

In the High Court of Punjab and Haryana, at Chandigarh

Arbitration Case No. 194 of 2020 (O&M)

Date of Decision: 07.12.2020

Thyssenkrupp Elevator (India) Private Limited

... Petitioner(s)

Versus

Public Works Department, B& R Branch, Government of Punjab

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. Neeraj Sheoran, Advocate
for the petitioner.

Mr. Navdeep Chhabra, Deputy Advocate
General, Punjab for the respondent.

Anil Kshetarpal, J.

This petition has been filed under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”) for appointment an independent and impartial person as Sole Arbitrator.

The existence of the agreement containing a clause for resolution of the dispute is not contested between the parties. The dispute resolution mechanism is provided in Clause 25 of the Instructions to the Bidders, which reads as under:-

“25. DISPUTES RESOLUTION MECHANISM

i) If any dispute or differences of any kind what-so-ever arise between the Government, its authorized representatives and the Contractor in connection with or arising out of this contract or the execution of work, these shall be resolved as under.

- ii) *Whether before its commencement or during the progress of Project/Work or after the termination, abandonment or breach of the contract, the dispute shall in the first instance supported with complete documents and further documents, if any, required by him, be referred for settlement to the Engineer of the work and he shall, within a period of sixty (60) days after being requested in writing by the Contractor to do so, convey his decision to the Contractor. Such decision in respect of every matter so referred shall, subject to arbitration as hereinafter provided, be final and binding upon the Contractor. In case the work is already in process, the Contractor shall continue with the execution of the work as aforesaid with all due diligence, whether any of the parties requires arbitration as hereinafter provided or not.*
- iii) *If the Engineer has conveyed his decision to the Contractor and no claim for arbitration has been filed by the Contractor within a period of sixty (60) days from the receipt of the 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.*
- iv) *If the Engineer fails to convey his decision within a*

period of sixty (60) days from the date on which the said request was made by the Contractor, he may refer the dispute for arbitration as hereinafter provided.

v) *All disputes or differences in respect of which the decision is not final and conclusive shall, at the request of either party made in communication sent through registered A.D. post, be referred for arbitration as per following:*

a. *For original contract of the value upto Rs. 5.00 Crore, the disputes shall be referred to the sole arbitration of the Superintending Engineer of the concerned circle of Public Works Department, Buildings and Roads Branch acting as such at the time of reference unless debarred from acting as an Arbitrator by an order of the Punjab Government, in which event, the Employer shall appoint any other Superintending Engineer of the department to act as an arbitrator on receipt of a request from either party.*

b. *For original contract of the value more than Rs. 5.00 Crore and upto Rs. 15.00 Crore, the disputes shall be referred to the sole*

arbitration of any other Superintending Engineer of the department to be appointed by the Employer.

c. For original contracts of the value more than Rs. 15.00 Crore, the disputes shall be referred to the Arbitral Tribunal consisting of three (3) members. The composition of tribunal will be as under:

- One official member, Chairman of the Tribunal, who shall be a serving Chief Engineer of PWD (B&R) other than the Chief Engineer incharge of the work. The appointment of the chairmanship of the Tribunal shall be done by the Employer;*
- One official member, not below the rank of Superintending Engineer (serving) of the Punjab PWD (B&R) to be appointed by the Employer and*
- One non-official member, who will be a technical expert, not below the rank of Superintending Engineer (serving/retired) of the Punjab PWD (B&R) selected by the Contractor from a panel of three (3) persons*

given to him by the Employer.

- vi) *The Employer shall have the authority to change the arbitrator/any member of arbitral tribunal on an application by either the Contractor or the Engineer requesting change of arbitrator giving reasons thereof, either before the start of the arbitration proceedings or during the course of such proceedings. The arbitration proceedings would stand suspended as soon as an application for change of Arbitrator/any member of Arbitral Tribunal is filed before the Employer and a notice thereof is given by the applicant to the Arbitrator. The Employer after hearing both the parties may pass a speaking order rejecting the application or accepting to change the arbitrator or simultaneously, appointing a technical officer as Arbitrator/any member of arbitral tribunal under the contract. The new Arbitrator/Arbitral Tribunal so appointed may enter upon the reference afresh or may continue the hearings from the point these were suspended before the previous Arbitrator/Arbitral Tribunal.*
- vii) *The reference to the Arbitrator/Arbitral Tribunal shall be made by the claimant party within one hundred twenty (120) days from the date of dispute*

of claim arises during the execution of work. If the claim pertains to rates or recoveries introduced in the final bill, the reference to the Arbitrator/Arbitral Tribunal shall be made within six calendar months from the date of payment of the final bill to the Contractor or from the date a registered notice is sent to the Contractor to the effect that his final bill is ready by the Engineer (whose decision in this respect shall be final and binding) whichever is earlier.

