

IN THE HIGH COURT OF JUDICATURE AT PATNA
REQUEST CASE No.171 of 2018

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M/s Trishul Construction, at and P.O.- Balmikinagar, West Champaran, at present 205 Ashiana Tower, Exhibition Road, Patna through its Partner Chandra Prakash Gupta, Son of Sushil Kumar Gupta, resident of Mohalla-Bank Road, Bagaha Bazar, P.S.- Bagaha, District- West Champaran.

... .. Petitioner/s

Versus

1. Union Of India
2. The Chief Engineer, Construction, NIEC Railway, Mahendru Ghat, Patna.
3. The Deputy Chief Engineer, Construction NIEC Railway, Darbhanga.
4. The Deputy Chief Engineer, Construction, EC Railway, Raxaul, District-East Champaran.
5. The Financial Advisor, F.A./CON E.C. Railway, Mahendru Ghat, Patna.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Radha Mohan Pandey, Advocate
For the Railways	:	Mr. Kumar Manish, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
ORAL JUDGMENT

Date : 19-07-2019

This application under Section-11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 1996 Act) has been moved by the petitioner Construction Company for terminating the Arbitral Tribunal arising out of an agreement with the respondent Railways dated 10th of April, 2014 in respect of a contract awarded to the petitioner for construction of sub-structure for the open foundation of three bridges at the site referred to in paragraph 2 of the application.



The background is that on a tender being floated the petitioner's offer was accepted and an agreement was entered into on 10th of April, 2006. The petitioner claims to have mobilized his resources and proceeded with the construction, but the respondents, dissatisfied with the quality of construction, got a vigilance enquiry proceedings initiated. However, the petitioner contends that the work had been executed as per the specifications and a request was made for release of final bills etc. The contention raised by the applicant is that on a refusal to release the legitimate payments, the petitioner filed a writ petition before this Court, being C.W.J.C. No.4909 of 2010. After having noted the facts as narrated by the petitioner, the Court disposed of the writ petition with liberty to approach the Deputy Chief Engineer, Construction, East Central Railway, Darbhanga along with an application which authority was directed to pass a reasoned and speaking order within three months. Certain action that was proposed to be taken against the petitioner was stayed till the disposal of the said application. The order passed by the Court on 2.12.2011 in C.W.J.C.No. 4909 of 2010 is extracted hereinunder:

"Heard learned counsel for the
petitioner.

2. No one appears for the



respondents. On earlier occasion also, no one appeared for the respondents when the case was taken up on 21.10.2011.

3. This writ petition has been filed by the petitioner for directing respondent-authorities of East Central Railway, Patna to settle the final bill of the petitioner forth with and make payment of the petitioner's dues with respect to contractual work of construction/rebuilding of sub-structure (on open foundation) of major bridge nos. 63, 64 and 65A between Sitamarhi and Narkatiyaganj Stations in connection with the gauge conversion work of Jaynagar, Darbhanga-Narkatiyaganj Section.

4. Learned counsel for the petitioner claims that the petitioner completed the work under the supervision of the Railway authority and as per their specifications the work was completed during the validity of the tender period i.e. by 30.06.2008, whereafter the Deputy Chief Engineer of the E.C. Railway, Darbhanga issued certificate for satisfactory completion of work in terms of Clause 48 of the General Conditions of Contract.

5. Learned counsel for the petitioner further claims that the record also shows that the work has been satisfactorily completed, but the petitioner had been paid only part of the contractual amount and the remaining amount is not being paid to it on the illegal and arbitrary assumption that the work



had not been completed. In this connection, learned counsel for the petitioner has relied upon completion certificate dated 23.12.2009 (Annexure 4) as well as the applications dated 24.11.2009 and 25.01.2010 (Annexures 2 and 3).

6. Considering the facts and circumstances of the case as well as the materials on record, this writ petition is disposed of with a liberty to the petitioner to approach the Deputy Chief Engineer, Construction, N-1, E.C. Railway, Darbhanga (respondent no.3) along with an application giving details of its claim with respect to the remaining dues with interest. If such an application is filed by the petitioner within fifteen days from today along with a copy of this order, the said authority shall consider the same in accordance with law as well as the documents and records etc. mentioned above showing completion of work by the petitioner and shall decide the same by a speaking order within three months thereafter. If any amount is found to be admitted and payable, it should be paid to the petitioner immediately thereafter. However, if any amount or interest is not found admitted and payable in the said order, the petitioner will be at liberty to challenge the same before an appropriate forum.

7. Till disposal of the aforesaid application, which is going to be filed by the petitioner within fifteen days from today, the



operation of the order dated 10.01.2011 (Annexure 7), issued by the Deputy Chief Engineer, Eastern Central Railway, Darbhanga vide memo no. DCE/C/I/DBG/WT/10-11/01 dated 10.01.2011 shall remain stayed."

