

HIGH COURT OF CHHATTISGARH, BILASPURArbitration Application No.4 of 2018

Surya Alloy Industries Limited, A Company incorporated & registered under Companies Act having its registered office at 1/1, Camac Street, 3rd Floor, Kolkata-W.B.700016. Through its authorized Signatory Shri Chandan Tripathi, S/o Shri U.N. Tripathi, Age 32 years, working as Company Secretary.

---- Applicant

Versus

South East Central Railway, through its General Manager, having office at New GM Building, Bilaspur (C.G.) 495004.

---- Non-applicant

For Applicant:	Mr. Ali Asgar, Advocate.
For Non-applicant:	Mr. H.S. Ahluwalia, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

23/02/2018

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. Learned counsel for the applicant would submit that on 28-11-2016, purchase order was issued by the Railways for supply of Elastic Rail Clips, part of supply was made and remaining supply has not been received by the Railways and therefore it was sold as scrap. The applicant has suffered damage by selling it in open market and the amount of said damage was sought to be recovered which was not given leading to prayer for appointment of arbitrator in terms of clause 2900 of the Indian Railway Standard Conditions of Contract on 23-11-2017 which has not been done by the Railways leading to filing of this application. He would further submit that in terms of Section 11(6) of

the Act of 1996, arbitrator deserves to be appointed, as the non-applicant Railways has failed to appoint arbitrator in terms of the contract agreement.

3. On the other hand, learned counsel for the non-applicant would oppose the application.
4. 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.
5. 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.”

6. 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. v. M/s. Gangavaram Port Limited**¹ 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: -

1 2017 SCC OnLine SC 1233

“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.”

7. 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. All objections/questions raised by the non-applicants are left open to be considered by the arbitral tribunal, if raised by filing appropriate pleading.

8. 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 Dharendra Mishra, former Judge of this High Court to arbitrate the dispute. Registry is directed to communicate this order to Hon'ble Mr. Justice Dharendra Mishra who shall enter into reference after complying with the provisions contained in Section 12 (2) of the Act of 1996.
9. 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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