

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

FAO No.1825 of 2006 (O&M)

Date of Decision: December 16, 2019

State of Haryana etc.

...Appellants

Versus

M/s Yash Pal Chopra and Co.

...Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present:- Mr. Pramjeet Singh, AAG Haryana
for the appellants.

Mr. Anupam Singla, Advocate
for respondent No.1.

JAISHREE THAKUR, J. (Oral)

1. This is an appeal that has been filed seeking to challenge the order dated 04.01.2006 passed by the Addl. District Judge, Karnal whereby, the objections filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') for setting aside the award of the Arbitrator dated 06.11.2002, has been allowed.

2. In brief, the facts of the case are that a contract, as available on the record as Ex.P5, was executed between the parties for Rehabilitation of Bank Strengthening of Nardak Distributory from RD 27000 to Tail. The contract was allotted vide letter No.5013-14 dated 18.10.2000 for the contract price of Rs.1,29,11,304/-. Since a dispute arose between the parties, in the light of clause 24(1) of the contract agreement, respondent

No.1-contractor referred the dispute to the Adjudicator Sh. R.S. Gupta, Chief Engineer (retd.), who was nominated adjudicator in the contract itself. The Adjudicator gave his award dated 23.04.2002. The Adjudicator by his award dated 23.04.2002 held that all the dues of the contractor be settled in terms of clause 60.2 of the contract agreement. Subsequent to the said award, the Financial Commissioner and Principal Secretary to Govt. of Haryana appointed an Arbitrator to decide the disputes. The Arbitrator, Sh. Gian Singh, H.S.E. 1., Superintending Engineer, Construction Circle, Canal Colony, Panipat gave his award against the contractor holding that the State of Haryana would be entitled to recovery of 20% of work done from a third agency amounting to Rs.14,66,298/- along with other amount. Aggrieved against the award of the Arbitrator, objections were filed by the contractor primarily taking up the plea that the reference made to the Arbitrator was illegal and beyond the terms of the agreement entered into between the parties, while further submitting that the contract had been illegally terminated in terms of clause 59.1 of the contract agreement. The Addl. District Judge, Karnal on appreciation of the evidence and exhibits placed on the record came to hold that the very appointment of the Arbitrator was against the conditions as specified in the contract agreement, but at the same time also allowed either of the parties to refer the decision of the Adjudicator to the Arbitrator. Aggrieved against the setting aside of the award itself, the instant appeal has been filed by the State of Haryana.

3. Learned counsel for the appellants lays stress on the argument that respondent No.1 took part in all proceedings before the Arbitrator, and, therefore, by his own conduct was estopped from raising an objection in this

regard and had waived his right by taking part in the proceedings before the Arbitrator whereas, learned counsel appearing on behalf of respondent No.1-contractor submits that the appointment of the Arbitrator was not in consonance with the contract agreement, while contending that he had, in fact, raised the objection regarding appointment of the Arbitrator, but the same had not been dealt with.

4. I have heard learned counsel for the parties and have also perused the award of the Arbitrator as well as the terms and conditions of the contract agreement Ex.P5 executed between the parties.

5. The contract agreement is not in dispute and neither is it disputed that the named Adjudicator was appointed in terms of clause 36-1 of the contract agreement, who by his award dated 23.04.2002, allowed the claim of the contractor. Subsequent to the said award, the Financial Commissioner and Principal Secretary to Government of Haryana by his letter dated 07.05.2002, appointed Sh. Gian Singh, Superintending Engineer, Construction Circle, Hissar as an Arbitrator, who ultimately gave his award dated 06.11.2002.

6. The argument as raised by the counsel for the appellants that respondent No.1-contractor had not taken any plea before the Arbitrator regarding his appointment, is an argument which cannot be dealt with by this court, since the record of the entire proceedings before the Arbitrator stands burnt and the counsel for the parties are unable to reconstruct the burnt record. Therefore, reliance is placed upon the argument advanced by counsel for respondent No.1-contractor that he has raised necessary objection before the Arbitrator, which was not dealt with.

7. The contract agreement provides for a resolution to the dispute, if any of the parties is not satisfied with the award of the Adjudicator, as appointed under clause 36.1. Clause 25 of the General Conditions of Contract provides for procedure for disputes and sub-clause 25.3 provides that the arbitration shall be conducted in accordance with the arbitration procedure as given in the Special Conditions of Contract. Clause 17 of the Special Conditions of Contract provides for details of the procedure to be followed for arbitration under clause 25.3 of the General Conditions of Contract (GCC). Sub-clause (f) of 25.3 is reproduced herein

“When the value of the contract is Rs.50 millions and below, the disputes or differences arising shall be referred to the Sole Arbitrator. The Sole Arbitrator should be appointed by agreement between the parties; failing such agreement, by the appointing authority, namely by the Indian Council of Arbitration/President of the Institutes of Engineers (India)/The International Centre for Alternative Disputes Resolution (India).”

A reading of the said sub-clause (f) reflects that a dispute would be referred to arbitration in case, there is no agreement for the sole Arbitrator to be appointed (if the value of the dispute is less than 50 millions, as in the present case) and in such a situation, the Indian Council of Arbitration/President of the Institutes of Engineers (India)/The International Centre for Alternative Disputes Resolution (India) would be the appointing authority whereas, in the instant case, the matter has been referred to the Sole Arbitrator i.e. to the Superintending Engineer by the Financial Commissioner, who was not the competent authority to appoint the Arbitrator. Once the appointment of the Arbitrator is a nullity, the

award as passed would not be sustainable, and has rightly been set aside by the Addl. District Judge, Karnal. The judgments, as relied upon by the Addl. District Judge, Karnal are fully applicable to the facts of the instant case. Further reliance in this regard can be placed upon the judgment as rendered by the Apex Court in *Union of India vs. Parmar Construction Company, 2019(5) RCR (Civil) 302.*

8. In view of the appeal, the appeal in hand is hereby dismissed, being devoid of any merits, leaving it open to the parties to approach the Arbitrator in terms of the agreement, on receipt of certified copy of the order.

December 16, 2019
vijay saini

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No