

HIGH COURT OF CHHATTISGARH, BILASPUR**Arbitration Application No.70 of 2017**

M/s. Todarmull Balchand Suntwal through its Authorized Signatory, Shri Suresh Suntwal, age 46 years, S/o Late Shri Balchand Sharma, 18/254, Bharata Cottage, Shankar Nagar, Raipur (CG)-492 007

---- Petitioner

Versus

1. South East Central Railways Through its General Manager, Office of General Manager, Bilaspur (CG) 495 004
2. Senior Divisional Engineer (Co) South East Central Railways, Raipur

---- Respondents

For Petitioner	:	Mr.Abhishek Vinod Deshmukh, Advocate
For Respondents	:	Mr.Abhishek Sinha and Ms S. Harshita, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

17/11/2017

1. Invoking Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter called as '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 with respondent No.2 on 13.5.2010 for work of manning of unmanned level crossing between various sections. The total contract price was ₹ 1,84,54,706/-. The work was to be completed within a period of twelve months. However, the work was not completed within the stipulated time and time

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was extended upto 30.6.2012. Ultimately work was completed on 28.6.2012 and final bill was prepared and passed. During execution of work, certain disputes arose between the parties, which were not settled amicably and accordingly, the applicant made a request to the respondent Railways for appointment of arbitrator, to which the respondent Railways requested the applicant to waive off the applicability of the Arbitration & Conciliation (Amendment) Act, 2015, to which the applicant refused and ultimately, on failure on the part of the respondent Railways to appoint an arbitrator, this application under Section 11(6) of the Act of 1996 has been filed for appointment of the arbitrator.

2.2) It has been stated that since the respondent Railways has failed to appoint the arbitrator and in view of the amended provisions i.e. Section 11(6A) of the Act of 1996, only the existence of arbitration agreement has to be seen and arbitrator has been appointed for resolving the dispute.

3. Mr.Abhishek Vinod Deshmukh, learned counsel appearing for the applicant, would 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 further submit that contract

agreement provides for arbitration in the shape of clause 64.(3) of the General Conditions of Contract. He would reply 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. On the other hand, Ms S. Harshita, learned counsel appearing for the respondents, would oppose the application for appointment of arbitrator and 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. Clause 64 (1) (i) & (ii) of the General Conditions of Contract states as under:-

“64.(1) Demand For Arbitration :

64.(1) (i) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the “expected matters” referred to in Clause 63

¹ 2017 SCC OnLine SC 1233

of these conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.

64.(1) (ii) The demand for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item-wise. Only such dispute(s) or difference(s) in respect of which the demand has been made, together with counter claims or set off, given by the Railway, shall be referred to arbitration and other matters shall not be included in the reference.”

7. 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.”

8. 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.”

9. 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 and all other disputes 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 and other disputes is left open to be considered by the arbitral tribunal.

10. 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 L.C. Bhadoo, former Judge of this High Court to arbitrate the dispute. Registry is directed to communicate this order to Hon'ble Mr. Justice L.C. Bhadoo who shall enter into reference after complying with the provisions contained in Section 12 (2) of the Act of 1996.

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

Sd/-

(Sanjay K. Agrawal)

Judge

B/-