

RA-CR-31-2023 in ARB-159-2019

AND

CM-9922-CII-2023 AND

RA-CR-97-2023 in ARB-160-2022

M/S S.R. ENGINEERING CONSTRUCTION

VERSUS

UNION OF INDIA AND OTHERS

Present: Petitioner in person.
 Mr. Arun Gosain, Advocate
 for respondent-Union of India.

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The present application has been filed for seeking condonation of delay under Section 5 of the Civil Procedure Code in filing the review petition.

For the reasons mentioned in the application, the same is allowed and delay of 178 days is hereby condoned.

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The instant review applications have been filed for sending order of reference to the Arbitrator appointed vide order dated 28.10.2022 as per Section 20 (4) of the Arbitration Act, 1940. It is averred by the petitioner that the Arbitration Case No. 159-2019 had been filed by the petitioner for appointment of an independent Arbitrator under Section 8(2) read with Section 20 of the Arbitration and Conciliation Act, 1940 after failure of the appointing authority in appointing of an Arbitrator as per the contract i.e.

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within the statutory period of 15 days. The grievance initially espoused by the petitioner was that a contract bearing No. CECHZ-14/90-91 amounting to Rs. 41,42,295.32 had been awarded to him. The date of commencement as stipulated in the contract agreement was 08.04.1991 and that during the execution of said contract a dispute arose between the parties whereupon a notice as per condition No. 70 of IAFW-2249 was served by the petitioner upon respondent authorities for appointment of an Arbitrator. Since no action was taken by the respondent authorities on the above said notice, an application under Section 20 under the Arbitration Act, 1940 was moved by the petitioner before the Civil Judge, Chandigarh.

During the pendency of the above said application, the respondent No.2-Engineer-in-Chief unilaterally appointed a sole Arbitrator. The petitioner raised objections to the appointment of the sole Arbitrator as well as his entitlement to continue with the proceedings, however, ignoring the objections, the sole Arbitrator proceeded with the case and passed a one sided order without considering the claims of the petitioner. The objections against the said award was also preferred but the same was dismissed and thereafter even the appeal was dismissed. Aggrieved thereof, the petitioner preferred Civil Revision 164-2017 which was finally decided by this Court on 12.04.2019. The Revision petition filed by the petitioner was allowed and the award passed by the Arbitrator as well as the subsequent orders dismissing objections and the appeal of the petitioner was set aside. It was left open to the competent authority to refer the matter and dispute alongwith counter claims of the petitioner for Arbitration as per the conditions of the contract.

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A request was thereafter submitted yet again by the petitioner on 27.04.2019, to the respondent No.2, for appointment of the sole Arbitrator, however, the said request was again not acceded to whereupon the Arbitration Petition No. 159-2019 was preferred.

Vide order dated 28.10.2022, the case was allowed and this Court deemed it appropriate to appoint an independent Arbitrator in view of the directions issued by this Court in its order of 12.04.2019 passed in CR-164 -2017. Ms. Rupinder Kaur Thind, Advocate was appointed as the sole Arbitrator to resolve the disputes/difference between the parties. The Arbitrator was required to complete the proceedings within the time specified in terms of Section 29 (A) and the fee was to be paid in accordance with the fourth schedule to be apportioned equally amongst both the parties.

It is contended by the petitioner in person that another Arbitration Case No. 160-2022 had also been filed by him in respect to the contract agreement No. CWE/AF/CHD-03 of 92-93 which was for providing of certain technical ACCN and allied services at 3BRD AF Chandigarh.

A dispute had accrued even in the said contract for which matter was referred to arbitration as per the contract agreement in the said dispute and as many as 09 different Arbitrators had been appointed within a span of 14 years by the Chief Engineer, however, the Arbitrators failed to adjudicate the disputes that arose between the parties. Prior to the appointment of the 9th Arbitrator, the petitioner had approached this Court under Section 11 (6) of the Arbitration & Conciliation Act, 1996 for appointment of an independent Arbitrator since the petitioner was suffering

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harassment on account of failure of the arbitrators to finalize the proceedings. This Court vide its order dated 22.11.2013 passed in Arbitration Case No. 140-2013, appointed a Sole Arbitrator. The said appointed sole Arbitrator passed final arbitral award on 16.05.2015, however, certain claims could not be adjudicated either on account of absence of furnishing audited final bill or due to defaults and non-cooperation by the respondents. The petitioner had requested to release the full and final amount due and to refund the additional security deposited by him for which he moved an application before the Arbitrator under Section 33 of the Arbitration and Conciliation Act, 1996 to consider the said applications, however, on account of the prolonged illness of the appointed Arbitrator, he could not deal with the said two claims and he died without adjudicating on the said application. As some of the dispute remained unsettled, hence, a second reference was sought under Section 11 (6) of the Arbitration and Conciliation Act, 1996 for appointment of an independent Arbitrator in case No. 160-2022. The above said arbitration case was also decided by this Court vide judgment dated 28.10.2022 and Ms. R.K. Thind, Advocate was also appointed as the Sole Arbitrator to also adjudicate the said disputes. Hence, a common Arbitrator was appointed by this Court in relation to the disputes raised by the applicant-petitioner, by two separate orders passed in different arbitration petitions.

