

IN THE HIGH COURT OF JUDICATURE AT PATNA
REQUEST CASE No.3 of 2023

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M/s Phular Construction Company Pvt Ltd having its Registered Office At Phular,P.O. Mansurpur, District Vaishali through its Managing Director Sri Umesh Prasad Singh, (Male), aged About 61Years, Son of Late Nand Kishor Singh Resident of 112, Khabra @ Kiratpur Gurdas, P.O. Khabra, P.S. Muzaffarpur Sadar, District-Muzaffarpur.

... .. Petitioner/s

Versus

1. The East Central Railway having its Zonal Office at Rail Niketan, Hajipur, District Vaishali through its General Manager, East Central Railway, Hajipur, District Vaishali
2. The General Manager, East Central Railway having its Zonal Office at Rail Niketan, Hajipur, District Vaishali.
3. The Chief Administrative Officer (North), East Central Railway At and P.O. Mahendrughat, District Patna.
4. The Chief Engineer (Con) (North/East), East Central Railway At and P.O. Mahendrughat, District Patna.
5. The Deputy Chief Engineer (Con) (BTH), East Central Railway At and P.O. Bettiah, District West Champaran.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr.Alok Kumar Agrawal, Advocate
For the Respondent/s	:	Mr. Kumar Priya Ranjan, CGC
		Mr. Vibhuti Kumar, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE

C.A.V. JUDGMENT

Date : 28.06.2023

The above arbitration request is by a contractor who was successful in the tender and entered into an agreement with the 1st respondent. The 1st respondent came out with e-tender notice No. ECR/CAO/CON/North-48-18-19, to which



the respondent bid and he was issued a letter of acceptance vide letter No.151 dated 4/7.01.2019 for a total amount of Rs. 91,92,78,527.38. An agreement was executed by the 1st respondent and the petitioner on 11.03.2019 bearing agreement No. ECR/CAO/Con/Wt/Agt/40, produced as Annexure-3. A supplementary agreement for additional work was also executed between the parties vide Agreement No. ECR/CAO/COM/WT/40/1 dated 26.02.2021 and the revised agreement value was Rs.98,34,88,803.66; which is produced as Annexure-4. The petitioner alleges that the 1st respondent failed to provide the work site in time and there were hindrances in the commencement and continuance of the work by reason of which the date of completion was extended time and again; lastly by Annexure 5 letter dated 28.07.2021, up to 31.03.2022. Later Annexure-6 notice of termination dated 28.02.2022 was issued to the petitioner. The petitioner invoked the arbitration clause as per the agreement read with Clause 49 of the Special Conditions of Contract and requested for appointment of an independent arbitrator. By Annexure-7, the petitioner had specifically stated that there was no waiver of Section-12(5) of the Arbitration and Conciliation Act, 1996 (for brevity the Act of 1996). The petitioner was then served with Annexure-8 communication by



the 1st respondent, nominating a panel of four retired Railway officers for appointment as Arbitral Tribunal, allegedly under Clause-64(3)(a)(ii) and (iii) of the General Conditions of Contract. The petitioner alleges that the said communication nominating four retired officers of the awarder violates Section-12(5) of the Act of 1996. The petitioner, hence, prays for appointment of an independent arbitrator.

The petitioner has also relied on Annexure-12 judgement of this Court where, in similar circumstances, an independent arbitrator was appointed despite the identical provision for nomination of retired employees.

That the dispute is arbitrable is admitted by both parties. The specific arbitration clause is found as Clause-64(3) (b) in page-182 of Annexure-9, which is the General Conditions of Contract of 2014. The said Clause is extracted hereunder:

“The Arbitral Tribunal shall consist of a panel of three (3) retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of at least four (4) names of retired Railway Officers(s) empanelled to work as Railway Arbitrator duly indicating their retirement date to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM.

Contractor will be asked to suggest to General Manager at least 2 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 from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them has served in the Accounts Department.”

The learned counsel for the petitioner submits that the said Clause specifically indicates no waiver having been carried out of Section-12(5). It is urged that ***Bharat Broadband Network Limited Vs. United Telecoms Limited, (2019) 5 SCC 755*** specifically looked at Section-12(5) and held that the proviso enables waiver only after disputes have arisen between the parties to an agreement, which waiver also has to be expressed in writing by way of an agreement. ***Voestalpine Schienen GmbH v. DMRC, (2017) 4 SCC 665*** was relied upon to urge that though the nature and source of an arbitrator's appointment could be deduced from the agreement entered into between the parties, yet non-independence and non-impartiality of such arbitrator would render him ineligible to conduct the arbitration. Reliance is also placed on ***T.R.F. Ltd. V. Energo Engg. Projects Ltd., (2017) 8 SCC 377***. The Hon'ble Supreme



