

IN THE HIGH COURT OF JUDICATURE AT PATNA

Request Case No.6 of 2015

=====

M/s Bajrang Construction through Partner Harkesh Singh having office at Village Chand Parna P.O. & P.S. Sidhwalia, District Gopalganj

.... Petitioner

Versus

1. The Union of India through the General Manager N E., Railway At & P.O. Gorakhpur, District Gorakhpur.
2. The Dy. Chief Engineer, N.E. Railway, At & P.O. Gorakhpur, District Gorakhpur (Uttar Pradesh)
3. The Executive Engineer/CON/N E Railway At & P.O. Hathwa, District Gopalganj

.... Opposite Parties

=====

Appearance :

For the Petitioner : Mr. Nand Kishore Singh, Advocate

For the Respondents: Mr. Amaresh Kumar Singh, Advocate

=====

CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

Date: 25-02-2016

The present application has been filed for appointment of sole arbitrator consequent upon the termination of mandate of the appointed arbitrators under Clause 64 of the General Conditions of Contract (for short, "GCC") for failure of the arbitral tribunal to enter upon the reference despite filing of claim petition and repeated requests to decide the claims and disputes arising from the contract agreement.

2. An agreement no. CAO/CON/GKP/928 dated 07.11.2006 for a total value of Rs. 1,64,09,993/- was executed between the petitioner and respondent no. 1 for the work of linking of track, construction of station building, & platform at *Salar Khurd, Phulwaria* and *Bathua Bazar*, construction level crossing, gate lodge, staff

quarter, and other miscellaneous works between Km. 12/0 to *Bathua Bazar* (including) in connection with construction of *Hathua-Bhatni New B G Line*. It is claimed that the petitioner completed the work amounting to Rs. 2,36,00,000/- as per variations and verbal orders of the Railway Officers as against the contract amount of Rs. 1,64,09,993/- but however, final bill was prepared only for Rs. 2,14,74,228/- as various items of work done were not recorded. Though the work was completed within the stipulated time to the satisfaction of the authorities, several deductions were made from the running bills of the petitioner leading to an arbitrable dispute between the parties and for which the petitioner demanded arbitration for settlement of the claims. An arbitral Tribunal consisting of three members, namely, *Sri D. K. Dhusia*, Dy. FA & CAO, Gorakhpur as presiding arbitrator, *Sri S.N. Sahu*, Dy. CE ROB, Gorakhpur and *Sri Bipul Singh*, Dy. CE Mechanical as co-arbitrators came to be constituted in terms of the letter dated 11.01.2013 but however, no steps in the proceedings were taken for a long time. Despite the statement of claims being filed before the arbitral Tribunal, the proceedings did not go forward and accordingly, a legal notice dated 20.11.2014 was sent by registered post on behalf of the petitioner, inter alia, terminating the mandate of appointed Arbitrators in terms of Section 14 of the Arbitration and Conciliation Act, 1996 (for short,

“the Act”). It was informed that in case the arbitral Tribunal did not enter upon the reference within 15 days, the petitioner would proceed to take steps for appointment of sole arbitrator in terms of Section 11 of the Act.

3. A counter affidavit has been filed on behalf of the respondent-Railways, stating that in view of the transfer of one of the arbitrators, *Sri D.K. Dhusia*, to another Railway, the arbitration proceeding could not be initiated within time and subsequently, *Sri Ajay Kumar Srivastava* has been appointed as Arbitrator in his place and the arbitral Tribunal accordingly reconstituted in terms of letter dated 01.07.2015.

4. There is no dispute in the present case that an agreement was entered into between the parties and an arbitrable dispute arose and demand for arbitration was made. The petitioner invoked the arbitration Clause 64 GCC and the arbitral Tribunal was duly constituted but did not enter upon reference for a long time and one of the presiding arbitrators *Sri D.K. Dhusia* was transferred. After filing its statement of claims and issuing legal notice dated 20.11.2014, the present request case was filed on 12.03.2015 for appointment of sole arbitrator. Subsequently, *Sri A.K. Srivastava* has been appointed to the place of outgoing *Sri D.K. Dhusia* and accordingly, the arbitral Tribunal consisting of *Sri A.K. Srivastava*, *Sri S.N. Shahoo* and *Sri*

Rahul Srivastava came to be constituted in terms of the letter dated 01.07.2015. From the admitted facts aforesaid, it is apparent that though an arbitral Tribunal was initially constituted, it failed to enter upon the reference till the time when *Sri D.K. Dhusia* was transferred. It was only after the present request case was filed on 12.03.2015 that *Sri Ajay Kumar Srivastava* was appointed as arbitrator.

5. It is well settled that if after being called upon, a party fails to appoint an arbitrator within the statutory time, or even belatedly, such right to appoint an arbitrator is lost once a request case is filed by the person requesting the appointment of the arbitrator. The Apex Court in *Datar Switchgears Ltd. v. Tata Finance Ltd.* [(2000) 8 SCC 151] has categorically held as follows:-

“19. So far as cases falling under Section 11(6) are concerned – such as the one before us – no time-limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. 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, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with

the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.”

6. The same view has been reiterated in *Punj Lloyd Ltd. v. Petronet MHB Ltd* [(2006) 2 SCC 638] as well as in *Denel (Proprietary) Limited v. Ministry of Defence* [(2012) 2 SCC 759].

7. Clearly, therefore, the subsequent appointment of *Sri A.K. Srivastava* as arbitrator after filing of the instant request case was invalid and the arbitral Tribunal as reconstituted remained non-functional.

8. Learned counsel for the respondent-Railway has also submitted that in view of the specific provisions of Clause 64(3)(a)(ii) of the GCC, replacement of an arbitrator in various circumstances enumerated therein has to be made by the General Manager in the same manner in which the earlier Arbitrator had been appointed, and hence the request case is not maintainable. This submission has to be noticed only to be rejected. Learned counsel for the respondent-Railway has not been able to demonstrate that the requisite procedure and manner in which an arbitrator has to be appointed had been followed and that the conditions of the said Clause 64(3)(a)(ii) had been fulfilled. In these circumstances, this Court is of the view that the mandate of the arbitral Tribunal stands terminated and the appointment

of *Sri A.K. Srivastava* as arbitrator is invalid, null and void.

9. In view of the submissions made by learned counsel for the petitioner, this Court accordingly appoints Sri Vikash Kumar Sharma, a retired District Judge, residing at 202, Sanyal Enclave, Budh Marg, Patna 800001 as the sole Arbitrator with respect to the disputes between the parties in accordance with the provisions of the Act.

10. The petitioner must approach the said Arbitrator within one month along with a certified copy of this order and the said Arbitrator will proceed with the adjudication accordingly. The fees of the Arbitrator shall abide by the Fourth Schedule to the Act, which shall be borne equally by the parties.

11. With the aforesaid directions, this request case is disposed of.

(Vikash Jain, J)

B.T/-

U			
---	--	--	--