

IN THE HIGH COURT OF JUDICATURE AT PATNA
REQUEST CASE No.58 of 2020

The Bihar State Text Book Publishing Corporation Ltd. through its Managing
Director, Pathya Pustak Bhawan, Budh Marg, Patna-1

... .. Petitioner/s

Versus

1. M/s Patna Offset Press, a registered partnership firm having its Registered office at- Naya Tola, Near Dharahara Kothi, P.S.- Kadam Kuan, P.O.- Bankipore, District- Patna through one of its partners- Shri Amit Kumar Singh, S/O Shri Ram Naresh Singh, Resident of Mohalla Naya Tola, Near Dharahara Kothi, P.S.- Kadam Kuan, P.O.- Bankipore, District- Patna.
2. Amit Kumar Singh S/O Shri Ram Naresh Singh resident and partner of M/s Patna Offset Press, Registered Office at Naya Tola, Near Dharahara Kothi, P.S.- Kadam Kuan, P.O.- Bankipore, District- Patna.
3. Smt. Supriti Singh W/O Sri Shailesh Kumar Singh resident and partner of M/s Patna Offset Press, Registered Office at Naya Tola, Near Dharahara Kothi, P.S.- Kadam Kuan, P.O.- Bankipore, District- Patna.
4. Sri Tushit Singh S/O Late Sri Vinay Singh resident and partner of M/s Patna Offset Press, Registered Office at Naya Tola, Near Dharahara Kothi, P.S.- Kadam Kuan, P.O.- Bankipore, District- Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Mrigank Mauli, Sr. Advocate Mrs. Anukriti Jaipuriyar, Advocate Mr. Anshuman Jaipuriyar, Advocate
For the Respondent/s	:	Mr. Nand Kishore Singh, Advocate Mr. Jitendra Kumar, Advocate

CORAM: HONOURABLE THE CHIEF JUSTICE
ORAL JUDGMENT

Date : 17-08-2022

1. This application has been moved seeking appointment of an Arbitrator invoking the powers of this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act).

2. Certain facts are not in dispute.

3.1.) Vide tender notice dated 27th July, 2015, bids were



invited by the petitioner-Bihar State Textbook Publishing Corporation Limited for “Set Making And Transportation Of Textbooks For Class I To VIII” under Sarva Shiksha Abhiyan 2016-17, Bihar.

3.2) The respondent herein being the successful bidder was awarded work order no.379 dated 08.09.2015 for a sum of Rs.3,00,00,000 (Rupees Three Crore) (approx.). Also a written agreement was entered into between the parties to the *lis* on 14.09.2015. The said written agreement stipulated a clause for resolution of the disputes which reads as under:

“33. Resolution of Disputes

33.1. The Corporation and the Bidder shall make every effort to resolve amicably by direct informal negotiation any disagreement or dispute arising between them under or in connection with the Contract.

33.2. In case of any dispute between the parties in respect of agreement or breach thereof the same shall be referred under Section –IV of Arbitration and Conciliation Act to Principal Secretary, HRD, Bihar Govt. Patna as sole Arbitrator U/s 10(2) of the act and his decision will be final. The Court at Patna shall have the jurisdiction in case of any dispute. No other court will have jurisdiction in case of any dispute.”

3.3.) Disputes relating to the implementation of the work resulted into litigation with the Respondent filing a writ petition being CWJC No.9143 of 2016 titled as M/s Patna Offset Press v. The State of Bihar & Ors. wherein cancellation of the agreement was challenged. The said petition was disposed of on



27.07.2016, vide order which reads as under:-

“Heard learned counsels for the parties.

