

OCD 4

ORDER SHEET
AP-COM/762/2025
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

ITD ITD CEM JOINT VENTURE
VS
KOLKATA METRO RAIL CORPORATION LTD

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 11th November, 2025.

Appearance:
Mr. Anal Kumar Ghosh, Adv.
Ms. Neelina Chatterjee, Adv.
Ms. Nilanjana Adhya, Adv.
...for the petitioner

Mr. Jishnu Chowdhury, Sr. Adv.
Mr. Aritra Basu, Adv.
Mr. Aniket Dey, Adv.
Mr. Atri Mandal, Adv.
...for the respondent

The Court:

1. This is an application for appointment of a learned Arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act). The petitioner submits that the procedure prescribed in the General Conditions of Contract has failed, inasmuch as, Clause 17.9(a) provides that a tribunal comprising of three arbitrators shall settle the dispute where the total claim is above Rs.5

million and such arbitral tribunal would have to be constituted from a panel to be supplied by the respondent.

2. According to the petitioner, the law laid down by the Hon'ble Apex Court in the matter of ***Central Organisation for Railway Electrification vs. ECI SPIC SMO MCML (JV) A joint Venture Company*** reported in ***(2025) 4 SCC 641*** prohibits unilateral appointment and also appointment of arbitrators from a panel curated by an interested party. According to the Hon'ble Apex Court, unilateral appointment is contrary to Section 18 of the said Act. Equal participation in an arbitral proceeding envisages equal say in the matter of appointment of an arbitrator. The Apex Court was of the view that the arbitration clause which mandated that a party seeking reference of dispute to arbitration was bound to select its arbitrators from a curated panel of the other party was prohibited in law. Such appointment would be unequal treatment of the parties and prejudicial to the interest of one. Under such circumstances, the contention of the petitioner is accepted to be correct and the petitioner has rightly approached this Court under Section 11(6) of the said Act for constitution of the arbitral panel.
3. Mr. Chowdhury, learned senior advocate appearing for the respondent submits that the petitioner had requested reference of the dispute to a panel to be selected by the respondent and as such, the petitioner was bound by such request. Accordingly, before the earlier bench, a suggestion was made by Mr. Chowdhury that a panel of ten arbitrators would be provided to the petitioner and the petitioner would have a

larger choice. It appears that the Acting Chief Justice had recorded that the panel would consist of people from different fields and retired Judges as potential arbitrators. From the panel that has been submitted before the Court, the Court finds that apart from one learned retired Judge, of the Allahabad High Court who is stationed outside Kolkata, all other members of the suggested panel are ex-employees of the railways. Thus, such a panel is unworkable.

4. This Court does not agree with Mr. Chowdhury's submission that once the petitioner had requested for constitution of the arbitral tribunal, the petitioner had given up the right to approach this Court for such appointment. This is not the correct approach. The applicability of the provision of Section 12(5) of the said Act can only be waived by the written agreement executed between the parties.
5. Under such circumstances, the petitioner has raised an objection on the ground that, relegating the matter to a tribunal comprising of railway officers would defeat the very purpose of Section 12(5) of the Arbitration and Conciliation Act, 1996 read with Schedules V and VII. This Court is not required to decide whether the panel submitted by Mr. Chowdhury is an independent panel or not. The question is whether an arbitral tribunal should be constituted from a curated panel prepared by one of the interested parties. This is not permissible in law. The ratio of the decision of the Hon'ble Apex Court in ***Central Organization for Railway Electrification (supra)*** is quoted below:-

“J. Conclusion

170. *In view of the above discussion, we conclude that:*

170.1. *The principle of equal treatment of parties applies at all stages of arbitration proceedings, including the stage of appointment of arbitrators;*

170.2. *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;*

170.3. *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;*

170.4. *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 is unequal and prejudiced in favour of the Railways;

170.5. *Unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution;*

170.6. *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*

170.7. *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.*

171. *The reference is answered in the above terms.*

172. *Pending application(s), if any, shall stand disposed of.”*

6. The prescribed procedure has failed. This Court allows the application. The respondent has nominated Mr. Akhil Agarwal, Ex-Director General (Signal & Telecom), Railway Board as its nominee. The petitioner is to supply the nominee within i.e. 13.11.2025. Accordingly, the third

presiding arbitrator shall be decided by the court on 13.11.2025. List the matter on 13.11.2025.

(SHAMPA SARKAR, J.)