

IN THE HIGH COURT OF JHARKHAND AT RANCHI

Arbitration Application No. 36 of 2017

Jaishiv Construction Pvt. Ltd; a Company registered under the Companies Act, 1956 having its Office at Bano Manzil Road, P.O. – Ranchi GPO, Police Station – Sukhdeo Nagar, Town & District – Ranchi – 834001. Through its Director, Sri Yatindra Nath Singh, son of Late Jinish Prasad Singh, Resident of Bano Manzil Road, P.O. – Ranchi GPO, Police Station – Sukhdeo Nagar, Town & District – Ranchi – 834001.

... ... **Applicant/Petitioner**

Versus

1. The Union of India acting in the premises through Dy. Chief Engineer (Con/Works/GRC of South Eastern Railway Administration at Garden Reach, Kolkata – 700043. P.O. & P.S. - Khidirpur.
2. General Manager (CON), South Eastern Railway at Garden Reach P.O. + P.S. Khidirpur, Kolkata – 700043.
3. Chief Administrative Officer, (CON) South Eastern Railway Administration at Garden Reach P.O. + P.S. - Khidirpur, Kolkata – 700043.
4. Chief Engineer, (CONS) South Eastern Railway at Garden Reach, Kolkata – 700043. P.O. & P.S. - Khidirpur
5. Dy. Chief Engineer, (Con) – II, Chakardharpur, P.O. - & P.S. - Chakardharpur. District West Singhbhum, Jharkhand, PIN – 833201.
6. Sri S.K. Sinha, Presiding Arbitrator, the Chief Material Manager, (G), Office of Controller of Stores, 11, Garden Reach, Kolkata – 700043. P.O. & P.S. - Khidirpur
7. Sir S. Bhattacharya, FA & CAO, (T) Now, FA & CAO, (HQ)/SER/ GRC, Co-arbitrator, 11 Garden Reach Road, Kolkata – 700043.
8. Sri Ranjan Srivastava (CEDE/SER/GRC), Now ADCM/HWH, the Co-Arbitrator, 11, Garden Reach, Kolkata – 700043. P.O. & P.S. - Khidirpur.

... ... **Respondents**

CORAM: HON'BLE MRS. JUSTICE ANUBHA RAWAT CHOUDHARY

For the Petitioner : Mr. G. Mustafa, Advocate

: Mr. Raashid Mustafa, Advocate

For the Respondents : Mr. Gautam Rakesh, S.C. (Railway)

13/29.03.2019 Heard Mr. G. Mustafa, counsel appearing on behalf of the petitioner assisted by Mr. Raashid Mustafa, Advocate.

2. Heard Mr. Gautam Rakesh, counsel appearing on behalf of the respondent-Railways.
3. This application has been filed for the following reliefs:

“That by way of the present application, the applicant prays for an appropriate order of appointment of an independent and impartial Sole Arbitrator under Section 11 (6) (C) of the Arbitration and Conciliation Act, 1996 read with Sub-section - 5 of Section - 12 and the Seventh Schedule of the Arbitration and Conciliation (Amendment) Act, 2015 for settlement of dispute and claims of the petitioner arising out of Agreement No.: CE/CON/GRC/28/2009 dated 21.04.2009 for the work of Earth work, Bridge works, Transportation and other misc. works in connection with ‘Augmentation of coaching maintenance facilities for coaching complex’ at Tatanagar in CKP Division of S.E. Railway in the jurisdiction of Dy. Chief Engineer (Con) – II/ Chakardharpur, S.E. Railway entered into between Jaishiv Construction Private Limited, Bano Manzil Road, Ranchi – 834001 (Jharkhand), and the President of India acting in the premises of the Dy. Chief Engineer, (Con)/Works//GRC, South Eastern Railway Administration at Garden Reach, Kolkata – 700043.”

4. Counsel for the petitioner by referring to Annexure – 5 to this petition has submitted that in terms of the Arbitration Clause as contained in Clause 64 (3) of the Agreement entered into between the parties, Arbitral Tribunal was duly appointed, and one of the Arbitrators out of 3 was Mrs. Jaya Verma Sinha. He submits that this fact is apparent from the letter dated 02.12.2003 issued by said Presiding Arbitrator Mrs. Jaya Verma Sinha as contained in Annexure – 5.

5. He further submits that a letter dated 01.07.2015 was issued by another person namely Mr. S.K. Sinha claiming himself to be the Presiding Arbitrator asking the petitioner to file his statement of facts/claims with supporting documents before the Arbitral Tribunal.

