

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

122

**RA-CR-204-CII-2018 IN/AND
ARB-222-2016 (O&M).
Date of Decision: 20.02.2024.**

M/S DHARAM PAL MADDAR AND SONS

... Petitioner(s)

Versus

**UNION OF INDIA THROUGH SENIOR D.E.N. III DRM OFFICE
NORTHERN RAILWAY, FEROZEPUR.**

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ.

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

Mr. Sudhir Nar, Senior Standing Counsel,
for respondent No.1/UOI.

VINOD S. BHARDWAJ, J. (ORAL)

RA-CR-204-CII-2018

The present review application has been filed under Order 47
Rule 1 of the Code of Civil Procedure, 1908, for review of the order dated
14.09.2018 passed by this Court in ARB-222-2016, titled as 'Dharam Pal
Maddar and sons Vs. Union of India and another.'

Learned counsel for the applicant-petitioner contends that the
above Arbitration Case bearing No.ARB-222-2016 was listed before this

Court and was finally decided vide order dated 14.09.2018. While dismissing the arbitration petition at the said stage, it was noticed by the Court as under:-

*“12. Although a reference has been made in paragraph-3 of the rejoinder affidavit quoted hereinabove that a representation dated 31.07.2015 through registered post was sent to the office of Senior DEN III, DRM Office, Northern Railway, Ferozepur requesting the said authority that on one hand various contractual defaults have been committed by the department and on the other hand the department is not releasing the payment of the executed work and the petitioner-applicant is entitled to interest at the rate of 18% per annum on delayed payment of Rs.5,50,614/- besides entitled to the overhead charges due to prolongment of work for 494 days. **However, except for making bald allegations, the alleged representation dated 31.07.2015 has not been brought on the record of the case to demonstrate that it satisfies the condition of clause 63 of the GCC.** In the absence of the said document having been brought on record, the Court is at a total loss to find out that the said representation conforms to the requirement of clause 63 of the GCC. Thus circumstances lead to the conclusion that straightway provisions of clause 64 of GCC have been invoked by making an application setting out claims and appointment of an arbitrator.*

“13. The issue as to whether in such circumstances where the rigours of clause 63 have not been followed, the contractor would be entitled to make a demand for appointment of an arbitrator and on failure to invoke the provisions of Section 11 of the Act is no longer res-integra and stands settled by the decision of the Hon’ble Apex Court in the case of M/s Shetty’s

Construction Company Pvt. Ltd. V. M/s Konkan Railway Corporation Ltd. 1999(8) SCC 604. *Following the said judgment similar view has been taken by the learned Single Judge of this Court in case of **M/s Trehan Construction Engg. & Government Contractor v. Union of India and another 2013(1) RCR (Civil) 699.***

Learned counsel for the review applicant-petitioner contends that the said petition had been dismissed by this Court merely on the ground that initial notice under Clause 63 of the General Conditions of the Contract, had not been satisfied and a liberty was granted to the petitioner to seek appointment of an arbitrator after seeking recourse to Clause 63 providing for appointment of Arbitrator. He contends that the petitioner had, in fact, already submitted the representation dated 31.07.2015 through registered post in the office of Senior DEN III, DRM Office, Northern Railway, Ferozepur, and that the same was annexed along with CM-13368-CII-2018 in Arbitration Case No.222 of 2016. The same had been taken on record vide order dated 13.07.2018. However, the said fact could not be brought to the notice of the Court resulting in dismissal of the petition. Since the factual aspect noticed is incorrect, the foundation of the order was bad.

It is evident from a perusal of the order and the contentions noticed in para No.12 that despite submission of representation dated 31.07.2015 (the same had been placed on record along with CM-13368-CII-2018 which was allowed vide order dated 13.07.2018), the reason noticed for dismissal of the petition being non-availability of the above letter is bad.

Hence, the said factual aspect has been incorrectly recorded in the said order.

The instant review application is accordingly allowed and the petition is restored.

The order dated 14.09.2018 dismissing the petition is recalled. The main case is taken up on Board today itself.

Main case

Learned counsel for the petitioner contends that pursuant to the tender notice issued by respondent for improvement of flooring of second class waiting hall at Amritsar and repair of badly damaged flooring of Platform No.2 at Beas Railway Station in the Section of SSE/ML/ASR under ADEN/ASR, the bid submitted by the petitioner was accepted and he was awarded the said contract vide letter dated 26.06.2012 at an estimated cost of Rs.36,36,672/-. An agreement in this regard was executed between the parties on 06.08.2012 and that the work in question was completed by the petitioner on 21.10.2012.

