



CR-5026-2018

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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

(227-1)

CR-5026-2018

DATE OF DECISION:- 23.09.2024

YASH PAUL

...PETITIONER

VERSUS

THE EXECUTIVE ENGINEER PANCHAYATI RAJ, PW (C&M)
DIVISION AMRITSAR, DISTRICT AMRITSAR AND ANR

...RESPONDENTS

(227-2)

CR-5840-2018

YASH PAUL

...PETITIONER

VERSUS

THE EXECUTIVE ENGINEER PANCHAYATI RAJ, PW (C&M)
DIVISION AMRITSAR, DISTRICT AMRITSAR AND ANR

...RESPONDENTS

CORAM: HON'BLE MR. JUSTICE SUVIR SEHGAL

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

Mr. Anil Bansal, DAG, Punjab
for the respondents in both the cases.

SUVIR SEHGAL, J. (Oral)

1. This common order shall dispose of both the above noted revision petitions as they involve common questions of law and facts. For the sake of convenience, factual position is being taken from CR-5026-2018.

2. This revision petition has been filed under Article 227 of the Constitution of India for quashing order dated 18.04.2018 passed by the learned Additional District Judge, S.A.S. Nagar, Mohali, whereby application, Annexure P-5, filed under Section 14 of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act") has been dismissed.



3. Factual position leading to the filing of the petition is that the petitioner was allotted work of construction of Modern Cattle Fair Ground at village Vallah, District Amritsar vide letter dated 26.04.2010 by respondent No.1. The work was to be completed by 25.04.2011, within a period of 12 months, but was actually completed on the site on 31.12.2011. Some disputes arose between the parties and by letter dated 14.05.2015, Annexure P-1, petitioner requested for the settlement of disputes under Arbitration Clause 28 of the contract. However, by response dated 25.06.2015, Annexure P-2, respondent No.1 rejected the claim as time barred. Petitioner referred the claims for adjudication to the designated sole Arbitrator-respondent No.2 and sent a claim petition dated 17.08.2015, Annexure P-3, which was followed by notice dated 27.10.2015, Annexure P-4. However, the Arbitrator failed to enter upon the reference. Claiming that the mandate of the Arbitrator stood terminated, petitioner filed an application, Annexure P-5, under Section 14 of the Arbitration Act. Upon being served, respondent No.1 did not file any response, however, Arbitrator-respondent No.2 filed a written statement, Annexure P-6, and contested the application, which stood rejected vide order under challenge herein.

4. While making a reference to Clause 28 of the contract agreement, counsel for the petitioner has contended that the Clause stipulates that the Arbitrator has to make an award within a period of two months from the day he enters upon the reference and the time for conclusion of arbitral proceedings could be extended only with the consent of the parties, which was never given. He contends that the Arbitrator did not enter upon the reference and no notice was received from him. It is his argument that as the Arbitrator has become *defacto*, unable to perform his functions and has failed

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to act without undue delay, his mandate be terminated, and a substitute Arbitrator be appointed.

5. Petition has been contested by the respondents by filing a reply, wherein it has been submitted that the claim raised by the petitioner was beyond the time specified in Clause 28. State counsel contends that the claim had been raised beyond a period of six months of the receipt of the final payment and has been rightly rejected by the respondents vide communication, Annexure P-2. He asserts that the petitioner was required to make a pre-deposit of 10% in terms of the Arbitration Clause, which he has failed to do and the matter cannot be referred to the Arbitrator. Still further, it is his submission that the Arbitrator issued two notices dated 18.11.2015 and 15.12.2015, Annexure R-3, collectively, but the petitioner did not appear before him. An additional affidavit of Kulwant Singh, Executive Engineer, Panchayati Raj PW, Amritsar has been filed on behalf of respondents No.1 and 2 in compliance of order passed by this Court, which is taken on record, wherein it has been submitted that the arbitral proceedings were suspended once the petitioner had approached the Court by filing an application under Section 14 of the Arbitration Act.

6. I have heard counsel for the parties and considered their respective submission, besides examining the documents brought on the record.

7. The dispute revolves around the interpretation of Clause 28 of the contract agreement, which deserves to be noticed and its relevant extract is reproduced hereunder:-

“DISPUTES AND ARBITRATION

Clause-28

If any question, difference or objection whatsoever



*shall arise in any way connected with or arising out of this instrument or the meaning or operation of any part thereof or the rights, duties or liabilities of either party than save 1 so far as the decision of any such matter is here in before provided for and has been so decided, every such matter including whether its decision has been otherwise provided for and/or whether it has been finally decided accordingly, or whether the contract should be terminated or has been rightly terminated and as regards the right and obligations of the parties as the result of such termination shall be referred for arbitration to **The Superintending Engineer**, Panchayati Raj Circle, Public Works, SCO 49, Sector-17-E Chandigarh acting as such at the time of reference and his decision shall be final and binding and where the matter involves a claim for or the payment or recovery or deduction of money, only the amount, if any, awarded in such arbitration shall be recoverable in respect of the matter so referred if matter, is not referred to arbitration within the specified period, all the rights and claims under the contract shall be deemed to have been forfeited and absolutely barred.*

Conditions

*i) The reference to the Arbitrator shall be made by the claimant party within **120 days** from the date of dispute of claim arises during the execution of work. If the claim pertains to rates on recoveries introduced in the final bill, the reference to the arbitrator shall be made within **6 months** from the date of payment of the final bill to the contractor or from the date a registered notice is sent to the contractor to the effect that his final bill is ready by the Engineer-in-charge (whose decision in this respect shall be final and binding) which ever is earlier).*



ii) *It shall be an essential term of this contract that in order to avoid frivolous claims, the party invoking arbitration shall specify the disputes based on facts and calculations stating the amount claimed under each claim and shall furnish a "deposit-at-call" for 10% of the amount claimed, on a scheduled bank in the name of the Arbitrator, by his official designation who shall keep the amount in deposit till the announcement of the award. In the event of an award in favour of the claimant, the deposit shall be refunded to him in proportion to the amount awarded with respect to the amount claimed and the balance, if any, shall be forfeited and paid to the other party."*

Condition (iii) to (ix) XXXXXXXXXXXXXXXXXXXX

x) *The arbitrator shall be deemed to have entered on the reference on the day, he issues notices to the parties fixing the first date of hearing and announce the award with in **two** months. The arbitrator may, from time to time, with the consent of the parties enlarge the initial time for making and publishing the award.*

xi) *The expiry of the contractual time limit, whether originally fixed or extended, shall not invalidate the provisions of this clause.*

Note :- *The provision prevailing in PWD (B&R) will only be applicable in case of contradiction."*

8. A perusal of the above reproduced Clause shows that the Superintending Engineering, Panchayati Raj Circle, Public Works has been named as an Arbitrator to determine any dispute, which may arise between the parties out of the contract agreement and finality has been attached to his decision. The first condition to the Clause provides that the reference to the Arbitrator is to be made within a period of 120 days from the date when the dispute arises during the execution of the work and in case the dispute



pertains to recoveries made from the final bill, the reference has to be made within a period of six months from the payment of the final bill. The second condition stipulates that the contractor is to furnish a “deposit at call” of 10% of the amount claimed and the tenth condition provides that the Arbitrator shall be deemed to have entered upon the reference on the day he issues notices to the parties, fixing the day of hearing, and he has to announce the award within a period of two months, unless the period is extended with the consent of the parties.

9. The respondents claim that the Arbitrator-respondent No.2 entered upon the reference by issuing notice dated 18.11.2015, Annexure R-3, whereby he called upon the petitioner to appear in his office on 14.12.2015. This was followed by another notice dated 15.12.2015, however, the petitioner did not appear. On the other hand, petitioner has taken a categorical stand that both the notices were not served upon him. Be that as it may, the fact remains that with the issuance of notices, Annexure R-2, the Arbitrator entered upon the reference in terms of the Arbitration Clause and he was mandatorily required to announce his award within a period of two months as stipulated in the contract agreement. Neither the award has been announced within the said period, nor the period for announcing the award was extended with the consent of the parties.

10. The question that arises is as to whether the mandate of the Arbitrator stood terminated when he failed to announce the award within a period of two months as stipulated in the tenth condition of Arbitration Clause 28 of the contract agreement on failure to publish the award within the stipulated period. Without much ado, the answer to this question can be found in the judgment of the Supreme Court in Jayesh H.Pandya and



another Versus Subhtex India Limited and others, (2020) 17 SCC 383.

Paras 21 to 23 of the judgment deserve to be noticed and are reproduced hereunder:-

“21. The clause so referred indicates that the parties have admittedly agreed and the time period so prescribed is final and binding. It means the arbitration proceedings should commence and end within the prescribed period of time which in the instant case was of four months and expired on 04.09.2007 and, there was no occasion for either party to raise an objection as long as the time was available at the command of the Arbitrator to conclude the arbitral proceedings and pass an award within the time schedule fixed under the terms of contract as agreed by the parties.

22. That apart, there is no provision under the arbitration agreement to condone the delay when agreement between the parties binds them to see that the arbitration proceedings should be concluded within the time prescribed. This time restriction is well within the scope and purport of the 1996 Act at national and international arbitrations.

23. The time fixed for the arbitration and/or schedule of time limit in such arbitration proceedings, as it is recognised by law, there is no reason not to accept the same, basically in the present facts and circumstances where the parties themselves agreed to bind themselves by the time limit. Section 14 read with Section 15 of the 1996 Act also recognise this mechanism and after the expiry of four months period from the date of first preliminary meeting held on 04.05.2007, the Arbitrator indeed became de jure unable to perform his functions and the mandate to act as an Arbitrator in the arbitral proceedings between the parties as prayed for stood terminated.”