6. Thereafter, another letter dated 25/26.05.2016 was issued fixing the first hearing on 15.06.2016 at 12.30 hours. Subsequently, the petitioner was served with a letter dated

10.03.2017 seeking consent in connection with waiving off the applicability of Arbitration and Conciliation (Amendment) Act, 2015 which in turn was based on the recommendation of NITI Ayog and was pursuant to the said amendment Act, of 2015. The petitioner was asked to submit his consent in the prescribed form within 30 days from the date of receipt of the notice, failing which it was indicated that it will be presumed that the petitioner has agreed with the ongoing proceeding. In response to this letter dated 10.03.2017 (Annexure - 8), the petitioner has responded through its Advocate vide letter dated 22.05.2017 refusing to give consent and insisting that the petitioner will not waive his right conferred in terms of Section 12 (5) of the aforesaid Act of 2015 and also refused to sign the format sent by the respondents. It was also indicated in that letter, that the petitioner is of the opinion that an independent Arbitrator, say a Judge, is to be appointed, who will adjudicate the matter arising out of the agreement and at the end mentioned that the petitioner will be at liberty to take steps for appointment of an independent Arbitrator from judiciary.

7. The counsel submits that aforesaid reply dated 22.5.2017 was given by the petitioner through its Advocate to the respondents and this letter is itself a letter requesting for appointment of an independent Arbitrator and the respondents having not acted pursuant to this letter and having not appointed an independent Arbitrator i.e., an Arbitrator from the judiciary, is the cause of action for filing the instant petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 as amended in the year 2015. He submits that an independent Arbitrator may be appointed by this Court. He also submits that the mandate of the earlier arbitral tribunal had terminated.

8. He also submits that the reply letter dated 22.05.2017 should have been acted upon by the respondents, but having not done so it is not open to them to send the names of the

Arbitrator asking the petitioner to exercise the option vide letter dated 08.02.2019 during the pendency of this case. He submits that in such circumstances, the petitioner is not bound to choose any of the Arbitrators as has been mentioned in the letter dated 08.02.2019 and an independent Arbitrator may be appointed by the order of this Court.

9. Counsel appearing on behalf of the respondents on the other hand submits that the instant petition for appointment of Arbitrator under Section 11 (6) of the Arbitration and Conciliation Act, 1996 is itself not maintainable in view of the fact that there was an ongoing arbitral proceeding in connection with this matter. He submits that any dispute in connection with termination of the mandate of the Arbitrator or any connected matter therewith cannot be adjudicated in a petition filed under Section 11 (6) of the Arbitration and Conciliation Act, 2015.

10. He further submits that in connection with the dispute involved in this case, the petitioner was requested to nominate for appointment of Arbitrator, pursuant to which, the petitioner vide letter dated 28.10.2013 had chosen two names i.e., Mrs. Jaya Verma Sinha and Mr. S.K. Sinha and the respondent-Railway had appointed Mrs. Jaya Verma Sinha as Presiding Arbitrator. The Arbitral Tribunal entered into reference on 02.12.2013, but ultimately Mrs. Jaya Verma Sinha, retired without completing the proceedings and as the consent from the side of the petitioner for Mr. S.K. Sinha was already available, therefore, a fresh Arbitral Tribunal replacing Mrs. Jaya Verma Sinha by Mr. S.K. Sinha was constituted on 05.02.2014. Thereafter, a fresh Arbitral Tribunal entered into reference in which the petitioner had participated and had also submitted his claim on 14.07.2015 and thereafter number of dates were fixed.

11. He further submits that the arbitration proceeding was still pending before the Arbitral Tribunal and the last date of

hearing was fixed as 05.10.2018. However, Mr. S.K. Sinha retired on 30.11.2018 and accordingly the petitioner was requested vide letter dated 08.02.2019 to give his nominee for appointment of an Arbitrator in place of Mr. S.K. Sinha. He submits that the respondents have been throughout acting as per the mandate of the Arbitration clause involved in this case, and there was no cause of action for the petitioner to file the instant case. He further submits that the issue as to whether the mandate of Arbitral Tribunal has terminated or not, cannot be decided in this proceeding. He further refers to aforesaid letter dated 22.05.2017 and submits that the petitioner has himself mentioned that arbitration proceeding is pending. He submits that the instant proceeding for appointment of arbitrator is not maintainable.

