

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Arbitration Case No. 35 of 2016 (O&M)

Date of Decision: 15.07.2016

S.P.Singla Constructions Pvt. Ltd.

..Petitioner

Versus

State of Haryana and another

..Respondents

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

Present : Mr. Anirudh Wadhwa, Advocate, for the petitioner.
Mr. Deepak Balyan, Addl. Advocate General, Haryana,
for the respondents.

S.J.VAZIFDAR, ACTING CHIEF JUSTICE

This is an application under section 11 of the Arbitration & Conciliation Act, 1996 (for short 'the Act') for the appointment of an Arbitrator.

2. Clause 67 of the terms and conditions in so far as it is relevant reads as under:-

“67. ARBITRATION (GCC Clause 25.3)

The procedure for arbitration will be as follows:-

(a) In case of Dispute or difference arising between the Employer and a domestic Contractor, relating to any matter arising out of the connected with this agreement, such disputes or difference shall be settled in accordance with the Arbitration & Conciliation Act, 1996. The Arbitral Tribunal shall consist of 3 arbitrators one each to be appointed by the Employer and the Contractor. The third arbitrator shall be chosen by the two Arbitrators so appointed by the parties and shall act as presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Government of Haryana. The Arbitrators including the Presiding Arbitrator so appointed must possess minimum educational qualification of degree in Civil Engineering.

If one of the parties fails to appoint its arbitrator within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then Government of Haryana shall appoint the arbitrator. A certified copy of the order of the Government of Haryana, making such an appointment shall be furnished to each of the parties.

(b) Arbitration proceedings shall be held at Chandigarh or at any place within the State of Haryana to be decided by the Arbitrators in consultation with both the parties. The language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

(c) to (e) xx xx xx

(f) It is also a term of this arbitration agreement that where the party invoking arbitration is the contractor no reference for arbitration shall be maintainable unless the contractor furnishes to the satisfaction of the Resident Engineer-in-charge of the work a security deposit of a sum determined according to details given below and the sum so deposited shall on the termination of the arbitration proceedings be adjusted against the cost, if any, awarded by the arbitrator against the claimant party and the balance remaining after such adjustment in the absence of any such cost being awarded the whole of the sum will be refunded to him within one month from the date of the award.

<u>Amount of Claims</u>	<u>Rate of Security deposit</u>
(i) For claims below Rs.10,000/-	2% of amount claimed
(ii) For claims of Rs.10,000/- and below Rs. 1,00,000/-	5% of amount claimed
(iii) For claims of Rs.1,00,000/- and above.	10% of amount claimed

The stamp fee due on the award shall be payable by the party as desired by the arbitrator and in the event of such party's default stamp fee shall be recoverable from any other sum due to such party under this or any other contract."

3. The value of the contract was over ₹ 20 crores. The reference, therefore, is before a tribunal comprising of three Arbitrators. Disputes and differences arose between the parties. On 05.05.2008, the respondents terminated the contract. The petitioner disputed the validity of the termination and has raised claims of over ₹ 4.50 crores. By a letter dated 23.09.2008, the petitioner invoked the arbitration clause and nominated an Arbitrator.

4. Correspondence ensued between the parties in the course of which the respondents insisted upon the petitioner depositing an amount of 10% of the claim as security in terms of sub-clause (f) of clause 67. The petitioner contended that on an interpretation of the clause it was not bound to deposit the said amount. This issue was, however, decided against the petitioner by an order dated 23.02.2010 in Arbitration Case No.

24 of 2009 filed by the petitioner in this Court under Section 11 of the Act. The learned Judge allowed the petition partly by directing the respondents to appoint an Arbitrator within a period of two months of the receipt of a copy of the order provided the petitioner deposited the security amount within a period of one month from the date of the order.

