

IN THE HIGH COURT OF JUDICATURE AT PATNA
REQUEST CASE No.42 of 2022

M/s Shivendra Kumar, through its Proprietor Sri Shivenra Kumar, Male, aged about 49 years, Resident of Village - Baro, Bishanpur Tola, P.O. - Barauni, District - Begusarai.

... .. Petitioner/s

Versus

1. The Union of India, through the General Manager, East Central Railway, Hajipur At and P.O. - Hajipur, District - Vaishali.
2. The Chief Mechanical Engineer, East Central Railway, Hajipur, At and P.O. - Hajipur, District - Vaishali.
3. The Senior Divisional Mechanical Engineer, East Central Railway, Sonpur, At and P.O. - Sonpur, District - Saran.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Jitendra Kumar, Advocate
For the Respondent/s	:	Mr. Kumar Priya Ranjan, CGC.

CORAM: HONOURABLE THE CHIEF JUSTICE

ORAL JUDGMENT

Date : 17-08-2022

This application has been moved seeking appointment of an Arbitrator invoking the powers of this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act').

Petitioner and the respondents entered into a written agreement dated 16.11.2015. The said agreement contains an arbitration clause- 64 (Annexure-P/1, Page 9) for settlement of disputes, which the petitioner invoked, vide communication dated 30.10.2021 (Annexure-P/2, Page 13) to the Chief Mechanical Engineer, EC Railway, Hajipur and subsequent communication dated 16.02.2022 (Annexure-P/3, Page 20) to the General Manager, E.C. Railway, At & PO-Hajipur, which



were neither acted upon nor responded to.

In this view of the matter, more so, in view of the law laid down by Hon'ble the Apex Court in **Railway Electrification Vs. M/s ECI-SPIC-SMO-MCML(JV) A Joint Venture Company; (2020) 14 SCC 712** (Para-28, 29, 30 and 31), present petition filed under Section 11(6) of the Act, needs to be allowed. The relevant paragraphs are extracted as under:-

28. Learned counsel for the respondent has submitted that vide letter dated 27.07.2018, the respondent requested for referring the dispute to arbitration but, no steps were taken by the appellant within thirty days from the date of request dated 27.07.2018. It was submitted that on 17.12.2018, respondent filed application under Section 11(6) of the Act before the High Court for appointment of a sole arbitrator, by which time, no steps were taken by the appellant under the Contract, except sending two lists of persons by letters dated 24.09.2018 and 25.10.2018 who were de jure ineligible to be appointed as the arbitrators. In this regard, reliance was placed upon **Punj Lloyd Ltd. vs. Petronet MHB Ltd. (2006) 2 SCC 638**. Considering the applicability of Section 11(6) of the Act, in **Punj Lloyd Ltd.**, the Supreme Court held as under:-

"5. Having heard the learned counsel for the parties, we are satisfied that the appeal deserves to be allowed. The learned counsel for the appellant has placed reliance on the law laid down by this Court in the case of **Datar Switchgears Ltd. v. Tata Finance Ltd. (2000) 8 SCC 151**, wherein this Court has held as under:"[S]o far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases."

As held in **Punj Lloyd Ltd.**, if the opposite party has not made any application for appointment of the arbitrator within thirty days of demand, the right to make appointment is not forfeited but continues; but the appointment has to be made before the former files application under Section 11 of the Act seeking appointment of



an arbitrator. Only then the right of the opposite party ceases.

29. In **Union of India vs. Bharat Battery Manufacturing Co. (P) Ltd. (2007) 7 SCC 684**, on 30.03.2006, the respondent thereon filed petition under Section 11(6) seeking appointment of an arbitrator. Union of India-the appellant thereon appointed Dr. Gita Rawat on 15.05.2006 as a sole arbitrator in terms of Clause 24 of the agreement. In such facts and circumstances of the case, considering the decision in *Punj Lloyd Ltd.*, the Supreme Court held that "once a party files an application under Section 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. The right to appoint arbitrator under the clause of agreement ceases after Section 11(6) petition has been filed by the other party before the Court seeking appointment of an arbitrator.....".

