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HIGH COURT OF CHHATTISGARH, BILASPUR

Arbitration Application No.75 of 2017

R.K. Transport Company Through its Proprietor Shri Ramesh Kumar Jain S/o Heera Lal Jain, age about 62 years, Navkaar Parisar, Pulgaon Naka, Durg (CG)

---- Applicant

Versus

Chhattisgarh Mineral Development Corporation Ltd., through its Managing Director, Sonkhan Bhawan, Ring Road No.1 Village Puraina, P.O. Ravigram, Raipur (CG)

---- Respondent

For Applicant	:	Mr. Ali Asgar, Advocate.
For Respondent	:	Mr. Yogesh Pandey, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

08/12/2017

1. Invoking Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, 'the Act of 1996'), the applicant herein has filed this application for appointment of arbitrator to arbitrate the dispute arising between the parties pursuant to termination of the contract agreement dated 18.1.2008 by an order of the respondent herein on 4.6.2016.

2. The agreement was entered into between the applicant and the respondent company on 18.1.2008 for mining and marketing of Bauxite from certain villages of Tahsil Sitapur, District Surguja which includes mining, breaking, sorting, stacking and lifting of Bauxite for minimum quantity of 1,50,000 matric tonne per year.

3. It is the case of the applicant that the the applicant company has

performed its work, yet no payment was made pursuant to the execution of work and the respondent company has terminated the contract agreement, against which, the applicant has filed the writ petition being WPC No.724 of 2016. The Division Bench of this Court on 4.4.2016 allowed the writ petition and directed the respondent company to pass a reasoned and speaking order. Finally, on 4.6.2016 the respondent company has passed a reasoned and speaking order terminating the applicant's contract. It is further case of the applicant that since the contract agreement provides for resolution of dispute through arbitration, therefore, under the provisions of the Act of 1996 this application has been filed by the applicant herein for appointment of arbitrator.

4. The respondent has filed the reply opposing the application stating inter-alia that Clause-20.2 of the contract agreement has not been followed and matter has not been referred to the Managing Director of the respondent company for amicable settlement, therefore, the application as framed and filed is not maintainable. The procedure prescribed in the agreement ought to have been followed before making an application for appointment of arbitrator. Therefore, the application deserves to be rejected.

5. Mr.Ali Asgar, learned counsel appearing for the applicant, would submit that the Managing Director of the respondent company has passed a detailed order terminating the contract entered into between the parties on 4.6.2016 pursuant to the direction issued by this Court in WPC No.724 of 2016 and as such, Clause-20.2 of the

contract agreement is directory in nature in view of Section 11(6A) of the Act of 1996 and in view of decision of the Supreme Court in the matter of **M/s. Duro Felguera, S.A. Vs. M/s. Gangavaram Port Limited**[1] in which it has been held that only the existence of arbitration agreement has to be seen for referring the matter to the arbitrator and all other contentions have to be taken care by the arbitrator. Therefore, the application deserves to be allowed.

6. Mr.Yogesh Pandey, learned counsel appearing for the respondent, would submit that since the procedure prescribed in Clause-20.2 of the contract agreement has not been followed by the applicant herein, the application for appointment of arbitrator as framed and filed is not maintainable. He would rely upon the judgment of the Supreme Court in the matter of **Union of India Vs. BESCO Ltd.**[2].

7. I have heard learned counsel appearing for the parties and considered their rival submissions made herein-above and also gone through the records with utmost circumspection.

8. It is not in dispute that the arbitration agreement contains arbitration clause for resolving the dispute. At this stage, it would be appropriate to notice Clause-20.2 of the contract agreement which provides as under:-

> "20.2 In the event of any dispute, controversy of claim between the parties arising out of the breach, termination or invalidity thereof, the parties shall use their best endeavors to resolve the matter amicably. If the parties are unable to resolve the dispute amicably within thirty (30) days of one party notifying in writing of the existence of the dispute, controversy or claim, either party may serve formal

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1 AIR 2017 SC 5070
2 AIR 2017 SC 1628

> written notice on the other that a material dispute has arisen. If the parties are unable to resolve the dispute within seven (7) days of receipt of such notice, the dispute shall be referred to the Managing Director of CMDC for discussion and solution."

A bare perusal of the aforesaid clause would show that the parties shall use their best endeavors to resolve the dispute amicably. If they fail to resolve the dispute amicably, the dispute shall be referred to the Managing Director of CMDC for discussion and solution.

