

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

ARB-207-2016 (O&M)

Date of decision : May 13, 2022

M/S MEHAR SINGH AND SONS

.....Applicant

Versus

UNION OF INDIA AND ORS

....Respondents

CORAM:- HON'BLE MRS. JUSTICE LISA GILL

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

Mr. Alankrit Bhardwaj, Advocate for the respondents.

LISA GILL, J.

Prayer in this petition under Section 11 of the Arbitration and Conciliation Act, 1996 (for short – ‘the Arbitration Act’) is for appointment of sole independent Arbitrator for resolution of disputes and differences arising out of Contract Agreement No. 47/EE/ACD/2006-07 and award letter dated 24.03.2007 executed between the parties.

It is submitted that agreement was executed between the parties regarding construction of ‘Billet Single Accommodation for SNCO’s and WO’s at No. 1 FBSU Force Raja Sansi Amritsar’. Dispute arose between the parties and applicant in terms of Arbitration Clause 25 raised a demand on 03.02.2012 (Annexure A6) for appointment of an Arbitrator and requested the respondents to refer all claims to the Arbitrator.

ARB-136-2014 earlier filed by the applicant was disposed of on 06.02.2015 with consent of the parties to the extent that respondent No. 2 would appoint an Arbitrator in respect to the disputes between the parties on or before 06.03.2015. Pursuant thereto, Sh. V.K. Malik, Ministry of Urban Development,

New Delhi was appointed as a Sole Arbitrator, however, he relinquished charge on 01.06.2016 (Annexure P8). ARB-144-2016 then filed by the applicant was withdrawn on account of clerical omissions with liberty to file afresh. Instant petition was, thus, filed seeking appointment of an Arbitrator.

Respondent sought consent of the applicant for appointment of Sh.G.C. Kabi as an Arbitrator vide letter dated 01.07.2016, in accordance with Section 12(5) of the amended Arbitration Act, 1996. Applicant not being agreeable to said Arbitrator as he was a sitting official of the same Department, conveyed its dissent and also stated the matter to be pending before this Court regarding appointment of an Arbitrator.

Learned counsel for the applicant argues that unilateral appointment of an Arbitrator by the respondent is not made out especially in view of amendment carried out in Arbitration and Conciliation Act on 23.10.2015. It is submitted that the specific arbitration clause in the agreement itself provides that parties would be governed by the Arbitration Act or any statutory modifications or re-enactment thereof, therefore, there cannot be any unilateral appointment of an Arbitrator. Learned counsel for the applicant further refers to communication dated 27.06.2016 by the respondent seeking consent of the applicant for appointment of Sh. G.C. Kabi as Arbitrator as the former Arbitrator Sh. V.K. Malik has relinquished the charge. It is submitted that this communication by itself indicates that the parties are governed by the amended provisions. Applicant had refused to give consent to the appointment of the said Arbitrator for the reason that the Arbitrator so proposed was a sitting official of the same Department and moreover the matter was pending before this High Court for appointment of an independent Sole Arbitrator. Learned counsel for the applicant relies upon judgment of the Hon'ble Supreme Court in **Delhi Transport Corporation Ltd. versus Rose Advertising 2003 (6) SCC 36** and the judgment

of Delhi High Court in **Raffles Design International India Private Limited and another versus Educomp Professional Education Limited and others 2017 (2) RAJ 505**. It is, thus, prayed that this petition be allowed.

Learned counsel for the respondent while refuting the contentions raised by learned counsel for the applicant contends that this petition itself is not filed under the amended Act as it is not so mentioned in the head note of the petition. Head note of the application should have stated “Petition under Section 11 of the Arbitration and Conciliation Act, 1996 as amended up-to-date” but the words “as amended up-to-date” are conspicuous by their absence. Moreover, proceedings in this matter having commenced much prior to the amendment in question with the request for appointment of Arbitrator being received on 03.02.2012 and Arbitrator Sh. V.K. Malik being appointed, there is no question of appointment of an independent Sole Arbitrator by this Court. It is further submitted that on earlier occasion, this Court had directed respondent No. 2 to appoint an Arbitrator in respect to the dispute between the parties. Therefore, present application, it is prayed, should be dismissed.

