

IN THE PUNJAB AND HARYANA HIGH COURT AT
CHANDIGARH.

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ARB-144-2019 (O&M).
Date of Decision: 02.04.2024.

SPS INFRABUILD PVT. LTD.

... Petitioner(s)

Versus

U.T. CHANDIGARH AND OTHERS

... Respondent(s)

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

Present: Ms. Sonia Madan, Advocate, for the petitioner.

Mr. Ashish Rawal, Advocate, for the respondents.

VINOD S. BHARDWAJ, J. (ORAL)

The petitioner has invoked the jurisdiction of this Court under Section 11 (6) of the Arbitration and Conciliation Act, 1996 for seeking appointment of an arbitrator.

2 Briefly summarized, the factual matrix leading to the filing of the present arbitration petition respondents had entered into an Agreement No.1876 of 2015-16 for construction of 5 Nos. Judges Houses for Hon'ble Judges Houses in Sector 10, Chandigarh (Composite Work) on the express terms and conditions contained therein. The tender of the work submitted by the petitioner was accepted by Respondent No.2 and the Agreement was signed between the petitioner and respondent No.4. The work was allotted on 27.05.2015. The time allowed for completion of the work was 9 months i.e. upto 26.02.2016. It is contended that the petitioner had taken up the

work immediately after signing of the Agreement, however, the Engineering Department of U.T., Chandigarh, was not ready and was not able to furnish an encumbrance free site. There were electrical and sewer lines in the area and trees were standing which had to be removed by the respondents. The overhead electrical lines, poles and sewerage lines were cleared by the respondents only during May, 2016 while the trees were removed on 30.04.2017. Additionally, the site of work was also shifted by 36 ft. and it was rotated by 180 degree. The drawings for servant quarter, store rooms, rain water locations, open kitchen details, wooden/steel jaffri, and other details were not supplied on time. The work was further delayed for stitching slab over filled up earth, due to changes in HVAC layout. Various other reasons attributable to the respondents were alleged and culled out for attributing and explaining causing delay in execution of work.

The said work was completed on 12.07.2017 and the final bill of Civil Works were submitted on 29.09.2017, amounting to Rs.1,13,91,480/- (Rupees One Crore Thirteen Lacs Ninety One Thousand Four Hundred and Eighty). It is contended that notwithstanding the submission of the said bills, payment had not been released. Additionally, the claim for extra items and substituted items amounting to Rs.62,35,503/- and Rs.74,54,252/- were also submitted on 30.05.2017 and 11.12.2017, respectively, but the respondents failed to make payment for the same. The final bill of Rs.10,00,000/- for public health works was submitted on 04.08.2017, which was also pending payment. The liability of the petitioner further increased w.e.f. 01.07.2017 on account of introduction of Goods and Services Tax. It is averred that as per clause 25 of the Clauses of

Contract, the procedure for settlement of disputes by way of arbitration was prescribed. The relevant Clause 25 is reproduced as under:-

"Clause 25

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specification, design, drawings and instructions here-in before mentioned and as to quality of workmanship or material used on the work or as to any other contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof, shall be dealt with as mentioned hereinafter.

(i) If the contractor considers any work demanded of him to be outside the requirement of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails or give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may within 15 days of the receipt of Superintendent Engineer's decision, appeal to Chief

Engineer, who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with the decision of the Chief Engineer, the contractor may within 30 days from the receipt of the Chief Engineer decision, appeal before the Dispute Redressal Committee (DRC) along with a list disputes with amounts claimed in respect of each such dispute and giving reference the rejection of his disputes by the Chief Engineer. The Dispute Redressal Committee (DRC) shall give his decision within a period of 90 days from the receipt of Contractor appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F'. If the Disputes Redressal Committee (DRC) fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC), then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Chief Engineer for appointment of Arbitrator on prescribed performa as per Appendix XV, failing which the said decision shall be final binding and conclusive and not referable to adjudication by the Arbitrator.

It is a term of contract that each party invoking arbitration must exhaust the aforesaid mechanism of settlement of claims/disputes prior to invoking arbitration.

