

In the High Court of Punjab and Haryana, at Chandigarh

Arbitration Case No. 195 of 2020 (O&M)

Date of Decision: 08.12.2020

Mehar Singh and Others

... Petitioner(s)

Versus

Gem Education Solutions India Private Limited and Another

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. Anand Chhibbar, Senior Advocate
with Mr. Vaibhav Saini, Advocate
for the petitioners.

Ms. Smriti Dua, Advocate
for respondent No.1.

Anil Kshetarpal, J.

An application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act, 1996) has been filed with a prayer to nominate an Arbitrator to adjudicate the dispute arising from or in relation to the registered lease agreement dated 04.03.2020. The existence and validity of Clause No. 20 in the registered lease deed is not in dispute, which reads as under:

“20. DISPUTE RESOLUTION & JURISDICTION:

20.1 Negotiation: The parties shall negotiate in good faith and use reasonable efforts to settle any dispute, difference or claim raised arising out of or in connection with this Lease Deed including the constitution, validity, execution, performance,

termination or breach hereof (a “Dispute”). If any Dispute arising between the Parties is not amicably settled within Fifteen (15) days of commencement of amicable attempts to settle the same, the Dispute shall be first referred to, and be finally settled by arbitration in accordance with the provisions of the Arbitration and Conciliation act, 1996 or any enactment of statutory modification thereof. The arbitration proceedings shall be conducted in English language and shall be held in Gurgaon, Haryana, India. The parties agree that the Dispute shall be adjudicated by a sole arbitrator appointed by the Lessee and the arbitrator so appointed shall be of minimum stature of a retired additional district judge. The award passed by the arbitrator shall be final and binding on the Parties.

20.2 *Subject to the preceding paragraph, the courts in Gurgaon, Haryana shall have exclusive jurisdiction over any dispute, differences or claims arising out of this Lease Deed”.*

In the present case, respondent No. 1 has nominated respondent No.2 as an Arbitrator. Although, for the disposal of this petition detailed facts are not necessary, however, to complete the narration, certain facts are being noticed. Previously, there was a lease deed for a period of three years executed between the parties on 19.07.2016. After completion of three years and eight month a fresh registered lease deed was executed on 04.03.2020 containing the

clause which has been reproduced above. It was provided that the lease deed would come into force with effect from 15.05.2019. It is alleged that respondent No.1 stopped paying rent in the month of March, 2020 and thereafter, invoked *force majeure*. There was correspondence between the petitioner and respondent No.1, however, no settlement could be arrived at. On 27.08.2020, respondent No.1 terminated the lease and offered to deliver possession of the leased premises to the petitioners on 31.10.2020. Thereafter, respondent No.1 while serving notice dated 25.09.2020 called upon the petitioners to attend the proceedings before the Arbitrator as it has nominated respondent No.2 as an Arbitrator. The aforesaid notice was replied and vide notice dated 05.10.2020, a counter-offer was made that another Arbitrator be appointed. However, the Arbitrator nominated by respondent No.1 entered reference on 12.10.2020. The petitioners filed an application under Section 13 read with Section 12 & 16 of the Act, 1996 pointing out that one party to the agreement cannot appoint Arbitrator in view of the amendment in the Act, 1996 enforced from 23.10.2015. However, the Arbitrator vide order dated 02.11.2020 did not decide the aforesaid question and disposed of the application by observing that mixed questions of fact and law are involved and therefore, these will be decided at subsequent stage. That is how the application under Section 11 of the Act, 1996 has been filed before this Court.

On the very first date of hearing i.e. 12.11.2020, Ms. Smriti Dua, Advocate has appeared and contested the petition and the following order was passed:

“Notice of motion.

*Ms. Smriti Dua, Advocate, has accepted notice on
behalf of respondent No.1.*

Arguments heard.

Judgment reserved.

Learned counsel for the parties shall be at liberty to forward the synopsis along with the gist of arguments within 48 hours”.

Pursuant thereto, learned counsel appearing for respondent No.1 has forwarded the written submissions along with certain judgments being relied upon.

