

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL REVIEW No.181 of 2023
In
REQUEST CASE No.12 of 2023

1. The State of Bihar through the Principal Secretary cum Commissioner Building Construction Department, Government of Bihar, Patna.
2. The Engineer in Chief cum Additional Commissioner cum Special Secretary, Building Construction Department, Government of Bihar, Patna.
3. The Chief Engineer, Building Construction Department, Government of Bihar, Patna.
4. The Superintending Engineer, Building Division No. 2, Building Construction Department, Bihar, Patna.
5. The Executive Engineer, Construction Division No. 2, Building Construction Department, Bihar, Patna.

... .. Petitioner/s

Versus

Kashish Developers Limited Registered Office at 87 Old A.G. Colony, Kadru, Ranchi Jharkhand 834002, Local Address at 201, Kamla Sadan Apartment, Punai Chak, District Patna through its Director Mukesh Kumar aged about 47 years, Gender Male, son of Sri Mukut Prasad Rao, resident of 171, Mushahari, Bijbaniya, P.S. Lauriya, West Champaran, District West Champaran.

... .. Opposite Party/s

with
CIVIL REVIEW No. 182 of 2023

1. The State of Bihar through the Principal Secretary cum Commissioner Building Construction Department, Government of Bihar, Patna.
2. Construction Department, Government of Bihar, Patna.
3. The Chief Engineer, Building Construction Department, Government of Bihar, Patna.
4. The Superintending Engineer, Building Division No. 2, Building Construction Department, Bihar, Patna.
5. The Executive Engineer, Construction Division No. 2, Building Construction Department, Bihar, Patna.

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Appearance :

(In CIVIL REVIEW No. 181 of 2023)

For the Petitioner/s : Mr. P. K. Shahi, AG
Mr. Ajay, GA-5
Mr. Pratik Kumar Sinha, AC to GA-5
Mr. Uday Bhan Singh (Ac To Gp 19)
For the Opposite Party/s : Mr. Lalit Kishore, Sr. Advocate
Mr. Ranjeet Kumar, Advocate
Mr. Ayush Kumar, Advocate
Mr. Shikhar Mani, Advocate
Mr. Kanishka Shankar, Advocate
Mr. Lakshmi Kumari, Advocate
Mr. Rajnish Prakash, Advocate

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Mr. Ranjeet Kumar, Advocate
Mr. Ayush Kumar, Advocate
Mr. Shikhar Mani, Advocate
Mr. Kanishka Shankar, Advocate
Mr. Lakshmi Kumari, Advocate
Mr. Rajnish Prakash, Advocate

CORAM: HONOURABLE THE CHIEF JUSTICE
ORAL JUDGMENT
Date : 04-10-2024

The State is in review from the judgments in the request cases, which appointed an arbitrator to decide the disputes arising out of two contracts entered into between the Construction Division of the State, with the 1st Respondent; who



was the petitioner in the request cases.

2. Two civil reviews are considered together, since the issues raised are identical though the agreements executed are separate; Agreement No. 04-SBD/2017-18 in Request Case No. 12 of 2023 and Agreement No. 05-SBD/2015-16 in Request Case No. 13 of 2023. The nature of the work awarded to the 1st Respondent is also identical being the work of construction of *Vidhayak Awasan* (MLA *Parisar*) at Patna, Bihar. The review petitions are also on the same ground of the petitioner having not approached the review petitioner/the Respondent-State, as per the procedure stipulated in the arbitration clause, found in the agreement.

3. The learned Advocate General appeared for the State and pointed out that the request cases were allowed on the first posting date; without even giving the State a chance to file a counter affidavit. Clause-25 of the General Conditions of Contract, which deals with settlement of disputes & arbitration is pointed out. It is the specific contention that any dispute arising out of the contract or in execution of the work should be taken up with the Superintending Engineer within 07 days, from whose decision there is an appeal provided to the Chief Engineer who also should give a decision within 30 days of



receipt of appeal, after affording an opportunity to the contractor to be heard. It is also provided that if the contractor is dissatisfied with the decision of the Chief Engineer, then a notice shall be given to the Chief Engineer for appointment of an arbitrator, which appointment shall be made by the Engineer-in-Chief or the administrative head of the Public Works Division. The 1st Respondent had completely failed to take up the issue with the Superintending Engineer or the Chief Engineer and in such circumstances, there can be no appointment of an arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for brevity 'Act of 1996'), is the contention.

