

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

CR No.7616 of 2016

Date of Decision:29.11.2017

M/s Gulshan Rai Jain-II

...Petitioner

Versus

The Executive Engineer, Housing Board, Haryana, Gurgaon and anr

...Respondents

CR No.8553 of 2016

Housing Board, Haryana through its Executive Engineer

...Petitioner

Versus

M/s Gulshan Rai Jain-II and another

...Respondents

CR No.8569 of 2016

Housing Board, Haryana through its Executive Engineer

...Petitioner

Versus

M/s Gulshan Rai Jain-II and another

...Respondents

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.Karan Bhardwaj, Advocate for the petitioner in
CR No.7616 of 2016 and for respondent No.1 in
CR Nos.8553 and 8569 of 2016.
Mr.Vishal Garg, Advocate for the for the petitioner in
CR Nos.8553 and 8569 of 2016.
Mr.Prateek Mahajan, Advocate for the respondent
No.1 in CR No.7616 of 2016.

ANIL KSHETARPAL, J. (ORAL)

By this order, Civil Revision Nos.7616, 8553 and 8569 of 2016
are being disposed of together, as a common issue is involved. For the
facility of reference, facts are being culled out from CR No.7616 of 2016.

Housing Board Haryana gave three similarly worded contracts to M/s Gulshan Raj Jain-II. In all the three contracts, for settlement of the dispute(s), there was a provision for referring the dispute for adjudication to the Arbitrator nominated by the Chief Administrator, Housing Board, Haryana. Clause 33 of the agreement deals with the resolution of the dispute, which reads as as under:-

(1) If any dispute or difference of any kind whatsoever shall arise between the Housing Board Haryana or its authorized agent and the contractor in connection with or arising out of the contract or the execution of the work that is (i) whether before its commencement or during the progress of the work or after its completion, (ii) and whether before or after the termination abandonment or breach of the contract it shall in the first instance be referred to for being settled by the Executive Engineer at the time and he shall within a period of sixty days after being requested in writing by the contractor to do so convey his decision to the contractor and subject to arbitration as hereinafter provided such decision in respect of every matter so referred shall be final and binding upon the contractor. In case the work is already in progress the contractor will proceed with the execution of the work on receipt of the decision by the Executive Engineer as aforesaid with all due diligence whether he or the Housing Board Haryana/its authorized agent requires arbitration as hereinafter provided or not. If the Executive Engineer has conveyed his decision to the contractor and no claim to arbitration has been filed with him by the contractor

within a period of sixty days from the receipt of letter communicating the decision, the said decision shall be final and binding upon the contractor and will not be a subject matter of arbitration at all. If the Executive Engineer fails to convey his decision within a period of sixty days after being requested as aforesaid the contractor may within further sixty days of the expiry of first sixty days from the date on which request has been made to the Executive Engineer request the Chief Administrator HBH hereinafter provided.

(2) All disputes or differences in respect of which the decision is not final and conclusive shall at the request in writing of either party, made in a communication sent through Registered A.D. post be referred to the sole Arbitrator to be nominated by the Chief Administrator from amongst officers who will be either.

(i) A serving Superintending Engineer or Chief Engineer of the Housing Board, or Haryana PWD B&R Branch.

(ii) A retired Superintending Engineer, Chief Engineer or an Executive Engineer of the Housing Board of Haryana PWD B&R or any the person to be selected out of panel of Arbitrator approved by the Chief Administrator. It will be no objection to any such an appointment that the Arbitrator so appointed is a Housing Board Employee/Government servant or that he had to deal with the matters to which the contract relates and

that in the course of his duties as a Housing Board Employee/Government servant he had expressed his views on all or any of the matters in dispute. The Arbitrator to whom the matter is originally referred being transferred or vacating his office his successor in office as such shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

In case the Arbitrator nominated by the Chief Administrator, Housing Board Haryana is unable or unwilling to act as such for any reason whatsoever, the Chief Administrator shall be competent to appoint and nominate any other Superintending Engineer or Chief Engineer as the case may be as Arbitrator in his place and the Arbitrator so appointed shall be entitled to proceed with the reference.

