

HIGH COURT OF CHHATTISGARH, BILASPURArbitration Request No.9 of 2018

Todarmull Infrastructures Pvt. Ltd. (Engineers & Contractors), Having Registered office at 18/254, Bhrata Cottage, Shankar Nagar, Raipur – 492 007, Chhattisgarh

Having Corporate Office at 203, Second Floor, AADI Apartment, Sri Ram Nagar, Phase – II Road, Shankar Nagar, Raipur – 492 007, Chhattisgarh

Through its Managing Director Shri Suresh Suntwal, age 46 years, S/o Late Shri Balchand Sharma

---- Applicant

Versus

1. South East Central Railways, Through its General Manager, Office of General Manager, Bilaspur (C.G.) – 495 004
2. Union of India, Through Senior Divisional Engineer (Co-ord.), South East Central Railways, Raipur, Chhattisgarh

---- Non-applicants

For Applicant:	Mr. Abhishek Vinod Deshmukh, Advocate.
For Non-applicants:	Mr. Vivek Tripathi, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

13/07/2018

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. Agreement was entered into between the parties for execution of work. Clause 64 of the General Conditions of Contract provides for arbitration clause. During the course of execution of work, certain disputes arose between the parties and accordingly, the applicant invoked the said clause by making request for appointment of arbitrator which was accepted and on 28-9-2016, non-applicant

No.1 constituted Arbitral Tribunal, but that Arbitral Tribunal could not conclude and pass award as mandated under Section 29-A(1) of the Act of 1996 within twelve months leading to filing of fresh application on 4-1-2018 stating that the mandate of the Tribunal has already been terminated by virtue of the said provision, and made application for appointment of arbitrator which was not accepted leading to filing of instant application / request on 28-3-2018.

3. Mr. Abhishek Vinod Deshmukh, learned counsel appearing for the applicant, submits that since the mandate has already been terminated by virtue of Section 29-A(1) of the Act of 1996 and no time has been extended under sub-section (4) of Section 29-A, therefore, arbitrator be appointed for resolution of arbitral dispute between the parties.
4. Mr. Vivek Tripathi, learned counsel appearing for the non-applicants, would submit that on 27-3-2018, arbitrator has already been appointed.
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. Since the Arbitral Tribunal was constituted on 28-9-2016, therefore, the Arbitrator could have concluded the proceeding and passed award in terms of Section 29-A(1) of the Act of 1996 within twelve months from the date of his entering upon the reference i.e. from 28-9-2016, but that was not done and period was also not extended in terms of sub-section (4) of Section 29-A of the Act of 1996. Therefore, by virtue of Section 29-A(4) of the Act of 1996, the

mandate is deemed to have been terminated, as the period for passing arbitral award has not been extended by the competent court. Therefore, second application is maintainable.

7. Now, the stand of the non-applicants is that arbitrator has already been appointed on 27-3-2018.
8. Learned counsel for the applicant would submit that by virtue of the provision contained in Section 12(5) of the Act of 1996, the appointment of departmental arbitrator runs contrary to Section 12(5).
9. It is not in dispute that the non-applicant has appointed an officer of the Railways which is covered within the meaning of officer mentioned in clause (1) of the Seventh Schedule enacted under Section 12(5) of the Act of 1996, therefore, appointment of arbitrator by the non-applicants on 27-3-2018 is hit by Section 12(5) of the Act of 1996 (see M/s. Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd.¹).
10. 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.”
11. Amended sub-section (6A) of Section 11 of the Act of 1996 came up

1 AIR 2017 SC 939

for consideration before the Supreme Court in M/s. Duro Felguera, S.A. v. M/s. Gangavaram Port Limited² 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.”

12. Following the principle of law laid down by Their Lordships of the

² 2017 SCC OnLine SC 1233

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.

13. 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.
14. The arbitration application is allowed to the extent indicated herein-above. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge