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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Date of Decision:*** *20th January, 2026*

\+ ARB.P. 1574/2025

JCC INFRAPROJECTS BIL JV .....Petitioner

Through: Mr. Susshil Daga and Mr. Chitransh Mathur, Advocates
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versus

NORTH WESTERN RAILWAY JAIPUR RAJASTHAN THROUGH GENERAL MANAGER & ORS. .....Respondents

Through: Ms. Arunima Dwivedi, CGSC with Ms. Monalisha Pradhan and Ms. Priya Khurana, Advocates
Mob: 9810916537
Email: arunima.associate@gmail.com

CORAM:
HON'BLE MS. JUSTICE MINI PUSHKARNA

MINI PUSHKARNA, J *(ORAL):*

1. The present petition has been filed on behalf of the petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") seeking appointment of a Sole Arbitrator in terms of Clause 24.3 of the Engineering, Procurement and Construction ("**EPC**") Agreement dated 30th September, 2022, entered between the parties for the *"Major Upgradation of Gandhi Nagar – Jaipur Railway Station"*.

2. The petitioner, i.e., JCC Infraprojects BIL (JV), is a joint venture, engaged in the execution of works through competitive tenders floated by various governmental agencies.

3. The respondent no. 1 is responsible for the overall administration, construction and operations of the North-Western Railway Zone, whereas, respondent nos. 2 and 3 are officials of North-Western Railway, Rajasthan, directly connected with the process of inviting competitive bids, finalisation of the Contract Agreement and providing complete facilities required for execution of work related to this Agreement.

4. The respondent no. 2 issued a Notice Inviting Tender ("**NIT**") bearing no. NWR-SC-EPC/GADJ-T-921 dated 30th April, 2022 for procurement of work in relation to the *"Major Upgradation of Gandhi Nagar – Jaipur Railway Station"*.

5. The petitioner participated in the bidding process and was issued a Letter of Acceptance dated 20th August, 2022, after which the EPC Agreement dated 30th September, 2022 was executed between the parties thereafter.

6. Disputes have arisen between the parties under the EPC Agreement.

7. It is submitted that under the EPC Agreement, the Arbitration Clause, i.e., Clause 24.3, prescribes a three-tier dispute resolution mechanism, i.e., conciliation, adjudication by a Dispute Adjudication Board and arbitration by a Standing Arbitral Tribunal.

8. It is submitted that the petitioner, in good faith, has on multiple occasions invoked the said mechanism and attempted to resolve the disputes amicably, through representations, conciliatory correspondence and participation in conciliation proceedings. However, such efforts have yielded no resolution.

9. Conciliation between the parties failed. Further, the petitioner, in good faith also sought initiation of the process for constitution of the

Dispute Adjudication Board and the Standing Arbitral Tribunal. However, both the processes have remained wholly non-functional and ineffective.

10. Learned counsel for the petitioner submits that on account of the failure of the initial two-tiers of the dispute resolution mechanisms, the petitioner issued a Notice dated 01st August, 2025, under Section 21 of the Arbitration Act, invoking arbitration as per the Arbitration Clause, i.e., Clause 24.3 of the EPC Agreement.

11. *Per contra*, learned counsel appearing for the respondents submits that the present petition is not maintainable on account of the multi-tier dispute resolution mechanism under Clause 24 of the EPC Agreement, which envisages conciliation and thereafter resolution of disputes by way of Dispute Adjudication Board, and subsequently through Standing Arbitral Tribunal.

12. It is submitted that the competent authority duly nominated the Dispute Adjudication Board *vide* letter dated 21st July, 2025, however, the petitioner, instead of making their submissions, sent the Notice dated 01st August, 2025, under Section 21 of the Arbitration Act. Furthermore, the Dispute Adjudication Board is currently seized with the matter, and the arbitral mechanism cannot be approached without completing the mandate of resolution of disputes through the Dispute Adjudication Board.

13. In rejoinder, learned counsel for the petitioner submits that the objection regarding constitution of Dispute Adjudication Board is misplaced, as the Dispute Adjudication Board was required to be constituted within 90 days from the date of the EPC Agreement between the parties.

14. As regards formation of Standing Arbitral Tribunal, learned counsel appearing for the petitioner submits that the same is unilateral, unfair and

contrary to law, and therefore, is hit by the judgement of the Supreme Court in the case of ***Perkins Eastman Architects DPC and Another Versus HSCC (India) Limited, (2020) 20 SCC 760***. Further, reliance is also placed upon the judgement of this Court dated 07th October, 2024 in *ARB. P. 1493/2024*, titled as *"Jhajharia Nirman Ltd. Versus South Western Railways Through Dy. Chief Engineer/IV Construction*".

15. Thus, it is submitted that the process of formation of the Standing Arbitral Tribunal raises justifiable doubts as to the fairness of the proceedings. Therefore, it is prayed that an independent Sole Arbitrator be appointed to resolve the disputes between the parties.

