

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.2308 of 2014

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Kumar & Kumar Associates, a partnership firm registered under the Indian Partnership Act, 1932, having its registered office at 1st Floor, Satyanarayan Market, Opposite Karlo Automobiles, Boring Road, Patna, through its Partner, Subodh Kumar, son of Shri Roop Narayan Roy, residing at Boring Road, Montessori School Lane, Gandhinagar, P.S. Shrikrishnapuri, District - Patna

..... Petitioner

Versus

1. The Union of India, through General Manager, East Central Railway, having its office at B - Block, Dighi, Hajipur, District - Vaishali (Bihar)
2. General Manager, East Central Railway, having its office at B - Block, Dighi, Hajipur, District - Vaishali (Bihar)
3. Principal Chief Engineer, East Central Railway, B - Block, Dighi, Hajipur, District - Vaishali (Bihar)
4. Divisional Railway Manager, East Central Railway, Danapur, P.O. & P.S. Danapur, District - Patna (Bihar)
5. Sr. Divisional Engineer (Cord), East Central Railway, Danapur, P.O. & P.S. Danapur, District - Patna (Bihar)
6. Sr. Divisional Engineer (I), East Central Railway, Danapur, P.O. & P.S. Danapur, District - Patna (Bihar)
7. Divisional Engineer (I), East Central Railway, Danapur, P.O. & P.S. Danapur, District - Patna (Bihar)

..... Respondents

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Appearance:

For the Petitioner : Mr. Nikhil Kumar Agrawal, Advocate

For the Respondents : Mr. Bindhyachal Singh,

Mr. Ram Binod Singh

Mr. Anil Kr. Sinha, Advocates

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CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

Date: 27.07.2016

The present writ petition has been filed for quashing the termination notice bearing no. W.7/17/Misc/PNBE/L/Open/08-09 dated 29.01.2013 issued by the Respondent No. 6 whereby the

Agreement No. W-17/Misc/PNBE/L/Open/08-09 executed between East Central Railway and the petitioner on 05.12.2008 has been terminated; as well as for a number of connected reliefs.


2. I.A. No. 2802 of 2016 has been filed for amendment in the relief portion by adding the following prayers –

“1(ix) To issue an appropriate writ/order/direction referring the parties to settle their dispute through the alternative mechanism of arbitration by invoking Section 89 of the Code of Civil Procedure, 1908;


1(x) To issue an appropriate writ/order/direction directing for appointment of an independent arbitrator for adjudication of the dispute between the parties in view of Section 12(5) read with Seventh Schedule of the Arbitration and Conciliation Act, 1996”

Having regard to the nature of the prayers, I.A. No. 2802 of 2016 is allowed and the petitioner is permitted to make appropriate amendments in the writ petition.

3. The short facts of the case are that the petitioner, a registered partnership firm, participated in a Tender bearing No. W-7/Tender/16/Open/DNR/07-08 dated 28.09.2007 issued by the respondent railway for earth work in filling in formation, blanketing, extension/construction of low/high level platform,




construction of sand hump, linking of track, linking of point and crossing, construction of retaining wall and other ancillary work with respect to loop and crossover at Bankaghat and Khusrupur Railway Station on Main Line under AEN (Line), Patna. The work was awarded to the petitioner vide letter of acceptance dated 30.05.2008 at a total cost of Rs. 2,11,75,420.03. Subsequently, an agreement was entered into between the parties on 05.12.2008. The petitioner duly deposited the requisite amounts towards security deposit and earnest money as well as towards personal guarantee. It appears that progress of the work was delayed, which delay was, according to the petitioner, attributable to the respondent-Railway and for which several letters were written by the petitioner. Applications were also filed for extension of date of completion ("DOC" for short), which was granted successively upto 30.12.2009, 30.06.2010, 31.03.2011, 31.12.2011, 31.01.2012 and lastly upto 16.04.2012. Three supplementary agreements were also executed on 13.03.2009, 25.01.2010 and 26.12.2011 respectively, and the value of the contract was enhanced first to Rs. 2,90,31,896.06 and finally to Rs. 3,14,60,586.15. In view of considerable problems and hindrances being faced by the petitioner in completing the work, the petitioner requested the respondents by letter dated 08.03.2011 to close the agreement and




