

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR No.3279 of 2017 (O&M)
Date of decision: 01.03.2018

The Government of Haryana

.....Petitioner

Versus

M/s G.F. Toll Road Pvt. Ltd. and others

.....Respondents

CORAM:HON'BLE MS. JUSTICE RITU BAHRI

Present: Mr. P.S. Rana, Advocate,
for the petitioner.

Mr. A.K. Chopra, Senior Advocate,
with Ms. Rupa Pathania, Advocate,
for respondent No.1.

Mr. Sumeet Goel, Advocate,
and Mr. Atul Goel, Advocate,
for respondent No.2.

Ritu Bahri, J.

Challenge in this petition is to the order dated 27.01.2017 passed by the Additional District Judge, Chandigarh, dismissing an application filed by the petitioner under Section 14 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') for declaration to the effect that the constitution of the Arbitral Tribunal is illegal, arbitrary, unwarranted and against the principles of natural justice.

Government of Haryana, Public Works (B&R) Department through Engineer-in-Chief, Haryana, PWD B&R Branch issued letter of acceptance dated 12.12.2008 in favour of M/s GF Toll Road Private Limited

(respondent) for execution of work of Design, Engineering, Finance, Construction, Operation and Maintenance of Gurgaon-Faridabad and Ballabhgarh-Sohna Roads in Faridabad and Gurgaon Districts on Built, Operate and Transfer (BOT) basis. Concession agreement was signed on 31.01.2009 with construction period of 24 months having concession period of 17 years starting from appointed date i.e. 31.05.2009 i.e. 120 days from date of signing of concession agreement.

Respondent No.1-M/s G.F. Toll Road Pvt. Ltd. issued notice under Clause 39.1 of Concession Agreement regarding compensation for alleged material breach in the contract. The matter was referred to an independent consultant, who was to further act in accordance with terms of concession agreement. The independent consultant, thereafter, issued letter dated 27.02.2014. Finally, respondent No.1, vide letter dated 14.02.2015, sought reference of the dispute in accordance with clause 39.1 (b) of the Concession Agreement. However, respondent No.1 sent a notice dated 30.03.2015, to respondent No.2-Registrar Indian Council of Arbitration (for short 'ICA') to commence arbitration. Pursuant to the said notice, ICA sent a letter dated 09.04.2015, directing the petitioner to deposit Rs.51,80,595/- towards arbitration cost and expenses towards the claim amount submitted by respondent No.1 being Rs.95 crore approximately and to file defense statement/counter claims, if any. A further direction was given to nominate arbitrator on its behalf from the panel of council by 11.05.2015. Respondent No.1, vide its letter dated 05.05.2015, intimated appointment of Mr. Surjit Singh as its Arbitrator-respondent No.4. ICA vide letter dated 12.05.2015 acknowledged appointment of arbitrator subject to clearing the arbitral dues.

Vide letter dated 12.05.2015, ICA called upon the petitioner (State of Haryana) to submit defence statement/counter claims, deposit cost of arbitration and to forward the name of its nominee arbitrator from the panel of arbitrator. The State of Haryana (petitioner) vide letter dated 08.06.2015 intimated the ICA about its nominee arbitrator i.e. Mr. M.K. Aggarwal, Engineer-in-Chief (Retired) Haryana PWD (B&R). Petitioner's nominee arbitrator Mr. M.K. Aggarwal, gave his consent and declaration dated 19.06.2015, which was forwarded by the petitioner vide letter dated 30.06.2015. Respondent No.1, vide letter dated 27.07.2015, requested the ICA to proceed further with the matter and did not raise any objection with regard to nominee arbitrator of the petitioner namely Mr. M.K. Aggarwal. Thereafter, ICA vide letter dated 03.08.2015, asked the petitioner to deposit Rs.51,80,959/- and file defence statement along with the counter claim because without deposit of the said amount, further proceedings could not be carried out. The ICA vide letter dated 24.09.2015 again reasserted that the nomination of Mr. M.K. Aggarwal was against the norms and code of conduct. Thereafter, respondent No.1 sent a letter dated 25.09.2015 in response to email dated 21.05.2015 sent by the ICA, conveyed its objection for the first time to the appointment of Mr. M.K. Aggarwal as an Arbitrator merely because he had worked in the organization of petitioner-State of Haryana, which gave rise to justifiable doubts about his independence and impartiality to act as an arbitrator. Vide letter dated 12.10.2015, ICA asked the petitioner to forward a fresh name to be appointed as arbitrator. It was further stated that if, the State of Haryana still insisted to nominate Mr. M.K. Aggarwal, the Council would have to refer the matter to its Arbitration Committee for appointment of petitioner's nominee arbitrator.

