

IN THE HIGH COURT OF JUDICATURE AT PATNA

Request Case No.8 of 2016

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1. Sadhna Kumari wife of Shree Prakash Sharma Proprietor, M/s Sadhna Rice Mill, Ramnandan Nagar, Datiyana, Bikram, P.S. Bikram, District Patna.

.... Petitioner/s

Versus

1. The Bihar State Food & Civil Supplies Corporation Limited, Khadya Bhawan, Daroga Prasad Path, R-Block, Road No. 2, Patna - 800001, through its Managing Director.
2. The Managing Director, Bihar State Food & Civil Supplies Corporation Limited, Khadya Bhawan, Daroga Prasad Path, R - Block, Road No. 2, Patna - 800001.
3. The District Manager, Bihar State Food & Civil Supplies Corporation Limited, Patna.

.... Respondent/s

with

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Request Case No. 9 of 2016

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1. Smt. Bina Devi wife of Kul Prakash Proprietor, M/s Maa Vindhyavasini Rice Mill, Rani Talab, Bikram, Gauna, P.S. Bikram, District Patna.

.... Petitioner/s

Versus

1. The Bihar State Food & Civil Supplies Corporation Limited, Khadya Bhawan, Daroga Prasad Path, R-Block, Road No. 2, Patna - 800001, through its Managing Director.
2. The Managing Director, Bihar State Food & Civil Supplies Corporation Limited, Khadya Bhawan, Daroga Prasad Path, R - Block, Road No. 2, Patna - 800001.
3. The District Manager, Bihar State Food & Civil Supplies Corporation Limited, Patna.

.... Respondent/s

with

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Request Case No. 47 of 2016

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1. M/s Tiripati Rice Mills, Through Its Proprietor Shtrugan Thakur, Resident of Village & P.O.- Sursand, Police Station- Sursand, District- Sitamarhi, Bihar.

.... Petitioner/s

Versus

1. The State of Bihar through the District Magistrate, Sitamarhi.
2. The District Certificate Officer, Sitamarhi.
3. The District Manager, Bihar State Food and Civil Supplies Corporation Ltd., Shankar Chowk Dumra, District Office Sitamarhi, Bihar.



.... Respondent/s

with

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Request Case No. 37 of 2016

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1. Amit Jaiswal S/o Sunil Kumar Jaiswal, proprietor of M/s Baba Mini Rice Mill, Purnea, Resident of GulabBagh, P.S.- Sadar, District- Purnea.

.... Petitioner/s

Versus

1. The Bihar State Food & Civil Supplies Corporation Limited, Khadya Bhawan, Daroga Prasad Path, R- Block, Road No. 2, Patna- 800001, through its Managing Director.
2. The Managing Director, Bihar State Food & Civil Supplies Corporation Limited, Khadya Bhawan, Daroga Prasad Path, R- Block, Road No. 2, Patna- 800001.
3. The District Manager, Bihar State Food & Civil Supplies Corporation Limited, Purnea, District- Purnea.

.... Respondent/s

with

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Request Case No. 38 of 2016

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1. Rajeev Ranjan Kumar, son of Ganauri Prasad, Proprietor M/S Sharda Rice Mill, resident of Village- Krujari, P.S.- Chandaury, District- Gaya.

.... Petitioner/s

Versus

1. The Bihar State Food & Civil Supplies Corporation Limited, Khadya Bhawan, Daroga Prasad Path, R- Block, Road No. 2, Patna- 800001, through its Managing Director.
2. The Managing Director, Bihar State Food & Civil Supplies Corporation Limited, Khadya Bhawan, Daroga Prasad Path, R- Block, Road No. 2, Patna- 800001.
3. The District Manager, Bihar State Food & Civil Supplies Corporation Limited, Gaya.

.... Respondent/s

with

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Request Case No. 39 of 2016

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1. M/s Savitri Raghunath Rice Mill, through its Proprietor/ Representative namely Manish Kumar S/o. Sri Arun Kumar Jha, Resident of Maithil Tola P.O.- Madhubani P.S.- K.Hat District- Purnea.

