

HIGH COURT OF CHHATTISGARH, BILASPURArbitration Application No.87 of 2017

M/s Brijesh Agrawal, Sharda Sadan, Vinoba Nagar, Behind Gayatri Mandir, Talapara Road, Bilaspur (C.G.) through its Power of Attorney Holder Shri Shailesh Agrawal, S/o Shri Madan Lal Agrawal, aged about 48 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 (Co-ordination), Titli Chowk, Railway Settlement Area, South East Central Railway, Bilaspur (C.G.)
5. Divisional Engineer (Spl/Works), in the office of Sr. Divisional Engineer (Co-ordination), Titli Chowk, Railway Settlement Area, South East Central Railway, Bilaspur (C.G.)

---- Non-applicants

For Applicant: Mr. Harsh Wardhan, Advocate.

For Non-applicants: Mr. Abhishek Sinha & Ms. S. Harshita, Advocates.

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. The applicant entered into agreement dated 20-9-2011 for undertaking the work of provision of limited height subway near level crossing No.388 at Km.771/23-25 of Raipur Division. According to the applicant, after execution of agreement, the Railways and its

authorities did not act in accordance with the agreement and delayed their part and on account of their non-cooperation, the non-applicant Railways terminated the contract on 21-8-2013 to which the applicant represented, but no heed was paid. The applicant has also represented to invoke the arbitration clause and demanded arbitration for settlement of all disputes, but no arbitrator was appointed leading to filing of the instant application.

3. Learned counsel for the applicant submits that it is a fit case where arbitrator can be appointed for resolution of dispute as provided in clause 64 of the general conditions of contract which provides for resolution of dispute under the provisions contained in the Act of 1996.
4. On the other hand, learned counsel for the non-applicants would submit that it is a case where clause 64(3) of the general conditions of contract can be invoked and 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.”

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. 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: -

“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.”

1 2017 SCC OnLine SC 1233

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. All objections of the non-applicants are left open to be considered by the arbitral tribunal, if raised by appropriate pleading.
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 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.
10. The arbitration application is allowed to the extent indicated herein-above. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge