

IN THE HIGH COURT OF JUDICATURE AT PATNA
REQUEST CASE No.53 of 2020

Hindustan Construction Company Ltd. a Company incorporated under the Companies Act, 1956, having its registered office at Hincan House, L.B.S. Marg, Vikhroli (West), Mumbai- 400 083, through its authorized representative Mr. Nilesh Vasant Mekel, son of Vasant Dasharath Mekel, aged about 44 years, Gender- Male, resident of Flat No. G- 2, Building No. C7, Mohan Puram CHS, Kansai Section, Jatale Hospital, Ambarnath East, Thane- 421501, Maharashtra.

... .. Petitioner/s

Versus

1. Bihar Rajya Pul Nirman Nigam Limited a Company incorporated under the Indian Companies Act, 1956, having its registered office at 7, Sardar Patel Marg, Patna, Bihar- 800015, through the Managing Director.
2. The Managing Director, Bihar Rajya Pul Nirman Nigam Limited.
3. The Deputy Chief Engineer. South Bihar, Bihar Rajya Pul Nirman Nigam Limited.
4. The Engineer-in- Charge, Works Division- Gaya, Bihar Rajya Pul Nirman Nigam Limited.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Umesh Prasad Singh, Sr. Advocate Ms. Aditi Hansaria, Advocate Ms. Nivedita Chaudhary, Advocate
For the Respondent/s	:	Mr. P.K. Shahi, AG Dr. Anand Kumar, Advocate

CORAM: HONOURABLE THE CHIEF JUSTICE
CAV JUDGMENT

Date : 09-12-2024

The petitioner herein had entered into an agreement pursuant to a successful bid in the tender process initiated by the respondent. The agreement 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 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 this very 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 *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. We also notice 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 an unilateral clause is exclusive and hinders equal participation of the parties in the appointment process of arbitrators. The larger Bench 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).

7. The learned Senior Counsel for the request petitioner pointed out the judgment in *BSNL v. Motorola India (P) Ltd., (2009) 2 SCC 337* and specifically relied on paragraph no. 39 to argue that once the requirement under the agreement has not been complied with and a party aware of that, still proceeds with the arbitration, without raising an objection, waives their right to object. It is specifically pointed out that in the above request case there was a judgment passed by this Court on 18.08.2021 wherein it was categorically observed that there was no dispute about the legality, validity and binding effect of the agreement entered into between the parties and the existence of arbitration clause as also the existence of the dispute and the petitioner having put the respondent to notice to seek arbitration under the agreement.



8. On the facts of the decision cited by the learned Senior Counsel for the respondents, it has to be noticed that therein, the appellant had a contention that it was within their domain to appoint the Arbitrator. It was found that the respondent had invoked the arbitration clause which was responded to by the appellant, affirming their right to recover liquidated damages. Finding no arbitrable dispute, insofar as the recovery of damages, the appointing authority did not respond to the notice requiring the appointment of an Arbitrator and failed to act within the time prescribed under the Act of 1996, which led to the respondent filing a petition under Section 11 of the said Act before the High Court. The facts in the present case are clearly distinct.

9. Earlier, this Court had appointed an Arbitrator in the Request Case and had also made the observation, as stated by the learned Senior Counsel for the request petitioner. The objection now raised is that arbitration clause itself is rendered otiose, for reason of the amendments brought in Section 12 by Act 3 of 2016. There is also no waiver by an express agreement in writing as required by the proviso to Sub-section 5 of Section 12 of the Act of 1996. In the present case, the Arbitrator appointed under Section 11, had recused and in that



circumstances, there was a review application filed and on resumption of the request case, this present objection was raised. The review was allowed in C.Rev No. 293 of 2024 on the short ground of the recusal of the Arbitrator appointed under Section 11.

10. In the present case, originally when the request case came up for consideration, first on 09.12.2020, the learned Counsel for the petitioner specifically drew attention to Clause-25 of agreement dated 04.03.2014 and sought for reference to a retired Hon. Judge of Patna High Court. The respondents appearing through learned Counsel sought for time. Pleadings were exchanged and on 23.12.2020, the matter was adjourned for supply of copy of rejoinder to the respondents.

11. Again, the case came on 23.03.2021, when it was posted to 07.04.2021 and later to 07.07.2021, 28.07.2021, 11.08.2021 and 18.08.2021. On 18.08.2021, the matter was considered and an Arbitrator was appointed. The 4th paragraph of the judgment reads as follows:

“The sole ground for resistance of the petition, as argued in the Court, is non-qualification of the claim. From the communication dated 10th January, 2020, whereby the petitioner, in exercise of its right, had named the Arbitrator, the claim stands quantified. At one place, the figure mentioned is Rs.8883.65 lakhs. Hence,



the contention is misconceived.”

12. This Court also notices from the counter affidavit filed that Clause-25 was dealt with *in extenso* and it was also contended that while the appeal of the petitioner was pending before the Managing Director, without opportunity being given to the Managing Director to consider the appeal, this Court was moved for the appointment of an Arbitrator. It was the contention of the respondent that the appeal having not been considered, the appellant should have presumed that it was rejected and applied to the Managing Director for appointment of an Arbitrator. This Court could have been approached for appointment only after expiry of thirty days from the issuance of such notice.

13. In this context, this Court looked at *Ashok Tubewell and Engineering Corporation v. Union of India, (2015) 5SCC 702* as referred to in C.Rev. Nos. 181 and 182 of 2023. Paragraph no. 13 of the cited decision indicates that the Hon'ble Supreme Court held that, when an application under Section 11 is moved before the Chief Justice for appointment of an Arbitrator and both parties agree to the appointment of a former Judge; this 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. However, it has to be specifically noticed that here the objection raised is on the basis of the amendment made to Section 12; long prior to which, ***BSNL*** and ***Ashok Tubwell and Engineering Corporation*** (both supra) were decided. The proviso to sub-section 5 of Section 12 also specifically provided for a waiver by an express agreement in writing. When the statute provides for an express agreement in writing there can be no novation of the agreement found, by reason only of the appointment of an Arbitrator at the first instance. We also respectfully refer to the Constitution Bench judgment in ***Central Organisation for Railway Electrification*** (supra) which reaffirmed the rigor of section 12 (5); from which no exception can be taken.

15. The Request Case stands dismissed.

(K. Vinod Chandran, CJ)

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AFR/NAFR	
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