Court held in the said case that the Managing Director of the awarder having been rendered incapable of carrying out an arbitration, by virtue of Section-12(5) of the Act of 1996, is also rendered ineligible to nominate another person. The learned Standing Counsel would also specifically draw this Court's attention to the judgment in ***Central Organization for Railway Electrification Vs. ECI-SPIC-SMOMCML (JV), (2020) 14 SCC 712***, wherein another Co-ordinate Bench, considering T.R.F. Ltd. (supra) held that when a panel of retired employees is proffered by the Railways as per Clause 64(3)(b) of the General Conditions of Contract, with the details of those retired officers, and the contractor is required to nominate two persons from the list, then the nomination made by the awarder gets 'counter balanced by the power of choice given to the contractor'. The decision in T.R.F. Ltd. (supra) was held to be not applicable to the General Conditions of Contract of the Railways which enables the parties to choose two arbitrators, which goes against the dictum laid down in T.R.F. Ltd. (supra). It is pointed out by the learned counsel for the petitioner that by Annexure-11 another Co-ordinate Bench referred Central Organization for Railway Electrification (supra) judgment to a larger Bench.



The petitioner seeks appointment of an independent arbitrator, a retired Judge of this Court.

The learned Standing Counsel for the Railways asserts on the basis of Central Organization for Railways Electrification (supra) that in an identical situation the Hon'ble Supreme Court had upheld the nomination. There can be found no interest in a retired government employee and it was submitted that even in Voestalpine (supra) the nomination by the Metro Railway Corporation Limited of retired employees of the Railways was upheld. Learned Standing Counsel seeks dismissal of the request case and continuation of the arbitration, if required, after nomination of the two members from the panel as proffered to the petitioner by Annexure-8.

It is trite that merely because of a reference made, the binding nature of a precedent is not effaced. In Central Organization For Railway Electrification (supra), T.R.F. Ltd. (supra) was specifically noticed and the same was found to be inapplicable on facts and the Clause coming forth from the General Conditions of Contract. The facts in the above case are identical insofar as the invocation of arbitration is concerned; the arbitration clause being identical. However, it is to be noticed that the proffering of four names as required under



Clause-64(3)(b) has not been done in the manner required under the above quoted Clause-64(3)(b) which requires the Railways to send a panel of at least four names of retired Railway officers empanelled to work as Railway Arbitrator 'duly indicating their retirement date to the contractor within 60 days from the date' when a written and valid demand is received by the General Manager. Annexure-8 does not show the retirement dates of the four persons suggested.

In this context we have to specifically notice Central Organization For Railway Electrification (supra) which held that in response to the respondent's letter dated 26.09.2018, the appellant has sent a panel of four retired Railway Officers to act as arbitrators "giving the details of those retired officers and requesting the respondents to select two of them and communicate to the office of the General Manager" (sic ... Para-38).

Hence, the counter balancing as found in Central Organization For Railway Electrification (supra) was only when the details required to be supplied have been given to the contractor.

In the present case, we find that such details have not been given to the contractor. T.R.F. Limited (supra) also



categorically held that when there has been failure of procedure or *ex facie* contravention of the inherent facets of the arbitration clause, the Courts under Section-11 could nullify the appointments made by the authorities. When there is a nomination to be made, it has to be made in terms of the agreement and the Clause of arbitration agreed upon between the parties. As has been held in ***Perkins Eastman Architects DPC v. HSCC (India) Limited, (2020) 20 SCC 760***, the logical deduction from T.R.F. Ltd. (supra) would be that the Managing Director, after becoming ineligible by operation of law would also be ineligible to nominate an arbitrator. The ineligibility referred to therein as a result of operation of law, it was held, must not only to be ineligibility to act as an arbitrator but also to appoint any one else as an arbitrator. However, in cases where both the parties could nominate their respective arbitrators of their choice, it was found to be a completely different situation. In such a circumstance, it was held that whatever advantage a party may derive by nominating an arbitrator of his choice, the same would get counter balanced by equal power on the other party. It is also to be noticed that in Voestalpine (supra) a 3 Judge Bench of the Hon'ble Supreme Court, while upholding the nomination of retired Railway Employees, noticed that there



is no ineligibility since the awarder therein was the Delhi Metro Corporation Limited and the panel proffered was not of the retired officers of the awarder. It is also pertinent to note that despite that finding; in that case the subsequent action of the D.M.R.C. forwarding the entire panel available with the awarder, as against the four names proffered earlier to get a very wide choice to the petitioner was approved and upheld.

This Court referred to the above judgments only to answer the arguments put forth by the counsel. However, in the present case, the panel was not proffered in accordance with the terms of the arbitration clause.

The following directions are, hence, issued appointing the sole arbitrator, a retired judge of this Court.

Hon'ble Mr. Justice Jyoti Sharan, 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.

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)

K.C.Jha/-

AFR/NAFR	
CAV DATE	
Uploading Date	28.06.2023
Transmission Date	

