

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

BEFORE

HON'BLE SHRI JUSTICE VIVEK JAIN

AC No. 150 of 2024

M/S HEWLETT PACKARD ENTERPRISE INDIA PRIVATE LIMITED

Vs

BHOPAL SMART CITY DEVELOPMENT CORPORATION LIMITED

Appearance:

*Ms. Prashasthi Bhat and Shri Mallikarjun Khare - Advocates for petitioner.
Shri Anuj Shrivastava and Shri Siddharth Sharma - Advocates for respondent.*

(O R D E R)

**(Reserved on :27/01/2026)
(Pronounced on: 31/03/2026)**

The present petition has been filed under Section 11 of Arbitration and Conciliation Act 1996 ("Act of 1996" for short) for appointment of arbitrator in terms of Clause 24 of Master Service Agreement (MSA) for adjudicating the disputes between the applicant and the respondent.

2. The counsel for the petitioner has vehemently argued that MSA was executed on 07-12-2017 between the petitioner and Bhopal Smart City Development Corporation Limited (BSCC for short). It is contended that the agreement was executed in pursuant to an inter-city agreement executed between 5 SMART City Corporations as well as 2 Municipal Corporations in the State of Madhya Pradesh. This agreement was executed on 09-10-2017 in terms of which a single agency was to be employed by BSCC (i.e. Bhopal Smart City Development

Corporation) to provide IT related services, i.e. providing Cloud based common Integrated Data center and disaster recovery center for SMART Cities of Madhya Pradesh. It is contended that when a notice for arbitration was given to the respondents, then the respondents have unilaterally appointed one arbitrator from their side who is the Commissioner, Urban Administration and Development Department, State of Madhya Pradesh and though the arbitration clause contemplates arbitration by three member Tribunal, but the Commissioner Urban Development Department of the State of Madhya Pradesh being a party to the agreement cannot act as arbitrator even on behalf of BSCC because he is having interest and these interests are such that are hit by 7th schedule to Act of 1996. Therefore, since an arbitrator needs to be impartial and even if it is appointed by one of the parties in a three member tribunal, then also there will be no distinction between the presiding arbitrator and a arbitrator representing one party in the arbitration proceedings. As per Section 12(5) of Act of 1996, there is a requirement that even the party appointed arbitrator in three member Tribunal should be independent and impartial and therefore the respondent erroneously appointed a hand-picked arbitrator who is the Commissioner, Urban Development Madhya Pradesh under which all the smart city development projects are being executed. Hence, the Commissioner cannot act as arbitrator even on behalf of one of the parties to the contract.

3. On these grounds, it is prayed that this court should appoint an impartial sole arbitrator because the manner in which the respondents have proceeded to appoint

a highly interested person and in fact, the Commissioner of State Government of the Department which is supervising smart city projects as its arbitrator, then the arbitration clause as contemplated in the agreement has become non-starter and the present case is the fit case to appoint sole arbitrator by this court.

3. *Per contra*, it is vehemently contended by counsel for the respondents that the arbitration clause in the agreement in question i.e. Clause 24.7 itself contemplates that the MD of MPUDC or the Commissioner of UADD will be the arbitrator from BSCC and therefore what has been done by the respondents is strictly in accordance with the contract and no exception can be raised to that.

4. It is further contended that even the Commissioner UADD cannot be treated to be an interested person and if the petitioner contends that Commissioner UADD is the interested person, then it would be a disputed question of fact which has to be raised in accordance with Section 13 of Act of 1996 and therefore, remedy can be availed under Section 13 of Act of 1996 and straight away jumping to this court to get appointment of an arbitrator is not the proper course of action which was available to the petitioner. On these assertions the present petition is prayed to be dismissed and it is prayed that the petitioner be asked to nominate its arbitrator and both the arbitrators will then nominate a third and presiding arbitrator and it is the petitioner who has not carried out its obligations under the agreement and has unnecessarily filed this application before this court.