4. A similar provision was considered in Request Case No. 105 of 2019, titled as *Nirman Engicons Private Limited Vs. The State of Bihar & Ors*, and analogous cases, by decision dated 25.11.2020, in which the request was declined noticing the provision available under Clause-25. Reliance is also placed on the judgment of the Hon'ble Supreme Court in *Municipal Corporation of Greater Mumbai v. Pratibha Industries Limited, (2019) 3 SCC 203*, to contend that a review is possible to an order appointing an arbitrator under the Act of 1996.

5. Shri Lalit Kishore, learned Senior Counsel



appearing for the respondent would point out that the very same contention was raised before the Hon'ble Sole Arbitrator, who is a former Judge of the Hon'ble Supreme Court, which was disposed of by Annexure-B dated 02.05.2023; which is not stated in the review application. It is also asserted that five request cases, between the same parties, were allowed on the same day and in all the five cases, an arbitrator was appointed with consent and hence, there is no case for review. It is also pointed out that the arbitration had proceeded considerably before the sole arbitrator and substantial amounts have been expended for the arbitration proceeding. There is absolutely no ground for review of the judgment passed appointing a sole arbitrator. Reliance is placed on *Ashok Tubwell and Engineering Corporation v. Union of India, (2015) 5 SCC 702* and *Demerara Distilleries (P) Ltd. v. Demerara Distillers Ltd., (2015) 13 SCC 610*.

6. On the question of whether review is permissible, *Municipal Corporation of Greater Mumbai* (supra) is apposite. That was a case in which the General Conditions of Contract specified that no arbitration shall be allowed; despite which the court appointed an arbitrator in an application filed under Section 9 of the Act of 1996. An application for review was



allowed by the learned Single Judge recalling the order appointing the sole arbitrator, which was reversed by a Division Bench. The Division Bench relied on Section 5 of the Act of 1996, which, according to the Division Bench, mandated that there would be no judicial intervention with respect to anything included in Part-1 of the Act of 1996. It was also found that there was no provision enabling the court to review its own order. It was also argued by the respondents before the Hon'ble Supreme Court that the Arbitration Act is a self-contained Code and the court cannot look outside the four-corners of the Act to find a power of review. The Hon'ble Supreme Court, however, emphasised Article 215 of the Constitution of India, which designates the High Courts as courts of record; in which inheres jurisdiction to recall its own order. Reliance was placed on a number of judgments of the Hon'ble Supreme Court and the arguments of the respondents were rejected. The judgment of the Division Bench of the High Court was set aside and the power of review exercised by the learned Single Judge was held to be proper.

7. It is also a fact that by Arbitration & Conciliation (Amendment) Act, 2015 (Act 3 of 2016), the words "the Chief Justice or any person or institution designated by him" in sub-



sections 4, 5 and 6 of Section 11 of the Act of 1996 was substituted by the words, “the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court”. After the said amendment, the appointment made of an arbitrator is by the High Court and even an argument that it was passed by a *persona designata*; the Chief Justice will not stand scrutiny. Hence, there is no question of the review power not being available to this Court with respect to the proceedings under the Act of 1996.

8. This Court has also perused the Judges papers of the request cases, and it is seen that the judgment was passed on the first day; but after noticing the presence of the learned Counsel for the respondent also. However, there is no consent recorded in the judgment and we cannot infer it. The contention also is only that there was a procedure available under the contract, which had to be scrupulously followed, insofar as the appointment of an arbitrator for settlement of disputes, through arbitration. The procedure also prescribes an appointment to be made by the Engineer-in-Chief or the head of the Public Works Division, which, as of now, is not permissible under Section 12 read with Schedule-V of the Act of 1996.

9. *Voestalpine Schienen GmbH v. Delhi Metro Rail*



Corpn. Ltd, (2017) 4 SCC 665 held that though the nature and source of 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. *TRF Ltd. v. Energo Engineering Projects Ltd., (2017) 8 SCC 377*, further held that the Managing Director of the awarder is rendered incapable of carrying out arbitration by virtue of Section 12(5) of the Act of 1996, who would also be rendered ineligible to nominate another person as arbitrator. *Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2020) 20 SCC 760* found that the logical deduction from *TRF Ltd.*(supra) would be that that Managing Director after becoming ineligible by operation of law, would also be ineligible to nominate an arbitrator. The ineligibility as a result of operation of law, would not only be the ineligibility to act as an arbitrator, but also to appoint anyone else as an arbitrator. Hence, as of now, the Engineer-in-Chief would not be entitled to appoint an arbitrator; the particular designate having been disqualified by operation of law.

