

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Request Case No.16 of 2017**

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Hindustan Steelworks Construction Limited a company registered under the Companies Act, 1956 having registered office at P-34A Garia Hat Road (South), Kolkata-700031 through its authorised representative and the Head Project Incharge Bokaro Steel City, Shri Utapal Sarkar, S/o Late H. B. Sarkar, R/o Hindustan Steelworks Construction Limited, Administrative Building, Bokaro Steel City-827001.

.... .... Petitioner/s

Versus

1. The Union of India through the Chairman Railway Board, Ministry of Railways, Rail Bhawan, New Delhi.
2. East Central Railway through General Manager, East Central Railway, Hajipur, Bihar.
3. CAO, East Central Railway, Mahendru Ghat, Patna-800004.
4. Chief Engineer, (Con)/CPU, East Central Railways, Mahendru Ghat, Patna-800004, Bihar.
5. Deputy Chief Engineer (Con)/CPU. East Central Railways, Mahendru Ghat, Patna-800004, Bihar.

.... .... Respondent/s

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**Appearance :**

For the Petitioner/s : Mr. P. N. Shahi, Senior Advocate  
Mr. Mrigank Mauli, Advocate  
Mr. Sanket, Advocate  
Mr. Prince Kr. Mishra, Advocate

For the Respondent/s : Mr. P. K. Verma, Senior Advocate  
Mr. Abhinay Raj, Advocate

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**CORAM: HONOURABLE THE CHIEF JUSTICE**

**ORAL JUDGMENT**

**Date: 02-08-2017**

This is an application filed by the petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') for constituting an arbitral tribunal for resolution of the dispute in question.

2. The East Central Railway floated an open tender Notice No.33 of 2015-16 and Tender Notice No. 58 of 2015-16 in two packet system for the work of cutting/filling and associated work



thereto for various sections in the East Central Railway. In the execution of the agreement, in question, as certain dispute had arisen, the matter has come to this Court. The Railway Administration have filed a detailed counter affidavit and by referring to the arbitration agreement, in question, they have indicated that they have already appointed an arbitrator in pursuance to the arbitration clause and, therefore, no further action is required to be taken in the matter.

3. However, learned counsel for the petitioner invites my attention to a judgment rendered by the Supreme Court in the case of **M/s. Voestalpine Schienen GMHB v. Delhi Metro Rail Corporation Ltd.**, AIR 2017 SC 939, the amendment to the Arbitration Act incorporated and bring into force sub-section (5) to Section 12 vide Amending Act of 2005 and the principles laid down therein, particularly with reference to Schedule 7 to say that now in the light of this judgment, the officers of the Railway cannot be appointed. Independent arbitrators are required to be appointed and a proposal is submitted to say that independent arbitrator should be appointed.

4. However, the petitioner has filed an interlocutory application as directed by this Court vide application dated 07.04.2017 and by referring to communication Annexure- P/1 dated 30<sup>th</sup> March, 2017 pointed out that an arbitral tribunal has been constituted consisting of the persons detailed therein and as these officers were never employed with the East Central Railway, they are independent



arbitrators and further when this Court directed for filing an affidavit indicating that the officers are independent officers, a supplementary counter affidavit has been filed on behalf of respondents on 25.07.2017 and it is stated by referring to Annexure-B dated 13.07.2017 that the General Manager of the East Central Railway has appointed a panel of four arbitrators, as detailed in Annexure-B dated 13.07.2017, an affidavit is filed to say that these officers were never associated with the East Central Railway, therefore, they are independent arbitrators and their appointment can be approved.

5. However, learned counsel for the petitioner refuted the aforesaid contention and placing reliance on the judgment of the Supreme Court in the case of **Delhi Metro Rail Corporation Ltd.** (supra) argued that all the officers now appointed were associated with the Railway and the Railway Board and in the present case as the agreement, in question, is executed after due approval or guidelines issued by the Railway Board, the prohibition contained in Section 12(5) of the Act still attracted, the arbitrators, who were the members of the Railway Board or the Indian Railway Service, cannot be termed as arbitrator and, therefore, the relationship between the arbitrator and the parties as contemplated under the 7<sup>th</sup> Schedule of the Act still in existence and they cannot be appointed.

