

**(2006) 11 PAT CK 0051**

**In the Patna High Court**

**Case No :** Request Case No. 20 of 2006

M/s Sidharth Construction and Trading Private Limited,  
Kolkata

**APPELLANT**

**Vs**

The Union of India and Others

**RESPONDENT**

**Date of Decision :** 22-11-2006

**Acts Referred:**

Arbitration Act, 1940 — Section 20

Arbitration and Conciliation Act, 1996 — Section 11

**Citation :** (2007) 1 PLJR 280

**Hon'ble Judges :** V.N. Sinha, J

**Bench :** Single Bench

**Advocate :** K.D. Chatterjee, Anjan Chakraverty and Amlesh Kumar Verma, for the Appellant; Chitranjan Sinha and Bindhyachal Singh For the Railway, for the Respondent

## **Judgement**

V.N. Sinha, J.—Heard learned counsel for the applicant and Sri Chitranjan Sinha, for the East Central Railways. Applicant is a Works" Contractor. He entered into Works" Agreement with the East Central Railway, which is dated 15.3.2004. During execution of the said Works" Agreement there arose a dispute between the parties whereafter notice dated 7th March. "2006, Annexure-4 was served on the Deputy Chief Engineer requesting him to comply the request contained in the different letters referred to in the said notice itself, failing which the applicant shall assume that the authorities have committed fundamental breach of the contract entitling the applicant to claim compensation and damages. It appears, request contained in the notice dated 7th March, 2006. Annexure-4 was not complied with and thereafter another notice dated 20th March. 2006, Annexure-6 was served requesting the General Manager to appoint Arbitrator for adjudicating the dispute between the applicant and the Railway Administration, arising out of the contract dated 15.3.2004. When the Railway Administration did not respond to the two notices dated 7th and 20th March, 2006, Annexures-4 and 6, the applicant filed the present request case on 26.4.2006 requesting the

Chief Justice or his nominee to invoke the provisions contained in Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") and to proceed and make appointment of the Arbitrator. According to learned counsel, in terms of the provisions contained in sub-sections (4) and (6) of Section 11 of the Act, after passage of 30 days of service of notice for appointment of Arbitrator, the party on whom request is made to appoint Arbitrator loses its right to make such appointment and this Court (nominee of Hon'ble the Chief Justice) should intervene and appoint the Arbitrator to adjudicate the dispute between the parties arising out of contract dated 15.3.2004 for failure of the Railways to accede to the request contained in the two notices dated 7/20.3.2006. In support of his case, counsel for the petitioner has relied on the judgment of this Court in the case of Orissa Concrete and Allied Industries Ltd. Vs. East Central Railway, .

2. Having received notice of these proceedings, the Railway Administration has filed counter affidavit and from the counter affidavit, it appears that the Railway Administration has raised two objections to the prayer made in this application, namely; the application itself is premature as was filed without waiting for the period of 120 days, as provided in the Arbitration Clause itself and the case should be dismissed as premature. The other objection raised in the counter affidavit is that even though the Railway Administration did not act in terms of the notice dated 7th and 20th March, 2006 within 30 days of its receipt but belatedly they are agreeable to the appointment of any of the Railway Officer as Arbitrator in terms of the provisions of the Arbitration Clause of the agreement and this Court may appoint any serving Railway Officer as Arbitrator to adjudicate the dispute between the parties.

3. In support of the aforesaid submission, learned counsel for the Railway Administration has relied on the case of Union of India and Another vs. M.P. Gupta reported in (2004)10 SCC 504 and on the case of B.S.N.L. and Others Vs. Subash Chandra Kanchan and Another, .

4. Perusal of the two judgments indicate that in the former case Union of India & Another vs. M.P. Gupta {supra} the Hon'ble Supreme Court was dealing with Section 20 of the Arbitration Act, 1940, scheme whereof is entirely different from the present Act and in due consideration of the provisions contained in Section 11 of the present Act, this Court is of the opinion that the case law laid down in terms of the Arbitration Act, 1940 has no application at all to the cases arising out of the present Act as thereunder once the party on whom request is made to appoint the Arbitrator does not choose to respond to the request/notice within 30 days of its receipt loses its right to make appointment of Arbitrator.

5. So far the other judgment relied on by the counsel for the Railway Administration in the case of BSNL and Others vs. Subash Chandra Kanchan and Another (supra) is concerned, thereunder the Hon'ble Court held that the Arbitration Clause is subject to the provisions of the Act and legal right under the Arbitration Clause if waived enforcement thereof cannot be insisted upon.

6. Having heard counsel for the parties and having perused the pleadings filed by them as also the case law relied on by them, I am of the view that the Railway Administration was called upon by the applicant to appoint an Arbitrator in terms of the request contained in notice dated 20th March, 2006 Annexure-6 as the administration had not chosen to comply the request made by the applicant under notice dated 7th March, 2006, Annexure-4. The administration having failed to respond to the notice within 30 days of its receipt, lost its right to appoint Arbitrator and accordingly, this Court is of the view that it is an appropriate case to make appointment of an Arbitrator to adjudicate the dispute between the parties. The other submission of the counsel for the Railway Administration that the petition itself was premature on the date it was filed as the same was filed without awaiting for 120 days provided in the Arbitration Clause has been noticed only for the purposes of being rejected as the Arbitration Clause is always subject to the provisions of the Act and during the pendency of this petition not only 120 days from the date of receipt of the first and second notice rolled by but many more months passed on, in the circumstances, the plea of the Railway Administration that the petition was premature on the date it was filed, is wholly misconceived and is, accordingly, rejected.

7. In view of my findings above, Hon"ble Mr. Justice Nagendra Rai, a retired Judge of this Court, is appointed Arbitrator to adjudicate the dispute between the parties. His Lordship shall be at liberty to fix his own remuneration as also the procedure to be gone into during the arbitral proceedings. Parties are directed to appear before his Lordship for further directions.

8. This application is disposed of. Let a copy of this order be forwarded to Hon"ble Mr. Justice Rai.