

In the High Court of Punjab and Haryana, at Chandigarh

Arbitration Case No. 321 of 2018 (O&M)

Date of Decision: 16.12.2020

Paras Foods

... Applicant(s)

Versus

State of Haryana and Others

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. Arun Bansal, Advocate
for the applicant(s).

Mr. S.S.Pannu, Deputy Advocate
General, Haryana for respondent No.1.

Mr. Padam Kant Dwivedi, Advocate
for respondents No. 2 and 3.

Anil Kshetarpal, J.

This application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act of 1996”) has been filed for appointment of an Arbitrator to adjudicate the dispute between the parties.

At the outset, it must be noticed that the respondents have not filed any response to the application. Notice was issued to the respondents on 26.10.2018 and they appeared through their counsel on 08.02.2019. Thus, approximately, one year and 10 months have elapsed, however, no response has been filed. Therefore, it is safe to assume that the respondents do not wish to file any reply. At the time of hearing, no request for adjournment was made to enable them to file reply.

As per the pleaded case of the applicant, the parties entered into

paddy. The paddy belong to the Haryana Agro Industries Corporation Limited, whereas it was given for milling to the applicant herein Paras Foods. The applicant claims that the milling charges have not been paid although substantial quantity of rice milled from the paddy has already been delivered. It is further pleaded that the respondents are illegally and arbitrarily demanding an amount of ₹ 2,85,00,000/- from the applicant. The clause 24 of the agreement reads as under:

“24. All the minor disputes and differences arising out of interpretations or in any manner touching or concerning this agreement whatsoever (except as to any matter the decision of which is expressly provided for in the contract) shall be referred to the sole Arbitrator of the Managing Director of the Haryana Agro Indsut. Corp. Ltd., Panchkula, Haryana or any person appointed by them in this behalf. There will be no objection to any such appointment that the person appointed is or was an employee of Haryana Agro Indsut. Corp. Ltd., Panchkula, Haryana and he had expressed views on all or any of the matter in dispute or difference. The award of such arbitration shall be final and binding on both the parties to this contract. It is a term of this contract that in the event of transfer, vacation of office or being unable to act for any reason of a person appointed as an arbitrator by the Managing Director, Haryana Agro Industries Corporation Limited at the time of such transfer, vacation of office death or inability shall appoint another person to act as an arbitrator. Such a person shall be

entitled to proceed with reference from the stage where it was left by this predecessor.

Provided that any demand for arbitration in respect of any claim(s) of the Miller/Second Party, under the contract shall be in writing and made within one year of the date of completion or expiry of the period of contract. If the demand is not made within the period the claim(s) of the Miller/Second party shall be deemed to have been waived off and released of all liabilities under the Contract in respect of these claims. The cost for and in connection with arbitration shall be the discretion of the arbitrator who may make suitable orders in his award.

Subject as aforesaid, the Arbitration and Conciliation Act, 1996 shall apply to the arbitration provided under this clause. However, the cases of fraud, theft or misappropriation etc. on the part of second party are not covered under this clause and in such cases legal proceedings as deemed fit will be initiated by the First Party against the second party as well as against the sureties”.

At the time of arguments, learned counsel appearing for the Haryana Agro Industries Corporation Limited-respondent No.2 has submitted that the Managing Director of the Corporation or his nominee is the sole Arbitrator and therefore, the application is not maintainable.

The argument of learned counsel representing respondent No.2 cannot be accepted in view of the amendment brought in by Act No. 3 of

2016 in the Act, which has been made effective from 23.10.2015. Sub Section 5 of Section 12, which has been introduced with effect from 23.10.2015 provides that notwithstanding any prior agreement to the contrary, any person who falls in any of the category specified in VIIth Schedule shall be ineligible to be appointed as an Arbitrator. Schedule VII enlists various categories of persons who are ineligible to be appointed as an Arbitrator. As per clause 5 of the Schedule, the Director or anyone who is part of the management is ineligible to be Arbitrator after the amended Act has come into force.

This aspect has been examined in detail by the Supreme Court in *TRF Limited v. Energo Engineering Projects Limited (2017) 8 SCC 377* and *Perkins Eastman Architects v. H.S.C.C. (India) Limited (2019) SCOnline Supreme Court 1517*. It has further been held that the person, who himself is ineligible cannot be permitted to nominate another person as the sole Arbitrator.

In the present case, Section 21 of the Act of 1996 is not applicable because the first request for appointment of an Arbitrator was made on 20.09.2017. It is not the case of the respondent that anyone was appointed as the Arbitrator. The second request for appointment of the Arbitrator was made on 20.08.2018.

Keeping in view the aforesaid facts, there is no doubt that the amended Act would be applicable. Hence, this Court is required to exercise its power under Section 11 and make an appointment of the sole arbitrator to decide the disputes and differences between the parties.

(a) Appointment of Arbitrator: Mr. Justice S.S.Saron,

Former Judge of this Court, is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties.

(b) Communication to Arbitrator of this order:

- (i) A copy of this order will be communicated to the learned Sole Arbitrator by the learned counsel for the petitioner within one week from today of the order being uploaded.
- (ii) In addition, within one week of this order being uploaded, the Registry will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal address:

**Arbitrator : Mr. Justice S.S.Saron,
Former Judge, Punjab and
Haryana High Court.**

**Address : House No. 9, Sector 9,
Chandigarh.**

Mobile No. : +91 9780008109

- (c) **Disclosure:** The learned Sole Arbitrator is requested to forward his statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to the Registrar General of this Court, referencing this arbitration petition, as soon as possible, and in any case sufficiently in advance of his entering upon the reference to his arbitration. That statement will be retained by the Registrar General on the file of this application. Copies

will be given to both sides.

- (d) Appearance before the Arbitrator:** The parties will appear before the learned Sole Arbitrator physically or through video conference on such date and at such place as he nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.
- (e) Contact/communication information of the parties:** Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator within one week of this order being uploaded. The information is to include a valid and functional email address.
- (f) Application under Section 16:** Liberty to either side to file an application before the learned Sole Arbitrator under Section 16 in regard to any matter or claim and its arbitrability, jurisdiction and the arbitral tribunal competence.
- (g) Interim Application(s):**

 - (i) Liberty to both sides parties to make an interim application or interim applications including (but not limited to) interim applications under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator
 - (ii) Any such application will be decided in such manner and within such time as the learned Sole

Arbitrator deems fit.

- (h) **Fees:** The fees of Arbitral Tribunal shall be governed by the Punjab Haryana and Union Territory, Chandigarh Arbitration and Conciliation Rules, 2003.
- (i) **Sharing of costs and fees:** Parties agree that all arbitral costs and the fees of the arbitrator will be borne by the two sides in equal shares in the first instance.
- (j) **Venue and seat of arbitration:** The venue of the arbitration shall be such place or places in the Punjab or Chandigarh as may be fixed by the Sole Arbitrator in his sole discretion.
- (k) **Contentions kept open.** All contentions before the learned Sole Arbitrator are specifically kept open.

It is clarified that it is open to the respondents to file a counterclaim, if so advised, before the learned Sole Arbitrator within such time and subject to such terms as the learned Sole Arbitrator may direct.

The application is disposed of in these terms. Costs of the arbitration application may be included by both sides in their claims before the learned Sole Arbitrator.

The miscellaneous application(s) pending, if any, shall also stand disposed of.

(Anil Kshetarpal)
Judge

December 16, 2020
“DK”

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