

HIGH COURT OF CHHATTISGARH AT BILASPUR**ARBR No. 9 of 2021**

Varahi Associates Through Its Partner Subhash Singh, Having Its Head Office At C/o Shri Vinayak Petroleum (Kharsia Dharamjaigarh Main Road) At P. O. Chandrashekharapur (Edu), Tehsil Dharamjaigarh District Raigarh 496665, Chhattisgarh

---- Applicant

Versus

South Eastern Coalfields Limited Through The Chairman Cum Managing Director, SECL Bhavan, Seepat Road, Bilaspur 495555, Chhattisgarh

---- Non-applicant

For Applicant	:	Mr. Rishabh Garg, Advocate
For Non-applicant	:	Mr. Vaibhav Shukla, Advocate

Hon'ble Shri Justice P. Sam Koshy

Order on Board

03/09/2021

1. In the contractual disputes arising out of an agreement entered into between the two contracting parties in this application, the present application with a request to appoint an Arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 has been filed.
2. The brief relevant facts for the disposal of the present application is that the applicant is a partnership firm registered under the Indian Partnership Act and carries on the business of transportation, loading and unloading of goods, execution of mining activities raising agents and other related works.
3. The non-applicant is a subsidiary of Coal India Limited having its headquarters at Bilaspur Chhattisgarh and their coal mines spread between the two States i.e. State of Chhattisgarh and State of Madhya Pradesh.

4. The non-applicant (SECL) floated a tender on 10.02.2018 pertaining to the work of '*(A) Hiring of pay loader for mechanical loading of coal at coalface of eastern part of sector-D and (B) Hiring of tippers for transportation of coal from coal face of eastern part of sector-D to Mobile Crusher via proposed Weigh bridge at Dhanpuri OCM of Sohagpur Area. Quantity: 5.25 LT, TPD: 2500, Lead: (A) N.A. (B) 5.555 Km. Period: 210 Days*'. The estimated value of the work was Rs.3,02,61,000/- and amount of Rs.3,78,300/-.
5. The applicant herein being eligible for the same, participated in the tender proceedings and was found most eligible. Accordingly, the contract was awarded to the applicant and letter of intent (LOI) was issued. As per the tender condition, the applicant had to deposit, the earnest money deposit (EMD) of Rs.3,78,300/-. Soon thereafter the work could not commence on account of certain alleged difficulties and the problems which the applicant's were likely to face in the event of commencement of work. The applicant thereafter made many correspondences seeking an assurance from the respondents in respect of the nature of work awarded and also for the purpose of providing an area where there is sufficient coal in face, with given DPD. Thereafter continuous correspondences were made between either side and then finally the respondents issued the applicant with a final notice for commencing the work within the stipulated period, failing which the applicant shall be facing the consequences of forfeiture of the earnest money deposited and further debarring the applicant from further participating in the tender proceedings for a minimum period of 12 months.

6. Finally, on account of the alleged default on the part of the applicant in not concluding the assigned work within the stipulated period, the respondent authorities finally vide their order dated 29/30.12.2019 cancelled/terminated the contract awarded vide LOI as also the agreement entered into between the parties.
7. Further, the applicant was debarred from participating in any future tender under the respondents for a period of 24 months and further imposition of penalties as per the relevant provisions of the contract/agreement entered into between the parties. Further, as a consequence the respondents had also initiated recovery of the losses suffered in terms of the contract and had ordered for forfeiture of the EMD of Rs.3,78,300/-.
8. As per the agreement entered into between the parties, there was a mechanism provided for settlement of dispute. Clause 13 deals with settlement of dispute and Clause 13-A deals with settlement of dispute through arbitration.
9. The applicant being aggrieved by the order of blacklisting and also the action on the part of the respondent in forfeiting the EMD has been approaching the respondent for resolving the dispute both against the order of debarring them from business for two years and also against the forfeiture of the EMD. However, the respondent did not accept the request of the applicant which has led to the filing of the present application under Section 11(6).
10. The respondent opposing the application have filed their reply and in the reply they have taken a stand that since the agreement entered into between the parties has an agreed mechanism for resolving the dispute,

the applicant should first avail the said mechanism and then should resolve the remedy of arbitration.

11. Having heard the parties and on perusal of the pleadings what clearly requires consideration is the response to the request of the applicant for appointment of an arbitrator. Before proceeding further it would be relevant at this juncture to take note of the Clause 13 & 13-A dealing with settlement of the dispute and settlement of disputes through arbitration.

“13. SETTLEMENT OF DISPUTE:

It is incumbent upon the contractor to avoid litigation and disputes during the course of execution. However, if such disputes take place between the contractor and the department, effort shall be made first to settle the disputes at the company level.

The contractor should make request in writing to the Engineer-in-Chief for settlement of such disputes/claims within 30 (thirty) days of arising of the cause of dispute/claim failing which no disputes/claims of the contractor shall be entertained by the company.

Effort shall be made to resolve the dispute in two stages.

In first stage dispute shall be referred to Area CGM, GM. If difference still persists the dispute shall be referred to a committee constituted by the Owner. The committee shall have one member of the rank of Director of the company who shall be chairman of the committee.

If differences still persist, the settlement of the dispute shall be resolve in the following manner:

Disputes relating to the commercial contracts with Central Public Sector Enterprises/Govt. Departments (except Railways, Income Tax, Customs & excise duties)/State Public Sector Enterprises shall be referred by either party for Arbitration to the PMA (Permanent Machinery of Arbitration in the department of Public Enterprises.

