

IN THE HIGH COURT OF JUDICATURE AT PATNA
REQUEST CASE No.105 of 2024

M/s R.S. Contruction, a firm registered under the Partnership Act 1932, through its Partner Shri Pankaj Kumar, Son of Shri Rameshwar Prasad Singh, having its registered office at Corporated House, Ramkrishna Nagar, Hemra Road, Ward No. 20, Begusarai,-851101, Bihar.

... .. Petitioner/s

Versus

1. Building Construction Department, Government of Bihar, Visvesvaraya Bhawan, Bailey Road, Patna- 800001, acting through its Secretary.
2. The Engineer in Chief, Building Construction Department, Government of Bihar Visvesvaraya Bhawan, Bailey Road, Patna- 800001, Bihar.
3. The Superintending Engineer, Building Circle Chapra, Chapra, Saran, Bihar.
4. The Executive Engineer, Building Division, Gopalganj, Building Construction Department, Gopalganj, Bihar.
5. The State of Bihar through Principal Secretary , Building Construction Department, Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr. Prashant Kumar, Advocate
For the Respondent/s : Mr. Vikas Kumar, SC-11

CORAM: HONOURABLE THE CHIEF JUSTICE
ORAL JUDGMENT

Date : 19-12-2024

The petitioner herein had entered into an agreement pursuant to tender process initiated by the respondent. The separate agreements entered into contained Clause-25 for dispute resolution. The petitioner requests for appointment of an arbitrator under Clause-25 read with the provisions of the Arbitration and Conciliation Act, 1996.

2. The learned Senior Counsel appearing for the respondent, however, relied on the decision of this Court in C.Rev No. 181 and 182 of 2023 (**The State of Bihar v. Kashish Developers Limited**) dated 04.10.2024 wherein Clause-25 was



interpreted to find that after the amendment of 2016 of the Arbitration and Conciliation Act, 1996, there would be no question of an arbitration going by the language employed in Clause-25.

3. It is also submitted that the said decision was taken up before the Hon'ble Supreme Court in ***SLP Nos. 25109- 25110 of 2024*** which stood dismissed.

4. Clause-25 specifically indicates that no person other than the person appointed by the Engineer-in-Chief or administrative head should act as arbitrator and for any reason if that is not possible, the matter shall not be referred for arbitration at all.

5. We extract hereunder paragraph nos. 9 to 15 of the judgment in C.Rev Nos. 181 and 182 of 2023:

“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.”

6. There is no dispute that Clause-25 is similar to that interpreted in the aforesaid decision. The learned Counsel for the petitioner, however, points out the observation in paragraph no. 14 of the above extract that *‘the contention that the arbitration clause was never invoked by the petitioner stands undisputed’* (sic). It is submitted that in the instant cases the petitioner has invoked the arbitration clause as provided under Clause-25 by Annexure-P-15. This distinguishes the above case from that cited, is the contention. It has to be observed that therein, an arbitrator was appointed in both the request case and later a review was filed by the State, the review petitioner, contending that the arbitrator was appointed on the first date itself without giving an opportunity to the State to raise its objections.

7. The request petitioner, therein, who was the respondent in the review case, had raised the contention that the



Government Advocate was present when the arbitrator was appointed. This Court found that though the Government Advocate was present, there is nothing recorded in the order to find consent of the parties. It was also observed that even if the arbitration clause was invoked by the petitioner, the Engineer-in-Chief could not have appointed the arbitrator due to the disqualification arising from the Act of 1996. Hence, the invocation of Clause-25 is inconsequential since the parties have agreed that there would be no arbitration unless the arbitrator is a person appointed by the Engineer-in-Chief or the administrative head; which is not possible by reason of the substitution of Section 12 of the Arbitration and Conciliation Act by Act 3 of 2016. There is also no further agreement to waive the applicability of sub-section (5) of Section 12 as is required under the proviso to the sub-section.

8. This Court also notices that the decision of the *three Judge Bench in (2020) 14 SCC 712*, as noticed in the extract above, has been held to be not good law finding that unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution of India and the principle of express waiver contained in the proviso to Section 12(5) of the Act of 1996 also applies to circumstances where parties are seeking appointments unilaterally by one of the



parties. It was held that a clause that allows one party to unilaterally appoint a sole arbitrator gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further, such a unilateral clause is exclusive and hinders equal participation of the parties in the appointment process of arbitrators.

9. The larger Bench decision in *Central Organisation for Railway Electrification v. M/s ECI SPIC SMO MCML (JV) A Joint Venture Company*; in *Civil Appeal Nos. 9486-9487 of 2019* re-affirms the rigor of Section 12(5).

10. This Court finds absolutely no reason to take a different view from the cited decision in C.Rev Nos. 181 and 182 of 2023 and reject the request case.

(K. Vinod Chandran, CJ)

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CAV DATE	
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