

IN THE HIGH COURT OF JUDICATURE AT PATNA

Request Case No.3 of 2016

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M/s Indian Potash Limited, Pragati Tower, 3rd Floor, 26, Rajendra Place, New Delhi-110 008.

.... Petitioner

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
 2. The Principal Secretary, Department of Sugarcane Industries, Government of Bihar, New Secretariat, Vikas Bhawan, Bailey Road, Patna.
 3. The Cane Commissioner, Department of Sugarcane Industries, Government of Bihar, Patna.
 4. The Industrial Development Commissioner, Government of Bihar, Patna.
 5. The Development Commissioner, Government of Bihar, Patna.
 6. The Principal Secretary, Government of Bihar, New Secretariat, Bailey Road, Patna.
 7. The Commissioner, Land Reforms, Government of Bihar, Patna.
- Respondents (1st Set).
8. The Bihar State Sugar Corporation Ltd., having its office at Udyog Bhawan, Opposite Gandhi Maidan, Patna through its Managing Director.
 9. The Managing Director, Bihar State Sugar Corporation Ltd., having its office at Udyog Bhawan, Opposite Gandhi Maidan, Patna.
 10. The General Manager, Bihar State Sugar Corporation Ltd., Unit Motipur, District-Muzaffarpur.

.... Respondents (2nd Set).

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Appearance :

For the Petitioner : Mr. Dhruv Mukherjee, Senior Advocate
Mr. Md. Nazir Ansari, Advocate
For the Respondents 1st Set: Mr. Kameshwar Prasad Gupta, G.P.-10
For the Respondents 2nd Set: Mr. Gyan Shankar, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE

JUDGMENT AND ORDER

CAV

Date: 20-10-2016

With the help of this application made under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Arbitration Act, 1996'), the petitioner herein seeks appointment of an independent and impartial arbitrator for resolution of the disputes, which have arisen between the petitioner and the principal respondent Nos. 1 and 8, namely,

The State of Bihar and the Bihar State Sugar Corporation Ltd. respectively.

BACKGROUND FACTS:

2. The petitioner herein, namely, Indian Potash Limited, a company incorporated under the Companies Act, 1956, (hereinafter referred to as 'the petitioner Company') has approached this Court, under Section 11(5) of the Arbitration Act, 1996, seeking appointment of a sole arbitrator for adjudication of the dispute that has arisen between the petitioner Company and the respondents herein.

3. Shorn of unnecessary details, pursuant to a Letter of Intent, the petitioner Company submitted its technical and financial bid for Motipur Sugar Unit against Request for Qualification issued by respondent No.3 and, having succeeded in the aforementioned bid, a tripartite agreement was entered into among the petitioner Company, the State of Bihar and the Bihar State Sugar Corporation Limited, on 12.01.2011. By the said agreement, a long term lease and asset transfer agreement was also signed between the parties, one of the clauses of the agreement was that in case a dispute or difference arises amongst the parties in relation to the transaction, in question, a sole arbitrator would be appointed for adjudication.



4. The petitioner contends that at the time of signing the lease deed, assets transfer and the tripartite agreement, the respondents did not act fairly and deliberately kept the petitioner in dark about the on-going litigation in respect of the Motipur Sugar Unit. It is the case of the petitioner Company that they were not informed about the writ petitions, bearing C.W.J.C. Nos. 8840 of 2006, C.W.J.C. No. 427 of 2008 and C.W.J.C. No. 710 of 2011, which were pending adjudication before this Court, involving the respondents herein.

5. The case of the petitioner Company is that had it known about the pending litigation, the petitioner Company would not have submitted its bid to acquire Motipur Sugar Unit and, because of the pending litigation, the petitioner Company informed the respondents that it was no longer interested in pursuing the agreement for developing the sugar mill and requested the respondent authorities to return Rs.95.32 crores, which it claims to have invested in the project.

6. I have heard Mr. Dhrub Mukherjee, learned Senior Counsel, appearing for the petitioner, and Mr. Kameshwar Prasad Gupta, learned Government Pleader No.10, appearing for the respondents 1st set (i.e., respondent Nos. 1 to 7). I have heard also Mr. Gyan Shankar, learned Counsel, appearing for the respondents 2nd set (i.e., respondent Nos. 8

to 10).

7. Mr. Dhruba Mukherjee, learned Senior counsel, submits that in order to protect its huge investments that was already made, the petitioner Company did not have any option, but to contest the writ petition and accordingly appeared before this Court and contested the claim made in the writ petitions aforementioned. However, the writ petitions were, allowed by the judgment and order, dated 25.06.2012, and the public notice, dated 03.06.2006, Letter of Intent, dated 30.08.2010, lease deed, dated 12.01.2011, and the tripartite agreement, dated 12.01.2011, were quashed. Consequently, the petitioner Company was directed to return all the assets and properties, including the money to the Bihar State Sugar Corporation Limited.