(3) It is also a term of this arbitration agreement that no person other than a person appointed by the Chief Administrator, Housing Board Haryana, Panchkula shall act as a Arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all. In all cases the Arbitrator shall give reasons for his award in respect of each claim and counter claim separately.

(4) The Arbitrator shall award separately giving his award against each claim and dispute raised by either party including any counter-claims individually and that any lump-sum award shall not be legally enforceable.

(5) The following matters shall not lie within the purview of

arbitration:

- (a) Any dispute relating to the levy of compensation as liquidated damages which has already been referred to the Superintending Engineer/Chief Engineer and is being heard or has been finally decided by the Superintending Engineer/Chief Engineer or the work.
- (b) Any dispute in respect of substituted, altered, additional work/omitted work/defective work referred by the contractor for the decision of the Chief Engineer, HBH or if it is being heard or has already been decided/heard by the said Chief Engineer. Any dispute regarding the scope of the work or its execution or suspension or abandonment that has been referred by the contractor for the decision of the Housing Board Haryana, has been so decided finally by the Housing Board Haryana.
- (6) The independent claims of the party other than the one getting the Arbitrator appointed, and the counter-claims of any party will be entertained by the Arbitrator notwithstanding that the Arbitrator had been appointed at the instance of the other party.
- (7) It is also a term of this arbitration agreement that where the party invoking arbitration is the contractor, no reference for Arbitrator shall be maintainable unless the contractor furnishes to the satisfaction of the Executive Engineer, 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:

Sr. No. Amount Claims Rate of Security Deposit

- i) For claims below Rs.10,000/- 2% of amount claimed
- ii) For claims of Rs.10,000/- & above but
- iii) For claims of Rs.1,00,000/- and above 7.5% of amount claimed

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

(8) The venue of arbitration shall be such place or places as may be fixed by the arbitrator in his sole discretion. The work under the contract shall continue during the arbitration proceedings.

(9) Neither party shall be entitled to bring a claim for arbitration if the appointment of such Arbitrator has not been applied within 6 months:

Or

(a) from the date of completion of the work as certified by Executive

(b) from the date of abandonment of the work.

(c) Of its non commencement within 6 months from the date of

(d) from the completion of the work through any alternative agency or below Rs.1,00,000/- Engineer. Or abandonment, Or written orders to commence the work as applicable. Or means after withdrawal of the work from the contractor in whole or in part and/or its decision. Or

(e) of receiving the intimation from the Executive Engineer of the work that final payment due to or recovery from the contractor had been determined which he may acknowledge and/or receive.

Whichever of (a) to (e) above is the latest?

If the matter is not referred to arbitration within the period prescribed above, all the rights and claims of any party under the contract shall be deemed to have been forfeited and absolutely barred by time even for civil litigation notwithstanding.

(10) It is also a term of this arbitration agreement that no question relating to this contract shall be brought before any civil court first involving and completing the arbitration proceedings as above, if the scope of the arbitration specified herein covers issues that can be brought before the arbitrator, i.e., any matter that can be referred to arbitration shall not be brought before a Civil Court. The pendency of arbitration proceedings shall not disentitle the Government to terminate

the contract and make alternative arrangement for the completion of the work.

(11) The Arbitrator shall be deemed to have entered on the reference on the day he issue notices to the parties fixing the first date of hearing. The Arbitrator may from time to time with the consent of the parties enlarge the initial time for making and publishing the award.

(12) It is also a term of this arbitration agreement that subject to the stipulation herein mentioned the arbitration proceedings should be conducted in accordance with the provisions of the Arbitration Act, 1996 or any other law in force for the time being.

(13) In case of dispute, if any, of the party intends to go for in arbitration the expenses concerning to the arbitration proceedings such as fee of the Arbitrator, if necessary stamp paper for award and all the expenses concerning to the traveling allowance of witnesses, stationery or any other charges concerning to the arbitration case shall be borne by the party going in for the arbitration. If the matter is not referred to Arbitrator within the specified period, all the rights/claims under the contract shall be deemed to have been forfeited and absolutely time barred. The Arbitrator shall give a speaking award otherwise the award shall be null & void and will not be binding on the parties.

