IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ARB No.164 of 2021 (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.

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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 arising out of the contract agreement for the construction of multi-purpose indoor hall at Tarn Taran.

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

the construction of multi-purpose Indoor Hall at Tarn Taran. The petitioner also participated in the tender process. The bid forwarded by the petitioner was found to be the most acceptable. The work was allotted to the petitioner for an estimated value of Rs.360.50 lakhs on 18.02.2014. The period of execution of work was 10 months from the date of allotment i.e. 18.02.2014. The respondents were under legal obligation to fulfill their part of contractual obligation towards the petitioner, but the respondents failed to do the needful and made defaults on many occasions. The respondent No.4 made alterations in the work to be executed by the petitioner relating to the structural designs and material of trusses and roof sheets etc. The respondents changed the trusses to non-regular sizes which were not available in the market. That ultimately required the petitioner to place orders to manufacturer who had specially manufactured the non-regular sizes conforming to IS: 2062 for the completion of the work. Though the respondents were within their right to revise the work but the revision was not on contractual obligations. The revision and changes ultimately brought additional costs into picture and the petitioner had to convey the same to the respondents towards its demand for change of scope and consequent changes in terms of rate etc.

[3]. The Executive Engineer/respondent No.4 denied the

extra rates vide letter dated 28.05.2015 and 29.05.2015. The petitioner wrote another letter on 01.06.2015 to the Executive Engineer in order to keep its right reserved. The Executive Engineer acceded to the demand vide letter dated 12.06.2015 that the rights were reserved according to the agreement and as such the petitioner had suffered huge financial losses towards additional costs and rates to which it was legally and contractually entitled and the same were not paid, resulting in financial constraints.

[4]. As per the contract, the petitioner was required to fill earth under the floor of the rooms and the playing area. In order to provide the earth for the said filling, it needed to be brought from the outside. The petitioner was entitled for the payments towards carriage of this earth. Inspite of being part of standard engineering practice, the respondents failed to do the needful and denied the legitimate dues of the petitioner. The issue was raised by the petitioner before the respondents through representation dated 28.05.2014. The respondents denied the legitimate dues of the petitioner in utter disregard to the provisions of the clause of the contract.

[5]. Various shortfalls at the instance of the respondents were not adhered to, rather the respondents forcibly extracted an undertaking dated 19.08.2014 from the petitioner that it

would execute such electrical activities which were not even part of the scope of contract. The aforesaid undertaking was on account of financial distress. The intention of the petitioner always remained *bona fide* to complete the project by maintaining goodwill and the petitioner gave the undertaking with submission to provide schedule of quality of the electrical work intended to be got executed by the firm of the petitioner.

[6]. The abatement offered by the petitioner on the CSR rates was to be subtracted from the zonal premium and the percentage so arrived was to be applied to the basic rates exhibited in the CSR. The respondents adopted a formula which was in contravention with the settled procedure laid down by the PWD Department. The issue was raked up by the petitioner vide letter dated 30.05.2015 but the same was never adhered to by the respondents.

[7]. The respondents were obliged to ensure availability of funds and timely payment to the petitioner on account of execution of work. The respondents failed to do the needful on many occasions and the payments of bills were delayed. The delay in releasing the payment ultimately created financial impact and further caused delay in overall execution of work for which the respondents were liable. The petitioner being aggrieved by the delay in releasing its dues against the running

bill and paucity of funds raised the issue in number of letters dated 21.07.2014, 10.11.2014, 01.12.2014, 10.07.2015 and 04.08.2015. The Executive Engineer at the time of seeking extension of time to the office of Superintending Engineer had also cited the reason for the work not being completed in time as the funds were not received in time in the Proforma for Extension of Time dated 19.02.2015, 17.06.2015, 08.10.2015 and 09.06.2016. However there was no significant improvement in the performance of the respondents qua the timely payments of the petitioner's dues due to the paucity of funds.

[8]. The copies of Proforma of Time Extensions were signed by the Executive Engineer mentioning the cause of delay as funds not received in time i.e. on 19.02.2015, 17.06.2015, 08.10.2015 and 09.06.2015. The letters issued by the Executive Engineer to the Superintending Engineer on 19.02.2015 and 17.06.2015 are also relevant to be quoted.

