



ARB-402-2023

-1-

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

262

ARB-402-2023

Date of Decision: 31.07.2024

SKS Nirman Vaanijay Private Limited

...Applicant

Versus

Engineer-in-Chief, Department of Public Works and others

...Respondents

CORAM: HON'BLE MR. JUSTICE JAGMOHAN BANSAL

Present: - Mr. Dinesh Arora, Advocate for the applicant

Ms. Harsh Rekha Kapoor, Assistant Advocate General, Haryana

JAGMOHAN BANSAL, J. (Oral)

1. Through instant application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short '**1996 Act**'), the applicant is seeking appointment of an Arbitrator.

2. The applicant entered into an agreement 06.09.2019 (Annexure A-2) with the respondent. General Conditions of Contract were part of the said agreement. It is apt to notice here that respondent is an Engineering Department of State of Haryana which is taking care of construction of road/bridges and buildings within State of Haryana. A dispute erupted between the parties and applicant in terms of Clause 24 of General conditions of contract filed application dated 01.05.2023 seeking settlement of dispute.



The application came up for consideration before Engineer-in-Chief who vide order dated 07.07.2023 (Annexure A-5) rejected application of the applicant on the ground of limitation. The order of Engineer-in-Chief was communicated by Executive Engineer. The applicant vide letter dated 15.07.2023 (Annexure A-6) followed by letter dated 14.08.2023 (Annexure A-7) explained the respondent that there is no delay on its part and the matter should be referred to Empowered Standing Committee (for short 'Committee').

3. Mr. Dinesh Arora, Advocate submits that as per Clause 25 of General Conditions of Contract, the respondent was bound to make appointment of Arbitrator. The dispute raised by the applicant was never referred to Committee, thus, respondent was duty bound to make appointment of an arbitrator. In support of his contentions, he relies upon judgment of Rajasthan High Court in *M/s Surya Construction Company v. The State of Rajasthan and another, 2013(30) R.C.R. (Civil) 40* and Gauhati High Court in *M/s GSR Venture Private Limited v. State of Mizoram r/b its Commissioner and Secretary to the Government of Mizoram and others, 2020(4) GauLT 455*.

4. *Per contra*, Ms. Harsh Rekha Kapoor, Assistant Advocate General, Haryana submits that matter of the applicant was not referred to the Committee because there was delay on the part of applicant. As per Clause 25.1 of the Contract, there is no provision for arbitration, thus, applicant cannot invoke jurisdiction of this Court in terms of Section 11 of 1996 Act.



5. I have heard the arguments of learned counsels for both sides and perused the record with their able assistance.

6. The dispute is centered around reading of Clause 24 and 25 of General Conditions of Contract which are reproduced as below:-

“24. Dispute Redressal System

*24.1 If any dispute or difference of any kind what-so-ever shall arise in connection with or arising out of this Contract or the execution of Works or defect liability-cum-maintenance period of the Works there under, whether before its commencement or during the progress of Works or after the termination, abandonment or breach of the Contract, be referred for settlement to the Empowered Standing Committee within 45 days of arising of the dispute or difference. To avoid frivolous claims, the contractor while referring the disputes to the Empowered Standing Committee shall deposit a claim fee of 5% of the claim amount. On termination of the proceedings, "this fee shall be adjusted in the cost, if any, awarded by the Empowered Standing Committee against the claimant contractor and the balance shall refunded. In the absence of such cost being awarded, the whole of the sum will be refunded within one month of the date of the award. **The Empowered Standing Committee shall, within a period of 90 days after being requested in writing by the Contractor to do so, convey its decision. The period of 90 days can be extended with mutual agreement between the parties.***

24.2 Deleted.

24.3 The composition of the Empowered Standing Committee will be:

I. One official member, Chairman of the Empowered Standing Committee, not below the rank of Chief Engineer;



II. One official member not below the rank of Superintending Engineer; and

III. One non-official member who will be technical expert of Chief Engineer's or Superintending Engineer's level selected by the Contractor from a panel of three persons given to him by the Employer.

24.4 The Contractor and the Employer will be entitled to present their case in writing duly supported by documents. If so requested, the Standing Empowered Committee may allow one opportunity to the Contractor and the Employer for oral arguments for a specified period. The Empowered Committee shall give its decision within a period of ninety days from the date of appeal or such extended period as mutually agreed by the parties, failing which either of the parties can approach the appropriate court for the resolution of the dispute.

