OCD –13

ORDER SHEET

AP-COM/559/2025

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

M/S. NATIONAL PROJECT CONSTRUCTION (NPCCL)

VS

MILITARY ENGINEER SERVICES (MES)

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 29th July, 2025.

Appearance:

Mr. DebajyotiBasu,Sr.Adv.
Mr. DiptomoyTalukder, Adv.
Mr. Dibyendu Ghosh, Adv.
.... for the petitioner
Mr. BishwambherJha, Adv.
Mr. H.K. Jha, Adv.
Ms. Munmun Mishra, Adv.
...for the respondent

The Court: This is an application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act).

The respondent floated a notice inviting tender for the job of Building and Structure works, Site Clearance, area development, earth work and also excavation, internal electrification etc. The petitioner participated in the said tender process.

The petitioner prays for appointment of an arbitrator under Clause 70 of the General Conditions of Contract(in short GCC). The clause provides that all disputes between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding), shall, after written notice by either party to the Contract, to the other of them, be referred to the sole arbitration of a [Serving Officer having degree in Engineering of equivalent or having passed final/direct final Examination of sub-Division II of Institution of Surveyor (India) recognized by the Govt. Of India]. The clause provides that unless both parties agree in writing to such reference, the reference shall not take place until after completion or alleged completion of the Works or termination or determination of the Contract under Condition Nos. 55, 56 and 57. It also provides that in case of abandonment of the Works or cancellation of the Contract under Condition Nos. 52, 53 and 54, such reference shall not take place until alternative arrangements have been finalized by the Government to get the Works completed by or through any other Contractor or Contractors or Agency or Agencies.

Mr. Basu, learned senior advocate submits that the contract has been terminated. Thus this is not a case which will be covered by the exception to Clause 70. It is further contended that Courts situated at the place from which the tenderwas accepted or where the work was to be executed, shall have jurisdiction. Clause 72 of the GCC is referred to. It is submitted that the tender was accepted at Kolkata and Letter of Award (LOA) was issued from Kolkata. Reliance has been placed on Clause 9 of the NIT and Appendix A, in support of the contention that the office of the tender issuing and accepting authority was in Gurusaday Road, Kolkata.

It is next contended by the petitioner that disputes and differences arose between the parties with regard to the execution of the work and lastly when the contract was terminated. The respondent did not accept foreclosure as prayed for by the petitioner. Reference was made to the letter dated July 24, 2024 in support of the contention that several letters had been exchanged between the parties between November 15, 2023 and July 19, 2024 on the disputes and differences. The petitioner participated in the tender process and was selected. The LOA was issued on November 16, 2023. A contract was executed between the parties which contemplated diverse terms and conditions and also included Clause 70 of the General Conditions of Contract (GCC) which was the arbitration agreement. Clause 28 of the Special Conditions of Contract (SCC) provided for resolution of the dispute by the Dispute Resolution Board. Both the GCC and SCC were made applicable to the concerned agreement between the parties.

The allegations of the petitioner are that the work could not be started on time due to the breach committed by the respondent. The work could not be completed on time because the respondent had failed to issue contemporaneous documents like drawings, designs and dimensions etc. From the very beginning the respondent committed several laches, negligence and breaches of the contract. The respondent also threatened to terminate the contract. The petitioner was allegedly compelled to accelerate the date of completion to December 8, 2024. Finding no other alternative, the petitioner had approached the authority for foreclosure. Further submission is that a nominal amount was paid to the petitioner for the preparatory work.The subject work could not be executed in the manner contemplated under the contract, in view of non availability of the structural drawings and designs.

Mr. Jha, learned advocate for the respondent denies the allegations of the petitioner. He submits that the petitioner did not even start the work. The entire breach was on the part of the petitioner. He prays for dismissal of this application on the ground that the application is premature.Clause 28 of the SCC provides that for resolution of any dispute,the aggrieved party was required to approach the Dispute Resolution Board (DRB). The DRB was to be constituted by the Chief Engineer, Eastern Command Kolkata at the request of the party seeking resolution of the dispute by the dispute resolution mechanism provided under SCC. Mr. Jha submits that it was the incumbent duty of the petitioner to first approach the authority for constitution of the DRB and seek resolution of the dispute before the DRB. Only after the DRB was constituted, and the decision was given by the said Board, the party aggrieved could invoke arbitration as per Clause 70 of the GCC. The petitioner invoked arbitration without complying with the provisions of Clause 28 of the SCC.

