IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

ARB No.37 of 2020 (O&M)

Date of Reserve: 15.12.2022
Date of Decision: 25.01.2023

Supreme Builders ......Petitioner

Vs

State of Punjab and others
.....Respondents

CORAM: ***HON'BLE MR. JUSTICE RAJ MOHAN SINGH***

Present: Mr. Nikhil Handu, Advocate
for the petitioner.

Mr. R.S. Pandher, Sr. D.A.G., Punjab.

****

RAJ MOHAN SINGH, J.

[1]. The 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 independent Arbitrator to adjudicate the dispute between the parties in respect of C.C. Flooring at village Kolianwali, Block Malout, Punjab.

[2]. The petitioner is a partnership firm duly registered with the Registrar of Firms. The respondents had floated tender for

the construction of C.C. Flooring in the streets of Village Kolianwali Block Malout Distt. Sri Muktsar Sahib. The petitioner also participated in the tender process and was found to be most acceptable tenderer being the lowest one. The petitioner was allocated the work for an estimated value of Rs.249.02 lakhs by the respondents on 02.11.2015.

[3]. The contract was signed by the parties. The time period for completion of work was six months. The project remained gripped and influenced by shortage of funds and the respondents failed to make timely payments of the work executed by the petitioner. The 1st RA bill for the work executed and entered in the measurement book upto 24.01.2016 for Rs.47,13,149/- was answered by way of payment for the work of only Rs.18,00,000/- which was released on 04.02.2016 due to shortage of funds. The said amount was carried unpaid to the 2nd RA bill which was prepared by the Department on 08.04.2016 and the same was paid on 12.04.2016 due to shortage of funds with the respondents. The aforesaid fact ultimately created adverse impart on the progress of the work which was being executed by the petitioner. The respondents made certain changes in the work to be executed by the petitioner particularly relating to the quantity of cement concrete as the streets, where the cement concrete was stipulated in the

approved estimates were changed with laying of inter-locking paver blocks.

[4]. The petitioner was required to produce the cement concrete with concrete mixer using weigh batcher. The petitioner insisted on the use of ready mix concrete only after the work had already been allotted. This required the preparation of design mix. On 18.03.2016, a letter was written by the petitioner to the respondents along with analysis of rate as the cost of cement concrete obtained from the nearest located plant had escalated the cost.

[5]. The petitioner being aggrieved by the repeated delay in releasing the payment against the final bill, raised the issue vide letter dated 16.09.2016, 12.10.2016 and 24.10.2016. Even the legal notice dated 14.12.2016 was served upon the respondents. The final bill of Rs.55,878/- was released on 25.07.2019 i.e. after a delay of 2 years and 11 months from the completion of work. The work was certified to have been completed on 28.08.2016, still the security deposits were retained from the running bills and were partly released on 08.05.2018 and remaining on 14.11.2018 due to paucity of funds. A letter dated 03.10.2017 was extracted by the respondents under duress and the petitioner was forced to write that final bill be prepared with the rates approved by Wapcos.

The petitioner had clearly mentioned while accepting that it was under acute financial crisis.

[6]. Under clause 25(ii) of the contract agreement, the petitioner raised formal notice of invocation and claims vide its representation dated 07.12.2020 for an amount of Rs.182.11 lakhs and demanded the liquidation of the same at the earliest. The claims were disputed by the respondents vide letter dated 05.01.2021 alleging that it had paid the entire outstanding amount to the petitioner. The petitioner has already invoked the arbitration clause.

[7]. Both the parties are at variance in respect of claims and denial of the same by the respondents. Existence of an agreement having arbitration clause is not in dispute. The petitioner has already executed the work. The stand taken by the respondents in written statement is in respect of limitation as per clause 25 of the Dispute Resolution Mechanism and the payments towards first to final running bills were made from time to time.

[8]. Learned State counsel submitted that that final bill was never put up by the petitioner nor any statement of account furnished. The present claims sought to be raised by the petitioner to be adjudicated by the Arbitrator is *qua* non-payment of the escalated costs, non-payment of extra carriage of

materials, reduction in quantity of cement, difference in rates/quantities of items, besides interest on delayed payments. These calculations were to be raised in the year 2016 but were never raised despite the payment of 5th running bill during 2016. Had these claims been raised in the year 2016, the respondent-Department would have been able to exercise the multiple options available to it under the contract agreement and that opportunity has now been deprived due to efflux of time and completion of work assignment. Learned State counsel by referring to the clause 25 of the Dispute Resolution Mechanism has also raised plea of limitation.

[9]. The plea as regards the claim being *ex facie* time barred can be considered in the light of observations made in ***Bharat Sanchar Nigam Ltd. and another vs. M/s Nortel Networks India Private Limited, 2021(2) R.C.R. (Civil) 337***. The Court must undertake a primary review to weed out manifestly *ex facie* non-existent and invalid arbitration agreements or non-arbitrable disputes. The plea as raised by the respondents is not such which would make the arbitration to be *ex facie* time barred. Even in case of slightest doubt, the matter has to be referred to the Arbitrator, where the parties would be at liberty to lead evidence and all pleas can be considered by the Arbitrator on the basis of quality of evidence

to be led before him/her.

[10]. Evidently, the parties kept on transacting the business/executing the work even after the fixed date. In view of ***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*** such disputes are squarely covered by the arbitration clause which provides for resolution of dispute through arbitration. The clause is not limited to the disputes relating only to the initial period of the contract irrespective of whether the contract agreement is now in existence or not, the arbitration clause would survive. The Court is required to refer disputes between the parties to the Arbitrator without any in-depth examination of the disputes. The Court is merely to be satisfied that the disputes fall within the ambit of the arbitration clause. All disputes are to be referred to the sole Arbitrator which need to be decided by the Arbitrator on merits.

[11]. 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. Even in case of termination of the agreement, the arbitration clause would still survive. The arbitration clause would not come to an end with the efflux of time or with effect from the date of

termination of the agreement. In the event of such culmination, the same would lead to very uncertain state of affairs, destroying the very efficacy of Section 16(1) of the Act. Section 16(1) of the Act makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, the arbitration clause which formed part of the contract has to be treated as an agreement independent of other terms of the contract. Section 16(1)(b) of the Act further provides that even if the arbitral Tribunal concludes that the contract is null and void, it should not result as a matter of law in an automatic invalidation of the arbitration clause. Section 16(1)(a) of the Act presumes the existence of a valid arbitration clause and mandates the same to be treated as an independent agreement independent. By virtue of Section 16(1)(b) of the Act, it continues to be enforceable notwithstanding a declaration of the contract being null and void. The arbitration clause would not cease to exist with the termination of contract agreement or non-renewal of the same beyond a certain date.

[12]. For the reasons recorded hereinabove, I hereby appoint **HMJ Jitendra Chauhan (Retd.), R/o H.No.1501, Sector 36-D, Chandigarh, Email: email ID: justicejitendrachauhan@gmail.com** 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 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 both the parties equally.

[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 Jitendra Chauhan (Retd.),
R/o House No.1501, Sector 36-D, Chandigarh,
email ID: justicejitendrachauhan@gmail.com

[16]. Petition stands disposed of accordingly.

(RAJ MOHAN SINGH)
JUDGE

January 25, 2023
Atik

Whether speaking/reasoned Yes/No

Whether reportable Yes/No