

IN THE HIGH COURT OF JUDICATURE AT PATNA
REQUEST CASE No.109 of 2023

M/s MBL Infrastructure Ltd., a Company registered under Indian Companies Act, 1956, having its registered Office at Banni Corporate one, 308, 3rd Floor, Plot No.5, Commercial District Centre, Jasola, New Delhi-110025 and also having office at Divine Bliss, 2/3 Judges Court Road, 1st Floor Kolkata-700-027 through its Authorized Signatory, Darban Singh Nayal, aged about 49 years (Male), Son of Late Shri Ranjit Singh Nayal, Resident of RZF-766/26, Gali No.7, Raj Nagar-2, Palam Colony, New Delhi-110077.

... .. Petitioner/s

Versus

1. The Chief Engineer, Project Management Unit (National Highway Wing), Road Construction Department Government of Bihar, Vishweshwaraiya Bhawan Campus Balley Road, Patna.
2. The Executive Engineer, Project Management Unit (National Highway Wing) Road Construction Department Government of Bihar, Vishweshwaraiya Bhawan Campus Balley Road, Patna.
3. The Bihar State Road Development Corporation Ltd., RCD Mechanical Workshop Campus, Near Patna Airport, Sheikhpura, Patna- 800014, through its Managing Director.
4. The Executive Engineer State Highway Division, Road Construction Department, Gaya, Bihar

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr.Mrigank Mauli, Sr. Advocate Mr.Brisketu Sharan Pandey
For the Respondent/s	:	Mr.P.K.Shahi, AG Mr.Vikash Kr. Advocate Mr.Umesh Pd. Singh, Sr. Advocate Mr.Kumar Manish, Advocate Mr.Kumar Saurabh, Advocate

CORAM: HONOURABLE THE CHIEF JUSTICE
ORAL JUDGMENT

Date : 13-09-2024

The petitioner is concerned with an arbitration which had commenced by the appointment of an Arbitral Tribunal which, however, later has become dysfunctional insofar as the Presiding Arbitrator having recused and the Arbitrator appointed by the employer having recalled the mandate to the Arbitrator appointed by them.



2. Admittedly, there was a contract entered into by the petitioner and the 4th respondent- the Executive Engineer of the State Highway Division which has been authorized by the 1st respondent-the Chief Engineer of the Project Management Unit of the National Highways. The petitioner was also informed as per Annexure-P/2 letter dated 23.07.2009 by the Road Construction Department, Government of Bihar that the 3rd respondent- The Bihar State Road Development Corporation Ltd. (for brevity 'Corporation') is appointed as the agency of the Government and all future correspondence regarding the contract made, be addressed to the Corporation i.e., the 3rd respondent. The Corporation was roped in, to supervise the work, approve the bills submitted by the petitioner and the payments were also released by the Corporation.

3. Disputes arose and the petitioner approached the 1st respondent and appointed an Arbitrator as per the arbitration clause. The 3rd respondent as the agency of the 4th respondent had also appointed an Arbitrator. The two Arbitrators appointed by the employer and the contractor appointed a Presiding Arbitrator. It is stated that some allegations were raised against the Presiding Arbitrator which led to his recusal. The mandate of appointment issued by the employer to the one nominated by



them was also withdrawn. It is in such circumstance that the petitioner is before this Court with the Request Case.

4. The learned Advocate General appearing for the 4th respondent submitted that the Executive Engineer-the 4th respondent was never issued with a notice by the petitioner. It is also pointed out that if at all an arbitration is required, the same has to be by approaching the Secretary, Indian Road Congress, New Delhi, India as is provided in the agreement itself. The learned Senior Counsel appearing for the 3rd respondent would submit that they had no privity of contract with the petitioner and they are not a necessary party in the proceedings.