The writ application has been filed for quashing the office order dated 13.04.2016 of the Managing Director, Bihar State Text Book Publishing Corporation, by which he has directed to stop any type of payment to petitioner No.1 with respect to Set Making of Text Books and Block wise supply; further the contract given to petitioner No.1 by order dated 08.09.2015 for Set Making of Text Books and Block wise supply has been cancelled; lastly security deposit of petitioner No.1 was ordered to be forfeited and it has been debarred for three years from Set Making Agency Work of the Corporation and also for quashing the further consequential action of the respondent and for directing the respondents to make payment of the bills of the petitioners and refund the performance security and book security etc. Prayer is also to quash the allotment of work of 3rd and 4th phase under Sarva Shiksha Abhiyan to respondent Nos. 10 and 11 issued on 28.04.2016.

Several grounds have been raised by learned counsel for the petitioners against the impugned order stating that the same are arbitrary and not in accord with the law laid down by the Apex Court in the various decisions with regard to issuance of a proper notice indicating the punishment therein as also apply mind to the reply to the show cause filed.

Ultimately, the parties have agreed to go for arbitration in view of there being an arbitration clause in which the Principal Secretary of the Human Resources Department, who is also the Chairman of the Corporation, shall be the sole arbitrator, but it is submitted by learned counsel for the petitioner that in view of the amendment brought about by the Arbitration and Conciliation (Amendment) Act, 2015, the matter has to go to an independent Arbitrator. After consultation among themselves, the parties have agreed that so far as the issues and facts, except the question of debarment, are concerned, the matter may be referred to arbitration by Mr. Justice Shyam Kishore Sharma, a retired Judge of this Court.

In the above circumstances, the impugned orders are set aside and the matter is referred to Mr. Justice Shyam Kishore Sharma, a retired Judge of this Court, for arbitration on all claims and issues that may be raised by the parties before him. It shall be open to the parties to make any prayer before the learned Arbitrator in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and he may pass appropriate order thereon.



So far as the question of debarment is concerned, it shall be open to the Respondent-Corporation to proceed afresh with regard to the same in accordance with law on the basis of the findings given by the learned Arbitrator.

The writ application is, accordingly, disposed of.”

(Emphasis supplied)

3.4.) In the said petition M/s Patna Offset Press was the petitioner (referred as the Respondent) and the Bihar State Text Book Publishing Corporation Limited was the respondent (referred as the Petitioner)

3.5.) Since the nominated Arbitrator stood appointed as a Principal Lokayukta of the State of Bihar, in an application filed by the Respondent being MJC No.1593 of 2018, titled as M/s. Patna Offset Press & Ors. Vs. The State of Bihar & Ors. vide order dated 06.09.2018, the said Arbitrator stood substituted with the appointment of Hon’ble Mr. Justice C.M. Prasad, a retired Judge of this Court. None objected to the same.

3.6.) Also the arbitral proceedings commenced with the parties voluntarily joining and submitting to its jurisdiction.

3.7.) Accounting for certain developments which took place during the course of the arbitral proceedings, sometime in the year 2019, the present petitioner filed an application under Section 14 read with Section 34 of the Arbitration and Conciliation Act, 1996 seeking termination of the mandate of the substituted Arbitrator. Such Miscellaneous (Arbitration)



Case No.31 of 2019, titled as The Bihar State Text Book Publishing Corporation Ltd. & Ors. Vs. M/s. Patna Offset Press & Ors., treated to be filed only under Sec-14, stood rejected by the learned District Judge, Patna on 5th November, 2020.

3.8.) Post rejection of such application, on 01.12.2020, petitioner preferred the instant petition under Section 11(6) of the Act, seeking appointment of an independent and impartial arbitrator.