16. I have heard learned counsels for the parties and perused the record.

17. At the outset, this Court notes that *vide* order dated 14th January, 2026, this Court had directed that the Dispute Adjudication Board constituted by the respondents shall not proceed further with the matter, till further directions from this Court are issued. The order dated 14th January, 2026, is reproduced as under:

> *"xxx xxx xxx*
>
> 1. *Learned counsel for the petitioner submits that in the present case, the objection taken by the respondent that a Disputes Adjudication Board ("DAB"), has been constituted is totally misplaced. He submits that the DAB was required to be constituted within 90 days from the date of the Agreement between the parties, as per the contractual terms.*
> 2. *He submits that Clause 24.3.1, pertaining to a Standing Arbitral Tribunal ("SAT") is hit by the judgment of the Supreme Court in the case of* ***Perkins Eastman Architects DPC & Am. Versus HSCC (India) Ltd., AIR 2020 SC 59****.*
> 3. *He further relies upon the judgment dated 07th October, 2024, passed in ARB. P. 1493/2024, titled as "Jhajharia Nirman Ltd. Versus South Western Railways Through Dy. Chief Engineer/IV Construction".*
> 4. *He further submits that a rejoinder has been filed on behalf of the*

petitioner.

5. *However, the same is under objection. Let steps be taken to have the objections removed and to have the rejoinder placed on record.*
6. *If the only objection is with regard to the delay in filing said rejoinder, the said delay stands condoned.*
7. *Learned counsel for the respondents seeks time to address arguments.*
8. ***Considering the submissions made before this Court, it is directed that the DAB constituted by the respondents shall not proceed further with the matter, till further directions from this Court.***
9. *Accordingly, at request, re-notify on 20th January, 2026.*

xxx xxx xxx"

(Emphasis Supplied)

18. As per the scheme of the EPC agreement between the parties, dispute resolution in Clause 24 initially provides for conciliation of disputes under Clause 24.1, which reads as under:

"xxx xxx xxx

*"**24.1 Conciliation of Disputes***

24.1.1 All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the Contractor to the "Authority" through "Notice of Dispute" provided that no such notice shall be served later than 30 days after the date of issue of Completion Certificate by the Authority Engineer. Authority shall, within 30 days after receipt of the Contractor's "Notice of Dispute", notify the name of conciliator(s) to the Contractor. In case Authority fails to fix Conciliator within 30 days, Contractor shall be free to approach Dispute Adjudication Board (DAB) for adjudication of Dispute.

24.1.2 The Conciliator(s) shall assist the parties to reach an amicable settlement in an independent and impartial manner within the terms of contract. If the parties reach agreement on a settlement of the dispute, they shall draw up and sign a written settlement agreement duly signed by Authority Engineer, Contractor and conciliator(s). When the settlement agreement is signed, it shall be final and binding on the parties. The conciliators shall be paid fee as fixed by Ministry of Railways time to time, which shall be shared equally by the parties.

24.1.3 The parties shall not initiate, during the conciliation proceedings, any reference to DAB or arbitral or judicial proceedings in respect of a dispute that is the subject matter of the conciliation proceedings.

24.1.4 The conciliation shall be carried out as per "The Arbitration and Conciliation Act, 1996" and the proceedings may be terminated as per Section 76 of the above Act."

xxx xxx xxx"

19. This Court records that the said conciliation process has already failed on 30th May, 2024, though, formal Declaration in this regard was issued by the respondents subsequently on 20th September, 2024 and 04th March, 2025.

20. The EPC Agreement between the parties further envisages a Dispute Adjudication Board in Clause 24.2, relevant portion of which, reads as under:

"xxx xxx xxx

24.2 Dispute Adjudication Board (DAB)

24.2.1 A dispute/s if not settled through conciliation, shall be referred to DAB. The DAB shall consist of a panel of three Retired Railway Officers not below senior administrative grade (SAG). The DAB shall be formed within 90 days of signing of Contract Agreement. For this purpose, the Authority will maintain a panel of DAB members. The complete panel, which shall not be less than five members, shall be sent by Authority to the Contractor to nominate one member of the DAB from the panel as Contractor's nominee within two weeks of receipt of the panel. On receipt of Contractor's nominee, the Authority shall nominate one member from the same panel as Authority's nominee for the DAB. Both above nominees shall jointly select presiding member of the DAB from the same panel.

xxx xxx xxx

24.2.6 DAB proceedings shall be conducted as decided by the DAB. The DAB shall give its decision within 90 days of a Dispute referred to it by any of the Parties, duly recording the reasons before arriving at the decision. The DAB shall decide the issue within terms and conditions of the contract. This time limit shall be extendable subject to the Parties mutual agreement.

xxx xxx xxx"

21. As per the aforesaid Clause, a dispute which has not been settled through the conciliation process, shall be referred to Dispute Adjudication Board, which shall consist of a panel of three retired Railway Officers. Further, Clause 24.2.1 envisages that the Dispute Adjudication Board shall be formed within 90 days of signing the EPC Agreement. However, the same has admittedly not been done by the respondents in the present case. It is to be noted that the Dispute Adjudication Board was constituted only on 11th June, 2024. Hence, the constitution of the Dispute Adjudication Board was itself belated, and not in terms of the agreement between the parties.

