

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

ARBR No. 26 of 2018

- Abhyudaya Tele-Infra & Consultants (P) Ltd. Through its Managing Director, Having its Registered Office At-B-17/UG-3, Dilshad Colony, Delhi- 110095 Also having office at: C – 12, LIC Colony, Mowa, Raipur Chhattisgarh.....Applicant, District : Raipur, Chhattisgarh

---- Applicant

Versus

- Sumeet Infracon Pvt. Ltd. Through its Managing Director, 3rd Floor, Tahir Plaza, Malviya Road, Raipur, Chhattisgarh.....Respondent, District : Raipur, Chhattisgarh

---- Respondent

For Applicant – Mr. Abhishek Vinod Deshmukh and Ms. Pushpa Dwivedi, Advocates.

For Respondent – Mr. Shobhit Mishra, Advocate.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

Order on Board

04-04-2019

1. This application has been brought under Section 11(5) & (6) of the Arbitration and conciliation Act, 1996 (in short 'the Act, 1996') praying for appointment of arbitrator in this case.

2. It is submitted by learned counsel for the applicant that the respondent company had awarded a work of labour contract for civil works to be executed in Kachana, Raipur vide work order dated 26-07-2013. The work was to be executed on the terms and conditions stipulated in the work order. The work was to be commenced from 01-08-2013 and it was to be completed within 6 months. The applicant company has satisfactorily completed all the work within the time schedule which has been confirmed and accepted by the respondent. The applicant then submitted final bill for payment of Rs.1,01,28,067/- along with bill of the material supplied worth Rs.54,83,393/-, thus, in total the respondent had to make payment of Rs.1,87,11,973/-. The respondent company has failed to make payment of the outstanding amount, because of which the applicant invoked the arbitration clause and a notice through counsel

was sent to the respondent on 22-08-2015 requesting consent for appointment of Shri Manoj Kumar Tyagi as sole arbitrator. The respondent replied to the notice on 15-09-2015 and agreed for adjudication of dispute by arbitrator, however, the respondent did not agree for appointment of sole arbitrator proposed by the applicant and instead proposed names of Shri K. K. Shukla, Shri R.K. Gupta and Shri Rajendra Jain to be appointed as arbitrators in the case.

On the basis of this disagreement between the parties, the applicant has felt compelled to file this application under Section 11(6) of the Act, 1996 praying for appointment of sole arbitrator to arbitrate in the dispute between the parties.

3. It is submitted by learned counsel for the respondent that in sub-clause (d) and (e) of clause 3 of the work order it has been clearly proposed that entire work was to be completed in strict compliance with the schedule set forth there in, the contract and the construction was to be completed strictly as per drawing and any changes if at all occur, then it should have been done in the same scope of contract without any extra cost. Therefore, the applicant has not completed the work to the satisfaction of the respondent and has left a bulk of work incomplete, despite the condition that the applicant had to complete it within the stipulated time. For this reason, the respondent was required to get the work completed through other agencies, for which he had to incur extra expenses and heavy financial losses. It is also submitted that the applicant has raised bills which are false and fabricated not containing correct information, suppressing the facts regarding the actual construction made. Therefore, the respondent is entitled for payment of Rs.7,72,800/- from the applicant side by way of penalty. It is submitted that the respondent has not agreed to appointment of Shri Manoj Kumar Tyagi as sole arbitrator, because he is not a technical person capable to resolve the dispute which is of technical nature.

Therefore, in reply to the notice through Advocate 3 members arbitration tribunal was proposed naming Shri K.K. Shukla, Advocate, Shri R.K. Gupta, B.E. Civil and Shri Rajendra Jain, B.E. Civil to resolve the dispute between the parties, to which the applicant has neither approved nor disapproved. Therefore, a situation has not arisen as it is postulated in Section 11(5) of the Act, 1996 that the parties have failed to agree for appointment of arbitrator within the time specified in this case as the proposal made by the respondent has not been refused by the applicant till date. On the other hand, it is also argued that the application brought by the applicant is delayed and barred by limitation which cannot be entertained. Therefore, prayer has been made for rejecting the application.

4. Heard learned counsel for the parties and perused the documents.

5. There is existence of arbitration clause in the work order which is agreed between both the parties, which is as under:-

21. **FORCE MAJEURE / ARBITRATION**

a. xxxxxx xxxxxx xxxxxx

b. In case of any dispute however, you should accept resolution by arbitration under India Arbitration Act.

6. After considering the submissions made by both the parties, I am of this view that the parties have failed to agree in the matter of appointment of arbitrators. The arbitrator proposed by the applicant was not acceptable to the respondent and for the arbitrators proposed by the respondent, the applicant has chosen to make no reply. Silence of the applicant in this case cannot be considered as his acceptance, because in the matter of business contracts there has to be clear acceptance and clear denial. On this basis it can be regarded that there has been disagreement between the parties regarding the appointment of arbitrators proposed by each of them. Hence, the requirement under Section 11(5) of the Act, 1996 appears to have been fulfilled in this case

and thus the jurisdiction under Section 11(6) of the Act, 1996 can be invoked.

7. Considered on the nature of objection raised by the respondent that the application has been filed belatedly, which is barred by limitation. On this point, the counsel for the applicant has placed reliance on the judgment of Bombay High Court delivered in the matter of **Deepdharshan Builders Pvt. Ltd V. Saroj and others**, 2018 SCC OnLine Bom 4885, in which it was held that the proceeding under Section 11(6) of the Act, 1996 shall be governed by Article 137 of the Schedule to the Limitation Act, 1963 and for the similar reason in cases of delay Section 5 of the Limitation Act, 1963 also be made applicable. Firstly it has to be examined whether there is delay in this case or not.

8. In reply to the notice for invoking arbitration clause dated 22-08-2015 the respondent had made reply by letter dated 15-09-2015 making return proposal for appointment of a team of arbitrators, which has been found not acceptable to the applicant. Subsequent to that, the application was filed before this Court on 23-08-2018, that is still within three years from the date of reply of notice given by the respondent. The outer limit of limitation under Article 137 of Schedule of Limitation Act 1963 is three years, therefore, there is no reason to hold that the application filed by the applicant is barred by limitation.

9. Therefore, on the basis of discussions made hereinabove, this conclusion is arrived at, that it is 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 Dheerendra 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 Dheerendra 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.

10. The remuneration of the arbitrator shall be settled by the parties with mutual consent.

11. The petition is disposed off with the aforesaid directions.

Sd/-
(Rajendra Chandra Singh Samant)
Judge

Aadil