9. It is apparent on the face of record that the dispute arose between the parties reached to this Court and ultimately, on 4.4.2016 the Division Bench of this Court in WPC No.724 of 2016 has directed the respondent/CMDC to pass a reasoned and speaking order by holding as under:-

> "14. Respondent No.2 is required to pass a fresh reasoned ans speaking order showing due application of mind and consideration of the cause shown by the Petitioner within a maximum period of one month from the date of receipt and/or presentation of the copy of the present order before it.
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> 15. If the Petitioner is dissatisfied, it shall be at liberty to invoke Clause-20 of the agreement within a period of 30 days from the date that the order is communicated whereafter, the parties shall abide by the stipulations contained under Clause-20."

Thereafter, on 4.6.2016 the respondent company has passed a detailed order. Thereafter, the applicant served a notice on 27.9.2017 to the Managing Director of the respondent company for appointment of arbitrator, which was received by the said company on 3.10.2017, but no further action was taken by the respondent company either for amicable settlement or for appointment of arbitrator. Nothing was done by the Managing Director of the respondent company and ultimately, after the expiry of period of 30 days, the applicant has filed this application under Section 11(6) of the Act of 1996 for appointment of arbitrator.

10. Section 77 of the Act of 1996 provides as under:-

> "**77. Resort to arbitral or judicial proceedings**.- The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights."

A careful reading of Section 77 of the Act of 1996 would show that party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

11. At this stage, it would be appropriate to notice Section 11(6A) of the Act of 1996 which has been incorporated in the Arbitration and Conciliation Act, 1996 by the Arbitration and Conciliation (Amendment) Act, 2015 with effect from 23-10-2015. Sub-section (6A) of Section 11 of the Act of 1996 reads as follows: -

> "(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

12. Amended sub-section (6A) of Section 11 of the Act of 1996 came

up for consideration before the Supreme Court in **<u>M/s. Duro Felguera, S.A.</u>** (supra) in which Kurian Joseph, J, while concurring with the conclusions recorded by R. Banumathi, J, formulated a question as to "what is the effect of the change introduced by the Arbitration and Conciliation (Amendment) Act, 2015 with particular reference to Section 11(6) and the newly added Section 11(6A) of the Arbitration and Conciliation Act, 1996" and answered the question in paragraph 51 and finally answered in paragraphs 62 and 63 as under: -

> "51. From a reading of Section 11(6A), the intention of the legislature is crystal clear i.e. the Court should and need only look into one aspect-the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple – it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.
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> 62. The scope of the power under Section 11 (6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co., (2005) 8 SCC 618, and Boghara Polyfab, (2009) 1 SCC 267. This position continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6A) ought to be respected.
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> 63. In the case at hand, there are six arbitrable agreements (five agreements for works and one Corporate Guarantee) and each agreement contains a provision for arbitration. Hence, there has to be an Arbitral Tribunal for the disputes pertaining to each agreement. While the arbitrators can be the same, there has to be six Tribunals - two for international commercial arbitration involving the Spanish Company-M/s Duro Felguera, S.A. and four for the domestic."

13. Following the principle of law laid down by Their Lordships of the Supreme Court in **M/s. Duro Felguera, S.A.** (supra), while considering the application for appointment of arbitrator by virtue of amended provision i.e. Section 11(6A) of the Act of 1996, only the existence of arbitration agreement has to be seen by this Court.

14. Since the contract agreement contains the arbitration agreement / clause, therefore, an arbitral tribunal for resolving the dispute pertaining to the agreement has to be constituted by granting the present application.

15. In the present case, the parties were litigating and the dispute arose between the parties reached to this Court and ultimately, the Division Bench of this Court has directed the CMDC to pass a reasoned and speaking order and granted liberty to the parties to invoke Clause-20 of the agreement. Even otherwise, the applicant approached the Managing Director of the respondent company by serving a notice. However, the Managing Director of the respondent company did not do anything, therefore, the applicant considered it that the application is the only option, which is necessary to preserve the right of getting the dispute decided, moved an application under Section 11(6) of the Act of 1996. Following the statutory provision contained in Section 11(6A) of the Act of 2017 as interpreted by the Hon'ble Supreme Court in **M/s. Duro Felguera, S.A.** (supra), the application is allowed. All the contentions of the respondent are kept open to be raised and decided by learned arbitrator.

16. As a fallout and consequence of aforesaid discussion, in exercise of power under Section 11(6) of the Act of 1996, I hereby appoint Hon'ble Mr. Justice Dhirendra Mishra, former Judge of this High Court to arbitrate the dispute. Registry is directed to communicate this order to Hon'ble Mr. Justice Dhirendra Mishra, who shall enter into reference after complying with the provisions contained in Section 12 (2) of the Act of 1996.

17. The arbitration application is allowed to the extent indicated herein-above. No order as to cost(s).

Sd/-

(Sanjay K. Agrawal)
Judge

B/-