Mr. Jha pointed out that Clause 70 of the GCC provides that the arbitrator shall be a serving officer having degree in Engineering or equivalent or having passed final/direct final Examination of sub-Division II of Institution of Surveyor (India) recognized by the Govt. of India and to be appointed by the authority mentioned in the tender document. Thus under no circumstances could the petitioner come to Court for reference of a dispute to an independent arbitrator. The petitioner signed the contract with his eyes and ears open and was bound by the terms and conditions thereof. Mr. Jha submits that settlement of disputes duringthe execution of the works or after completion or after determination/cancellation/termination of the contract must be attempted through the DRB, to be constituted by the Chief Engineer, Eastern Command Kolkata. Only in case of disagreement with the decision of the DRB,any party could invoke arbitration.

Heard the parties.The constitution of the DRB has been provided under Clause 28.1(a) and (b) of the SCC. Clause 28.1(b) provides the names of Chairman and members of DRB, shall be notified by the Accepting Officer within one month from the date of acceptance of the contract. In this case, it is submitted that no such composition of the DRB had ever been notified. Thus, the provision of clause 28 will not be a bar for the petitioner to invoke arbitration and to approach this Court for appointment of an arbitrator. Reference is further made to the order passed by the learned Commercial Court at Alipore under Section 9 of the Arbitration and Conciliation Act. The existence of the arbitration clause was never in dispute.

The parties had a meeting on August 20, 2024 and after due deliberation, the Chief Engineer Eastern Command directed as follows :

"4. (a) The misquoting of work by the firm is accepted by them. The difference of L1 and L2 amount was known to them before acceptance and submission of Performance Guarantee. The firm is a reputed Govt. PSU, has participated in the bid after due deliberation. The case of non workable rates was highlighted after 06 month which is not acceptable.

(b) The redesign of foundation is not agreed as it was designed by a Consultant, checked at HQ Chief Engineer Kolkata Zone and vetted by IIT Guwahati. In any case, if it is redesigned to shallow foundation, the financial effect between pile foundation and shallow / raft foundation shall be recovered. There is no considerable savings to the firm M/s NPCC.

(c) Foreclosure of contract under condition 57 of the GCC (IAFW-2249) is applicable where the Govt. (User) no more enquires the project. In this case, this clause is not operative and not acceptable.

(d) The Performance Guarantee submitted by the firm shall be forfeited immediately after cancellation of contract under Condition 19 of GCC (IAFW-2249). There is no consideration for releasing the PG being Govt. Dept. The firm M/s NPCC can represent the case through concerned Ministry for its consideration.

(e) During the discussion it came out that NPCC has invited bid for this work on similar lines and awarded the work to a Contractor. Command CE pointed out that this reflects that neither NPCC nor their Contractor carried out any due diligence by studying the drawings of the project and estimating the cost. NPCC may forfeit the PSD of their Contractor. There is no way ahead for continuance of the contract except cancellation.

5. Considering the points above, CEEC, i.e., NHEA directs to cancel the contract after completing the procedure as per Para 21.8.1 of Manual on Contract 2020."

It appears that according to the respondent, no other option was left to it but to cancel the contract. Thus, no useful purpose will be served, by relegating the matter to the DRB which comprises of officers of the respondent itself. The decision was communicated on September 4, 2024 on behalf of the Chief Engineer. On October 5, 2024 the petitioner wrote a letter to the DRB through proper channel, inter alia, disagreeing with the decision dated August 20, 2024. The Chief Engineer, Kolkata Zone Headquarters informed the petitioner that the decision was not taken by the DRB but by the accepting officer. By a letter dated November 6, 2024, petitioner was asked to approach the DRB. The constitution of the DRB was informed to the petitioner for the first time by the said letter. An internal communication dated October 23, 2024 has been shown to the Court which is annexed to the application.Itreflects that the DRB was constituted, but a direction was made that, all the Court cases should be fought vigorously so that the stay order would be vacated and the authority could proceed to cancel the contract. Having considered the above documents which are already on record, this Court is of the view that the authority had already made up its mind to cancel the contract before constitution of the DRB and before referring the composition of the DRB to the petitioner. Clause 28 provides that the composition of the DRB should be informed within a month from the execution of the contract, but in this case though the disputes cropped up in 2023, until November 6, 2024no such DRB was constituted.

