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HIGH COURT OF CHHATTISGARH, BILASPURARBR No. 12 of 2019

IRCON Infrastructure & Services Ltd. C-4, District Center, Saket New Delhi – 110017 Email: info@irconisl.com Through Rana Pratap Singh CEO (Chief Executive Officer) S/o Shri Cahdrama Singh, Aged about 57 years, R/o 904, SUN BREEZE, Tower-3, Sector-4, Vaishali, I.E. Sahibabad, Ghaziabad-201010 (UP)

---- Petitioner

Versus

South Eastern Coalfields Ltd. Regd. Office Seepat Road Sarkanda, Bilaspur, Chhattisgarh - 495006

---- Respondent

(Cause-title taken from Case Information System)

For Petitioner	:	Mr. Anshuman Shrivastava, Advocate.
For Respondents	:	Mr. Atul Kumar Kesharwani, Advocate.
Date of hearing	:	29.10.2021
Date of Judgment	:	10.12.2021

Hon'ble Shri Arup Kumar Goswami, Chief JusticeCAV Order

By this application under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (for short, 'Act of 1996'), the petitioner prays for appointment of an Arbitrator.

2. Heard Mr. Anshuman Shrivastava, learned counsel for the petitioner as well as Mr. Atul Kumar Kesharwani, learned counsel appearing for the respondent.

3. The petitioner Company, M/s Ircon Infrastructure and Services Limited, is a wholly owned subsidiary of Ircon International Limited, a Government of India

undertaking.

4. The respondent, which is a company, registered under the Companies Act, 1956, is one of the eight fully owned subsidiaries of Coal India Limited.
5. The petitioner undertakes infrastructure construction work on Build Operate Transfer (BOT), Build Own Operate Transfer (BOOT) and Build Lease Transfer (BLT) etc. or otherwise or any other schemes or projects found suitable in and related to the field of infrastructural projects and other ancillary fields. It is also engaged in planning, designing, development, improvement, commissioning, operation, maintenance, etc. in the field of construction of infrastructure of Multi Functional Complexes (MFCs), providing facilities and amenities to users of Indian Railway System and all matters in the field of real estate and allied areas.
6. The respondent was desirous to construct toilet blocks in various schools across the country under the “Swachh Vidyalaya Abhiyan” towards its Corporate Social Responsibility (CSR) initiative and the petitioner consented to execute about 12000 number of toilets in 7000 number of schools identified by the respondent as per the implementation mechanism and terms and conditions set out in the Memorandum of Undertaking (MoU) executed on 28.02.2015.
7. The case of the petitioner is that it was to engage agencies for construction of toilet blocks by inviting open tenders and the work was executed by the selected agencies as per specification and conditions of contract. It is the case of the petitioner that completed toilets were handed over to the school authorities in July, 2015 and by letter dated 19.01.2016, petitioner submitted the original handing over certificates and photographs for payment as requested by the respondent and also requested for release of payment immediately to start the water arrangement work and to fulfill other financial liabilities of the project. By another letter dated 25.01.2016, the petitioner requested the respondent to release the payment as per Clause 5.7.
8. It is pleaded that defects pointed out by the respondent had also been rectified in terms of the agreement. By letter dated 22.03.2017, the respondent intimated that it

had withheld the PMC (Project Management Contract) amount of Rs. 1,88,00,998.72 on account of non-compliance of terms of MoU to which an objection was raised by the petitioner by letter dated 03.04.2017. The petitioner asserted that the balance amount due by the respondent to the petitioner is Rs. 2,06,42,912/- after appropriating an amount of Rs. 1,74,70,449/- towards PMC of the petitioner and accordingly, called upon the respondent to release payment of Rs. 2,06,42,912/-. As there was no favourable response, the petitioner by letter dated 15.03.2018 demanded payment of balance amount of Rs. 15,34,180,36/- and requested for release of the aforesaid payment within a period 30 days failing which it was indicated that the said notice be treated as notice invoking the arbitration clause. It was indicated in the said letter that though steps taken by the petitioner to resolve the matter amicably had failed, yet the petitioner was open for an amicable settlement.

9. By letter dated 20.07.2018, the respondent informed the petitioner that there is no dispute between them and therefore, the question of appointment of arbitrator does not arise and that the respondent was still desirous of an amicable solution for maintaining long and harmonious business relations between them. By the said letter, the respondent requested the petitioner to provide documents as asked for vide letters at reference nos. iii, iv and v of the said letter.

10. The petitioner wrote a letter dated 08.05.2018 to the General Manager of respondent No. 3 stating that as the claims of the petitioner were denied by the respondent, dispute had arisen in between them and requested for agreeing on any independent and impartial Sole Arbitrator as, after the amendment of Act of 1996, the respondent cannot appoint its officer as an Arbitrator; failing which it was indicated that the petitioner would take appropriate legal recourse.

11. The respondent filed a return taking a preliminary objection that the dispute raised by the petitioner cannot be referred to an Arbitrator as the respondent was only asking for certain documents for finalizing the contract which the petitioner is not furnishing. It is also stated that the petitioner had not approached the authority referred

to in Clause 14 of the MoU in order to settle the issue and therefore, instant application is premature and is liable to be dismissed.