.... Petitioner/s

Versus

1. The Bihar State Food & Civil Supplies Corporation Limited, Khadya Bhawan, Daroga Prasad Path, R- Block, Road No. 2, Patna- 800001, through its Managing Director.



2. The Managing Director, Bihar State Food & Civil Supplies Corporation Limited, Khadya Bhawan, Daroga Prasad Path, R- Block, Road No. 2, Patna-800001.
3. The District Manager, Bihar State Food & Civil Supplies Corporation Limited, Purnea, District- Purnea.

.... Respondent/s

with

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Request Case No. 40 of 2016

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1. Rabindra Kumar, son of late Radha Madhav Prasad, proprietor of M/s Chitrans Rice Mill, Purnea resident of Koratibari, P.O.- Madhubani, P.S.- K.Hat, District- Purnea.

.... Petitioner/s

Versus

1. The Bihar State Food & Civil Supplies Corporation Limited, Khadya Bhawan, Daroga Prasad Path, R- Block, Road No. 2, Patna- 800001, through its Managing Director.
2. The Managing Director, Bihar State Food & Civil Supplies Corporation Limited, Khadya Bhawan, Daroga Prasad Path, R- Block, Road No. 2, Patna-800001.
3. The District Manager, Bihar State Food & Civil Supplies Corporation Limited, Purnea.

.... Respondent/s

with

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Request Case No. 46 of 2016

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1. M/s Aathri Packs Rice Mills Through Its Proprietor Manoj Kumar, son of Shriam Babu Sharma, resident of Village- Aathari, P.S.- Runni Saidpur, District- Sitamarhi (Bihar).

.... Petitioner/s

Versus

1. The District Manager, Bihar State Food And Civil Supplies Corporation Ltd. Shankar Chowk Dumra, District Office, Sitamarhi, Bihar.

.... Respondent/s

with

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Request Case No. 29 of 2016

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Anup Jaiswal

.... Petitioner/s

Versus

The Bihar State Food & Civil Supplies Corporation Limited & Ors

.... Respondent/s

with



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Request Case No. 30 of 2016

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Lal Babu Prasad
..... Petitioner/s
Versus
The Bihar State Food & Civil Supplies Corporation Limited & Ors
..... Respondent/s
with

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Request Case No. 31 of 2016

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Abinash Kumar
..... Petitioner/s
Versus
The Bihar State Food & Civil Supplies Corporation Limited & Ors
..... Respondent/s
with

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Request Case No. 32 of 2016

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Sudhir Kumar
..... Petitioner/s
Versus
The Bihar State Food & Civil Supplies Corporation Limited & Ors
..... Respondent/s
with

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Request Case No. 33 of 2016

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1. Nutan Kumari wife of Kamlesh Kumar, Proprietor of M/S Nutan Rice Mill, resident of village, Mohalla- A.P. Colony, P.S.- Rampur, District- Gaya.
..... Petitioner/s
Versus
1. The Bihar State Food & Civil Supplies Corporation Limited, Khadya Bhawan, Daroga Prasad Path, R- Block, Road No. 2, Patna- 800001, through its Managing Director.
2. The Managing Director, Bihar State Food & Civil Supplies Corporation Limited, Khadya Bhawan, Daroga Prasad Path, R- Block, Road No. 2, Patna- 800001.
3. The District Manager, Bihar State Food & Civil Supplies Corporation Limited, Gaya.
..... Respondent/s
with

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Request Case No. 34 of 2016

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1. Bandan Kumar Singh, Son Of Sri Suresh Prasad Singh, proprietor of M/s Shree Kuber Udyog, Purnea, Resident Of Bageshwari Asthan Gulab Bagh P.S- Sadar,



District- Purnea.