5. Heard.

6. In the present case the arbitration clause in MSA is as under:-

“24.7 Except as otherwise provided elsewhere in the Contract if any dispute, difference, question or disagreement arises between the parties hereto or their respective representatives or assignees, at any time in connection with construction, meaning, operation, effect, interpretation or out of the Contract or breach thereof the same shall be referred to a Tribunal of three (3) Arbitrators, constituted as per the terms of and under the (Indian) Arbitration and Conciliation Act, 1996. MD of MPUDC or the Commissioner of UADD will be the Arbitrator from BSCDCL in this case. One arbitrator shall be appointed by MSI and the two arbitrators shall appoint a third arbitrator.

24.8 In case, a party fails to appoint an arbitrator within 30 days from the receipt of the request to do so by the other party or the two Arbitrators so appointed fail to agree on the appointment of third Arbitrator within 30 days from the date of their appointment upon request of a party, the Chief Justice of the Madhya Pradesh High Court or any person or institution designated by him shall appoint the Arbitrator/Presiding Arbitrator upon request of one of the parties.”

7. In the present case there are two sets of agreements. One agreement is an Master Service Agreement (MSA) executed between the petitioner and BSCC. On the other hand there is another agreement which is executed between five smart city corporations of Madhya Pradesh i.e. Bhopal, Indore, Jabalpur, Ujjain and Gwalior as well as Sagar Municipal Corporation and Satna Municipal Corporation. As per this agreement which is captioned as “Inter City agreement” (or “ICA” for short), apart from the five smart city corporations and two municipal corporations, the eighth party is the Directorate of Urban Administration and Development (UADD) represented through its Commissioner. Therefore the Commissioner UADD is a party to the Intercity agreement dated 09-10-2017. There is interplay between intercity agreement and master service agreement. Though the petitioner is not party to the intercity agreement and is party only to the master service agreement, but it is clearly provided that BSCC would be the designated authority on behalf of all the urban local bodies and the smart cities which are party to intercity agreement and the BSCC would be lead member of the

intercity agreement who would select one private entity to appoint as MSI and would monitor the performance of the MSI. The petitioner is MSI i.e. Master System Integrator. Clause 3.1 of the intercity agreement reads as under.

“3.1 It is agreed between the Parties that the contractual documents including Tender documents, RFP issued for selection of private entity for the Project shall reflect that BSCDCL along with City SPV/ULB is responsible to appoint the MSI and City SPV/ULB is responsible monitor the performance of the MSI at city level under the contractual arrangements. Accordingly, the other Parties to this Agreement do hereby nominate BSCDCL as the Lead Member who shall be responsible to undertake all necessary activities including those set out in this Clause for implementing the Project in accordance with the requirements and other applicable provisions of law and guidelines issued by Government of, India /Government of Madhya Pradesh from time to time in consultation/ agreement with other City SPVs/ULBs.”

8. Therefore, there being a strong interplay between intercity agreement and master service agreement and Commissioner UADD being a party to intercity agreement, therefore the Commissioner UADD obviously becomes affected by 7th Schedule to Act of 1996 which is as under.

“7. Arbitrator's relationship with the parties or counsel.

- 1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.*
- 2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.*
- 3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.*
- 4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.*
- 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.*
- 6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.*
- 7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties or an affiliate of one of the parties.*
- 8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.*
- 9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.*

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

11. The arbitrator is a legal representative of an entity that is a party in the arbitration.

12. The arbitrator is a manager, director or part of the management. or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.

Arbitrator's direct or indirect interest in the dispute

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.”

9. The Commissioner UADD therefore has a direct involvement in the case and has a direct interest in the dispute, he being Officer of State of Madhya Pradesh and being Commissioner UADD and being party to the Intercity agreement and therefore becomes a passive party to the master service agreement also. Therefore his appointment is hit by 7th schedule as well as Section 12(5) of Act of 1996, unless waived by the petitioner, that has not been done.