12. It was asserted that the petitioner was required to complete the work as per the approved estimate, but it could not complete the work due to its poor supervision, which was also admitted by the representative of the petitioner in a meeting held on 27.09.2017. It is also stated that toilets were continued to be handed over by the petitioner till January, 2016, thereby disputing the assertion of the petitioner that it had handed over the toilets in July, 2015.

13. The respondent disputed submission of photographs as claimed by the petitioner and also the claim of rectification made by the petitioner. It is stated that while the respondent is under an obligation to pay legitimate claim of the petitioner, the petitioner is also under an obligation to perform the work assigned to it and since the petitioner was not making available certain documents as indicated in paragraph 27(ii), necessary direction is required to be issued to the petitioner to furnish the said documents for finalization of the contract.

14. Mr. Shrivastava submits that the MoU at Clause 14 visualizes settlement of disputes through arbitration by any executive of the rank of General Manager and above appointed by the Director (Personnel) of the respondent and in view of insertion of Section 12(5) in the Act of 1996 by way of amendment, an employee of the respondent is ineligible to be appointed as an Arbitrator. Therefore, the petitioner had requested the respondent to appoint an Arbitrator and as the same was declined, this Court may appoint an Arbitrator for resolving the disputes between the parties. It is submitted that the petitioner had tried to amicably settle the disputes between the parties, but as no amicable settlement could be arrived at, disputes are to be resolved through the Arbitration, he contends.

15. *Per contra*, Mr. Atul Kumar Kesharwani, learned counsel for the respondent submits that it is only because of the fact that the petitioner is not furnishing certain documents that payment could not be made to the petitioner. It is the petitioner, who is

responsible for the present state of affairs, and therefore, it cannot be said that there is any dispute between the parties. Accordingly, he submits that the application is liable to be dismissed.

16. I have considered the submissions made by the learned counsel for the parties and perused the materials on record.

17. At the outset, it would be relevant to refer the Clause 14 of the MoU, which reads as follows:

“14.0 Settlement of Disputes

14.1 Parties shall amicably resolve any dispute arising from this Understanding. Should the Parties be unable to reach agreement on the meaning and interpretation of any of the clauses set out hereto or any other matters arising out of the Understanding, the matter in dispute shall be referred to any Executive of the rank of General Manager and above appointed by Director (Personnel) of SECL, whose decision will be final and binding on the parties and the arbitration shall be conducted in accordance with India Arbitration and Conciliation Act, 1996. The venue of arbitration shall be Bilaspur, Chhattigarh. If the dispute (s) still remains unresolved, the matter will referred to the Permanent Machinery of Arbitrators as per OM No.14(1)/2001 – DPE (PMA) – GL dated 12.6.2013, issued by Govt. of India, read with OM No. 7(3) 2014 – DPE (PMA) dt. 14.7.2014.

14.2 All disputes arising between the parties shall be subjected to the jurisdiction of the Courts in Bilaspur only.”

18. The letter dated 15.03.2018, annexed as Annexure P/11 of the application by

which claim of Rs. 15,34,180,36/- was raised is not signed. However, receipt of an identical letter dated 19.03.2018 is annexed as Annexure R/19 in the return of the respondent.

19. Materials on record demonstrate that while the petitioner is asserting that it had undertaken its contractual obligation as envisaged under the MoU, it is the contention of the respondent that the petitioner had failed in construction, supervision, monitoring work and in fulfilling MoU conditions. The petitioner claimed payment of Rs.15,34,180,36/- by letter dated 19.03.2018 and the said amount having not been paid by the respondent, evidently disputes had arisen between the parties regarding making of such payment.

20. Perusal of Clause 14 of the MoU goes to show that at the first instance, the matter in dispute is to be referred to any Executive of the rank of General Manager and above appointed by Director (Personnel) of the respondent. It is in that context, it will be relevant to take note of Section 12 (5) of the Act of 1996, which was inserted by way of amendment w.e.f. 23.10.2015. The same reads as follows:

“12. Grounds for challenge. -

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(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

21. The Seventh Schedule lists the categories of persons, who are ineligible to be appointed as an arbitrator. Amongst others, it is laid down that an employee, consultant, advisor or any one who has any past or present business relationship with a

party, is ineligible to be appointed as an arbitrator. Therefore, when Clause 14 of the MoU envisages appointment of an employee of the respondent to be an arbitrator, such a person will be ineligible to act as an arbitrator in the matter of dispute in which the employer is involved.

22. In the facts and circumstances of the case, I am of the considered opinion that a case is made out for appointment of an Arbitrator by this Court.

23. Resultantly, the arbitration application is allowed. Hon'ble Mr. Justice Satish K. Agnihotri, retired Chief Justice of the High Court Sikkim is appointed to act as the Sole Arbitrator between the parties. The Registry is directed to communicate this order to Hon'ble Mr. Justice Satish K. Agnihotri in His Lordship's proper address. The remuneration of the Arbitrator shall be settled with the mutual consent of the parties.

Sd/-
(Arup Kumar Goswami)
Chief Justice