

IN THE HIGH COURT OF JUDICATURE AT PATNA
Request Case No.1 of 2018

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Data Technosys (Engineers) Pvt. Ltd. Asha Apartment (1), 19 Ram Mohan Rai (Lucknow through its legal representative Sandeep Saxena) S/o late K.C. Saxena resident of house no. c 740 Sector C Mahanagar Lucknow.

... .. Petitioner/s

Versus

1. The Union of India through the General Manager, East Central Railway, Hazipur, Patna.
2. The General Manager East Central Railway, Hazipur.
3. The Deputy Chief Engineer (Construction), East Railway, Patna.
4. The Chief Engineer (Construction), Jharkhand East Central Railway Mahendrughat, Patna.
5. The Chief Administrative Officer (Construction), East Central Railway Mahendrughat, Patna.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Sanjeev Kumar Mishra, Advocate
For the Railways	:	Mr. Kumar Manish, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
ORAL JUDGMENT

Date : 23-03-2018

This application has been filed under Section 11(6) of the Arbitration and Conciliation Act seeking constitution of an arbitral tribunal for adjudication of the dispute between the parties in the matter of execution of an agreement i.e. the work of PET survey for doubling (3rd line) of Buxer-Ara-Mokamah Section of the railway in question.

Having heard learned counsel for the parties and keeping in view the considerations made and legal principle discussed by this Bench in Request Case No. 91 of 2017 (M/s Dwivedi & Sons Vs. Bharat Petroleum Corporation Ltd.)



decided on 30th of August, 2017, I am of the considered view that in view of the law laid down by the Supreme Court in the case of **Voestalpine Schienen GMBH Vs. Delhi Metro Rail Corporation Ltd.- (2017) 4 SCC 665** and the observations made therein after amendment to the Arbitration and Conciliation Act and incorporation of the prohibition as contained in Section 12(5) of the 1996 Act, the contention of the Railway Administration and the proposal made by them in the supplementary affidavit for appointing an Arbitrator from the panel indicated therein cannot be accepted, instead keeping in view the following observations made by this Court in the case of **Delhi Metro Rail Corporation** (supra) which reads as under:-

“18. Keeping in mind the aforequoted 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 provisions 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 the arbitration agreement.

28. Before we part with, we deem it necessary to make certain comments on the procedure contained in the arbitration agreement for constituting the Arbitral Tribunal. Even when there are a number of persons empanelled, discretion is with DMRC to pick five persons therefrom and forward their names to the other side which is to select one of these five persons as its nominee (though in this case, it is now done away with). Not only this, DMRC is also to nominate its arbitrator from the said list. Above all, the two arbitrators have also limited choice of picking upon the third arbitrator from the very same list i.e. from remaining three persons. This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by DMRC. Secondly, with the discretion given to



DMRC to choose five persons, a room for suspicion is created in the mind of the other side that DMRC may have picked up its own favourites. Such a situation has to be countenanced. We are, therefore, of the opinion that sub-clauses (b) & (c) of Clause 9.2 of SCC need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator from the whole panel.”

the Railway Administration is directed to prepare a panel as indicated hereinabove and proceed to appoint Arbitrator from such panel after taking consent of the petitioner within a period of six weeks.

With the aforesaid, the application stands disposed of.

(Rajendra Menon, CJ)

P.K.P./-

AFR/NAFR	N.A.F.R.
CAV DATE	N.A.
Uploading Date	27.03.2018
Transmission Date	

