

IN THE HIGH COURT OF JUDICATURE AT PATNA
REQUEST CASE No.44 of 2022

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M/s REW Contracts Pvt. Ltd., a company incorporated under the Companies Act, 1956, Civil and Electricals Engineer Contractors and Manufacturers, Plot No. 594, Sector 1, Vaishali, Ghaziabad-201010, Uttar Pradesh, in JV with M/s A K Das Associates Ltd.

... .. Petitioner/s

Versus

1. Bihar State Power Transmission Co Ltd., 4th Floor, Vidyut Bhawan, Bailey Road, Patna-800021, Bihar, through its Managing Director.
2. The Managing Director, Bihar State Power Transmission Co. Ltd., 4th Floor, Vidyut Bhawan, Bailey Road, Patna-800021, Bihar, through its Managing Director.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Ankit Katriar, Advocate
For the Respondent/s	:	Mr. Anand Kumar Ojha, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE

ORAL JUDGMENT

Date : 12-04-2023

One M/s REW Contracts Pvt. Ltd., who is shown in the cause title of the above request case to be a Joint Venture ("JV", hereinafter) with M/s. A.K. Das Associates Ltd., has filed the arbitration request for appointment of an arbitrator.

2. Learned counsel for the requester submitted that there were seven contracts entered into for capacity augmentation of transformers which took within its ambit supply, installation and maintenance. The award was notified by the respondents on 21.01.2019, the contracts executed on 30.05.2019 and the purchase orders placed on 21.06.2019. The



transformers were to be installed within twelve months from the notification of the award and the contract extended for a period of two years. Out of seven, four contracts were completed and the balance could not be completed due to the pandemic situation and the price rise in the intervening period. The specific arbitration clause in the agreement was pointed out to seek appointment of an arbitrator; which request made to the respondent was not complied with, resulting in the present request for appointment of an arbitrator.

3. The learned counsel for the respondents at the outset pointed out that the M/s REW Contracts Pvt. Ltd. was not a party to the arbitration agreement, was only one of the constituents of the JV; who, alone, could not have filed the arbitration request. The provisions of the Arbitration and Conciliation Act, 1996 were specifically read over to emphasize the significance of the remedy being made available only to a party to the agreement. Reliance was also placed on decisions to put forth the status of a separate legal entity conferred on a 'JV'. It is pointed out from Clause 41 of the General Conditions of Contract that there was a procedure required to be followed by the JV in the event of disputes arising which have to be referred for arbitration. The Managing Director has to provide a panel of



five arbitrators from which one each has to be chosen by the employer and the contractor and if after appointment of one such arbitrator by either parties, the other fails to appoint an arbitrator, the one appointed by one of the parties would be the sole arbitrator. If both the parties appoint two arbitrators within the time stipulated then there would be a third arbitrator appointed by the chosen two from the same list provided by the Managing Director. In the present case, the respondent has appointed an arbitrator without reference to the list of the Managing Director and there cannot be any arbitration deemed to have been initiated through the sole arbitrator so appointed unilaterally by the respondent.

4. The learned counsel for the requester does not insist on continuing the arbitration based on the appointment made of an arbitrator, by itself as is seen from Annexure P-10. However, that does not answer the contention raised by the respondent that the procedure for appointment of an arbitrator, as seen from the agreement, has not been scrupulously followed.

5. The arbitration clause insofar as it is relevant is extracted hereunder:-

“41. ARBITRATION

41.1 All disputes or differences in respect of which the decision, if any, of the Project



Manager and/or the Head of the Implementing Authority has not become final or binding as aforesaid shall be settled by arbitration in the manner provided herein below:

41.2 The arbitration shall be conducted by three arbitrators one each to be nominated by the Contractor and the Employer and the third to be appointed by both the arbitrators in accordance with the Indian Arbitration Act, 1996 as amended from time to time. For this purpose a panel of five arbitrators shall be provided by Managing Director of the Employer from which Employer and Contractor will choose one each and the third Arbitrator shall be chosen by two Arbitrators from the same list. If either of the parties fails to appoint its arbitrator within sixty (60) days after receipt of a notice from the other party invoking the Arbitration Clause, the arbitrator appointed by the party invoking the arbitration Clause shall become the sole arbitrator to conduct the arbitration.”

6. The procedure requires the Managing Director to provide a panel of five arbitrators from which each of the parties to the agreement has to choose one each and the chosen two would appoint a third arbitrator, thus constituting an Arbitral Tribunal consisting of three members. The arbitration clause also provides for a situation where, after appointment of one arbitrator from the panel provided by the Managing Director, the



other party does not choose one from among the remaining four; in which event, the arbitrator appointed by one of the parties would be considered as the sole arbitrator appointed to settle the disputes. The parties to the arbitration agreement are the respondent, called the employer and the JV; termed the contractor.

7. In the present case, the JV did not seek for a panel and REW Contracts, one of the constituents of the JV, by themselves, as seen from Annexure P-10, appointed an arbitrator; a Retired Chief Engineer from CPWD. This is definitely in violation of the procedure stipulated under the agreement to initiate an arbitration. However, the communication at Annexure P-10 dated 24.12.2021 was not responded to by the respondent and the requester herein followed it up with another communication dated 04.03.2022 produced as Annexure P-13, pointing out that sixty days time has expired and hence the arbitrator appointed by the requester would be the sole arbitrator to conduct the arbitration.

