

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

**Case No. ARB-81-2020
Date of decision : 10.11.2020**

Rana BuildersPetitioner

Versus

General Manager, Northern Railway and othersRespondents

CORAM: HON'BLE MR. JUSTICE ARUN KUMAR TYAGI

Present : Mr. Dheeraj Mahajan, Advocate
for the petitioner.

Mr. Karaminder Singh, Advocate
for the respondents.

ARUN KUMAR TYAGI, J.

(The case has been taken up for hearing through video conferencing.)

The petitioner has filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short 'the 1996 Act') for appointment of sole Arbitrator to adjudicate the dispute between the parties arising out of the work namely "Dismantling and disposal of release material i.e. brick bats CI/GI/MS Sheets Scrap, wooden scrap etc. by sale of abounded structures (staff quarters, service buildings and other buildings) in the section of ADEN-I Ferozepur".

The petitioner has pleaded that the above said work was allotted to the petitioner vide acceptance letter dated 28.02.2003 and the detailed acceptance letter dated 28.03.2003. The parties were governed by General Conditions of Contract 1999. The period of work was extended by the respondents vide letter dated 14.09.2012 till 30.11.2012. On account of defaults committed by the respondents

disputes arose between the parties. As per clause 64 of the General Conditions of Contract, 1999, the disputes were required to be referred to arbitration. The petitioner served legal notices dated 02.09.2019 and 27.01.2020 but the respondents failed to appoint the Arbitral Tribunal within 30 days. The petitioner has accordingly prayed that independent person other than that mentioned in the Arbitration Clause may be appointed as the sole Arbitrator.

The petition has been contested by the respondents in terms of reply filed by respondent No.2. In his reply respondent No.2 has taken preliminary objection as to the petition being barred by limitation as there was no extension of work after 30.11.2012. In reply on merits it has been submitted that as per Clause 64(3)(a)(i) only Gazetted Officer of Railway not below JA Grade can be nominated as Arbitrator. The petitioner failed to complete the work at the site and cannot ask for appointment of Arbitrator after a period of eight years. The petition is without any merits and the same may be dismissed.

The petitioner filed rejoinder to the reply pleading that the plea regarding bar of limitation is factually incorrect and has to be decided by the Arbitrator. The respondents failed to fulfil their part of contractual obligations giving rise to the disputes between the parties. Since the respondents failed to take any action on legal notices for appointment of arbitrator within 30 days, the respondents have waived their right to appoint the Arbitrator.

I have heard arguments addressed by Mr. Dheeraj Mahajan, learned counsel for the petitioner and Mr. Karaminder Singh, learned counsel for the respondents and have gone through the relevant

record.

Mr. Dheeraj Mahajan, learned counsel for the petitioner has submitted that disputes between the parties have arisen which have to be referred as per Clause 64 of the General Conditions of Contract, 1999 to Arbitration for decision. The petition is not time barred. In any case the question of limitation has to be decided by the Arbitrator. The respondent No.2 did not appoint the Arbitrator within the statutory period of 30 days and the respondents have thereby waived the right to do so. Therefore, some independent person may be appointed as sole Arbitrator for decision of the disputes between the parties. In support of his arguments, learned counsel for the petitioner has placed reliance on the judgments of Hon'ble Supreme Court in *M/s Uttarakhand Purv Sainik Kalyan Nigam Limited Vs. Northern Coal Field Limited : 2020 AIR Supreme Court 979* and *Denel (Proprietary Limited) Vs. Bharat Electronics Ltd. and another : 2010 (3) RCR (Civil) 233* and a Coordinate Bench of this Court in *ARB Case No.24 of 2010 titled M/s Akash Enterprises Vs. The General Manager, Northern Railway and others decided on 17.03.2011* and of Delhi High Court in *ARB.P. 779/2019 titled M/s Arvind Kumar Jain Vs. Union of India decided on 04.02.2020*.

On the other hand, Mr. Karaminder Singh, learned counsel for the respondents has argued that the petitioner did not complete the work in terms of last extension of work upto 30.11.2012. The petition is time barred. The petitioner is not entitled to reference of the dispute to Arbitration. Therefore, the petition for appointment of Arbitrator may be dismissed. Learned Counsel for the respondents has argued in

the alternative that in terms of Clause 64(3)(a)(i) of the General Conditions of Contract, 1999 the Arbitrator and in terms of Clause 64(3)(a)(ii) of the General Conditions of Contract, 1999 the Arbitral Tribunal consisting of panel of three Gazetted Railway Officers not below the JA grade as the arbitrators has to be appointed by respondent No.2 the General Manager and liberty may be granted to the respondents in this regard.

On consideration of the submissions made by learned Counsel for the parties and on perusal of the material on record, I am of the considered view that the petition deserves to be allowed.

In the present case, the petitioner was allotted the work of dismantling and disposal of release material i.e. brick bats CI/GI/MS sheets scrap, wooden scrap etc. by sale of abounded structures (staff quarters, service buildings and other buildings) in the section of ADEN-I Ferozepur vide acceptance letter dated 28.02.2003 and detailed acceptance letter dated 28.03.2003. The period for completion of the work was extended upto 30.11.2012 but disputes have arisen between the parties regarding the same.

