

IN THE HIGH COURT OF JUDICATURE AT PATNA

Request Case No.23 of 2015

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M/s Gangotri Enterprises Ltd. having its registered office in B-158, Sector-A, Mahanagar, Lucknow-226006, Uttar Pradesh through its DGM (P) Shri Anurag Sharma aged about 37 years, Son of Sri O.P. Sharma, Resident of C-2629, Rajaji Puram Awas Vikas Colony, P.S. Rajaji Puram, District Lucknow

.... Petitioner

Versus

1. The State of Bihar through its Secretary, Road Construction Department, Govt. of Bihar, Patna.
2. The Secretary, Road Construction Department, Govt. of Bihar, Patna.
3. The Engineer-in-Chief cum Additional Commissioner-cum-Special Secretary, Road Construction Department, Government of Bihar, Patna.
4. The Chief Engineer, National Highways Wing, Road Construction Department, Govt. of Bihar, Patna.
5. The Executive Engineer, National Highways Division, Road Construction Department, Jainagar, District Madhubani.

.... Respondents

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Appearance :

For the Petitioner : Mr. Y.V. Giri, Sr. Advocate

Mr. Naresh Dikshit

Mr. Ashish Giri, Advocates

For the Respondents: Mr. Roy Shivaji Nath, AAG 3

Mr. Sunil Kumar Ravi, AC to AAG 3

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CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

Date: 08-04-2016

Heard learned senior counsel for the petitioner and learned counsel for the respondents.

2. The present request petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, "the Act") for appointment of sole independent Arbitrator in terms of Clause 64 of the General Conditions of Contract ("GCC" for short) for adjudication of contractual disputes between the parties in connection with Contract No. 4 S.B.D./2011-12 dated

22.08.2011 for Rs. 84,63,38,504/-.

3. According to the petitioner, a tender notice was issued by the respondents for widening and strengthening of the existing intermediate single lane to 2 lane carriageway in KM 28.0 to KM 53.76 of NH-105 in Bihar, under the Special Project Scheme (Job No. – 105-BHR-2010-11-034), in which the petitioner participated and was declared the successful bidder. The contract was awarded to the petitioner in terms of the letter of acceptance dated 03.08.2011 and subsequently, an agreement was executed between the parties on 22.08.2011. It is stated that the work could not be progressed effectively by reason of failure on the part of the respondents to remove the hindrances as the respondents failed to do the utility shifting even taking forest clearance which was a sine-qua-non to start the work. Despite this, the petitioner executed the work to the extent possible on the road stretches which were hindrance-free. It is stated that the reasons for delay in progress of the work were therefore solely attributable to the respondents. Despite correspondences between the parties including “Early Warning” by the petitioner with reference to Clause 32 of the Conditions of Contract, the problems being faced by the petitioner were not resolved, all of which led to an arbitrable dispute between the parties. The



petitioner by its letter dated 08.04.2015 invoked the arbitration clause and made a request to the Executive Engineer, National Highway Division, Jainagar , District Madhubani (Bihar) (respondent no. 5) for appointment of a sole arbitrator for the resolution of the disputes, which request, however, was not responded to by the respondents.

4. Learned counsel for the respondents relies on the statements made in the counter affidavit and has been heard at length.

5. The provision for arbitration is contained in Clause 25.3 of the General Conditions of Contract and the relevant extract is being reproduced herein for the sake of ready reference:

“25.3(a) In case of dispute or difference arising between the employer and a domestic contractor relating to any matter arising out of or connected with this agreement, such dispute or difference shall be settled in accordance with the Arbitration and Conciliation Act, 1996. The parties shall make efforts to agree on a sole arbitrator and only if such an attempt does not succeed then the Arbitral Tribunal consisting of 3 Arbitrators one each to be appointed by the employer and the contractor and the third arbitrator to be chosen by the two arbitrators so appointed by the parties to act as presiding arbitrator, shall be considered. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the presiding arbitrator shall be appointed by the Council, Indian Road Congress.

(b) The Arbitral Tribunal shall consist of three Arbitrators one each to be appointed by the Employer

and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties, and shall act a presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the presiding arbitrator shall be appointed by the Council, Indian Roads Congress.

(c) If one of the parties fails to appoint its arbitrator in pursuance of sub-clause (a) and (b) above within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the Council of Indian Road Congress shall appoint the arbitrator. A certified copy of the order of the Council of Indian Road Congress making such an appointment shall be furnished to each of the parties."

6. It is evident from the facts narrated in the petition as well as in the counter affidavit that an arbitrable dispute exists between the parties. There is specific provision for referring the dispute between the parties to the forum of arbitration in terms of Clause 25.3 referred to above. It is a matter of record that the petitioner invoked the arbitration clause in terms of the letter dated 08.04.2015 and requested for appointment of sole arbitrator but the same was not acceded to by the respondents. This fact has not been controverted in the counter affidavit. Clause 25.3(c) of the GCC contemplates a situation of the present nature where one of the parties fails to appoint its arbitrator under sub-clause (a) and (b) thereof within 30 days after receipt of the notice from the other party. In such event, the appointment

of the arbitrator has to be made by the Council of Indian Road Congress.

7. Having regard to the entirety of the facts and circumstances of the case, this Court accordingly directs that on being approached by the petitioner within a period of three weeks from today with a copy of the present judgment, the Council of Indian Road Congress shall proceed to appoint a sole arbitrator for settlement of the claims and disputes between the parties. Such appointment shall be made within a period of 30 days from the date of the receipt/production of a copy of this judgment.

8. The petitioner must approach the Arbitrator so appointed within one month thereafter along with a certified copy of this judgment and file its statement of claims and the said Arbitrator will thereupon proceed with the adjudication expeditiously. The fees of the Arbitrator shall abide by the Fourth Schedule of the Act and shall be borne equally by the parties.

9. With the aforesaid observations and directions, this Request Case is disposed of.

(Vikash Jain, J)

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