

222

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

ARB No. 28 of 2019 (O&M)
Date of Decision: 13.12.2022

M/s Pritam Chand and sons

-Petitioner

Versus

Union of India and others

-Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

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

Mr. Shobit Phutela, Advocate,
for the respondents.

RAJ MOHAN SINGH, J. (Oral)

1. The petitioner has preferred this petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015 for appointment of an independent arbitrator in order to adjudicate the dispute between the parties arising out of contract agreement dated 04.04.1991.

2. The aforesaid agreement was executed for the work i.e. supply of 6680-cum-(65 MM) stone ballast along the cess from KM 2.30 to KM 10.00 between Amritsar-Gohrewal-Varpal Station on ASR-KEMK section.

3. The petitioner is a partnership firm registered under the Indian Partnership Act, 1932. The petitioner is an approved contractor of railway department. The aforesaid work assignment was allocated to the petitioner after due legal compliance. Letter of acceptance stipulates the date of commencement of work as 20.05.1990 and its completion on 24.11.1990.

4. Learned counsel for the petitioner submits that after the acceptance of tender of the petitioner and allotment of the work, the same was undertaken by the petitioner in its right perspective and stone ballast were supplied, but the payments were not released in favour of the petitioner.

5. A dispute arose between the parties within the ambit of arbitration clause of contract agreement. The arbitration clause of the contract agreement 64(3) (f) reads as under:-

*“Subject as aforesaid, Arbitration Act 1940
an the Rules thereunder and any statutory
modification thereof shall apply to the Arbitration
proceedings under this clause.”*

6. The petitioner has raised the dispute in respect of its dues towards non-payment of price of the final bill approximately Rs.4 lacs, non-payment of earnest money, non-payment of security, imposition of penalty at 15% rate when the contract

agreement was not in subsistence as the time period of contract agreement was from 20.05.1990 to 24.11.1990. The effect of extension of time and whether the petitioner is liable for any penalty or not. Whether termination of contract is valid or not. Whether the petitioner is entitled to escalation from the date of completion stipulated in the contract agreement in the shape of overhead cost and material costs. Interest for withholding payment for supply of stone ballast and its effect. Consultation fee of technical expert and interest for non-payment of price of the final bill, security and non-refundable earnest money.

7. The petitioner after invoking the arbitration clause ventured to file an application under Section 20 of the Old Act of 1940 on 26.04.1996 and the same was rejected by the trial Court on 11.03.2010. The petitioner preferred an appeal before the appellate Court on 15.04.2010 and the same was accepted on 26.10.2013.

8. Feeling aggrieved against the said order, the respondent- railway department filed Civil Revision No.3022 of 2014 and the same was accepted vide order dated 19.02.2018. The operative part of the order reads as under:-

“Keeping in view the aforesaid undisputed facts, this Court is of the opinion that the contractor was not justified in directly filing a petition under Section 20 of the Arbitration Act,

1940, as held by the Hon'ble Supreme Court in M/s Shetty's Construction Pvt. Ltd. (supra). However, the respondent- contractor shall be at liberty to take steps as prescribed under the General Conditions of Contract.

With the aforesaid observations, the revision petition is allowed and the order under challenge passed by the learned first appellate Court is set aside.”

9. Evidently, opportunity was granted to the petitioner to take steps as prescribed under General Conditions of Contract. The amending Act of 2015 came into force during pendency of the aforesaid civil revision.

10. 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.”

11. Perusal of the aforesaid section would indicate 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 as reproduced in the preceding para 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.

12. In the present case, though there is no such agreement in writing for continuation of original proceedings, rather the subsequent modification, statutory amendment, re-enactment would squarely apply to the facts of the case in view of ratio of **Bharat Broadband Network Ltd. Vs United Telecoms Ltd. (2019) 5 SCC 755** and **Delhi Transport Corporation Ltd vs Rose Advertising 2003 (6) SCC 36.** Section 12(5) of the Act if read in the light of observations made in **Bharat Broadband Network Ltd.'s case (supra)**, the same would indicate that the official Arbitrator has become ineligible to act as an Arbitrator. After the aforesaid amendment in the Act, 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.

13. Section 26 of the Act if read in conjunction with arbitration clause 64 (3) (f) of the General Conditions of Contract and Section 85 of the Arbitration and Conciliation Act, 1996, a conclusion would be formed that even if the original proceedings were initiated under the Old Act but after the amendment, the relevant provision would apply and for which the petitioner has filed the present petition under Section 11 (6) of the Act.

14. The tentative value of the claim is about Rs.15 to 20 lacs.

15. All the pleas would be available to the parties including the objection with regard to cause of action and limitation.

16. Though the learned counsel for the respondents has vehemently opposed the petition but for the reasons recorded hereinabove and for the legal position emerging from the ratio of **Bharat Broadband Network Ltd. Vs United Telecoms Ltd. (2019) 5 SCC 755** and **Delhi Transport Corporation Ltd vs Rose Advertising 2003 (6) SCC 36**, I deem it appropriate to appoint **Ms. Harsimrat Rai, Advocate, H.No.401, GH-9, Sector 20, Panchkula, 9915468877** 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 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 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:-

Ms. Harsimrat Rai, Advocate
H.No.401, GH-9, Sector 20, Panchkula
9915468877

20. Petition stands disposed of accordingly.

13.12.2022

Jyoti Sharma

(RAJ MOHAN SINGH)
JUDGE

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