

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Arbitration Case No. 64 of 2016
Date of Decision: 09.09.2016

M/s Krishan Chand Contractor

..Petitioner

Versus

State of Haryana and others

..Respondents

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

Present : Mr. Vivek Khatri, Advocate, for the petitioner.
Mr. Deepak Balyan, Additional Advocate General, Haryana,
for the respondents.

S.J.VAZIFDAR CHIEF JUSTICE

This is an application under section 11(6) of the Arbitration & Conciliation Act, 1996 for appointment of a sole arbitrator to adjudicate the disputes and differences between the parties.

2. The parties had entered into an agreement. Disputes and differences have arisen between the parties. The petitioner has invoked the arbitration clause. The question that arises for consideration is whether the arbitration clause contained in clause-19.5 of the agreement survives in view of Section-IV titled as 'Contract Data', which also admittedly forms a part of the contract.

3. Clause 19 of the detailed notice inviting tenders reads as under:-

“**19.1** If the contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer under the Contract or that a decision was wrongly taken, the decision will be referred to the adjudicator within 15 days of the notification of the Engineer's decision, through Registered Letter/courier or speed post under intimation to both Engineer and competent authority.

19.2 The adjudication shall give a decision in writing within 30 days of receipt of a dispute provided that if both the parties to dispute agree, this period may be extended for a longer period, but not exceeding a total of 60 days, from the date of receipt of notification of a dispute.

19.3 The Adjudicator will be paid daily at the rate specified in the Contract Data together with such reimbursable expense of the types as provided in the Contract Data and the cost shall be divided equally between both the Engineer and the Contractor. Either party may refer a decision of the Adjudicator for arbitration within 15 days of the receipt of the Adjudicator's written decision. If neither party refers the dispute to arbitration within this period, the Adjudicator's decision will be final and binding.

19.4 Dispute in the first instance shall be referred to adjudicator.

19.5 Arbitration will be conducted as per the Indian Arbitration and Conciliation Act, 1996 or any amendments thereof, as mentioned in the Contract Data."

4. Had the matter ended there, the disputes and differences between the parties would undoubtedly fall within clause 19.5. The difficulty arises on account of Section-IV titled as 'Contract Data', which also forms part of the contract documents and contains the following provision:-

"Arbitration: Deleted
Dispute Redressal System-

There will be two Empowered Standing Committees to settle the claims, one at the level of Chief Engineer for claims upto Rs.10 lacs, with the following composition:-

- a) Chief Engineer Coordination, H.I.D. or any other Chief Engineer appointed by the Government.
- b) One official member not below the rank of Superintending Engineer and;
- c) One non-official member who will be technical expert of SE level selected by the claimant from a panel of three persons given to him by the Employer.

If any dispute or difference of any kind whatsoever shall arise in connection with or arising out of this Contract or the execution of work, maintenance of the works thereunder, whether before its commencement or during the progress of works or after the termination, abandonment or breach of the Contract it shall be in the first instance be referred to for settlement of claims not exceeding Rs. 10 lacs to the committee headed by the Chief Engineer. The Committee shall within a period of 45 days after being requested in writing by the Contractor to do so convey its decision in respect of every matter so referred shall subject to review as here in after provided be final and binding upon the Contractor. In case the Works already in progress, the Contractor shall proceed with the execution of the Works, including maintenance thereof, pending receipt of the decision of the Committee as aforesaid with all diligence.

Either party will have the right of appeal against the decision of the Committee to Empowered Standing Committee claims exceeding Rs. Ten lacs will be directly referred to the empowered standing committee.

The composition of the Empowered Committee will be:-

- (a) one official member Chairman of the Standing Empowered Committee not below the rank of Special Secretary/Joint Secretary to the State Government.
- (b) One official member not below the rank of Chief Engineer and
- (c) One non-official member of who will be technical expert of Chief Engineer's level selected by the Contractor from the panel of three persons given to him by the Employer.

The contractor and the Employer will be entitled to present their case in writing duly supported by documents. If so requested the Standing Empowered Committee may allow one opportunity to the contractor and the Employer for oral arguments for a specified period. The Empowered Committee will give the decision within a period of 90 days from the date of appeal failing which contractor can approach the appropriate Court for the resolution of the dispute.

