

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR**ARBR No. 15 of 2018**

Cube Engitech Consultant Pvt. Ltd. Through Its Director Amit Kr Sinha
Jeevan Lok Complex, Hinoo, Main Road, Ranchi, Jharkhand

---- Applicant**Versus**

- Public Works Department Through Its Engineer In Chief, Bridge Zone,
Sirpur Bhawan Campus, Raipur, Chhattisgarh

---- Respondents

For Applicant	:	Mr. Mukesh Sharma, Advocate
For Respondent	:	Mr. Jitendra Pali, Dy. Advocate General

Hon'ble Shri Justice P. Sam Koshy**Order on Board****13/08/2021**

1. Present is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred as "the Act of 1996") seeking for appointment of an Arbitrator for redressal of the grievances between applicant and respondent.
2. The brief facts, relevant for disposal of the present application, are that the applicant is a Company registered under the Companies Act, 1956 engaged in providing consultancy services inter alia in Traffic Survey, Techno Economic Feasibility study, preparation of scheme, preparation of general arrangement drawing for structure, utility identification, soil investigation, all good for construction drawings, preparation of Bill of Quantity (BOQ) and other related disciplines.
3. The respondent State in the instant case had floated a NIT for appointment of a Consultant for the purpose of providing Techno-Economic Feasibility Study, Geometric Design, Structural Design, Issue of Good for Construction Drawings Preparation. The applicant herein

having participated in the said tender proceeding was found to be the most eligible and an agreement as such was entered into between applicant and respondent.

4. From bare perusal of the agreement and the nature of tender floated, it would clearly reflect that the service which was provided to the applicant was a consultancy service. The agreement entered into between the parties, Clause-9 envisages settlement of disputes by resorting to arbitration under the provisions of the Act of 1996 and procedures were clearly laid down which were to be availed while and before, invoking the arbitration clause.
5. The contention of applicant is that on account of certain dispute in respect of non-releasing of the bills raised by applicant, they had approached the respondent authorities for resolving the dispute by way of arbitration as agreed upon between the parties by way of an agreement. It is contended that the respondent authorities did not respond to the representations and the reminders put forth by the applicant. This non-response by the respondent led to the filing of the present application under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator.
6. As regards entering into the contract between the parties, the agreement between the parties and in the agreement there being an arbitration clause are not in dispute. It is also not in dispute that the nature of work assigned to the applicant by the respondent was exclusively that of consultancy.
7. Learned Dy. Advocate General however referring to the reply and to the stand taken by the respondent, submits that whatever work was assigned to the applicant herein was in respect of construction of a pathway within

the city of Raipur. Therefore, the nature of contract entered into between the parties is one which could fall within the ambit of “works-contract” defined under Section 2 (1)(i) Chhattisgarh Madhyastatha Adhikaran Adhiniyam, 1983 (hereinafter referred as “Adhiniyam, 1983”) and therefore the present application under Section 11(6) of the Act of 1996 would not be maintainable and the recourse available to applicant herein would be according to the provisions of Adhiniyam 1983, where the matter has to be raised before the Tribunal established under the said Act of 1983.

8. Learned Dy. Advocate General referred to Section 2 (1)(i) defining “Works-Contract” and tried to emphasize the fact that since the nature of work assigned to the applicant was relating to the construction of pathway, it would come within the definition of a Work Contract. Learned State counsel also referred to a full Bench judgment of the Madhya Pradesh High Court in AIR 2017 MP 103 in support of his contention.
9. Learned counsel appearing for applicant, on the contrary, submits that the applicant herein has got nothing to do with the execution of work of construction of path way. The said execution of work was to be carried out by a different agency altogether by a separate contract and agreement being executed for the same. So far as the applicant company is concerned, the applicant was only to provide consultancy services and also the feasibility report which includes Geometric Design, Structural Design and apart from the consultancy, the applicant company was not in any manner associated with the execution of work. Thus, the said contract and agreement entered into between the parties would be get excluded from the ambit of Works Contract and the only remedy and recourse available would be in terms of the agreement i.e. resorting to the provisions of the Act of 1996. Learned counsel for applicant referred to a

recent decision of this High Court in the case of SMEC International Private Ltd. Vs. State of Chhattisgarh, ARBR No.23/2018 decided on 13.05.2019 and the order of this Court has subsequently been affirmed by the Supreme Court in Special Leave to Appeal (C) No. 21120/2019 decided on 11.09.2019.

