

GAHC010107112022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Arb.P./20/2022

M/S RAITANI ENGINEERING WORKS PVT LTD
A COMPANY CONSTITUTED UNDER THE INDIAN COMPANIES ACT, 1956
HAVING ITS REGISTERED OFFICE AND HEAD OFFICE AT CAMPUS OF M.M.
CHAUDHURY, P.B. ROAD, REHABARI, GUWAHATI-781008, ASSAM,
REPRESENTED BY ONE OF ITS DIRECTORS SHRI MAYUR RAITANI, S/O SRI
ANAND RAM RAITANI, R/O 4TH FLOOR, NIRMAL SAGAR APARTMENT,
OLD POST OFFICE LANE, REHABARI, GUWAHATI-781008, DIST-
KAMRUP(M), ASSAM

VERSUS

THE UNION OF INDIA AND 3 ORS
REPRESENTED BY THE GENERAL MANAGER (CONSTRUCTION), N.F.
RAILWAYS, MALIGAON, GUWAHATI-11, DIST-KAMRUP(M), ASSAM, PIN-
781011

2:THE GENERAL MANAGER (CONSTRUCTION)
N.F. RAILWAYS
MALIGAON
GUWAHATI-11
DIST-KAMRUP(M)
ASSAM
PIN-781011

3:THE CHIEF ENGINEER/CON-I
N.F. RAILWAYS
MALIGAON
GUWAHATI-11
DIST- KAMRUP(M)
ASSAM
PIN-781011

4:THE DEPUTY CHIEF ENGINEER/CON-II
N.F. RAILWAYS
LUMDING
DIST-NAGAON
ASSAM
PIN-78244

Advocate for the Petitioner : MR. A BISWAS

Advocate for the Respondent : ASSTT.S.G.I.

**BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM**

ORDER

12.05.2023

Heard Mr. Arnab Biswas, learned counsel for the petitioner. Also heard Mr. Kaustav Gogoi, learned Standing Counsel, N. F. Railway appearing for the respondents.

2. This application has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 praying for appointment of an Arbitrator so as to enter upon adjudication in respect of the contractual disputes arising by and between the parties. The facts of the case, in a nutshell, are that the petitioner had entered into a contract with the N. F. Railways, Maligaon signed by the Chief Engineer/CON-I dated 12.02.2013 for execution of the contractual work viz. **"Between Km 110.886 to 125.228 earthwork in cutting to make formation, providing blanketing, construction of minor bridges, approach roads, protection works, providing sausage crate, boulder pitching making of side drains and other ancillary works in connection with Lumding-Silchar Gauge Conversion Project"**. According to the petitioner, it had executed the contractual work and completed the same on 29.03.2016 whereafter, a work completion

certificate was also issued in its favour on 02.04.2016. Thereafter, the obligations pertaining to six months maintenance period was also discharged by the petitioner which came to an end on 30.09.2016. A final variation statement was also prepared by the respondents. However, according to the petitioner, there was error in the variation statement and therefore, it had raised objection and requested for preparation of a fresh statement. When the respondents failed to respond to such request of the petitioner, it had lodged its final claim before the respondent on 13.09.2021. When the respondents failed to respond to the final claim notice dated 13.09.2021 submitted by the petitioner, a notice under Section 11 of the Arbitration and Conciliation Act, 1996 was served upon the respondents on 17.01.2022 but instead of appointing an Arbitrator they had made a request to the petitioner to reduce the claim amount as mentioned in the notice dated 17.01.2022. On the request coming from the respondents the petitioner had reduced its claim and thereafter, served a fresh notice dated 15.03.2022 demanding reference of the dispute to the Arbitrator. The respondents, however, did not take any steps for appointment of Arbitrator and instead, wrote back to the petitioner seeking waiver of the provision of Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015. Situated thus, the petitioner has been compelled to approach this Court by filing the present petition.

3. This is not in dispute that there is an arbitration agreement by and between the parties in the form of Clause 64 of the GCC, as amended, and there is an arbitrable dispute by and between the parties which requires to be referred to Arbitration by a Sole Arbitrator. The question that would arise in this case is as to whether, the respondents have forfeited their right to appoint an

Arbitrator and if so, whether an order is required to be passed in this case by this Court appointing an Arbitrator.

4. Law is firmly settled since the decision of the Supreme Court rendered in the case of **Datar Switchgears Ltd. Vs. Tata Finance Ltd. and another** reported in **(2000)8 SCC 151** that if one party demands appointment of Arbitrator by serving a notice under Section 11(6) of the Act of 1996 and the opposite party does not make an appointment within 30 days of the demand, right to make appointment of Arbitrator does not get automatically forfeited. If the opposite party makes an appointment even after 30 days of the demand but before the First Party has moved the Court under Section 11, the right to make appointment of Arbitrator would survive. However, if the demand for appointment of Arbitrator is not acted upon before the party making the demand moves the Court under Section 11(6) of the Act of 1996, then the right of the other party to appoint an Arbitrator stands forfeited.

5. In the present case, as can be seen from the facts narrated above, the respondents had received the demand for appointment of Arbitrator made by the petitioner but not to speak of 30 days, they have failed to appoint an Arbitrator till date. In the meantime, the petitioner has approached this Court under Section 11 of the Act of 1996. As such, the respondents have forfeited their right to appoint an Arbitrator. In view of the above, this is a fit case where this Court is required to pass an order making appointment of an Arbitrator from the panel prepared by this High Court under Notification No.47 dated 26.04.2023 so as to enter into a reference in respect of the dispute.

6. The learned counsel for both the parties have agreed that Mr. Justice H. N. Sarma (Retd), a former Judge of this Court, can be appointed as the Sole

Arbitrator so as to adjudicate upon the disputes by and between the parties. As such, in exercise of jurisdiction under Section 11(6) of the Arbitration and Conciliation Act, 1996, this Court hereby appoints Mr. Justice H. N. Sarma (Retd) as the Sole Arbitrator so as to enter into a reference in respect of the disputes by and between the parties, subject, however, to absence of any ground/impediment under Section 12(5) of the Act of 1996 to perform the duties of Sole Arbitrator.

This petition stands disposed of accordingly.

A copy of this order be transmitted by the Registry to the learned Arbitrator.

JUDGE

Comparing Assistant