30. As discussed earlier, as per the modified Clause 64(3)(b) of GCC, when a written and valid demand for arbitration is received by the General Manager, the Railway will send a panel of at least four names of retired railway officers empanelled to work as arbitrators. The contractor will be asked to suggest to the General Manager at least two names out of the panel for appointment as contractor's nominee within thirty days from the date of dispatch of the request by the Railway. Vide letter dated 27.07.2018, the respondent has sought for appointment of an arbitrator for resolving the disputes. The appellant by its letter dated 24.09.2018 (which is well within the period of sixty days) in terms of Clause 64(3)(a)(ii) (where applicability of Section 12(5) of the Act has been waived off) sent a panel of four serving railway officers of JA Grade to act as arbitrators and requested the respondent to select any two from the list and communicate to the office at the earliest for formation of Arbitration Tribunal. By the letter dated 26.09.2018, the respondent conveyed their disagreement in waiving the applicability of Section 12(5) of the Amendment Act, 2015. By the letter dated 25.10.2018, in terms of Clause 64(3)(b) of GCC (where applicability of Section 12(5) has not been waived off) the appellant has nominated a panel of four retired railway officers to act as arbitrators and requested the respondent to select any two from the list and communicate to the appellant within thirty days from the date of the letter for formation of Arbitration Tribunal. The respondent has neither sent its reply nor selected two names from the list and replied to the appellant. Without responding to the appellant, the respondent has filed petition under Section 11(6) of the Arbitration and Conciliation Act before the High Court on 17.12.2018. When the respondent has not sent any reply to the communication dated 25.10.2018, the respondent is not justified in contending that the appointment of Arbitral Tribunal has not been made before filing of the application under Section 11 of the Act and that the right of the appellant to constitute Arbitral Tribunal is extinguished on filing of the application under Section 11(6) of the Act.

RE: Contention:- General Manager himself becoming ineligible by operation of law to be appointed as arbitrator, is not eligible to nominate the arbitrator.



31. Stand of the learned counsel for the respondent is that by virtue of Section 12(5) read with Schedule VII of the Act, General Manager himself is made ineligible to be appointed as an arbitrator and hence, he cannot nominate any other person to be an arbitrator. The essence of the submission is "that which cannot be done directly, may not be done indirectly". In support of his contention, the learned counsel for the respondent placed reliance upon **TRF Limited vs. Energo Engineering Projects Limited (2017) 8 SCC 377** wherein the Supreme Court held as under:-

"54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."

Today, there is no dispute about-(a) the legality, validity and binding effect of a written agreement dated 16.11.2015 and subsequently entered into between the parties to the lis; (b) the existence of arbitration clause contained therein; (c) the existence of dispute(s) arising there from; (d) the dispute arisen out of the agreement being civil in nature; (e) no legal impediment in the adjudication of the dispute by the learned Arbitrator; (f) Petitioner having exhausted the channel available for resolution of dispute; (g) the respondents having failed to appoint an Arbitrator pursuant to the invocation of the



arbitration clause by the petitioner.

As such, Hon'ble Ms. Justice Indu Malhotra, Former Judge, Supreme Court of India, Mobile No.9810026757, is appointed as learned Arbitrator to adjudicate all disputes arising out of agreement dated 16.11.2015 entered into between the parties to the *lis*.

All pleas and issues raised, on merits, are left open to be considered and decided by the learned Arbitrator.

Learned Arbitrator shall be entitled to fee as per the schedule of the Act.

Since the dispute arises out of an agreement of the year 2015, it is expected of the learned Arbitrator to decide the issues expeditiously.

Parties are directed to fully cooperate and not take any unnecessary adjournment.

The proceedings, during the time of current Pandemic- Covid-19 shall be conducted through digital mode, unless the parties otherwise mutually agree to meet in person i.e. physical mode.

Joint Registrar (List) is directed to immediately communicate the order to the learned Arbitrator.

Learned counsel for the parties to communicate the



order to the learned Arbitrator. Also, parties are directed to appear before him, through physical/digital mode on 08.09.2022 and apprise him of passing of this order.

Parties shall file their statement of claims before the learned Arbitrator on such date of hearing which he may fix, as per mutual convenience.

The Request Petition stands disposed of in the above terms.

Interlocutory Application(s), if any, shall stand disposed of.

(Sanjay Karol, CJ)

Sujit/Ashwini

AFR/NAFR	
CAV DATE	
Uploading Date	25.08.2022
Transmission Date	