4. In the attending facts and circumstances, Sri Mrigank Mauli, learned Senior Counsel appearing for the petitioner while making his submissions has raised the following issues for consideration:-

1. The Hon'ble High Court in exercise of the writ jurisdiction cannot appoint an Arbitrator when there is specific provision for appointment of an Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 and when innumerable judgments have said that the Act is a complete code in itself- hence the court was coram non judice?
2. Consent of the parties cannot attribute jurisdiction to a Court?
3. The present Arbitration Tribunal constituted under a modification petition of the writ jurisdiction in MJC Case No.1593 of 2018 in CWJC no.9143 of 2016 vide order dated 0609.2018 is a Coram non Judice?
4. The Arbitrator cannot be appointed in exercise of the power under Section 8 of the Arbitration and Conciliation Act, 1996?
5. Principles of consent, acquiescence, waiver, res-judicate does not apply when issue of coram non judice is raised?
6. What will be the effect of



any order passed by or arising out of coram non judice? 7. Whether any subsequent or consequential proceedings would be binding upon the parties when the initial action itself is not in consonance with law? 8. Whether the Court in its jurisdiction under 11(6) can look into validity of appointment of Arbitrator?

5. In support, he refers to and relies upon the following judicial pronouncements:-

1. Chief Engineer, Hydel Projects & Ors. v. Ravinder Nath & Ors. (2008) 2 SCC 350, Para 24 to 26; 2. Kiran Singh & Ors. v. Chaman Paswan & Ors. AIR 1954 SC 340, Para 6; 3. Kanwar Singh Saini v. High Court of Delhi, (2012) 4 SCC 307, Para 30; 4. Dr. Jagmittar Sain Bhagat v. Director, Health Services, Haryana & Ors. (2013) 10 SCC 136, Para 9 to 11; 5. Hasham Abbas Sayyad v. Usman Abbas Sayyad, AIR 2007 SC 1077, Para 22 & 24; 6. Branch Manager, Magma Leasing & Finance Limited & Ors. v. Potluri Madhavalata & Ors. (2009) 10 SCC 103, Para 18; 7. P. Anand Gajpathi Raju & Anr. v. PV. G. Raju (Dead) & Ors., (2000) 4 SCC 539, Para 8; 8. HDFC Bank Ltd. vs. Ashish, (2008) 3 Mh. L. J. 865, Para 4; 9. Harvestdeal Securities Ltd. v. Punjab National Bank, (2016) 4 Mh. L. J. 273; 10. State of Goa v. M/s Praveen Enterprises, (2012) 12 SCC 581, Para 13; 11. Alok Kumar Lodha v. Asian Hotels (North) Limited, order dated



24.12.2020 by Hon'ble Delhi High Court in RFA (OS) (COMM)13/2020, CMs No.16950/2020, para 27,32, 41, 52; 12. State of Rajasthan & Ors. v. Jeev Raj & Ors. (2011) 12 SCC 252, Para 14 & 15; 13. State of Haryana v. District Judge, Chandigarh & Ors., AIR 2006 P & H 69, Para 6 to 12; 14. Tamil Nadu Electricity Board v. Sumathi & Ors., (2000) 4 SCC 543 ;15. State of Punjab v. Davinder Pal Singh Bhullar & Ors., (2011) 14 SCC 770, Para 107-110; 16. Walter Bau Ag., Legal Successor of the Original Contractor, Dyckeroff and Windmann A.G. v. Municipal Corporation of Greater Mumbai & Anr. (2015) 3 SCC 800, Para 6, 7 & 10; 17. Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd. & Ors., 2019 SCC Online SC 1517, Para 21, 22, 26 & 27; 18. M/s Om Sai R K Constructions Pvt. Ltd. v. M/s Foresight Infractech Pvt. Ltd. order dated 29.04.2022 passed in Arbitration Case No.32 of 2021 by M.P. High Court.

6. Vehemently opposing the petition, Sri Nand Kishore Singh, learned counsel for the respondents submits that initiation of the instant petition is nothing but mere abuse of the process of law, more so, with the petitioner having themselves submitted to the jurisdiction of the Arbitrator and participated therein.

7. Perusal of the order dated 27.07.2016 passed in CWJC



No.9143 of 2016 makes it evidently clear that the parties had themselves agreed to have the matter referred to an independent arbitrator. This was, be it for whatever reason, not in terms of the clause containing the terms of Arbitration under the agreement. There was due deliberation and consultation amongst the parties to the lis and the agreement and only thereafter they agreed for referring the issues, save and except the question of debarment, for adjudication by the Arbitrator.

