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HIGH COURT OF CHHATTISGARH, BILASPUR**Arbitration Application No. 42 of 2016**

In the matter of :-

Dinesh Infrasprojects (P) Limited, through its Director Shri Umesh Mahato, Having its office at Village Chakbad, Post-Bagra, P.S. Santaldih, District-Purulia, West Bengal

---- Applicant**Versus**

South East Central Railway, Through its General Manager, G.M. Annexe Building, Bilaspur (C.G.)

---- Respondent

For Applicant : Mr. Ankit Singhal, Advocate.

For respondent : Mr. Abhishek Sinha, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal**Order On Board****28/04/2017**

(1) Applicant-Dinesh Infrasprojects (P) Limited filed this application under Section 11(6) of the Arbitration & Conciliation Act, 1996 (henceforth 'Act, 1996') seeking appointment of an arbitrator in terms of clause 1.64.2 of the agreement dated 26.03.2012 executed between the applicant-Company and the respondent-SECR to adjudicate the dispute arisen between the parties.

(2) Essential facts requisite to decide the above-stated application are as under:-

(2.1) The respondent- South East Central Railway (SECR) invited a tender for “Execution of earthwork in cutting and bank, construction of minor bridges and other allied misc. work between Jharsugda Belpahar station in connection with construction of Champa-Jharsugda 3rd line”. The total value of the contract was estimated at Rs.8,87,22,650/- and total period of completion of work was 18 months commencing from 30.9.2011 to 29.3.2013.

(2.2) The applicant-Company participated in the said tender process and was declared successful bidder on completion of the tender process. Pursuant thereto, agreement was duly executed between the applicant and the respondent-Company on 26.3.2012. According to the applicant-Company, the said agreement contains an arbitration clause for resolving the disputes through arbitration in terms of clause 1.64.2 of the agreement dated 26.03.2012.

(2.3) According to the applicant, though the applicant-Company has performed the contractual obligation to the satisfaction of Chief Engineer (Construction), but the respondent-SECR alleged delay in performance of the contractual obligation and illegally and arbitrarily withheld the payments due under the running bills and ultimately the contract was terminated by the respondent-SECR on 08.5.2015.

(2.4) Being aggrieved against the attitude of the concerned officials of the respondent-SECR, the applicant-Company invoked its right to arbitration and as per clause 1.64.1 of the agreement and clause 63 & 64 of General Conditions of Contract called upon the respondent-SECR through notice dated 28.12.2015 for appointment of an arbitrator and take recourse to the provisions of agreement for settlement of disputes and claims as arisen between them. The said notice was served upon the respondent-SECR on 31.12.2015.

(2.5) The respondent-SECR informed the applicant-Company vide letter dated 4.1.2016 that the matter with regard to appointment of arbitrator has been forwarded to the railway administration. Thereafter, on 28.03.2016 informed that the Respondent-SECR nominated four Railway Officers of SA grades in terms of para 64(3)(a)(ii) of the General Conditions of Contract and also asked the applicant to suggest two names out of which one will be appointed as the applicant nominee.

(2.6) The applicant-Company, vide letter dated 27.04.2016, informed the respondent-SECR that in view of section 12 of amendment Act, 2015 no person connected with railway can be appointed as arbitrator and the same would be against the mandate of the Act, 1996; and till this date, respondent-SECR had not appointed arbitrator in terms of amended Act of 2005 and, therefore, the respondent-SECR has forfeited its right to

appoint arbitrator leading to filing of the said application for appointment of arbitrator on the ground that there is valid and enforceable arbitration agreement between the parties and the applicant has approached before appropriate High Court and there is live arbitrable issue existing between the parties and, therefore, the matter be referred to the Arbitrator under Section 11(6) of the Act, 1996.

(3) Return has been filed stating inter alia that as per agreement /contract exists between the parties, Special terms of Contract (Part-I) conditions of agreement contained in Chapter-6, read with the General Conditions of Contract Clause-63 and Clause 64, contain agreed dispute redressal/settlement mechanism. It is an explicitly agreed condition of the contract under clause 63 of agreement termination/rescinding of contract under clause 62 would be an excepted matter and thus could not be referred to arbitration or in other words it would be outside the purview of arbitration. It has further been stated that the agreement entered into between the parties was under the old Act and, therefore, the demand made by the applicant for appointment of arbitrator as per amendment Act, 2015 is not permitted under the law.

