

HIGH COURT OF CHHATTISGARH, BILASPUR

Arbitration Application No.50 of 2017

M/s Shivam Infrastructure, a partnership firm registered under the Indian Partnerships Act, 1935, Having its office at Sharda Sadan, Behind Gayatri Mandir, Vinoba Nagar, Talapara Road, Bilaspur (C.G.) Through its Partner Shri Shailesh Agrawal, S/o Shri Madanlal Agrawal, aged about 47 years.

---- Applicant

Versus

1. South East Central Railway (SECR), through its General Manager, GM/SECR's Officer Complex, Bilaspur (C.G.)
2. General Manager (Arbitration), South East Central Railway, GM Annex Building, 5th Floor, Bilaspur (C.G.)
3. Divisional Railway Manager, Bilaspur Division, South East Central Railway, Bilaspur (C.G.)
4. Sr. Divisional Engineer (Central), Office of Sr. Divisional Engineer (Co-ordination), Titli Chowk, Railway, Settlement, Bilaspur (C.G.)
5. Additional Divisional Engineer (ADEN), South East Central Railway, Pendra Road, Pin – 495 117, District Bilaspur (C.G.)

---- Non-applicants

For Applicant:	Mr. Harsh Wardhan, Advocate.
For Non-applicants:	Mr. H.S. Ahluwalia, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

10/11/2017

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.
2. Essential facts leading to filing of this application are as under: -
 - 2.1) The applicant had entered into an agreement on 23-7-2014

for execution of work tabled in the NIT. The applicant completed the work on the extended time and made request for payment of his bills which was finally prepared on 28-10-2016, but the bill was not paid and no claim certificate was asked which the applicant as per terms of clauses 16.(1) and 16.(2) of the general conditions of contract, submitted on 14-12-2016 and pending bill was paid on 14-12-2016 itself and security deposit was also released. Thereafter, additional claim was not paid leading to filing of application on 4-4-2017 for appointment of arbitrator before the Railways, but despite completing the formalities, arbitrator was not appointed leading to filing of this application.

2.2) Reply has been filed stating inter alia that since the applicant has signed no claim certificate, the agreement stood discharged and there is no claim and therefore the applicant is not entitled for appointment of arbitrator.

3. Mr. Harsh Wardhan, learned counsel appearing for the applicant, would submit that no claim certificate was signed as per clauses 16.(1) and 16.(2) of the general conditions of contract which provides, without execution of no claim certificate, no bill shall be paid and once no claim certificate was signed as per the conditions of contract on 14-12-2016, immediately, on that day, bills were cleared and security deposit was paid to the applicant. He would further submit that in view of the amendment in the shape of Section 11(6A) of the Act of 1996 by the Arbitration and Conciliation (Amendment) Act, 2015, only the existence of

arbitration agreement has to be looked into and all the defences have to be taken care of by the arbitral tribunal and the said amendment has come into force with effect from 23-10-2015. He would rely upon a very recent decision of the Supreme Court in the matter of **M/s. Duro Felguera, S.A. v. M/s. Gangavaram Port Limited**¹. Therefore, the application deserves to be allowed.

4. Mr. H.S. Ahluwalia, learned counsel appearing for the non-applicants, would submit that the applicant has signed no claim certificate clearly stating in itself no claim against the said contract and thus, by principle of accord and satisfaction, the applicant is not entitled for appointment of arbitrator and the application deserves to be rejected.
5. I have heard learned counsel for the parties and considered the rival submissions made herein-above and also gone through the record with utmost circumspection.
6. 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.”

1 2017 SCC OnLine SC 1233

7. Amended sub-section (6A) of Section 11 of the Act of 1996 came up for consideration before the Supreme Court in **M/s. Duro Felguera, S.A.** (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.

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.

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.”

8. 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. In the present case also, the general conditions of contract which is a part of the 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. The dispute about no claim certificate has to be left to be decided by the arbitrator, as only the existence of arbitration agreement has to be seen by virtue of the amendment incorporated by Section 11(6A) of the Act of 1996. The question of no claim certificate is left open to be considered by the arbitral tribunal.
9. 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 Dilip Raosaheb Deshmukh, former Judge of this High Court to arbitrate the dispute. Registry is directed to

communicate this order to Hon'ble Mr. Justice Dilip Raosaheb Deshmukh who shall enter into reference after complying with the provisions contained in Section 12 (2) of the Act of 1996.

10. 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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