.... Petitioner/s

Versus

1. The Bihar State Food & Civil Supplies Corporation Limited, Khadya Bhawan, Daroga Prasad Path, R- Block, Road No. 2, Patna- 800001, through its Managing Director.
2. The Managing Director, Bihar State Food & Civil Supplies Corporation Limited, Khadya Bhawan, Daroga Prasad Path, R- Block, Road No. 2, Patna- 800001.
3. The District Manager, Bihar State Food & Civil Supplies Corporation Limited, Purnea.

.... Respondent/s

with

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Request Case No. 35 of 2016

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1. Gurudeo Prasad Gupta Son Of Late Ganesh Lal Sah, proprietor of M/s Balaji Rice Mill, Purnea, Resident Of Rajendra Nagar Madhubani, P.S.- Madhubani, P.S.- K.Hat District- Purnea.

.... Petitioner/s

Versus

1. The Bihar State Food & Civil Supplies Corporation Limited, Khadya Bhawan, Daroga Prasad Path, R- Block, Road No. 2, Patna- 800001, through its Managing Director.
2. The Managing Director, Bihar State Food & Civil Supplies Corporation Limited, Khadya Bhawan, Daroga Prasad Path, R- Block, Road No. 2, Patna- 800001.
3. The District Manager, Bihar State Food & Civil Supplies Corporation Limited, Purnea, District- Purnea.

.... Respondent/s

with

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Request Case No. 36 of 2016

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1. Dharmvir Singh Alias Dharamveer Singh Proprietor of M/s Ganga Yamuna Rice Mill, resident of village- Sevter, P.S.- Atri, District- Gaya.

.... Petitioner/s

Versus

1. The Bihar State Food & Civil Supplies Corporation Limited, Khadya Bhawan, Daroga Prasad Path, R- Block, Road No. 2, Patna- 800001, through its Managing Director.
2. The Managing Director, Bihar State Food & Civil Supplies Corporation Limited, Khadya Bhawan, Daroga Prasad Path, R- Block, Road No. 2, Patna- 800001.
3. The District Manager, Bihar State Food & Civil Supplies Corporation Limited, Gaya.

.... Respondent/s



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Appearance :

For the Petitioners:	Mr. P.K. Sahi, Sr. Advocate Mr. Jitendra Singh, Sr. Advocate Mr. N.K. Agrawal, Sr. Advocate Mr. Sumeet Kumar Singh, Advocate Mr. Abhiprav Singh, Advocate Mr. Yash Singh, Advocate
For the Respondents	Mr. Aditya Prakash Sahay, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
ORAL JUDGMENT

Date: 19-04-2017

These are sixteen applications filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking constitution of an Arbitral Tribunal for adjudication of the dispute that has arisen between the parties in execution of an agreement and, as questions of law and fact are similar in all the cases, they are being disposed of by this common order.

2. For the sake of convenience, the documents and pleadings in the record of Request Case No.8 of 2016 are being referred to in this order.

3. The applicants herein and the Bihar State Food and Civil Supplies Corporation Limited, the respondents, entered into agreement for milling of paddy for Kharif marketing for the seasons 2012-2013. Annexure-1 dated 14.2.2013 is the agreement available on record and Clause 15 and 16 of the agreement, which are identical in all the cases read as under:

“15. The second party agrees that in case, any amount found recoverable on account of default, loss, damage on the part of the second party, the said recoverable amount with interest will be recovered as Land Revenue under Bihar & Orissa



Public Demands Recovery Act, 1914 by instituting Certificate case before the concerned District *Certificate Officer*.

16. In case of disputes both parties agree to settle the issue(s) on mutual discussion. Failure to reach agreement the matter will be referred to arbitrator. It has been also agreed that the arbitrator will be District Collector of the concerned District whose decision shall be final, concerning the dispute referred to him.”

4. It seems that certain dispute arose and the Board issued show cause notices and initiated certificate proceedings under the Bihar and Orissa Public Demands Recovery Act, 1914 (for short, Recovery Act) under Clause 19.