It has been specifically stated by the petitioner in person that the sole Arbitrator appointed by this Court has expressed her inability to act as sole Arbitrator and that the application is hence being moved for appointing a substituted Arbitrator.

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Factual aspect noticed above is not disputed by the counsel for the respondents. He also admits and acknowledges that the sole Arbitrator appointed by this Court has expressed her inability to arbitrate on the issue. An objection is however raised that the instant application for review has been filed after much delay and that the terms of reference drawn in arbitration case No. 159 of 2019 cannot be expanded at this stage to travel beyond what had been originally raised before this Court.

I have heard petitioner in person as well as the counsel appearing on behalf of the respondent. An objection as regards delay in moving the instant application is over-ruled at this stage. The sole Arbitrator appointed by this Court expressed her unwillingness to arbitrate on the issue, which such fact is undisputed. The petitioner is a resident of Assam and a mere delay in moving the instant application for seeking review, owing to practical difficulty in presenting and pursuing an application before this Court, should not ordinarily be used to deny a remedy that had been granted by this Court vide its order dated 28.10.2022. The dispute has already remained pending for a substantive period for no lapse on the part of the petitioner-applicant and for reasons that were prima facie as noticed by this Court, to be attributable to the default by the respondent as well as the appointed arbitrators.

Taking into consideration the totality of the circumstances, the present applications are disposed of. The Arbitration clause in Case No. 159 of 2019, as per the Section 20 (4) of the Arbitration Act, 1940, is as under:-

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(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

The sole Arbitrator shall also decide upon the claims as well as counter claims raised by the petitioner and as noticed in the list of disputes in the judgment dated 12.04.2019 passed in **CR-164-2017** titled as **“M/s S.R. Engineering Construction versus Union of India”** alongwith claims/counter claims of the respondent-Union of India as noticed in the said order.

Mr. Ramesh Kumar Gandhi, Engineer-in-Chief (Retd.) Haryana PWD (B & R) is appointed as the Sole Arbitrator to decide the disputes arising out of the contract CA No. CECHZ-14/90-91 and CWE/AF/CHD-03 of 92-93. The terms of reference in Arbitration case No. 159-2019 is appended as Annexure ‘A’.

The venue of Arbitration shall be disclosed by the Arbitrator according to his convenience. Considering that the petitioner has expressed his inability to appear personally before the Arbitrator on each and every date since he belongs to Assam, the Arbitrator is requested to explore the possibility of conducting the proceedings through Video Conferencing as well.

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All other conditions as prescribed in the judgment dated 28.10.2022 shall remain intact.

Insofar as the proceedings in relation to Arbitration case No.160-2022 are concerned, the same shall also be carried out by the above said Arbitrator with respect to the pending claims and as per conditions incorporated vide order dated 28.10.2022 in the above said Arbitration case No. 160-2022 and subject to the possibility of conducting the proceedings through Video Conferencing as noticed above. Since appointment of arbitrator is under the Act of 1996, no reference is required to be done.

A photocopy of this order be placed on the file of connected cases.

**(VINOD S. BHARDWAJ)
JUDGE**

FEBRUARY 06, 2024

Vishal Sharma

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Annexure 'A'

APPOINTMENT OF ARBITRATOR: CA NO.CECHZ-14 OF 90-91
PROVN OF OFFICERS ACCN FOR GEB AT (AF) CHANDIGARH

Dear Sir,

WHEREAS the above mentioned contract was entered into between the President of India, represented by Chief Engineer Chandigarh Zone and M/s S.R. Engineering Const 2543-A, Sector 47-C. Chandigarh-160047.

AND WHEREAS the said contract includes an arbitration agreement vide Condition 70 of IAFW-2249 forming part of the contract which, interalia, provides that all disputes between the parties to the contract (other than those for which the decision of the CWE or any other person is by the contract expressed to be final and binding) shall, after written notice by either party to the contract to the other of them, be referred to the Sole Arbitration of an Engineer Officer to be appointed by Engineer-in-Chief:

AND WHEREAS CE (AF) WAC Jalandhar Cantt has taken over the area of works from CE Chandigarh Zone and will now be representing Union of India.

AND WHEREAS the Engineer-in-Chief, vide letter dated 01.02.2019 had appointed Brig. T.K. Mittal as the sole Arbitrator to enter on difference and publish his findings and award in respect of disputes listed as Appendix 'A' to the said letter.