8. Aggrieved by the judgment and order, dated 25.06.2012, aforementioned, passed by the learned single Judge, the parties to the litigation preferred *intra* Court appeals, bearing L.P.A. Nos. 1354, 1387, 1462, 1479, 1489, 1549, 1679, 1680 and 1681 all of 2012, and a Division Bench of this Court, by order, dated 02.01.2014, allowed all the appeals and set aside the judgment and order, dated 25.06.2012, passed by the learned single Judge in the writ petitions.

9. Two sets of Special Leave Petitions have been

filed against the judgment and order, dated 02.01.2014, and the same is pending adjudication without any interim order.

10. Thereafter, the petitioner Company decided not to go ahead with the implementation of the project and intimated its intention to the respondent authorities by letter, dated 27.02.2015, requesting the respondent authorities to disburse the up-to-date expenses incurred by the petitioner Company. When no action was taken by the respondents, the petitioner Company issued a notice through its Advocate, dated 12.09.2015, but it, too, was not responded by the respondents.

11. In the circumstances indicated above, the petitioner Company invoked the arbitration clause by letter, dated 18.11.2015, addressed to all the respondents, calling upon them to appoint an independent and impartial arbitrator, so that the dispute and differences between the parties can be adjudicated. But when the respondents did not appoint any such arbitrator within the stipulated period of time, the petitioner Company has approached this Court, under Section 11 of the Arbitration Act, 1996, seeking appointment of a retired Judge as a sole arbitrator.

12. Two sets of counter affidavits have been filed by the respondents, *inter alia*, stating that as the Supreme Court has not granted any interim protection to the petitioners

of Special Leave Petition, there is no obstruction to the development of the Sugar Mill by the petitioner Company and, as such, the petition for appointment of sole arbitrator is premature and liable to be dismissed.

13. The sole question, agitated at the bar is : *whether, on the failure of the opposite party to make appointment of an arbitrator within 30 days of receiving the request made by the first party, their right to appoint an arbitrator has got automatically forfeited or whether this period of 30 days is directory in nature and not mandatory?*

14. The questions, posed above, take this Court to the decision of the Supreme Court, in ***Datar Switch Gears Ltd. Vs. Tata Finance Ltd.***, reported in **(2000) 8 SCC 151**, at paragraph 19 whereof, the Supreme Court has held as under :

“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 seizes."

15. The same view was reiterated by a three Judge Bench of the Supreme Court, in ***Punj Lloyd Ltd. Vs. Petronet MHB Ltd.***, reported in **(2006) 2 SCC 638**.

16. From a careful reading of the decisions, in ***Datar Switch Gears Ltd.*** (supra) and ***Punj Lloyd Ltd.*** (supra), what becomes clear is that though the right of a party to appoint an arbitrator, who has been, under the Arbitration Act, 1996, given the right to make appointment of arbitrator, does not get automatically forfeited on expiry of a period of 30 days as stipulated under Section 11(6), the fact remains that the party, who has the power to make appointment of the arbitrator under arbitration agreement, forfeits his right to make appointment if and when an application, seeking appointment of arbitrator, is made under Section 11 of the Arbitration Act, 1996.

17. The case at hand is squarely covered by the law, laid down by the Supreme Court in its two decisions, ***Datar Switch Gears Ltd.*** (supra) and ***Punj Lloyd Ltd.*** (supra), inasmuch as the respondent has sought to appoint the

arbitrator after the institution of the present application before this Court. The right of the respondents has ceased once the first party has approached this Court seeking appointment of an arbitrator.

18. In view of the above, I hold that the appointment of the Arbitrator needs to be made under the provisions of Section 11 of the Arbitration and Conciliation (Amendment) Act, 2015, inasmuch as the agreement, in question, in the present case, indicates that the parties had agreed to resolve their dispute under the provisions of the Arbitration Act, 1996, and, hence, I appoint Mr. Justice Sadanand Mukherjee, a former Judge of the Patna High Court, as the Sole Arbitrator, who, upon assuming charge, needs to take care of Section 12 (1) of the Arbitration Act, 1996, and do the needful in accordance with law. The fees shall be determined as per the Fourth Schedule.

19. I leave the parties to bear their own costs.

(I. A. Ansari, CJ)

Pawan/-

AFR/NAFR	N.A.F.R.
CAV DATE	04.10.2016
Uploading Date	21.10.2016
Transmission Date	N.A.