

HIGH COURT OF CHHATTISGARH, BILASPURArbitration Request No.7 of 2018

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 (Engg.), Bilaspur Division, South East Central Railway, Bilaspur (C.G.)
4. Sr. Divisional Engineer (Co-ordination), Titli Chowk, Railway Settlement Area, Bilaspur (C.G.)
5. Divisional Engineer/SPL (W), Office of Sr. Divisional Engineer (Co-ordination), Titli Chowk, Railway Settlement Area, Bilaspur (C.G.)

---- Non-applicants

For Applicant:	Mr. Harsh Wardhan, Advocate.
For Non-applicants:	Miss S. Harshita, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

06/04/2017

1. Invoking Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, 'the Act of 1996'), the applicant herein has filed this request for appointment of arbitrator.
2. Essential facts leading to filing of this application are as under: -
 - 2.1) The applicant and non-applicants Railways entered into agreement and the applicant was awarded construction of limited height subway by pushing method in connection with closing of level crossing No.AB-44 at Km. 972/06-07 between Baikunthpur –

Katora under the jurisdiction of SSE/ABKP and agreement was entered on 13-8-2013 for ₹ 1,81,53,662/-. The applicant successfully completed the work, but dispute arisen between the parties and the applicant made application on 15-12-2017 before the General Manager (Arbitration) of Railways under prescribed format demanding arbitration in respect of the dispute and the claims of the applicant which was replied and said that it is being processed, but did not make any claim. Thereafter, the applicant made application for appointment of arbitrator, but 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, 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 Limited¹. Therefore, the application deserves to be allowed.

4. Miss S. Harshita, 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.”
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

¹ 2017 SCC OnLine SC 1233

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 L.C. Bhadoo, former Judge of this High Court to arbitrate the dispute. Registry is directed to communicate this order to Hon'ble Mr. 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

HIGH COURT OF CHHATTISGARH, BILASPUR

Order Sheet

Arbitration Request No.7 of 2018

M/s Brijesh Agrawal **Versus** South East Central Railway (SECR) and others

SB
Hon'ble Shri Justice Sanjay K. Agrawal

Motion	
11/04/2018	Due to inadvertent mistake, while finally disposing of Arbitration Request No.7/2018, date of the order passed in the said case has been typed as 06/04/2017, whereas it should be <u>06/04/2018</u>, therefore, the date of order disposing of the said arbitration request be read as <u>06/04/2018</u>. Certified copy of this order be also supplied to the parties along with the main order and this order be kept along with the main order finally disposing of the arbitration request and it be made a part of it. Sd/- (Sanjay K. Agrawal) Judge