- viii) *It shall be an essential term of this contract that in order to avoid frivolous claims, the party invoking arbitration shall specify the disputes based upon facts and calculations stating the amount claimed under each claim and shall furnish a “deposit-at-call” for ten percent of the amount claimed, on a scheduled bank in the name of the Arbitrator/chairman of the Arbitral Tribunal, by his official designation who shall keep the amount in deposit till the announcement of the award. In the event of an award in favour of the claimant, the deposit shall be refunded to him in proportion to the amount awarded with respect to the amount claimed and the balance, if any, shall be forfeited and paid to the other party.*

- ix) *The provisions of the Arbitration and Reconciliation Act, 1996 or any other statutory law there under or modification thereof and for the time being in force shall apply to the arbitration proceedings under this clause.*
- x) *The Arbitrator/Arbitral Tribunal shall give a reasoned award for each claim/counter claim.*
- xi) *The independent claims of the party other than one seeking arbitration as also the counter claims of any party shall be entertained by the arbitrator.*
- xii) *The venue of arbitration shall be such place or places in Punjab or Chandigarh as may be fixed by the arbitrator in his sole discretion. The work under the contract shall continue during the arbitration proceedings.*
- xiii) *The stamp fee due on the award shall be payable by the party as desired by the Arbitrator/Arbitral Tribunal and in the event of such party's default, the stamp fee shall be recoverable from another sum due to such party under this or any other contract.*
- xiv) *Neither party shall be entitled to bring a claim for arbitration, if it is not filed as per the time period already specified or within six months of the following:-*

- a) *of the date of completion of the work as certified by the Engineer or*
- b) *of the date of abandonment of the work or breach of contract under any of its clauses, or*
- c) *of its non-commencement or non resumption of work within 10 days of written notice for commencement or resumption as applicable, or*
- d) *of the cancellation, termination or withdrawal of the work from the Contractor in whole or in part and/or revision for closure of the contract, or*
- e) *of receiving an intimation from the Engineer that the final payment due or to be recovered from the Contractor had been determined, for the purpose of payment/adjustment whichever is the latest. If the matter is not referred to arbitration within the period prescribed above, all the rights and claims of either party under the contract shall be deemed to have been forfeited and absolutely barred by the time for arbitration and even for civil litigation.*

xv) *No question relating to this contract shall be*

brought before any civil court without first invoking and completing the arbitration proceedings, if the issue is covered by the scope of arbitration under the contract. The pending arbitration proceedings shall not disentitle the Engineer to terminate the contract and to make alternate arrangement for completion of the works.

xvi) Arbitrator/Arbitral Tribunal shall be deemed to have entered into the reference on the day, notice is issued to the parties fixing the first date of hearing. The Arbitrator/Arbitral Tribunal may, from time to time, with the consent of the parties enlarge the initial time for making and publishing the award. However the Arbitrator/Arbitral Tribunal shall make all out efforts to decide each claim within a period of 6 months from the date of initiation.

xvii) The expiry to the contractual time limit, whether originally fixed or extended, shall not invalidate the provisions of this clause”.

The respondent-Public Works Department (Buildings & Roads Branch), Punjab invited bids for installing passenger elevators in a new under construction District Administrative Complex, Amritsar. 9 elevators having capacity of 13 passengers each are required to be installed. The petitioner was awarded contract on 16.07.2015 for a sum of ₹ 1,95,40,787/-.

