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HIGH COURT OF CHHATTISGARH, BILASPUR**ARB REQ No. 25 of 2018**

M/s Ramesh Kumar Swarnakar A Proprietor Firm, Having Its Office At Ward No. 15, Station Road, Shakti, District - Janjgir Champa Chhattisgarh Through Its Partner Shri Ramesh Kumar Swarnkar, S/o Shri Amarnath Swarnakar, Aged About 45 Years., District : Janjgir-Champa, Chhattisgarh.

---- Applicant**Versus**

1. South East Central Railway (SECR), Through Its General Manager, Gm/secrs Officer Complex, Bilaspur Chhattisgarh., District : Bilaspur, Chhattisgarh
2. General Manager (Arbitration), South East Central Railway, Gm Annex Building, 5th Floor, Bilaspur Chhattisgarh., District : Bilaspur, Chhattisgarh
3. Chief Electrical Engineer (Con-Hq), South East Central Railway, Bilaspur Chhattisgarh., District : Bilaspur, Chhattisgarh
4. Dy. Chief Electrical Engineer (Con-Hq), Office Of Chief Electrical Engineer, South East Central Railway, Bilaspur Chhattisgarh., District : Bilaspur, Chhattisgarh
5. Divisional Electrical Engineer / Con-Hq, South East Central Railway, Bilaspur Chhattisgarh., District : Bilaspur, Chhattisgarh

---- Respondents

For Applicant	:	Shri Harsh Wardhan, Advocate.
For Respondents	:	Shri H.S. Ahluwalia, Dy. A.G.

Hon'ble Shri Justice Rajendra Chandra Singh Samant**Judgment on Board****18.04.2019**

Heard.

(1) The application under Section 11(6) of the Arbitration and Conciliation Act, 1996 has been brought by the applicant praying for appointment of arbitrator.

(2) Learned counsel appearing on behalf of the applicant submits that the applicant is a Proprietorship firm. The applicant participated in a tender process initiated by the respondents for supply and installation of air-conditioners. As the offer bid of the applicant was lowest, the work order was passed in his favour and an agreement dated 19.6.2017 was executed. The applicant was ready to perform his part, but the items demanded by the respondents with the specifications were not available in the market. Several meetings were held, but no solution was found, therefore, the dispute arose between the parties and the applicant made a demand for arbitration in accordance with the terms of the arbitration clause in the contract. The applicant was asked to submit his agreement to give waiver of applicability of Section 12(5) of the Arbitration and Conciliation Act, to which he complied and submitted the waiver accordingly on 6.2.2018. The applicant had mobilized his resources for execution of work for which he had made expenditure, towards which a partial payment was made by the respondents. The respondents then finally terminated the contract by letter dated 13.6.2018, on the ground of non-competition of work under the contract. The applicant then sent reminders to the respondents requesting for appointment of Arbitrator. Despite the waiver submitted by the applicant, the respondents have failed to appoint an Arbitrator or arbitrators within a period of 90 days. It is further submitted that the applicant prayed before this Court to invoke the powers under Section 11(6) of the Arbitration and Conciliation Act and appoint one independent Arbitrator for Arbitration of the dispute between the parties.

(3) Learned counsel for the respondents submits that according to the amended Clause 64 sub-clause (3)(b) of the General Conditions of Contract-2014 it is clearly agreed between the parties that arbitration Tribunal shall consist of a panel of three Gazetted Revenue Officers, not below the rank of JA Grade or two Railway Gazetted Officers not below JA Grade and one retired Gazetted Officer. According to this condition, the contractor has to make a proposal for such appointment in which the contractor is to be asked to suggest General Manager at least two names from the official panel for appointment as contractor's nominee within 30 days from the date of dispatch of request by the Railway. The applicant has not complied with clause 64(3) (b) of the General Conditions of Contract-2014 therefore it cannot be said that the parties have failed in the matter of appointment of arbitrator in accordance with the arbitration clause.

Reliance has been placed on the judgment of Supreme Court in **Northern Railway Administration, Ministry of Railway, New Delhi vs. Patel Engineering Company Limited** reported in **2008 10 SCC 240** in which it is held that the Court may ask to do what has not been done.

(4) In reply, it is submitted that after the Supreme Court judgment of the year 2008, the Act has been amended. For the reason that the applicant has no faith in the Railway Officers, he insists for appointment of an independent Arbitrator and as Fifth Schedule of the Act 1998 itself provides that where the Arbitrator is an employee, consultant, advisor or has any past or present business relationship with the party, that may be

made a ground of justifiable doubts as to the independence or impartiality of arbitrator, therefore, it is prayed that the objections raised by the respondents be rejected and the prayer of the applicant be allowed.

(5) The clause for arbitration in Indian Railway standard General Conditions of Contract-2014 under Clause 64(1)(i) is as under:

'64.(1) (i) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the "excepted matters" referred to in Clause 63 of these Conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.'

(6) In this case, the applicant made his submission for resolution of dispute by arbitration on 6.2.2018 vide Annexure-A/4 by making a statement of waiver under Section 12(5) of the Arbitration and Conciliation Act.

(7) Clause 64 of General Conditions of Contract-2014 was modified and amended. According to the Clause 64(3)(b), which is as under:

'Clause 64(3)(b): Appointment of Arbitrator where

applicability of Section 12(5) of A & C Act has not been waived off:

“The Arbitral Tribunal shall consist of a Panel of three retired Railway Officer, not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than three names of Gazetted Rly. Offices or at least (4) names of retired Railway Officer(s) empanelled to work as Railway Arbitrator duly indicating their retirement date to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM.

Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the presiding arbitrator from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees”.'

- (8) As it appears that the applicant was never asked to suggest to the General Manager, the names for appointment of his nominees which was the next step to be taken by the respondents after accepting the request of the applicant to proceed for arbitration. There is nothing to suggest in the reply made by the respondents and the documents filed by them that any such step was taken. Therefore, it is a clear case of failure on the

part of the respondents to make an appointment to proceed for the arbitration proceedings. Hence, in this case, it can be safely held that the applicant had made negotiations on his part in accordance with the arbitration clause, which was not responded accordingly by the respondents and the time limit for the same has also been expired. Therefore, on the basis of the application filed, this Court is competent to exercise the power under Section 11(6) of the Arbitration and Conciliation Act, 1996.

(9) After due consideration, the application is allowed and I hereby appoint Hon'ble Shri Justice Dharendra Mishra, Former Judge of this High Court to arbitrate the dispute.

(10) Therefore, on the basis of the discussions made herein-above, this conclusion is arrived at, that it is a fit case for exercise of power under Section 11(6) of the Act, 1996. Therefore, by exercising power under Section 11(6) of the Act, 1996 under the authority given by Hon'ble the Acting Chief Justice, I hereby appoint Hon'ble Shri Justice Dharendra Mishra, Former Judge of this High Court to arbitrate the dispute between the parties. Registry is directed to communicate this order to Hon'ble Shri Justice Dharendra Mishra, who shall enter into reference after complying with the provisions contained in Section 12(2) of the Act, 1996. Learned arbitrator is requested to dispose off the matter within the time prescribed in the Act, 1996 as amended.

(11) The remuneration of the arbitrator shall be settled by the parties with the mutual consent.

(12) The petition is disposed off with the aforesaid directions.

Sd/-

(Rajendra Chandra Singh Samant)
JUDGE

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