

HIGH COURT OF CHHATTISGARH, BILASPUR

Order reserved on: 17/05/2019

Order delivered on: 27/06/2019

ARBR No. 33 of 2018

- M/s I. A. Hydro Energy Private Limited (Formerly Known As I.A. Energy), A Company Duly Incorporated under the provisions of the Companies Act 2013 having its registered office at D-17, Sector- 1, Lane-1, New Shimla, Himachal Pradesh and administrative office at Village-Borjhara, Urla Guma Road, Urla Growth Centre, Raipur, Chhattisgarh, Through its authorized signatory Shri Manoj Kumar Puri.

---- Applicant

Versus

- M/s Ashwani Saini & Company Having its registered office At S-14, Avas Vikas, Roorkee, District- Haridwar, Uttarakhand, Through its Proprietor Shri Ashwani Saini.

---- Respondent

For Applicant	:	Mr. Ankit Singhal, Advocate.
For Respondent	:	Mr. Shivang Dubey, Advocate.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

CAV Order

27/06/2019

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 to arbitrate dispute between the parties.
2. Applicant is a company registered under relevant provisions of Companies Act, 1956. Respondent is a firm engaged in the business

of providing consultancy services. A consultancy agreement between the parties was executed on 20.10.2015. Terms and conditions were provided in the agreement. In compliance of terms of agreement, applicant company made payment of first installment of Rs.50 lakhs to the respondent on 29.10.2015. After such payment, the respondent was responsible to perform his part of obligation undertaken in impugned agreement, but respondent firm totally failed to perform its part despite reminders, e-mails etc. In this situation, applicant company was left with no option but to send notice dated 25.1.2017 to the respondent calling upon it to make refund of Rs.50 lakhs. On service of notice, respondent firm issued a cheque but the same was also dishonored by the bank. Thus, it is a case of dispute in which the respondent has totally failed to fulfill its obligation under the agreement and also failed to make repayments of amount advanced to them by appellant. Thereafter applicant invoked Clause-10 of agreement and proposed for appointment of Shri G.C. Bajpai, Retired District & Sessions Judge, Raipur as sole Arbitrator, for resolving dispute between the parties. The respondent firm vide letter dated 17.7.2017 expressed its disagreement in respect of appointment of Arbitrator named above. Thereafter, the applicant approached this Court by filing an application under Section 11 of the Act, 1996 which was dismissed by this Court on 23.2.2018 with such liberty to file the same before the High Court having jurisdiction in the matter. Thereafter applicant filed application under Section 11 of the Act, 1996 before Delhi High Court in which an order was passed on 4.10.2018 holding that High Court of Chhattisgarh has jurisdiction to deal with application and therefore this application has again been preferred before this Court with a prayer to appoint Arbitrator.

3. It is submitted by the counsel for respondent that the application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 is not maintainable. The applicant had vide order dated 16.6.2017 had alleged that respondent had forged signature on the cheque with an intention to commit fraud or cheat the applicant, therefore, it is an issue which can be decided by regular criminal Court only. The applicant has not approached this Court with clean hands as he had suppressed the fact that criminal complaint was filed against respondent praying for initiation of criminal action against him and therefore present application is frivolous & vexatious. It is submitted that Hon'ble Supreme Court has held in the judgment of **A. Ayyasamy vs A. Paramasivam & Ors.,** reported in **(2016) 10 SCC 386** that allegations of fraud and malpractices etc. are exclusively within the domain of Court and are not arbitrable, therefore, the present application is sheer abuse of process of law. It is submitted that bone of contention between the parties is only to this extent, that respondent had given cheque bearing No.159769 to the applicant towards payment which was dishonored by the bank on the ground that drawers signature has not matched. According to agreement, this matter was to be resolved mutually within 30 days, but without resorting to said clause the applicant filed criminal complaint against respondent. The respondent never denied issuance of cheque in favor of applicant but applicant instead of resolving dispute amicably has adopted arm twisting method and filed a criminal complaint.
4. Denying all the averments made by counsel for applicant, it is submitted that according to Clause-11 of agreement, it has been agreed between the parties that the Court at Delhi shall only have

jurisdiction to entertain any application or other proceedings in respect of anything arising out of this agreement, therefore, this Court has no jurisdiction to entertain this application and for this reason alone earlier arbitration application bearing No.58/2017 (Annexure-A/8) was dismissed by this Court. Hence, it is prayed that application be rejected.