In case of parties other than Govt. Agencies, the redressal of the dispute may be sought through Arbitration (THE ARBITRATION AND CONCILIATORY ACT, 1996 as amended by AMENDMENT ACT of 2015).

13A. SETTLEMENT OF DISPUTES THROUGH ARBITRATION:

If the parties fail to resolve the disputes/differences by in house mechanism, then, depending on the position of the case, either the employer/owner or the contractor shall give notice to other party to refer the matter to arbitration instead of directly approaching Court. The contractor shall, however, be entitled to invoke arbitration clause only after exhausting the remedy available under the clause 13.

In case of parties other than Govt. agencies the redressal of disputes /differences shall be sought through Sole Arbitration as under.

Sole Arbitration:

In the event of any question, dispute or difference arising under these terms & conditions or any condition contained in this contract or

interpretation of the term of, or in connection with this Contract (except as to any matter the decision of which is specially provided for by these conditions), the same shall be referred to the sole arbitration of a person, appointed to be the arbitrator by the Competent Authority of CIL/CMD of Subsidiary Company (as the case may be). The award of the arbitrator shall be final and binding on the parties of this Contract.

(a) In the event of the Arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, or his/her award being set aside by the Court for any reason by the Court for any reason, it shall be lawful for the Competent Authority of CIL/CMD of Subsidiary Company (as the case may be) to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.

(b) It is further a term of this contract that no person other than the person appointed by the Competent Authority of CIL/CMD of Subsidiary Company (as the case may be) as aforesaid should act as arbitrator and that, if for any reason that is not possible, the matter is not to be referred to Arbitration at all.

Subject as aforesaid, Arbitration and Conciliation Act, 1996 as amended by Amendment Act of 2015 and the rules thereunder and any statutory modification thereof for the time being in force shall be deemed to apply to the Arbitration proceedings under this clause.

The venue of arbitration shall be the place from which the contract is issued.

Applicable Law: The contracts shall be interpreted in accordance with the laws of the Union of India.

Contracts with Partnership firm/Joint Venture/Consortium.

The Partnership firm/Joint Venture/Consortium is required to submit written consent of all the partners to above arbitration clause at the time of submission of bid.”

12. Document Annexure P/9 dated 28.12.2020 would show that the applicant had approached the authorities for invoking the provisions of Clause 13 for the settlement of dispute. In response to the same the General Manager of that area vide Annexure P/10 dated 06.01.2021 refused to entertain the request of the applicant. The respondents took a stand that Clause 13 of the general terms and conditions would be applicable only upon a party where the contract was in existence i.e. whose contract is not terminated and since the contract between the parties already stood terminated, thereafter Clause 13 cannot be invoked.
13. As per the provisions of Section 11(6) of the Arbitration and Conciliation Act, 1996 after coming into force of the amendment made to the Act in the

year 2015, the task of appointing an arbitrator stood entrusted to the High Court in the event where the parties failed to resort to the mechanism provided under the agreement between the contracting parties. In the instant case, the correspondence of the respondent-company dated 06.01.2021 amounts to a categorical refusal to resort to the mechanism in terms of the contract. In the light of there being a categorical denial or refusal by the respondent, the only recourse thereafter left is to invoke the arbitration clause.

14. Though in terms of the contract and Clause 13-A of the agreement, the power of appointment of an arbitrator vest with the competent authority of Coal India Limited or CMD of the subsidiary company as the case may be, but in the light of the judgment of the Hon'ble Supreme Court in the case of **"Perkins Eastman Architects DPC & Another v/s. HSCC (India) Ltd.** reported in **2019 SCC Online 1517**", the Hon'ble Supreme Court has categorically held that the power of unilateral appointment of sole arbitrator is invalid for the reason that there is a possibility of bias where the sole arbitrator appointed may act in a manner to safeguard the interest of the appointing party and in the process the neutrality of the proceedings gets violated or is lost.
15. Thus, in the aforesaid factual backdrop and the legal position as it stands, this Court is of the opinion that the present is a matter which requires to be referred to the arbitrator for resolving the dispute between the parties, both in connection of the blacklisting of the applicant-company as also in respect of the forfeiture of the EMD. Further, in the light of the Hon'ble Supreme Court in the case of **"Perkins Eastman Architects DPC"** (supra), the arbitrator in the given circumstances needs to be appointed

by this Court. In view of the agreed conditions of the contract both the parties have accepted the proposal of the name of Hon'ble Mr. Justice Dhirendra Mishra, former Judge of this High Court to act as an Arbitrator for resolving the dispute between the parties.

16. In view of the joint proposal made by the parties in exercise of the powers conferred under Section 11(6) of the Act of 1996 under the authority given by Hon'ble the Chief Justice, I hereby appoint Hon'ble Mr. Justice Dhirendra Mishra, former Judge to act as an Arbitrator and arbitrate the dispute between the parties in accordance with the provisions of Arbitration and Conciliation Act, 1996.
17. The Registry is directed to communicate this order to Hon'ble Mr. Justice Dhirendra Mishra, former Judge to enter upon reference after complying with the provisions contained under Section 12(2) of the Arbitration and Conciliation Act, 1996 and to adjudicate upon the dispute as expeditiously as possible in accordance with the Act of 1996.
18. The remuneration of the Arbitrator shall be settled with the mutual consent by the parties.
19. The arbitration application accordingly stands allowed to the extent indicated herein above.
20. No order as to costs.

Sd/-
(P. Sam Koshy)
Judge