for setting aside the award under section 34 as stipulated under section 16(6) of the Arbitration and Conciliation Act, 1996. It may be premature to consider such application in view of the statutory bar. However, the matter is adjourned till the next available Circuit Bench in order to enable Mr. Shatadru Chakraborty to obtain necessary instruction if an arbitrator could be appointed by the Court to resolve the impasse as in the event it is ultimately found that such unilateral appointment is *de hors* the law laid down by the Hon'ble

Supreme Court the expenditure likely to be incurred by the parties would ultimately cause injustice to the parties.

5. The matter shall be listed before the next available Circuit Bench, subject to the convenience of the Bench.

(Soumen Sen, J.)