The petitioner submitted his claim to the said authority that was rejected on 10th March, 2012.

This was again assailed by the petitioner in a writ petition being C.W.J.C. No.6463 of 2012 that was disposed off with liberty to the petitioner to seek arbitration of the dispute. It was observed that the order passed, which was under challenge, shall not influence the arbitrator in deciding the matter independently. The judgement dated 5.7.2012 is extracted hereinunder:

"It appears that on account of pendency of part of the amount of bill with the railway authorities, petitioner had moved this Court through C.W.J.C. No.4909 of 2010. The writ application was disposed of on 2.12.2011, vide Annexure-8, permitting the petitioner to file a representation before the Deputy Chief Engineer, Construction, N-1, E.C. Railway, Darbhanga, who was directed to dispose of the same within three months by a speaking order. Accordingly, petitioner filed representation, which has been disposed of by the impugned order, as contained in Annexure-10, and claim



of the petitioner has been rejected.

Hence, claim of the petitioner of the remaining amount of bill becomes disputed, which issue cannot be decided in a writ proceeding. As submitted by learned counsel for the Railways, petitioner has a remedy by way of arbitration in terms of general conditions of contract.

Writ application is disposed of with liberty to the petitioner to avail its remedy in accordance with law.

It is made clear that the impugned order of the Deputy Chief Engineer, Construction dated 10.3.2012 shall not be taken into account or influence the arbitrator in deciding the matter."

The appellant also preferred an L.P.A., but withdrew it on 10th July, 2013. A copy of the said order is Annexure P/8 to the writ petition.

In compliance of the aforesaid order of the High Court, legal notice was tendered indicating the broad areas of dispute for being decided by the Arbitral Tribunal. On 8th August, 2014 after a span of almost two years, the Arbitral Tribunal was constituted. The petitioner put in appearance and filed his claim in the year 2016. The petitioner also filed an injunction application whereafter dates were fixed. The petitioner had made a request for a copy of the proceedings of



the Tribunal that was not supplied. The petitioner also intimated the Tribunal about the order dated 8th March, 2016 in C.W.J.C. No.20362 of 2013 which had been filed by the petitioner challenging the order dated 1.7.2013 whereby the Civil Engineering Department had taken a decision not to have business dealings with the petitioner for a period of three years. The Court took notice of the fact that arbitration proceedings are pending and, therefore, since the three years' ban imposed on the petitioner was about to come to an end, the Court observed that it shall be open for contest and adjudication in the arbitration proceeding itself. The Court also observed that the arbitration proceedings be concluded preferably within three months. The judgement dated 8th March, 2016 is extracted hereinunder:

"Heard Mr. Jitendra Prasad Singh, learned counsel appearing for the petitioner and Mr. Anil Kumar Sinha, learned counsel appearing for the respondent-Union of India in its Ministry of Railways.

The petitioner is aggrieved by the order dated 1.7.2013 issued under the signature of the Acting Director-cum-Civil Engineering (G), Railway Board whereby a decision has been taken not to have business dealings with the petitioner for a period of three years. The detail order so passed finds enclosed



at Annexure-14 to the interlocutory application bearing I.A. No.8079 of 2014.

Mr. Singh, learned counsel appearing for the petitioner has submitted that the dispute pertains to the construction work carried out by the petitioner at Major Bridge No.63, 64 and 65A between Sitamarhi and Narkatiyaganj stations in connection with the gauge conversion work of Jay Nagar, Darbhanga, Narkatiyaganj station. He submits that on the failure of the respondents to make payment that the petitioner came before this Court in CWJC No. 4909 of 2010 and which was disposed of with a liberty to approach the Deputy Chief Engineer/Construction, NIEC Railway, Darbhanga along with his claim and which was rejected vide order dated 10.3.2012 impugned at Annexure-10 to the writ petition. It is the case of the petitioner that being aggrieved he moved before this court again in CWJC No.6463 of 2012 and the bench taking note of the submission of the learned counsel for the Railways that the petitioner has a remedy by way of 'Arbitration' in terms of general conditions of the contract, disposed of the writ petition affording liberty to the petitioner to avail of the remedy in accordance with law. A challenge by the petitioner to the order of the writ Court resulting in Letters Patent Appeal No. 1404 of 2012 was disposed of as withdrawn.

The undisputed present status is



that the parties have chosen their respective arbitrators and while the arbitration proceeding as regarding the payment for the work carried out by the petitioner is pending consideration before the Arbitrators that the order impugned has been passed containing a ban of business dealings with the petitioner for the next three years. The order was passed on 1.7.2013 and the period is to expire within a few months.

