

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**ARBA No. 46 of 2015**

1. D. Rajkumar S/o Shri D.S.N. Murthy, Aged About 45 Years
R/o Flat No. 203 (1st Floor), Laxmi Apartment, Opposite Old
Power House, Torwa, Bilaspur, Chhattisgarh 495004

---- Petitioner**Versus**

1. The General Manager, South East Central Railway, (In Short
SECR) At General Manager's Complex, Bilaspur,
Chhattisgarh 495004
2. The Divisional Engineer (II) In The Office Of The Sr. Divl.
Engineer (Co-ord) Raipur Division, South East Central
Railway (SECR) Raipur, Chhattisgarh, 492008

---- Respondent

For Petitioner	Shri Amrito Das, Advocate
For Respondent/Railways	Shri H.S. Ahulwalia, Advocate

Hon'ble Shri Justice Prashant Kumar Mishra**Order On Board****10/11/2016**

1. Present is an application under Section 11 (6) of the
Arbitration and Conciliation Act, 1996 ('the Act' in short) for
appointment of Arbitrator to resolve the dispute between the
parties in relation to execution of contract vide Letter of

Acceptance No.13TS/108/Zonal/Horticulture/294/3424 dated 10-10-2007 wherein the petitioner was awarded contract for execution of Horticulture Zonal Works including maintenance and up keeping lawns, flowers, beds, gardens, etc. under the jurisdiction of ADEN (Works)/Raipur, for the period ending 30-6-2008.

2. In course of execution of the said work some dispute arose between the parties which could not be resolved, therefore, the petitioner served a notice for appointment of Arbitrator on 12-10-2011 (Annexure – A/5) claiming the sum quantified in the said notice.
3. The respondents issued a communication to the petitioner on 9-11-2011 informing that the matter has been forwarded to the executive and PHOD of the concerned department for their remarks in connection with the appointment of Arbitrator, if required. However, vide communications dated 21-12-2011 and 17-1-2012 the respondent authorities informed the petitioner that the prayer for appointment of Arbitrator cannot be considered as the same has been submitted after the prescribed three years time limit for demand of arbitration. The respondents have referred to the provisions of Section 43

of the Act, 1996 and Article 137 of the Limitation Act, 1963 to say that the prayer for arbitration is barred by limitation.

4. It is argued by Shri Amrito Das, learned counsel appearing for the petitioner, that the issue as to whether the claim is barred by limitation being a mixed question of law and fact the same is to be addressed by the Arbitrator, and is not to be seen at the stage of appointment of Arbitrator under Section 11 (6). Reliance has been placed in the order passed by this Court in **M/s Harinarayan & Co. v. South Eastern Coalfields Limited**¹ and other connected matter.
5. Per contra Shri H.S. Ahulwalia, learned counsel appearing for the respondents/Railways, would draw attention of the Court to the documents Annexures – R/4 to R/6 annexed with the return, which would indicate that the petitioner was issued notice under clause 62 of the General Conditions of Contract ('the GCC' in short) and clause 63 wherein it is provided that if termination is under clause 62 (1) of the GCC the arbitration clause would not apply.

¹ ARBA 39 of 2013 (decided on 22-11-2013)

6. In **SBP & Co. v. Patel Engineering Ltd. and Another**², the Supreme Court held thus at para 39 :

39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral tribunal.

(Emphasis supplied)

7. The Supreme Court in **Hari Shankar Singhania and Others v. Gaur Hari Singhania and Others**³, 24 held thus at para 24 :

24. Where a settlement with or without conciliation is not possible, then comes the stage of adjudication by way of arbitration. Article 137, as construed in this sense, then as long as parties are in dialogue and even the differences would have surfaced it cannot be asserted that a limitation under Article 137 has commenced. Such an interpretation will compel the parties to resort to litigation/ arbitration even where there is serious hope of the parties themselves resolving the issues. The learned Judges of the High Court, in our view, have erred in dismissing the appellants appeal and affirming the findings of the learned Single Judge to the effect that the application made by the appellants under Section 20 of the Act, 1940 asking for reference was beyond time under Article 137 of the Limitation Act. The learned Judges ought to have allowed the appeal and quashed and set aside the impugned order passed by the learned Single Judge and ought to have restored and allowed arbitration suit filed by the appellants. As already noticed, the correspondence between the parties, in fact, bears out that every attempt was being made to comply with and carry out the reciprocal obligations spelt out in the agreement between the parties.....

(Emphasis supplied)

8. In a subsequent decision rendered by the Supreme Court in **Bharat Rasiklal Ashra v. Gautam Rasiklal Ashra and**

3 (2006) 4 SCC 658

Another⁴, it has been held that the question of limitation is a mixed question of law of fact, which cannot be gone into at the stage of appointment of Arbitrator under Section 11 (6). In the said decision the Supreme Court held thus at para 12 :

12. Following the decision in S.B.P. & Co., this court in National Insurance Co. Ltd. held as follows : (National Insurance Co. Ltd. case, SCC p.283, paras 22 & 22.1-22.3)

"22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under section 11 of the Act into three categories, that is (i) issues which the Chief Justice or his Designate is bound to decide; (ii) issues which he can also decide, that is issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1) The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such an agreement.

22.2) The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the arbitral tribunal) are:

(a) Whether the claim is a dead (long barred) claim or a live claim.

(b) Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3) The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are :

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration."

9. In view of the settled legal position as also for the reason that while rejecting the petitioner's prayer for appointment of Arbitrator the respondents have not referred to clause 63 or clause 62 of the GCC, in the considered opinion of this Court the application for appointment of Arbitrator deserves to be allowed.

10. Learned counsel for the parties have agreed to appoint Justice Vijay Kumar Shrivastava (Retd.) as Arbitrator to

resolve the dispute and adjudicate the matter. It is ordered accordingly.

11. Let the order of appointment be issued by the Registry of this Court in favour of Justice Vijay Kumar Shrivastava (Retd.), 'Mridu Villa', Behind Uday Children Hospital, Vidhik Seva Marg (Old Warehouse Road), Bilaspur (CG).
12. It is made clear that the fees of Arbitrator and venue of the proceedings shall be decided by the Arbitrator in consultation with the parties.
13. Let the parties appear before the learned Arbitrator for initiation of proceedings on 3rd December, 2016.
14. *Ex.consequenti*, the application (ARBA No.46 of 2015) is allowed to the extent indicated above.
15. No order as to costs. Sd/-

Judge
Prashant Kumar Mishra

Gowri