

**In the High Court for the States of Punjab and Haryana
At Chandigarh**

ARB-50-2020 (O&M)
Date of Decision:-18.7.2023

M/s Sutlej Constructions Limited ... Petitioner
Versus
State of Haryana and others ... Respondents

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present:- Mr. P.S. Rana, Advocate for the petitioner.

Mr. Sharad Aggarwal, DAG, Haryana.

GURVINDER SINGH GILL, J. (Oral)

1. The present application, under Section 11(6) of Arbitration and Conciliation Act, 1996, has been filed seeking appointment of an Arbitrator.
2. Upon issuance of notice, Mr. Sharad Aggarwal, DAG, Haryana has put in appearance on behalf of the respondent/State and has filed reply.
3. It is not in dispute that there was a specific clause i.e. Clause 25-A providing for settlement of disputes by way of arbitration. The relevant extract of contract is annexed as Annexure A-1.
4. A dispute having arisen, the applicant issued a notice dated 3.11.2005 (Annexure A-3) for appointment of a sole Arbitrator.
5. A perusal of letter dated 9.1.2006 (Annexure A-4) would show that The Superintendent Engineer, Chandigarh Circle, HR. PWD (B&R) Br.,

Chandigarh responded to the said notice pointing out that the applicant had not deposited the security in accordance with provisions of Clause 25-A (7) of the contract agreement. The matter consequently remained pending and neither the deposit was made nor any Arbitrator was appointed.

6. The applicant wrote another letter dated 8.11.2019 (Annexure A-9) in connection with his request for appointment of an Arbitrator, wherein he referred to a judgment passed by Hon'ble Supreme Court in M/s Icomm Tele Limited Versus Punjab State Water Supply & Sewerage Board and another, 2019(4) SCC 401, to contend that he was not liable to pay the amount in question. The respondent vide its letter dated 24.12.2019 (Annexure P-10), declined the request of applicant to appoint Arbitrator. The relevant extract of letter dated 24.12.2019 reads as under:

“Also, the earlier request for appointment of arbitrator was made in the year 2005 and due to default of agency by non deposit of security deposit, the matter remained pending all throughout the years. As such even in term of Limitation Act, 1963 the request for appointment of a arbitrator is barred by limitation. A reference is made to judgment of Hon'ble Supreme Court of India in Punjab State Electricity board and others Vs. M/s Kartar Singh and Company (Annexure-‘C’) in your application. The facts of this case are different from the present matter. Therefore, this judgment is not applicable to the issue at hand.

In view of above, your request of appointment of arbitrator submitted vide application under reference is hereby rejected.”

7. The present application under Section 11(6) of Arbitration and Conciliation Act, 1996 was instituted in this Court on 17.2.2020 but the same remained

pending. A few of the adjournments were on account of the fact that a Division Bench of this Court was seized of a matter pertaining to interpretation in respect of deposit of 10% of the claimed amount in light of ratio of M/s Icomm Tele Limited's case (supra) and S.K. Jain Versus State of Haryana, (2009) 4 SCC 357.

8. Learned counsel for the applicant submitted that since his client is suffering irreparable loss, he is now willing to deposit 7.5% of the claimed amount in accordance with the agreement and that some independent Arbitrator may be appointed.
9. On the other hand, learned State counsel has vehemently opposed the aforesaid request for appointment of Arbitrator *inter alia* on the following grounds:
 - (i) that the applicant did not resort to pre-arbitration as is specifically provided in the agreement (Annexure A-1);
 - (ii) that the deposit of 7.5% of claimed amount is mandatory since the same is specifically provided in the contract itself; and
 - (iii) that there is delay in filing application under Section 11(6) of Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator.
10. This Court has considered the rival submissions addressed before this Court.
11. As far as the contention of the respondents to the effect that the applicant had not surrendered himself for pre-arbitration is concerned, it is noticed in letter dated 3.11.2005 (Annexure A-3) that the applicant had infact written to the Executive Engineer on 2.11.2005 and had sent statement of claims. Though the agreement does provide that the parties have to wait for 60 days after