Mr. Sinha informs that the arbitration proceedings were initiated in 2014. Now where the matter is pending before the Arbitrators on the issue of payment and which issue takes into fold the quality of work performed by the petitioner, as well taking note of the fact that the 3 year ban period is to expire within a few months, this Court at the present stage would refrain from expressing any opinion for the present and would dispose of the writ petition with an advice to the Arbitrators in seisen of the matter to conclude the proceedings in accordance with law expeditiously and preferably within three months from today.

I would hasten to clarify here that this disposal is not on merits and thus the challenge of the petitioner to the decision of the Railways impugned in the present writ proceedings in so far as it casts a stigma on him, would be open for contest and adjudication in the Arbitration proceedings and the disposal of the writ petition should not have any prejudicial effect on the claim of the petitioner in the



Arbitration proceedings which is to be considered and disposed of on its own merits."

It is alleged that the meetings of the Arbitral Tribunal got adjourned without any orders on the interim injunction application filed by the petitioner. Accordingly, the petitioner was compelled to file Misc. Case No.1 of 2017 before the learned D.J. Patna under Section 9 of the 1996 Act where an injunction was prayed for in respect of the action of the Railways being taken for dismantling Bridge No.63 that would have prejudicial impact on the arbitration proceedings. A plea was also raised that some new contractor had been given a work order to construct the said bridge after demolition and in case the same is allowed to be carried out, it would tantamount to a destruction of material evidence and should not be permitted till a proper test with regard to the safety of the constructions carried out by the petitioner is not established.

The learned Additional District & Sessions Judge, Patna vide order dated 12th June, 2017 made an observation that injunction should not be granted keeping in view the public nature of the work, namely the construction of a bridge and, therefore, injunction was refused, but at the same time a further observation was made that the award ought to



have been delivered within one year which period has already expired in spite of the constitution of the Arbitral Tribunal and, therefore, the Tribunal deserves to be re-constituted and the claim of the petitioner deserves to be disposed off within three months. The order dated 12th of June, 2017 passed in the aforesaid case is Annexure 21 to the petition.

The grievance of the petitioner is that till date no award has been delivered and the arbitrators being the own Railway personnel of the respondents who are serving officers, they can ill afford to go against their own Department and, therefore, they are avoiding to arrive at any conclusion.

The contention is that the Arbitral Tribunal intentionally failed to conclude the proceedings or abide by the directions of this Court and that of the learned Additional District & Sessions Judge, Patna, referred to hereinabove. Hence, there are justifiable doubts as to the independence of the three arbitrators.

Apart from this, one of the arbitrators Shri Kripal Prasad has been transferred and there is no communication about the substitute arbitrator nor is there any information as to when the next date of hearing is to take place. Hence, the arbitrators should be treated to have abandoned their office and



in these circumstances an independent arbitrator to substitute the Arbitral Tribunal should be appointed by the High Court keeping in view the law laid down by the Apex Court in the case of **Union of India Vs. U.P. State Bridge Corporation Limited**, reported in **(2015) 2 SCC 52**.

A counter affidavit has been filed on behalf of the respondents and it is stated therein that a substitute arbitrator has to be appointed on the same terms as existing in the agreement and the petitioner has to first approach the respondent Railways for the same. Accordingly, this application under Section 11(6) of the 1996 Act is not maintainable. In paragraph 4 of the counter affidavit, it has been stated that eight dates had been fixed since 2016 in which both the parties had participated.

It is also evident that after 6.4.2018 no dates have been fixed nor is there any indication of the fact that one of the three arbitrators has been replaced. The counter affidavit prays for further six weeks' time to conclude the proceedings.

A supplementary counter affidavit has been filed by the respondents stating therein that a proposal has been made to the petitioner vide letter dated 27.6.2019 calling upon him to choose his nominees for re-constitution of the Tribunal, but



having failed to respond to the same, the petitioner cannot be permitted to raise a plea for appointment of an independent arbitrator without exhausting the remedies available under the contract itself.

Learned counsel for the Railways has come up citing the judgements in the cases of **Rajasthan Small Industries Corporation Limited Vs. Ganesh Containers Movers Syndicate**, reported in (2019) 3 SCC 282, **Government of Haryana P.W.D Haryana (B And R) Branch Vs. G.F.Toll Road Private Limited & Ors.** Reported in (2019) 3 SCC 505 and the judgement in the case of **Union of India Vs. Parmar Construction Company**, reported in 2019 (5) SCALE 453 to contend that in the instant case the dispute had arisen prior to the Amendment Act of 2015 and its enforcement. The amended Act, namely the Arbitration And Conciliation (Amendment) Act, 2015 came into effect from 23rd October, 2015 and, therefore, in the present case, the dispute will continue to be governed by the provisions prior to amendment. Accordingly, as reflected in the aforesaid judgements cited on behalf of the respondents, even the appointment of a substitute arbitrator has to be on the same terms as in the agreement for which there is a provision. The respondents have, accordingly,



made that offer and, therefore, the ground of delay being taken by the petitioner, which is neither correct on facts or in law, can be invoked for the purpose of getting relief from this Court for the appointment of an independent arbitrator. It is further submitted that there has been no deliberate or intentional prolonging of the proceedings as projected by the petitioner and, consequently, the relief prayed for does not deserve to be granted.