10. *Nirman Engicons Private Limited* (supra) was a case in which reliance was placed on another judgment of the



Hon'ble Supreme Court in *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML(JV)*, (2020) 14 SCC 712. Therein, a Co-ordinate Bench, after considering *TRF 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 further nomination made by the awarder gets counter balanced by the power of choice given to the contractor. The decision in *TRF 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. This Court is informed that the aforesaid decision has been referred by a Co-ordinate Bench to a Larger Bench. However, it has to be pertinently observed that there is no such distinguishing clause, in the present contract as is available in the General Conditions of Contract of the Railways.

11. Insofar as the present contract is concerned, what is relevant is the specific condition in Clause-25, which reads as under:-

“It is also a term of this contract that no person other than a person appointed by such Engineer-in-Charge 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.”

Hence, by reason of substitution of Section 12 by Act 3 of 2016, the arbitration clause enabling settlement of dispute through arbitration becomes otiose since the Engineer-in-Chief or the administrative head of the Public Works Division is dis-entitled from appointing an arbitrator.

12. Sub-section (5) of Section 12 is also relevant, which is extracted hereunder:-

“12(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator.

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

One of the agreements; ie: the one in Request Case No. 13 of 2023 was executed on 10.08.2015, prior to the amendment; which was made effective retrospectively from 23.10.2015. The agreement in Request Case No. 12 of 2023 was after the amendment was enforced. Obviously, after the amendment by



substitution and insertion, there was no agreement entered into by the parties to waive the applicability of this sub-section by an express agreement in writing. In the teeth of the above circumstances, this Court has to find that there is no arbitration clause in the agreement entered into between the parties.

13. *Ashok Tubwell and Engineering Corporation* (supra) considered the term in the arbitration agreement that no person other than the gazetted railway officers should act as arbitrator and if that is not possible, matter not to be referred to arbitration at all. It was held that if such officer is not appointed as arbitrator, the only option available to the parties is to approach the Civil Court by way of a suit. It was also noticed by the Hon'ble Supreme Court that in that case when the application under Section 11 was moved before the Chief Justice for appointment of an arbitrator, both parties agreed to the appointment of a former Judge; which consent raises a presumption that there was a new contract by way of novation, whereby parties stand agreed to the appointment of someone else other than the named arbitrator.

14. In the present case, as we noticed at the outset, despite a contention having been raised of consent, there is nothing recorded in the order, to find a consent of the parties. In



fact, the order indicates that there are no disputes about a number of aspects from(a) to (g); out of which, (g) refers to the respondents having failed to appoint an arbitrator pursuant to the invocation of the arbitration clause by the petitioner. The contention that the arbitration clause was never invoked by the petitioner stands undisputed. Even if it was so invoked, the Engineer-in-Chief could not have appointed an arbitrator due to the disqualification arising from the Act of 1996, which disqualification has also been declared by the binding precedents of the Hon'ble Supreme Court.

15. On the above reasoning, this Court finds that the present cases are almost similar to *Municipal Corporation of Greater Mumbai* (supra); wherein there was a specific clause that there shall be no arbitration. In the present case, there is no provision for arbitration, if the appointment is not made by the Engineer In Chief or the administrative head of the Public Works Division. In the context of the disability visited on the Engineer-in-Chief and the administrative head to make appointment of an arbitrator; the agreement does not have a clause for arbitration and the parties will have to approach the Civil Court or any other appropriate forum. That this Court failed to notice the specific provision in the arbitration



agreement is an error on the face of the record.

16. Review petitions are allowed and the judgments in both the request cases are recalled. The request cases, hence, as a consequence, on the very same reasoning stand rejected.

17. Interlocutory applications, if any, shall stand closed.

(K. Vinod Chandran, CJ)

Sujit/-

AFR/NAFR	NAFR
CAV DATE	
Uploading Date	05.10.2024
Transmission Date	