[9]. In case of revision of work, the respondents were under obligation to promptly furnish the copies of revised drawings to the petitioner based upon which the petitioner was to execute the revised scope of work. The respondents informed the petitioner that the respondents wanted to revise the scope of work but failed to issue the revised drawings in time leading to further delay in execution of work. The issue was formally raised

by the petitioner on 12.08.2014 and thereafter again raised on 22.09.2014, 07.10.2014, 27.10.2014, 01.12.2014, 01.02.2015. 10.08.2015 and 22.08.2015. Despite the aforesaid, the revised drawings were not issued by the respondents thereby delaying the work. There were various instances of failure on the part of the respondents and due to which the petitioner could not complete the work within the time stipulated and, therefore, the petitioner applied for extension in time. The request for extension in time was made on four occasions i.e. on 04.12.2014, 26.05.2015, 23.09.2015 and 23.01.2016. The requests for extension of time were based on different reasons justifying extensions.

[10]. Despite shortfalls on the part of the respondents, the petitioner kept on executing the work at site with the objective to complete the work at the earliest. Despite increase in project costs due to extra items, the petitioner did not stop the work. As a consequence of the same, the petitioner submitted its 13th bill for the claim of Rs.97,01,302/- on 06.08.2016 and demanded immediate liquidation of the same. The petitioner also raised various claims through representations dated 14.10.2016 and demanded the liquidation of the same as well.

[11]. Owing to the inaction on behalf of the respondents, the petitioner had to file Arbitration Case No.287 of 2016 in the High

Court and the same was disposed of vide order dated 17.11.2016 with a liberty to file fresh petition.

[12]. Final bill as prepared by the Department was paid on 07.09.2017 and the same was accepted under protest. The same was got scribed on page No.189 of the Measurement Book 153 signed by both the partners of the petitioner's firm. Subsequently vide letter dated 15.12.2017, the respondents alleged that they had paid the entire outstanding amount to the petitioner which was disputed by the petitioner in its letter dated 03.01.2018 by pointing that the bill prepared by the respondents had been accepted under protest only.

[13]. When the issue was not settled, the petitioner issued notice of invocation under clause 25(ii) of the contract agreement demanding its complete outstanding dues of Rs.2,53,11,128/-. Since there was no response to the aforesaid letter, the petitioner proceeded further according to clause 25 of the contract agreement. The petitioner informed the Superintending Engineer on 27.08.2020 that now the official Arbitrator is not to be appointed in view of amended provisions of the Arbitration and Conciliation Act, 1996 in view of ***TRF Limited vs. Energo Engineering Projects Limited, (2017) 8 SCC 377***; ***Bharat Broadband Network Limited vs. United Telecoms Limited, (2019) 5 SCC 755***; ***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*** . With this background, the petitioner has already approached the Chief Engineer on 27.08.2020 intimating the background in which the petitioner has been made to suffer.

[14]. In the reply filed by the Executive Engineer on behalf of the respondents No.1 to 4 would indicate that the respondents have denied the claim of the petitioner on the ground of limitation and disbursement of full payment of the petitioner. The respondents have pointed out that as per direction issued on 27.09.2016 by the High Court in CWP No.20175 of 2016, the letter dated 06.08.2016 submitted by the petitioner was resolved again in an explanatory way thereby reciting that after considering the letter dated 06.08.2016, the competent authority came to the conclusion that the firm was to remove the defects under clause 6 & 6-A of the agreement, clear the site and hand over to the Department by furnishing completion drawing including variation statement etc. under signature of competent signatory of the firm and only then according to CSR allotted rates as per agreement and winding up of agreement final payment was to be made. If the petitioner/firm wanted to go for arbitration after completing the conditions of as per clause 25 of

the contract agreement, the petitioner was to move an application to the Superintending Engineer for arbitration. Perusal of the aforesaid stand would indicate that there is no denial that in the event of default on behalf of the respondents, the petitioner was required to approach the Superintending Engineer for arbitration. The petitioner had accepted the part payment only under protest. The date of completion of the work was 30.06.2016 after extension of time. According to the respondents, final bill was paid on 07.09.2017 and arbitration clause was invoked on 27.08.2020 within the period of limitation of three years.

[15]. Evidently, the parties kept on transacting the business/executing the work even after the fixed date. The dispute has arisen in relation to termination of original contract or extension thereof and its consequences. 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. Even in case of slightest doubt in respect of limitation particularly when the issue is not *ex-facie* time barred, the matter needs to be referred to the Arbitration in view of ***Bharat Sanchar Nigam Ltd. and another vs. M/s Nortel Networks India Private Limited, 2021(2) R.C.R. (Civil) 337***.

[16]. 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.

[17]. For the reasons recorded hereinabove, I hereby appoint **HMJ Jitendra Chauhan (Retd.), R/o House No.1501, Sector 36-D, Chandigarh, 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.

[18]. 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.

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

[20]. 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

[21]. Petition stands disposed of accordingly.

(RAJ MOHAN SINGH)
JUDGE

January 25, 2023
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Whether speaking/reasoned Yes/No

Whether reportable Yes/No