

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

ARB-87-2020

Date of Decision: March 17, 2021

M/s Malwa & Company

...Petitioner

Versus

Punjab Water Supply & Sewerage Board and others

...Respondents

CORAM: HON'BLE MR. JUSTICE MAHABIR SINGH SINDHU.

Present: Mr. Jagdeep Singh Rana, Advocate,
for the petitioner.

Mr. Shaurya Punj, Advocate,
for Mr. A.S. Miglani, Advocate,
for the respondents.

MAHABIR SINGH SINDHU, J.

This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, 'the Act'), for appointment of an Arbitrator.

It transpires that the parties entered into an agreement (Annexure P-1), for desilting/cleaning of existing Sewar lines by mechanised system using Super Sucker machine and CCTV including disposal of silt for a period of 3 years in the towns falling under West Zone (Jalandhar and Amritsar Circles) of Punjab Water Supply & Sewerage Board and clause 25 of the same, being relevant is reproduced as under:-

“CLAUSE-25: DISPUTES AND ARBITRATION

- i) If any dispute or difference of any kind whatsoever shall arise between the PWSSB, its authorized representative

and the contractor in connection with or arising out of this contract or the execution of work there under.

- ii) Whether before its commencement or during the progress of work or after the termination, abandonment or breach of the contract, it shall, in the first instance, be referred for settlement to the Engineer-in-charge of the work and he shall within a period of sixty 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 hereunder provided, be final and binding upon the contractor in case the work is already in progress, the contractor shall proceed with the execution of the work on receipt of the decision of the Engineer-in-charge as aforesaid with all due diligence whether any of the parties requests arbitration as hereinafter provided or not.
- iii) If the Engineer-in-charge has conveyed his decision to the contractor and no claim for arbitration has been filed by the contractor within a period of first sixty 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-in-charge fails to convey his decision within a period of sixty days after being requested as aforesaid the contractor may within further sixty days of the expiry of the first sixty days after being requested as said request was made by the contractor 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 a communication sent through registered A.D. Post be referred to the sole arbitration of the Superintending Engineer of the circle concerned in the PWSSB acting as such at the time of reference unless debarred from acting as an arbitrator by an order of the **CEO, PWSSB/Court**, in which event, the **CEO** shall appoint any other technical officer not below the rank of Superintending Engineer to act as an arbitrator on receipt of a request from either party.
- vi) **CEO, PWSSB** shall have the authority to change the arbitrator on an application by either the contractor or the Engineer-in-charge 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 application for change of

arbitrator is filed before the **CEO, PWSSB** and a notice thereof is given by the application to the arbitrator. The **CEO** after hearing both the parties may pass the speaking order rejecting the application or accepting to change the arbitrator simultaneously, appointing a technical officer not below the rank of a Superintending Engineer as arbitrator under the contract. The new arbitrator so appointed may enter upon the reference a fresh or he may continue the hearings from the point these were suspended before the previous arbitrator.

- vii) The reference to the Arbitrator shall be made by the claimant party within one hundred twenty 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 shall be made within six calendar months from the date of payment of the final bill to the contractor from the date a registered notice is sent to the contractor to the effect that his final bill is ready by the Engineer-in-charge (whose decision in 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 on 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, 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 Indian Arbitration Act 1940 or any other statutory enactment there under or modification thereof and for the time being in force shall apply to the arbitration proceedings under this clause.
- x) The Arbitrator shall award separately giving his award against each claim and dispute and counter claim raised by either party giving reasons for his award. Any lump sum award shall not be legally enforceable.
- xi) The independent claims of the party other than the 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 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 duty due on the award shall be payable by the party as desired by the Arbitrator and in the event of such party's default, the stamp fee shall be recoverable from any other 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-in-charge or
 - b) Of the date of abandonment of the work or breach of contract under any of its clauses, or commencement or resumption as application, or
 - c) Of its non-commencement or no resumption or 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 or foreclosure of the contract, or
 - e) Of receiving intimation from the Engineer-in-charge that the final payment due or recovery 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 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 scopes of arbitration under this contract. The pending of arbitration proceedings shall not disentitle the Engineer-in-charge to terminate the contract and to make alternate arrangements for completion of the works.
- xvi) The arbitrator shall be deemed to have entered on the reference on the day, he issues notices to the parties fixing the first date of hearing. The arbitrator may from time to time with the consent of the parties enlarge the initial time for marking and publishing the award.
- xvii) The expiry of the contractual time limit, whether originally fixed or extended shall not invalidate the provisions of this clause.”

In terms of clause 25, reproduced herein above, the petitioner

sent a notice dated 31.01.2020 (Annexure P-5), to the respondents for settlement of disputes through arbitration.

Necessary to mention here that the petitioner also made a request dated 04.04.2020 (Annexure P-6), for change of arbitrator (Superintending Engineer), in view of the amended provisions of the Act, i.e. Fifth Schedule read with Seventh Schedule, which were inserted by the Arbitration and Conciliation (Amendment) Act, 2015, vide Act No. 3 of 2016, dated 31.12.2015. Since, there was no response from the respondents, therefore, petitioner filed the present petition.

In pursuance of the notice of motion, short reply has been filed on behalf of the respondents and paragraph Nos. 3 and 4 of the same read as under:-

- “3. That the notice under clause 25 was received from M/s Malwa & Company on 31.01.2020, and was being considered by the Respondent officials. Nevertheless, it is submitted that the claims/disputes raised by the Petitioner/Claimant are wholly denied, being contrary to facts as well as law.
4. That however, the Respondents have no objection if an independent and impartial arbitrator is appointed by this Hon’ble Court in view of the arbitration clause contained in the agreement. The same may not be taken to be an admission of any claims or averments made by the Petitioner.”

Perusal of para 3 & 4, extracted above, clearly reveal that respondents have failed to act upon the request of the petitioner and they have raised no objection against the appointment of an Arbitrator.

As a result of the agreed stand taken by both sides, and in terms of the provisions of Section 11(6) of the Act, Shri Justice Rakesh Kumar Jain (former Judge of this Court) is appointed as the sole arbitrator to decide all the disputes arising out of the agreement (Annexure P-1), between the parties, subject to the mandatory declaration made under the amended Section 12 of the Act with respect to independence as well as impartiality and the ability to devote sufficient time to complete the arbitration within the period as per Section 29A of the Act. Learned arbitrator shall be entitled to charge fees in terms of the Fourth Schedule to the Act. Needless to say that fees and other expenses shall be shared by the parties equally.

Registry will send copy of this order to Shri Justice Rakesh Kumar Jain, Former Judge, Punjab and Haryana High Court, at House No. 133, Sector 35, Chandigarh.

The parties are directed to appear before the learned Arbitrator after seeking his convenience.

The matter is disposed off in the above terms.

(MAHABIR SINGH SINDHU)
JUDGE

March 17, 2021

P Kapoor

Whether Speaking/Reasoned: ✓ YES/NO

Whether Reportable: YES/NO ✓