

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**Civil Revision No.2225 of 2003 (O&M)
Date of Decision: 28.08.2015**

State of Haryana

.....Petitioner

Vs

M/s Mehta Construction Company & another

....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Siddharth Sanwaria, D.A.G., Haryana.

Mr. Sumit Gupta, Advocate
for respondent No.1.

1. *Whether Reporters of local papers may be allowed to see the judgment ?*
2. *To be referred to the Reporters or not ?*
3. *Whether the judgment should be reported in the Digest?*

RAJ MOHAN SINGH, J.

[1]. State of Haryana has filed this revision petition against the order dated 13.02.2003 passed by Civil Judge (Sr. Divn.) Panipat, on the ground that the trial Court has not considered the arbitration clause 67 of the agreement while passing the impugned order.

[2]. Petitioner-State of Haryana entered into an agreement with respondent No.1-M/s Mehta Construction Company on 04.08.2000 for the work of widening of four lanes including strengthening of National Highway No.1 (Km. 50 to 74.870). The work assignment was in the context of place of work in the portion of Samalakha town for an amount of Rs.2,34,15,200/- vide agreement No.1 of 2000-

2001 entered into between the parties. The work assignment was finally completed by the Contractor.

[3]. A dispute arose regarding execution of work. The Contractor made a representation dated 14.12.2001 to the Employer/Engineer through Chief Engineer, National Highway, Haryana, PWD (B&R) Branch, Sector 19, Chandigarh stating that the final payment certificate conveyed vide letter No.889 dated 22.11.2001 is based on arbitrary decisions and deductions made are without any basis. He invoked the arbitration clause No.67 on 14.12.2001 and thereafter reminder dated 18.03.2002 was also sent.

[4]. The arbitration clause No.67 of the agreement is reproduced as under:-

“If any dispute or difference of any kind whatsoever (the decision where-of is not herein otherwise provided for) shall arise between the Employer and the Contractor in connection with, or arising out of the Contract, or the execution of the works, whether during the progress of the works or after the their completion and whether before or after the termination, abandonment or breach of the Contract, it shall, in the first place, be referred to and settled by the Engineer who shall, within a sixty days after being requested in writing by the Contractor to do so, given written notice of his decision to the Contractor, Subject to arbitration, as hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the Employer and the Contractor and shall forthwith be given effect to by the Contractor, who shall proceed with the execution of the works with all due

diligence whether he or the Employer requires arbitration, as herein after provided, or not. If the Engineer has given written notice of his decision to the Contract or and no claim to arbitration has been communicated to him by the Contractor within a period of sixty days from receipt of such notice, the said decision shall remain final and binding upon the Contractor. If the Engineer shall fail to give notice of his decision, as aforesaid, within period of sixty days after being requested as aforesaid, or if either the Employer or the Contractor be dis-satisfied with any such decision, then and in any such case either the Employer or the Contractor may within sixty days after the expiration of the first named period of sixty days or receiving notice of such decision, as the case may be, require that the matter or matters in dispute be referred to arbitration as hereinafter provided. All disputes or differences in respect of which the decision, if any, of the Engineer has not become binding as aforesaid shall, on the initiative of either party be referred to the adjudication of a committee of three arbitrators. The committee shall be composed of one arbitrator to be nominated by the Employer, one to be nominated by the Contractor and the third, who will also act as the Chairman of committee, to be nominated by the Director General (Road Development), Ministry of Transport, Department of Surface Transport (Roads Wing), Government of India. If either of the parties abstain or fail to appoint his arbitrator, within sixty days after receipt of notice for the appointment of such arbitrator, then the Director General (Road Development), Ministry of Transport, Department of Surface Transport (Road Wing), Government of India, himself shall also appoint such arbitrator(s). A certified copy of the appointment made by the Director General Ministry of Transport, Department of Surface Transport

(Road Wing), Government of India, shall be furnished to both parties.

Save as otherwise provided in the Contract, the arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory modification or enactment thereof and shall be held at such place and time in India as the Committee of arbitrators may determine. The decision of the majority of the Arbitrator shall be final and binding as may be determined by the Arbitrators.

Performance under the contract shall continue during the arbitration proceedings and payments due to the Contractor by the Employer shall not be withheld, unless they are the subject matter of the arbitration proceedings.

All awards shall be in writing and such awards shall state reasons for the amounts awarded. No decisions given by the Engineer in accordance with the foregoing provisions shall disqualify him from being called as witness and giving evidence before the arbitrators as aforesaid and neither party will be limited in proceedings before such arbitrators to the evidence of arguments put before the Engineer for the purpose of obtaining his said decisions."