24.5 The decision of the Standing Empowered Committee will be binding on the Employer, for payment of claims up to five percent of the Initial Contract Price. The Contractor can accept and receive payment after signing as "in full and final settlement of all claims". If he does not accept the decision, he is not barred from approaching the courts. Similarly, if the Employer does not accept the decision of the Standing Empowered Committee above the limit of five percent of the Initial Contract Price, he will be free to approach the courts applicable under the law.

25. Arbitration

25.1 In view of the provision of the clause 24 on the Dispute Redressal System, it is the condition of the Contract that there will be no arbitration for the settlement of any dispute between the parties."

7. From the perusal of Clause 24, it is evident that in case of dispute between the parties, the contractor may request for reference of dispute to the



Committee within 45 days of arising of dispute or difference. The decision of the Committee can be assailed in Courts. Clause 25 specifically prohibits appointment of an Arbitrator for the settlement of dispute between the parties.

8. The applicant is claiming that its application seeking reference to the Committee was not time barred and Engineer-in-Chief has wrongly rejected its representation. He was duty bound to refer the matter to the Committee. The applicant, on being asked, confirms that it is not assailing order dated 07.07.2023 passed by Engineer-in-Chief.

9. From the perusal of Clause 25, it stares that there is no arbitration agreement. The expression '*arbitration agreement*' has been defined under Section 7 of 1996 Act. Section 7 of 1996 Act read as:

"7. Arbitration agreement.—(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.



(5) *The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”*

10. This Court can make appointment of an Arbitrator if there is arbitration agreement as defined under Section 7 of 1996 Act. In the absence of Arbitration Agreement, this Court cannot invoke its power conferred by Section 11 of 1996 Act. It is not a case of absence of clause providing for arbitration whereas it is a case where it is categorically provided that there would be no arbitration.

11. The Supreme Court in ***Mahanadi Coalfields Ltd. and another v. IVRCL AMR Joint Venture, 2022 SCC OnLine SC 960***, has clearly held that matter cannot be referred to an Arbitrator if there is no arbitration agreement.

12. The applicant may assail order dated 07.07.2023 passed by Engineer-in-Chief before a Court of competent jurisdiction, however, this Court while exercising power under Section 11 of 1996 Act cannot set aside aforesaid order.

13. The applicant has approached this Court under Section 11 of 1996 Act without serving notice under Section 21 upon the respondent. The applicant through its letters has asked the respondent to reconsider their decision with respect to rejection of claim, however, the applicant has not served notice required under Section 21 of 1996 Act. As per Section 11, High Court can make appointment of an Arbitrator after the expiry of 30 days from



the date of notice. As the applicant has not served notice upon the respondent, the instant application is not sustainable.

14. The applicant has relied upon judgment of Rajasthan High Court in *M/s Surya Construction Company (supra)* and Gauhati High Court in *M/s GSR Venture Private Limited (supra)*. The applicant is claiming that clauses of the agreement in question are identically worded as were considered by the Rajasthan High Court and Gauhati High Court in aforecited judgments. From the perusal of Clause 24 of agreement in question and Clause 24 considered by Rajasthan High Court, it appears that there is a substantial difference in both the clauses. In the case in hand, Clause 24 provides for reference of dispute to Committee, within 45 days of arising of dispute or difference. Clause 24 noticed by Rajasthan High Court provided that at the first instance matter would be considered by the competent authority and an appeal would lie to Standing Empowered Committee against the decision of the competent authority. It means the Committee was an appellate authority.

The applicant herein requested the respondent to refer the matter to Committee and Chief Engineer has rejected its request. There is no provision of appeal against the said order. The applicant has right to challenge decision of Committee before the Court. In the present case, there is no decision of the Committee whereas Chief Engineer has denied to refer the matter to Committee.



ARB-402-2023

-8-

15. In the wake of above discussion and findings, this Court is of the considered opinion that present petition being bereft of merit deserves to be dismissed and accordingly dismissed.

16. The applicant is at liberty to avail remedies as permissible by law.

(JAGMOHAN BANSAL)
JUDGE

31.07.2024
Mohit Kumar

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