Admittedly, the parties are governed by the General Conditions of Contract, 1999. The clauses relevant for disposal of the present petition may be noticed which read as under:-

“Clause 64(1)(i) : In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the “excepted matters” referred to in

clause 63 of these Conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.

Clause 64(3)(a)(i) : *In cases where the total value of all claims in question added together does not exceed Rs.10,00,000/- (Rupees ten lac only), the Arbitral Tribunal Shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway not below JA Grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by railway.*

Clause 64(3)(a)(ii) : *In cases not covered by the Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a Panel of three gazette Railway Officers not below JA Grade, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of gazette Railway Officers of one or more departments of the Railway to the contractor who will be asked to suggest to General Manager up to 2 names out of the panel for appointment as contractor's nominee. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. While nominating the arbitrators, it will be necessary to ensure that one of them is from the Accounts Department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA grade of other departments of the Railway for the purpose of appointment of arbitrator."*

It is not disputed that the petitioner served legal notices dated 02.09.2019 and 27.01.2020 for reference of the matter to arbitration but admittedly, respondent No.2 did not take any action for appointment of Arbitrator/Arbitral Tribunal.

The respondents have opposed the present petition on the ground that the claim is time barred. It is now well settled that after amendment of the 1996 Act by insertion of sub-section (6A) in Section 11 thereof, the question of limitation being a jurisdictional issue has to

be decided by the Arbitrator/Arbitral Tribunal under Section 16 of the 1996 Act which is based on Article 17 of UNCITRAL Model Law which enshrines the Kompetenz principle. Reference for judicial precedents in this regard may be made to judgments of Hon'ble Supreme Court in *M/s Indian Farmers Fertilizers Cooperative Ltd. Vs. Bhadra Products : 2007 (4) SCC 451* and *M/s Uttarakhand Purv Sainik Kalyan Nigam Limited Vs. Northern Coal Field Limited : 2020 AIR Supreme Court 979*. Even though Sub-Section (6A) was deleted by Section 3 of the Arbitration and Conciliation (Amendment) Act, 2019 but the Central Government has not yet notified any date for enforcement thereof. Therefore, Sub-Section (6A) of the 1996 Act continues to govern the field and the above-referred judgments fully apply to the present case.

Respondent No.2-the General Manager, Northern Railway was under an obligation to appoint Arbitral Tribunal within 30 days from receipt of legal notice from the petitioner but respondent No.2 failed to do so even till filing of the present petition. It is now well settled that after petition under Section 11(6) of the 1996 Act is filed before the court seeking appointment of an arbitrator, the power to appoint an arbitrator in terms of the arbitration clause of the agreement ceases. Reference for judicial precedents in this regard may be made to judgments of Hon'ble Supreme Court in *Datar Switchgears Ltd. Vs. Tata Finance Ltd. & Another : (2000)8 SCC 151* and *Union of India Vs. Bharat Battery Mfg. Co. (P) Ltd. : (2007) 7 SCC 684* and a Coordinate Bench of this Court in *ARB Case No.24 of 2010 titled M/s Akash Enterprises Vs. The General Manager, Northern Railway and*

others decided on 17.03.2011. In view of the settled position of law, respondent No.2 must be held to have waived the right to appoint and is estopped from appointing the Arbitral Tribunal under Clause 64(3)(a)(ii) of the General Conditions of Contract, 1999. The Court can on petition filed under Section 11(6) of the 1996 Act appoint an independent person as sole Arbitrator. Reference in this regard may be made to judgment of Hon'ble Supreme Court in ***Denel (Proprietary Limited) Vs. Bharat Electronics Ltd. and another : 2010 (3) RCR (Civil) 233*** and Delhi High Court in ***ARB.P. 779/2019 titled M/s Arvind Kumar Jain Vs. Union of India decided on 04.02.2020.***

In view of above discussion, the petition is allowed and Sh. A.P. Batra, Additional District and Sessions Judge (Retired) is appointed as sole Arbitrator for deciding the disputes arising between the parties.

The Arbitrator shall be at liberty to conduct the proceedings at the venue determined as per the convenience of the Arbitrator and the parties as far as possible. The Arbitrator shall be paid fees in accordance with the Fourth Schedule of the 1996 Act. The parties shall share the costs of the arbitration equally.

The Registry is directed to dispatch a copy of this order to Sh. A.P. Batra, Additional District and Sessions Judge (Retired) at the following address:-

Sh. A.P. Batra, Addl. D&SJ (Retd.)
Apartment No.171-172,
Tower-H, 5th Floor,
Orbit Apartment,
Opp. CCC Road, Zirakpur.

The parties are directed to appear before the Arbitrator on 01.12.2020 at 11 A.M. who shall expeditiously conclude the arbitration proceedings in accordance with law.

10.11.2020

Vinay/kothiwal

(ARUN KUMAR TYAGI)
JUDGE

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