12. The counsel for the respondent Railways has relied upon a judgment passed by Hon'ble Allahabad High court reported in ***2012 SCC Online Allahabad 1042 (M/s B.M.G. Construction Vs. National Small Industries Corporation Ltd. and Ors.)*** to submit that as per Sub-section 2 of Section 14 of the Arbitration and Conciliation Act, 1996, where any controversy regarding termination of the mandate of the arbitrator arises, the party has to approach the civil court and this Court, in the instant proceeding has got no jurisdiction. He has also submitted that so far as the proposed name of the Arbitrators forwarded by the respondent-Railways are concerned, the same are as per the provisions of Sub-Section 5 of Section 12 of the Arbitration and Conciliation Act, 1996 as amended in the year 2015 and the petitioner has yet to respond to the same. He also submits as the respondent-Railways have through out acted as per Clause 64 (3) (a) of the agreement and accordingly the instant petition is not maintainable.

13. After hearing the counsel for the parties and after considering the materials on record, this Court finds that admittedly, Arbitral Tribunal was constituted as back as in the

year 2013 itself and the Arbitral Tribunal had entered into reference on 02.12.2013. Subsequently, a fresh Arbitral Tribunal was constituted on account of retirement of one of the Arbitrators and the fresh Arbitral Tribunal also entered into reference. The petitioner filed his claim before the fresh Arbitral Tribunal, and thereafter different dates were fixed.

14. In the meantime, a letter dated 10.03.2017 was issued by the respondent seeking consent in connection with waiving off the applicability of Arbitration and Conciliation (Amendment) Act, 2015 which in turn was based on the recommendation of NITI Ayog, and was pursuant to the said amendment Act of 2015. The petitioner was asked to submit his consent in the prescribed form within 30 days from the date of receipt of the notice, failing which it was indicated that it will be presumed that the petitioner has agreed with the ongoing proceeding. In response to this letter dated 10.03.2017 (Annexure - 8), the petitioner has responded through its Advocate vide letter dated 22.05.2017 refusing to give consent and insisting that the petitioner will not waive his right conferred in terms of Section 12 (5) of the aforesaid Act of 2015 and also refused to sign the format sent by the respondents. It was also indicated in that letter, that the petitioner is of the opinion that an independent Arbitrator, say a Judge, is to be appointed, who will adjudicate the matter arising out of the agreement and at the end mentioned that the petitioner will be at liberty to take steps for appointment of an independent Arbitrator from judiciary. Upon getting no response to this letter dated 22.05.2017, the petitioner has filed the instant petition for appointment of an independent Arbitrator. It is the specific case of the petitioner that the mandate of the earlier arbitral tribunal had terminated. This petition was filed on 06.12.2017 and during the pendency of this case, the Arbitrator namely Mr. S.K. Sinha also retired on 30.11.2018 and accordingly a letter dated 08.02.2019 was issued

asking the petitioner to give his nominee for appointment of arbitrator.

15. Clause 64 (3) (a) (i), (ii) and (iii) of the agreement are quoted as under:

64. (3) (a) (i) In cases where the total value of all claims in question added together does not exceed Rs.10,00,000/- (Rupees ten lakhs only), the Arbitral Tribunal consist of a sole arbitrator who shall be either the General Manager or a gazetted officer of Railway not below the grade of JA grade nominated by the General Manager in that behalf. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by Railway.

(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 Manager 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 Railways for the purpose of appointment of arbitrators.

(iii) if one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall

appoint new arbitrator/ arbitrators to act in his/their place in the same manner in which the earlier arbitrator / arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator(s).

16. This Court finds that as per clause 64 (3) (a) (iii) of the agreement, if the arbitrator withdraws from his office then it is for the General Manager to appoint new arbitrator in the same manner as earlier arbitrator was appointed and such re-constituted tribunal shall proceed as per the provision of the said clause.

17. This Court finds that at the time of filing of this case i.e., on 06.12.2017, admittedly, an arbitral tribunal was there, before whom the arbitration proceeding, arising out of the dispute involved in this case, was pending.

18. *Section 2 (e) read with Section 14, 15 and 16 of Arbitration and Conciliation Act, 1996 are relevant on the point of mandate of arbitral tribunal. The said sections are quoted below for ready reference :*

2 (e) "Court" *(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes.*

(ii) *in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court*

having jurisdiction to hear appeals from decrees of Courts subordinate to that High Court.