22. Furthermore, as per Clause 24.2.6, the Dispute Adjudication Board shall give its decision within 90 days of a dispute being referred to it. As per the facts on record, the petitioner submitted its Statement of Claims before the Dispute Adjudication Board on 9th June, 2025, whereupon, the Dispute Adjudication Board was mandatorily required under Clause 24.2.6 to render its decision within 90 days, i.e., by 07th September, 2025. Clearly, the decision as regards the dispute referred to it, has not been given by the Dispute Adjudication Board within the time stipulated as per the EPC Agreement between the parties.

23. This Court further notes that re-nomination of one of the members of Dispute Adjudication Board was done by the respondents *vide* letter dated 21st July, 2025. However, no meeting of the said Dispute Adjudication Board took place. It is only during the pendency of the present proceedings, that the first meeting of Dispute Adjudication Board was fixed on 04th December, 2025. The order passed by the Dispute Adjudication Board in this regard, reads as under:

Dispute Adjudication Board

Comprising of

Sh. Mangal Bihari Vijay, Retd. PCE/WCR B4/501, Waterlily, Adani Shantigram, Near Vaishnodevi Circle, Ahmedabad, Gujarat-382441 Mob-8233811554,7999760884 e-mail- vimangal@gmail.com (Presiding Member DAB)	Sh. Vinod Kumar Khera Retd.CPD/Works/NWR V-304, Ground Floor Rajouri Garden, New Dehli-110027 Mob-9717636820 e-mail- vinodkheral@gmail.com (Member DAB)	Sh.Mahesh Kumar Gupta Retd AGM/NWR House No. 155, Lane-5 Guru Jambheshwar Nagar, Gandhi Path, Vaisali Nagar, Jaipur-302021, Mob-7525835777 e-mail-mkg239@hotmail.com (Member DAB)

Name of Work: T. No. NWR-SC-EPC/GADJ-T-921; Major up gradation of Gandhi Nagar (Jaipur) Railway station of Jaipur Division of North Western Railway on Engineering, Procurement and construction (EPC).

Ref: - (i)Contract Agreement No NWR/S&C/CA/196 (EPC) dated 30/09/2022.
(ii) Re-nomination of DAB (Dispute Adjudication Board) vide this office letter No. NWR/SC/EPC/GADJ/T-921/DAB/e-file-135515 dated 21.07.2025.

In connection with the above references the Re-nomination of DAB (Dispute Adjudication Board) fixed the first meeting on 04/12/2025 and following minutes of the first meeting
Present responded side

1. CE construction NWR Mrs. Sheela Pawar
2. Dy. CEE(C-II) NWR Mr. A. K. Sharma
3. Counceller responded Mr. C. S. Sharma
4. CLA NWR Mr. Jat

The DBA Welcomed all the members for the meeting. The minutes of the meeting are as below

1. During the meeting nobody from the claimant side was present. Just before the meeting an email was received from the claimant indicating that the claimant has gone to the court at New Delhi and has intimated that the issue sought to be placed before the Hon'ble Delhi High Court, **"Owing to the delayed constitution of DAB in respect of various disputes earlier submitted by our client, our client was constrained to approach the Hon'ble High Court under Section 11 of the Arbitration and Conciliation Act, 1996 for initiation of the subsequent contractual step of dispute resolution, namely arbitration. This was necessitated as the mechanism envisaged in the contract for appointment of the arbitrator is unilateral and therefore untenable. In view of the above and considering that the subject disputes are already under active consideration before the Hon'ble High Court, you are requested not to continue with present DAB proceedings until the matter is adjudicated by the Court. "**

2. The respondent was directed to put up the complete legal status of the court case so as to proceed further in the disputes arise out of the subject contract under the reference.

3. It has been reported that the statement of claim had earlier been submitted by the claimant. The respondent was directed to forward the Statement of claim and the statement of defence by 18/12/2025.

4. On the receipt of the document and the legal status next meeting of the DAB is fixed on 06/01/2026 at 16:30 hours.

5. This is issued to the all with the consent of all the DAB members.

Mangal Bihari Vijay
(Presiding Member DAB)

24. Perusal of the aforesaid clearly shows that despite re-constitution of

the Dispute Adjudication Board in July, 2025, the first meeting of the Dispute Adjudication Board was fixed only on 04th December, 2025, long after the expiry of the contractual mandate and that too after filing and issuance of notice by this Court in the instant petition.

25. Therefore, the whole purpose and object of referring the dispute to the Dispute Adjudication Board stands defeated, and the said process has been rendered nugatory in view of the prolonged delay. Further, given the excessive time taken, the reference to the Dispute Adjudication Board, has become a futile exercise.