Heard learned counsel for the parties and have gone through the file with their able assistance.

At this stage, it is necessary to refer to the relevant clause relating to settlement and disputes by arbitration governing the parties. Relevant portion of Clause 25 (ii) of General Conditions of works which admittedly forms part of Contract agreement No. 47/EE/ACD/2006-07 reads as under:-

“ The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or **any statutory modifications or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceedings under this clause.**” (emphasis added)

Section 87 of the Arbitration Act indicates that parties to a contract can agree to be governed as per the amended provisions of the Act.

In the instant case, parties have consented to be governed as per statutory modifications, re-enactment etc. of the rules.

In similar circumstances, the Hon'ble Supreme Court in the case of **Delhi Transport Corporation Ltd.** (supra) observed that where the parties have agreed to be governed by the law as in force at the relevant time, there is no question of proceedings being conducted under unamended provisions. Similar clause, as is present in the agreement in the present case, existed in case of **Delhi Transport Corporation Ltd.** (supra) and reads as under:-

“Subject to as aforesaid, the provision of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause.”

Hon'ble Supreme Court in respect to this issue observed as under:-

“ The above clause shows that the parties agreed to be governed by the law as in force at the relevant time. Section 85(2) of the 1996 Act recognizes such an agreement between the parties. The conduct of the arbitration proceedings and the participation of the parties therein shows that the parties acted under the 1996 Act. Even the arbitrator proceeded on that understanding and gave his award in pursuance of the 1996 Act. Therefore, the impugned judgment of the High Court appears to be totally unassailable. We are unable to find any ground or reason to differ with the view taken by the High Court on the main issue.”

In the present case, relevant clause wherein parties have agreed to be governed by Arbitration Act, 1996 or any statutory modifications or re-enactment thereof, and the rules made thereunder for the time being in force, is undeniable.

Learned counsel for the respondents has sought to rely upon decision of the Hon'ble Supreme Court in **Aravali Power Company Pvt. Ltd. versus M/s Era Infra Engineering Ltd. 2017 (4) RCR (Civil) 842** but is unable to deny that there was no similar provision in the agreement in question in that case where the parties had consented to be governed by the amended provisions of the Arbitration Act and there is no discussion as such on this point in the said decision. Disposal of **ARB-136-2014** on 06.02.2015 directing respondent No. 2 to appoint the Arbitrator can be of no avail to the respondents for the reason that this order was admittedly passed prior to the amendment in question. It is also relevant note that conduct of respondents themselves in issuance of communication dated 27.06.2016 seeking consent of the applicant for appointment of Sh. G.C. Kabi in terms of Section 12 (5) of the Amended Arbitration Act is indicative of the intent of respondents to be governed by the amended provisions of the Arbitration Act. Therefore, in view of Section 12 (5) of the Arbitration Act and judgment of the Hon'ble Supreme Court in **TRF Limited versus Energo Engineering Projects Limited (2017) 8 SCC 377**, unilateral appointment of the Arbitrator is not justified and there is indeed no impediment to the appointment of a sole independent Arbitrator in this case. Argument of learned counsel for the respondents that this petition is not reflected to be filed under the amended Act due to Head note of the petition not so reflecting the same is an argument noticed only to be rejected in view of the frivolous nature thereof.

Keeping in view the facts and circumstances as above, this petition is allowed and Mr. Mahender Singh, former Additional District and Sessions Judge (Retd.), is appointed as the Sole Arbitrator to resolve the dispute/differences between the parties. Appointment is subject to declaration to be made by the Arbitrator under Section 12 of the Act with regard to his independence and

impartiality to settle the disputes between the parties. The Arbitrator to complete the proceedings within the time limit specified under Section 29-A of the Act. The Arbitrator shall be paid fee in accordance with the Fourth Schedule of the Act, as amended from time to time to be borne equally by the parties.

A copy of this order be dispatched to Mr. Mahender Singh, former Additional District and Sessions Judge (Retd.), at the following address:-

Flat No. 704, Block A-5, Purab Apartments, Sector 88, Mohali.

May 13, 2022
rts

(LISA GILL)
JUDGE

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