make payment of its legitimate dues to the extent of work already completed. On the request of the respondents to complete the remaining work, however, the petitioner continued in the project upon the DOC being extended upto 16.04.2012 as aforesaid. Thereafter, however, on being required by the respondents through letter dated 19.12.2012 to execute and complete the entire work, the petitioner expressed by letter dated 24.12.2012 that in view of the continuing obstructions on the work site, the work could not be completed and it was not possible to seek further extension of the DOC, and therefore a request was again made for closing the agreement and for making payment of the petitioner's dues. Further correspondence ensued, leading the petitioner to dispatch a legal notice dated 14.01.2013, seeking closure of the agreement and payment of its dues. The respondents on their part terminated the agreement with effect from 16.04.2012 being the date upto which the DOC had been finally granted.

4. Learned counsel for the petitioner submits that the impugned order of termination dated 29.01.2013 is wholly arbitrary and illegal, considering that the enormous delay in completing the work was attributable to the respondents. The hindrances and obstructions on the work site prevented the



proper and timely execution of work which is self-evident from the fact that extensions of DOC were allowed by the respondents under clause 17.A of the General Conditions of Contract, 2001 (for short, "GCC"), thereby implying admission by the Railway that the reasons for delay were genuine and bonafide as far as concerned the petitioner. It is submitted that the petitioner had been requesting for closing the agreement which had initially contemplated a short period of 11 months for completion of work, and that in view of the delay attributable to the respondent railway, the petitioner had incurred a huge cost overrun which had made proceeding with the work unviable. The petitioner had accordingly requested for settlement and payment of its bills to the extent of the work done and for refund of its security deposit and performance guarantee.

5. Learned counsel for the respondent-Railway, on the other hand, submits that some delay had no doubt occurred owing to hindrances on the work site etc., and for which a reasonable view had been taken by duly extending the DOC from time to time under clause 17.A(i) of GCC, 2001. However, there was no impediment in executing the work after time was extended upto 16.04.2012 but it was seen that the petitioner had then suddenly stopped execution of work and did not also apply for extension of DOC. It is submitted



that the petitioner took no action whatsoever for a long period of eight months between 16.04.2012 being the date of the last granted DOC, and 19.12.2012 when the petitioner was informed that appropriate action would be taken if the petitioner failed to restart the work. In this backdrop of facts, it is, therefore, submitted that no fault could be found with the action of the respondents in terminating the contract in terms of the impugned order dated 29.01.2013 on the ground of failure by the petitioner to complete the work and fulfill its contractual obligations. He relies on the counter affidavit filed on behalf of the respondent-Railway, inter alia, reiterating the lapses on the part of the petitioner in completing the work and thus seeks to justify the action taken against the petitioner in terminating the contract.


6. Without going into the detailed merits of the respective claims of the parties, this Court at the very outset takes note of clause 64 of the GCC which provides for the forum of arbitration for resolution of disputes and differences between the parties. Having regard to the submissions made by the parties, it is quite evident that an arbitrable dispute exists between them involving disputed questions of fact requiring adduction and appraisal of evidence. In that view of the matter, this Court is not inclined to decide the issues on merit and would relegate the

petitioner to raise its grievances by invoking arbitration in terms of the GCC.

7. At this stage, learned counsel for the petitioner invites attention to Clause 64(3)(a) (ii) of the GCC which is relevant for the present purposes, which reads as follows : —

“64(3)(a)(ii) In cases not covered by clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three Gazetted Rly. officers not below JA grade, as the arbitrators. For this purpose the Railway will send a panel of more than 3 names of Gazetted Rly. Officers of one or more departments, of the Rly. to the contractor who will be asked to suggest to General Manger upto 2 names out of the panel for appointment as contractor’s nominee. The General Manager shall appoint at least one out of them as the contractor’s nominee and will also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the presiding arbitrator from amongst the 3 arbitrators so appointed. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts department. An officer of Selection Grade of the Accounts department shall be considered of equal status to the officers in SA grade of other departments of the Railways for the purpose of appointment of arbitrators.”

