

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**ARBR No. 13 of 2018****Reserved on 25.09.2018****Pronounced on 10.10 .2018**

1. M/s South Eastern Coalfields Limited, A Govt. Company Having Its Head Quarters At Seepat Road, Bilaspur, Through Its Chairman-Cum-Managing Director, South Eastern Coalfields Limited, Seepat Road, Bilaspur, Chhattisgarh,
2. Chief General Manager (Civil) South Eastern Coalfields Limited, Seepat Road, Bilaspur, Chhattisgarh

---- Applicants**Versus**

1. M/s Shrikishan And Co. Engineer And Contractors, B-4, Commercial Complex, T.P.Nagar, Korba, Tahsil And District Korba, Chhattisgarh, Through Proprietor Sushil Agrawal, R/o T.P.Nagar, Korba, Tahsil And District Korba, Chhattisgarh,
2. Sushil Kumar Agrawal 5-1, Shree Complex, Stadium Road, T.P.Nagar, Korba, Chhattisgarh 495679, Korba (C.G.)

---- Respondents

For Applicants:	Shri H. B. Agrawal, learned senior counsel along with Ms. Priti Yadav, Advocate.
For Respondents:	Shri Rahul Jha, Advocate.

Single Bench: Hon'ble Shri Sanjay Agrawal, J**CAV Order/Judgment**

1. This application has been made under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act, 1996') for appointment of arbitrator.

2. Briefly stated the facts of the case are that in response to the Notice Inviting Tender (NIT) No. SECL/GA/SO(C)/NIT/05/2240 issued by the Applicants on 05.03.2005, respondent No.1 / Ms. Shrikishan & Co. has participated and its tender was accepted by the applicants/SECL and accordingly the Work Order No. GM(C)/SECL/BSP/WO/GVR/2005/4271

was issued to respondent No.1 /Ms. Shrikishan & Co. on 30.11.2005 and an Agreement bearing No. SECL/BSP/GM(C)/AGT/5/562 was executed between the parties on 02.02.2006 under certain terms and conditions stipulated therein for work of "Black Topping of Coal Tipper Road including maintenance for 03 years from CHP-BSES Junction of Dipka Expansion Project to Dy. GM Office Gevra Project in Gevra Area", District-Korba (C.G.). Total value of contract was Rs. 5,33,10,612.56 and completion period of it was twelve months.

3. The aforesaid contract for the said work was cancelled by the Applicants/SECL vide order dated 02.07.2009 as the terms and conditions of the alleged agreement was violated by respondent No.1/Ms. Shrikishan & Co. while forfeiting its EMD, security deposits of Rs. 54,31,698.98/- and directed to pay an amount of Rs. 53,31,061.26/- on account of compensation, i.e., 10% of the total contract value as per the clause 6.2 of the said Agreement.

4. According to the averments made in the application, a dispute arose between the parties in relation to the alleged Agreement and since the applicants/SECL have suffered a loss to the tune of Rs. 70,83,561.90/- due to the violation of the terms and conditions of the alleged Agreement, therefore, a civil suit being Civil Suit No. 4-B/2011, for its recovery was earlier filed by the Applicants/SECL on 12.05.2011 before the learned District Judge, Bilaspur and the same was dismissed on 12.05.2017 under Order 7 Rule 11(d) of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC').

5. It is pleaded further that as the Applicants were agitating the matter up to the Apex Court, therefore, an application for appointment of arbitrator

could not be filed earlier in relation to adjudicate the claim of said amount of Rs.70,83,561.90/-. Since the alleged agreement contained the arbitration clause, therefore, while invoking it, a prayer for appointment of arbitrator has been made for adjudication of the said claim.

6. The aforesaid claim for appointment of arbitrator has been contested by the Respondents on the ground that since on an earlier occasion, an arbitrator was appointed vide order dated 29.02.2012 by this Court in an Arbitration Application No. 10/2008 preferred by the Respondent No.1/M/s. Shrikishan & Co. whereby the Applicants/SECL were also granted an opportunity to raise its counter claim before the said arbitrator. However, no such counter claim was filed by the Applicants/SECL and ultimately the said arbitrator has passed its award on 14.06.2017. It is contested further on the ground that the learned District Judge while dismissing the Applicants' suit as framed has observed therein that the Applicants may raise their claim before the said arbitrator as appointed by this Court. Having failed so, the instant application has been filed on 08.03.2018 after the pronouncement of the said award dated 14.06.2017 by the said arbitrator holding therein that the cancellation of the alleged contract on 02.07.2009 was unlawful. It is, therefore, pleaded that the application as framed under such circumstances is not maintainable and liable to be dismissed as it attracts and hits by the principles of constructive res-judicata.

7. Shri H. B. Agrawal, learned senior counsel appears along with Ms. Priti Yadav for the Applicants submits that in view of the provisions prescribed under Section 11(6-A) of the Act, 1996 incorporated by way of Arbitration and Conciliation (Amendment) Act, 2015, which came into force

with effect from 23.10.2015, the existence of arbitration clause alone is required to be seen while entertaining the application for appointment of arbitrator and all other objections are required to be dealt with by the arbitrator. In support, he placed his reliance upon the decision rendered in the matter of “**Duro Felguera, S.A. Vs. Gangavaram Port Limited**” reported in **2017(9) SCC 729**.