11. The above reproduced observations are squarely applicable to the facts of the present case. As the Arbitrator has failed to conclude the proceedings as per the terms of the agreement, his mandate stood terminated in terms of Section 14 of the Arbitration Act.

12. There is yet another very vital aspect, which deserves to be noticed and considered. The petitioner had made a reference before the learned Arbitrator vide his communication dated 17.08.2015 and the Arbitrator entered upon the reference vide his letter dated 18.11.2015, Annexure R-3. In the meantime, the Arbitration Act was amended on 23.10.2015 with the insertion of Section 12 (5) *ibid*, which provides that, notwithstanding any prior agreement to the contrary, any person whose relationship with the parties, counsel, or the dispute, fell under any of the categories mentioned in the Seventh Schedule, he shall be ineligible to be appointed as an Arbitrator. No doubt that the petitioner had made a reference to the Arbitrator in August, 2015, but the Arbitrator had entered upon the reference after the amending Act came into force. Therefore, his appointment had to meet the mandate of the Amending Act. Respondent No.2 is a serving employee of the Government of Punjab. He is, therefore, clearly ineligible to act and continue as an Arbitrator. In *Ellora Paper Mills Limited Versus State of Madhya Pradesh, (2022) 3 SCC 1*, stressing upon the importance of “neutrality of arbitrators”, Supreme Court laid down that an ineligible Arbitrator cannot continue as an Arbitrator, even if the Arbitral Tribunal was constituted prior to the amendment of 2015. Moreover, record shows that the petition under Section 14 filed by the petitioner was not contested by the State. Rather, reply, Annexure P-6, was filed by the Arbitrator-respondent No.2 before the learned District Judge. It manifests that the Arbitrator was



personally interested in the outcome of the application and his appointment as an Arbitrator does not meet the test of impartiality and independence. Respondent No.2 is inherently incapable of being appointed as an Arbitrator and is disqualified to continue as such. For the afore-going reasons, this Court has no hesitation in coming to the conclusion that not only is the Arbitrator ineligible, but his mandate also stands terminated as he is *dejure* and *defacto* unable to perform his functions.

13. As a result, impugned order dated 18.04.2018, passed by the learned Additional District Judge, S.A.S. Nagar, Mohali is set aside, application filed under Section 14 of the Arbitration Act is accepted and the mandate of the Arbitrator-respondent No.2 is terminated.

14. Now, another question arises as to whether a substitute Arbitrator can be appointed in the place of respondent No.2. The language of the statutory provision as contained in Sections 14 and 15 of the Arbitration Act is very clear. Sub-section (1) to Section 14 and sub-section (2) of Section 15 provide that where the mandate of an Arbitrator is terminated, he shall be substituted with another Arbitrator. This Court, therefore, does not see any obstacle in the appointment of a substitute Arbitrator in the place of respondent No.2 to adjudicate and resolve the dispute between the parties.

15. To be fair to respondent No.1, both the objections raised by it deserve to be dealt with. In so far as the first objection regarding the claim being barred by time is concerned, suffice is to notice that it is hit by Section 28 of the Contract Act, 1872. Supreme Court in **Grasim Industries Ltd. Versus State of Kerala, (2018) 14 SCC 265** has held that any condition in the arbitration agreement, which restricts the time period for raising the claim, cannot be held to be legal. The second objection is regarding pre-deposit of



the amount. In *Lombardi Engineering Limited Versus Uttarakhand Jal Vidyut Nigam Limited, 2024(4) SCC 341*, Supreme Court has observed that such a condition being arbitrary can be ignored at the time of making reference of the dispute to an Arbitrator. So both the objections raised by respondent No.1 are rejected, however, liberty is given to it to raise them before the learned Arbitrator, who will determine them in accordance with law.

16. While disposing of the petitions, Mr. Justice (Retd.) Raj Mohan Singh, a former Judge of the Madhya Pradesh High Court, is nominated as an Arbitrator in both the petitions to adjudicate the dispute between the parties, subject to compliance of the statutory provisions.

17. Parties are directed to appear before the learned Arbitrator on the day, time and place to be fixed and communicated by the learned Arbitrator at his convenience.

18. Parties will be at liberty to raise all claims, counter claims, defences, pleas etc. before the learned Arbitrator.

19. Needless to mention that all the questions arising between the parties in this matter will remain open for determination in the arbitration proceedings, and any observation made hereinabove will not be binding on the learned Arbitrator.

20. A request letter be sent to Mr. Justice (Retd.) Raj Mohan Singh alongwith a copy of this order.

(SUVIR SEHGAL)
JUDGE

23.09.2024
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Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No