

OCD 7

ORDER SHEET
AP-COM/434/2025
IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

STERLING AND WILSON PVT. LTD.
VS
CENTRAL PUBLIC WORKS DEPARTMENT

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 9th July, 2025.

Appearance:
Mr. Sanjib Tyagi, Adv.
Ms. Shetparna Ray, Adv.
Ms. S. Sha, Adv.
Mr. Krishnayan Ghosh, Adv.
...for the petitioner

Mr. Rabi Prasad Mookerjee, Adv.
Ms. Priti Jain, Adv.
...for Union of India

The Court:

1. Supplementary affidavit is taken on record.
2. This is an application for appointment of an arbitrator in terms of Clause 25 of the General Conditions of Contract (GCC), 2020 of the Central Public Works Department, Government of India.
3. An agreement was entered into between the parties for construction of the permanent campus of IISER-Kolkata at Haringhata, Nadia. The agreement dated August 31, 2018 was governed by General Conditions of Contract (GCC), which

was available in the CPWDs official website. Copy of the same was also handed over to the petitioner. The total value of the contract was Rs.5,90,35,393/-. The contention of the petitioner is that although bills were raised, there were outstanding dues. A sum of Rs.1,59,64,577/- remained outstanding. The respondent also failed to refund the Earnest Money Deposit amounting to Rs.4,28,093/-. The bank guarantee for an amount of Rs.29,51,770/- was not released. The work had been completed. Despite multiple follow ups, the authority did not take any steps. Several meetings were held with various personnel of the CPWD official at Nizam Palace. The petitioner issued several letters. The petitioner made a final request to the Chief Engineer for appointment of the Dispute Redressal Committee (DRC) under Clause 25 of the GCC. The petitioner relies on the provisions of Clause 25 of the GCC. The Chief Engineer failed to take steps and thus, this application has been filed.

4. Mr. Mukherjee, learned advocate for the respondent submits that once the petitioner approached the authority for constitution of the DRC, the petitioner must wait for the committee to be constituted and the DRC shall look into the matter. The application before this Court is, thus, premature. Moreover, the letter to the Chief Engineer was sent to the wrong address. The DRC will be constituted soon and the matter shall be referred.

5. Heard the parties. Clause 25 of the GCC provides for settlement of dispute by arbitration. The said GCC was modified on June 28, 2021. The said modification provides that a party can seek reference to arbitration even without taking recourse to conciliation. The provision for constitution of the DRC has

been modified. Under such circumstances, it matters little whether the petitioner requested the Chief Engineer for constitution of the DRC or not.

6. The petitioner invoked arbitration on February 5, 2025. The said notice was addressed to the Superintendent Engineer. It appears from the records that various letters were exchanged between the parties and meetings were held at Nizam Palace. The cause of action arose within the jurisdiction of this Court. The GCC does not provide for a seat of arbitration.

7. In my opinion, the modified GCC should be applied in this case and thus, even if the petitioner was misled into asking for constitution of a DRC, such request would not be a bar for the petitioner to approach this Court for appointment of an arbitrator. This does not amount to waiver of the applicability of Section 12 (5) of the said Act.

8. It is also important to note that after several rounds of meetings and failed requests, the question of further conciliation does not arise. In this regard, reliance is placed on the decisions of ***Visa International Limited vs. Continental Resources (USA) Limited*** reported in ***(2009) 2SCC 55*** and ***Demerara Distilleries Private Limited and anr. vs. Demerara Distillers limited*** reported in ***(2015) 13 SCC 610***.

9. In the decision of ***Visa International (supra)*** the Hon'ble Apex Court held as follows:-

“38. It was contended that the pre-condition for amicable settlement of the dispute between the parties has not been exhausted and therefore the application seeking appointment of arbitrator is premature. From the correspondence exchanged between the parties at pp. 54-77 of the paper book, it is clear that there was no scope for amicable settlement, for both the parties have taken rigid stand making allegations against each other. In this regard a reference may be made to the letter dated 15-9-2006 from the respondent herein in which it is inter alia stated “... since

February 2005 after the execution of the agreements, various meetings/discussions have taken place between both the parties for furtherance of the objective and purpose with which the agreement and the MoU were signed between the parties. Several correspondences have been made by CRL to VISA to help and support its endeavour for achieving the goal for which the abovementioned agreements were executed". In the same letter it is alleged that in spite of repeated requests the petitioner has not provided any funding schedules for their portion of equity along with supporting documents to help in convincing OMC of financial capabilities of the parties and ultimately to obtain financial closure of the project. The exchange of letters between the parties undoubtedly discloses that attempts were made for an amicable settlement but without any result leaving no option but to invoke the arbitration clause."

10. In the decision of ***Demerara Distilleries Private Limited and Another v. Demerar Distillers Limited*** reported in **(2015)13 SCC 610**, the Hon'ble Apex Court held as follows:-

"5. Of the various contentions advanced by the respondent Company to resist the prayer for appointment of an arbitrator under Section 11(6) of the Act, the objections with regard the application being premature; the disputes not being arbitrable, and the proceedings pending before the Company Law Board, would not merit any serious consideration. The elaborate correspondence by and between the parties, as brought on record of the present proceeding, would indicate that any attempt, at this stage, to resolve the disputes by mutual discussions and mediation would be an empty formality. The proceedings before the Company Law Board at the instance of the present respondent and the prayer of the petitioners therein for reference to arbitration cannot logically and reasonably be construed to be a bar to the entertainment of the present application. Admittedly, a dispute has occurred with regard to the commitments of the respondent Company as regards equity participation and dissemination of technology as visualised under the Agreement. It would, therefore, be difficult to hold that the same would not be arbitrable, if otherwise, the arbitration clause can be legitimately invoked. Therefore, it is the objection of the respondent Company that the present petition is not maintainable at the instance of the petitioners which alone would require an in-depth consideration."

11. The GCC has been modified. It permits a party to request for arbitration irrespective of the conciliation clause. The records also reveal that conciliation between the parties were attempted when they had sat across the table at

different meetings. Thus, at this stage, it cannot be said that this application is premature. The existence of a dispute redressal clause, providing for settlement of dispute by a sole arbitrator is available.

12. The issues raised by Mr. Mookerjee with regard to non-arbitrability, admissibility, limitation etc. will be decided by the learned arbitrator. The learned arbitrator can rule on his own jurisdiction. He can also decide on the arbitrability of the dispute between the parties.

13. Further contention of Mr. Mookerjee that once the petitioner accepts the terms and conditions of the GCC and proceeds to request the authority for appointment of a redressal committee, the petitioner is bound by the terms and conditions of the said contract and in case of failure of conciliation or redressal of the grievance of the petitioner, the respondent/chief engineer will appoint the arbitrator, is erroneous. The contract provides for unilateral appointment, which is prohibited in law. Reference is made to the decisions of ***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*** : 2024 SCC OnLine SC 3219.

14. 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.

15. ***

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...”

16. 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 judex* 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.”

17. Unilateral appointment by a party interested in the result of the arbitration, is not permissible in law and as such, this application is maintainable.

18. Under such circumstances, the Court appoints Hon’ble Justice Debasish Kargupta, former Chief Justice of this 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 his/her own remuneration as per the Schedule of the Act.

19. AP-COM/434/2025 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)