

In the High Court of Punjab and Haryana, at Chandigarh

Arbitration Case No. 88 of 2020

Date of Decision: 18.02.2021

Raj Kamal Builders

... Petitioner(s)

Versus

General Manager (Engineering), Northern Railway and Another

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. Dheeraj Mahajan, Advocate
for the petitioner(s).

Mr. Karminder Singh, Advocate
for the respondents.

Anil Kshetarpal, J.

This petition under under Section 11(6) of the Arbitration & Conciliation Act, 1996, as amended (hereinafter referred to as “the 1996 Act”), has been filed for the appointment of an independent Arbitrator.

An agreement containing the provision for resolution of the dispute through arbitration is not in dispute between the parties. From the reading of the petition, it is apparent that the petitioner claims to have completed various work contracts, awarded by the respondents. Apart from the other claims, the petitioner claims interest on the delayed payment of the amount. As per para 8 of the petition, the approximate value of the claim is about ₹ 50,00,000/-, however, the petitioner reserves its right to file detailed claim before the Tribunal.

On notice, the respondents have filed their reply, contesting the petition on the ground that the entire payment has already been released to

the petitioner and therefore, the petition is not maintainable. It would be noted here that the petitioner requested for the appointment of an Arbitrator vide representation dated 20.12.2017 (Annexure P5). However, no action thereon has been taken by the respondents. It is not the stand of the respondents that any Arbitrator has been nominated. Thus, the respondents have forfeited their right to nominate an Arbitrator. Further, as per the amended Act, which came into force w.e.f. 23.10.2015, a party to the contract has lost its right to either act as an Arbitrator or nominate an Arbitrator. A reference, in this regard, can be made to the judgments passed in *TRF Limited v. Energo Engineering Projects Limited (2017) 8 SCC 377* and *Perkins Eastman Architects DPC and Another v. H.S.C.C. (India) Limited (2019) SCOnline Supreme Court 1517*.

No doubt, a three Judges bench of the Hon'ble Supreme Court in *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML(JV) A Joint Venture Company (2019) SCC Online SC 1635* held that the arbitrators can be appointed from the panel of its retired employees, prepared by the Railways. However, the aforesaid decision has recently been referred to a larger bench for reconsideration in *Union of India v. Tania Construction Private Limited Special Leave Petition (C) No. 12670 of 2020, decided on 11.01.2021*, which reads as under:-

“Having heard Mr. K.M. Nataraj, learned ASG for sometime, it is clear that on the facts of this case, the judgment of the High Court cannot be faulted with. Accordingly, the Special Leave Petition is dismissed. However, reliance has been placed upon a recent three-Judge Bench decision of this Court

delivered on 17.12.2019 in Central Organisation for Railway Electrification vs. M/s ECI-SPIC-SMO-MCML (JV) A Joint Venture Company, 2019 SCC OnLine 1635. We have perused the aforesaid judgment and prima facie disagree with it for the basic reason that once the appointing authority itself is incapacitated from referring the matter to arbitration, it does not then follow that notwithstanding this yet appointments may be valid depending on the facts of the case.

We therefore request the Hon'ble Chief Justice to constitute a larger Bench to look into the correctness of this judgment.

Pending application stands disposed of".

Keeping in view the aforesaid facts, this Court is of the considered opinion that the Court is required to nominate an Arbitrator. The respondents have not drawn attention of the Court to any specific qualifications or requirements of technical know-how, which an Arbitrator to be nominated must possess. This Court, after considering considering the nature of the dispute, is of the opinion that the dispute can be decided by a retired Judicial Officer.

Keeping in view the aforesaid facts, this petition is allowed. This Court is required to exercise its power under Section 11(6) of the 1996 Act and nominate the sole Arbitrator to decide the disputes and differences between the parties.

(a) Appointment of Arbitrator: Mr. Surinder Singh Walia, District and Sessions Judge (Retired), is hereby

nominated to act as the Sole Arbitrator to decide the disputes and differences between the parties in both the petitions.

(b) Communication to Arbitrator of this order:

(i) A copy of this order will be communicated to the learned Sole Arbitrator by the learned counsel for the petitioner within one week from the date of the order being uploaded.

(ii) In addition, within one week of this order being uploaded, the Registry will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal address:

Arbitrator : **Mr. Surinder Singh Walia,
District and Sessions Judge,
(Retired).**

Address : House No. 5413, Sector 38
West, Chandigarh.

Mobile No. : +91 9876614207

(c) Disclosure: The learned Sole Arbitrator is requested to forward his statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act, 1996 to the Registrar General of this Court, referencing this arbitration petition, as soon as possible, and in any case, sufficiently in advance of his entering upon the reference to his arbitration. That statement will be retained by the Registrar General on the file of this application. Copies will be given to both sides.

- (d) **Appearance before the Arbitrator:** The parties will appear before the learned Sole Arbitrator physically or through video conferencing on such date and at such place as he nominates and will obtain appropriate directions in regard to fixing a schedule for completing the pleadings, etc.
- (e) **Contact/communication information of the parties:** Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator within one week of this order being uploaded. The information is to include a valid and functional email address.
- (f) **Application under Section 16:** Liberty to either side to file an application before the learned Sole Arbitrator under Section 16 in regard to any matter or claim and its arbitrability, jurisdiction and competency of the arbitral tribunal.
- (g) **Interim Application(s):**

 - (i) Liberty to both the parties to make an interim application or interim applications including (but not limited to) an interim application under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator
 - (ii) Any such application will be decided in such manner and within such time as the learned Sole

Arbitrator deems fit.

- (h) **Fees:** The fees of Arbitral Tribunal shall be governed by IVth Schedule of the Arbitration and Conciliation Act, 1996.
- (i) **Sharing of costs and fees:** Parties agree that all arbitral costs and the fees of the arbitrator will be borne by both sides in equal shares at the first instance.
- (j) **Venue and seat of arbitration:** The venue of arbitration shall be at such place or places as may be fixed by the Sole Arbitrator in his sole discretion.
- (k) **Contentions kept open.** All contentions before the learned Sole Arbitrator are specifically kept open.

It is clarified that it is open to the respondents to file a counter-claim, if so advised, before the learned Sole Arbitrator, within such time and subject to such terms as the learned sole Arbitrator may direct.

Costs of the arbitration petition may be included by both the sides in their claims before the learned Sole Arbitrator.

(Anil Kshetarpal)
Judge

February 18, 2021

“DK”

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No