Under such circumstances, in my, prima facie view, Clause 28 was definitely not treated to be a mandatory clause by the authority itself. Secondly, from the internal communication, it appears that the Eastern Command had clearly instructed theChief Engineer that the Court cases filed by the petitioner should be vigorously opposed and the stay order should be lifted so that the contract can be cancelled. Under such circumstances, sending the matter back to the DRB constituted by the said authority, will be an empty formality. By a letter dated 13th June, 2025, the contract ultimately stood cancelled and terminated. Even before the petitioner had the opportunity to approach the DRB upon receiving the letter dated November 6, 2024, the contract was cancelled.In view of the decisions in***Demerara Distilleries Private Limited and Anr. vs. Demerara Distillers Limited*** : ***(2015) 13 SCC 610*** and ***Visa International Limited vs. Continental Resources (USA) Limited*** : ***(2009) 2 SCC 5,*** this Court holds that in the factual background of this case and the latest decision adopted in the meeting held on August 20, 2024, this is not a case which can be resolved by the DRB.The DRB is not in a position to take an independent decision.

This is a, prima facie, observation and the contentions of Mr. Jha that the disputesdo not become arbitrable until the DRB decides the matter, can be raised before the learned arbitrator.The learned arbitratorcan rule on his own jurisdiction, which includes rendering a decision with regard to arbitribility. With regard to the claim of the petitioner, which Mr. Jha says to be superfluous and without any fundamental basis,an objection can be raised before the learned arbitrator. With regard to the contention of Mr. Jha that the respondentmust appoint the arbitrator, this court holds that the same is not permissible in law.

An authority of the respondent cannot appoint the sole arbitrator under Clause 70 of the GCC. This Court holds that this mechanism is no longer good law as the same will be barred under Section 12(5) of the arbitration and conciliation Act, 1996. Reference is made in this regard to***Perkins Eastman Architects DPC and Another vs. HSCC (India) Ltd. ; 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.*** Unilateral appointment of an arbitrator by one of the parties from its own panel of arbitrators or from its own employees is contrary to law.

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

“73. The 2015 amendment has introduced concrete standards of impartiality and independence of arbitrators. One of the facets of impartiality is procedural impartiality. Procedural impartiality implies that the rules constitutive of the decision-making process must favour neither party to the dispute or favour or inhibit both parties equally.137 Further, a procedurally impartial adjudication entails equal participation of parties in all aspects of adjudication for the process to approach legitimacy.138 Participation in the adjudicatory process is meaningless for a party against whom the arbitrator is already prejudiced.139 Equal participation of parties in the process of appointment of arbitrators ensures that both sides have an equal say in the establishment of a genuinely independent and impartial arbitral process.

74. Under Sections 12(1) and 12(5), the Arbitration Act recognises certain mandatory standards of independent and impartial tribunals. The parties have to challenge the independence or impartiality of the arbitrator or arbitrators in terms of Section 12(3) before the same arbitral tribunal under Section 13.140 If the tribunal rejects the challenge, it has to continue with the arbitral proceedings and make an award. Such an award can always be challenged under Section 34. However, considerable time and expenses are incurred by the parties by the time the award is set aside by the courts. Equal participation of parties at the stage of the appointment of arbitrators can thus obviate later challenges to arbitrators.

75. Independence and impartiality of arbitral proceedings and equality of parties are concomitant principles. The independence and impartiality of arbitral proceedings can be effectively enforced only if the parties can participate equally at all stages of an arbitral process. Therefore, the principle of equal treatment of parties

applies at all stages of arbitral proceedings, including the stage of the appointment of arbitrators.

* * *

124. The doctrine of bias as evolved in English and Indian law emphasizes independence and impartiality in the process of adjudication to inspire the confidence of the public in the adjudicatory processes. Although Section 12 deals with the quality of independence and impartiality inherent in the arbitrators, the provision's emphasis is to ensure an independent and impartial arbitral process."

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. EnergoEngg. 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. EnergoEngg. 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.

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. 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 (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:

'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'.

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…"

Accordingly, the application is disposed of by appointing Hon'ble Justice Debasish Kar Gupta, former Chief Justice of the High Court at Calcutta as the sole arbitrator, to arbitrate upon the dispute between the parties. All questions are left open to be decided by the learned arbitrator.

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.)

TR/