approaching the Executive Engineer before any application for appointment of Arbitrator is filed but it is not disputed that despite letter dated 2.11.2005 or letter dated 3.11.2005 (Annexure A-3), the Executive Engineer has not taken up the matter till date to resolve the dispute in question. In any case, a perusal of letter dated 9.1.2006 (Annexure A-4) would show that the only objection raised by the respondents is in respect to non-deposit of the amount in accordance with Clause 25-A (7) of the contract agreement and no objection pertaining to the applicant not having approached the Executive Engineer for pre-arbitration had been raised. Even in letter dated 24.12.2019 (Annexure A-10), there is no objection with regard to the applicant not having availed of the pre-arbitration and the only objection raised therein is regarding non-deposit of the pre-deposit. Still further, even in the reply filed in this Court, no such objection has been raised and the only objection is with regard to non-deposit of security of 7.5%.

12. In view of the aforestated position, this Court finds that it does not lie in the mouth of the State to say that the Arbitrator cannot be appointed as the applicant had not availed of pre-arbitration.
13. As far as the contention of the State that the applicant had not deposited the amount of 7.5% of the claimed amount, the learned counsel for the applicant has today volunteered that his client shall deposit the aforesaid amount of 7.5% of the claimed amount when the proceedings are initiated with the claimed statement. As such, the aforesaid objection also stands taken care of, even though the validity of such like deposit has been doubted in M/s Icomm Tele Limited's case (supra).

14. As regards the objection regarding limitation is concerned, this Court finds that it was initially in the year 2005 that a notice was issued by the applicant to Executive Engineer requesting for appointment of sole Arbitrator to which the respondents replied after 2 months i.e. on 9.1.2006, pointing out that petitioner had not deposited the security amount. The matter, however, remained pending on account of the insistence of the respondents for making the pre-deposit and it was again in the year 2019 i.e. on 8.11.2019 (Annexure A-9) that request for appointment of Arbitrator was reiterated, but the same was specifically rejected vide letter dated 24.12.2019 (Annexure P-10). It was pursuant to the aforesaid rejection that the instant petition was filed on 17.2.2020.
15. In view of the aforesaid peculiar circumstances, particularly the fact that the matter remained pending before Executive Engineer/Engineer-in-Chief on account of insistence of respondents for security deposit, a practice which has been deprecated by Hon'ble Supreme Court in M/s Icomm Tele Limited's case (supra) and also that it was on 24.11.2019 that respondent finally chose to specifically turn down the request for appointment of Arbitrator, this Court is of the opinion that the limitation will not come in the way of applicant.
16. The objections raised on behalf of the respondents, thus do not carry any weight. The application under Section 11(6) of Arbitration and Conciliation Act, 1996 merits acceptance and is accepted.
17. Accordingly, Shri J. Surinder Gupta (Retd.) is appointed as the sole Arbitrator. However, such appointment would be subject to the declaration to be made by Shri J. Surinder Gupta (Retd.) under Section 12 of the Act with

regard to his independence and impartiality to settle the disputes between the parties.

18. The Arbitrator shall be paid fee in accordance with the Fourth Schedule of the Act, as amended or as may be mutually settled by the parties and the Arbitrator.
19. As per agreement expressed by learned counsel for the parties, for the sake of the convenience of their respective clients, as also of the Arbitrator, the venue for the Arbitration shall be at Arbitration Centre, Chandigarh or at any other place convenient to all concerned.
20. After seeking convenience of the Arbitrator, the parties are directed to appear before him on 8.8.2023 at 11:00 A.M. or any other date suitable to all concerned.
21. A copy of this order be sent to the appointed Arbitrator at the given address :

#542, The Foothills Cooperative Residential Society (IAS/PCS Society),
New Chandigarh, Mullanpur 140901.
Phone Nos.96463-56001 and 94173-12323.

18.7.2023

pankaj

**(Gurvinder Singh Gill)
Judge**

Whether speaking /reasoned

Yes / No

Whether Reportable

Yes / No