

IN THE HIGH COURT OF JUDICATURE AT PATNA
REQUEST CASE No.52 of 2025

J. K. Engicon Private Limited a company having its head office at Hathua Chhawani, Chatardhari Bazar, P.S. Bhagwan Bazar, District - Chhapra, Bihar, duly represented by its Director Vikas Kumar Singh, aged about 37 years, Gender - Male, son of Jitendra Singh, Resident of Barwa Khurd, Daudpur, District -Saran, Bihar

... .. Petitioner

Versus

1. The State of Bihar through the Secretary, Road Construction Department, Government of Bihar, Patna
2. The Engineer-In-Chief, Head-Quarter, Road Construction Department, 3rd Floor, Vishweshwaraiya Bhawan, Patna, Bihar
3. The Chief Engineer, North Bihar Wing, Road Construction Department, Patna, Bihar
4. The Superintending Engineer, Saran Circle, Road Construction Department, Patna, Bihar
5. The Executive Engineer, Chhapra Road Division, Road Construction Department, Patna, Bihar

... .. Respondents

Appearance :

For the Petitioner	:	Mr. Prashant Kumar, Advocate
		Mr. Divyam Kumar, Advocate
For the Respondents	:	Mr. Vikas Kumar, Advocate

CORAM: HONOURABLE THE CHIEF JUSTICE
ORAL JUDGMENT

Date : 13-02-2026

This request case has been filed under Section 11(5)



and 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter '1996 Act') by J.K. Engicon Private Limited with the prayer for appointment of an arbitrator for adjudication of dispute between the parties in accordance with the Arbitration Agreement as contained in Clause 25 of the Agreement No. 06-SBD/2020-2021.

2. It is the case of the petitioner that such agreement was executed between the petitioner and Respondent no. 5 for execution of IRQP (Improvement of Riding Quality Programme) Work on the Ekma to Masrakh Road via Shajitpur, coverying KM0.000 to KM 31.60, under Road Division Chhapra for the year 2020-21, for a contract value of Rs. 24,98,74,047/- (at 16.95% below the BOQ rate).

Subsequently, a supplementary agreement to the said agreement was also executed between the parties for an additional sum of Rs. 87,76,528/- covering the Electrical Utility Shifting work alongside the main IRQP project.

It is further case of the petitioner that since some dispute arose between the parties, the petitioner issued a notice on 24.06.2025 seeking appointment of the arbitrator to the respondents for adjudication of the claims to the tune of Rs. 6,65,21,488/- (Rupees Six Crores Sixty-Five Lakhs Twenty-One



Thousand Four Hundred Eight-Eight Only) in relation to arrears for work completed, approved deviations and/or extra work performed, price escalation and applicable taxes etc., under the Agreement No. 06-SBD/2020-21.

3. The respondents failed to respond to the request of the petitioner, and as such, the petitioner has filed this petition for appointment of the arbitrator.

4. The learned counsel for the State on behalf of the Respondent Nos. 1 to 5 has filed counter affidavit wherein a specific stand has been taken in paragraph nos. 5 and 16, which is as follows:

“5. That at the outset, it is submitted that the present application is not maintainable in view of judgment/order dated 05.10.2024 passed in Civil Review No. 181 of 2023 (State of Bihar vs. Kashish Developer Limited) by this Hon’ble Court.

16. That in reply to the statement made in Paragraph Nos. 15 and 16 of the petition, it is submitted that no arbitrator can be appointed under Section 11 of Arbitration and Conciliation Act, 1996 as there is no such provision in the contract as has been held in the matter of Civil Review No. 181 of 2023, State of Bihar vs. Kashish Developers Limited, by this Hon’ble Court (supra).”

4.1. The learned counsel for the State also placed the



decision of this Court in the aforesaid Civil Review Case No.

181 of 2023 wherein it is held in paragraph no. 15 as follows:

*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 record.”*

5. The learned counsel for the petitioner, on the other hand, placed the agreement and more specifically clause 25 of the agreement which, *inter alia*, states as follows :

*“**CLAUSE-25** Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design, drawings and Instructions here-in-before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim right matter or thing whatsoever in any way arising out of or relating to contract, designs, drawings, specifications, estimates,*



Instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter.

(i) If the contractor considered any work demanded of him to be outside the requirements of the contract, or dispute any drawings, record or decision given In writing by the Engineer-In-Charge on any matter in connection with or arising out of the contract or carrying out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 7 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of fifteen days from the receipt of the contractor's letter.

If the Superintending Engineer falls to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Chief Engineer for appointment of arbitrator



failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

(ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above disputes or difference shall be referred for adjudication through arbitrator appointed by Engineer-in-Chief or the administrative head of the said P.W.D. If the arbitrator so appointed is unable or unwilling to act or resign his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

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

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 45 days of receiving the Intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be



discharged and released of all liabilities under the contract in respect of these claims. The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of the contract that if any fees are payable to the arbitrator these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (Including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.”

5.1. Learned counsel for the petitioner placed reliance in the case of ***Hindustan Construction Company Ltd. -Versus- Bihar Rajya Pul Nirman Nigam Limited and Others*** reported in **2025 SCC OnLine SC 2578**, wherein Issue No. 2 was quoted, which is as follows :



Issue No.2

“Whether a valid and subsisting arbitration agreement exists between the parties within the meaning of Section 7 of the A&C Act, and whether Clause 25 of the agreement satisfies the statutory requirements of an arbitration clause.”