Consequent upon resignation of Brig. T.K. Mittal on 08.08.2000 as the Arbitrator, Brig. R.R. Singh was appointed as the sole Arbitrator in his place vide letter dated 28.09.2000.

ANDWHEREAS a petition under Section 5, 11 and 12 of the Arbitration Act, 1940 had been filed before the Civil Judge (Senior Division), Chandigarh for removal of the Arbitrator. The said application was dismissed on 26.04.2000 and award dated 30.04.2002 was passed in favour of the respondent and against the petitioner.

WHEREAS an application under Section 36 had been filed for execution of the said award and objections under Section 47 CPC had also been filed alleging that the proceedings before the Arbitrator were without

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jurisdiction. The said objections were dismissed by the Additional District Judge, Chandigarh vide order dated 10.03.2009 which was challenged in Civil Revision No. 3921 of 2010.

WHEREAS during pendency of the Civil Revision, the execution petition was withdrawn. The revision petition was accordingly disposed of as having been rendered infructuous vide order dated 13.09.2010 with liberty to the petitioner to raise objections in the event of fresh execution.

WHEREAS fresh execution was moved before the Additional District Chandigarh on 16.07.2010 to which objections under Section 47 were filed. The said objections were again dismissed vide order dated 04.05.2015 which was subject matter of challenge in Civil Revision No. 6827 of 2013. The order of the Additional District Judge dated 04.05.2013 was set aside and the matter was remanded to pass a fresh order in accordance with law. The objections were dismissed again and was held that the award could be challenged only by means of an application under Section 34 of the Arbitration and Conciliation Act of 1996 and not by way of objections under Section 47 read with Section 151 CPC. Aggrieved thereof, Civil Revision No. 164 of 2017 was filed.

WHEREAS the above said Civil Revision No.164 of 2017 was allowed by this Court vide judgment dated 12.04.2019 holding that the proceedings in relation to the above contract would be governed by the Arbitration Act, 1940 and affirming the maintainability of objections under Section 47 CPC notwithstanding absence of challenge to the award under Section 14 of the Arbitration Act, 1940. The award passed by the Arbitrator was declared null and void and the orders dismissing the objection and the review petition was set aside.

WHEREAS Arbitration petition No.159-2019 was preferred before this Court which was allowed vide judgment dated 28.10.2019 and one Ms. Rupinder Kaur Thind, Advocate was appointed as independent sole Arbitrator.

WHEREAS the said sole Arbitrator has undisputedly expressed her unwillingness to arbitrate the pending dispute.

WHEREAS by an application moved and a request made, the

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petitioner has sought for appointment of another Arbitrator in substitution Arbitrator appointed earlier.

NOW, THEREFORE, by virtue of the aforesaid, I hereby appoint you as Sole Arbitrator to adjudicate upon the disputes pertaining to the above contract and request you to enter on the reference and publish your findings and the award in respect of list of disputes raised on behalf of Union of India extracted as under:-

LIST OF DISPUTES

<i>Brief description of claims/items</i>	<i>Approximate amount in Rupees</i>
<i>CLAIMS OF UNION OF INDIA</i>	
<i>Additional expenditure in execution of leftover work through risk and cost contract</i>	<i>7,84,000.00</i>
<i>Various losses suffered due to delay in execution such as engagement of supervisory, staff non-occupancy of the buildings, etc.</i>	<i>15,00,000.00</i>
<i>Cost of reference</i>	<i>20,000.00</i>
<i>Interest @ 18% p.a. On the above amounts (Pre-suit, pendentelite and failure)</i>	<i>Not indicated</i>

And the list of disputes raised on behalf of the petitioner extracted as under:

LIST OF DISPUTES

- 1. Extra expenditures incurred in prolongation of Contract due to various breaches on part of the Department resulted work carried out in new rates, idle Tools and Plants. Establishment, Loss of Profits, etc, not contemplated in the contract agreement.*
- 2. Extra Work for removal of Tree roots not paid as per actual work done.*

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3. *Extra work than the drawing got completed but not been paid.*
4. *Non payment of E/M items, etc.*
5. *Cement base paint to the Building twice in lieu of color wash.*
6. *Non-payment of final bill.*
7. *Non-payment of security deposit and thereby loss of interest, etc.*
8. *Meaning items as found missing due to not permitted to enter at the site/building and fixtures are not returned back, etc. many furniture and*
9. *There are other items in disputes which will be mentioned in the statement of case.*
10. *Interest from the date of cancellation of contract till appointment of Arbitrator @ 12% per annum, pendente lite interest and interest from the date of Award till realization or Court decree, whichever is earlier @ 21% p.a.”.*

The arbitration proceedings in the contract be carried out as per the provisions of the Arbitration Act, 1940 and as per the judgment of this Court in CR-164-2017.

**(VINOD S. BHARDWAJ)
JUDGE**

FEBRUARY 06, 2024

Vishal Sharma