(ii) Except where the decision has become final, binding and conclusive in terms of sub-para (i) above, disputes or differences shall be referred for adjudication through arbitration by a Sole Arbitrator appointed by the Chief Engineer CPWD, incharge of the work or in case there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Special Director General or the Director General, CPWD. If the Arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another Sole Arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is also a term of this contract that no person other than a person appointed by such Chief Engineer CPWD or Additional Director General or Special Director General or Director General, CPWD, as aforesaid, should act as Arbitrator and if for any reason that is not possible, the matter shall not be referred to Arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of Arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract, that the Arbitration shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs.1,00,000/- the Arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the Arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the Arbitrator in his sole discretion. The fees, if any, of the Arbitrator shall, if required to be paid before the award is made and published be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the Arbitrator) shall be in the discretion of the Arbitrator who may direct to any by whom and in what manner,

such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid."

3 It was further averred that due to failure on the part of the respondents in release of payments, claim was filed under Clause 25 (1) of the Agreement to the Executive Engineer-Respondent No.4, along with Letter dated 19.12.2018. No reply to the said letter was, however, received whereafter the matter was raised with the Superintending Engineer-Respondent No.3. No reply was furnished by the Superintending Engineer as well and no decision was taken within the prescribed period of one month. An appeal was thereafter filed by the petitioner before the Chief Engineer-respondent No.2, on 13.02.2019 i.e. within the stipulated period. Instead of deciding the appeal, the Chief Engineer forwarded the matter to respondent Nos. 3 and 4 vide letter dated 18.02.2019 with a request to take necessary action. It is contended that the Chief Engineer could not have forwarded the dispute to the Superintendent Engineer/Executive Engineer, rather he was duty bound to decide the appeal as per the terms and conditions of the Agreement and to take a decision thereupon within a period of 30 days.

Since no decision was given within a period of 30 days, the petitioner submitted a request vide letter dated 18.03.2019 to appoint the Sole Arbitration and refer the claim for adjudication. The same was also not done and rather, the said request was again forwarded by the Chief Engineer to the Superintending Engineer for necessary action. Hence, the present petition was filed for appointment of an arbitrator as the respondents lost

their right to appoint an arbitrator under Clause 25 (ii) of the agreement as per Section 11 of the Arbitration and Conciliation Act, 1996.

The details with respect to breach of contractual obligation of the agreement, committed by the respondents and the consequential repercussions suffered on account thereof, are summarily tabulated as under:-

“i) The Respondents are liable to pay the Petitioner a sum of Rs.1,13,91,480/- on account of final bill, for civil work including the extra items and substituted items, submitted on 29.09.2017, along with an interest @18% per annum from the date when the said amount had fallen due, till the entire amount is received by the Petitioner.

ii) The Respondents are liable to pay the Petitioner a sum of Rs.10,00,000/- on account of final bill, for public health works, submitted on 04.08.2017, along with an interest @18% per annum from the date when the said amount had fallen due, till the entire amount is received by the Petitioner.

(iii) The Respondents are liable to pay the Petitioner a sum of Rs.14,86,978/- on account of extra burden due to introduction of GST w.e.f. 01.07.2017.

iv) The Respondents are liable to pay the Petitioner a sum of Rs.32,60,930/- on account of refund of security deposit deducted from the running bills.

v) The Respondents are liable to pay the Petitioner a sum of Rs.91,88,908/- on account of damages, due to prolongation of contract for breaches committed by the Respondents.

vi) The Respondents are liable to pay the Petitioner a sum of Rs.44,716/- on account of expenditure incurred for extension of Bank Guarantees and Insurance Premium during the prolonged period for reasons, attributable to the Respondents.

vii) The Respondents are liable to pay the Petitioner a sum of Rs.43,29,000/- on account of escalation other than cement and reinforcement steel during the prolonged period, for reasons, attributable to the Respondents.

viii) The Respondents are liable to pay the Petitioner a sum of Rs.90,000/- on account of expenditure incurred on watch and ward of the buildings, for the period 01.08.2018 to 31.10.2018, when the Respondents failed to take over the buildings, inspite of their completion.

ix) The Respondents are liable to pay the Petitioner interest on all the claims, including claims of damages, till date of payment.

x) The Respondents are liable to pay the Petitioner the cost of Arbitration, as per actual.

xi) The Respondents are also liable to compensate the Petitioner for the harassment and humiliation caused by the latter on the basis of the acts of omission and commission, committed by the former.”

4 Pursuant to the notice issued, a short reply was filed by the respondents wherein the aspect as regards the award of work and the claims being raised by the petitioner were not disputed. However, it was submitted

that the demand for appointment of arbitrator has to be made within 120 days of receiving the intimation regarding final bills from the Engineer-in-charge and because the bills were submitted by the petitioner in September/December 2017 could not be finalized and are still under consideration for want of information to be supplied by the petitioner, hence, the request for appointment of arbitrator is pre-mature and cannot be entertained.