6. I have heard learned counsel for the parties and perused the record.



7. There is no dispute that an arbitral tribunal has to be constituted and the dispute has to be resolved only by constitution of an arbitral tribunal. The only dispute is as to whether the arbitrators nominated by the General Manager of East Central Railway as contemplated in the arbitration agreement should be approved or taking note of the requirement of Schedule 7 of the Act whether it can be said that these arbitrators are not independent arbitrators and therefore, independent arbitrators have to be appointed.

8. The panel approved and appointed by the General Manager is a panel of retired Railway officers and a perusal of Annexure-B dated 13.07.2017 goes to show that all the four officers appointed were associated with the Railway Board or one or the other General Manager in various capacities as members of the Railway Board, Executive Directors, AGM or General Manager of a particular Railway. An independent arbitrator is required to be appointed in terms of the law laid down by the Supreme court in the case of **Delhi Metro Rail Corporation Ltd.** (supra) and while considering this question, the Hon'ble Supreme Court has gone into the issue in question and in para 17, the matter has been dealt with in the following manner:

“17. Keeping in mind the afore-quoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this,



Sub-section (5) of Section 12 lays down that 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, he shall be ineligible to be appointed as an arbitrator. In such an eventuality, i.e., when the arbitration Clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non-obstante Clause contained in Sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement.”

9. If we take note of the aforesaid provision, it would be clear that the purpose of amending the provision of Section 12 to the Act was to ensure that the arbitrator appointed is independent and discharges his duties without any hindrance. In para 19 of the said judgment, the importance of independence and impartiality of an arbitrator as hallmark of an arbitration proceedings and the requirement of rule of natural justice has been highlighted in the following manner:-

“19. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators



themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in *Jivraj v. Hashwani*: (2011) UKSC 40, in the following words:

“the dominant purpose of appointing an arbitrator is the impartial resolution of dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.”

10. Thereafter, in the case of **Delhi Metro Rail Corporation Ltd.** (supra), the Hon'ble Supreme Court has taken note of the panel recommended for appointment and finding the officers not to be in any way related to the Deli Metro Rail Corporation approved their appointment.



11. If the case in hand is evaluated in the aforesaid requirement of law it is clear that the appointment made by the Railway Administration vide communication dated 30<sup>th</sup> March, 2017 which consists of officers of the East Central Railway cannot approved by this Court as they are all officers, who are associated with the East Central Railway, and their appointment cannot be approved. When these facts were brought to the notice of the respondents, the respondents have indicated the names of four other officers vide supplementary affidavit filed on 25<sup>th</sup> July, 2017 and in Annexure-B thereof dated 13.07.2017, the following names have been suggested:-

1. Shri Ratnesh Kumar Bariar, Retd. ED/ RITES (IRSE)
2. Shri Ajay Kumar Goyal, Retd. Member Staff/ Rly. Board (IRTS)
3. Shri Vipin Jha, Retd. AGM/ NFR (IRSEE)
4. Shri Ajay Kumar Verma, Retd. GM/SER (IRSME)

12. The aforesaid panel also seems to be consisting of retired Railway Officers, who were in some way or the other associated with the Railway Administration either through the Railway Board or the Zonal Railway. Therefore, after evaluating the suggestions made by the respondents with regard to this panel, in the backdrop of the law laid down by the Hon'ble Supreme Court in the case of **Delhi Metro Rail Corporation Ltd.** (supra), I am of the considered view that as all these officers were in some way or the other connected with the Railway Administration either through the



Railway Board or other zonal Railways and as the dispute in question pertains to an agreement executed as per the guidelines of the Railway Board, it is not appropriate to approve the aforesaid panel, in stead from the panel submitted by the petitioner, Hon’ble Justice Smt. Mridula Mishra, a retired Judge of this Court, is directed to be appointed as an arbitrator nominated by the petitioner and along with her, Hon’ble Mr. Justice Jayanandan Singh, a retired Judge of this Court, is appointed as the second member and Sri Tapas K Ghosh, B.E. C.E. FIF, Technical Advisor/Consultant is appointed as Technical member of the Arbitral Tribunal.

13. With the aforesaid, the application stands disposed of.

**(Rajendra Menon, CJ)**

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