

HIGH COURT OF CHHATTISGARH, BILASPUR

Arbitration Application No.44 of 2016

M/s KMC Construction Limited (Registered Office at MCH No. 555, Arora Colony, Road No.3, Banjara Hills, Hyderabad-500034) Through V. Yugandhar Reddy, a Power of Attorney Holder, S/o Sri V.A. Rami Reddy, R/o M-4, Green Land, Vishal Nagar, Raipur, Pin Code-492001, District Raipur (C.G.)

---- Applicant

Versus

1. State of Chhattisgarh, through the Secretary, Public Works Department, Mantralaya, Mahanadi Bhawan, New Raipur (C.G.)
2. The Executive Engineer, Public Works Department, Division-3, Raipur, District Raipur (C.G.)

---- Non-applicants

For Applicant:	Mr. Rahul Jha, Advocate.
For Non-applicants/State:	Mr. P.K. Bhaduri, Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

10/07/2017

1. In an arbitral dispute arisen between the contracting parties, the applicant herein i.e. the contractor and the non-applicants herein – State of Chhattisgarh, invoking the arbitration clause relating to proceeding for appointment of arbitrator, notice was issued by the applicant to the non-applicants herein for appointment of arbitrator. In the meanwhile, steps were taken by the non-applicants to make recovery against the applicant which led the applicant to file an application under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act of 1996'). By order

dated 29-4-2013, the District Judge, Raipur decided that application holding that the dispute shall be first settled by the Arbitral Tribunal in accordance with the provisions of the Act of 1996 and till then the bank guarantee shall not be encashed.

2. The non-applicants/State did not respond to the request of the applicant for appointment of arbitrator. Therefore, in accordance with the provisions of the arbitral agreement clause 20.6, Indian Council of Arbitration appointed Mr. V.B. Shaligram as Member Arbitrator for the non-applicants State and thereafter, the applicant preferred W.P.(C)No.16/2015 against the State seeking certain reliefs against unlawful recovery by the State in which a Division Bench of this Court by order dated 29-6-2015 directed the State to comply the order passed by the District Judge under Section 9 of the Act of 1996, dated 29-4-2013. The non-applicants/State appointed Mr. B.S. Gupta as Arbitrator and Indian Roads Congress appointed Mr. B.P. Rao, former Engineer-in-Chief, A.P. Public Works Department, as Presiding Arbitrator. The applicant herein appointed Hon'ble Mr. Justice Deepak Verma, former Judge, Supreme Court of India as Arbitrator. Before the arbitration proceeding could become functional, Mr. B.P. Rao, Presiding Arbitrator appointed by Indian Roads Congress, in accordance with the terms of agreement withdrawn his consent on 27-1-2016 citing reasons mentioned in his letter of withdrawal dated 27-1-2016. Likewise, Mr. B.S. Gupta, appointed by the State, has also withdrawn on behalf of

the State Government with effect from 15-11-2015. Thereafter, the applicant made a request to the President, Indian Roads Congress on 13-5-2016 for appointment of substitute Presiding Arbitrator of the impugned arbitral dispute, but no action has been taken leading to filing of the present application by the applicant under Section 11 (6) read with Section 15 of the Act of 1996.

3. The non-applicant State has filed reply stating inter alia that the work in question comes within the meaning of “works contract” under Section 2 (i) of the Chhattisgarh Madhyastham Adhikaran Adhiniyam, 1983 (for short, 'the Act of 1983'), therefore, the dispute is cognizable by the Arbitral Tribunal constituted by the Act of 1983 and as such, the dispute is not to be referred to the Arbitral Tribunal by appointment of Arbitrator under Section 11 (6) read with Section 15 of the Act of 1996 and the applicant be relegated to the Arbitration Tribunal for deciding the dispute.
4. Mr. Rahul Jha, learned counsel for the applicant, would submit as under: -

1. The provisions of the Act of 1983 would not be applicable as in the first/earlier round of litigation, the applicant filed application under Section 9 of the Act of 1996 which was allowed and the order passed by the District Judge under Section 9 was also got enforced by a writ of mandamus issued by this Court which has attained finality and

therefore by virtue of the provisions contained in Section 42 of the Act of 1996, application under Section 11 (6) would be maintainable before this Court, as Section 42 would have overriding effect over any other law since the application under Section 9 of the Act of 1996 was contested by the non-applicants/State.