26. In this regard, this Court refers to the judgment of this Court in the case of ***Jhajharia Nirma Ltd. Versus South Western Railways through Dy. Chief Engineer/IV Construction & Connected matter, 2024 SCC OnLine Del 7133***, wherein, while dealing with a similar clause in relation to resolution of dispute by the Dispute Adjudication Board, it has been held as follows:

> *"xxx xxx xxx*
>
> ***17. Further, the constitution of the DAB in the present case was belated and not within the timeframe stipulated in the Contract Agreement. In terms of the Contract, the DAB was to be formed within the 90 days of signing of the contract agreement. Admittedly, the same was not done.***
>
> ***18. In numerous judicial precedents, this Court has taken the view that any pre-condition in an arbitration agreement obliging one of the contracting parties to either exhaust the pre-arbitral amicable resolution avenues or to take recourse to Conciliation are directory and not mandatory.***
>
> ***19. In this regard, reference may be made to Oasis Projects Ltd. v. National Highway & Infrastructure Development Corporation Limited, (2023) 1 HCC (Del) 525, wherein the Court has observed as under:***
>
> ***"12. The primary issue to be decided in the present petition is, therefore, as to whether it was mandatory for the***

petitioner to resort to the conciliation process by the Committee before invoking arbitration. Though Article 26.2 clearly states that before resorting to arbitration, the parties agree to explore conciliation by the Committee, in my opinion, the same cannot be held to be mandatory in nature. *It needs no emphasis that conciliation as a dispute resolution mechanism must be encouraged and should be one of the first endeavours of the parties when a dispute arises between them. However, having said that, conciliation expresses a broad notion of a voluntary process, controlled by the parties and conducted with the assistance of a neutral third person or persons. It can be terminated by the parties at any time as per their free will. Therefore, while interpreting Article 26.2, the basic concept of conciliation would have to be kept in mind."*

[Emphasis supplied]

21. *This Court in Subhash Infraengineers (P) Ltd. v. NTPC Ltd., 2023 SCC OnLine Del 2177 has held as under:—*

> ***"21.*** *In this regard, it is relevant to note that in terms of Section 62(3) of the Act, it is open for a party to reject the invitation to conciliate. Further, in terms of Section 76 of the Act, the conciliation proceedings can be terminated by a written declaration of a party and there is no legal bar in this regard. In the present case, Clause 7.2.5 of the GCC expressly provides that "parties are free to terminate Conciliation proceedings at any stage as provided under the Arbitration and Conciliation Act, 1996."*
>
> ***
>
> ***28.*** ***In the present case, the clause/pre arbitral mechanism contemplates mutual consultation followed by conciliation. As noticed in Abhi Engg. and Oasis Projects, conciliation is a voluntary process and once a party has opted out of conciliation, it cannot be said that the said party cannot take recourse to dispute resolution through arbitration****."*

xxx xxx xxx"

(Emphasis Supplied)

27. In this context, reference may also be made to the judgment in the case of ***Coach Com Versus DME its Sole Proprietor Smt. Lalita Devi Sureka, Northern Railway, 2025 SCC OnLine Del 8055***, wherein the Court, while holding that reference to pre-arbitral mechanisms, including a

Dispute Adjudication Board, would be a futile exercise, and appointed an Arbitrator for adjudication of disputes between the parties therein, held as follows:

> *"xxx xxx xxx*
>
> ***9.*** *In Jhajharia Nirman v. South Western Railways, 2024 SCC OnLine Del 7133, a Coordinate Bench of this Court, dealing with a similar arbitration clause in a Railway Contract,* ***has observed that any pre-condition in an arbitration agreement binding one of the contracting parties to either exhaust the pre-arbitral amicable resolution procedures or to take recourse to conciliation are directory, and not mandatory in nature.***
>
> ***10. In view of the facts noted above, in my view, the reference of the dispute between the parties to the conciliation and thereafter DAB would be an exercise of futility.***
>
> ***11. In the aforesaid facts and circumstances, this Court is of the view that the present petition is not premature and a Sole Arbitrator is required to be appointed to adjudicate the disputes between the parties.***
>
> *xx xxx xxx"*
>
> *(Emphasis Supplied)*

28. Therefore, the contention of the respondents that the proceedings before the Dispute Adjudication Board be allowed to be culminated, finds no favour with this Court, and the said contention is accordingly, rejected.

29. Furthermore, the EPC Agreement between the parties provides for arbitration proceedings to be conducted by an Arbitral Tribunal consisting of a panel of three retired Railway Officers. Clause 24.3 of the EPC Agreement between the parties in this regard, reads as under:

> *"xxx xxx xxx*
>
> *"**24.3 Standing Arbitral Tribunal***
>
> *24.3.1 The arbitration proceedings shall be conducted as per "The Arbitration and Conciliation Act, 1996". The Arbitral Tribunal shall consist of a panel of three Retired Railway Officers not below senior administrative grade (SAG). The Standing Arbitral Tribunal shall be*

formed within 90 days of signing of Contract document. For this purpose, the Authority shall maintain a panel of arbitrators. The complete panel, which shall not be less than five members, shall be sent by Authority to the Contractor to nominate one arbitrator from the panel as Contractor's nominee within two weeks of receipt of the panel. On receipt of Contractor's nominee, the Authority shall appoint above Contractor's nominee as well as another from the same panel as Authority's nominee as arbitrators. Both above arbitrators shall jointly select presiding arbitrator from the same panel.

