

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

ARB-91-2015 (O&M)
Date of decision:- 05.02.2016

M/s Spirit Global Constructions Pvt. Ltd.

...Petitioner

Versus

Managing Director, Pepsu Road Transport Corporation, Nabha Road,
Patiala and others

...Respondents

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

Present: Mr. Sumeet Mahajan, Senior Advocate,
with Mr. Amit Kohar, Advocate,
for the petitioner.

Mr. Vikas Mohan Gupta, Advocate,
for respondent No. 2.

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S.J. VAZIFDAR, A.C.J. (ORAL)

This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 (in short the Act) for the appointment of an arbitrator.

2. The parties had entered into a Concession Agreement dated 08.05.2009 for the development of a Bus Terminal-cum-Commercial Complex on Design, Build, Operate and Transfer (D.B.O.T) Basis at Patiala. The agreement is admitted. Clause 27.3 thereof reads as under:-

“27.3 Arbitration or Adjudication

a. In the event that the parties are unable to resolve the dispute through direct discussion under Article 27.2, the parties shall submit the dispute for adjudication by the Punjab Infrastructure Regulatory Authority constituted under the Punjab Infrastructure (Development and Regulation) Act, 2002.

b. However, in the event that the Punjab Infrastructure Regulatory Authority has not been appointed at the time of the dispute, the parties shall submit the dispute for arbitration in accordance with the Arbitration and Conciliation Act, 1996. There shall be a board of 3 (three) arbitrators of whom one shall be jointly appointed by Concessioneing Authority and PIDB, one shall be appointed by Concessionaire and the

third shall be appointed by the two arbitrators appointed as aforesaid.

c. The arbitrators shall make a reasoned award and any award made pursuant to this Article 27.3 shall be final and binding on the parties as from the date on which it is made, and the concessionaire and the concessioning authority agree to undertake to carry out such award without delay.

d. The arbitration proceedings shall be conducted in the English language and in Chandigarh only.

e. The cost incurred on the process of arbitration including inter alia the fees of the arbitral tribunal and the cost of the proceedings shall be borne by the parties in equal proportions. Each party shall bear its own legal fees incurred as a result of any dispute under this Article 27.”

3. Disputes and differences have admittedly arisen between the parties.

The petitioner had filed an application under Section 9 of the Act which was dismissed on the ground that the Punjab Infrastructure Regulatory Authority (in short PIRA) had been constituted and, therefore, the application was not maintainable. On 21.09.2010, respondent No. 1 terminated the agreement. In October, 2010, the petitioner invoked the jurisdiction of PIRA and filed a statement of claim. Written statements were filed by respondents No. 1 and 2 who were parties to the agreement. FAO-5581-2010 filed by the petitioner against the order dated 30.08.2010 dismissing the application under Section 9 of the Act was disposed of by recording the statement on behalf of the respondents that the bank guarantee would not be invoked till the decision by PIRA. Interim orders/directions had been passed by PIRA. Contempt proceedings adopted by the respondents were disposed of.

4. By a notice dated 14.02.2015, the petitioner invoked the arbitration clause. The respondents contend that in view of the arbitration clause set out above, the disputes and differences cannot be referred to arbitration and that they can be decided only by PIRA.

5. The PIRA is constituted under Sections 4 and 5 of the Punjab Infrastructure (Development & Regulation) Act, 2002 (in short the PIDR Act).

Sections 4 and 5 of the PIDR Act read as under:-

“4. Establishment of the Authority

(1) The State Government shall, by notification, establish for the purpose of this Act, an authority to be called the Punjab Infrastructure Regulatory Authority.

(2) The Authority shall be a body Corporate known by the aforesaid name having perpetual succession and a common seal with power, subject to the provisions of this Act to acquire, hold and dispose of property, both moveable and immovable and to contract and shall, by the said name, sue or be sued.

(3) The Head Office of the Authority shall be at Chandigarh or at such place, as the State Government may notify from time to time.

5. Composition of the Authority

(1) The Authority shall consist of a Chairperson and not less than two and not more than six members, appointed by the State Government with the approval of the Chief Minister of Punjab by notification.

(2) The Chairperson, shall either be a retired Chief Justice or a serving or retired Judge of the Supreme Court or a retired Chief Justice of a High Court or a serving or retired Judge of a High Court or a serving or retired officer of the rank and status of the Chief Secretary of the State of Punjab or Secretary to the Government of India.

(3) The members shall possess the qualifications specified in sub-section (5).

