

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

ARB No.232 of 2018 (O&M)

Date of Reserve: 07.09.2022

Date of Decision: 14.10.2022

M/s Gupta Enterprises

.....Petitioner

Vs

**General Manager Baroda House Northern Railway,
New Delhi and others**

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Sh. Saurabh Arora, Advocate
for the petitioner.

Mr. Parvesh K. Saini, Advocate
for the respondents.

RAJ MOHAN SINGH, J.

[1]. Petitioner has preferred this petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred as 'the Act') for appointment of an Arbitrator.

[2]. Petitioner has pleaded that on 28.08.2012, respondent No.4-Northern Railway, Chandigarh had issued a tender notice inviting sealed open tenders on the prescribed forms for the work of "construction of road over bridge in lieu of level crossing No.169-B at KM. 361/3-5 on Ambala-Ludhiana Section of

Northern Railway near railway station Sanehwal.” The date of completion of work was fixed as 9 months and approximate cost of the project was shown as Rs.514.35 lakhs. Petitioner is a registered partnership firm working in the name and style of Gupta Enterprises (Regd.) at 2666, Urban Estate, Phase-1, Dugri Road, Ludhiana. Petitioner applied for the tender for the aforesaid work with the tender cost of Rs.492.49 lakhs. Petitioner was allotted the aforesaid work vide letter dated 23.11.2012. Written agreement was executed between the petitioner and respondents on 26.02.2013. By giving subsequent undertaking dated 04.10.2012, the tender of the petitioner was accepted vide allotment letter dated 23.11.2012. Thereafter petitioner was engaged in the execution of work but due to the hurdles, the work was completed on 10.06.2015 after delay of 1 year 9 months and 19 days. After completion of the work, a completion certificate was issued on 29.09.2015 with satisfactory completion of work by the Northern Railway, Chandigarh.

[3]. Petitioner has submitted that final dues have not been paid to the petitioner till date despite expiry of 2 years 9 months and 15 days since the completion of work. The request made by the petitioner was not entertained. The final bill was paid to the petitioner which did not include the actual amount due to the

petitioner. Petitioner gave detailed representations to the respondents on 09.02.2016, 18.04.2016 and 11.07.2016. Thereafter petitioner made requests for appointment of Arbitrator on 01.09.2016, 01.11.2016, 02.02.2017 and 07.08.2017. The requests were duly received by the respondents and were also replied on 12.07.2017, 15.07.2017, 02.08.2017, 04.10.2017 and 16.10.2017. When no action was taken by the respondents, the petitioner sent a notice of invocation of arbitration clause on 04.04.2018.

[4]. In reply to the aforesaid, the respondents gave reply on 20.04.2018 endorsing the earlier reply dated 02.08.2017 which was treated to be sufficient for the claim of the petitioner. Vide reply dated 02.08.2017, request for referring the dispute to the Arbitrator was rejected. In the letter of rejection, the respondents have mentioned that the final bill was signed by the petitioner after receiving full payment of legitimate dues. Final bill was signed under no claim and thereafter the petitioner also signed supplementary agreement on 10.12.2015 under clear signature and without any protest. The supplementary agreement dated 10.12.2015 stipulated that the petitioner has accepted the said sums mentioned in full and final satisfaction of all its dues and claims under the principal agreement. In consideration of the payment already made under the agreement, the said principal

agreement shall stand finally discharged and rescinded all the terms and conditions including the arbitration clause. In view of the aforesaid reply dated 02.08.2017, the claim of the petitioner was held to be not referable to the arbitration in view of supplementary agreement having signed by the petitioner.

[5]. Learned counsel for the petitioner submitted that the supplementary agreement as relied upon by the respondents initially was signed by the petitioner under protest. When the payments of the petitioner were not made by the respondents, the petitioner was again made to sign under duress. The contract agreement has clause No.64 of the General Condition of Contract, 1999 which provides for resolution of dispute through arbitration.

[6]. Learned counsel further submitted that there exists a *bona fide* dispute between the parties which is covered under the arbitration clause for which the same has been invoked by the petitioner. The cause of action started in favour of the petitioner only after refusal by the respondents on 02.08.2017. Petitioner has fixed the value of its claim to the tune of Rs.1,35,49,540.21 along with interest @ 18% per annum qua total outstanding amount from the date of completion of work upto initiation of arbitration proceedings and compensation for damages on account of prolongation of contract. The claim of

the petitioner however would be subject to the final adjudication by the Arbitrator on all the aforesaid components.

