

(2011) 01 PAT CK 0038
In the Patna High Court
Case No : Request Case No. 8 of 2010

Mahendra Prasad Singh and Brothers	APPELLANT
Vs	
The General Manager, East Central Railway and Others	RESPONDENT

Date of Decision : 19-01-2011

Acts Referred:

Citation : (2011) 01 PAT CK 0038

Judgement

S.N. Hussain, J.—Heard learned Counsel for the Petitioner and learned Counsel for the Respondents.

2. This petition has been filed for appointment of an independent Arbitrator to resolve, settle and decide the dispute and differences which has arisen between the Petitioner and the Respondents in terms of Agreement No. " DEC/Con/Br/ PNBE/WT/ 06 dated 27.12.2005 (Annexure-1) executed by the then Deputy Chief Engineer of the East Central Railway.

3. The facts admitted by the parties are that there was an agreement/contract for construction of boundary wall and earth work in filling for site development at Hajipur/Sonepur for Railways in the year 2005 and that arbitration clause No. 23 was specifically incorporated in the said agreement. It is also not in dispute that a dispute arose between the parties with respect to payment of the dues amount and the progress of the work and hence notice dated 19.3.2009 (Annexure-6) was sent by the Petitioner to the Respondents, whereafter letter dated 6.8.2009 (Annexure-8) through an Advocate was sent by the Petitioner to the Respondents for appointment of an Arbitrator.

4. Learned Counsel for the Petitioner claims that no response to the said letter was sent by the Respondents and after waiting for several months this request case was filed on 21.5.2010. Learned Counsel for the Petitioner relies upon a decision of the Apex Court in case of Bharat Sanchar Nigam Ltd. and Another Vs. Motorola India Pvt. Ltd., in paragraphs 35 and 36 of which reliance was placed on an earlier decision of the Supreme Court in case of Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, and it was held that once a minimum of 30 days

expires and a petition is filed in the court, the appointing authority loses the right to appoint any Arbitrator for settling the disputes under the agreement and the court has to appoint an independent Arbitrator.

5. On the other hand, learned Counsel for the Respondents vehemently opposes the contentions of learned Counsel for the Petitioner and submits that after receiving notice dated 6.8.2009 (Annexure-8) sent by the Petitioner through his lawyer the Respondents sent a reply dated 17.5.2010 (Annexure-F) to the Petitioner giving name of four arbitrators as per the arbitration clause of the agreement and requested the Petitioner to choose any two of them for deciding the dispute, but the Petitioner instead of choosing the names of the arbitrators filed the instant case on 21.5.2010, although according to the Respondents, the Petitioner was legally bound to choose Arbitrator from the panel supplied by the Respondents. In this connection, learned Counsel for the Respondents relies upon two decisions of the Supreme Court. In case of *Ace Pipeline Contracts Private Limited Vs. Bharat Petroleum Corporation Limited*, it was held that in cases arising u/s 11(6) of the Arbitration and Conciliation Act, 1996, if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application u/s 11 seeking appointment of an Arbitrator and only then the right of the opposite party ceases. In case of *Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Ltd.* reported in AIR 2009 SC (Supp.) 839 : 2009 (1) PLJR (SC) 16, it was held that a bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has been done, but the court must first ensure that the remedies provided for are exhausted.

In the said circumstances, learned Counsel for the Respondents submits that Arbitrator should be appointed from the panel provided by the Respondents in their letter dated 17.5.2010 (Annexure-F).

6. After hearing learned Counsel for the parties and after perusing the materials on record and the provisions of law relied upon by them it is quite apparent that it is not in dispute that the instant case is with respect to the provision of Section 11(6) of the Act. However, letter dated 17.5.2010 (Annexure-F) sent by the Respondents to the Petitioner giving names of four Arbitrators shows that at the top of the said letter a date 17/24.5.2010 is written whereas at the bottom of the said letter date 29.5.2010 is given for discussion and a date 8.6.2010 is written directing to send the letter to the contractor. No receipt has been produced by the Respondents showing service of the said letter upon the Petitioner, whereas the Petitioner denies the receipt of any such letter. Furthermore, a reminder dated 15.9.2010 (Annexure-G) is said to have been sent by the Respondents to the Petitioner reiterating the names of same four Arbitrators, but at the bottom the date of dispatch is shown as 23.9.2010. In the said circumstances, it is quite

apparent that there is no material at all to show that the said letter dated 17.5.2010 (Annexure-F) was sent to the Petitioner before the filing of the request case on 21.5.2010, rather entry in the said letter clearly shows that the said letter was not sent by the Respondents to the Petitioner before the filing of the request case and non-filing of any receipt thereof gives reason to this Court to believe that no such letter was ever sent to the Petitioner and wrong statement has been made by the Respondents.

7. In the aforesaid facts and circumstances, the case laws relied upon by the Respondents are not applicable to the facts and circumstances of this case, whereas the case law relied upon by the Petitioner squarely covers this case.

8. Accordingly, this Court appoints an independent Arbitrator, namely a retired Judge of this Hon"ble Court Mr. Justice Nagendra Rai as an Arbitrator to consider and settle the dispute between the parties. Both the parties must approach the said Arbitrator alongwith a copy of this order within thirty days from today and the said Arbitrator shall fix his charges and expenses which shall be borne by both the parties half and half. The said Arbitrator will also fix the dates of arbitration so that the dispute may be resolved expeditiously.

9. With the aforesaid observation, this request case is disposed of.