

IN THE HIGH COURT OF JUDICATURE AT PATNA
REQUEST CASE No.107 of 2019

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Sri Ohm Construction having its place of business at Mirchaibari, District- Katihar, PIN- 854105, through one of its Director namely - Rajib Ranjan Singh Son of Sri Jibeshwar Prasad Singh resident of Mirchaibari, Town- Katihar, P.S. Sahayak Thana, Katihar, District- Katihar, Bihar.

... .. Applicant/Petitioner/s

Versus

1. The State of Bihar through Principal Secretary, Rural Works Department, Bihar, Patna.
2. Executive Engineer, Rural Works Department, Works Division, Katihar.
3. Superintending Engineer, Rural Works Department, Circle Purnea.
4. Chief Engineer-2 Rural Works Department, Bhagalpur at Patna.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Prabhakar Nath Rai, Advocate
For the Respondent/s	:	Mr. Pushkar Narain Shahi, AAG 6
		Mr. Patanjali Rishi, AC to AAG-6

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CORAM: HONOURABLE THE CHIEF JUSTICE
ORAL JUDGMENT

Date : 23-12-2020

The petitioner seeks reference of the disputes in terms of Agreement No. SBD27/2009-2010 dated 26.02.2010 entered into between the parties.

It is not in dispute that the agreement contains arbitration Clause 25 which reads as under:-

“Clause 25 Settlement of Dispute & Arbitration

Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in-before mentioned and as to the quality of workmanship or materials used on the



work or as to any other question, claim right matter or thing whatsoever in any way arising out of or relating to contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination completion or abandonment thereof shall be dealt with as mentioned hereinafter.

i) If the contractor considered any work demanded of him to be outside the requirements of the contract, or dispute 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 contract or carrying out of the work, to be unacceptable, he shall promptly within 7 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of fifteen days from the receipt contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer 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 Chief Engineer shall give



his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall, within a period of 30 days from receipt of the decision, give notice to the Chief Engineer for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above disputes or difference shall be referred for adjudication through arbitrator appointed by Engineer-in-Chief or the administrative head of the said P.W.D. If the arbitrator so appointed is unable or unwilling to act or resign his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person other than a person appointed by such Engineer-in-Chief or the administrative head of the department as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitrator at all.



It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 45 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of the contract that if any fees are payable to the arbitrator these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award including the fees, if any, of the arbitrator) shall be in the discretion of the



arbitrator who may direct to any by whom and in what manner such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.

All arbitration shall be held at PATNA and at no other place.”

It is also not in dispute that the petitioner herein did not resort to the procedure prescribed under the said Clause and straightaway approached this Court by way of a present petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996. However, it is a matter of record that prior thereto, petitioner did approach the other authorities seeking settlement of the claims arising out of the agreement but no heed was paid.

In support of his contention, opposing the petition on the ground of non compliance of procedure prescribed under Clause 25, learned counsel refers and relies upon the decision rendered by Hon’ble the Apex Court in the case of **VISA INTERNATIONAL LIMITED V. CONTINENTAL RESOURCES (USA) LIMITED; (2009) 2 SCC 55**, further highlighting that no fruitful purpose will be served in relegating the petitioner to first exhaust the procedure prescribed in the Arbitration Clause, more so in view of the non-consideration of petitioner’s claim.



On first brush, the contention appears to be alluring but, however, in view of the law laid down by the Apex Court in the case of **Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML(JV) in Civil Appeal Nos. 9486-9487 of 2019 decided on 17.12.2019[2019 SCC Online SC 1635]**, upon which much reliance is placed by Shri P.N.Shahi, learned senior counsel appearing for the respondents, this Court is constrained to hold the petition to be premature.

In the case of **Central Organisation for Railway Electrification (supra)**, an identical provision stipulated in the agreement came up for consideration and the Court, while framing a specific issue as to whether an arbitrator could have been appointed *de hors* the provision of the clause containing the arbitration agreement and non-compliance of the procedure prescribed thereunder, categorically repelled such claim by holding:-

“18. Clause 64(3)(b) of GCC deals with appointment of arbitrator where applicability of Section 12(5) of the Act has not been waived off. The modified Clause 64(3)(b) inter alia provided that the arbitral tribunal shall consist of a panel of three retired railway officers not below the rank of SAO officer as arbitrator. For this purpose, the Railway will send a panel of at least four names of retired railway officer(s) empanelled. The contractor will be asked to suggest to the



General Manager at least two names out of the panel for appointment as the contractor's nominee and the General Manager shall appoint at least one out of them as the contractor's nominee. The General Manager will also simultaneously appoint the balance number of arbitrators from the panel or from outside the panel. The modified Clause 64(3)(b) of the General Conditions of Contract reads as under:

64. (3)(b) Appointment of Arbitrator where applicability of Section 12(5) of A&C Act has not been waived off.