Further, the latter dated 30.10.2015 also stated that the petitioner had never ever responded positively to opportunities give by the Council for change and substitution of its nominee arbitrator, as such, it (Council) was in the process of appointing arbitrator in place of Mr. M.K. Aggarwal, under the recommendation of Arbitration Committee. Vide letter dated 16.11.2015, State of Haryana-petitioner requested the ICA to give 30 days' time to do the needful. Upon this, vide letter dated 23.11.2015, ICA had informed the petitioner that Arbitration Committee had already appointed nominee arbitrator on behalf of State of Haryana-petitioner as well as the Presiding Arbitrator and the Council was waiting consent letters from the appointed arbitrators, as such, 30 days' time, sought for vide letter dated 16.11.2015, could not be granted.

In the application under Section 14 of the Act, grouse of the State was that they had never been intimated about appointment of arbitrator by the Arbitration Committee prior to 23.11.2015. Nomination of respondent No.5 and constitution of the Arbitral Tribunal by ICA was not legal & valid, as such, mandate of the Arbitral Tribunal stood terminated in view of Section 14 of the Arbitration & Conciliation Act, 1996. Ultimately, a prayer was made that State of Haryana-petitioner be permitted to substitute/nominate its nominee arbitrator in place of respondent No.5.

Upon notice, respondent No.1 filed its reply along with counter claim, stating therein that the Arbitral Tribunal consisting of respondent Nos.3, 4 & 5 was constituted and petitioner-State of Haryana had appeared before the Tribunal through counsel on 20.02.2016. In this backdrop, the Arbitral Tribunal was entitled to continue the proceedings and make an arbitral award. Only remedy available to the petitioner as per Section 13 of

the Act, was to make an application for setting aside the said award in accordance with Section 34 of the Act. It was further stated that State of Haryana had already challenged appointment of Mr. P.C. Markanda before the Arbitral Tribunal and hence, application under Section 14 of the Act was not maintainable. The ICA had reminded State of Haryana-petitioner regarding objection to the nomination of Mr. M.K. Aggarwal as Arbitrator as he was employee of the petitioner. In spite of several opportunities given to the petitioner to substitute and/or nominate any other Arbitrator from the list of panel of Arbitrators of Council, it had failed to do so. As per ICA rules, after nomination of respondent No.5 as their nominee arbitrator on behalf of State of Haryana-petitioner, the Arbitral Tribunal was rightly constituted.

Respondent No.2-Indian Council of Arbitration filed a separate reply and reiterated the stand taken by respondent No.1 to the effect that despite numerous opportunities given, neither the present petitioner-State of Haryana sent any substituted name for its nominee arbitrator nor any attempt was made to deposit the amount towards arbitration proceedings. Vide letter dated 30.10.2015, respondent No.2 had communicated to the petitioner that the nomination of Mr. M.K. Aggarwal was illegal and he was to be substituted by another arbitrator. After giving ample opportunities to petitioner-State of Haryana, the Arbitration Committee appointed Dr. P.C. Markanda-respondent No.5 as the nominee arbitrator on behalf of petitioner and this decision was communicated by respondent Nos.2 to 5 vide letter dated 18.11.2015. It was further submitted that the Arbitral Tribunal has been constituted under Rule 24 of the ICA Rules and the same was communicated by respondent No.2 to all the concerned parties. First

meeting of the constituted Tribunal was held on 20.02.2016 and in that hearing, both the claimant and respondent had appeared and a time schedule for completion of pleadings was set down. Thereafter, notice of the present application under Section 14 of the Act was received by respondent No.2.

After hearing learned counsel for the parties, the Additional District Judge, Chandigarh dismissed the above said application. State of Haryana-petitioner had taken a plea that prior to invoking the arbitration clause, respondent No.1 had not exhausted the dispute resolution clause for amicable settlement. While considering this aspect, it has been held that sufficient efforts were made to settle the dispute with amicable settlement and in pursuance thereof, independent consultant was appointed. When no such amicable settlement took place, at that stage, respondent No.1 submitted statement of claim dated 30.03.2015 as per Rule 15 of the ICA Rules of Arbitration, stating therein that dispute had not been resolved by way of mutual settlement. Further, objections were raised by the department vide letter dated 10.06.2015, in response to which, the ICA vide letter dated 11.07.2015, clearly notified that the point of maintainability of the Arbitral reference sent to the opposite party for its reply and the objections would be decided by the Arbitral Tribunal as and when it was established. The department had nominated its own nominee vide letter dated 08.06.2015 and this fact showed that the dispute could not be resolved amicably as per clause 38.1.