8. By Annexure-14 dated 14.03.2022, the respondent replied pointing out that appointment of sole arbitrator is not acceptable to them and that it is not as per the terms and conditions of the contract. It was also stated therein



that the panel of the arbitrators shall be intimated separately. If the intention of one of the parties to initiate arbitration was clear; it was incumbent upon the respondent to supply a panel of arbitrators provided by the Managing Director, failing which the arbitration request filed under Section 11 (6) of the Act of 1996 was the only remedy available to the party. The learned counsel for the respondents also does not now rely upon the appointment of the sole arbitrator, but the difficulty is insofar as the objection raised by the respondents regarding the arbitration request having been made by one of the constituents of the JV, who cannot be considered as a party to the agreement.

9. Section 11 of the Act of 1996 deals with the appointment of arbitrators and sub-section (6) specifies that when a party fails to act according to the appointment procedure agreed upon by the parties or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure or a person/institution fails to perform any function entrusted to him/it under the procedure, then a party may request to the Supreme Court or the High Court to take necessary measure for appointment of an arbitrator. Section 2(h) specifically defines a party to be a party to an arbitration agreement and an arbitration agreement as is seen from Section 7 means an agreement by the



parties to submit to arbitration all or certain disputes, which have arisen or may arise between them in respect of a defined legal relationship.

10. The contract produced as Annexure P-3, is between the respondent and the Joint Venture of M/s. A.K. Das Associates Ltd., the lead partner of the JV and M/s REW Contracts Pvt. Ltd. The Request Case has been initiated by M/s REW Contracts Pvt. Ltd., who in the cause title is also shown as 'in JV with M/s. A.K. Das Associates Ltd'. This is not to say that it is the JV who has sought for the appointment of an arbitrator. The fact remains that the JV has not initiated the arbitration request and in that circumstance, one of the constituents of the JV cannot be considered as a 'party' to the agreement enabling such 'party' to make a request for arbitration.

11. In **New Horizons Ltd. v. Union of India, (1995) 1 SCC 478**, the constitution of a JV was considered in detail, affirming the status of a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons of companies jointly undertaking a commercial enterprise, wherein all contributes their assets and share risks. Para 24 of the said



decision is extracted hereunder:-

“24. The expression “joint venture” is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. (*Black's Law Dictionary, 6th Edn., p. 839.*) According to *Words and Phrases*, Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p. 117, Vol.23). A joint venture can take the form of a corporation wherein two or more persons or companies may join together. A ‘joint venture corporation’ has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, chemicals, electronic, atomic fields. (*Black's Law Dictionary, 6th Edn., p. 342.*)...”

12. The joint venture thus having been conferred with the status of a separate legal entity, distinct from its constituents who come together to form the JV; M/s REW Contracts Pvt. Ltd., one of the constituents cannot be considered as the party to the arbitration agreement; which is the JV, a separate legal entity.



13. Faced with the above proposition, the learned counsel for the requester pointed out that the other constituent M/s. A.K. Das Associates Ltd. had in fact executed a power of attorney which is produced as Annexure P-17 along with rejoinder to the supplementary counter affidavit dated 09.02.2023. Annexure P-17 is a resolution of M/s. A.K. Das Associates Ltd. which decided to sign the power of attorney in joint venture with M/s REW Contracts Pvt. Ltd. and authorized the Managing Director to sign the said power of attorney. The power of attorney dated 14.09.2019 is also produced as Annexure P-17A authorizing Mr. Kunal Jindal, Director of M/s REW Contracts Pvt. Ltd. to be the true and lawful attorney or attorneys to do every act with respect to the tender for '*Capacity Augmentation of Different GSS by Replacement Of Power Transformer On Turnkey Basis*'. The said power of attorney also confers power on the attorney to initiate *inter alia* an arbitration for settling disputes for and on behalf of the JV. This Court cannot but notice that the power is conferred by the other constituent of the JV and is conferred on an individual, who is the Director of the requester herein. It is not conferred on the requester as such and M/s REW Contracts Pvt. Ltd. is represented herein by one Raj Kumar Chaubey authorized to



represent that Company by resolution produced as Annexure P/1; different from the power holder of M/s A.K Das Associates Ltd. It is also pertinent that the power conferred or the resolution made is not by the JV.

14. The learned counsel for the requester pointed out that the communications between the parties to the contract were addressed to and from M/s REW Contracts Pvt. Ltd. which is evident from even the appointment of the sole arbitrator and the response to the same by the respondent. The respondent's counsel, however, counters with the submission that the mere exchange of communications cannot permit any deviation insofar as the particular legal entity, who is a party to the arbitration agreement, only being entitled to initiate proceedings for arbitration, as per the Act of 1996. It is also pointed out that the writ petition filed against the debarment of the JV and its constituents was by M/s. A.K. Das Associates Ltd. and not by the JV or the power of attorney appointed by M/s. A.K. Das Associates Ltd.

15. In this context, it is to be reiterated that the power of attorney executed is of M/s. A.K. Das Associates Ltd. who authorized one of the Directors of M/s REW Contracts Pvt. Ltd., the other constituent of the JV to act in terms of the JV. In



fact, when two parties come together to float a JV, which as the Hon’ble Supreme Court held, has a distinct and definite status of a legal entity, then the further authorization to represent such JV has to be made by the JV according to the terms of its constitution; which is totally absent in the present case. M/s. A.K.Das Associates Ltd. is also the lead partner of the JV, who is not effectively represented in this request; nor is the JV, having a legal status, represented here.

16. The arbitration request hence has to be rejected on the ground of the requester being not a party to the agreement. However, this would not affect the rights of the JV to seek for arbitration, subject to just exceptions.

17. The Request Case stands rejected with the above observation.

(K. Vinod Chandran, CJ)

Sunil/Aditya

AFR/NAFR	NAFR
CAV DATE	
Uploading Date	18.04.2023
Transmission Date	