The agreement in this behalf was entered into on 16.07.2015. It is the

pleaded case of the petitioner that the payment was to be made at three different stages. By way of the first instalment, 80% of the rate was required to be paid on receipt of the entire complete material at the site, the second instalment of 10% was to be paid on completion of the installation work in all respects, and the last instalment of 10% was to be paid on testing, commissioning, trial run and handing over to the department. The agreement was executed between the parties was executed on 16.07.2015. The petitioner is stated to have supplied the entire material at the site in the month of April, 2015. The petitioner raised 9 invoices for a sum of ₹ 1,57,71,594/-. Thereafter, payment thereof was not released forcing the petitioner to send representation. However, no payment was made. It is the pleaded case of the petitioner that after waiting for more than sufficient time, the petitioner, as per Clause 25 of the agreement, filed a claim before the Settlement Officer-cum-Executive Engineer, Electric Division. After the claim was filed before the Settlement Officer, an amount of ₹ 70,00,000/- was paid to the petitioner. The petitioner, vide letter dated 26.08.2020, requested the Settlement Officer to finalize the claim, however, he did not pass any order. The petitioner, vide notice dated 01.10.2020, sought reference to the Arbitrator as per Clause 25. However, still no action thereon was taken and therefore, the present petition has been filed.

Pursuant to notice, a reply by way of affidavit of the Superintending Engineer, Electrical Circle (North), Mohali, Punjab, has been filed contesting the petition. It has been pointed out that as per the arbitration clause, the Superintending Engineer, Electrical Circle (North), Mohali, Punjab is the designated Arbitrator and the petitioner should contact him. It

has been pleaded that once there is a prior agreement between the parties agreeing to refer the dispute to a designated arbitrator, therefore, the present petition is not maintainable.

It will be noted that after the amendment brought in the year 2015 in the Act, 1996, the regime of appointment of Arbitrators by one party has come to an end. In order to bring in more neutrality in the appointment of the Arbitrators, the power given to one party to act as an Arbitrator or appoint or nominate an Arbitrator stands obliterated. Neither the employee nor office bearer of one party can himself act as an Arbitrator nor they have power to nominate or appoint an Arbitrator. In these circumstances, there is no substance in the objections of the respondent.

Learned Deputy Advocate General, Punjab has relied upon a judgment passed by the Supreme Court in *Union of India v. Parmar Construction Company 2019 (5) RCR (Civil) 302 : 2019 (4) JT Supreme Court 394*. He contended that in view of the aforesaid judgment, it is still permissible for a party to appoint an Arbitrator as in the present case the agreement was executed prior to the date of enforcement of the amendment in October, 2015. This court has carefully read the aforesaid judgment, which examines a case filed against the Railways. The demand notice to appoint an Arbitrator was issued on 23.12.2013. Thus, in that case, the request for appointment of an Arbitrator was made before 23.10.2015. The High Court committed an error in applying the amended Act while nominating an Arbitrator. The Supreme Court set aside the same while interpreting the provisions of the amended Act to hold that the arbitration would be deemed to have commenced when an application for appointment

was made. In the aforesaid case, the Supreme Court has interpreted Section 21 of the Act, 1996 which provides that arbitration proceedings shall commence on the date on which a request for appointment of an Arbitrator is received by the other party. In the case before the Supreme Court, the request for appointment of an Arbitrator was sent on 23.12.2013 i.e. much before the amendment came to be enforced on 23.10.2015. In that judgment, Section 26 of the amending Act i.e. 3 of 2016 was also interpreted. This is not the position in the present case. In the present case, the aforesaid judgment has no applicability. Further, the amended provisions have been interpreted by the Supreme Court in the case of *TRF Limited v. Energo Engineering Projects Limited* (2017) 8 SCC 377 and *Perkins Eastman Architects v. H.S.C.C. (India) Limited* (2019) SCCOnline Supreme Court 1517. It has been held that while deciding application under Section 11 of the Act, 1996 the Court can even declare that the mandate of ineligible Arbitrator has come to an end.

Keeping in view the aforesaid facts, this Court is required to exercise its power under Section 11 and make an appointment of a sole arbitrator to act as the sole arbitrator to decide the disputes and differences between the parties.

(a) Appointment of Arbitrator: Mr. Justice S.D. Anand, 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.D. Anand,
Former Judge, Punjab and
Haryana High Court.**

Address : Flat No. A-9, Orbit
Apartments, VIP Road,
Zirakpur, District S.A.S. Nagar
Mohali.

Mobile No. : +91 8968326699

(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 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 Respondent to file a counter-claim, if so advised, before the learned Sole Arbitrator within such time and subject to such terms as the learned Sole Arbitrator may direct.

The petition is disposed of in these terms. Costs of the arbitration petition 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 07, 2020

“DK”

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No