10. So far as the argument before this court that Commissioner UADD is named as arbitrator on behalf of BSCC in the agreement Clause 24.7, no doubt such a agreement clause is there, but as has been held recently by the Constitution Bench in the case of **Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)**, reported in 2024 SCC online SC 3219, such appointment of arbitrator cannot be given stamp of approval. Hence, relegating the parties to raise

objection as to competence under Section 13 would be empty formality and would only delay the arbitral proceedings. In ***Central Organization for Railway Electrification (supra)***, the Hon'ble Supreme Court has held as under:-

“47. 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. The proviso secures "real and genuine party autonomy" by allowing parties to waive the applicability of Section 12(5).

116. Section 12(5) automatically disqualifies any person whose relationship with the parties or counsel or subject-matter of the dispute falls under any of the categories mentioned under the Seventh Schedule. The categories listed in the Seventh Schedule in essence denote situations where an arbitrator might have a pecuniary, proprietary, or cause-based interest in the arbitration. For instance, employees of either of the parties are barred from acting as an arbitrator because they have an immediate financial and cause-based interest in the arbitration. If such an employee is appointed as an arbitrator, they would be sitting as a Judge in their cause because they have a pecuniary interest in the outcome of the case.

120. The categories mentioned under the Seventh Schedule are such that it is difficult to distinguish the interests of an arbitrator from those of a party to which an arbitrator is connected. In such cases, the issue is whether the outcome of the arbitration will realistically affect the arbitrator's interests. The law prioritises the objective criterion of independence over the subjective criterion of impartiality. Once it is established that an arbitrator falls under any of the categories mentioned in the Seventh Schedule, they are automatically disqualified without any investigation into whether or not there is any real likelihood of bias. Since the ineligibility envisaged under Section 12(5) goes to the root of the appointment, an application may be filed under Section 14(2) of the Arbitration Act to the Court to decide on the termination of the arbitrator's mandate.”

11. The Commissioner UADD even cannot delegate another arbitrator because the Commissioner UADD has become ineligible to act as arbitrator by virtue of the 2015 amendment whereby 7th schedule has come into force as well as Section 12(5) as it now stands has come into force. Therefore, in view of judgement of the Hon'ble Supreme Court in case of ***TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377*** as also ***Central Organisation for Railway Electrification (supra)***, the appointment of commissioner UADD as

arbitrator cannot be recognised by this Court and it cannot be inferred that the respondents have acted in accordance with terms of the contract by appointing Commissioner UADD as their arbitrator.

12. The respondents could have appointed some other independent and impartial person as their arbitrator because independence and impartiality is not required only of third arbitrator in a three members arbitral tribunal, but each and every arbitrator needs to be independent and impartial.

13. It would have been different matter if before this court atleast, the respondents had expressed any willingness to appoint some other independent and impartial person as their arbitrator, but they have only defended the appointment of Commissioner UADD as their arbitrator.

14. Therefore in the considered opinion of this court, the mechanism as provided in Clause 24.7 of the contract has failed and it is a fit case where this court should step in by exercising its jurisdiction under Section 11(6) in terms of Clause 24.8 of the agreement and appoint a sole arbitrator to adjudicate the disputes between the parties.

15. Therefore, this Court appoints **Shri Justice K.K. Lahoti, former Acting Chief Justice, M.P. High Court as sole arbitrator** to adjudicate the dispute between the parties.

16. The parties shall appear before the learned sole arbitrator firstly on 16.4.2026, and thereafter, as may be directed by the learned Arbitrator.

17. The Registrar Judicial shall obtain necessary consent and disclosure of the arbitrator within 10 days and in case the learned arbitrator fails to give consent and disclosure as per the Act of 1996, then the matter will be listed under the head “directions” on 15.4.2026. If consent and disclosure is received, then the matter shall be treated as disposed of.

18. With the aforesaid, the petition stands *allowed and disposed of*.

(VIVEK JAIN)
JUDGE

MISHRA