(4) Rejoinder has been filed controverting the submissions made in the return.

(5) Shri Ankit Singhal, learned counsel appearing for the applicant submits that the work in question has been awarded at Bilaspur and the same has been executed within the territory of High Court of Chhattisgarh and, therefore, the High Court of Chhattisgarh is the appropriate High Court for appointing the arbitrator under Section 11(6) of the Act, 1996 for resolving the dispute between the parties. He would further submit that there is a valid and enforceable arbitration agreement between the parties in terms of clause 1.64.2 of the agreement dated 26.03.2012 and there is an arbitral dispute between the parties for which the applicant has approached this Court which is the appropriate High Court for appointment of sole arbitrator for resolution of arbitral dispute arose between the parties. He would further submit that even if the matter is excepted matter, then also the said question has to be adjudicated by the arbitral Tribunal under Section 11(6) of the Act, 1996. He placed reliance upon the judgment of the Supreme Court in the matter of National Insurance Company Limited Vs. Boghara Polyfab Private Limited reported in (2009) 1 SCC 267 in support of his case.

(6) Per contra, Shri Abhishek Sinha, learned counsel appearing for the respondent-SECR would submit that the matter is excepted matter in terms of clause 62 of the General Conditions of Contract and, therefore, the arbitral tribunal cannot decide the claim specifically excluded from arbitration by

agreement. He would place strong reliance upon the judgment of the Supreme Court in the matter of **Harsha Contructions Vs. Union of India and others**¹

(7) I have heard learned counsel appearing for the parties and considered their rival submissions made hereinabove and have perused the documents appended thereto.

(8) Having regard to the pleadings and submissions made by the parties, the following questions arise for consideration.

(i) Whether there exists a valid and enforceable arbitration agreement between the parties and the applicant has approached appropriate High Court ?

(ii) Whether there is live arbitrable issue exists between the parties in the instant case ?

and/or

(iii) Whether the claim made by the applicant is excepted matter and, therefore, there is no arbitral issue between the parties.

Answer to question No. (i)

(9) Agreement dated 26.3.2012 contains arbitration clause 1.64.2, which states as under :-

“ 1.64.2. The provision of clause 63 and 64 of General Conditions of Contract and Standard Specification 2001 (Vol II) with upto date correction slips will be applicable only for settlement of claims or disputes between the parties for value less than or equal to 20% (twenty percent) of the value of contract and

¹ (2014) 9 SCC 246

when claims or disputes are of the value of contract and when claims or disputes are of the value more than 20% (twenty percent) of the contract, provisions of clause 63 and 64 and other relevant clauses of SE Railway General Conditions of Contract and standard specification 2001(Vol II) with upto date correction slips will not be remedy for settlement of such disputes.”

(10) This clause 1.64.2 has to be read along with clause 63 & 64 of the General Conditions of Contract.

(11) Pursuant to the agreement between the parties, the applicant commences work and thereafter the work in question was terminated on 8.5.2015; and the applicant's request for appointment of an arbitrator has been though responded partly but as the appointment of arbitrator was not made, the applicant approached before this Court. Thus, the existence of arbitration clause as contended in arbitral agreement read with General Conditions of contract is not a serious dispute between the parties. On the other hand, it is the case of the respondent-SECR that dispute is not arbitrable as it is an excepted matter.

(12) Thus, in light of arbitration clause provided in arbitration agreement dated 26.3.2012 read with General Conditions of the Contract entered into between the parties, I hold there is valid and enforceable arbitration agreement as provided under Section 11(6) of the Act, 1996 between the parties in which the applicant and the respondent both are parties and the applicant

has made a request for appointment of an Arbitrator under Section 11(6) of the Act, 1996 to this Court which is appropriate High Court for appointment of Arbitrator in the instant case. Question No. I is answered accordingly.

Answer to Question No. (ii)

(13) This brings me to the next question whether there is live arbitrable issue exists between the parties in the instant case or not.

(14) Indisputably, the petitioner's agreement was terminated by the respondent-SECR by letter dated 8.5.2015 and, thereafter, the petitioner made an application for appointment of an arbitrator, which according to the petitioner, has not been appointed. Petitioner's claim is that there is arbitral issue exists between the parties, whereas, respondent-SECR has clearly and elaborately stated in its reply that the matter is an excepted matter as the petitioner's contract has been provided in terms of clause 62 of the General Conditions of Contract and, therefore, the dispute between the parties is not an arbitrable dispute.