5. Reliance has been placed on the judgment of this High Court in WP(C) No.312 of 2016 in Zuberi Engineering Company vs M/s M.P. Thar Products and another and judgment of Supreme Court in ARB.P. No.9/2017 reported in CVS Insurance & Investments vs Vipul IT Infrasoft Pvt. Ltd.
6. I have heard both the parties and perused the document on record.
7. Agreement entered between the parties contain arbitration clauses in which reads as under:-

“10. Dispute Resolution:-

In the event of any dispute arising between the Parties in any matter arising from or in connection to this Agreement and not being mutually resolved within 30 days, the dispute shall upon request of any Party to this Agreement be referred to an Arbitrator to be appointed by mutual consent. In the event of failure amongst the Parties to reach a consensus on the choice of the arbitrator, the Parties shall agree to appoint an arbitrator by following the procedure prescribed by the Arbitration and Conciliation Act, 1996 and Rules framed there under. The award of the Arbitrator shall be final, conclusive and binding on the Parties. The venue of Arbitration shall be Raipur and the language to be adopted for the purpose shall be English.

11. Governing Law & Jurisdiction:-

The terms of this Agreement shall be construed and interpreted in accordance with Indian Law. The Parties hereby agree that the courts of Delhi alone shall have jurisdiction to entertain any application or other proceeding in respect of anything

arising under this Agreement and any award or awards made by arbitrator appointed pursuant to Clause 10 above shall be filed in the concerned courts in Raipur only.”

8. Considered on the submissions made by both the parties. There is no dispute regarding the agreement between the parties, and the clause regarding resolution of dispute by arbitration proceedings. It is also not disputed that the applicant had a claim of Rs.50 lakhs upon the respondent and the respondent had in satisfaction of the same issued Cheque No.159769, in favor of applicant, which was dishonored by the bank. Pursuant to this event, no step has been taken by the respondent to make good loss of applicant, on the ground that the applicant had resorted to the criminal jurisdiction without making any effort for settlement in terms of arbitration clause.
9. On perusal of arbitration clause, it appears that the clause speaks that in case no mutual settlement takes place between the parties then one of the parties can resort to the arbitration procedure. From these clear wordings it is apparent that settlement is not a compulsion, but mutual if both the parties are agreed to deliberate and settle their dispute, which is not reflected in this case.
10. Following the arbitration clause, the applicant had taken step first by proposing for appointment of a retired District Judge as an arbitrator, to which the respondent has not agreed. This may be regarded as a failure of parties in appointing an arbitrator, as it is prescribed under Section 11 (5) of the Arbitration and Conciliation Act. Therefore, the applicant made a correct approach by filing an application for appointment of arbitrator before this Court which was registered as

Arbitration Application No.58/2017 and the same was dismissed as withdrawn on the request made by the counsel for applicant, reserving liberty to file application before jurisdictional High Court. Thus, earlier application filed before this Court has not been decided on merits and there is no finding regarding jurisdiction for filing application for appointment of an arbitrator in that order dated 23.2.2018.

11. Under the liberty granted to the applicant by this Court, he has filed an application before the High Court of Delhi which was registered as Arbitration Petition No.216/2018 (Annexure-A9) and this application was decided by High Court of Delhi on 4.10.2018, holding that it is only High Court of Chhattisgarh which will have territorial jurisdiction to entertain this application. Respondent has not challenged this order passed by Delhi High Court.

12. Considering the fact that this High Court has not decided petition on merits nor given any finding with respect to jurisdiction for entertainment of application under Section 11 (5) & (6) of the Act, 1996, I am of this view that the petition filed by the applicant before this Court is maintainable, for this reason and also for the reason that Clause No.11 of agreement is ambiguous and it does not bar jurisdiction of this Court to entertain application under Section 11 (5) & (6) of the Act, 1996.

13. For the foregoing discussions, the fact situation appears to be very clear that dispute between the parties still exists and the parties have failed to come to an agreement for appointment of sole Arbitrator for resolving of that dispute. As it has already been held above that there is no issue with respect to maintainability of this application before this

Court, therefore, present application deserves to be allowed.

14. On the basis of above discussions, this Court is of the opinion that that this is this fit case for exercise of powers under Section 11(5) &(6) of the Act, 1996. Therefore, by exercising power under Section 11(5) & (6) of the Act, 1996 and under the authority given by Hon'ble the Chief Justice, I hereby appoint Hon'ble Shri Justice G.Minhajuddin, Former Judge of this High Court, as Arbitrator to arbitrate the dispute between the parties. Registry is directed to communicate this order to Hon'ble Shri G. Minhajuddin, 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 limit prescribed under the Act, 1996, as amended.

15. The remuneration of the Arbitrator shall be mutually settled by the parties.

16. The petition stands disposed off with the aforesaid directions.

Sd/-
(Rajendra Chandra Singh Samant)
Judge

Nisha