

THE GAUHATI HIGH COURT

(The High Court of Assam, Nagaland, Mizoram & Arunachal Pradesh)

Arbitration Petition No. 12 of 2011

Panihati Rubber Limited,
A company incorporated under the provisions of the
Companies Act, 1956 having its office at
27, Bentinck Street, Second Floor,
Kolkata-700001.

.....**Petitioner.**

-Versus-

1. The Principal Chief Engineer,
Northeast Frontier Railway,
Maligaon, Guwahati-781011.
2. The Deputy Chief Engineer/TP,
Northeast Frontier Railway,
Maligaon, Guwahati-781011.
3. The Executive Engineer/Computer,
Northeast Frontier Railway,
Maligaon, Guwahati-781011.
4. The Executive Engineer/TP,
Northeast Frontier Railway,
Maligaon, Guwahati-781011.
5. Northeast Frontier Railway,
Service through the General Manager (Works),
Maligaon, Guwahati-781011.
6. The Union of India,
Represented by the Secretary,
Ministry of Railway, Govt. of India,
New Delhi.

.....**Respondents.**

Advocate(s) for the Petitioner : Mr. G. Rahul,
Mr. D.M. Nath.

Advocate(s) for the Respondents : Mr. A.K. Sarkar,
Mr. A. Saikia,
SC, NF Railway.

BEFORE
THE HON'BLE MR. JUSTICE HRISHIKESH ROY

Date of Hearing and Judgment : ***15th March, 2016***

JUDGMENT AND ORDER (ORAL)

Heard Mr. G. Rahul, the learned counsel appearing for the petitioner. The respondents are represented by Mr. A.K. Sarkar, the learned standing counsel for the Railways.

2. This application is filed under *Section 11(6)* of the *Arbitration and Conciliation Act, 1996* (hereinafter referred to as the "*Arbitration Act*") for nomination of arbitrator in connection with the dispute arising out of the contract for manufacture and supply of *grooved rubber sole plate to RDSO's Drg. No.T-3711*, for which supply order was issued to the petitioner on 23.09.2008 (page-100), by the General Manager (Works), N.F. Railways, Maligaon. But eventually the contract was *terminated* by the Railways on 16.12.2010 (page-169) by imposing penalty of general damage @10% of the total cost of the undelivered materials.

3. Following *termination* of the contract, the petitioner invoked *Clause 2900* (page-77) of the *Standard Conditions of Contract* of the Indian Railways, as made applicable through the purchase order dated 23.09.2008 and issued notice to the Railways requesting for nomination of arbitrator to adjudicate the dispute between the parties. The Railways belatedly reacted to the contractor's notice but in the meantime, the contractor approached the High Court on 04.04.2011.

4. Two days after the case was filed under *Section 11(6)* of the *Arbitration Act*, the contractor received a communication on 06.04.2011 (signed by the Dy. General Manager/Works of the N.F. Railways on 29.03.2011) whereby, one *V.P. Srivastava* is shown to be appointed as the sole arbitrator, to adjudicate the contractual dispute. The appointed arbitrator then wrote a letter on 04.04.2011 to the contractor to furnish their statement of claim. In their response to the letter of the sole arbitrator, the contractor on 05.05.2011 informed about filing of their petition in the High Court on 04.04.2011 and accordingly the sole arbitrator was requested to not to proceed with the matter.

5. The appointed arbitrator *V.P. Srivastava* was transferred out of Guwahati and accordingly a 2nd arbitrator in the shape of *J.P. Singh*, the Dy. Chief Engineer/BD-2 of the N.F. Railways was appointed as the arbitrator on

21.05.2012 by the Railways. Immediately after his appointment, the 2nd arbitrator on 30.05.2012 called upon the petitioner to furnish their statement of claim, with copy to the other side.

6. The issue here is whether the Court should allow the arbitrator appointed by the Railways to proceed with the matter or whether a neutral arbitrator unconnected with either party, should be appointed to adjudicate the contractual dispute.

7. In *Datar Switchgears Ltd. Vs. Tata Finance Ltd.* reported in (2000)8 SCC 151, the Supreme Court held that if the opposite party has failed to nominate the arbitrator as per the agreed procedure and in the meantime the first party has approached the Court under *Section 11(6)* of the *Arbitration Act*, the 2nd party *forfeit* the right to nominate the arbitrator in accordance with the agreed procedure. Similar view was taken by the Apex Court in *Deep Trading Company Vs. Indian Oil Corporation* reported in (2013)4 SCC 35.

8. At this stage it would be apposite to take note of the amendment incorporated in the *Arbitration Act* w.e.f. 23.10.2015 by the Act 3 of 2016. Under the substituted *sub-section (5)* of *Section 12*, certain categories of people are made *ineligible* to be appointed as arbitrator and in the 7th *Schedule* relating to *Section 12(5)* of the *Arbitration Act*, a person who was associated as an employee with a party, is *ineligible* to be appointed as the arbitrator. Thus an employee, consultant, advisor or any such person having a relationship with a party, is no longer qualified to be appointed as an arbitrator, by virtue of the amendment incorporated in the *Arbitration Act* w.e.f. 23.10.2015.

9. When we return now to the facts of this case, both the nominated arbitrators were employees of the Railways and therefore under *sub-section (5)* of *Section 12* of the *Arbitration Act*, neither the Chief Engineer nor the Dy. Chief Engineer are *eligible* to adjudicate the dispute as the arbitrator. That apart, the intimation about appointment of the first arbitrator *V.P. Srivastava* was received by the contractor only on 06.04.2011 and by that time, they had already filed their petition in the High Court on 04.04.2011 itself. Therefore, if we apply the ratio of *Datar Switchgears Ltd.* (supra) and *Deep Trading Company* (supra), it is apparent that the Railways have *forfeited* their right to nominate the arbitrator

after the contractor had approached this Court on 04.04.2011 under *Section 11(6)* of the *Arbitration Act*.

10. In any case, the appointment of the 2nd arbitrator on 21.05.2012 indicates that the first arbitrator failed to proceed with the matter as the 2nd arbitrator *J.P. Singh* also requested the contractor to furnish their statement of claim through his letter dated 30.05.2012.

11. In this case, since the Railways have *forfeited* their right to nominate the arbitrator, the nomination of *V.P. Srivastava* at the first instance and *J.P. Singh* next, in my perception was not a valid nomination as the right accruing to the Railways under *Clause 2900* of the *Standard Conditions of Contract*, was *forfeited*, after the contractor filed their petition under *Section 11(6)* of the *Arbitration Act*.

12. Moreover, under the amended provisions of *Section 12(5)*, a person, who served as an employee of one of the party, cannot be appointed as arbitrator. Therefore in this application filed under *Section 11(6)* of the *Arbitration Act*, a neutral person has to be nominated, to arbitrate the dispute.

13. Consequently to adjudicate the present dispute Mr. Justice P.K. Saikia, a former Judge of this High Court is appointed as the arbitrator. The parties are directed to report before him on 22.04.2016 and the arbitrator will fix the terms in presence of the parties before proceeding with the arbitration. With this direction, the case is disposed of.

14. The Registry will immediately communicate this order to Mr. Justice P.K. Saikia for his kind information.

JUDGE

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