The decision of the Standing Empowered Committee will be binding on the Employer for payment of claims upto five percent of the Initial Contract Price. The Contractor can accept and receive payment after signing as in full and final settlement of all claims. If he does not accept the decision, he is not barred from approaching the Courts. Similarly if the Employer does not accept the decision or the Standing Empowered Committee above the limit of five percent of the Initial Contract Price he will be free to approach the Court applicable under the law.

"Any party taking recourse of dispute redressal system will have to deposit 2% of the claim amount in the form of unconditional DRD pledged in favour of claimant".

“In view of the provisions of clause on Dispute Redressal System there will be no arbitration for the settlement of any dispute between parties”.
(..emphasis supplied).

5. On behalf of the petitioner, reliance was placed on my order dated 11.03.2016 passed in Arbitration Case No. 219 of 2015 *M/s Tibba Danasher Co-op L/C Society Limited v. State of Haryana and others* and it was contended that in respect of a similar agreement I had appointed an Arbitrator.

6. I am, however, informed that a review petition has been filed against that order. In any event Mr. Balyan, learned Additional Advocate General, Haryana contends that my attention was not invited in that case to the above provision in Section-IV ‘Contract Data’. That is correct as is obvious from the fact that my order dated 11.03.2016 does not refer to the same. Infact the order does not even indicate whether in that case Section-IV ‘Contract Data’ formed part of the contract documents.

7. The respondent obviously placed reliance upon the very first word ‘Deleted’ which appears alongside the title to the clause, namely, ‘Arbitration’ as well as to the concluding portion which states that in view of the provision of the clause on ‘Dispute Redressal System’ (DRS) there will be no arbitration for settlement of any disputes between the parties. Emphasis is placed on the word ‘any’. On the other hand it was contended on behalf of the petitioner that the above provision of Section-IV only deals the cases upto ₹ 10 lacs.

8. The title to Section-IV is ‘Dispute Redressal System’ (DRS). The DRS set out in that clause is in respect of the claims upto ₹ 10 lacs as well as in respect of claims exceeding ₹ 10 lacs. After setting out the ‘DRS’ in respect of claims upto ₹ 10 lacs, the clause states that either

party would have the right of appeal against the decision of the Committee to the Empowered Standing Committee. On claims upto ₹ 10 lacs the DRS in the first instance provides for the reference of the disputes to the first Empowered Standing Committee which is headed by the Chief Engineer. The parties then have a right to appeal against the decision of that Committee to the Empowered Standing Committee. The constitution of the Empowered Standing Committee is also provided.

9. After providing the right of appeal against the decision of the first Empowered Standing Committee, the clause provides that “claims exceeding ₹ 10 lacs will be directly referred to the Empowered Standing Committee” which is the second Empowered Standing Committee. The proceedings before the second Empowered Standing Committee are also referred to. The decision of the committees are not binding upon the contractors and are binding upon the employer i.e. the respondent only to the limited extent provided in the clause namely for payments of claims upto 5% of the initial contract price. The parties are otherwise at liberty to approach the Courts.

10. The right of the parties to approach the Courts referred to in clause in Section-IV is not conclusive of the matter either way. The nature of the proceedings are not circumscribed. An application for appointment of an Arbitrator and in respect of arbitration proceedings are made to Courts as are suits or other proceedings including for recovery of claims.

11. However what is decisive is the express provision in the clause that “in view of the provision of clause on Dispute Redressal System there will be no arbitration for settlement of any dispute between the parties”*emphasis supplied*). This concluding sentence is not limited to claims of any particular value. In other words it is not limited

to claims less than ₹ 10 lacs. This is clearer from the fact that this sentence is added at the end of the entire Dispute Redressal System which relates to claims both upto ₹ 10 lacs and exceeding ₹ 10 lacs.

11. I appreciate that Section-IV does not expressly delete clause 19.5. That, however, to my mind is not conclusive of the matter. The arbitration clause could have been deleted by an express provision. However, the relevant part of Section-IV opens with the words “Arbitration: Deleted”. This is followed by the heading ‘Dispute Redressal System’. The entire system is thereafter set out in respect of claims upto ₹ 10 lacs and exceeding ₹ 10 lacs. After the system relating to all the claims is set out is the sentence that in view of the Dispute Redressal System there will be no arbitration for settlement of any disputes between the parties. It is clear, therefore, that clause 19.5 relating to arbitration stood deleted.

12. In the circumstances, the petition is dismissed.

(S.J.VAZIFDAR)
CHIEF JUSTICE

09.09.2016
'ravinder'

Whether speaking/reasoned	√Yes/No
Whether reportable	Yes/No√