On the dispute having been arisen between the parties, the contractor submitted an application on 3.3.2015, requesting the Chief

Administrator, Housing Board, Haryana to intervene in the matter and try to resolve the dispute. However, since the dispute was not resolved to the satisfaction of the contractor, therefore, contractor submitted another application vide letter dated 15.4.2015, requesting the Chief Administrator to appoint Arbitrator in all the cases. In response thereto, Housing Board, Haryana, wrote a letter to the contractor dated 28.10.2015, calling upon him to deposit the amount of security, as provided under clause 33(7) of the agreement as security deposit. The arbitrator was nominated by the Housing Board, Haryana, vide communication dated 18.6.2015. In the communication, the contractor was once again called upon to submit its claim along with the requisite security amount as per the terms and conditions of the contract agreement. The endorsement to this effect is extracted as under:-

“iii. M/s Gulshan Rai Jain-II, 518, Rakesh Marg, Nasirpur, GT Road, Ghaziabad w.r.t. his request dated 15.05.2015. He is requested to submit his claim alongwith requisite security amount as per terms and conditions of contract agreement to the Arbitrator with a copy to Executive Engineer, Housing Board Haryana, Gurgaon under intimation to this office.”

In one case, Shri O.P.Garg, Additional District & Sessions Judge (Retd.) was nominated as an Arbitrator, whereas in other two cases, K.B.Singal, (former Engineer-in-Chief, PWD (B&R) was nominated as an Arbitrator.

The Arbitrator entered into a reference and contractor submitted its statement of claim. At this stage, Housing Board, Haryana filed an application, seeking direction to the contractor to deposit the security amount as per clause 33 (7) of the contract agreement between the parties,

failing which the claim petition should not be adjudicated upon.

Reply to the application was filed by the contractor and it was pleaded that the issue of security deposit related to pre appointment stage of Arbitrator and therefore, the same stands waived. It was further pleaded that this issue cannot be raised before the Arbitrator.

The Arbitrator after considering the matter passed an order, directing the contractor to deposit the security deposit, in terms of clause 33 (7) of the contract agreement, failing which the claim petition shall stand dismissed. It may be pertinent to note here that in CR Nos.8553 and 8569 of 2016, the application filed by the Housing Board, Haryana was dismissed by the Arbitrator.

Feeling aggrieved, two appeals were filed by the Housing Board, Haryana, whereas one appeal was filed by the Contractor, before the learned Additional District Judge, Panchkula. The appeals filed by Housing Board, Haryana, were dismissed by a common order dated 1.10.2016 and the appeal filed by the contractor was also dismissed vide a separate order of even date. That is how three revision petitions have come up for final disposal.

I have heard the learned counsel for the parties at length and with their able assistance gone through the documents filed.

In the considered opinion of this Court, following two issues arise for consideration of this Court:-

- (i) Whether in the facts and circumstances of the case, the amount of security deposit, which is pre-requisite as per contract between the parties, stood waived once the Chief Administrator appointed the Arbitrator without

first ensuring security deposit by the contractor?

- (ii) Whether the appeal was maintainable before the learned Additional District Judge against the order passed by the Arbitrator?

Learned counsel for the Housing Board, Haryana, has submitted that before appointment of the Arbitrator, the contractor was called upon to deposit the security deposit, in terms of clause 33(7) of the agreement between the parties. He has further submitted that while appointing the Arbitrator, it was clearly communicated to the contractor to deposit the requisite amount as security deposit, in terms of the contract along with his statement of claim. Therefore, there was no waiver on the part of the Housing Board, Haryana.

On the other hand, learned counsel for the contractor has submitted that the requisite security deposit was only a condition for reference to the arbitration. Once the Arbitrator had been appointed, this condition could not be insisted upon/enforced and deemed to have been waived. He has further submitted that by referring two letters dated 25.5.2015 and 9.6.2015 written by the Executive Engineer, recommending the appointment of the Arbitrator and leaving the condition of security deposit to the Arbitrator in the public interest.