The second ground taken was that under the rules of Arbitration, the ICA had no power or jurisdiction to order substitution of Mr. M.K. Aggarwal as Arbitrator. As per clause 39.1 of Concession Agreement, each party was to appoint an arbitrator and third arbitrator was to be

appointed by the Council. In this agreement, there was no provision as to what what would happen in a situation of any objection or any dispute regarding appointment of arbitrator. In such circumstances, rules of the Indian Council of Arbitration were to be followed. There was objection to the appointment of Mr. M.K. Aggarwal as an Arbitrator. Accordingly, petitioner-Government of Haryana was advised to reconsider the nomination of Mr. M.K. Aggarwal, as he was an ex-employee of the department and did not qualify to be nominated as an arbitrator. This objection was raised by respondent No.1. Petitioner-State of Haryana was given 15 days' time, as per Rule 27 (b) of the ICA Rules, to reconsider his name. But, the department had not sent any name by 27.10.2015. Thereafter, vide letter dated 23.11.2015, Council had informed the petitioner-department that they had already appointed a nominee arbitrator and were awaiting the consent letter from him. Finally, vide letter dated 05.12.2015, the ICA notified under Rule 24 of the ICA Rules of Arbitration about the constitution of Arbitral Tribunal.

Respondent No.1-M/s G.F. Tolls filed statement of claim before the Arbitral Tribunal. Even, the present petitioner-State of Haryana filed objections before the constituted Tribunal, which were rejected being not in the form of a valid application. The petitioner has also filed counter claim before the Arbitral Tribunal. This fact shows that impliedly, the jurisdiction of the Tribunal has been accepted by the petitioner. In such circumstances, the aggrieved party can make an application with regard to constitution of the Tribunal, before the Tribunal itself. With these observations, the Additional District Judge, Chandigarh has dismissed the application filed by the petitioner.

Learned counsel for the petitioner, in support of his contentions, has referred to the judgment passed by Hon'ble the Supreme Court in **C.M.C. Ltd. Vs. Unit Trust of India and others**, 2007 (2) RCR (Civil) 335.

However, the judgment referred to by learned counsel for the petitioner is not applicable to the facts of the present case. In this case, it has been held that once both the parties agree to resolve their dispute by way of arbitration and they retain the right to nominate respective arbitrators, then there was no obligation on any of the parties to choose only an arbitrator as per the rules of Arbitration of the Indian Council of Arbitration or to proceed only in terms of those Rules for appointment of an arbitrator. The aforesaid judgment was given in the backdrop of arbitration agreement between the parties, where parties had retained themselves to name arbitrator of their own, who in turn had to nominate a Presiding Arbitrator, so as to constitute an Arbitral Tribunal. The power to appoint has not been ceded to the Indian Council of Arbitration. Hence, after constitution of Arbitral Tribunal, the proceedings were to be conducted as per rules prescribed by the Indian Council of Arbitration. In that case, as per the resolution of disputes by way of arbitration, the parties had resolved and retained in themselves the power to constitute an Arbitral Tribunal. It was held that there was nothing wrong in such a provision. After constitution of the Arbitral Tribunal, the proceedings were to follow as per rules prescribed by Indian Council of Arbitration. Constitution of the Tribunal was as per clause 20 of the agreement. The challenge was made to the constitution of the Arbitral Tribunal by way of application under Section 11 (6) of the Arbitration and Conciliation Act, 1996. The Hon'ble Supreme Court upheld the order passed by the designated judgment of the High Court that

resolution of disputes by way of arbitration was a matter of agreement between the parties. If, while contemplating such a resolution of disputes, they also retained in themselves the power to constitute an Arbitral Tribunal, it cannot be said that there is anything wrong in such a provision or that the same cannot be given effect to.

In the case before the Hon'ble Supreme Court, the parties had resolved to constitute an Arbitral Tribunal. However, power of appointment of Arbitral Tribunal, in the present case is conspicuously missing. In the present case, initially as per clause 39.1 (b) of Concession Agreement, dispute could be resolved amicably by referring the matter to an independent consultant. If the dispute is not resolved within 45 days, then the parties could make a claim in writing under clause 39.2 for Arbitration. Relevant Rules 39.2.1 and 39.2.2, in this regard are reproduced as under:-

“**39.2.1.** Any dispute, which is not resolved amicably as provided in clause 39.1, shall be finally decided by reference to arbitration by a Board of Arbitrators, appointed pursuant to Clause 39.2.2 sub clause (b) below. Such arbitration shall be held in accordance with the Rules of Arbitration of the Indian Council of Arbitration and shall be subject to the provisions of the Arbitration Act.