5. Petitioners challenged these proceedings by filing writ petitions before this Court and the petitioners were granted liberty to raise objections before the Certificate Officer-cum-Subdivisional Officer under Section 9 of the Recovery Act. The petitioners raised the claim. Their objections were rejected and when the certificates for recovery of the amount were issued, they filed these applications, *inter alia* seeking constitution of an Arbitral Tribunal in accordance to the requirement of Clause-16 reproduced hereinabove.

6. It is the case of the petitioners that the recovery proceedings initiated without adjudication of the dispute is unsustainable and, as the recovery proceedings under the Certificate Act, proceedings is unsustainable, they are not liable to pay the amount. They want resolution of the dispute by taking recourse to



Clause-16 of the agreement.

7. Learned counsel for the petitioners argued that Clause-16 is an arbitration agreement and even though in the arbitration agreement the District Collector is nominated as a named arbitrator, but in view of Section-12(5) of the Arbitration and Conciliation Act and the provisions of Schedule-7, Clause-1 thereof, the Collector being an employee of the organization and a person having business relationship and interested in the dispute, cannot act as an arbitrator and, therefore, an independent arbitrator should be appointed. In support of the aforesaid contention, a reasoned judgment of the Supreme Court in the case of M/s. Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd., reported in AIR 2017 SC 939 is relied upon.

8. Learned senior Counsel for the petitioners took us through various aspects of the matter, the principle laid down by the Supreme Court, the recommendations made by the Law Commission, the amendment to the provisions of Section-12 and argues that it is a fit case where the independent arbitrator should be appointed. Learned Counsel invites our attention to the views recorded by the Supreme Court at para-17, in the case of M/s. Voestalpine (supra) various judgments of the Supreme Court on the subject in question with regard to independent and impartial arbitrator being appointed discussed in 18 of the judgment and



argues that this is a fit case where independent arbitrator should be appointed.

9. Learned counsel for the respondents refuted the aforesaid contention, placed reliance on Section 8 of the Arbitration and Conciliation Act, 1996 and argues that as a judicial authority, namely, the Certificate Officer, has issued the certificate under the Bihar and Orissa Public Demands Recovery Act, 1914. Now the only remedy available to the petitioners is to challenge the recovery certificate by filing an appeal under the aforesaid statutory provision and no application for arbitration is now maintainable after such a long period of time as the certificate proceedings were initiated in the year 2014. He further argues that Clause-16 is not an arbitration agreement and, therefore, this application under Section-11(6) is not maintainable and in support of the aforesaid contention, invites my attention to a judgment of the Supreme Court in the case of P. Dasaratharama Reddy Complex vs. Government of Karnataka & Anr., reported in (2014) 2 SCC 201.

10. Shri Y.V. Giri, appearing for one of the applicants in Request Case No.34 of 2016, invites my attention to an admission made by the respondents in a proceedings held before this Court in C.W.J.C. No.9113 of 2014, 12355 of 2014 and 12356 of 2014 on 25.2.2014 when certain admissions were made by counsel for the respondent Board, detailed in para-12 of the order passed by a



Division Bench of this Court on 22.7.2014, in that petition when a claim was made for quashing the demand notice issued, a plea of alternate remedy being available was made by arguing that an arbitration clause being available, the writ petition is not maintainable.

11. Heard learned counsel for the parties at length and perused the records. It is seen that after the certificate proceedings, the petitioners approached this Court and when the matter was pending before this Court, as pointed out by Shri Giri, the respondents admitted that an alternate remedy of settlement of dispute through arbitration is available. Apart from the aforesaid admission of the petitioners, a perusal of Clause-16 of the agreement in question clearly shows that it is an arbitration agreement. The judgment in the case of P. Dasaratharama Reddy Complex (supra), relied upon by the learned counsel for the respondents, is not applicable in the present case. There the arbitration clause considered and reproduced by the Hon'ble Supreme Court in para-10 is entirely different and in para 15 it is clearly indicated that the words 'Arbitrator' or 'Arbitration' are not available in that agreement and that was the reason why it was held that there is no arbitration agreement. In this case, the arbitration agreement is clear in its term and there is no iota of doubt that there is an arbitration agreement. As far as the contention of the respondents that in view