The Arbitrator Tribunal shall consist of a Panel of three retired Railway Officer retired not below the rank of SAO officer, as the arbitrator. For this purpose, the Railway will send a panel of at least four names of retired Railway Officer(s) empanelled to work as Railway. Arbitrator indicating their retirement date to the contractor within 60 days from the day when a written and valid demand for arbitrators is received by the GM.

Contractor will be asked to suggest to General Manager at least two names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators other from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the three arbitrators so appointed CM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the



names of contract's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them has served in the Accounts Department.

19. After coming into force of the Arbitration and Conciliation (Amendment) Act, 2015, when Clause 64 of the General Conditions of Contract has been modified inter alia providing for constitution of Arbitral Tribunal consisting of three arbitrators either serving or retired railway officers, the High Court is not justified in appointing an independent sole arbitrator without resorting to the procedure for appointment of the arbitrator as prescribed under Clause 64(3)(b) of the General Conditions of Contract.

20. It is pertinent to note that even in the application filed Under Section 11(6) of the Arbitration and Conciliation Act, 1996, the Respondent prayed for appointment of a sole arbitrator in terms of Clause 1.2.54(b)(i) of the Tender Agreement/Clause 64 of the General Conditions of Contract for adjudicating the disputes which have arisen between the parties. In the petition filed Under Section 11(6) of the Act, the Respondent prayed for appointment of one Shri Ashwani Kumar Kapoor to act as the arbitrator. Thus, the Respondent itself sought for appointment of arbitrator in terms of Clause 64 of the General Conditions of Contract. The appointment of Shri Ashwani Kumar Kapoor as arbitrator, of course, was not agreeable to the Appellant, since it was found that said Shri Ashwani Kumar Kapoor was not in the panel of arbitrators and therefore, could not be considered for appointment as arbitrator. As the value of the work contract was worth more than Rs. 165 crores, the dispute can be resolved only by a panel of three arbitrators in terms of Clause 64(3)(b) of the General Conditions of Contract. The Respondent was not



right in seeking for appointment of a sole arbitrator in terms of Clause 1.2.54(b)(i) of the Tender Agreement/Clause 64 of the General Conditions of Contract.

22. Applying ratio of the Parmar Construction Company, in Pradeep Vinod Construction Company, the Supreme Court held that the appointment of arbitrator should be in terms of the agreement and the High Court was not right in appointing an independent arbitrator ignoring Clause 64 of the General Conditions of Contract. As held in Parmar Construction Company and Pradeep Vinod Construction Company, the High Court was not justified in appointing an independent arbitrator without resorting to the procedure for appointment of the arbitrators which has been prescribed under the General Conditions of Contract.”

In view of the same, the petitions filed under Section 11(6) of the Act, seeking appointment of the arbitrator for reference of the disputes in relation to an agreement dated 26.02.2010 entered into *inter se* the parties, cannot be allowed and as such are dismissed reserving liberty to the petitioner to take recourse to the remedies in accordance with law.

At this stage, Mr. Prabhakar Nath Rai, learned counsel for the petitioner, states that the petitioner has already spent six years in convincing the authority for favourable consideration of his claim. In this regard, this Court is not precluded from issuing following directions:-

(a) If the petitioner were to take recourse to the



mechanism provided under Clause 25, the authorities stipulated thereunder shall expeditiously and positively, within the period stipulated thereunder, decide the petitioner's claim in accordance with law.

(b) If, however, for whatever reason, the disputes remain unresolved, the parties shall be at liberty to seek a referral for neutral adjudication either by mutual consent or through adjudicatory process.

(c) As agreed, limitation shall not come in the way of the parties.

The petition stands disposed of in the aforesaid terms.

Interlocutory application, if any, shall stand disposed of.

(Sanjay Karol, CJ)

sujit/-

AFR/NAFR	
CAV DATE	
Uploading Date	03.01.2021
Transmission Date	

