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

ARB No. 77 of 2015 (O&M)
Date of Decision: 11.11.2022

M/s Karam Chand Thapar and Bros.

-Petitioner

Versus

Haryana Power Generation Corporation Limited and another

-Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Sanjeev Sharma, Sr. Advocate, with
Mr. Shekhar Verma, Advocate, and
Mr. Dushyant, Advocate,
for the petitioner.

Mr. Vishal Garg, Advocate,
for respondent No.1.

RAJ MOHAN SINGH, J. (Oral)

1. The petitioner has preferred this petition under Section 11(6) of Arbitration and Conciliation Act, 1996 for appointment of an independent arbitrator in order to adjudicate the dispute between the parties.

2. The tentative value of the claim is Rs.1,23,58,930/- as on the date of filing of the petition.

3. A counter claim to the tune of Rs.1.57 crores has also been set up before the official Arbitrator by the respondents. An agreement was executed between the parties

on 29.08.2003 in respect of transportation of coal. Petitioner was obligated to provide services for minimized transit loss in coal at Thermal Power Plants situated in Panipat and Faridabad and for coal linkage materialization at Faridabad Thermal Power Station. The tenure of the agreement was from 01.09.2003 to 31.08.2004. The formal agreement was executed on 29.10.2003. A difference arose between the parties.

4. Clause 20 of the work order dated 29.08.2003 provides for arbitration clause which reads as under:-

“20.0 ARBITRATION

a) If at any time any question/dispute or difference whatsoever shall arise between Chief Engineer, TDLTPS/FTPS and the firm in relation to or in connection with the contract, either party may forthwith to give to other party notice in writing of the existence of such question or difference and the same shall be referred to the Chief Engineer (O&M), TDLTPS, HPGCL, Panipat or his nominee who shall be sole arbitrator. The award of the sole arbitrator shall be final and binding on both the parties under the provision of Arbitration and Conciliation Act, 1996 and the rules there under. Any statutory amendment, modification or re-enactment thereof for the time being inforce, shall be deemed to apply to and be incorporated in this contract it will not be objectionable if the sole

arbitrator is an officer of the HPGCL and he has expressed his view on all or any of the matters in question or dispute of differences.”

5. In view of differences, a reference was made to the official Arbitrator on 13.04.2007 after issuance of legal notice dated 28.01.2006. The parties filed their claim and reply before the Arbitrator. The Arbitrator has decided his jurisdiction under Section 16 of the Act on 20.07.2012.

6. Civil Revision No.6234 of 2012 filed by the petitioner against the order dated 20.07.2012 was dismissed by the High Court on 18.10.2012. It is not in dispute that number of persons by designation have participated in the arbitration proceedings on behalf of respondent- department

7. Since the arbitral proceedings were to be conducted by designated officer of the respondent- department, therefore, the officer kept on changing with the passage of time, but the proceedings could not be finalized. The Arbitration Act was amended vide Act No.03 of 2016 w.e.f. 23.10.2015 thereby adding sub Section 5 in Section 12 which now states notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject-matter of the dispute falls under any of the categories specified in the seventh schedule, shall be ineligible to be appointed as an arbitrator. Provided that the parties may, subsequent to

disputes having arisen between them, waive the applicability of this sub Section by an express agreement in writing.

8. Learned senior counsel for the petitioner on the strength of **TRF Limited vs. Energo Engineering Projects Limited, (2017) 8 SCC 377; Perkins Eastman Architects DPC and another vs. HSCC (India) Limited, (2020) 20 SCC 760** and **Ellora Paper Mills Limited vs. State of Madhya Pradesh, (2022) 3 SCC 1**, submits that the authority of the official Arbitrator stands negated in view of ineligibility of such arbitrator in view of Section 12(5) of the Act and there is no agreement to the contrary to seek any exemption from the ineligibility of the official Arbitrator.

9. On the other hand, as per arbitral clause itself, a specific provision has been made that any statutory amendment, modification or re-enactment thereof for the time being in force shall be deemed to apply to and be incorporated in this contract. The recital of applicability of any statutory amendment at a subsequent stage would satisfy the requirement of Section 16(1) (a) of the Act and in such eventuality, the arbitration clause would itself be treated as an independent agreement between the parties. The arbitration clause would survive for the purposes of answering the present */is/dispute.*

10. Learned counsel for respondent No.1, however, places reliance upon **Civil Appeal Nos.2879-2880 of 2018 (arising out of SLP (C) No.19545-19546 of 2016)** decided on 15.03.2018 to contend that arbitral proceedings started prior to commencement of Amending Act of 2015 are saved from inapplicability thereof.

11. Section 26 of the Amending Act reads as under:-

“26. Act not to apply to pending arbitral proceedings- Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.”

12. Perusal of the aforesaid Section would show that nothing contained in the Amending Act shall apply to the arbitral proceeding commenced in accordance with provisions of Section 21 of the principal Act before the commencement of this Act, unless the parties otherwise agree. Perusal of the arbitration clause itself is suggestive of the fact that the parties had agreed in respect of applicability of statutory amendment,

modification or re-enactment if any brought out at a subsequent stage.

13. Section 12(5) of the Act if read in the light of ratio of **Bharat Broadband Network Ltd. Vs United Telecoms Ltd. (2019) 5 SCC 755** would indicate that the official Arbitrator has become ineligible to act as an Arbitrator. After the aforesaid amendment in the provision, any prior agreement to the contrary shall wipe out by non obstante clause in Section 12(5) which declares the official Arbitrator to be ineligible to be appointed as Arbitrator and the only way in which this ineligibility can be removed is that the parties may after disputes have arisen between them, waive the applicability by an express agreement in writing for continuation of earlier arbitrator.

14. In the instant case, there is no such agreement to the contrary for continuation of original arbitrator, rather the subsequent modification, statutory amendment, re-enactment would squarely apply to the facts of the case. The ratio of **Bharat Broadband Network Ltd. Vs United Telecoms Ltd.'s case (supra)** is duly expressed in the light and facts and circumstances of the case.

15. The petition is accepted. Official Arbitrator is ordered to be replaced by way of new arbitrator.

16. In view of above, I hereby appoint HMJ Rajiv Sharma

(Retd.), House No.505 (Backside First Floor), Sector-36-B,
Chandigarh, 2nd address: Swastik Sadan, Cliffend Estate,
Shimla- 171001 (HP), 09816700002 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.

17. The Arbitrator shall 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 respondent(s) in equal proportion.

18. The venue will be as per the convenience of the
Arbitrator.

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

HMJ Rajiv Sharma (Retd.),
House No.505 (Backside First Floor), Sector-36-B,
Chandigarh
2nd address
Swastik Sadan, Cliffend Estate, Shimla- 171001
(HP),
09816700002

20. Petition stands disposed of accordingly.

11.11.2022

Jyoti Sharma

(RAJ MOHAN SINGH)
JUDGE

1. Whether speaking/reasoned : Yes/No
2. Whether reportable : Yes/No