

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

214

ARB No.176 of 2020

Date of decision: March 19, 2021

Sukhmani Megastructures Pvt. Ltd.

.....Petitioner

Versus

State of Punjab and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE MAHABIR SINGH SINDHU

Present: Mr. Amit Gupta, Advocate for the petitioner.

Ms. Maloo Chahal, D.A.G. Punjab.

Mr. A.S. Miglani, Advocate
for respondents No.2 and 3.

MAHABIR SINGH SINDHU, J

Present petition has been filed under Section 11 (6) of the Arbitration & 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 providing 100% water supply, laying, jointing, testing of distribution/construction of S.V./F.H. haudies and house connections for water supply, dismentaling and reconditioning of roads as well as other work contingent thereto and clause 25 of the same, being relevant is reproduced as under:-

“CLAUSE-25: DISPUTE RESOLUTION MECHANISM

- i) If an dispute and difference of any kind whatever arise between the Government employee its authorized representatives and the contractor in connection with or arising out of his contract or the execution of work,

these shall be resolved as under:

- ii) Whether before or during the progress of project/work or after the termination abandonment breach out of the department, 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 hereafter 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 first 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 herein after 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 referred to the sole arbitration of the Superintending Engineer the concerned circle of Punjab Water Supply and Sewerage Board acting as such at that time of reference unless debarred I am 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 Punjab Water Supply & Sewerage Board other than the Chief Engineer in Charge 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 Water Supply and Sewerage Board 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 Water Supply and Sewerage Board 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 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 claims, on a scheduled bank in the

name of the arbitrator/chairman of the arbitral tribunal, by thus 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 Conciliation 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 arbitrator (sic-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 during 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 of 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 its

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 marking 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.”

In terms of clause 25 (ii), reproduced herein above, the petitioner sent a communication dated 31.01.2020 (Annexure P-33) to the respondents for settlement of disputes through an arbitrator i.e. Superintending Engineer.

In view of the amendment of 2015 of the Act, i.e. Fifth Schedule read with Seventh Schedule, Superintending Engineer was not competent to continue with the arbitration proceedings. Therefore, petitioner vide request dated 21.05.2020 (Annexure P-35) asked for appointment of another arbitrator. Since, there was no response from the respondents, consequently, petitioner filed the present petition.

In pursuance of notice of motion issued on 15.10.2020, short reply on behalf of respondents No.2 and 3 has been filed and para Nos.3 and 4 of the same read as under:-

“3. That a notice of arbitration was received from Sukhmani Megastructures Pvt. Ltd. on 21.05.2020 and was being considered by the Respondent officials. 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 Answering 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 by this Court.

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 Rameshwar Singh Malik, (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 Rameshwar Singh Malik, Former Judge, Punjab and Haryana High Court, at House No.280, Advocates Society, Sector 49, 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 19, 2021

Sachin M.

Whether speaking/ reasoned: Yes/No

Whether Reportable: Yes/No