8. On the other hand, Shri Rahul Jha, learned counsel appearing for the Respondents while opposing the application for appointment of arbitrator submits that after cancellation of the alleged contract for the said work on 02.07.2009, an arbitrator was appointed by this Court vide order dated 29.02.2012 in an application preferred by him under Section 11(6) of the Act, 1996 in Arbitration Application No. 10/2008 entitling the Applicants therein also to raise their counter claim before the arbitrator. Therefore, under such circumstances, the application as framed seeking appointment of arbitrator again under the said provision in relation to the dispute on the same cause of action arose upon cancellation of the alleged Agreement is liable to be rejected. According to him, the principles laid down in the matter of “**Duro Felguera, S.A. Vs. Gangavaram Port Limited**” (Supra) is entirely on different footing and would have no application in the case in hand.

9. I have heard learned Counsel for the parties and perused the entire documents annexed with the application and its reply carefully.

10. Undisputedly, the aforesaid contract work was provided to the Respondents under the alleged agreement dated 02.02.2006 and was cancelled subsequently by the Applicants vide order dated 02.07.2009. After the cancellation of the alleged agreement as such, a dispute arose

between the parties, therefore, an application for appointment of arbitrator was made by the Respondents while exercising the powers enumerated under sub-section(6) of Section 11 of the Act, 1996, registered as Arbitration Application No. 10/2008. An objection was raised therein by the Applicants that since the arbitration clause is not in existence, therefore, the said application, i.e., Arbitration Application No. 10/2008, be rejected. However, after considering and that by setting aside the said objection, it was held that the arbitration clause exists between the parties while referring to Clause 14 of the Civil Engineering Manual and accordingly, an order was passed on 29.02.2012 appointing the arbitrator in order to decide claims and counter claims of the parties.

11. Pertinently to be noted here that the aforesaid order was questioned by the Applicants by way of Review Petition No. 103/2012. It was, however, dismissed vide order dated 09.08.2012 and was affirmed further in Special Leave to Appeal (Civil) No. 31720 of 2012 by the Supreme Court vide order dated 01.05.2017 and the Review Petition preferred there-against was also dismissed vide order dated 24.10.2017 in Review Petition (Civil) No. 2317 of 2017.

12. It is worth to mention here further that the suit which was instituted for recovery of sum of Rs. 70,83,561.90/- by the Applicants on 12.05.2011 after the cancellation of the alleged Agreement was registered as Civil Suit No. 4-B/2011, before the learned District Judge, Bilaspur and during its pendency, the sole arbitrator, as mentioned hererinabove, was appointed. It was, therefore, observed that since the arbitrator has already been appointed in relation to the subject matter of the suit and both the parties are at liberty to raise their respective claims and counter claims before the

said arbitrator and as such, the suit was held to be barred by Law under Order 7 Rule 11(d) of CPC by the learned District Judge, Bilaspur vide order dated 12.05.2017. Pertinently to be observed here further that the said arbitrator has passed its final award on 14.06.2017 and the same has been questioned by the Applicants before the Commercial Court at Raipur where it was registered as MJC No. 26/2017, while the MJC No. 35/2017 was registered in an appeal preferred by the Respondents in respect of refusal of their part of claim. Both the matters are still under consideration before the said Commercial Court at Raipur.

13. Despite availing the aforesaid remedies while questioning the said award as passed by the sole arbitrator, the instant application has been made seeking appointment of arbitrator on the same cause of action again for which the Applicants were already provided an opportunity to raise its claim by way of counter claim before the said arbitrator. Be that as it may, if the application as made by the Applicants for appointment of arbitrator under Section 11(6) of the Act, 1996 is allowed in relation to the claim for which the Applicants were already given an opportunity in an earlier occasion and/or, if the award is passed contrary to what was passed by the said sole arbitrator, it would then, certainly affect the propriety of the award dated 14.06.2017 passed already by the appointed sole arbitrator. Entertaining the instant application would, therefore, lead to allowing the Applicants to question the validity of the said award impliedly.

14. Further contention of Shri Agrawal, based upon the principles laid down in the matter **Duro Felguera, S.A. Vs. Gangavaram Port Limited** (supra) is, however, noted to be rejected as the principles laid down therein are on a different factual scenario, and therefore, would not come

as a rescue for the Applicants. It is true, as held in the said matter that while entertaining the application for appointment of arbitrator under Section 11(6) of the Act, 1996, the existence of arbitration clause alone is required to be seen by virtue of the amended provision of sub-section (6-A) of Section 11 of the Act, 1996. However, here in the instant case, the arbitrator was already appointed by this Court vide order dated 29.02.2012 when dispute arose owing to the cancellation of the alleged agreement on 02.07.2009 on the basis of the application filed by the Respondents and only after the completion of the aforesaid arbitration proceedings, the instant application has been made in respect of the claim based upon the same cause of action.

15. What is, therefore, reflected from the above mentioned facts and circumstances that the arbitration clause has not only been invoked, but, the appointed sole arbitrator has also passed its Award on 14.06.2017 and which is under consideration before the Commercial Court at Raipur. It will, therefore, be rather illogical to permit the Applicants to reopen the same issue again based upon the same cause of action. In such a peculiar facts and circumstances of the case, the application as framed under Section 11(6) of the Act, 1996 for appointment of arbitrator cannot be held to be maintainable.

16. In view of the foregoing discussions, I do not find any substance in this application. The application for appointment of arbitrator under Section 11(6) of the Act, 1996 is accordingly dismissed. No order as to costs.

Sd/-

(Sanjay Agrawal)
JUDGE