2. Since the Arbitral Tribunal was constituted in accordance with the provisions of clause 20.6 of the agreement, but the Presiding Arbitrator and other Arbitrators appointed by the non-applicants/State have withdrawn their consent and have declined to act as Presiding Arbitrator and Member Arbitrator respectively, and, therefore, Section 15 of the Act of 1996 can be invoked into for substitute Arbitrator on same procedure as was applicable for appointment of original Arbitral Tribunal and once the substitution is not done, remedy available under Section 11 (6) is attracted, as Indian Roads Congress has failed to appoint Presiding Arbitrator and, therefore, application under Section 11 (6) is maintainable before this Court for appointment of Arbitrator.
5. Mr. P.K. Bhaduri, learned Government Advocate appearing on behalf of the State/non-applicants, replying the contention made by learned counsel for the petitioner would submit that the dispute is clearly cognizable by the State Arbitration Tribunal constituted under the Act of 1983, as the work in question comes

within the definition of “works contract” and therefore, the application filed under Section 11 (6) of the Act of 1996 is not maintainable.

6. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also gone through the record with utmost circumspection.
7. The singular objection raised by learned counsel for the non-applicants State would be that the work in question falls within the definition of 'works contract' as defined in Section 2 (i) of the Act of 1983 and therefore it is cognizable by the Arbitration Tribunal constituted under the Act of 1983 and application under Section 11 (6) read with Section 15 (2) of the Act of 1996 is not maintainable before this Court.
8. In order to answer the submissions raised herein-above, few facts, though already been mentioned, at the risk of repetition, would be relevant to be incorporated.
9. The applicant after issuing notice to the non-applicants for appointment of arbitrator filed an application under Section 9 of the Act of 1996 for staying the recovery for encashment of bank guarantee, that was granted by the District Judge, Raipur on 29-4-2013 and in W.P.(C)No.16/2015, filed by the applicant restraining the unlawful recovery, the Division Bench of this Court directed for compliance of order dated 29-4-2013 and thereafter, arbitrator was appointed by the State also. So, the

non-applicants have already submitted to the jurisdiction of the court constituted under the provisions of the Act of 1996.

10. Section 42 of the Act of 1996 which deals with jurisdiction states as under: -

“42. Jurisdiction.—Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.”

11. In this regard, reference may be made to a decision rendered by the Supreme Court in the matter of **State of West Bengal and others v. Associated Contractors**¹ in which Their Lordships have held that Section 42 of the Act of 1996 will apply to preclude the making of all subsequent applications under Part-I to any court except the court to which an application has been made under Section 9 of the Act.

12. Therefore, in the considered opinion of this Court, since the applicant made application under Section 9 of the Act of 1996 before the District Court and submitted to the jurisdiction of the Court and that order was got enforced by a Division Bench of this Court by a writ of mandamus, the non-applicant State cannot resile and contend that the work in question was works contract which falls within the definition of “works contract” under Section 2 (i) of the Act of 1983 in view of the provision contained in

¹ (2015) 1 SCC 32

Section 42 of the Act of 1996 as held by the Supreme Court in **Associated Contractors'** case (supra) and, therefore, it is cognizable by the Arbitration Tribunal. That objection is overruled and it is held that in the present case, the Act of 1996 would apply.

13. This determination would bring me to the next question as to whether the application under Section 11 (6) read with Section 15 (2) of the Act of 1996 is maintainable at the instance of the applicant for appointment of Arbitrator.
14. At this stage, it would be appropriate to notice clause 20.6 of the contract agreement. Sub-clauses (a) and (b) (ii) of clause 20.6 of the contract agreement provides as under: -

“Any dispute in respect of which:

(a) the decision, if any, of the DB has not become final and binding pursuant to Clause 20.4; and

(b) amicable settlement has not been reached within the period stated in Clause 20.5, shall be finally settled;

(ii) where the value of the Accepted Contract Amount is Rs 10 Crore and below, the disputes and differences arising shall be referred to the sole arbitrator and the sole arbitrator shall be appointed by agreement between the parties failing such agreement by appointing authority namely; The Secretary General, Indian Roads Congress, New Delhi,

where the value of the Accepted Contract Amount is more than Rs 10 Crore, the disputes and differences arising shall be referred to arbitral tribunal consisting of 3 Arbitrators, one each to be appointed by the Employer and the Contractor, the third (Presiding) Arbitrator to be appointed by The Secretary General, Indian Roads Congress,

New Delhi,

if one of the parties fail to appoint its arbitrator in pursuance to sub-para above within thirty days after receipt of the notice of appointment of the arbitrator by the other party then the arbitrator would be appointed by The President of Indian Council of Arbitration, New Delhi,”

15. A careful perusal of the aforesaid arbitration clause would show that if the value of the Accepted Contract Amount is more than ₹ 10 crores, the disputes and differences arising shall be referred to arbitral tribunal consisting of 3 Arbitrators, one each to be appointed by the Employer and the Contractor, and third (Presiding) Arbitrator is to be appointed by the Secretary General, Indian Roads Congress, New Delhi, which is applicable to the facts of the present case.
16. In the present case, the applicant / contractor has appointed Hon'ble Mr. Justice Deepak Verma, former Judge, Supreme Court of India as Arbitrator; the non-applicant / State has appointed Mr. B.S. Gupta as Arbitrator; and Indian Roads Congress has appointed Mr. B.P. Rao, former Engineer-in-Chief, A.P. Public Works Department, as Presiding Arbitrator for arbitrating the matter. But thereafter, the Presiding Arbitrator appointed by the Indian Roads Congress as well as the Arbitrator appointed by the non-applicant/State have withdrawn their consent by their separate withdrawal letters to act as Arbitrator and the applicant has even made request to the Indian Roads Congress for appointment of substitute arbitrator that has

not been considered and acted upon. In that view of the matter, the present application for appointment of substitute arbitrator has been filed.

17. Section 15 of the Act of 1996 which deals with termination of mandate and substitution of arbitrator, provides as under: -

“15. Termination of mandate and substitution of arbitrator.—(1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate—

(a) where he withdraws from office for any reason;
or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.”

18. A studied perusal of Section 15 of the Act of 1996 would show that it provides for remedy when the arbitrator appointed by the parties, as provided in the agreement, refuses/withdraws to act as arbitrator.

19. In the matter of Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd. and another², Their Lordships of the

² (2006) 6 SCC 204

Supreme Court while considering the meaning of expression “rules” in Section 15 (2) of the Act of 1996 held that appointment of a substitute arbitrator must be done according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage and observed as under: -

“4. ... The term "rules" in [Section 15\(2\)](#) obviously referred to the provision for appointment contained in the arbitration agreement or any rules of any institution under which the disputes were referred to arbitration. There was no failure on the part of the concerned party as per the arbitration agreement, to fulfill his obligation in terms of [Section 11](#) of the Act so as to attract the jurisdiction of the Chief Justice under [Section 11\(6\)](#) of the Act for appointing a substitute arbitrator. Obviously, [Section 11\(6\)](#) of the Act has application only when a party or the person concerned had failed to act in terms of the arbitration agreement. When [Section 15\(2\)](#) says that a substitute arbitrator can be appointed according to the rules that were applicable for the appointment of the arbitrator originally, it is not confined to an appointment under any statutory rule or rule framed under the Act or under the scheme. It only means that the appointment of the substitute arbitrator must be done according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage. We are not in a position to agree with the contrary view taken by some of the High Courts.”