Arbitration between the parties is governed by the contract entered into between the parties. It is not in dispute that clause 33 (7) provides for security deposit of sum determined according to the details given thereunder. Validity of such provision has already been upheld by the Hon'ble Supreme Court in the judgment **Bharat Sanchar Nigam Ltd. and another Vs. Motorola India Pvt. Limited, 2004(4) SCC 357**. In the

considered opinion of this Court, there is no waiver of security deposit. Before appointment of the Arbitrator, the moment request for appointment of the Arbitrator was made by the Contractor. Housing Board, Haryana had communicated to the Contractor to deposit the security deposit, in terms of clause 33(7) of the contract. Further, even while appointing the Arbitrator, vide order dated 18.6.2015, the contractor was called upon to deposit the requisite security amount along with the claim statement. In view of the aforesaid communications, it will not be proper to accept the contention of learned counsel for the contractor. Learned counsel for the contractor has further submitted that arbitration proceedings had commenced, as Arbitrator had entered into a reference and therefore, in terms of Section 4 of the Act, Housing Board, Haryana would be deemed to have waived the condition of pre requisite deposit.

In the considered opinion of this Court, such waiver cannot be read in view of the facts stated above, particularly, the communication dated 28.10.2015 and the order dated 18.6.2015. Learned counsel for the Contractor has submitted that Housing Board, Haryana had filed an application under Section 16 of the Act for dismissal of the claim petition filed by the claimant-contractor, being not maintainable for want of requisite security deposit and therefore, Housing Board, Haryana, was challenging the jurisdiction of the Arbitral Tribunal. In my considered opinion, mere wrong reference to the provision of the Act would not change the nature of the application. The application was under Section 17 of the Act as it was prayed in the application that on account of non deposit of the requisite security deposit, the claim petition be dismissed, being not maintainable.

Taking into consideration the aforesaid facts available on the file, this Court is of the considered opinion that application filed by the Housing Board, Haryana would fall within the four corners of Section 17 of the Act.

In view of what has been discussed above, it is concluded that the Arbitral Tribunal could not have proceeded with the case, without insisting upon the requisite security deposit, as provided under clause 33(7) of the Act between the parties.

Learned counsel for the contractor has tried to submit that no appeal was maintainable against the order passed by the Arbitral Tribunal as the impugned order passed by the Arbitral Tribunal does not fall within the four corners of Section 17 of the Act. However, this court is not in the agreement with the aforesaid submission. Section 17 of the Act reads as under:-

[17.Interim measures ordered by arbitral tribunal-- (1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal--
(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
(ii) for an interim measure of protection in respect of any of the following matters, namely:-

- (a) the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;
- (b) securing the amount in dispute in the arbitration;
- (c) the detention, preservation or inspection of any

property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,

and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908, (5 of 1908) in the same manner as if it were an order of the Court.]

The language of Section 17 clearly provides that a party can request the Arbitral Tribunal to take an interim measure of protection necessary in respect of the subject matter of the dispute. Section 17 (1) (ii) further enables the Arbitral Tribunal to provide appropriate security in connection with measure ordered under Section 17 (1).

Section 37 of the Act is in two parts. First part of Section 37

deals with appeals against the orders passed under Sections 8, 9 and 34, whereas second part i.e., sub Section (2) of Section 37 deals with the appeals to a court from an order of the Arbitral Tribunal granting or refusing to grant an interim measure under Section 17 of the Act.

For the facility of reference, Section 37 of the Act is extracted as under:-

“37.Appealable orders- (1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-

[(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34].

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal:-

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

A reading of clause (b) of sub-section (2) of Section 37 leaves

no doubt that an appeal is maintainable against the order passed by the Arbitral Tribunal, granting or refusing to grant an interim measure under Section 17. It may be noticed that Sections 17 and 37 of the Act has been recently amended vide The Arbitration and Conciliation (Amendment) Act, 2015 (No.3 of 2016) w.e.f. 23.10.2015. However, in this case, parties shall be governed by unamended provisions of the Act as it existed before the amendment.

In view of discussion made above, Civil Revisions No.8553 and 8569 of 2016 are allowed, whereas Civil Revision No.7616 of 2016 filed by the Contractor is dismissed. The Contractor shall be required to deposit the security deposit as per clause 33(7) of the contract before requesting the Arbitrator to proceed and adjudicate upon the dispute.

29.11.2017
mks

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No