

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.22348 of 2013

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Afcons Infrastructure Ltd., a company registered under the Companies Act, 1956 with its registered office situated in the State of Maharashtra at Afcons House, 16, Shah Industrial Estate Veera Desai Road, Azad Nagar Post Office P.O. Box No.11978, Andheri (W) Mumbai-400053 through its authorized signatory Mr. G.C. Sinharoy, AGM (Execution)

.... Petitioner/s

Versus

1. The Union of India through the Secretary, Ministry of Railways, Rail Bhawan, New Delhi.
2. Railway Board, Ministry of Railways, Government of India, Rail Bhawan, New Delhi through its Chairman.
3. East Central Railway, having its Zonal Office at Hajipur, District-Vaishali through its General Manager.
4. Chief Engineer, East Central Railway, having its office at Mahendrughat, P.O. & P.S. Gandhi Maidan, District- Patna.
5. Deputy Chief Engineer, Construction, East Central Railway having its office at Mahendrughat, P.O. & P.S. Gandhi Maidan, District-Patna

.... Respondent/s

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Appearance :

For the Petitioner : Mr. Y.G. Giri, Senior Advocate
Mr. Raju Giri

For the Respondents : Mr. Anil Kumar Sinha

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA
ORAL ORDER

13 04-05-2016 Heard learned counsel for the petitioner and learned
counsel for the Railway.

The writ application has been filed seeking various reliefs with respect to the execution of contract work by the petitioner with the respondent East Central Railway, pursuant to Tender No.05 of 2002-03 dated 25.10.2002. The second of the reliefs sought is for issuance of direction to appoint an independent Arbitrator/Valuer for the purpose of quantifying the loss suffered by the petitioner in terms of the HAG report dated

16.04.2008 for the work executed during the contract period from 24.04.2003 to 24.04.2007 and during the extended period from 24.04.2007 to 20.10.2009, i.e., the date of foreclosure.

By filing an interlocutory application, being I.A. No.591 of 2016, a prayer has been made, apart from payment of certain amounts as interim measure by the Railway, to appoint three members as Arbitrators in paragraph No.13 of the interlocutory application.

Mr. Y.V. Giri, learned Senior Counsel for the petitioner submits that the petitioner is at present confining the reliefs sought to the appointment of an independent Arbitral Tribunal in view of the provisions of Section 12 (5) of the Arbitration and Conciliation Act, 1996 as amended by the Amendment Act, 2015 with effect from 23.10.2015, under which notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator.

It is urged that Item No.1 of the Seventh Schedule lays down that if the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party or

under Item No. 5, if the arbitrator is a Manager, Director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

It is contended that under clause-64 of the agreement, which provides for the arbitration clause, in case where the total value of all claims in question added together exceeds Rs.10,00,000/-, the Arbitral Tribunal shall consist of a panel of three Gazetted Railway officers not below JA grade as the arbitrators appointed by the General Manager at least one of whom shall be as suggested by the contractor. It is submitted that the said provision is directly hit by the amended provision as brought into force by Section 12 (5) of the Arbitration and Conciliation Act, 1996. The stand of the petitioner as taken earlier in the writ petition is that the Arbitral Tribunal should consist of independent persons like retired Supreme Court or High Court Judges.

Learned counsel for the Railway submits that by letter dated 03.12.2013 during the pendency of the writ petition in terms of clause 64, the Railway had requested the petitioner to suggest two names of Railway Officers out of a panel of four officers provided in the said letter but the petitioner has not acted upon the same.



Learned counsel for the Railway does not seriously contest the proposition that no fresh arbitral tribunal can be constituted contrary to the provisions of Section 12 (5) of the Arbitration and Conciliation Act, 1996, as of today, and thus to that extent the provision of clause 64 of the agreement cannot be acted upon and the Arbitral Tribunal as provided therein must consist of independent persons.

The other aspect in the present matter relates to the insistence by the petitioner for compliance of the Higher Administrative Grade Committee's report dated 16.04.2008, which had already been turned down at the level of Ministry of Railway and thus it is urged that any employee of the Railway would not be in a position to apply his independent mind in the matter.

On a consideration of the facts and circumstances of the case and the amended provisions of the Arbitration and Conciliation Act, 1996 as contained in Section 12 (5) read with Schedule 7, I am of the view that the employee of the Railway or ex-employee cannot Act as a part of the Arbitral Tribunal in the present matter and it needs to be considered and adjudicated upon by an independent Arbitral Tribunal. Certain names have been suggested at the bar.



Accordingly, the matter is referred to an Arbitral Tribunal consisting of three members presided over by Hon'ble Mr. Justice Chandramauli Kumar Prasad, former Judge, Supreme Court of India, and to further consist of Hon'ble Mr. Justice Amitava Lala , former Acting Chief Justice of the Allahabad High Court and Hon'ble Mr. Justice Sudhir Kumar Katriar, former Judge of the Patna High Court.

It is submitted by learned counsel for the petitioner that all the three Hon'ble Judges have given their consent to act as Arbitrators in the matter.

The writ application is, accordingly, disposed of with the aforesaid observations and directions.

(Ramesh Kumar Datta, J)

V.P.Sinha/-

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