5 Additional affidavit of Jatin Khurana, Executive Engineer, C.P. Division No.6, Chandigarh Administration was thereafter also filed wherein it was acknowledged that the work of construction of the 05 numbers of Judges Houses in Sector 10, Chandigarh, on composite basis was allotted to the petitioner for a total amount of Rs.7,02,00,000/- and that the last payment with respect to 11th running bill was made on 21.04.2017 to the tune of Rs.1,61,14,551/-. Hence, a total payment of Rs.6,52,18,590/- against the allotted amount of Rs.5,60,34,884/- had been made in respect of the civil work (building portion) which is above 10% of the allotted amount. As the supporting documents with respect to the final bill had not been submitted, hence, the petitioner was called upon to supply the additional documents. The final bill was resubmitted after incorporation all extra items, substituted items and deviation on 23.07.2018 but certain documents were still not provided and that instead of supplying the requisite documents, the petitioner has approached this Court. It was also averred that the revised cost estimated to Rs.8,97,08,972/- was approved by the competent authority and an intimation thereof was received from the Registrar General, Punjab and Haryana High Court, Chandigarh, vide letter

dated 22.08.2023. Thereafter, the matter was placed before the Standing Finance Committee in its meeting held on 23.01.2024 recommending the approval rough cost estimate for the above said amount. The minutes of the said meeting have already been forwarded to the Home Secretary, Chandigarh Administration for according the administrative approval and the same is being processed. Upon receipt of the final approval, the intimation would be sent to the petitioner that final payment is ready as envisaged in Clause 25 of the agreement.

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

7 The issue as regards obtaining of the financial approvals and sanctions for the deviations/substitutions and additions in the work are separate from the obligation of the respondents to make the payment in a time bound manner and that in the event the requisite payments are not made and a demand is raised by the claimant, the decisions are required to be taken within a time bound manner as agreed between the parties. It is also not in dispute that the petitioner sent his representation within the prescribed time schedule, as per clause 25 of the Clauses of the Contract, and submitted his request but no decision was taken thereupon. He further preferred his claim before the Chief Engineer who was required to take a decision within 30 days of the appeal, however, no decision was taken. Even though the respondents have taken a stand that the petitioner could have preferred an appeal before the Dispute Redressal Committee, however, a perusal of the clause shows that such an appeal could have been preferred only against a decision taken by the Chief Engineer. Since no such decision

was taken by the Chief Engineer and the matter was only sent to the Superintending Engineer/Executive Engineer to look into the same, hence, there was no occasion for preferring any appeal before the Disputes Settlement Committee. Hence, the notice of arbitration was submitted by the petitioner.

8 It is also evident that the respondents do not dispute the execution of the work as well as the pending payments to the petitioner but are giving details of the procedure that has already been adopted by them for making an expeditious payment. It thus necessarily flows that payments are still due and a determination is also required to be made to the quantum of dues, assessment and attribution of delay and to any compensatory interest to which the petitioner may be entitled as per law. The claim has been pending with the respondents since 2018 and already a period of nearly six years has elapsed since the submissions of the bills. The petitioner-contractor cannot be left at the convenient pace of the respondents to seek approvals and to thereafter take recourse to his remedies as per law. Besides, the delayed adjudication of a dispute has its own implications in burdening the fiscal resources by unnecessary interest, if such a claim is eventually allowed. It is thus in the larger interest that the disputes should be settled expeditiously.

9 Since a dispute exists in the present case and there is a valid arbitration agreement amongst the parties, hence, I am of the opinion that the petition deserves to be allowed and the parties ought to be referred to a Sole Arbitrator for adjudication of the dispute.

Accordingly, Sh. Rajiv Sharma, Judge (Retd.) Punjab and Haryana High Court, Mobile No.9816700002 is appointed as a Sole Arbitrator to adjudicate the claim/counter claim that may arise between the parties.

10. The fee of the Arbitrator shall be determined in terms of the Schedule 4 of the Arbitration and Conciliation Act, 1996. The nominated Arbitrator shall furnish a declaration as mandated in Section 12 of the Arbitration and Conciliation Act, 1996 and the Schedule attached as regard non-alignment and affiliation to any of the parties.

11 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.

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

13. The petition stands allowed as aforesaid.

14. Copy of the order be sent to the appointed arbitrator.

15. Pending, misc. application(s), if any shall also stand(s) disposed of accordingly.

April 02, 2024

raj arora

(VINOD S. BHARDWAJ
JUDGE
Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No