5. The petitioner furnished a bank guarantee for a sum of ₹ 54 lacs and nominated an Arbitrator only on 05.07.2012. On 23.07.2012, the respondents returned the bank guarantee and directed the petitioner to furnish a fresh bank guarantee in the name of the Chief Engineer, Bridges, Haryana, PWD (B&R), Chandigarh instead of in favour of the Chief Engineer, World Bank Project-II, Haryana, PWD (B&R), Chandigarh.

In other words, the respondents did not object to the security being furnished in the form of a bank guarantee. The respondents only sought for a change in the name of the person in whose favour the guarantee was furnished. Pursuant thereto on 30.07.2012, the petitioner furnished a bank guarantee as directed in the respondents' letter dated 23.07.2012.

6. Subsequent thereto, however, by a letter dated 21.09.2012, the respondents informed the petitioner that they had been intimated by the Superintending Engineer that the petitioner ought to deposit the security amount in cash and not in the form of a bank guarantee. The respondents stated that the bank guarantee was not acceptable security under clause 67(f).

7. The first question that arises whether a party invoking arbitration is required under clause 67(f) to furnish the security deposit of the required amount only in cash. In my view, the security deposit can be in any form. The only requirement is that it must be to the satisfaction of the Resident Engineer-in-charge of the work. If the clause intended the security deposit to be only in the form of cash, it would have been so

stated specifically in clause 67(f). The purpose of the clause is to ensure that only genuine claims are made. The security deposit is not to be appropriated by the respondents unconditionally. It is only a deposit and is subject to adjustment against the costs, if any, awarded by the Arbitrator and the balance remaining after such adjustment is to be refunded to the contractor. The purpose of this clause would be equally satisfied by furnishing a guarantee of the bank to the satisfaction of the Resident Engineer-in-charge of the work.

8. The Resident Engineer-in-charge of the work would be entitled to stipulate the terms and conditions of such a guarantee. He may for instance provide for interest on the guarantee. He may also insist upon the terms and conditions of the guarantee such as for instance that it should be an unconditional guarantee without recourse or demur. He may also satisfy himself about the guarantor. These aspects are, however, a different matter altogether.

9. This view is supported by the words “.....furnishes.....a security deposit.....” in clause 67(f). These words indicate that the deposit of the amount in cash is not the only security as contemplated by clause 67(f).

10. The security was, however, sought to be furnished after a delay of over two years without seeking any extension of time. The petitioner, however, furnished the bank guarantee only on 05.07.2012, although it was directed to furnish the security within one month of the order dated 23.02.2010. As noted earlier by the order dated 23.02.2010 the petitioner was required to deposit the security amount within a period of one month from the date of order i.e. by 23.03.2010. The order dated 11.05.2010 dismissing the review application did not extend this time. Nor did the order of the Supreme Court dated 27.08.2010 dismissing the petitioner's Special Leave Petition extend the time. No reasons are

furnished as to why the security deposit was furnished on 05.07.2012. In the circumstances, the respondents were not bound to accept the same or to appoint an Arbitrator. The order dated 23.02.2010 expressly required the respondents to appoint an Arbitrator within a period of two months of the receipt of the order "*provided the petitioner deposit the security amount within a period of one month from today*". Thus, even though the respondents were bound to accept the bank guarantee as valid security deposit, they were not bound to do so in view of the petitioner's not having complied with the order dated 23.02.2010 within the period stipulated. The respondents' right to nominate an Arbitrator cannot, therefore, be to have been forfeited.

11. In the circumstances, the petition is disposed of by the following order:-

- i) The petitioner shall be entitled to furnish a bank guarantee of the requisite amount as stipulated in clause 67(f) to the satisfaction of the Resident Engineer-in-charge of the work. In the event of its doing so, the respondents shall comply with the said order dated 23.02.2010 by nominating an Arbitrator within 30 days thereof. The learned Arbitrators nominated by the petitioner and the respondents shall appoint the Presiding Arbitrator in accordance with clause 67(a).

15.07.2016
'ravinder'

(S.J.VAZIFDAR)
ACTING CHIEF JUSTICE

To be referred to the reporter	√Yes	No.
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