Having considered the submissions raised and in view of the facts of this case, it is correct that the High Court had way-back on 8th of March, 2016 indicated that the dispute should be resolved preferably within three months, nonetheless, as admitted to the respondents in the counter affidavit, dates were fixed till 6th of April, 2018 whereafter nothing was done and a couple of the arbitrators were either transferred or were not available. The Tribunal had to be re-constituted which was not done and, compelled, the petitioner approached this Court by filing this application which was moved in December, 2018. It is after six months that the respondents have now come up with the letter dated 27th June, 2019 making an offer for appointing the substitute arbitrators. This delay after April, 2018 and up to June, 2019 for more than a year goes unexplained.



The question is as to whether on such facts the contention of the petitioner to invoke the provisions of Section 15(2) of the 1996 Act should be entertained or not. According to the judgements that have been cited at the Bar, delay by itself may not be a necessity for invoking the provisions of Section 15(2), but at the same time, if delay goes unexplained and is not *bona fide* but reflects slackness on the part of the authorities, then in view of the judgement in the case of **Union of India Vs. U.P. State Bridge Corporation Limited (Supra)**, the powers for appointment of a substitute arbitrator can be exercised in terms of Section 15(2), but there is no reason to terminate the arbitral proceedings as prayed for by the petitioner.

However, the first thing is as to what would be the procedure which can be adopted for the purpose of appointment of a substitute arbitrator. In this regard, the law as indicated in the two decisions of **Union of India Vs. Parmar Construction Company (Supra)** and **Union of India Vs. Parmar Construction Company (Supra)**, clearly lay down that where the dispute under the arbitration agreement has commenced prior to the amending Act, then the terms for substitute arbitrators as provided therein should be resorted to at the first instance. Apart from this, it has also been held that the



issue of delay should be viewed from the angle as to whether the delay was deliberate and was an outcome of the tactics adopted by the arbitrators for not allowing the arbitration to proceed.

In the instant case, it is evident that even though the request for arbitration was made and the Arbitral Tribunal was appointed in 2014, the applicant himself has pleaded in paragraph 20 of the application that after having put in appearance in 2014 itself, the petitioner could not file the statement of facts which was got delayed due to the ailment of one C.P. Gupta, a near relative of the petitioner. The petitioner filed his statement of claims on 22nd January, 2016 and subjected himself to the proceedings before the Arbitral Tribunal. It is also not disputed that 7 or 8 dates were fixed thereafter up to the year 2018, but in the meantime the petitioner was also seeking relief of an injunction which he has contested before the learned Additional District & Sessions Judge in Misc. Case No.1 of 2017. The plea of injunction was refused by the learned Additional District & Sessions Judge vide order dated 12th June, 2017.

It is, thus, evident that deliberate delay or default on the part of the opposite parties does not appear to be exactly made out which is the main plank of the argument of the learned



counsel for the applicant petitioner. In the absence of any deliberate default, the only question that now remains is that there was some inaction on the part of the respondents for the past almost one year. If the officers had been transferred who were members of the Tribunal, then it was the duty of the respondents to have taken appropriate steps. It is in this background that the petitioner was compelled to file this request application and it is after six months of the filing of the application that the respondents have now come up with a request on 27th June, 2019 to the petitioner to choose two names of the arbitrators who would be substituted in place of the other arbitrators for proceeding further.

In my considered opinion, there does not appear to be a case of heavy delay totally attributable to the opposite parties so as to construe any *mala fide* against the opposite parties or a bias in this regard. It is correct that the proceedings ought to be concluded when twice observations had been made to conclude the proceedings within three months.

I am, therefore, not inclined to invoke the powers for the appointment of an independent arbitrator at this stage with liberty to the applicant to choose from the names as offered by the respondents for appointment of substitute arbitrator and



to conclude the arbitration proceedings as directed by the Court earlier keeping in view the ratio of the judgements cited on behalf of the respondents.

With the aforesaid observations, the application stands disposed off.

(Amreshwar Pratap Sahi, CJ)

K.C.Jha/-

AFR/NAFR	NAFR
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