

IN THE HIGH COURT OF JUDICATURE AT PATNA

Request Case No.7 of 2014

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M/s Sunil Engicon Pvt. Ltd. having reistered office at 12, Pathar P.O. P.S. Samastipur, District Samastipur through Director Niraj Kumar

.... Petitioner

Versus

1. The Union of India through the General Manager E.C., Railway At & P.O. Hajipur, District Vaishali.
2. The Dy. Chief Engineer, E.C. Railway, At & P.O. Darbhanga, District Darbhanga
3. The Executive Engineer (Con), E.C. Railway, At & P.O. Darbhanga, District Darbhanga

.... Respondents

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Appearance :

For the Petitioner : Mr. Nand Kishore Singh, Advocate

For the Respondents: Mr. Anil Kumar Sinha,
Mr. Abhimanyu Deo, Advocates

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CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

Date: 18-02-2016

Heard learned counsel for the petitioner and learned counsel
for the Respondent Railway.

2. The present application has been filed for appointment of
sole independent Arbitrator on failure/refusal of the Opposite Parties
to constitute the Arbitral Tribunal under Clause 64 of the General
Conditions of Contract ('GCC' for short).

3. An agreement bearing No. DCE/Con/815/II/DBG/AGT
11-12/05 dated 30.03.2011 for Rs. 5,26,78,985/- was entered into
between the parties for the work of construction/extension of
platform, fabrication and erecting FOB and PP shelters, construction
of relay room, battery room, generator room, equipment room, rest



house, SEP way and SE/Works office, gate lodge, making level crossing as per provision in IRPWM and other Misc. works in connection with gauge conversion of *Sakari-Nirmali-Jhanjharpur-Laukaha Bazar* section. According to the petitioner, the Respondent Railway failed to provide working design for the work, which were not provided despite repeated extension of time for completion of the work. This led to the petitioner to demand for arbitration under Section 64 of the GCC in its letter dated 05.05.2014 enumerating the various disputes and claims requiring settlement through arbitration.

4. It is submitted on behalf of the petitioner that all the ingredients and pre-conditions for appointment of sole independent arbitrator are fulfilled in the present case inasmuch as there is a valid arbitration agreement, disputes have arisen by reason of breach committed by the Respondents, demand has been made by the petitioner for arbitration, and such demand for arbitration has been refused.

5. Learned counsel for the Respondent Railway submits with reference to the counter affidavit filed, that the Railway duly prepared a panel with names of four Railway Officers which was communicated to the petitioner by letter dated 12.08.2014 with a request to the petitioner to suggest two names therefrom. In absence of response from the petitioner, the General Manager of the



Respondent Railway appointed the arbitral tribunal consisting of three persons in terms of letter dated 02.12.2014. It is further submitted that the action for appointment of the arbitral tribunal having been taken by the Respondents prior to filing of the Request Case, the prayer of the petitioner is not fit to be allowed.

6. Having heard the parties and on a careful consideration of the materials on record, this Court finds that the fact of the petitioner having demanded arbitration in its letter dated 05.05.2014 is not in dispute. The Respondents have not resisted the petitioner's demand for arbitration rather it is their case that they took timely steps for constituting the arbitral tribunal and for which a panel of four names was communicated to the petitioner by letter dated 12.08.2014. The records of the case however disclose that the instant Request Case was filed on 22.07.2014 and hence the Respondents have acted belatedly in preparing the aforesaid panel and communicating the same on 12.08.2014 after filing of the Request Case. It is well settled that for purpose of Section 11(6) of the Arbitration and Conciliation Act, 1996 if the Respondent does not make the appointment of arbitrator within 30 days of the demand to do so, the right to such appointment is not automatically forfeited even after the expiry of 30 days. Such appointment may still be made, but however, before filing of a request petition under Section 11 of the

Act. Once the Request Case is filed, the right of the Respondents to make the appointment ceases. Authority for this proposition may be had from the decision in *Datar Switchgears Ltd., vs. Tata Finance Ltd. and another* [(2000) 8 SCC 151].

7. In the above circumstances and in view of the principle laid down in the aforesaid ruling of the Apex Court, the appointment of the arbitral tribunal by the Respondents having been made subsequent to filing of the Request Case is held to be invalid.

8. In view of the submissions made by learned counsel for the petitioner, this Court appoints Sri G.S. Tiwary, Ex. CAO/Con/ECR, B 156, P.C. Colony, Kankarbagh, Patna-800020 as the sole Arbitrator with respect to the disputes between the parties in accordance with the provisions of the Act.

9. 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.

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

(Vikash Jain, J)

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