

In the High Court for the States of Punjab and Haryana at Chandigarh

CR-7244-2023 (O&M)
Date of Decision: 14.12.2023

Punjab State Power Corporation LimitedPetitioner

Versus

Talwandi Sabo Power LimitedRespondent

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present: Mr. Gurminder Singh, Senior Advocate, Punjab, with
M/s Aman Pal and Mr. Japsehaj Singh, Advocates,
for the petitioner.
Mr. Chetan Mittal, Senior Advocate, with
M/s Nitin Kaushal, Kunal Mulwani, Satyveer, Ritvik Garg,
Daksh Uppal, Advocates, for the respondent.

GURVINDER SINGH GILL, J.

1. The petitioner - Punjab State Power Corporation Limited (hereinafter to be referred as 'PSPCL' in short) seeks setting aside of order dated 10.11.2023 (Annexure P-1) passed by the Additional District Judge, Commercial Court-I, Patiala, whereby an application filed by the respondent - Talwandi Sabo Power Limited (hereinafter to be referred as 'TSPL' in short) under Section 29A (5) of the Arbitration & Conciliation Act, 1996 (hereinafter to be referred 'the Act' in short) for extension of period of time for concluding the arbitration proceedings, has been allowed and the time has been extended by six months.

2. A few facts necessary to notice are that a Power Purchase Agreement dated 01.09.2008 had been entered between the petitioner - PSPCL and the respondent - TSPL. A dispute having arisen, respondent - TSPL approached the Punjab State Electricity Regulatory Commission (PSERC) on 20.05.2015 by filing a petition under Section 86(1)(f) of the Electricity Act. The PSERC vide its order dated 06.11.2015 (Annexure P-2) ordered for constitution of an Arbitral Tribunal. Accordingly a three member Arbitral Tribunal comprising of Hon'ble Justice E. Padmanabhan, former Judge of High Court of Madras, as Presiding Arbitrator; Shri A.A.Khan, former Technical Member, Appellate Tribunal for Electricity, New Delhi and Shri S. Jaya Raman, former Member of Central Electricity Regulatory Commission, was constituted on 17.12.2015. The petitioner - PSPCL during the course of hearing held on 14.05.2016 objected to the constitution of the Arbitral Tribunal particularly with regard to the eligibility of Shri A.A.Khan to be appointed as an Arbitrator. The said objection, which had been made orally, has been recorded in the Minutes of Meeting dated 14.05.2016 (Annexure P-3) by the Arbitral Tribunal.
3. Thereafter, the petitioner - PSPCL filed an application on 17.05.2016 (Annexure P-4) under Section 12 of the Act challenging the appointment of Shri A.A.Khan, as an Arbitrator, which was opposed by the respondent - TSPL. The Arbitral Tribunal upon considering the said application, dismissed the same vide order dated 28.10.2016 (Annexure P-7).
4. Subsequently, the petitioner - PSPCL moved an interlocutory application dated 9.11.2016 (Annexure P-8) under provisions of Section 86(1)(f) read with Section 158 of the Electricity Act and Section 14 of the Arbitration &

Conciliation Act before the Punjab State Electricity Regulatory Commission (PSERC) challenging the eligibility and continuity of Shri A.A.Khan, as a Member of the Arbitral Tribunal, but the same was dismissed vide order dated 24.01.2018 (Annexure P-9). Feeling aggrieved, the petitioner - PSPCL preferred an appeal against the said order dated 24.01.2018 (Annexure P-9) before the Appellate Tribunal for Electricity at New Delhi, which also came to be dismissed vide order dated 21.03.2023 (Annexure P-11) pursuant to statement made by petitioner's counsel that the appeal had become infructuous. The said order dated 21.03.2023 reads as under:

“Mr. Anand K. Ganesar, learned counsel for the Appellant states that the Appeal has become infructuous. The Appeal is accordingly dismissed alongwith IAs pending therein.”

