

OCD 10

ORDER SHEET
AP-COM/34/2026
IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

M/S. GOURIKA INDIA LIMITED
VS
ENGINEERING PROJETS (INDIA) LIMITED AND ANR.

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 3rd February, 2026.

Appearance:
Mr. Arik Banerjee, Adv.
Mr. Rajib Mullick, Adv.
Ms. Ayantika Saha, Adv.
Mr. Subham Chatterjee, Adv.
Ms. R. Sen, Adv.
...for the petitioner

Mr. Arnab Chakraborty, Adv.
Mrs. Pragya Bhowmick, Adv.
Ms. Rimi Mandal, Adv.
...for the respondent no.1

Mr. Anuran Samanta, Adv.
Mr. Asit Kumar De, Adv.
...for the respondent no.2

The Court:

1. Affidavit of service is taken on record.
2. This is an application for appointment of an Arbitrator on the strength of Clause 76 of the General Conditions of Contract (GCC). A tender was floated by the respondent no.1 inviting bids from various sub-contractors for execution of the work which were allotted to the

respondent no.1, by the respondent no.2. The petitioner claims to have been duly allocated the work for supply of certain items to the respondent no.2 through the respondent no.1.

3. Upon award of the work, the respondent no.1 and the petitioner entered into a formal agreement dated February 1, 2024. The contract value was Rs.4,79,26,912/-. The schedule date for completion of the work allotted was six months, to be reckoned from expiry of seven days from the issuance of the Letter of Intent (LOI). The petitioner contends to have effected delivery of seven items out of the 11 items stipulated in the Letter of Intent dated December 18, 2023. The respondents, however, rejected three of those items and the petitioner submits that the payments with regard to such delivery of the items were not made in full. Several R/A Bills were raised by the petitioner, which were partially paid and it is the specific contention of the petitioner that withholding of the remaining payment was illegal and contrary to the provisions of the contract.
4. Learned advocate for the railway authorities submits that the dispute is between the petitioner and the respondent no.1 and the railway was not a signatory to the agreement between the parties. Learned advocate for the respondent no.1 also submits that there is a misjoinder of the parties, as the railway is not a necessary party. Moreover, the dispute and differences which have been raised by the petitioner are false and frivolous. The railway authority was not concerned with the agreement between the parties and as such the arbitration clause in the GCC cannot be invoked.

5. Having considered the rival contentions of the parties, this Court finds that there is a subsisting dispute between the petitioner and the respondent no.1. The petitioner was required to supply articles to respondent no.1, which were to be used by the railway. The payment was to be directly made by the railway as alleged by the petitioner. Under such circumstances, whether the conditions of GCC will apply and whether the railway is a necessary party, who is interlinked or interconnected with the entire transaction is a matter of evidence which will be decided by the learned arbitrator. The respondent no.1 and the respondent no.2 shall be entitled to raise the objection with regard to misjoinder of parties before the learned arbitrator which the learned arbitrator has the jurisdiction to decide. The issue of non-applicability of clause 76 of the GCC will also be raised before the learned Arbitrator.
6. All objections that are available to the respondents with regard to the jurisdiction of the arbitrator, the arbitrability of the issues, the admissibility of the claim, limitation etc. are left open, to be raised before the learned Arbitrator and the learned arbitrator shall decide all such objections, if raised.
7. The application is allowed. As the GCC provides for unilateral appointment, the said mechanism has failed. Unilateral appointment is not permissible in law. Reference is made to the following decisions :-
 - (i) ***Perkins Eastman Architects DPC and Another vs. HSCC (India) Ltd. ; 2019 SCC OnLine SC 1517;***

(ii) **Central Organisation for Railway Electrification vs. ECI SPIC SMO MCML (JV) A Joint Venture Company : 2024 SCC OnLine SC 3219.**

The relevant paragraphs of **Perkins Eastman (supra)** are quoted below:-

“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.

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...”

In the decision of **Central Organization for Railway Electrification** (*supra*) the Hon’ble Apex Court ultimately discussed the pros and cons of unilateral appointment and held thus:-

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

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

b. 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;

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;

d. 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 (supra) is unequal and prejudiced in favour of the Railways;

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

f. 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 iudex* rule; and

g. 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.”

8. Thus, the petitioner has rightly approached this Court for appointment of an arbitrator. The petitioner invoked the arbitration for resolution of the dispute by a letter dated November 17, 2025.
9. Under such circumstances, the Court appoints Hon’ble Justice Samapti Chatterjee, a former Judge of this High Court, as the learned Arbitrator, to arbitrate upon the disputes between the parties. This appointment is subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall fix her own remuneration as per the Schedule of the Act.

10. AP-COM/34/2026 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)