[7]. Per contra, learned counsel for the respondents opposed the prayer of the petitioner on the ground that as per clause No.63 of the General Condition of Contract, 1999 “excepted matters” are specifically excluded from the purview of arbitration clause and not to be referred to the arbitration. The claims of the petitioner are beyond the purview of arbitration clause No.63 of the General Condition of Contract, 1999. The claimant has already signed the final bill on 10.12.2015 with the remarks “full and final measurement accepted with no claim”. As per clause 64(1)(iv) of the General Condition of Contract 1999, if the contractor does not prefer his claim in writing within a period of 90 days of receiving the intimation from the Railways that the final bill is ready for payment, then he would be deemed to have waived off his claims and the Railway shall be discharged and released of all liabilities under the contract in respect of the claims. The petitioner did not prefer his claim in writing in time and, therefore, respondents stand discharged and released of their liabilities under the agreement. Respondents have relied upon following paragraph of the supplementary agreement dated 10.12.2015:-

“And whereas it was agree by and between the

parties hereto that the works would be completed by the party hereto of the second part on 10.06.2015 date last extended and whereas the party hereto of the second part has executed the work to the entire satisfaction of the party hereto of the first part. And whereas the party hereto of the first part already made payment of the party hereto of the second part diverse sums from time to time aggregating to Rs.4,77,87,357.65 including the final bill bearing voucher No.57-C/C-11/CDG dated 15/12/2015 (the receipt of which is hereby acknowledged by the party hereto of the second part in full and final settlement of all his/its claims under the principal agreement.”

[8]. Learned counsel for the respondents by relying upon the reply dated 02.08.2017 further submitted that the petitioner has already accepted full and final payment to its satisfaction of all dues and claims under the principal agreement. According to the stand taken by the respondents, reply dated 02.08.2017 still holds the field. Respondents have also relied upon top sheet of Bill No.FCC-XIX/ROB/169-B dated 10.12.2015.

[9]. As against the aforesaid, learned counsel for the petitioner again submitted that even after 10.12.2015, number of representations were filed by the petitioner showing that there was a *bona fide* dispute in existence with regard to the dues of the petitioner in respect of principal agreement. Even the petitioner signed the supplementary agreement under protest,

when the payments of the petitioner were not released, he was made to sign the same under duress. Respondents were in dominant position and could channelize the behaviour of the petitioner being a dominant character and the action of the respondents was squarely hit by unconscionable bargain. Plea of the respondents as regards clause 65(1)(iv) of the General Condition of Contract 1999, can very well be commented upon by the Arbitrator.

[10]. Having heard learned counsel for the parties, I am of the view that termination of principal agreement with execution of supplementary agreement is covered by the arbitration clause. The clause provides that in the event of any dispute or difference between the parties in relation to the agreement it shall be referred to a sole Arbitrator. The clause is not limited to the disputes relating only to initial period of agreement irrespective of whether the agreement is now in existence or not, the arbitration clause would survive. The Court is required to refer the disputes between the parties to the Arbitrator without any in-depth examination of the disputes. The Court is required to satisfy itself that the dispute falls within the ambit of arbitration clause and all disputes are to be decided by the sole Arbitrator on merits as the same cannot be decided by this Court under Section 11(6) of the Act. The conclusion is

inescapable that even after conclusion/culmination of principal agreement, the dispute remained to be decided which has arisen in relation to the claim in respect of principal agreement which was terminated with the execution of supplementary agreement and the consequences thereof. Such dispute clearly falls under the arbitration clause which provides that in the event of any dispute or difference arising at any time between the parties in relation to the agreement, it shall be referred to a sole Arbitrator irrespective of whether the agreement is now in existence or no, the arbitration clause would survive. Reference can be made to **Everest Holding Limited vs. Shyam Kumar Shrivastava and others, (2008) 16 SCC 774** and **Reva Electric Car Company Private Limited vs. Green Mobil, (2012) 2 SCC 93.**

[11]. The dispute that has arisen between the parties clearly pertains to the subject matter of contract agreement which was a valid agreement showing an arbitration clause for settlement of dispute. The objection of the respondents as regards non-arbitral claim in view of execution of supplementary agreement is of no consequence as with the culmination of principal agreement, the validity of the same as regards the claim of the petitioner for settlement arising out of or in relation to the subject matter of the agreement would still survive in view of

ratio of **Everest Holding Limited's** case (supra) and Section 16(1)(a) of the Act provides that an arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract. The plain meaning of the aforesaid clause would tend to show that even on the termination of the agreement, the arbitration clause would still survive. If the stand of the respondents is accepted that the arbitration clause would come to an end after execution of supplementary agreement, the same would lead to uncertain state of affairs, destroying the very efficacy of Section 16(1) of the Act. Even the Arbitrator can decide his jurisdiction in terms of Section 16 of the Act.

[12]. For the reasons recorded hereinabove, I hereby appoint HMJ A.N. Jindal (Retd.) R/o # 12, Sector 15, Panchkula, Mobile No.8528300000 as the sole Arbitrator, to resolve the dispute/difference between the parties. The appointment of the Arbitrator shall be subject to the declaration to be made by him as required under Section 12 of Arbitration and Conciliation Act, 1996 in respect of his independence and impartiality to settle the dispute between the parties.

[13]. The Arbitrator would complete the proceedings within the specified time in terms of Section 29-A of the said Act. The Arbitrator shall be paid fee in accordance with the IVth Schedule

of the Act as amended from time to time. The fee shall be borne by the petitioner and respondents in equal proportion.

[14]. The venue of the Arbitration shall be the place to be disclosed by the Arbitrator according to his convenience.

[15]. A copy of this order be dispatched to the Arbitrator at the following address:-

HMJ A.N. Jindal (Retd.)
R/o # 12, Sector 15, Panchkula,
Mobile No.8528300000

[16]. Petition stands disposed of accordingly.

14th October, 2022
Atik

(RAJ MOHAN SINGH)
JUDGE

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