5. Since the period of one year from the commencement of the arbitration proceedings had expired on 29.11.2016, the respondent - TSPL moved an application dated 12.12.2016 under Section 29A of the Act seeking extension of period of time within which the Arbitral Tribunal had to make an award. The said application remained pending for more than 3 years and was ultimately dismissed by the learned Additional District Judge, Patiala vide order dated 14.01.2020 (Annexure P-15). The said order dated 14.01.2020 was challenged by the respondent - TSPL by way of filing a civil revision i.e. CR-4047-2022, which was accepted by this Court vide order dated 05.10.2023 (Annexure P-17) pursuant to 'No Objection' expressed by the counsel for the petitioner - PSPCL and the matter was remanded back to the Court of Additional District Judge, Patiala (acting as Commercial Court-I) to decide the matter afresh.

6. It is pursuant to passing of the aforesaid order dated 05.10.2023 (Annexure P-17) by this Court that the application under Section 29A of the Act was taken up afresh by the Additional District Judge, Commercial Court-I, Patiala and has been accepted vide order dated 10.11.2023 (Annexure P-1), which is impugned in the instant petition.
7. Learned senior counsel appearing on behalf of the petitioner - PSPCL has vehemently argued that it is a case wherein the petitioner - PSPCL on account of passing of the impugned order dated 10.11.2023 would be forced to surrender to the arbitration proceedings before an Arbitral Tribunal, which comprising of three members, one of whom had already expressed his opinion on some of the issues involved in the instant case. It has been submitted that although the petitioner - PSPCL had taken resort to all the appropriate remedies at the appropriate stage at the very outset i.e. initially, by way of filing an application under Section 12 of the Act (Annexure P-4) on 17.05.2016 and upon dismissal of the same on maintainability, the petitioner filed an interlocutory application under provisions of Section 86(1)(f) read with Section 158 of the Electricity Act and Section 14 of the Arbitration & Conciliation Act before the PSERC in the year 2016 itself. It has been submitted that upon dismissal of said interlocutory application by the PSERC vide order dated 24.01.2018 (Annexure P-9), the petitioner - PSPCL preferred an appeal against the said order before the Appellate Tribunal for Electricity at New Delhi, however, on account of certain change in circumstances i.e. mandate of the Arbitral Tribunal having expired, the petitioner withdrew the said appeal on 21.03.2023 (Annexure P-11) being infructuous i.e. for a bona fide reason under a bona fide belief.

8. It has, thus, been submitted that it was on account of the circumstances as existing on 21.03.2023 that the petitioner - PSPCL withdrew its appeal before the Appellate Tribunal for Electricity, wherein he had challenged the appointment of Shri A.A.Khan, as an Arbitrator, but now since the Additional District Judge, Commercial Court-I, Patiala, passed an order dated 10.11.2023 (Annexure P-1), extending the mandate of the Arbitral Tribunal, the petitioner - PSPCL is left in the lurch having withdrawn its appeal during the period when the mandate of the Arbitral Tribunal had expired but which has subsequently come to be extended vide impugned order. Learned counsel has, thus, prayed for setting aside of the impugned order dated 10.11.2023 (Annexure P-1).
9. Opposing the petition, learned senior counsel representing the respondent - TSPL has vehemently argued that the conduct of the petitioner - PSPCL right from day one is only for delaying the proceedings by resorting to one dilatory tactic after the another. It has further been submitted that once application under Section 12 of the Act filed by the petitioner - PSPCL stood dismissed vide order dated 28.10.2016 (Annexure P-7) passed by the Arbitral Tribunal, the petitioner filed an application before the PSERC under Section 86(1)(f) read with Section 158 of the Electricity Act and Section 14 of the Arbitration & Conciliation Act seeking recall of order dated 17.12.2015 and to declare Shri A.A.Khan ineligible to be an Arbitrator, which was also dismissed.
10. It has been submitted that upon dismissal of aforesaid application under Section 86 of Electricity Act, on 24.01.2018 (Annexure P-9), the petitioner challenged the same by filing an appeal before the Appellate Authority, but

later withdrew the same. It has thus been submitted that once the petitioner - PSPCL itself chose to withdraw the appeal against the order dated 24.01.2018, the same would operate as estoppel with respect to question as regards appointment of Shri A.A.Khan as an Arbitrator. It has further been submitted that in any case Mr. A.A.Khan had not directly furnished any opinion with respect to the issues involved in the present case and as such, he cannot be said to be ineligible on any account.