8. In the considered view of the Court, the only issue which arises for consideration is as to whether the order passed by this Court can be said to be appointing an Arbitrator and after adjudication of the issues on merits, on the issue of *The Coram Non Judice*, the instant application is maintainable or not.

9. It is a matter of record that the petitioner did not move any application seeking recall of either of the order(s) dated 27.07.2016 passed in CWJC No.9143 of 2016 or 06.09.2018 passed in MJC No.1593 of 2018, pleading the same to have been passed without jurisdiction.

10. Reliance on the order dated 26.07.2019 passed in **Request Case No.48 of 2019 titled as M/s Sudama Mal v. The Union of India**, referred to by learned counsel for the petitioner is misplaced, for in the said case none of the parties had resorted



to the provision of Section 14 of the Act and that application for recall of the order of Arbitrator stood filed immediately, unlike after lapse of period of four years in the instant case.

11. The other decisions referred to and relied upon by the learned counsel for the petitioner, in the attending facts and circumstances, are irrelevant, for the principles laid down therein are inapplicable, save and except for the one in **State of Goa** (supra) wherein (Paragraph-13), in fact, the Court itself, while discussing the ambit and scope of Sections 8 and 11 of the Act, held that judicial authority referring the parties to arbitration under Section 8 has no power to appoint an Arbitrator, but, however, may record the consent of the parties to appoint an agreed arbitrator.

12. This is exactly what has happened in the instant case. The parties themselves upon consultation amongst themselves agreed to refer the issues and facts in relation to the agreement containing an arbitration clause, save and except for one issue that being debarment, to the Arbitration of a retired Judge of this Court. Having recorded the same, the Court accordingly disposed of the petition.

13. In **Branch Manager, Magma Leasing and Finance Limited** (supra), the Court while interpreting the provisions of



Section 8 of the Act itself held to the effect that “Section 8 is in the form of legislative command to the court and once the prerequisite conditions as aforesaid are satisfied, the court must refer the parties to arbitration. As a matter of fact, on fulfillment of the conditions of Section 8, no option is left to the court and the court has to refer the parties to arbitration.” [See also para 8 in **P. Anand Gajapathi Raju** (supra)]

14. There is yet another reason for this Court not to entertain this petition and that being the petitioner having exercised its right under Section 14 of the Act before an appropriate Court having competent jurisdiction. Even this was done after having submitted to the jurisdiction of the Arbitrator as is apparent from the order passed by the learned District Judge in dismissing such a petition. The issue raised against the Arbitrator was not that of his authority, capacity, competence or jurisdiction but that of payment of fee and/or bias. Once having elected to exercise such a right, the remedy available to the petitioner was to assail the order in accordance with law and not file the instant petition under Section 11(6) of the Act, or else Principle of *Res Judicata* would apply.

15. Hence it cannot be said that the order reproduced supra is *coram non iudice*. The petitioner having elected to file



an application under Section 14 of the Act, seeking removal of the Arbitrator, be it on the ground of *de jure or de facto*, the only remedy available, in the considered view of the Court, is to assail the said order in accordance with law and not to file the instant petition before this Court.

16. In view of the attending circumstances, it cannot be said that arbitral tribunal is *coram non judice* having been constituted without the jurisdiction of the High Court in the matter under Article 226 of the Constitution of India.

17. In view of the aforesaid discussion, the Court need not specifically deal with each one of the issues referred to supra.

18. For all the reasons, the Request Case stands dismissed.

19. All interim orders stand vacated.

20. Interlocutory Application, if any, shall stand disposed of.

(Sanjay Karol, CJ)

Sunil/ K.C.Jha/-

AFR/NAFR	
CAV DATE	
Uploading Date	22.08.2022
Transmission Date	