24.3.2 If the Contractor fails to select the Contractor's nominee from the panel within two weeks of the receipt of the said panel, the Authority shall, after giving one more opportunity to contractor to nominate one as Contractor's nominee within next two weeks, appoint two arbitrators from the same panel. Both above arbitrators shall jointly select presiding arbitrator from the same panel.

24.3.3 If one or more of the Arbitrators appointed refuses to act as Arbitrator, withdraws from his office as Arbitrator, or vacates his office or is unable or unwilling to perform his functions as Arbitrator for any reason whatsoever or dies or in the opinion of the Authority fails to act without undue delay, the parties shall terminate the mandate of such arbitrator and thereupon new arbitrator shall be appointed in the same manner, as the outgoing arbitrator had been appointed.

24.3.4 Before start of arbitration proceedings, each appointed arbitrator shall give the following certificate to the Authority and the Contractor:

"I have no any past or present relationship in relation to the subject matter in dispute, whether financial, business, professional or other kind. Further,
I have no any past or present relationship with or interest in any of the parties whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to my independence or impartiality in terms of The Arbitration and Conciliation Act. 1996."

24.3.5 In the specific cases of any misconduct by any of the members of the TRIBUNAL, the parties shall have the right to specifically bring it to the notice of the TRIBUNAL such conduct, through a statement filed with necessary documents in proof of such misconduct and the TRIBUNAL, after taking NOTICE of such conduct initiate the replacement of the member concerned, in the same manner the member to be replaced was appointed.

24.3.6 Each party has to prepare and furnish to Standing Arbitral Tribunal and other party, once in a every six months, an account giving full and detailed particulars of all claims, which even after decision of DAB are unsettled, to which the parties may consider themselves entitled to during the last preceding six months. If any dispute has arisen as regards execution of the works under the contract, while submitting the said half yearly claims, the parties shall give full particulars of such dispute in the said submission. After signing Contract agreement, within 6 months, the parties shall submit all the claims from date of award of contract in first submission of claims.

24.3.7 The said communication will be the reference of the dispute to the ARBITRAL TRIBUNAL appointed under the present agreement.

24.3.8 The parties shall submit all the relevant documents in support of their claims and the reasons for raising the dispute to the TRIBUNAL.

24.3.9 The said claims of the parties so referred to ARBITRAL TRIBUNAL so far it relates to the disputed claims, shall be treated as Statement of Claims of the parties and the ARBITRAL TRIBUNAL shall call upon the other party to submit its reply. The ARBITRAL TRIBUNAL after giving an opportunity of being heard to both the parties, decide the dispute within a period of Four months from the date of communication of the dispute under clause 24.3.6 above. The Arbitral Tribunal will pass a reasoned award in writing, while deciding the Dispute. Once the award is declared, the Arbitral Tribunal cannot review the same except what is permissible in terms of provisions contained in Arbitration and Conciliation Act. The parties shall be entitled to the remedies under the Arbitration and Conciliation Act 1996 or any amendment thereof.

24.3.10 The parties agree that all the claims of any nature whatsoever, which the parties may have in respect of the work of the preceding six months, should be made in the said Statements of half yearly claims. If the parties do not raise the claim, if any, arising from the work done in the preceding six months in the statement of half yearly claim, to Standing Arbitral Tribunal, the parties shall be deemed to have waived and given up the claims. The ARBITRAL TRIBUNAL shall not entertain such disputes, which have not been raised in the statement of half yearly Claim before the Standing Arbitral Tribunal and such claims will stand excluded from the scope

of arbitration and beyond the terms of reference to the ARBITRAL TRIBUNAL.

24.3.11 The parties agree that where the Arbitral award is for payment of money, no interest shall be payable on the whole or any part of the money for any period till the date on which the award is made.

24.3.12 The obligation of the Authority and the Contactor shall not be altered by reasons of arbitration being conducted during the progress of work. Neither party shall be suspended the work on account of arbitration and payments to the contractor shall continue to be made in terms of the contract and/or as awarded (except when Award is challenged in the Court in which case the payments would be as per the court's orders)

24.3.13 The ARBITRAL TRIBUNAL shall remain in force during the entire period the PRINCIPAL CONTRACT is in force and until the closure of the PRINCIPAL CONTRACT with the final no claim certificate, which will be filed with ARBITRAL TRIBUNAL.

24.3.14 The Arbitral Tribunal shall conduct the Arbitration proceedings at [Delhi] or any other convenient venue which shall be decided by Tribunal in consultation with both parties.

