

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Arbitration Case No.22 of 2015 (O&M)
DATE OF DECISION: 03.07.2015

M/s Seighteen Electricals Pvt. Ltd.

....Applicants

versus

M/s PACL Ltd.

.....Respondents

CORAM:- HON'BLE MR.JUSTICE S.J. VAZIFDAR, ACTING CHIEF JUSTICE

Present: Mr. Deepak Jain, Advocate for
Mr. Rajesh Kumar, Advocate for the applicants
Mr. Anuj Kohli, Advocate for the respondents
..

S.J. VAZIFDAR, ACTING CHIEF JUSTICE (Oral):

This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996, seeking appointment of an arbitrator.

2. A compilation of documents was sought to be filed by the applicants. The office, however, raised certain objections in respect thereof. The compilation was tendered in Court. The respondents agreed to proceed on the basis thereof.

The office to take the compilation on record.

3. The parties had entered into an agreement. Clause-36 of the agreement, which contains an arbitration clause, reads as under:-

""Clause - 36

ARBITRATION:

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in-before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim,

right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

- (i) If the contractor considers an work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Engineer-in-Charge in writing for written instruction or decision. Thereupon the Engineer-in-Charge shall give his written instructions or decisions within a period of one month from the receipt of the contractor's letter.

If the Engineer-in-Charge fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Engineer-in-Charge, the contractor may, within 15 days of the receipt of the Engineer-in-Charge decision, appeal to the Director who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Director shall give his Decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with his decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to Director -PACL LIMITED for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

- (ii) Except where the decision has become final, binding and conclusive in terms of Sub para (i) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Director-PACL LIMITED. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Director-PACL LIMITED of the appeal.

It is also a term of this contract that no person, other than a person appointed by Director-PACL LIMITED, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make an demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the PACL LIMITED shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award again each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/- the arbitrator shall give reasons for the award.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be paid."

Under clause-36, if the contractor disputed any decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work to be unacceptable, he was to request the Engineer-in-Charge in writing for written instruction or decision. Disputes and differences having arisen between the parties, the applicants made such a request to the Engineer-in-Charge, who, by his decision, agreed with some of the grievances raised by the applicants, but not with the other. In the circumstances, the applicants, in accordance with clause-36, made an appeal to the Director by a letter dated 06.11.2013. The letter does not expressly use the word "appeal". However, for all practical purposes, it is an appeal to the Director. There is no reply or response thereto.

4. In the circumstances, the applicants were entitled to have the disputes and differences referred to a sole arbitrator appointed by the Director, M/s PACL Ltd., i.e., respondents. Under the arbitration clause, the respondents are entitled to appoint the sole arbitrator. There is no question of the Court appointing an arbitrator on the ground that the respondents have forfeited their right to appoint an arbitrator. If that was so, this application would have to be dismissed on the clear language of clause-36 which mandates that if for any reason it is not possible that a person appointed by the respondents is to act as an arbitrator, the matter shall not be referred to arbitration at all. In any event, I see no reason to deviate from the clause. There is nothing to indicate any *mala fide* or bias on the part of the respondents' Director.

5. In the circumstances, the application is disposed of by directing the respondents to appoint a sole arbitrator in accordance with clause-36 by 15th August, 2015, failing which the applicants are at liberty to make an application in this application itself to have the arbitrator named by the Court.

03.07.2015
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(S.J. VAZIFDAR)
ACTING CHIEF JUSTICE