He contends that a dispute arose between the respective parties in relation to disbursement of the dues for which the notice dated 31.07.2015 was sent by the petitioner seeking invocation of arbitration and for reference of the matter for appropriate adjudication. It is also argued that even though the respondents had disputed that the above said notice had not been received by them, however, the contemporaneous evidence in the form of the communication bearing Memo No.63-W/43/633-WA dated 09th/16th January, 2017 clearly shows that the respondents had sent a letter to the petitioner for appointment of a sole arbitrator/Arbitral Tribunal consisting

of Railway's Gazetted Officers. It is submitted that the said offer made by the respondents to refer the dispute for arbitration to the sole arbitrator appointed by them was in conflict with the provisions of the Arbitration and Conciliation Act, 1996, hence, an objection was raised by the petitioner. The submission of the respondents about non-receipt of the letter dated 31.07.2015 invoking arbitration as per agreed procedure thus stands falsified in view of their own correspondence sent in January 2017 agreeing to refer the matter to arbitration.

Learned counsel for the respondents, on the other hand, contends that as per the provisions of Clause 63 of the General Conditions of Contract, the request for referring the dispute for arbitration was required to be sent to the General Manager and that the said request has, in fact, been sent to an officer other than the General Manager as stipulated in the General Conditions of Contract.

While responding to the above said contention, learned counsel for the petitioner places reliance upon the order of this Court in **Arbitration Case No.24 of 2010 decided on 17.03.2011, titled as M/s Akash Enterprises Vs. The General Manager, Northern Railway and others,** wherein the matter was ordered to be referred to arbitration, under similar clauses, when the respondents authorities were duly served with the notice invoking arbitration. The relevant paragraphs of above order reads as under:-

“4. In the reply filed on behalf of the respondents, it has been pointed out that the demand for appointment of an Arbitrator was not made to respondent No.1 vide letter dated 28.05.2009 and that no such letter has been received by the General

Manager. It is, however, pointed out that the copy of letter dated 28.05.2009 was marked to respondent No.2 i.e. Divisional Rail Manager. The respondents have also attached a communication dated 23.03.2010 (Annexure R-1) to the effect that the communication from the petitioner regarding appointment of an Arbitrator has not been received, but the Arbitrator will be shortly appointed by the Railway.

5. Learned counsel for the respondents has vehemently argued that in terms of Standard General Conditions of Contract for use in connection with Engineering Works (hereinafter to be referred as 'the Conditions'), the communication in respect of demand of an Arbitrator is required to be submitted to the General Manager, Railways in terms of Clause 63 of the Agreement. Therefore, the petitioner having not submitted the request for appointment of an Arbitrator to the General Manager, the present petition for seeking appointment of an Arbitrator is not maintainable. Learned counsel for the respondents has further argued that since the letter was purportedly addressed to the General Manager, therefore, respondent No.2 to whom the letter was sent was under the impression that the General Manager shall appoint the Arbitrator.

6. Having heard learned counsel for the parties, I do not find any merit in the stand of the respondents that the request for appointment of an Arbitrator was not addressed to the appropriate Officer. In the Conditions, Clause 1(a) defines 'Railway' to mean the President of the Republic of India or the Administrative Officers of the Railway or of the Successor Railway authorized to deal with any matters which these presents are concerned on his behalf. Clause 1 (b) defines 'General Manager' to mean the Officer in-charge of the

General Superintendence and Control of the Railway and shall also includes the successors of the Successor Railway.

7. *Clause 63 of the Agreement reads as under:*

"63. Matters finally determined by the Railway - All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or alter its completion and whether before or after the determination of the contract shall be referred by the contractor to the Railways and the Railway shall within 120 days after receipt of the Contractor's representation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in clauses 8(a), 18, 22(5), 39, 43 (2), 45(a), 55, 55-A (5), 57, 57A, 61(1), 61(2) and 62(1)(b) of General Conditions of Contract or in any clause of the Special Conditions of the Contract or in any clause of the Special Conditions of the Contract shall be deemed as 'excepted matters' and decisions of the Railway authority, thereon shall be final and binding on the contractor provided further that 'excepted matters' shall stand specifically excluded from the purview of the arbitrator clause and not be referred to arbitration."