24.3.15 The cost of arbitration shall be borne equally by the respective parties. The cost shall inter-alia include fee of the arbitrators as per the rates fixed by the Indian Railways from time to time.

24.3.16 It is a term of this contract that the Contractor shall not approach any Court of Law for settlement of such disputes or differences unless an attempt has first been made by the parties to settle such disputes or differences through conciliation, DAB and Standing Arbitral Tribunal.

24.3.17 Even in case arbitration award is challenged by a party in the Court of Law, 75% of award amount, pending adjudication by Court of Law, shall be made by party to other party. In case payment is to be made by Authority to Contractor, the terms & conditions as incorporated in the Ministry of Railways letter No. 2016/CE(I)/CT/ARB/3(NITI Aayog)/Pt. dated 08th Mar, 2017 as amended time to time shall be followed. However, in case Contractor has to pay to the Authority, then 75% of the award amount shall be

deducted by the Authority from the running bills or other dues of the Contractor, pending adjudication by Court of Law.

24.3.18 The contract shall be governed by the law for the time being in force in the Republic of India. In case of any disputes/differences resulting in court cases between Contractor & Authority, the jurisdiction shall be of Courts at [Delhi] only."

xxx xxx xxx"

30. Reading of the aforesaid Clause shows that the said Clause contemplating appointment of Arbitrators from a panel of retired Railway Officers, is not in consonance with the settled position of law as laid down by the Supreme Court in the case of ***Perkins Eastman Architects DPC and Another Versus HSCC (India) Limited, (2020) 20 SCC 760***, which prohibits unilateral control or interest in the appointment process by one party, the relevant portion of which, reads as under:

"xxx xxx xxx

21. *But, in our view that has to be the logical deduction from TRF Ltd. [TRF Ltd. v. Energo Engg. 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. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]

xxx xxx xxx

23. Sub-para (vii) of the aforesaid para 48 lays down that if there are justifiable doubts as to the independence and impartiality of the person nominated, and if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, such appointment can be made by the Court. *It may also be noted that on the issue of necessity and desirability of impartial and independent arbitrators the matter was considered by the Law Commission in its Report No. 246. Paras 53 to 60 under the heading "Neutrality of Arbitrators" are quoted in the judgment of this Court in Voestalpine Schienen GmbH v. DMRC [Voestalpine Schienen GmbH v. DMRC, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , while paras 59 and 60 of the Report stand extracted in the decision of this Court in Bharat Broadband Network Ltd. v. United Telecoms Ltd. [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] . For the present purposes, we may rely on para 57, which is to the following effect: (Voestalpine case [Voestalpine Schienen GmbH v. DMRC, (2017) 4 SCC 665: (2017) 2 SCC (Civ) 607], SCC p. 681, para 16)*

> *"16. … '57.* ***The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the Arbitral Tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles — even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed.*** *The Commission hastens to add that Mr P.K. Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee*

arbitrators. ***The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous — and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes.' "***

24. *In Voestalpine [Voestalpine Schienen 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."

xxx xxx xxx"

(Emphasis Supplied)

31. Further, the Five Judge bench of the Supreme Court in the case of

Central Organisation for Railway Electrification Versus ECI SPIC SMO MCML (JV) A Joint Venture Company, (2025) 4 SCC 641, while holding that appointment of arbitrators from a panel of potential arbitrators is against the principle of equal treatment of parties, and any unilateral appointment is violative of Article 14 of the Constitution, held as follows:

> *"xxx xxx xxx*
>
> ***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 [Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV), (2020) 14 SCC 712] 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.

xxx xxx xxx"

(Emphasis Supplied)

32. Thus, a similar clause in relation to the three-tier dispute resolution mechanism and for appointment of arbitrators from the panel of the respondents, as existing in the present case, was dealt with by this Court in the case of ***Jhajharia Nirman Ltd. (Supra)***, wherein, holding that the procedure as contemplated in the said clause does not meet the requirement of law, it was held as follows:

"xxx xxx xxx

24. Even as regards the second objection, it is notable that this Court has had occasion to consider the arbitration agreement involving an appointment procedure similar to the one prescribed in the present case. ***The arbitration Clause in the present matter stipulates that the Arbitral Tribunal will consist of three retired railway officers of at least Senior Administrative Grade (SAG) and the Authority will maintain a panel of at least five arbitrators. The panel will be sent to the contractor, who must choose one arbitrator as their nominee within two weeks. The Authority will then appoint the contractor's nominee and another from the same panel as its own nominee. These two arbitrators will jointly select a presiding arbitrator from the same panel. Further, it is provided that the contractor does not select a nominee within the given two weeks, the Authority will give an additional two weeks. If the contractor still fails to nominate, the Authority will appoint two arbitrators from the panel, and they will jointly select the presiding arbitrator****.*

25. ***It has been held in a catena of judgments that the above mentioned appointment procedure does not meet with the requirement of law.*** *In Margo Networks Pvt. Ltd. v. Railtel Corporation of India Ltd., 2023:DHC : 4596, it was held as under:*

(i) ***In the context of appointment procedure contemplating appointment out of panel of arbitrators maintained by one of the contracting parties, it is mandatory that the panel should be sufficiently broad-based, failing which the appointment procedure does not meet with the requirements of law. Referring Voestalpine Schienen Gmbh v. Delhi Metro Rail Corporation Ltd., (2017) 4 SCC 665, it was held that an arbitrator***

panel must be broad-based, and not restrictive. This requirement was found to be not fulfilled where the panel comprised solely of ex-employees of a party.