8. Learned counsel for the petitioner further invites attention to the provisions of the Arbitration and Conciliation (Amendment) Act, 2015 published in the Gazette of India (Extraordinary) on 01.01.2016 (for short, “the Amendment Act”), by which significant changes have been brought about in the



Arbitration and Conciliation Act, 1996 (“the Arbitration Act” hereinafter), inter alia, by substitution of Section 12(1) and insertion of Section 12(5) therein as also insertion of the Fourth to Seventh Schedules to the Act, with retrospective effect from 23.10.2015, being the date when the Arbitration and Conciliation (Amendment) Ordinance, 2015 containing similar provisions was published in the Official Gazette.

9. It is submitted by the petitioner that by reason of the ineligibility created by Article 1 of the Seventh Schedule to the Act, a serving railway officer being an employee of the respondent-Railway, can no longer be appointed as an arbitrator to decide and settle the disputes between the parties. The provisions of the GCC contemplate appointment only of railway officers as arbitrator, and hence any such appointment would be violative of the Arbitration Act as amended.

10. The respondent-Railway has filed a supplementary counter affidavit to contest the petitioner’s submission with regard to ineligibility of a serving railway officer in being appointed as Arbitrator, submitting that the provisions of Clause 64 of the GCC specifically contemplate appointment of railway officers as arbitrators, and are binding upon the petitioner because of it having agreed thereto by its very act of entering into the contract.

It is further stated that the railway is willing for an appointment in terms of the GCC but, however, the petitioner has not made any demand thereunder for appointment of arbitrator, which if refused, would have afforded statutory recourse to the petitioner to approach this Court under the Arbitration Act.

11. The question that falls for consideration of this Court is whether the newly introduced provisions, and more particularly Section 12(5) conjointly read with the Fifth and Seventh Schedules to the Arbitration Act inserted with retrospective effect from 23.10.2015, have the effect of rendering serving railway officers ineligible for their appointment as Arbitrators by the respondent-Railway, the terms of Clause 64 of GCC notwithstanding.

12. Prior to its substitution, Section 12(1) of Arbitration Act read as follows :-

“12 (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.”

With the substitution of **Section 12(1)**, the requirement of disclosure has been made more specific as follows :-

“12 (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind,

which is likely to give rise to justifiable doubts as to his independence or impartiality; and
(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.”

The newly inserted **Fifth Schedule** to the Act enumerates the circumstances giving rise to justifiable doubts touching upon the arbitrator's independence and impartiality, listing out as many as 34 parameters in great detail and in a more explicit manner, while the Sixth Schedule provides the Form in which the disclosure is to be made by the proposed Arbitrator.

Section 12(5) as inserted by the Amendment Act reads as follows :-

“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 subsection by an express agreement in writing.”

The **Seventh Schedule** referred to in Section 12(5) was

inserted as hereinbelow:

“ARBITRATOR’S RELATIONSHIP WITH THE PARTIES OR COUNSEL

- 1. The Arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.*
- 2. ... ”*

13. Having heard the parties at length and on careful consideration of the amended provisions of the Act, this Court at the very outset takes note that Section 12(5) begins with a non-obstante clause and overrides any prior agreement between parties. The respondent-Railway cannot therefore oppose the petitioner’s contention merely on the strength of Clause 64 of the GCC which stands overridden by dint of the said statutory provision. The language used in Section 12(5) in this regard is clear and unambiguous, and thus, must be given full effect to.