8. *The letter (Annexure A-4) has been addressed to the General Manager, Northern Railway. The petitioner has attached photocopy of the receipt of sending the registered letter, which shows that such letter was addressed to the General Manager, Northern Railway. There is presumption of receipt of the letter by the addressee in terms of Section 27 of the General Clauses Act, 1897. Still further the written-statement filed on behalf of the respondents*

acknowledges the receipt of such letter by respondent No.2. But neither the General Manager nor respondent No.2 i.e. Divisional Rail Manager has appointed an Arbitrator before the filing of the present petition. Therefore, in terms of judgment rendered by Hon'ble Supreme Court in Datar Switchgears Ltd. Vs. Tata Finance Ltd. & Another (2000) 8 SCC 151, the respondents are estopped to appoint an Arbitrator under Clause 64 of the Agreement. Later in Union of India v. Bharat Battery Mfg. Co. (P) Ltd.,(2007) 7 SCC 684, the Hon'ble Supreme Court held:

"9. We are unable to countenance the submission of the learned counsel for the appellant. Section 11(8) of the Act could have come to the aid of the appellant had the appellant appointed the arbitrator within 30 days from the date of receipt of request to do so from the respondent or the extended time, as the case may be. In the present case, as noticed above, Section 11(6) petition was filed on 30-3-2006 by the respondent. The appellant stated to have appointed one Dr. Gita Rawat on 15-5-2006 i.e. after Section 11(6) petition was filed by the respondent on 30-3-2006, which is not permissible in law. In other words, the appellants are stopped from making an appointment of the arbitrator in terms of Clause 24 of the agreement after Section 11(6) petition is filed by the respondent. Once Section 11(6) petition is filed before the court, seeking appointment of an arbitrator, the power to appoint an arbitrator in terms of arbitration clause of the agreement ceases."

Learned counsel for the respondents/Railways is not in a position to controvert the above said order passed by this Court in the matter of **M/s Akash Enterprises** (supra).

No other argument has been raised.

I have heard the learned counsel appearing for the respective parties and have also gone through the documents appended along with the present petition with their able assistance.

The only contention that was raised on behalf of the respondents is that the invocation of the arbitration has not been done in accordance with the contract executed between the parties and the necessary procedure as stipulated under Clause 63 of the General Clauses of Contract has not been followed. The said aspect stands refuted by the fact that a registered post notice for seeking reference of the dispute for arbitration had been sent on 31.07.2015. The contemporaneous evidence by way of an offer made by the respondents to refer the dispute to the arbitration crystallizes the contention of the petitioner that the respondents were seized of the dispute and at one point of time were ready and willing to refer the dispute to arbitration. It was on account of an objection raised with respect to impartiality of the arbitrator sought to be nominated by the respondents Railways and the same being in conflict with the provisions of the Arbitration and Conciliation Act, 1996, that the offer was not acceptable and failed to crystallize. Thus the respondents were cognizant of their obligation to refer the dispute to arbitration. Further, the ratio of the judgment passed in the matter of **M/s Akash Enterprises** (supra) is also applicable to the facts of the present case.

Accordingly, the present petition is allowed. Sh. S.P. Arora, IAS (Retd.), Mobile No.9501311333, and an empanelled arbitrator is appointed as the Sole Arbitrator to adjudicate the dispute between the parties.

The fee of the Arbitrator shall be determined in terms of the Schedule IV of the Arbitration and Conciliation Act, 1996. The nominated Arbitrator shall furnish a declaration as mandated under Section 12 of the Arbitration and Conciliation Act, 1996 with respect to non-alignment and affiliation to any of the parties.

The duration for completion of arbitration proceedings would be as mandated in Section 29-A of the Arbitration and Conciliation Act, 1996. The venue of arbitration shall be Chandigarh Arbitration Centre, Chandigarh and without prejudice to the seat of arbitration and jurisdiction as agreed upon between the parties.

Parties are directed to appear before the learned Arbitrator on any date, time and place to be fixed by him at his convenience.

The petition stands allowed as aforesaid.

Copy of the order be sent to the appointed arbitrator.

February 20, 2024
raj arora

(VINOD S. BHARDWAJ
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No