[5]. Perusal of the aforesaid agreement clause reveals that respective parties are to appoint Arbitrator within 60 days. Section 11 (6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') is also reproduced hereasunder:-

"Section 11(6):

Where, under an appointment procedure agreed upon by the parties:-

(a) a party fails to act as required under that procedure; or

- (b) *the parties, or the two appointed arbitrators, fail to reach an agreement expected to them under that procedure; or*
- (c) *a person, including an institution, fails to perform any function entrusted to him or it under that procedure,*
a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”

[6]. As per clause 67 of the agreement in which any dispute arises then one Arbitrator is to be nominated by the Employer, second Arbitrator is to be nominated by the Contractor and third Arbitrator is to be the Chairman of the Committee who shall be nominated by the Director General (Road Department), Ministry of Transport, Department of Surface Transport (Roads Wing), Government of India.

[7]. The Contractor appointed Sh. R.N. Jolly, HSE-I, SE (retd.) as Arbitrator and requested the Employer to nominate Arbitrator on its behalf. The Employer instead of appointing Arbitrator on its part conveyed to the Contractor on 24.02.2002 that all the payments have already been made to him and the Contractor is raising unnecessary claim without any basis.

[8]. The Contractor again requested the Employer to nominate Arbitrator on its behalf vide letter dated 01.06.2002, but no action was taken by the Employer. Since the Employer has failed to

nominate Arbitrator within 60 days, consequently in terms of clause 67, the Contractor requested the Director General (Road Deptt.), Ministry of Transport, Department of Surface Transport (Road Wing), Government of India vide memo letter dated 27.08.2002 to appoint two Arbitrators one on behalf of Employer and the other Arbitrator as Chairman of the Committee.

[9]. Again letter dated 16.10.2002 was sent to the Director General and also on 08.11.2002, but in vain. Neither the Employer, nor the Director General appointed the required Arbitrators for a long time ranging in ten months.

[10]. The Contractor was constrained to take recourse to lawful action by filing petition under Section 11(6) of the Act before the Civil Judge (Sr. Divn.), Panipat on 10.01.2003 (competent authority at the relevant time). Upon notice, the Employer disclosed before the Court that they have already appointed Balbir Singh, Chief Engineer, (Irrigation) Haryana, Chandigarh as Arbitrator on 30.12.2002. Director General (Road Development), Ministry of Road Transport & Highways, Government of India, New Delhi has also pleaded that Sh. R.L. Kaul, Member NHAI (retd.) as Chairman has been appointed on 20.01.2003, that is after filing of the petition under Section 11(6) of the Act, which was filed on 10.01.2003.

[11]. Apparently, after filing of the petition under Section 11(6) of the Act, the power was only with the Court to appoint Arbitrators. After hearing rival contentions of both the sides Civil Judge (Sr.

Divn.), Panipat vide order dated 13.02.2003 appointed an Arbitral Tribunal consisting of three members, namely Mr. P.S. Rawat, Mr. S.P. Gupta and Mr. B.K. Wadhwa. One of the Arbitrator Mr. B.K. Wadhwa has died.

[12]. Since no Arbitrator could be appointed by the Employer as well as by the Director General after filing of the petition under Section 11(6) of the Act, therefore, there was no appointment of Arbitrators by them in the eyes of law and the same was *none est*. Reference can be made to **2000 ARB WLJ 689, Datar Switchgears Limited v. Tata Finance Limited and Another** and **2002(1) RCR (Civil) 845, M/s Concorn Railway Corporation Limited v. M/s Ravi Construction Pvt. Ltd.,** and **2012(2) ARB LR 31 (AP), Sharma and Sons v. Engineering-in-Chief Army Headquarters, New Delhi.**

[13]. Now after the amendment the powers under Section 11(6) for the appointment of Arbitrator is exclusively under the domain of the Chief Justice of High Court. These powers are judicial in nature and the decision thereof will be final. Reference can be made to **2005(4) RCR (Civil) 747, M/s SBP & Company v. M/s Patel Engineering Limited and another.** After the appointment of Arbitral Panel by the Civil Judge (Sr. Divn.) Panipat vide order dated 13.02.2003, necessary directions were issued to the parties to submit their claim before the Arbitral Tribunal. Since, with the death of one of the member i.e. Mr. B.K. Wadhwa now jurisdiction of the

High Court in terms of Section 11(6) of the Act can be invoked.

[14]. In view of aforesaid position, no interference is called for in the present revision petition and the same is hereby accordingly dismissed. However, aggrieved parties may resort to proceedings in terms of Section 11(6) of the Act in accordance with law.

August 28, 2015

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(RAJ MOHAN SINGH)
JUDGE