

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR**ARBR No. 19 of 2019**

M/s Brijesh Agrawal Sharda Sadan, Vinoba Nagar, Behind Gayatri Mandir, Talapara Road, Bilaspur Chhattisgarh. Through Its Power Of Attorney Holder Shri Shailesh Agrawal, S/o Shri Madan Lal Agrawal, Aged About 48 Years.

---- Applicant**Versus**

1. South East Central Railway (SECR) Through Its General Manager, GM/SECRS Officer Complex, Bilaspur Chhattisgarh.
2. General Manager (Arbitration) South East Central Railway, Gm Annex Building, 5th Floor, Bilaspur Chhattisgarh.
3. Divisional Railway Manager (Engg.) Bilaspur Division, South East Central Railway, Bilaspur Chhattisgarh.
4. Sr. Divisional Engineer (Co-ordination) Titli Chowk, Railway Settlement Area, Bilaspur Chhattisgarh.
5. Sr. Divisional Engineer (East) Office Of Sr. Divisional Engineer (Co-ordination) Titli Chowk, Railway Settlement Area, Bilaspur Chhattisgarh.

---- Respondent

For Applicant	:	Mr. Harsh Wardhan, Advocate
For Respondents	:	Mr. H.S. Ahluwalia, Advocate

Hon'ble Shri Justice P. Sam Koshy**Order on Board****24/09/2021**

1. The present is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator for resolving the dispute between the applicant and the respondents.
2. The applicant is a Proprietorship firm engaged in the business of undertaking construction contracts specially bridges etc. The respondents had issued a notice inviting tender for the work of "Construction of RUB (Limited Height Subway) for Level Crossing No. 286 (Km. 579/27-580/1) 294 (Km. 595/19-21) & 295 (Km. 596/21-23) By Box Pushing Method

Under the jurisdiction of Sr. DEN/East/Bilaspur". Since the applicant was the successful bidder, agreement dated 11.11.2011 was executed between the parties. The total value of the project was Rs.3,32,97,924/- (Three Crore Thirty Two Lakh Ninety Seven Thousand Nine Hundred Twenty Four).

3. That, under the General Conditions of Contract, clause 64 provides for settlements of disputes by way of arbitration. This condition was also incorporated in the contract executed between the parties in the instant case. The contention of the applicant is that inspite of all odds the applicant had executed the entire work and had thereafter requested the respondents to release the payments for the work executed. The respondents initially released an amount of Rs.3,17,44,647/-. However, a final bill and other dues of an amount of Rs.1,61,53,800/- was pending. Since the outstanding amount was not cleared, the applicant preferred a writ petition before the High Court vide WPC No. 288/2018. The said writ petition was finally disposed of on the contention of the respondents stating that the applicant has been asked to appear and complete the formality for processing the bills and on the said note the said writ petition was disposed of reserving the right of the applicant to avail the remedy of arbitration, in case the dispute still survives.
4. Since the dispute could not be resolved, the applicant again moved an application for appointment of an Arbitrator, so as to resolve the dispute in respect of non-settlement of his dues. When there was no proper response from the respondents side, the applicant was compelled to file the instant application under Section 11(6) of the Arbitration and Conciliation Act, 1996. Notices were issued to the respondents and they

have entered appearance and have filed their reply. The respondents have opposed the request application on the ground that the agreement provides for a mechanism of settlement of dispute and that the claim of settlement of dispute had to be raised within the specified period and since the applicant in the instant case has not raised his claim within the said period, the claim of the applicant was liable to be rejected as time barred claim. It was also contended by the counsel for the respondents that even though the claim was time barred, yet however the respondents vide letter dated 06.05.2019 had accepted the request for settlement of dispute by arbitration and proposed the name of 4 Arbitrators and had sought for the consent and option among the four from the applicant and which has not been responded to by the applicant. Therefore the application under Section 11(6) should not be entertained and thus prayed for rejection of the present Arbitration Application under Section 11(6).