14. Failure or impossibility to act. - (1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if- (a) He becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and (b) He withdraws from his office or the parties agree to the termination of his mandate. (2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the court to decide on the termination of the mandate. (3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

15. Termination of mandate and substitution of arbitrator. - (1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate-

(a) Where he withdraws from office for any reason; or (b) By or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

16. Competence of arbitral tribunal to rule on its jurisdiction. -

(1) *The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, -*

(a) An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and (b) A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) *A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.*

(3) *A plea that the arbitral tribunal is exceeding the scope of its authority shall be raise as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.*

(4) *The arbitral tribunal may, in either of the cases referred to in sub-section (2) or subsection (3), admit a later plea if it considers the delay justified.*

(5) *The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.*

(6) *A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.*

19. From the perusal of the aforesaid provisions, it is clear that the mandate of the arbitrator already appointed is terminable under Section 14/15 of the Arbitration and Conciliation Act, 1996. Section 14 of the Act provides that the mandate of an arbitrator shall terminate, if he becomes *de jure* or

de facto unable to perform his functions or fails to act for any other reason and withdraws from his office or the parties agree to terminate his mandate. Sub-section (2) of Section 14 of the Act provides that where any controversy regarding termination of the mandate of the arbitrator aforesaid arises, the party may unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate. Thus, from the above, it is sufficiently clear that the mandate of an arbitrator is to be terminable on an application to the Court by one of the parties and the 'Court' has been defined under Section 2 (1) (e) of the Act to mean the principal Civil Court of original jurisdiction in a district. Therefore, the mandate of an arbitrator has to be terminated not by the High Court but by the principal Civil Court of original jurisdiction. Moreover, a plea that the arbitral tribunal does not have jurisdiction can be raised before the arbitrator as per the provisions of section 16 of the aforesaid Act of 1996.

20. The Hon'ble Allahabad high court in the judgement relied upon by the petitioner, reported in **2012 SCC OnLine All 1042 (M/s B.M.G. Construction Vs. National Small Industries Corporation Ltd. and Ors.)** while considering the matter regarding termination of the mandate of arbitral tribunal has held that the mandate of an arbitrator is terminable on an application made before the principal civil court of original jurisdiction in a district as Allahabad High Court is not a Court within the meaning of Section 2 (e) of the said Act of 1996.

21. This Court fully agrees with the aforesaid view taken by the Hon'ble Allahabad High Court.

22. In the judgement passed by Hon'ble Supreme Court, reported in **(2015) 1 SCC 32 (State of west Bengal versus Associated Contractors)** meaning of court as defined under the said Act of 1996 has been explained and it has been held that the meaning of court for the purposes of section 2 (e) and Section 42 of the aforesaid Act of 1996 would mean principal

Civil Court of original jurisdiction in a district, or the High Court having ordinary original civil jurisdiction in the state and if both have jurisdiction then the superior most court has been chosen to adjudicate dispute arising out of arbitration agreement.

23. This Court finds that Jharkhand High Court is also not a Court within the meaning of section 2 (e) of the said Act of 1996 as this High Court does not exercise ordinary original civil jurisdiction and accordingly the mandate of an arbitrator is terminable on an application made before the principal civil court of original jurisdiction in a district.

24. This Court is of the considered view that the point as to whether the mandate of the Arbitral tribunal constituted on 05.02.2014, had terminated or not, or whether the fresh arbitral tribunal constituted on 05.02.2014 was rightly constituted or not, cannot be decided in the instant proceeding under Section 11 (6) of the Arbitration and Conciliation Act, 1996. Further, it can also not be decided in this proceeding as to whether the then ongoing arbitral tribunal was rightly constituted. This Court finds that the respondent-Railways have issued letter dated 08.02.2019 for constitution of fresh arbitral tribunal, to which the petitioner has yet to respond.

25. In the aforesaid fact situation of this case, there is no question of appointment of an Arbitrator by this Court in the instant case under Section 11 (6) of the Arbitration and Conciliation Act, 1996 as none of the condition precedent for appointment of an arbitrator under Section 11 (6) of the aforesaid Act is satisfied.

26. This Court is of the considered view that the condition precedent for filing an application under section 11(6) of Arbitration and Conciliation Act, 1996, requesting this Court for appointment of an arbitrator, was not satisfied on the date of filing of the instant petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 . Accordingly, this Court

finds that the instant petition is not maintainable, which is hereby dismissed.

(Anubha Rawat Choudhary, J.)

Saurav/