20. The Supreme Court in the matter of **San-A Tradubg Company Limited v. I.C. Textiles Limited**³ has held that in case where the arbitration clause provides for appointment of a sole arbitrator and he had refused to act, then the agreement clause stands exhausted and then the provisions of Section 15 would be attracted and it would be for the Court under Section 11 (6) to appoint an arbitrator on the procedure laid down in Section 11

3 (2012) 7 SCC 192

(6) being followed unless there is an agreement in the contract where the parties specifically debar appointment of any other arbitrator in case the named arbitrator refuses to act or perform his function.

21. In a very recent decision delivered by Their Lordships of the Supreme Court in the matter of **Shailesh Dhairyawan v. Mohan Balkrishna Lulla**⁴, while considering Section 15 (2) of the Act of 1996 it has been held as under: -

“19. The scheme of [Section 8](#) of the 1940 Act and the scheme of [Section 15\(2\)](#) of the 1996 Act now need to be appreciated. Under [Section 8\(1\)\(b\)](#) read with [Section 8\(2\)](#) of the 1940 Act if a situation arises in which an arbitrator refuses to act, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in a fresh appointment, and if such appointment is not made within 15 clear days after service of notice, the Court steps in to appoint such fresh arbitrator who, by a deeming fiction, is to act as if he has been appointed by the consent of all parties. This can only be done where the arbitration agreement does not show that it was intended that the vacancy caused be not supplied. However, under [Section 15\(2\)](#), where the mandate of an arbitrator terminates, a substitute arbitrator “shall” be appointed. Had [Section 15\(2\)](#) ended there, it would be clear that in accordance with the object sought to be achieved by the Arbitration and [Conciliation Act](#), 1996 in all cases and for whatever reason the mandate of an arbitrator terminates, a substitute arbitrator is mandatorily to be appointed. This Court, however, in the judgments noticed above, has interpreted the latter part of the section as including a reference to the arbitration agreement or arbitration clause which would then be “the rules” applicable to the appointment of the arbitrator being replaced. It is in this manner that the scheme of the repealed [Section 8](#) of the 1940 Act is resurrected while construing [Section 15\(2\)](#) of the 1996 Act. The arbitration agreement between the

4 (2016) 3 SCC 619

parties has now to be seen, and it is for this reason that unless it is clear that an arbitration agreement on the facts of a particular case excludes either expressly or by necessary implication the substitution of an arbitrator, whether named or otherwise, such a substitution must take place. In fact, sub-sections (3) and (4) of [Section 15](#) also throw considerable light on the correct construction of sub-section (2). Under sub-section (3), when an arbitrator is replaced, any hearings previously held by the replaced arbitrator may or may not be repeated at the discretion of the newly-appointed Tribunal, unless the parties have agreed otherwise. Equally, orders or rulings of the earlier Arbitral Tribunal are not to be invalid only because there has been a change in the composition of the earlier Tribunal, subject, of course, to a contrary agreement by parties. This also indicates that the object of speedy resolution of disputes by arbitration would best be subserved by a substitute arbitrator continuing at the point at which the earlier arbitrator has left off.”

Dr. A.K. Sikri, J, in his separate but concurring opinion held as under: -

“35. Once we keep in mind the aforesaid fundamental aspects of the arbitration, the irresistible conclusion would be that whenever parties agree for mediation, and even name a specific arbitrator with no specific provision for appointment of another arbitrator on the recusal/withdrawal of the said arbitrator, the said omission is made up by [Section 15\(2\)](#) of the Act and unless arbitration agreement between the parties provides a categorical prohibition or debarment in resolving a question or dispute or difference between the parties by a substitute arbitrator in case of death or the named arbitrator or non-availability of the said arbitrator, courts have the power to appoint substitute arbitrator, which power is given by [Section 15\(2\)](#) of the Act as this provision is to be given liberal interpretation so as to apply to all possible circumstances under which the mandate of the earlier arbitrator may be terminated.”