(15) Supreme Court in the matter of **Bharat Rasiklal Ashra Vs. Gautam Rasiklal Ashra and another**² relying upon the earlier decision of the Supreme Court in the matter of **Boghara Polyfact (P) Ltd.** (supra) held that the Chief Justice or his designate should leave the matter exclusively to the arbitral Tribunal to decide whether a claim made falls within the

arbitration clause and it is an excepted or excluded matter from consideration and held as under:-

“17. In *Bharat Rasiklal Ashra Vs. Gautam Rasiklal Ashra* and another (supra), the Supreme Court held as under:

“12. Following the decision in *SBP & Co. v. Patel Engg. Ltd.* (2005) 8 SCC 618, this Court in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267, 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.* case. 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) issue which he can also decide, that is issue 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 have 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.”

(16) The aforesaid decisions of **Bharat Rasiklal Ashra** (supra) & **Boghara Polyfact (P) Ltd.** (supra), have been followed with approval by the Supreme Court in the matter of **Velubanti Hari Babu Vs. Parvanthini Narasimha Rao & another**³.

(17) Thus, in view of the judgment of the Supreme Court in the above-referred matters, the question whether the claim falls within the arbitration clause or it is excepted or excluded from arbitration agreement, the Chief Justice/his designate is required to leave the issue open with a direction to the Arbitral Tribunal to decide the same.

(18) At this stage, Mr. Sinha, learned counsel for the respondent has relied upon the judgment of Supreme Court in the matter of **Harsh Construction Vs. Union of India &**

others⁴, in which their Lordships have held that even if a non-arbitrable dispute is referred to arbitrator, it is not open for an arbitrator to arbitrate since it is beyond his jurisdiction. It has also been held that mere reference of non-arbitrable dispute to arbitration or arbitrator framing an issue as to an excepted dispute, does not amount to agreement by parties to refer said dispute for arbitration.

(19) Thus, judgment of the Supreme Court in the above referred case **Harsh Construction (supra)** is an authority for the proposition that Arbitration Tribunal has no jurisdiction to claim etc. executed from arbitration by arbitration agreement particularly when the matter is excepted matter and it nowhere dilutes or held contrary to what had been held by their Lordships of the Supreme Court in the matter of **Boghara Polyfab Private Limited (supra)** and thus, it is a consistent view of the Supreme Court where it has been authoritatively held that where claims fall within the arbitration clause or it is excepted or excluded from arbitration agreement, there is arbitral dispute exists between the parties, therefore, it cannot be held that merely because respondent claims that as the matter is excepted matter, it cannot be referred to the arbitrator for arbitration to adjudicate the dispute. However, on a plea being raised, arbitral Tribunal will decide as to whether it is an excepted matter and whether it is arbitrable or non-arbitrable

4 (2014) 9 SCC 246

dispute being an excepted matter. It is left open accordingly. Thus, the objections raised by the respondent-department is hereby rejected.

CONCLUSION

(20) Considering the fact that the parties entered into agreement which contains arbitration; the respondent-SECR has failed to act on the request of the applicant for appointment of arbitrator; and further considering that the dispute and differences had arisen out of agreement with regard to termination of the contract, this Court is of the opinion that a case for appointment of arbitrator is made out and application filed by the applicant under Section 11(6) of the Act deserves to be and is hereby allowed leaving open the issue of arbitrability of dispute between the parties to be decided by learned arbitrator in accordance with law.

(21) In exercise of my power under Section 11(6) of the Arbitration and Conciliation Act, 1996 read with para 3(2) of the Scheme for Appointment of Arbitrators by the Chief Justice, Chhattisgarh High Court, 2002, I hereby appoint Hon'ble Mr. Justice Dharendra Mishra, Former Judge of the Chhattisgarh High Court, resident of Tilak Nagar, Bilaspur 495001 as the sole arbitrator to adjudicate the disputes that have arisen between the parties, on such terms and conditions as the learned sole arbitrator deems fit and proper.

(22) The Registry is directed to communicate this order to the learned sole arbitrator forthwith to enable him to enter upon the reference and decide the matter as expeditiously as possible.

No order as to costs.

Sd/-

(Sanjay K.Agrawal)
Judge

D/-