

OCD 8

ORDER SHEET
AP-COM/1015/2025
IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

MINA ROY
VS
GENERAL MANAGER, SOUTH EASTERN RAILWAY,
KHARAGPUR AND ORS.

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 29th January, 2026.

Appearance:
Mr. Shashwat Nayak, Adv.
Ms. Akanksha Mukherjee, Adv.
Mr. Sumit Biswas, Adv.
Ms. Rajashree Bhowmick, Adv.
...for the petitioner

Mr. Siddhartha Bhattacharyya, Adv.
Mr. Srikumar Chakraborty, Adv.
...for the respondent

The Court:

1. The petitioner prays for appointment of an Arbitrator for adjudication of the dispute which arose out of an e-tender process and alleged termination of the said work order. The petitioner participated in a tender process and was declared as the L-1 bidder. The Letter of Acceptance was issued by the respondents on August 30, 2024. The total contract value was Rs.36,00,781.4/-. On the same date, the work order was issued, for execution of the work mentioned in the said tender under the KGP Division.

2. The petitioner duly furnished a performance guarantee vide Demand Draft No.689239 dated September 17, 2024 for an amount of Rs.1,80,040/-. The petitioner's specific contention is that the petitioner was always ready and willing to execute and complete the work in terms of the work order, but the respondents failed to comply with their contractual obligations, inter alia, by not providing site clearance and by not making available the requisite materials that were necessary for execution of the work. The petitioner contends to have issued various representations calling upon the respondents to discharge their obligations.
3. On June 16, 2025, the petitioner submitted a representation seeking extension of the validity period of the contract beyond June 30, 2025. Instead, to the utter shock and surprise of the petitioner, the respondents issued a termination letter dated September 12, 2025 purporting to unilaterally and illegally terminate the contract without assigning any reasons. According to the petitioner, the said termination was *de hors* the provisions of the GCC and was *ex facie* illegal and unsustainable in law. By a reply dated September 18, 2025, the petitioner pointed out that the purported termination was unlawful, arbitrary, unilateral and in flagrant violation of the contractual provisions. Another termination notice was issued on September 26, 2025 calling upon the petitioner to reply within ten days. The petitioner alleges that the reply of the petitioner was not considered in its proper spirit.

4. The tender document contains an arbitration clause which has been embodied in Clause 64(1) of the General Conditions of Contract (GCC), 2022. It provides that in the event of any dispute or difference between the parties as to the construction or operation of the contract, or the respective rights and liabilities of the parties arising out of the contract, the contractor shall demand in writing for reference of the dispute to arbitration. The clause also provides that if the contractor had approached the General Manager or any other person who performed the duties of the General Manager under the GCC, then the contractor may demand reference to arbitration in writing after the period of 120 days had expired and no resolution of the dispute had taken place.
5. Mr. Nayak, learned advocate for the petitioner submits that determination of contract in this case is not an excepted matter, inasmuch as, Clause 61(1) provides that the respondents shall be entitled to determine and terminate the contract if the respondents are of the opinion that the cessation of the work became necessary owing to paucity of funds or from any other cause whatsoever. In such a situation, the value of the approved materials at site and the work done by the contractor would be paid in full and at the rates specified in the contract. In the first termination letter dated September 12, 2025, the railway authorities relied on the said clause and determined the contract. Thus, the petitioner submits that the consequence of such determination is arbitrable, as the petitioner has not been paid the value of the approved materials which were already stocked for the

purpose of execution of the work. Moreover, the petitioner also has a claim in liquidated damages for the inability of the railway authorities to deliver the site on time and for sudden determination without any consultation with the petitioner. The petitioner had submitted a performance guarantee, which was not returned.

6. The learned advocate for the railway authorities submits that the last notice invoking arbitration was received on December 30, 2025 and the application has been filed before this Court before the expiry of the thirty days from receipt thereof. He further submits that the GCC provides that the Arbitral Tribunal will be constituted by a particular officer of the railways. Thus, adequate time was not given to the railways to perform their role under the said GCC by constituting the Arbitral Tribunal from the panel maintained by the respondents.
7. With regard to the issue as to whether the dispute falls within excepted matter, this Court finds that apart from the challenge to the termination of the contract, the petitioner has other claims towards non-payment of the value of the approved materials which had been mobilized by the petitioner for execution of the work. In this case, the termination was not for non-performance or for any breach committed by the petitioner, but in exercise of power conferred upon the railways under Clause 61(1) of the GCC. The petitioner has claims in damages and for return of the performance guarantee. Thus, these disputes have to be resolved by an Arbitrator. Whether the dispute falls under excepted matters, will also fall within the domain of the arbitrator. Secondly, the petitioner

approached the Senior Divisional Electrical Engineer and made various representations for resolution of the dispute by a conciliation. The authorities did not take any steps and did not respond to the request of the petitioner for withdrawal of the termination and continuation of the project.

8. Under such circumstances, this Court does not hesitate to hold that the chances of conciliation never existed and referring the matter back for conciliation will be an empty formality. Reference is made to the decisions of ***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***.
9. With regard to the contention of the railways that the petitioner approached this Court without waiting for thirty days, this Court finds that the last notice invoking arbitration was issued on November 5, 2025 and the same was sent by email on the same day. The application was filed before this Court on December 23, 2025. However, records reveal that the first notice invoking arbitration was issued on October 23, 2025 and the same was received by the railway authorities. Pursuant to the said notice, the railway authorities asked the petitioner to submit certain details and item wise claim, inter alia, stating that the demand was not valid as per GCC.
10. Under such circumstances, the objection that this application is premature, is not accepted. The other contentions of the railway

authorities that the demand was not made in proper form and that the authority did not have the opportunity to constitute the tribunal are also not accepted. The law is well settled that, unilateral appointment of an arbitrator by a person or authority who himself cannot act as an arbitrator is prohibited under the law.

11. Reference is made in this regard to ***Perkins Eastman Architects DPC and Another vs. HSCC (India) Ltd. reported in 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.
12. 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 rationale 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...”

13. Clause 64(1)(i) provides as follows:

*“**64(1)(i)**: In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the Contractor may claim to be entitled to, **or** if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the “excepted matters” referred to in Clause 63.1 of these Conditions, the Contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.”*

14. The expression ‘or’ in the 7th line should be read as disjunctive and as such, there is no bar for the petitioner to approach the authority, by demanding reference to arbitration even without approaching any other authority, or waiting for a decision from the conciliator.

15. In ***Vidya Drolia and Others Vs. Durga Trading Corporation*** reported in ***(2021) 2 Supreme Court Case 1***, the Hon'ble Apex Court was of the opinion that issues arising out of the contract, its existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. Whether the disputes fell within exempted or excluded matters were also questions touching the arbitrability of the dispute and the jurisdiction of the learned arbitrator. Those should be decided at the appropriate stage.
16. Further reference is made to the decision of ***National Insurance Company Limited Vs. Boghara Polyfab Private Limited*** reported in ***(2009) 1 Supreme Court Cases 267***, on the same proposition.
17. Under such circumstances, this application is allowed. The objection of the respondents are left open, and to be decided by the learned Arbitrator.
18. Accordingly, the Court appoints Mr. Sourojit Dasgupta, learned Advocate (Mob. No.8697542775), as the 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 his own remuneration as per the Schedule of the Act.
19. AP-COM/1015/2025 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)