

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

ARB-2-2024
Date of decision:-05.01.2024

Rattan Lal, Contractor, deceased through Rajinder Kumar

...Petitioner

Versus

State of Haryana and others

...Respondents

CORAM : HON’BLE MR. JUSTICE SUVIR SEHGAL

Present : Mr.Lajpat Rai Sharma, Advocate for
Mr.Vivek Khatri, Advocagte
for the petitioner.

SUVIR SEHGAL, J.(ORAL)

1. Petitioner has approached this Court under Section 11(6) of Arbitration and Conciliation Act, 1996 (for short – ‘the Act’) for appointment of an independent person as a sole arbitrator to adjudicate the dispute between him and the respondents arising out of contract agreement for work of “Providing of additional Tubewell Guwani, Laying of 4” AC Pipeline and the other works contingent thereto”.

2. Counsel for the petitioner submits that petitioner was allotted the work, detailed above, vide memo dated 11.03.2008, Annexure P1, with approximate cost of Rs.20,000/-, which was enhanced to Rs.25,000/- and an agreement, Annexure P2, was entered

into between the parties. He submits that the work was completed within the period stipulated under the agreement as per specifications to the satisfaction of the Engineer-in-Chief and final bill along with earnest money is pending with the respondents along with damages for a total sum of Rs.1,73,900/- since 10.04.2008. Counsel asserts that despite repeatedly approaching the respondents, payment has not been made and the petitioner submitted a representation dated 07.07.2023, Annexure P3, without any success. He submits that by notice dated 06.10.2023, Annexure P4, petitioner invoked the arbitration clause, which was followed by legal notice dated 11.10.2023, Annexure P5 but the respondents have not given a reply.

3. On a specific query raised by this Court regarding the delay in invoking the arbitration clause, counsel for the petitioner has made a reference to Sub-Clause 9 of Clause 25 (a) and urges that despite the completion of the work, the respondent – authorities did not address any communication to the petitioner as a result of which period of limitation has not expired.

4. I have considered the submission made by counsel for the petitioner.

5. Clause 25(a) of the agreement provides for the arbitration clause and is reproduced hereunder:

“Clause 25(a) : If any dispute of difference of any kind whatsoever shall arise between the Governor of Haryana his authorised agent and the contractor in connection with or arising out of the contract or the execution of the work that is (i) whether before its commencement or during the progress of the work or

after its completion. (ii) and whether before or after the termination, abandonment or breach of the contract, it shall, in the first instance be referred to for being settled by the Executive Engineer-in-charge of the work at the time and he shall within a period of sixty days after being requested in writing by the contractor to do so, convey his decision to the contractor, and subject to arbitration as hereinafter provided, such decision in respect of every matter so referred, shall be final and binding upon the contractor. In case the work is already in progress, the contractor will proceed with the execution of the work on receipt of the decision by the Executive Engineer-in-charge as aforesaid, with all due diligence whether he or the Governor of Haryana/his authorised agent requires arbitration as hereinafter provided or not., If the Executive Engineer-in-charge of the work has conveyed his decision to the contractor and no claim to arbitration has been filed with him by the contractor within a period of sixty days from the receipt of letter communicating the decision, the said decision shall be final and binding upon the contractor and will not be a subject matter of arbitration at all. If the Executive Engineer-in-charge of the work fails to convey his decision within a period of sixty days after being requested, as aforesaid, the contractor may, within further sixty days of the expiry of first sixty days from the date on which request has been made to the Executive Engineer-in-charge request the Engineer-in-Chief, that the matter in dispute be relevant to arbitration, as hereinafter provided.”

6. A perusal of the above reproduced clause shows that the petitioner, at the first instance, is required to approach in writing, the Executive Engineer-in-charge of the work, within a period of 60 days, for settlement of any dispute, which may arise between the parties. There is nothing on the record to show that the petitioner has approached the Engineer concerned in terms of the above reproduced clause and has adhered to the procedure prescribed under clause 25(a). Petitioner is therefore debarred from issuing a notice under Section 21 of the Act and from invoking the arbitration clause.

7. Coming to the submission raised by counsel for the petitioner, Sub-Clause 9 to Clause 25(a) *ibid* deserves to be noticed and is reproduced as under:

“9. Neither party shall be entitled to bring a claim for arbitration if the appointment of such arbitrator has not been applied within 6 months:

(a) of the date of completion of the work as certified by Executive Engineer-in-charge or

(b) of the date of abandonment of the work, or

(c) of its non-commencement within 6 months from the date of abandonment or written orders to commence the work as applicable, or

(d) of the completion of the work through any alternative agency or means after withdrawal of the work from the contractor in whole or in part and/or its rescission, or

(e) of receiving an intimation from the Executive Engineer Incharge of the work that final payment due to or recovery from

the contractor had been determined which he may acknowledge and/or receive.

whichever of (a) to (e) above is the latest.

If the matter is not referred to arbitration within the period prescribed above, all the rights and claims or any party under the contract shall be deemed to have been forfeited and absolutely barred by the time even for civil litigation notwithstanding.”

8. Reliance on the sub-clause does not provide any assistance to the argument raised by the counsel for the petitioner. Mere fact that there has been no communication from Executive Engineer, does not imply that the petitioner will keep on waiting for years together, before availing the remedy available to him. The delay in invoking the arbitration clause is writ large and there is no explanation for the same.

9. In **Bharat Sanchar Nigam Limited and another Versus Nortel Networks India Private Limited (2021) 5 SCC 738**, Supreme Court has held that it is in cases where there is not even a vestige of doubt that the claim is *ex facia* time barred, or that the dispute is not arbitrable, the Court may decline to make the reference. However, if there is a slightest of doubt, rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the arbitrator. It has been further observed that this would ensure expeditious and efficient disposal at the referral stage.

10. In **M/s B & T AG Versus Ministry of Defence, 2023 AIR (Supreme Court) 2731**, Supreme Court has held that there is a fine distinction between the plea that the claims raised are barred by limitation and the plea that the application for appointment of an

arbitrator is barred by limitation. It has been held that the period of limitation for commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued.

11. Applying the above test, it is evident that after raising the claim in April, 2008, the petitioner went into a slumber and has neither followed up the claim nor taken any step to get his claim adjudicated nor did he move for appointment of an arbitrator for a period of more than a decade and a half. Even if no response was received from the respondents within a period of 6 months from raising the claim, the period of limitation for asserting the claim would not continue endlessly. This Court, therefore has no hesitation in coming to the conclusion that the claim of the petitioner is hopelessly time barred, stale, dead and does not deserve to be referred to an arbitrator. Petition deserves to be rejected at the threshold.

12. Finding no merit in the petition, it is hereby dismissed with no order as to costs.

(SUVIR SEHGAL)
JUDGE

05.01.2024
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Whether reasoned/speaking : Yes/No

Whether reportable : Yes/No