11. Lastly, the learned senior counsel for respondent submitted that in any case the order, which has been impugned in the present case, is merely for extending the mandate of the Arbitral Tribunal and that the same has been extended having regard to the facts & circumstances of the case and in exercise of powers vested with the District Court and as such the impugned order does not suffer from any infirmity.
12. This Court has considered the respective contentions.
13. The impugned order has been passed by the Additional District Judge, Commercial Court-I, Patiala in exercise of powers under Section 29A of the Act. Section 29A of the Act is reproduced hereunder:

“29A. Time limit for arbitral award. - (1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23:

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23.

- (2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.
- (3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

- (4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.

Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application:

Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.

- (5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.
- (6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.
- (7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.
- (8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.
- (9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.”

14. While considering an application under Section 29A of the Act for extension of time for concluding arbitration, one of the material issues which would be required to be examined by the Court would be as to whether the delay is attributable to the applicant or as to whether it is on account of some other reason. In the present case, the petitioner shortly after appointment of Arbitral Tribunal had moved application under Section 12 of the Act on

17.05.2016, challenging the appointment of one of the Arbitrator. The said application was dismissed on 28.10.2016 while assigning reasons of non-maintainability.

15. Sections 12 and 13 of the Act provide for the grounds and procedure for challenging appointment of an Arbitrator. Section 13 of the Act reads as under:

“13. Challenge procedure. –

- (1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.
- (2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.
- (3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
- (4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.**
- (5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.**
- (6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.”

16. A perusal of Section 13(4) and 13(5) would indicate that any party, having been unsuccessful in challenge to the appointment of an Arbitrator and by his continuance as such would be at liberty to rake up the said issue at the

time of adjudication of petition under Section 34 of the Act. The legislation, in its wisdom, and in furtherance of the very object of the Act i.e. speedy resolution of commercial disputes, has restricted the provisions of appeals or revisions against every order passed by the Arbitral Tribunal, but has kept it open to raise such grounds at the time of petition under Section 34 of the Act.

17. In the instant case, upon dismissal of petitioner's application under Section 12 of the Act, it chose to approach PSERC by way of filing an application under Section 86 of Electricity Act, which also came to be dismissed on 24.01.2018. The said facts would at least show that the respondent cannot be attributed any delay in conclusion of arbitral proceedings. There is nothing to suggest that he had resorted to any dilatory tactics. On the other hand, it is the petitioner who has been approaching various forums for challenging appointment of one of the members of the Arbitral Tribunal. Under these circumstances, the Court while passing order dated 10.11.2023 for extending the period for concluding arbitration proceedings by another 6 months cannot be said to be erroneous or to be suffering from any infirmity or illegality.
18. Before parting with the order, it needs to be observed that there are certain peculiar circumstances in the present case, which seem to have kept the petitioner - PSPCL away from effectively exercising its right of appeal before the "Appellate Tribunal for Electricity", (at New Delhi) against order dated 24.01.2018 passed by PSERC dismissing his application under Section 86 of the Electricity Act. Although, the petitioner did file an appeal against order dated 24.01.2018, but the said appeal came to be dismissed on

21.03.2023 as 'infructuous' pursuant to a statement made by petitioner's counsel. Though the reason on account of which the appeal was rendered 'infructuous' is not specifically recorded in the order, but the learned counsel submitted before this Court that the petitioner withdrew the appeal as having been rendered infructuous under a bona fide belief and circumstances where the petitioner had no option, but to virtually withdraw the appeal inasmuch as the mandate of the Arbitral Tribunal itself stood expired on the said date and there was no point in pursuing the said appeal. It is a matter of fact that it was subsequently that the said position as regards mandate ceased to exist inasmuch as mandate of Arbitral Tribunal now stands extended. This has created a situation, which has left the petitioner shorn of its right to get the aforesaid appeal adjudicated on merits. However, having regard to the fact that the petitioner did file an application under Section 12 of the Act and that the petitioner would even have a right to raise the said issue at the time of filing a petition under Section 34 of the Act, if required, this Court need not be detained further on the said issue at this stage.

19. The petition is sans merit and is dismissed.

14.12.2023

Vimal

(GURVINDER SINGH GILL)
JUDGE

Whether speaking/reasoned: **Yes**
Whether reportable: **Yes**