

IN THE HIGH COURT OF JUDICATURE AT PATNA

Request Case No.70 of 2017

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M/s K P C Projects Limited, a registered Company having its office at 1-2-339/1, Street No.- 6, Gagan Mahal, Domalguda, Hyderabad, erstwhile Andhra Pradesh, now Telengana, through its Project Manager, namely Mr. Pannalal Kali Charan, Son of Late P.V. Sastry, presently residing at I.G.I.C. North Building, P.M.C.H., Campus, Patna, Bihar.

.... Petitioner/s

Versus

1. Infrastructure Development Authority, Bihar Through its Managing Director, 1st Floor, Udyog Bhawan, East of Gandhi Maidan, Patna.
2. The Managing Director, Infrastructure Development Authority, Bihar, 1st floor, Udyog Bhawan, East of Gandhi Maidan, Patna.
3. The Chief Consultant and presently The Executive Engineer, Infrastructure Development Authority, Bihar Ist Floor, Udyog Bhawan, East of Gandhi Maidan, Patna.
4. The Director (P.I), Infrastructure Development Authority, Bihar, 1st Floor, Udyog Bhawan, East of Gandhi Maidan, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Avinash Kumar, Mr.Rajeev Shekhar and Mr. Sanjay Kumar
For the Respondent/s	:	Mr. Lalit Kishore, Advocate General Mr. Vikash Kumar and Mr. Sriram Krishna

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CORAM: HONOURABLE THE CHIEF JUSTICE

ORAL JUDGMENT

Date: 30-08-2017

This is an application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking constitution of an Arbitral Tribunal in view of the dispute as has arisen between the parties in the matter of execution of an agreement entered into



between them on 30th August, 2010.

The applicant-Company is engaged in the business of execution of works contract. A tender was invited for construction of a National Institute of Fashion Technology centre at Mithapur in Patna. The bid of the applicant was accepted and the agreement in question was executed. It seems that as the work in question was not completed within the stipulated period, extension was permitted from time to time and various issues cropped up pertaining to delay in conclusion of the project and the petitioner claimed price escalation. When this was not permitted, request was made for constitution of an Arbitral Tribunal as contemplated in Clause 25 of the agreement and when nothing was done in respect thereof, this application has been filed.

Learned counsel for the applicant submits that in the facts and circumstances of the case, the petitioner is entitled for certain cost escalation and other advances which remain unpaid and as the respondents are not taking action for resolution of the dispute in terms of Clause 25 of the agreement, this application has been filed.

Clause 25 of the agreement contemplates a detailed procedure for raising of claim before the various authorities including Superintending Engineer and Engineer-in-chief and finally it contemplates a provision for resolution of the dispute in accordance



with the provision of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the '1996 Act'). However, the respondents have filed objection and it is their contention that in view of a specific prohibition as per Clause **10CC/11** of the agreement, wherein, it is clearly stipulated that no advance payment shall be made in any case and no escalation shall also be allowed in the matter. Referring to Clause 11 of the agreement contemplating the aforesaid provision, learned counsel for the respondents argued that once there is prohibitory clause preventing escalation or payment of advance, then in view of the law laid down by the Supreme Court in the case of **Ramnath International Construction Private Limited vs. Union of India (AIR 2007 SC 509)** and the judgment of the Bombay High Court in **Bombay Railway Engineering Co. vs. General Manager, Central Railway [2014(4) Maharashtra Law Journal 103]**, the claim cannot be accepted and no Arbitral Tribunal can be constituted for adjudicating such a claim which is not permissible.

Refuting the aforesaid, learned counsel for the applicant invited my attention to an Office Order dated 18.10.2012 at Page 240, and argued that after extension of the contract advance payment for mobilization etc. which is said to be prevented were made and, therefore, the respondents have waived their right as per the prohibitory clause while making various payments as are evident from



this document Page 240. It is said that objection is unsustainable. That apart, he invites my attention to a judgment of the Supreme Court in the case of **Emm Enn Associates vs. Commander Works Engineer [(2016) 13 SCC 61]** to say that when there is dispute between the parties with regard to merits of the claim it should be left to the Arbitrator to resolve the dispute and the application on this ground should not be rejected.

I have heard learned counsel for the parties and perused the records. There is no dispute with regard to the existence of a clause prohibiting payment on account of advance and escalation cost. However, the dispute in this case is as to whether on such consideration at this stage the prayer under Section 11 of the 1996 Act can be rejected. Even though in the case of **Ramnath International Construction Private Limited** (supra) decided by the Supreme Court and in the case of **Bombay Railway Engg. Corporation** (supra), the Bombay High Court have held that once there is a prohibitory clause, no claim can be allowed under those heads. Both the judgments are rendered where such claims for escalation etc. were allowed ignoring the aforesaid clause by the arbitrator while adjudicating the dispute and in proceedings under Sections 30, 33 and 34 the appellate forum interfered into the matter.

Recently, the Hon'ble Supreme Court in the case of **Emm**



Enn Associates (supra) has considered the jurisdiction available under Section 11 of the 1996 Act and holds that jurisdiction available is only to examine the question as to whether the claim as has been based survives and needs to be adjudicated. It is only to be seen as to whether the claim is a dead claim and, therefore, it cannot be referred for arbitration. The dispute pertaining to merits of the claim need not be gone into at this stage in a proceeding under Section 11. If the case in hand is analyzed in the backdrop of this principle of law, it is seen that even though Clause 11 is a prohibitory clause but the records indicate that certain amounts were paid and the question is as to whether the respondents have waived the prohibitory clause by making certain payment. As is evident from Page 240, with regard to which the dispute still exists between the parties. Therefore, I am of the considered view that prayer for constitution of Arbitral Tribunal cannot be rejected. The principle as laid down in the case of **Emm Enn Associates** (supra) will apply in this case because the claim being a disputed one which has to be adjudicated after taking note of relevant facts, documents and material that may come on record. Therefore, it is not a case where the claim can be termed as a dead claim which needs no adjudication, on the contrary, there seems to be serious dispute between the parties with regard to the claim in question and the fact as to whether the prohibitory clause itself can be



invoked or is waived by the respondent is in dispute.

Accordingly, I am unable to uphold the objection of the respondents. The same is rejected and the application is allowed. Mr. Justice Samarendra Pratap Singh, a retired Judge of this Court, is directed to be appointed as Arbitrator to adjudicate the dispute between the parties.

(Rajendra Menon, CJ)

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AFR/NAFR	NAFR
CAV DATE	N.A.
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