5. Having heard the contentions put forth on either side and on perusal of record, some of the admitted factual position as it stands was the floating of an NIT for the work of "Construction of RUB (Limited Height Subway) for Level Crossing No. 286 (Km. 579/27-580/1) 294 (Km. 595/19-21) & 295 (Km. 596/21-23) By Box Pushing Method Under the jurisdiction of Sr. DEN/East/Bilaspur". The contract value was Rs.3,32,97,924/- (Three Crore Thirty Two Lakh Ninety Seven Thousand Nine Hundred Twenty Four).
6. According to the applicant, he has completed the execution of the work on the 28.02.2014 and had been requesting the respondents for releasing the payments due to the applicant against the work executed. The other

admitted factual position as it stands is that the Railway Department had released an amount of Rs.3,17,44,647/-.

7. The applicant for the first time had made a request for settlement of dispute by arbitration vide letter dated 20.12.2018. In terms of the agreement entered into between the parties, the respondents ought to have responded to the said request by sending a panel of four officers, one of whom to be appointed as an Arbitrator at the choice of the applicant. The respondents ought to have given a reply within a period of 60 days from the date the demand for arbitration is made. In the instant case the respondents have for the first time responded to the request made by the applicant only vide their letter dated 06.05.2019 suggesting 4 names of which two officers were to be opted by the applicant to be appointed as an Arbitrator.
8. Given the fact that the applicant has already approached this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996, particularly in the backdrop where on the notice to appoint Arbitrator submitted by the applicant dated 20.12.2018 being responded by the respondents after more than six months and meanwhile the present application being already filed the applicant cannot now be forced to avail the option floated by the respondents while their letter dated 06.05.2019. Learned counsel for the applicant referring to the judgment of the Hon'ble Supreme Court in the case of **“Perkins Eastman Architects DPC & Another v. HSCC (India) Limited” 2019 SCC Online SC 1517** has made a statement that since the proposal sent by the respondents was beyond a period of 60 days and that considerable period of time has also lapsed, in between the applicant prefers an Arbitrator to be appointed by the High Court rather

than exercising his option from among the panel floated by the respondents.

9. Having heard the contentions put forth on either side and on perusal of the pleadings and more particularly keeping in view the principles and ratio laid down by the Hon'ble Supreme Court in the judgment of "**Perkins Eastman**" (supra), this Court is of the firm view that it would not be proper and justified at this juncture to allow the applicant to act upon the letter dated 20.12.2018, rather ends of justice would meet if the dispute is referred to a Sole Arbitrator appointed by this Court.
10. As regards the objection that the application is barred by limitation or the claim raised by the applicant is barred by limitation, this Court is of the view that once when the respondents themselves have decided to settle the dispute by way of arbitration and have recommended the names of 4 Arbitrators from whom the applicant had to choose vide their correspondence dated 06.05.2019, the respondents cannot now be permitted to raise the ground of limitation in this application under Section 11 (6). Even otherwise, the aspect of limitation or the claim being a stale claim, one which cannot be entertained beyond the prescribed period provided under the agreement are all mater of evidence and which can still be looked into by the Arbitrator. Thus, the ground of limitation which has been raised by the respondents herein is left open to be considered and decided by the Arbitrator, if at all the respondents take the plea of delay laches before the Arbitrator.
11. This Court therefore is of the opinion that it is a fit case where the matter has to be referred to an Arbitrator to be appointed by this Court for adjudicating upon the dispute between the parties. The counsel

appearing on either side reached to a consensus for appointment of Hon'ble Mr. Justice Dhirendra Mishra (Retd.) Former Judge of this High Court to be appointed as a sole arbitrator for adjudicating upon the dispute between the parties.

12. 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 (Retd.) to act as an Arbitrator and arbitrate the dispute between the parties in accordance with the provisions of Arbitration and Conciliation Act, 1996.
13. The Registry is directed to communicate this order to Hon'ble Mr. Justice Dhirendra Mishra (Retd.) 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.
14. The remuneration of the Arbitrator shall be settled with the mutual consent by the parties.
15. The arbitration application accordingly stands allowed to the extent indicated herein above.
16. No order as to costs.

Sd/-
(P. Sam Koshy)
Judge