of the adjudication by the Certificate Officer and in view of Section-8, the arbitration cannot be resorted to is not correct. Section-8 empowers the judicial authority before whom an application is brought to refer the matter for arbitration, subject to an arbitration agreement. The certificate proceeding is not before a judicial authority. It is only an execution proceeding before a statutory authority who is not a judicial authority and, therefore, the objection of the respondents is unsustainable. That apart, merely because the certificate proceedings have been held and some certificates for recovery have been issued, it does not mean that the right of the petitioners to seek resolution of the dispute by arbitration and seek relief in terms of the agreement is taken away. The certificate proceedings are independent execution proceedings and the question as to whether the certificate proceedings held is legal without there being adjudication of the dispute is a question which would have to be considered by an appropriate authority, may be, the arbitrator or the appellate authority, under the Recovery Act.

12. For the present, in these proceedings, this Court is not required to go into all these aspects of the matter. These may be questions to be looked into either by the arbitrator or by the appellate authority, in case the petitioner takes recourse to the appellate proceedings under the Bihar and Orissa Public Demands Recovery Act, 1914. For the present, it is suffice to say that there is



a dispute between the parties, on the matter of execution of the work in pursuance to the agreement in question which has to be adjudicated in terms of Clause-16, the arbitral agreement and, therefore, an arbitrator has to be appointed. However, as a named arbitrator is indicated in Clause-16, the further question would be as to whether in view of requirement of Section-12(5) and the provisions of Schedule-7, Entry-1, the Collector can be permitted to discharge the duties of an arbitrator.

13. Admittedly, the Collector is an officer of the Board. He is the person who conducted the certificate proceedings and, therefore, as contemplated in Entry-1 to the 7th Schedule, falls in the category of, may be, an employee, a consultant and advisor or has any other past or present business relationship with the parties. That apart, many of the prohibitions contained in the 7th Schedule are attracted in the case of the named arbitrator i.e. the Collector.

14. While discussing the matter in the case of M/s. Voestalpine Schienen GMBH (supra), the Hon'ble Supreme Court has stressed upon the requirement of neutrality, impartiality and independence of the arbitrator, the recommendations of the Law Commission and has stressed upon the need to have an impartial arbitration. The question of appointing an independent and impartial arbitrator has been discussed and the requirement for doing so in para-16 and 17 has been crystallized in the following manner:



“16. We may put a note of clarification here. Though, the Law Commission discussed the aforesaid aspect under the heading “Neutrality of Arbitrators”, the focus of discussion was on impartiality and independence of the arbitrators which has relation to or bias towards one of the parties. In the field of international arbitration, neutrality is generally related to the nationality of the arbitrator. In international sphere, the ‘appearance of neutrality’ is considered equally important, which means that an arbitrator is neutral if his nationality is different from that of the parties. However, that is not the aspect which is being considered and the term ‘neutrality’ used is relatable to impartiality and independence of the arbitrators, without any bias towards any of the parties. In fact, the term ‘neutrality of arbitrators’ is commonly used in this context as well.

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.”

15. It is a case where the named arbitrator as contemplated in Clause-16 cannot be appointed and an independent arbitrator has to be appointed and, therefore, overruling all the



objections raised by the respondents, all these applications are allowed.

16. Justice (Retired) R.K. Datta is appointed as arbitrator to adjudicate the dispute. However, in these proceedings this Court has not gone into the merits of various objections raised with regard to maintainability of the dispute in view of the certificate proceedings held, the question of limitation and all other issues are left open to be canvassed by the parties before the arbitrator.

(Rajendra Menon, CJ)

K.C.jha/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	27.4.2017
Transmission Date	N/A