10. For proper understanding of the dispute it would also be relevant at this juncture to appreciate the fact that by the term “Consultancy” normally it is understood as “giving an expert advice in respect of a particular subject matter or a work”. “Consultancy” does not mean undertaking a work or a job for execution or completion of a project. The basic nature of a consultant is to provide expert opinion in the form of reports, presentations etc. which may be acceptable to the party who has sought consultancy or may not be acceptable. If it is acceptable to the party who has obtained consultancy they may get the work done by way of a fresh contract and agreement.

11. At the same time, as regards “works contract”, it is a contract entered into between the parties for execution of a particular work and in the instant case what needs consideration is the definition of “Works Contract” as provided under the aforementioned Adhiniyam, 1983 which for ready reference is reproduced hereinunder:

“works-contract” means an agreement in writing for the execution of any work relating to construction, repair or maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, work-shop, powerhouse, transformers or such other works of the State Government or Public Undertaking as the State Government may, by notification, specify in this behalf at any of its stages, entered into by the State Government or by an official of the State Government

or Public Undertaking or its official for and on behalf of such Public Undertaking and includes an agreement for the supply of goods or material and all other matters relating to the execution of any of the said works.”

12. A plain perusal of the definition of “Works Contract” would clearly give an indication that within the provisions of the Adhiniyam, 1983, the Works Contract would be a contract entered into between the parties for execution of a work relating to firstly construction, secondly repairing and thirdly maintenance of any of the items and nature of work specifically mentioned in the aforesaid definition. While the term “execution” means to carry out a work order for the course of action, the nature of work assigned to the applicant herein was not for carrying out a plan rather it is providing of a plan.

13. Keeping in view the aforesaid facts and circumstances and the definition under the Adhiniyam, 1983 it would be apt at this juncture to refer to the order passed by this Court in ARBR No.23/2018 where in paragraphs 13 it has been held as under:

“After due consideration on over all facts and circumstances of case and documents present on record, I am of this view that nature of the contract between the applicant and the respondent is not a contract as defined under Section 2 (I) of Adhiniyam, 1983 and as such, it is not a work contract rather it is a service contract. Hence, on the basis of this finding, it is held that this dispute shall not be governed by the provisions of Adhiniyam, 1983, hence, the application brought before this Court has merits and, further, this Court has jurisdiction and power to invoke section 11(6) of Arbitration and Conciliation Act, 1996.”

- 14.** The aforesaid view of the Court has also received a stamp of approval from the Hon'ble Supreme Court in Special Leave to Appeal (C) No. 21120/2019 decided on 11.09.2019
- 15.** In view of the aforesaid legal position, the objection raised by the State as regards the application being not maintainable is not acceptable and the same deserves to be negated.
- 16.** Given the aforesaid legal position as it stands, this court is of the opinion that considering the nature of dispute and the stand of the respondent and also considering the arbitration clause, this Court is of the opinion that it is a fit case where the dispute needs to be referred to an Arbitrator.
- 17.** Learned counsel appearing on either side proposed the name of Justice Mr. Dhirendra Mishra, Retired Judge from the High Court of Chhattisgarh as an Arbitrator.
- 18.** In view of the joint proposal made by the parties, in exercise of the powers conferred under Section 11(6) of the Act, 1996 under the authorities given by Hon'ble the Chief Justice, I hereby appoint Hon'ble Justice Mr. Dhirendra Mishra, retired Judge from the High Court of Chhattisgarh to act as an Arbitrator and arbitrate the dispute between the parties in accordance with the provisions of the Act of 1996.
- 19.** The Registry is directed to communicate this order to Hon'ble Justice Mr. Dhirendra Mishra to enter upon reference after complying with the provisions contained under Section 12(2) of the Act, 1996 and to adjudicate upon the dispute as expeditiously as possible in accordance with the Act of 1996.
- 20.** The remuneration of the Arbitrator shall be settled with the mutual consent of the parties.

- 21.** The ARBR accordingly stands allowed to the extent indicated here in above. No order as to costs.

**Sd/-
(P. Sam Koshy)
Judge**

Khatai