

IN THE HIGH COURT OF JUDICATURE AT PATNA
Request Case No.286 of 2017

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Enginnering Projects (India) Limited, through its Constituent Attorney, Sri Gaurav Khanna, S/o late K.M.Khanna, Manager, Grade-1 (Legal), Having its Office at Core 3, Scope Complex, Lodhi Road, New Delhi-110003.

... .. Petitioner/s

Versus

1. Bihar Police Building Construction Corporation, through its Chairman Cum Managing Director, Kutilya, Nagar, Patna.
2. The Chairman Cum Managing Director Bihar Police Building Construction Corporation Kutilya Nagar, Patna.
3. The Chief Engineer, Bihar Police Building Construction Corporation, Kutilya Nagar, Patna.
4. The Superintending Engineer, Bihar Police Building Construction Corporation, Kutilya Nagar, Patna.
5. The Executive Engineer, Chhabila Pur Road, Rajgir, District Nalanda, Bihar-803116.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. P. K. Shahi, Senior Advocate
		Mr. Vikas Kumar, Advocate
For the Respondent/s	:	Mr. Prasoon Sinha, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
ORAL JUDGMENT
Date : 21-03-2018

Seeking constitution of an arbitral tribunal, this application has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 and it is the case of the applicant that the parties entered into a contract agreement bearing No. 1 F2/3 of 2012 dated 15.02.2012 for the purpose of construction of the Bihar Police Academy, Rajgir for a total consideration of Rs.181,45,47,657/- and in execution of the agreement as per the terms and conditions as contained therein, 12 mobilisation advance bank guarantees to the tune of Rs.12,16,60,000/- were submitted and two performance bank guarantees to the tune of



Rs.3,62,32,000/- were submitted. As per the terms and conditions of the contract, the work was to be completed by 14th of August, 2014. The period was extended by time to time. It is the case of the petitioner that he was ready to commence the work as early as on 17.03.2012. He had fully mobilized for commencement of the work on 14.05.2012, but could not begin the work as the Engineer in charge could not supply the drawing, designs and various other equipments as per the agreement. Various correspondences took place and finally, on account of non-progress of work, after issuing a show cause notice on 25.03.2017, vide Annexure-6, it is stated that the Chief Engineer in terms of clause 14 of the contract terminated the contract vide order dated 24.04.2017. After cancellation of the contract, as indicated hereinabove, the petitioner wrote to the D.G.P.-cum- Chairman of the Corporation requesting for restoration of the contract agreement and allow the petitioner to complete the work. When nothing was done, on 05.05.2017, the petitioner represented to the Principal Secretary to the Government of Bihar, and also to the Chief Engineer. When nothing was done and when the Bank Guarantee itself was invoked, the writ petition was filed in the Delhi High Court which was withdrawn for want of jurisdiction and thereafter, in the matter of invocation of bank guarantee, proceedings have been initiated



under Section 9 of the Arbitration and Conciliation Act, 1996 before the District Judge, Patna.

As far as the grievance with regard to constitution of an arbitral tribunal is concerned, it is stated that when the representation of the petitioner for revocation of the cancellation of the contract was not considered in terms of Clause 25 of the contract, demand was made to the Chief Engineer for constitution of the arbitral tribunal within thirty days, the Chief Engineer rejected the request on the ground that the grievance should be raised before the Superintending Engineer and, therefore, on 18.08.2017, a letter was addressed to the Superintending Engineer who rejected the same on 05.09.2017 vide Annexures-18 and 19 and thereafter, when the request made to the Chief Engineer on 27.11.2017 was not considered, this application was filed for constituting arbitral tribunal.

Referring to various facts and documents, as indicated hereinabove, and Clause 25 of the agreement in question which constitutes an arbitral tribunal, Sri P. K. Shahi, learned Senior Counsel appearing for the petitioner prays that the application be allowed and an independent arbitrator appointed.

Learned counsel for the respondents refutes the aforesaid and raises a singular objection by referring to Clause 25 of the



agreement. It is argued by him that under Clause 25 (i) of the arbitration agreement, a departmental procedure for settlement of the dispute is contemplated first by raising the claim before the Superintending Engineer, on rejection or inaction by the Superintending Engineer by filing an appeal to the Engineer-in-Chief and then for appointment of an arbitrator by the Chief Engineer. It is stated that in this case, all these having not been done, this application is not maintainable. In support thereof, reliance is placed on a judgment of the Hon'ble Supreme Court in the case of **Inox Wind Limited Vs. Thermocables Limited**, (2018) 2 SCC 519.

Having heard learned counsel for the parties, this Court finds that there is an arbitration agreement between the parties and the arbitration has to be done in accordance to the provisions of the Arbitration and Conciliation Act, 1996 and under Clause 25(2), the arbitrator is to be appointed by the Chief Engineer or the administrative head and the arbitration has to be a departmental representative. Now, in view of amended provisions of Section 12(1) (b) and insertion of the Fifth Schedule to the Arbitration and Conciliation Act, 1996, in view of the relationship of the arbitrator contemplated under Clause 25(ii) and the definition contained in Schedule-5 and the law laid down by the Hon'ble Supreme Court



in the case of **M/s. Voestalpine Schienen GMHB v. Delhi Metro Rail Corporation Ltd.**, (2017) 4 SCC 665, appointment of an arbitrator by the departmental head cannot be made.

The next objection of the respondents are that as the petitioner did not raise the claim before the Superintending Engineer and thereafter did not file an appeal to the Engineer-in-Chief and as he has not resorted to the in house mechanism, the application is not maintainable.

In the facts and circumstances of this case, this objection is required to be rejected outright for the following reasons:-

After the agreement was executed and after various communications between the petitioner and the Engineer Incharge, a show cause notice was issued to the petitioner by the Chief Engineer himself on 25.03.2017 asking him as to why on account of delay in conclusion of the work under Clause 14 of the contract agreement, the contract be not cancelled. The petitioner responded to the same and the contract was cancelled on 24.04.2017 under Clause 14 of the agreement by respondent-Chief Engineer. Once the termination of agreement was ordered by the competent authority, namely the Chief Engineer, after notice to the petitioner and when the petitioner's representations to the same addressed to the D.G.P.-cum- C.M.D. and the Principal Secretary of the



Department were not addressed and when coercive method for revocation of the bank guarantee was undertaken, the petitioner again addressed a letter to the Chief Engineer who rejected it and asked the petitioner to go to the Superintending Engineer and the Superintending Engineer as is evident from Annexure-16, rejected the same on the ground that the Chief Engineer has already rejected.

In the facts and circumstances of this case, once the contract of the petitioner was cancelled after show cause notice by the Chief Engineer and when the petitioner's representation for resolution of his grievance by approaching the D.G.P., the Principal Secretary of the Department and the Chief Engineer were not at all considered, it has to be assumed that the departmental authorities were not interested in resolution of the dispute and now relegating the petitioner to take recourse to the departmental remedy would be an empty formality.

In this case, as the dispute has arisen between the parties in execution of the contract and there is an arbitration clause, it is a fit case where the objection raised now should be overruled and the application allowed. Considering the proposals made by learned counsel for the parties, this application is allowed and Mr. Justice Jayanandan Singh, a retired Judge of this Court, is



appointed as an arbitrator for resolution of the dispute between the parties.

The application stands allowed and disposed of with the aforesaid.

(Rajendra Menon, CJ)

Sunil/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	27.03.2018
Transmission Date	