At the outset, it must be noticed that after 23.10.2015, the date on which the Act of 1996 came to be amended by Act No. 3 of 2016, it is not permissible for one party to the agreement to nominate or appoint an Arbitrator. The regime of appointment of the manner in which the Arbitrators are required to be appointed has undergone a substantial change. By amendment in Section 11, 12 and Schedule V and VII, it is no longer possible for one party to nominate any of its employees or the office bearer or anyone else as an Arbitrator/sole Arbitrator.

Further in view of an authoritative pronouncement by the Supreme Court in ***TRF Limited v. Energo Engineering Projects Limited (2017) 8 SCC 377***, it is permissible for the Court while deciding an application under Section 11(6) to declare that mandate of previous Arbitrator, whose mandate *de jure* has come to an end, is no longer the Arbitrator and the Court can nominate an independent Arbitrator. The aforesaid view has been reiterated and rather elaborated further in ***Perkins Eastman Architects v. H.S.C.C. (India) Limited (2019) SCOnline Supreme Court 1517***. It has further been held that the objection with regard to eligibility to the appointment of an Arbitrator can only be waived by an express agreement in writing. In the present case, there is no such allegation. In view thereof, respondent No.2

could not be appointed as an Arbitrator by respondent No.1. The mandate of respondent No.2 ceases to exist in view of the statutory bar.

Learned counsel appearing for respondent No.1 has relied upon the judgment in *Union of India v. Pradeep Vinod Construction Company (Civil Appeal No. 6400 of 2016, decided on 14.11.2019)*. In this case, the contract was entered in the year 2010 whereas the work was completed in the year 2012. Before the amendment, the request for appointment of Arbitrator was made. Thereafter, the petitions under Section 11 of the Act, 1996 were filed before the High Court. The Supreme Court while interpreting Section 21 of the Act, 1996 and relying upon the judgment rendered in *Union of India v. Parmar Construction Company 2019 (4) JT Supreme Court 394* held that once the arbitration proceedings in terms of Section 21 of the Act, 1996 have commenced, therefore, the subsequent amendment brought in with effect from 23.10.2015 would not be applicable. The next judgment relied upon by learned counsel for respondent No.1 in *WAPCOS Limited vs. Salma Dam Joint Venture and Another (SLP(Civil) No. 7979 of 2019, decided on 14.11.2019)*. In that case, the dispute which arose before the Supreme Court has been noticed in para 18. In the aforesaid case, the Supreme Court has ultimately held that since the power of attorney has been cancelled, therefore, the party who had filed an application under Section 11 could not maintain that application. The issues which were decided in the aforesaid judgment were entirely different and have no relevance with the present case. Similarly, the learned counsel for respondent No.1 has also relied upon the judgment rendered in *M/s. Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited (Special Leave Petition (Civil) No. 11476 of 2018, decided on 27.11.2019)*. In this case, the Supreme Court considered whether the Court

while deciding application under Section 11(6A) of the Act, 1996 is entitled to go into the question of limitation. The Court, while interpreting Section 11(6) (A) of the Act, 1996, held that while dealing with the application under Section 11, the Court has no jurisdiction to go into the question of limitation. Hence, the aforesaid judgment is not applicable.

Still further, in the synopsis filed by learned counsel for the respondent, it has been contended that on service of notice, respondent No.2 has been appointed as an Arbitrator and since the petitioners have already filed an application under Section 13 read with Section 12 & 16 of the Act, 1996, therefore, the present petition is not maintainable. As noticed above, unilateral appointment of an Arbitrator by a party to the arbitration agreement is not permissible. Therefore, *de jure* respondent No.2 is not entitled to act as an Arbitrator unless the objection to his appointment is waived by an express agreement in writing. This is not the case set up by the respondent. Still further, respondent No.2, at the very initial stage, was informed of this fact by moving an application, however, respondent No.2 did not advert itself to that aspect. While deciding the objection with regard to incompetence of respondent No.1 to nominate an Arbitrator, no evidence was required to be examined.

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

(a) Appointment of Arbitrator: Mr. R.S.Baswana, former District & Sessions Judge, 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. R.S.Baswana, former District & Sessions Judge.

Address : I-66, South City-I, Gurugram

Mobile No. : +91 9466594777

(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 Arbitral Tribunal's fees 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 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 08, 2020
“DK”

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No