39.2.2. There shall be a Board of three arbitrators of whom each party shall select one and the third arbitrator shall be appointed in accordance with the Rules of Arbitration of the Indian Council of Arbitration.”

A perusal of the above two rules shows that there should be a Board of three Arbitrators of whom, each party shall select one and the third arbitrator shall be appointed in accordance with the Rules of Arbitration of the Indian Council of Arbitration. There is no rule with regard to objections of the nominee. If, there is an objection regarding name of arbitrator by one of the parties, in this backdrop, Rule 39.2.1 shall be applicable. As per this rule, the arbitration is to be held as per the Indian Council of Arbitration.

The provisions are silent as to what will be the procedure, if there is an objection to the appoint of arbitrator by one of the parties.

In the present case, when objection was raised with regard to the name of Mr. M.K. Aggarwal, the Registrar under Rule 27 (b) of the Indian Council of Arbitration Rules, gave 15 days' time to petitioner-State of Haryana, PWD (B&R) Department to withdraw the name of Mr. M.K. Aggarwal and send a substituted name. Thereafter, a number of letters were written. When no response was received from the PWD department (petitioner), a new arbitrator was appointed by the Registrar in consultation with the Arbitration Committee, as per Rules 25 and 27 of the Indian Council of Arbitration Rules. In the absence of any rule to decide the objection(s), procedure under Sections 25 to 27 had to be followed. Moreover, the Registrar had given its due notice under Section 27 (2) (b) of the ICA Rules for sending a substituted name of the arbitrator in place of Mr. M.K. Aggarwal. However, petitioner-State of Haryana failed to send its substituted nominee and ultimately, the Arbitral Tribunal Committee proceeded to appoint Mr. P.C. Markanda-respondent No.5 as substituted arbitrator in place of Mr. M.K. Aggarwal. This fact was duly informed to both the parties. Hence, the judgment referred to by learned counsel for the petitioner is not applicable to the facts of the present case as the concession agreement was silent with regard to the objection raised by any of the parties.

At the same time, learned counsel for the respondent No.1 has referred to the judgment passed by Hon'ble the Supreme Court in **M/s Gas Authority of India Ltd. and another vs. M/s Ketu Construction (I) Ltd. and others,** 2007 (3) RCR (Civil) 133 to contend that if, there is challenge to the

Arbitral Tribunal being improperly constituted, it is to be looked into by the Tribunal on an application under Section 16 of the Arbitration and Conciliation Act, 1996. It has been further held as under:-

“18. The whole object and scheme of the Act is to secure an expeditious resolution of disputes. Therefore, where a party raises a plea that the arbitral tribunal has not been properly constituted or has no jurisdiction, it must do so at the threshold before the arbitral tribunal so that remedial measures may be immediately taken and time and expense involved in hearing of the matter before the arbitral tribunal which may ultimately be found to be either not properly constituted or lacking in jurisdiction, in proceedings for setting aside the award, may be avoided. The commentary on Model Law clearly illustrates the aforesaid legal position.

19. Where a party has received notice and he does not raise a plea of lack of jurisdiction before the arbitral tribunal, he must make out a strong case why he did not do so if, he chooses to move a petition for setting aside the award under Section 34 (2) (v) of the Act on the ground that the composition of the arbitral tribunal was not in accordance with the agreement of the parties. If, plea of jurisdiction is not taken before the arbitrator as provided in Section 16 of the Act, such a plea cannot be permitted to be raised in proceedings under Section 34 of the Act for setting aside the award, unless good reasons are shown.”

In the light of the above discussion and the law laid down in M/s Gas Authority of India's case (supra), this Court is of the view that once the petitioner had a right to file an application under Section 16 of the Act with regard to constitution of Arbitral Tribunal, before the Tribunal itself, its application under Section 14 of the Act has been rightly dismissed by the Court of Additional District Judge, Chandigarh.

Accordingly, no ground is made out to interfere in the impugned order.

Dismissed.

01.03.2018
ajp

(RITU BAHRI)
JUDGE

Whether speaking/reasoned: Yes/No
Whether reportable : Yes/No