22. In the matter of **Huawei Technologies Company Limited v.**

Sterlite Technologies Limited⁵, the Supreme Court has clearly

5 (2016) 1 SCC 721

held that under Section 15 (2) of the Act of 1996, appointment of new arbitrator after the initially appointed arbitrator recuses himself from the proceedings may be done by the court under Section 11 (6) of the Act of 1996 only once agreement procedure has been resorted to afresh and preconditions for exercise of power under Section 11 (6) are satisfied thereafter, and succinctly observed as under: -

“6. Under [Section 15\(2\)](#) of the Act in a situation where the mandate of an arbitrator terminates, a substitute arbitrator is required to be appointed *according to the rules that were applicable to the appointment of the arbitrator who is replaced*. In *Yashwith Constructions (P) Ltd. (supra)*, the term “rules” appearing in [Section 15\(2\)](#) of the Act has been understood to be referring to the provisions for appointment contained in the arbitration agreement or any rules of any institution under which the disputes are to be referred to arbitration. In the present case, admittedly, there are no institutional rules under which the disputes between the parties are to be referred to arbitration and, therefore, the expression “rules” appearing in [Section 15\(2\)](#) of the Act will have to be understood with reference to the provisions for appointment contained in the supply contract.

8. Clause 22.3 of the supply contract contemplates appointment of a sole arbitrator by the parties by mutual consent. In a situation where the original arbitrator i.e. Shri Justice S.K. Dubey had recused himself the substitute or new arbitrator is required to be appointed according to the rules that were applicable to the appointment of the original arbitrator. This is the mandate of [Section 15\(2\)](#) of the Act. It was, therefore, incumbent on the petitioner to give notice and explore the possibility of naming an arbitrator by mutual consent and only on failure thereof the present application under [Section 11\(6\)](#) of the Act could/should have been filed. The above recourse is required to be followed by virtue of the provisions of [Section 15\(2\)](#) of the Act and the decision of this Court in *Yashwith Constructions (P)*

Ltd. (supra). Admittedly, the same had not been followed. In these circumstances, the Court will understand the present application/arbitration petition to be premature. It is accordingly not entertained leaving it open for the petitioner to act appropriately, if so advised, in terms of the present order and thereafter seek its remedies as provided by law.”

23. Reverting back to the facts of the present case, it is quite vivid that according to the terms of agreement, all the three parties i.e. the applicant, the non-applicants and Indian Roads Congress, have appointed their respective arbitrators as required, but the arbitrator appointed by Indian Roads Congress as Presiding Arbitrator and another arbitrator appointed by the State have declined to act or perform as arbitrators in the instant case and there is no such other procedure prescribed in the arbitration clause of the agreement debarring appointment of any other substitute arbitrator in case the named arbitrator(s) refuses to perform. The applicant gave notice to the Indian Roads Congress to appoint substitute Presiding Arbitrator on 13-5-2016 within 30 days but that was not considered and acted upon. Therefore, this is a case where this Court in exercise of power under Section 11 (6) read with Section 15 (2) of the Act of 1996 is empowered to appoint arbitrator to resolve the dispute arisen between the parties, as the two named arbitrators have withdrawn their consent to perform the job of arbitration and Indian Roads Congress has failed to appoint substitute Presiding Arbitrator as provided in the arbitration clause as such, the provisions of Sections 11(4)(a) and 11(6) of the Act of 1996 are

attracted and since the stipulated period of 30 days has expired, the preconditions mentioned in Section 11(6) are satisfied.

24. In exercise of power conferred under Section 11 (6) of the Act of 1996, I hereby appoint Hon'ble Mr. Justice L.C. Bhadoo, former Judge of this Court, as an Arbitrator to resolve the dispute between the parties in accordance with the provisions of the Act of 1996. Registry is directed to communicate this order to Hon'ble Mr. Justice L.C. Bhadoo to enter upon reference after complying with the provisions contained in Section 12 of the Act of 1996 and adjudicate the dispute expeditiously in accordance with the Act of 1996.

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

Sd/-
(Sanjay K. Agrawal)
Judge

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