

IN THE HIGH COURT OF JUDICATURE AT PATNA

Request Case No.278 of 2017

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S D B S P S (J V), a Joint venture between Som Dutt Buildders Private Limited & SP Singla Construction Pvt. Ltd. having its office at 56-58 Community Centgre East of Kailash, New Delhi -1110065 through its authorized Signatory Shri Parveer Singh Rathore S/o Late Mehar Singh, resident of Kothi No. 47, Sector 9, Panchkula, PS Panchkula, Haryana

.... Petitioner/s

Versus

1. Bihar Rajya Pul Nirman Nigam Ltd., Through its Managing Director , having its registered office at 7, Sardar Patel Marg Patna 15,Bihar
2. The Managing Director, Bihar Rajya Pul Nigam Ltd. Having its registered office at 7, Sardar Patel Marg, Patna 15
3. The Senior Project Engineer, Works Division No. 2, Bihar Rajya Pul Nirman Nigam Ltd.,, having its registered office at 7, Sardar Patel Marg, Patna -15

..... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Satyabir Bharti
	:	Mr. Anirudh Wadhwa
	:	Ms. Aparna Arun
For the Respondent/s	:	Mr. Lalit Kishore, Sr. Advocate
		Mr. Anand Kumar

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CORAM: HONOURABLE THE CHIEF JUSTICE

ORAL JUDGMENT

Date: 31-01-2018

This application has been filed under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as `the Act') seeking constitution of an Arbitral Tribunal for adjudication of the dispute that has arisen between the parties.



Facts in nutshell goes to show that that on 4.5.2010 the respondent-Bihar Rajya Pul Nirman Nigam issued a tender for construction of 4000 meter long 4 lane High Level Bridge along with 17 km long approach road across river Ganga connecting NH-30 (Arrah) & NH 19 (Chapra) in the State of Bihar. Bid of the petitioner was accepted on 8.7.2010 for Rs.539.42 crores and the work was given to the petitioner which was to be completed up to 4.7.2014. Clause 25 of the Agreement in question contemplates an arbitration clause and according to Clause 25(i) if the contractor has any grievance he is to first raise the dispute before the Deputy Chief Engineer who is required to adjudicate the same or pending decision within one month and thereafter appeal lies to the Managing Director.

Initially when the work was not completed on time, dispute raised between the parties in Request Case No. 14 of 2016 and this Court in exercise of its jurisdiction under Section 11(6) of the Act has already constituted a one-member Arbitral Tribunal headed by Hon'ble Justice (Retd.) S B Sinha. The matter is pending before the learned Arbitrator and it is the case of the petitioner that during the pendency of the arbitration proceeding further dispute has arisen but the work continued when the arbitration proceedings were pending and, therefore, further claim having arisen the petitioner raised the claim before the competent authority and the Managing Director



having rejected the same by his communication dated 8th of November, 2017 (Annexure-24) this application has been filed.

Learned counsel for the petitioner took me through the voluminous documents filed in the proceedings earlier initiated where 21 claims are pending and tried to argue that further claim from 22 to 29 have arisen now while executing the works. As now the claim having been rejected by the Managing Director the dispute should be referred to the already constituted Arbitral Tribunal inviting my attention to the law laid down in the case of **Duro Felguera. S.A. vs Gangavaram Fort Limited [(2017) 9 SCC 729]** tried to argue that a provision of amendment made to Section 12 of the Act the import of Section 11(6) is that it is a fit case where further claim made by the petitioner from 22 to 29 can be referred to the earlier arbitration proceedings. He argues that the objection of the respondents that the application is premature is unsustainable for the simple reason that the Managing Director who is the appellate authority has already rejected the claim.

Shri Lalit Kishore, learned Senior Counsel representing the respondents vehemently opposes the aforesaid contentions and argues that once a detailed procedure have been agreed to for consideration of the claim and the cause of action for seeking reference to arbitration would arise only when the departmental



mechanism for adjudication of the claim is complied with and at this stage without taking recourse to the departmental remedy the petitioner has invoked the jurisdiction of this Court which, according to Shri Lalit Kishore, is not permissible.

With regard to the contention that the Managing Director has already rejected the representation vide Annexure-24, Shri Lalit Kishore argues that the representation submitted to the Managing Director may have been rejected but that would not be sufficient to hold that the requirement of raising the dispute and a claim as contemplated under Section 25(1) and 25(ii) of the Agreement has been complied with. It is submitted that until and unless the procedure contemplated for adjudication of the claim as agreed to by the parties is not adhered to, an application under Section 11(6) of the Act is not maintainable.

I have heard learned counsel for the parties at length. I find much force in the objection raised by Shri Lalit Kishore. There is an arbitration clause in Clause 25 of the Agreement in question which reads as under :-

“CLAUSE 25. Settlement of Disputes

- (i) *If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in*



writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable he shall promptly within 7 days request the Deputy Chief Engineer in writing for written instruction or decision. Thereupon, the Deputy Chief Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

(ii)

If the Deputy Chief Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor may, within 15 days of the receipt of Deputy Chief Engineer's decision, appeal to the Managing Director who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Managing Director shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied within this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Managing Director for appointment of arbitrator failing which the said decision shall be



final binding and conclusive and not referable to adjudication by the arbitrator.”

As per the procedure agreed upon the petitioner is required to first raise the claim and it is only after the claim is rejected under the departmental mechanism that a right shall accrue to the petitioner to seek arbitration. The petitioner in this case has not raised the dispute strictly in accordance with the arbitration clause. On the contrary, the petitioner submitting a representation to the Senior Project Engineer who is not a competent authority and by merely endorsing a copy of the claim to the Deputy Chief Engineer now petitioner wants this Court to hold that the right as per the agreement is complied with. Once this Court find that the petitioner has not raised any claim before the Deputy Chief Engineer as per the agreement and when the arbitration agreement contemplates a detailed procedure to be followed for raising a claim then a prayer for constitution an Arbitral Tribunal will accrue only when the departmental procedure for resolution of the dispute is completed. Merely because the Managing Director has rejected the representation of the petitioner which was not a claim raised in accordance with the arbitration agreement, the claim for constitution of the Arbitral Tribunal cannot be considered.

Shri Lalit Kishore is right in contending that the remedy as



per the arbitration clause having not been exhausted, this application is premature. Upholding the objection of the respondents this application is disposed of with liberty to the petitioner to first exhaust the arbitration agreement and then invoke the jurisdiction of this Court under Section 11(6) of the Act.

This application is accordingly disposed of.

(Rajendra Menon, CJ)

mr1./-

AFR/NAFR	NAFR
CAV DATE	N.A.
Uploading Date	03/02/2018
Transmission Date	