5. For the time being, this Court is not called upon to decide as to the necessary parties in the arbitration, especially since appointment of the Arbitral Tribunal according to this Court is not properly done, even as per agreement. The arbitration clause in the agreement is extracted hereunder:

Sub-Clause 20.6: Arbitration

Substitute Sub-Clause 20.6 with the following:

Any dispute in respect of which the Recommendation(s), if any, of the Board has not become final and binding pursuant to Sub-Clause 20.4, shall be finally settled by arbitration as set forth below. The arbitral tribunal shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer an any Recommendation(s) of the Board related to the



dispute.

(i) A dispute with an Indian Contractor or the foreign contractor who opts for the application of the Indian Arbitration & Conciliation Act, 1996, shall be finally settled by arbitration in accordance with the Indian Arbitration & Conciliation Act, 1996 or any statutory amendment thereof. The Arbitration proceedings shall be carried out in accordance with the provisions of Indian Arbitration and Conciliation Act, 1996. For the purposes of this Sub-Clause, the term "Indian Contractor" means a Contractor who is registered in India and is a juridical person created under Indian law as well as a joint venture between such a Contractor and a Foreign Contractor.

(ii) In the case of a dispute with a Foreign Contractor, the dispute shall be finally settled in accordance with the provisions of UNCITRAL Arbitration Rules. The arbitral tribunal shall consist of three arbitrators, one is to be appointed by the employer and the contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the parties, and shall act as Presiding Arbitrator. In case of failure of the two Arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the Arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Authority specified in Part A Contract Data of Section 8. For the purposes of this Sub-Clause, the term "Foreign Contractor" means a Contractor who is not registered in India and is not a juridical person created under Indian Law.

(ii) Neither party shall be limited in the proceedings before such tribunal to the evidence or arguments before the Board for the purpose of obtaining its Recommendation(s) pursuant to Sub-Clause 20.4. No Recommendation shall disqualify any Board Member from being called as a witness and giving evidence before the Arbitrator(s) on any matter whatsoever relevant to the dispute.



(iv) Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employer, the Engineer, the Contractor and the Board shall not be altered by reason of the arbitration being conducted during the progress of the Works.

(v) If one of the parties fail to appoint its arbitrator in pursuance of Sub-paras (i) and (ii) above, within 30 days after receipt of the notice of the appointment of its Arbitrator by the other party, then the Appointing Authority specified in Part A-Contract Data of Section 8 shall appoint the Arbitrator.

(vi) Arbitration proceedings shall be held at Patna (India) or at the place near to the project site. The language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

(vii) The decision of the majority of Arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation, etc., of its proceedings as also the fees and expenses paid to the Arbitrator appointed by such party or on its behalf shall be borne by each party itself.

6. Sub clause 20.6 (i) speaks of a dispute arising as against an Indian contractor or a foreign contractor to be resolved under the Arbitration and Conciliation Act, 1996. Clause 20.6 (ii) delineates a specific procedure for a foreign contractor which is by appointment of an Arbitral Tribunal; one appointed by the employer and other by the contractor and both the said nominated arbitrators appointing a Presiding Arbitrator.



Looking at sub clause 20.6 relating to arbitration, this Court is of the opinion that Clause (ii) only refers to a foreign contractor. Insofar as an Indian contractor who has been distinctly mentioned in the arbitration clause, the procedure is as per the Particular Conditions of Contract of Section VIII; wherein the appointment of an Arbitrator specifically as per Clause 20.6 has to be done by the Indian Road Congress. We extract the procedure prescribed for appointment of an Arbitrator under Section VIII of the contract:

Secretary, Indian Road Congress, New Delhi, India. If Secretary Indian Road Congress has, in any way, affiliation with the EA, she/he shall be replaced with an independent agency/ person acceptable to both the parties.

7. On the above reasoning, this Court is of the opinion that the petitioner would have to approach the Indian Road Congress for appointment of an Arbitrator; as per the procedure delineated in the contract. Request case is closed leaving open all other contentions raised.

(K. Vinod Chandran, CJ)

Anushka/-

AFR/NAFR	
CAV DATE	
Uploading Date	18.09.2024
Transmission Date	