14. For the sake of perspective, let us first advert to the backdrop in which the newly inserted provisions were introduced in the Act, in order to appreciate their intent, purpose and the object sought to be achieved. Earlier on, the Supreme Court had, in the case of *Union of India vs M/s Singh Builders Syndicate [(2009) 4 SCC 523]*, expressed the desirability of appointment of Arbitrators other than serving officers, in the following words :-

“25. We find that a provision for serving officers of one party

being appointed as arbitrator(s) brings out considerable resistance from the other party, when disputes arise. Having regard to the emphasis on independence and impartiality in the new Act, Government, statutory authorities and government companies should think of phasing out arbitration clauses providing for serving officers and encourage professionalism in arbitration."

15. The Amendment Act has come in the wake of the above expression by the Apex Court. Read as a whole, the underlying spirit behind the Amendment Act in disqualifying certain classes of persons from being appointed as Arbitrators is clearly to bring about greater transparency in arbitration proceedings by reinforcing the 'rule against bias' in an effective and meaningful manner thus leading to greater independence and impartiality in the decision-making process by overriding the terms of any agreement between the parties. The provisions are intended to enhance public confidence in the concept of "duty to act fairly" which is an extension of the general concept of Natural Justice in matters of adjudication.

16. It is necessary at this stage to take note of the nature of the provisions of Section 12(5) and of the Seventh Schedule which were inserted with retrospective effect on and from 23.10.2015 in order to ascertain their applicability to pending matters where appointment of an arbitrator is required to be



made. On a bare reading of Section 12(5) which provides for disqualification of certain persons from being appointed as Arbitrators, it is evident that the same concerns itself with the determination of constitution of forum. It is well-settled that a law relating to forum is procedural in nature and that no person has a vested right in any course or procedure. If by Act of Parliament the mode of procedure is altered, one's right also stands altered and one is thus required to proceed according to the altered mode.

17. Having said that, we now advert to the provisions of **Section 26 of the Amendment Act** which take the matter beyond the realm of doubt, and read as follows :-

"26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

18. The provisions of **Section 21 of the Arbitration Act** in turn provide as follows -

"21. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

19. It is thus explicit from Section 26 quoted above that if the arbitration proceedings have not commenced at the time of

commencement of the Amendment Act, then the provisions as amended will become applicable.

20. In the instant case, it is manifest that no request has been received by the respondent railway for referring the dispute for arbitration and thus arbitration proceedings have admittedly not commenced within the meaning of Section 21 of the Arbitration Act. Any appointment of an arbitrator at this stage would thus have to be made in accordance with the Amendment Act which has now come into play.

21. For the aforesaid reasons therefore, this Court has no hesitation in concluding that a serving Railway officer as proposed in terms of the GCC would be ineligible for appointment as an Arbitrator in view of Section 12(5) read with the Seventh Schedule of the Act as newly inserted with effect from 23.10.2015 by the Amendment Act. In the face of the railway's expressed intention to appoint an arbitrator only in line with the terms of the GCC if approached by the petitioner, which is now clearly untenable, relegating the petitioner to take steps for recourse through the Arbitration Act at this stage for appointment of arbitrator would serve no purpose and would merely delay the matter apart from resulting in multiplicity of proceedings.

22. This Court accordingly appoints Hon'ble Mr. Justice

Radha Mohan Prasad, retired Judge of this Court, residing at M.P. Sinha Road, Kadam Kuan, Patna 800003 as the sole Arbitrator for settling the dispute between the parties in accordance with the provisions of the Arbitration Act.

23. The petitioner must approach the learned Arbitrator within two months along with its statement of claims and a certified copy of this judgment, whereupon the learned Arbitrator will proceed with the adjudication accordingly. The fees of the learned Arbitrator shall abide by the Fourth Schedule to the Act, which shall be borne equally by the parties. For this purpose, the 'sum in dispute' referred to thereunder shall be treated as the quantum of payment in respect of work done as demanded by the petitioner in the statement of claims before the learned arbitrator.

24. With the aforesaid observations and directions, the writ petition stands disposed.

B.T/-

(Vikash Jain, J)

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	28.07.2016
Transmission Date	N/A