(ii) ***A valid appointment procedure must be balanced and not confer excessive say or authority on one of the parties to the arbitration, as regards constitution of the arbitral tribunal. An appointment procedure which contemplates that one party appoints two out of three members of the arbitral tribunal, the appointment procedure contravenes this requirement.***

xxx xxx xxx"

(Emphasis Supplied)

33. Therefore, in view of the aforesaid, the appointment of arbitrators as per Clause 24.3 of the EPC Agreement and conduct of arbitration proceedings by an Arbitral Tribunal consisting of a panel of three retired Railway Officers, cannot be held to be valid.

34. Reference may also be made to the judgment of this Court in the case of ***Kalpataru Projects International Limited Versus Northern Railway, 2026 SCC OnLine Del 110***, wherein, this Court while considering a similar clause held that the same was not in consonance with the principles of independence and impartiality of arbitrators. Further, there is no bar to appointment of a Sole Arbitrator to adjudicate the disputes between the parties, where the arbitration agreement provided for a Tribunal of three members. Thus, this Court held as follows:

"xxx xxx xxx

12. ***The position of law is, thus, clear that even in cases, where there is a three member panel, an Arbitration Clause mandating the other party to select its Arbitrator from a curated panel of potential Arbitrators, is against the Principle of Equal Treatment of Parties. Accordingly, it is evident that the Arbitration Clause detailing the procedure for appointment of the Arbitral Tribunal, i.e., Clause 24.1 in the present case cannot be sustained, and would be invalid.***

13. ***In the present scenario, when the Arbitration Clause, i.e., Clause 24.1 of the Agreement between the parties is unsustainable, this***

Court is not powerless to pass an order for appointment of an Arbitrator to make appropriate alternative arrangements to give effect to the Arbitration Clause*. Thus, in the case of Singh Builders Syndicate v. Union of India, 2006 SCC OnLine Del 389,* ***this Court held that the Court has power to appoint a Sole Arbitrator where Court doubts the impartiality of the designated authority and the Arbitrator. In the said case also, the Arbitration Clause envisaged an Arbitral Tribunal consisting of three employees of the authority in question. Considering the facts and circumstances of the said case, the Court appointed an independent Sole Arbitrator, by holding as follows:***

> *"xxx xxx xxx*
>
> *11.* ***I may say at the outset that in view of provisions of Section 11(4), (5) & (6) of the Act, normally the procedure that has to be followed for appointment of an arbitrator should be the one which is agreed to between the parties.*** *[See: J.L. Prasad v. The General Manager, Southern Railway, Chennai, (2002) 1 Arb LR 584, National Thermal Power Corporation Ltd. v. Raghul Constructions Pvt. Ltd., AIR 2005 Ker 115]. In the instant case, as per the procedure prescribed in clause 64 of the general terms and conditions of the contract; for the purpose of nominating its arbitrator, the petitioner has to choose one name out of the list for appointment forwarded by the General Manager. This is the procedure which was followed in the first instance when application filed by the petitioner (AA No. 202/2000) was disposed of vide order dated 11th November, 2002. Even when the nominee of the petitioner resigned, in subsequent applications filed by the petitioner, again, direction was given by this court to follow the said procedure.*
>
> *12.* ***However, the petitioner now wants an independent arbitrator to be appointed on the ground that the respondent has lost its right to suggest the names. Under certain circumstances, notwithstanding the aforesaid procedure, the court has power to appoint its arbitrator.***
>
> *13.* ***Some of the circumstances which can be culled out from the case law, are the following:***
>
> *(a) Where the designated authority fails to appoint the arbitrator.*
>
> *xxx xxx xxx*
>
> *(b) Where the court doubts the impartiality of the designated authority and the arbitrator, the court can appoint an*

independent arbitrator. This happened in the case of Interstate Construction v. NPCC Construction reported as 2004 3 RAJ 672 (Del.) wherein the court observed as under;

> *"It is this type of conduct and dealing which sometimes compels a Court to override clauses in an agreement which waive objection as to impartiality of the Arbitration on the grounds that he is an officer of one of the parties to the dispute."*

(c) In peculiar circumstances where the court is faced with a move which is not covered by the provisions of the Act, this situation occurred in the case of Sushil Kumar Rant v. Hotel Marina reported as (2005) 81 DRJ 533 and the Division Bench appointed an independent arbitrator by observing as under:

> *"We are conscious of the position that arbitration admits of least judicial intervention and the manner in which an arbitrator is to be appointed. But we are faced with an impasse which is neither covered by the provisions of the Arbitration Act, nor any precedent. This, if left unattended would have the natural consequence of leaving the dispute between the parties unresolved which would be contrary to the spirit and intent of the Arbitration Act. It would, therefore, require to be broken which can be only done by the appointment of an impartial arbitrator. This may not be technically or strictly in tune with the provisions of the Act which do not provide for such tike eventualities but it is surely dictated by the interests of justice. Therefore to promote and secure the interests of Justice, it would be appropriate to set aside the impugned order and appoint an independent arbitrator."*

14. ***Keeping in view the aforesaid legal position in mind, I am of the opinion that in the present case also time is ripe for constituting an independent arbitral tribunal by this court. The arbitration clause contains a peculiar procedure for appointment of arbitrators. In the event of dispute, the General Manager, Railways has a right to appoint its arbitrator. In so far as nominee of the contractor is concerned, he is given choice of limited nature. There is no complete freedom given to him in this behalf. The General Manager, Railways is required to send a panel of more than three names of Gazetted railway offices of one or more departments of the Railways to the contractor. The contractor is given an option to suggest to the General Manager one name out of the said list who shall then be***

appointed by the General Manager as the contractor's nominee. Thus even the contractor's nominee has to be the officer of Railways. The two arbitrators have to nominate the third arbitrator, called umpire, who is also to be a gazetted railway officer. Thus the tribunal consists of two/three arbitrators and all are the Government/railway officers.

xxx xxx xxx"

(Emphasis Supplied)

14. The aforesaid judgment of this Court was upheld by the Supreme Court in the case of Union of India v. Singh Builders Syndicate, (2009) 4 SCC 523, wherein the Supreme Court held as follows:

> *"xxx xxx xxx*
>
> *14. It was further held in Northern Railway case [(2008) 10 SCC 240 : (2008) 11 Scale 500] that the Chief Justice or his designate should first ensure that the remedies provided under the arbitration agreement are exhausted, but at the same time also ensure that the twin requirements of sub-section (8) of Section 11 of the Act are kept in view.* ***This would mean that invariably the court should first appoint the arbitrators in the manner provided for in the arbitration agreement. But where the independence and impartiality of the arbitrator(s) appointed/nominated in terms of the arbitration agreement is in doubt, or where the Arbitral Tribunal appointed in the manner provided in the arbitration agreement has not functioned and it becomes necessary to make fresh appointment, the Chief Justice or his designate is not powerless to make appropriate alternative arrangements to give effect to the provision for arbitration****.*
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

15. ***This Court followed the aforesaid judgment of the Supreme Court, in the case of Twenty-Four Secure Services Pvt. Ltd. v. Competent Automobiles Company Limited, 2024 SCC OnLine Del 4358, and proceeded to appoint a Sole Arbitrator even when the Arbitration Clause stipulated reference to arbitration by three arbitrators, each party having the authority to appoint a nominee Arbitrator, when the parties were unable to agree on appointment of a Sole Arbitrator****. Thus, in the said case it was held as follows:*

> *"xxx xxx xxx*

> *22.* ***In Union of India (UOI) v. Singh Builders Syndicate, (2009) 4 SCC 523 the High Court rejected the contention on behalf of the Government that the Court was not vested with any powers to appoint a Sole Arbitrator in distinction to the Arbitration Agreement which provided for the Tribunal of three members. The Apex Court upheld the order of this Court appointing a Sole Arbitrator by observing that the appointment of the Sole Arbitrator was valid.***
>
> *xxx xxx xxx"*
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

35. Accordingly, this Court finds no impediment in appointing a Sole Arbitrator to adjudicate disputes between the parties.

36. Considering the aforesaid, the dispute between the parties arising out of the EPC Agreement is referred to the Arbitral Tribunal, comprising of a Sole Arbitrator. The following directions are issued in this regard:

i. Justice Rekha Palli, (Retd.), former Judge, Delhi High Court, (Mobile No.: 9810012120) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.

ii. The remuneration of the Arbitrator shall be in terms of Schedule IV of the Arbitration Act.

iii. The Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference. In the event there is any impediment to the Arbitrator's appointment on that count, the parties are given liberty to file an appropriate application before this Court.

iv. It shall be open to the respondent to raise counter-claims, if any, in arbitration proceedings.

v. It is made clear that all the rights and contentions of the parties, including, the arbitrability of any of the claims and/or counter-claims,

any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned Arbitrator.

vi. The parties shall approach the Arbitrator within two (2) weeks from today.

37. Needless to state, nothing in this order shall be construed as an expression of this Court on the merits of the case.

38. The petition is disposed of in the aforesaid terms.

MINI PUSHKARNA, J

JANUARY 20, 2026/sk/au