

IN THE HIGH COURT OF JUDICATURE AT PATNA
REQUEST CASE No.109 of 2022

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M/s Kumar Roadways, through its Proprietor Mrs. Kumari Shalini, Female, aged about 42 Years, W/o Avinash Kuamr Sah, R/o Murgi Farm, Bichli Addan, Moh-Sohsarai, District-Nalanda, Pin-803118.

... .. Petitioner/s

Versus

1. The Union of India through, The Central Warehousing Corporation, a Govt. of India Undertaking, 4/1, Siri Institutional Area, August Kranti Marg, Hauz Khas, New Delhi-110016.
2. The Managing Director, Central Warehousing Corporation, a Govt. of India Undertaking, 4/1, Siri Institutional Area, August Kranti Marg, Hauz Khas, New Delhi-110016.
3. The Regional Manager, Central Warehousing Corporation, a Govt. of India Undertaking, Regional Office, Patna.
4. The Manager (General) and Presenting officer, central Warehousing Corporation, Regional Office, Patna.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Abhishek Kumar, Advocate Mr. Pankaj Kumar Sinha, Advocate
For the Respondent/s	:	Mr. Anjani Kumar, Senior Advocate Mr. Alok Kumar Rahi, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE

ORAL JUDGMENT

Date : 17-05-2023

The petitioner was appointed as a regular contractor for handling and transportation of food-grains and allied services at Central Warehousing Corporation, Jamshedpur, under the Regional Office, Patna. The petitioner bid successfully and was appointed as the Regular Handling and Transportation (H&T) Contractor at the rail head, Tatanagar vide Office Letter No.2814 dated 20.11.2019 produced as Annexure-1. The petitioner



commenced the work and then a catastrophe in the nature of the pandemic struck with the Union Government bringing a national lockdown on 25.03.2020. There was a general disturbance of every work for about an year. The Finance Ministry of the Union Government also issued office memorandum dated 19.02.2020, which declared Covid-19 a 'natural calamity', pursuant to which Ministry of Renewable Energy also issued an office memorandum dated 20.03.2020 which is produced as Annexure-3, to treat the disturbance of supply chains due to spread of Covid-19 as a natural calamity. However, the petitioner was not given the benefit of such declarations and the work was given to another person; which appointment was illegally motivated with duress and discrimination, by a communication produced as Annexure-A5 dated 05.09.2020. The petitioner's contract was terminated as per Annexure-6. The petitioner relies on Clause-19 of the Agreement which is an arbitration clause, based on which the petitioner invoked the same as per Annexure-8. The petitioner also claims for appointment of an independent arbitrator as per the Arbitration and Conciliation Act, 1996.

The respondent filed a counter affidavit admitting that in terms of Clause-19 of the Notice Inviting Tender (NIT), the petitioner had sought for appointment of an arbitrator. Contrary to



the statement of the petitioner that he has carried out his part of the contract and that it was only due to the pandemic that there was disruption of supply, it was seriously contested. It is alleged in the counter affidavit that transportation of food-grains was a priority at the time of the pandemic and despite repeated reminders, the petitioner failed to comply with his obligations, which created a vacuum in the supply chain and, hence, the awarder was required to make alternate arrangements. As far as the application for appointment of an arbitrator, as per Clause-19 of the Agreement, an arbitrator has been appointed as per Annexure-B by the Managing Director. One Sri Ratnesh Kumar Baria, an independent arbitrator, has been appointed as sole arbitrator to adjudicate upon the dispute. There is no cause for filing the above writ petition.

The learned counsel for the petitioner refers to the decision of the Hon'ble Supreme Court in ***Perkins Eastman Architects DPC vs HSCC (India) Limited***, wherein the decision in ***TRF Ltd v. Energo Engineering Projects Ltd; (2017) 8 SCC 377*** was referred to and it was declared in paragraph 16:-

“16. But, in our view that has to be the logical deduction from ***TRF Limited***. Paragraph 50 of the decision shows that this Court was concerned with the issue, “whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator” The ineligibility



referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in **TRF Limited**.”

Going by the above extract, there can be no appointment of an independent arbitrator by the Managing Director, who is ineligible by operation of law to nominate an arbitrator. The learned Government Advocate, however, specifically refers to the arbitration clause and points out that no person other than the person appointed by the Managing Director, Central Warehousing Corporation, New Delhi, should act as an



arbitrator. The petitioner having agreed to the same cannot now seek to resile from the term of the agreement.

It is to be noticed that Section 12 of the Arbitration Act along with 5th Schedule disqualifies the person who has a direct or indirect, past or present relationship with or an interest in any of the parties or in relation to subject matter of the dispute. As per the 5th Schedule, any person who is an employee, consultant and advisor of a party, by that status alone gives rise to justifiable doubts as to the independence and impartiality, if appointed as an arbitrator. The specific term in the agreement requiring the Managing Director or rather confining and restricting the arbitration to be carried out only by the sole arbitrator appointed by the Managing Director would be *non est* in law, going by the declaration in the aforesaid judgment. If a person is not entitled to be appointed as an arbitrator necessarily, he shall not be entitled to have any role in charting out the course of the dispute resolution, by way of arbitration, especially in exercising power to appoint an arbitrator. TRF Ltd (*supra*) also held that ineligibility for appointment of arbitrator can be waived only after the dispute arises, which waiver also should be by a written agreement.

Going by the above declaration of law and the provisions in the enactment, this Court is of the opinion that the



appointment made by the Managing Director cannot be sustained. The following directions are, hence, issued appointing the sole arbitrator, a retired judge of this Court.

Hon'ble Mr. Justice Samrendra Pratap Singh, a former Judge of the Patna High Court, is appointed as learned Arbitrator to adjudicate all disputes arising out of agreement 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.

The 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 2019, the hearing be expedited.

The issue of limitation, if any, is left open to be raised before the Arbitral Tribunal.

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

Learned counsel for the parties also undertake to communicate the order to the learned Arbitrator.

The Arbitral Tribunal shall issue notice to the respondents.



The Request Petition stands disposed of in the above terms.

(K. Vinod Chandran, CJ)

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AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	20.06.2023
Transmission Date	N/A