(4) The State Government may appoint one of the members, by notification as Vice-Chairperson of the Authority.

(5) The members appointed under sub-section (1), shall have the following qualifications and experience in the fields of Management of Infrastructure Sectors or Infrastructure Projects, Law, Finance, Economics or Commerce –

(i) Qualifications and experience in the field of management of infrastructure sector or

infrastructure project:- Relevant professional qualifications and a minimum experience of ten years of working after acquiring the said qualifications in a Government department or public sector organization or in a private sector organization; having annual turnover of one hundred crore rupees or more in any infrastructure sector in respect of conceptualizing, appraisal, development, financing or implementation of infrastructure projects;

(ii) Qualifications and experience in the field of Law:-

A serving or a retired District and Sessions Judge or a person qualified to be a District and Sessions Judge;

(iii) Qualifications and experience in the field of Finance, Economics or Commerce:-

Qualifications:

(a) Membership of the Institute of Chartered Accountants of India; or

(b) Post Graduation in Economics, Commerce, Management or Engineering.

Experience:-

(a) Ten years' experience of working after acquiring the said qualifications in a Government department or public sector organization or in a private sector organization having annual turnover of one hundred crore rupees or more; or

(b) Ten years' teaching experience in a university or a college, recognized by the University Grants Commission or an institute recognized by the All India Council of Technical Education.

6. Before appointing any person to the Authority as a Chairperson or Vice-Chairperson or member, as the case may be, the State Government shall satisfy itself that the person does not have any financial or other interest, which may affect prejudicially his functioning as a Chairperson or Vice-Chairperson or member of the Authority."

6. Section 5 of the PIDR Act was amended by the Punjab Infrastructure (Development and Regulation) (Second Amendment) Ordinance, 2015 w.e.f.

09.12.2015. Clause 3 of the Ordinance reads as under:-

“3. In the principal Act, in Section 5, for sub-section (1), the following sub-section shall be substituted, namely:-

(1) The Authority, shall consist of a Chairperson and two other Members, duly appointed by the State Government by notification in the Official Gazette.”

7. The PIRA has not been established. Only the Chairperson has been appointed. Admittedly, the members have not been appointed by the State Government.

8. Learned counsel appearing on behalf of respondent No. 2 states that the process for appointment of the members has commenced.

9. That would not make any difference. Clause 27.3(b) states that the parties are entitled to invoke the arbitration clause if the PIRA has not been appointed “at the time of the dispute”. The disputes have already arisen. The PIRA has not been appointed. The arbitration agreement can, therefore, be invoked by the petitioner.

10. Faced with this, reliance was placed on Section 10 of the PIDR Act which reads as under:-

“10. Vacancies not to invalidate proceedings of the Authority

No act or proceeding of the Authority shall be invalid merely by reason of :-

(i) any vacancy in, or any defect in the constitution of the Authority; or

(ii) any defect in the appointment of a person acting as a member of the Authority; or

(iii) any irregularity in the procedure of the Authority not affecting the merits of the case.”

11. Section 10 of the PIDR Act does not support the respondents’ contention. It merely saves acts or proceedings of the authority from being rendered invalid merely by reason of any vacancy or defect in the constitution of the authority. In the present case, the question of a defect does not arise for the authority has not been constituted in the first place. There is, I will presume, a

vacancy on account of the members not having been appointed. That would not preclude the petitioner's right to invoke the arbitration agreement for the scope of Section 10 is limited. It is limited only to saving acts or proceedings of the authority from being rendered invalid by reason of such vacancy. I will assume that all orders passed and directions given thus far by the authority cannot be invalidated. The disputes and differences, however, have not been adjudicated upon to date. There is, therefore, no question of saving any act or proceeding relating to the adjudication of the disputes. Section 10, therefore, does not operate to bar the invocation of the arbitration agreement.

12. The petition is, therefore, disposed of by the following order:-

- (i) The arbitrator suggested by the petitioner shall be deemed to be the arbitrator nominated by the petitioner.
- (ii) Justice Kuldeep Singh, a former Judge of the Supreme Court of India, shall, therefore, be the arbitrator nominated by the petitioner and Mr. Justice H.S. Bedi, former Judge of the Supreme Court of India will be the arbitrator on behalf of the respondents.
- (iii) The said arbitrators shall appoint the presiding arbitrator.

(S.J. VAZIFDAR)
ACTING CHIEF JUSTICE

05.02.2016
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