The Hon’ble Supreme Court after quoting the Clause No. 25 of the agreement in paragraph no. 12.9 where similar clause was there, has been pleased to hold as follows:

“12.11. This principle was reaffirmed in Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)27, and conclusively settled by the Constitution Bench in CORE II v. ECI SPIC SMO MCML (JV)28, wherein, it was held that unilateral appointment clauses in public-private contracts violate Article 14 and offend the principle of nemo judex in causa sua. The Constitution Bench observed in paragraph 164 as follows:

"Unilateral appointment clauses in a public-private contract fail to provide the minimum level of integrity required in authorities performing quasi-judicial functions such as arbitral tribunals. Therefore, a unilateral appointment clause is against the principle of arbitration, that is, impartial resolution of disputes between parties. It also violates the nemo judex rule which constitutes the public policy of India in the context of arbitration. Therefore, unilateral



appointment clauses in public-private contracts are violative of Article 14 of the Constitution for being arbitrary, in addition to being contrary to the equality principle under the Arbitration Act.”

12.12. Accordingly, the portion of Clause 25 that vests exclusive appointment power in one party and forecloses arbitration in default of such appointment must be severed as void and unenforceable. However, the substantive agreement to arbitrate survives by virtue of the doctrine of severability.”

6. In view of such ratio laid down by the Hon’ble Supreme Court, I am of the humble view that the portion of Clause 25 in the agreement which has been executed in the case in hand vesting exclusive appointment power in one party i.e. the Engineer-in-Chief or the administrative head of the P.W.D. and forecloses arbitration in default of such appointment, must be severed as void and an unenforceable. However, the substantive agreement to arbitrate survives by virtue of doctrine of severability.

In ***Hindustan Construction Company Ltd.*** (*supra*), it has been further held in paragraph nos. 12.16 and 14 as follows :

“12.16. In light of the above discussion, the following propositions emerge:

(i) The parties' conduct clearly



demonstrates their intention to arbitrate, satisfying the requirement of Section 7(4)(c);

(ii) Clause 25, in its substantive form, constitutes a valid arbitration agreement;

(iii) The unilateral and exclusionary appointment mechanism is void and severable; and

(iv) This Court is empowered under Section 11(6) to cure the defect and appoint an independent arbitrator.

XX XX XX XX

14. In the present case, the respondents have placed considerable reliance on the fact that the decision in Kashish Developers, which was referred to by the High Court in the impugned judgment, stands "affirmed" on account of the dismissal of the Special Leave Petition. However, the circumstances in Kashish Developers involved appointment made without affording the State an opportunity to oppose it. Whereas, the present matter arose after extensive pleadings, objections, and participation by both parties. The two cases are therefore factually distinct, and such reliance cannot justify revisiting or unsettling the earlier appointment order.

14.1. It is necessary to restate the well-settled legal position regarding the precedential value of orders dismissing Special Leave Petitions. A non-speaking dismissal of an SLP signifies only that this Court, in its discretion under Article 136, has declined to interfere. It does not amount to approval of the reasoning of the subordinate forum. The doctrine of merger does not apply to such



dismissals. This position has been consistently affirmed by this Court, including Kunhayammed v. State of Kerala; and P. Singaravelan v. District Collector, Tiruppur.

14.2. Similarly, in State of Uttar Pradesh v. Atul Kumar Dwivedi, after reviewing earlier authorities, this Court reiterated that dismissal of an SLP at the threshold without reasons does not elevate the underlying judgment to binding precedent unless accompanied by an express declaration of law under Article 141.

14.3. Accordingly, the respondents' reliance on the supposed "affirmation" of Kashish Developers is wholly misconceived. A non-speaking dismissal of an SLP neither endorses the reasoning of the judgment challenged nor transforms it into binding precedent. At best, such a decision has persuasive value; its only legal effect is to bring finality to the dispute between the parties in that particular case."

7. In view of the foregoing discussions, I am of the humble view that in spite of the Clause no. 25, this Court has got ample power for appointment of arbitrator and there is no legal impediment in the adjudication of dispute by the arbitrator more particularly when the dispute arises out of the agreement which is being civil in nature and the petitioner having exhausted the channel available for resolution of the dispute.

8. In view of such finding as arrived at and on consensus of both the learned counsel for the parties, Hon'ble



Mr. Justice Shyam Kishore Sharma, former Judge of this Court, is appointed as learned Arbitrator to adjudicate all disputes arising out of agreement entered into between the parties to the lis.

9. All the pleas and issues raised, on merits, are left open to be considered and decided by the learned Arbitrator.

10. The learned Arbitrator shall be entitled to fee as per the Schedule of the Act.

11. Since the dispute arises out of an agreement of the year 2021, the hearing be expedited.

Parties undertake to fully cooperate and not to take any unnecessary adjournment.

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

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

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

14. The Arbitral Tribunal shall issue notice to the parties.

15. The Request Petition stands disposed of in the above terms.



16. Interlocutory Application(s), if any, shall stand disposed of.

(Sangam Kumar Sahoo, CJ)

shailendra/-

AFR/NAFR	
CAV DATE	
Uploading Date	16.02.2026
Transmission Date	

