

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Arbitration Case No. 104 of 2013
Date of Decision: 21.02.2014

Talwandi Sabo Power Ltd.

..Petitioner

Versus

M/s JPS Builders and contractors

..Respondents

CORAM: HON'BLE MR. JUSTICE SANJAY KISHAN KAUL, CHIEF JUSTICE.

1. Whether Reporters of local papers may be allowed to see the judgment?
2. Whether to be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest?

Present : Mr. Sanjeev Sharma, Senior Advocate with
Mr. Shekhar Verma, Advocate, for the petitioner.
None for the respondents.

SANJAY KISHAN KAUL C.J. (Oral)

Petitioner a company incorporated under the Companies Act had been allotted work of setting up of Thermal Power Plant in State of Punjab by the Punjab State Power Corporation Ltd. by way of a Long Term Power Purchase Agreement. In order to commission plant, the company had allotted two civil works to respondent company vide Letter of Intent dated 27.12.2010, namely, construction of Ash Dyke with HDPE Lining and Brick Lining on "Lump Sum Turnkey" basis in terms of technical specifications (ii) Construction of Raw Water Earthen Reservoir with HDPE Lining on "lump sum turnkey" basis in terms of the scope of the work/technical specifications. The target completion time of first work was 31.8.2011 and for second work 15.12.2011. The Letter of Intent dated 27.10.2010 was accepted by the respondents on 01.02.2011.

2. Clause 10 of the Agreement contains a mechanism for dispute redressal which is to the following effect:-

10.1 The Parties hereto shall endeavour to settle all dispute and differences relating to and/or arising out of the contract amicably at Mansa, Punjab.

10.2 In the event of parties failing to resolve any dispute amicably the same shall be referred to Arbitration in accordance with the Rules and regulations of the Arbitration and Conciliation Act, 1996. The dispute shall be referred to sole Arbitrator appointed after mutual consent of both parties.

10.3 The place of arbitration shall be at Mansa, Punjab and the language of the arbitration shall be English.

10.4 The parties hereto agree that contract shall be obliged to carry out its obligations under the contract even in the event a dispute is referred to Arbitration. It is further clarified that the owner shall be entitled to retain any sum or portion of contract price, which has become due and payable for any unfinished works/supplies or any subject matter under arbitration. However, on completion of milestones, payment shall be released as per the agreed payment terms.”

3. The respondent is alleged to have failed to complete the aforesaid two works within the target completion date. However, in view of the aforesaid clause 21 qua work No. (i) i.e. ‘Ash Dyke’ the drawing and scope of the project were revised in joint meeting held between the petitioner and the respondent companies on 29.8.2011 and as per the case of the petitioner the respondent company had accepted and agreed to complete the ‘Ash Dyke’ work with the change in the scope of the work and gave an assurance by e-mail dated 5.11.2011 saying that the said work would be completed by 15.3.2012. The work could not be completed, hence the petitioner cancelled the contract vide cancellation notice dated 20.06.2012 making it clear that in so far as the second contract component namely construction of ‘Raw Water Earthen Reservoir’ is concerned, the contract is still valid. It is the case of the petitioner that due to non-completion of work of ‘Ash Dyke’, petitioner had been caused a loss of ₹ 26-27 Crores which is recoverable from the respondents. Petitioners served another notice on 26.11.2012 upon the respondents in terms of Clause 6 and clause 34.3 of the Contract for submission of ‘No Due Certificate’ and to deposit an amount of ₹ 38,25,196/- recoverable from the respondent. It is case of the petitioner that respondent did not raise any objection qua legality and correctness of

the cancellation notice and rather acknowledged its liability to pay the aforesaid amount of ₹ 38, 25,196/- to be adjusted out of the bank guarantee submitted by it. The respondent further acknowledged the aforesaid liability vide its communication dated 30.11.2012 to the petitioner.

4. The second component of work regarding construction of ‘Raw Water Earthen Reservoir’ was also not likely to be completed within time i.e. upto December, 15, 2011. Hence, in a meeting held on 12.12.2011, amended contract was prepared which was acknowledged by the respondent. Since, the respondent was not completing the work, therefore on 7.12.2012, the petitioner served a notice saying that the contract should be completed in time failing which it would be allotted to someone else at its risk and costs. The respondent failed to respond. Hence, on 26.10.2012, the petitioner assigned the work to some other company and had suffered Rs. 8 Crores as loss recoverable from the respondent. A communication in this regard was sent to the respondent on 26.12.2012.

5. Respondent in the meantime filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 challenging the action taken qua both the aforesaid two components of civil work allotted to it. During the pendency of the application under Section 9, on 22.3.2013, the petitioners served a notice invoking arbitration clause for appointment of an Arbitrator and in that letter suggested names of two Arbitrators namely Hon’ble Mr. Justice A.L.Bahri, (Retd.) and Hon’ble Mr. Justice S.N.Aggarwal (Retd.). A reply dated 22.4.2013 to the said notice was sent by the respondent rejecting the proposal of the petitioner to refer the matter for arbitration and saying that steps should be taken for amicable settlement. After reply dated 22.4.2013, respondent also served a statutory notice under Section 434 of the Companies Act claiming some amount from the petitioner.

6. In the petition filed under Section 9 of the said Act, interim relief was declined by the Civil Court on 18.5.2013. On 28.5.2013, respondent sent a notice to the petitioner for appointment of Arbitrator whose name was suggested by the respondent in the notice and rejecting the names proposed by the petitioner in its notice dated 22.3.2013. The name of

the Arbitrator suggested by the respondent is not acceptable to the petitioner. Hence this petition.

7. On going through the pleadings of the petition it stands established that there exists a dispute between the parties as both the parties have raised claim and counter claim.

8. Notice in this petition was issued to the respondents on 26.7.2013 returnable on 4.10.2013. However, the notice issue was not received back. Hence fresh notice was ordered to be issued for 29.11.2013 and it was directed that an additional set be also served through counsel representing the respondents in the proceedings inter-se the parties arising from the same agreement to claim relief under Section 9 of the said Act. That notice was also received back with the report that name of the proprietor/partner is not available and the counsel was also not served as his house was found locked. It was brought to the notice that proceedings are pending inter-se the parties in F.A.O. No. 2924 of 2013 arising out of order passed by the Civil Court on application under Section 9 of the said Act which were listed before the learned Single Bench on 16.12.2013. The notice through counsel representing the respondent for 16.12.2013 was ordered to be issued and the case was ordered to be listed on 31.01.2014. On 31.01.2014, the following order was passed:-

“Present : Mr. Sanjeev Sharma, Sr. Advocate with
Mr. Shekhar Verma, Advocate, for the petitioner.

Office report is that the premise of the counsel for the respondents is locked. It is pointed out by learned Senior Counsel for the petitioner that in the proceedings under Section 9 of the Arbitration and Conciliation Act, 1996, in FAO No. 2924 of 2013, the pendency of the present petition was brought to the notice of the Court and the counsel appearing for the respondents noticed the same and infact agreed to appear in the present proceedings.

A copy of the said order dated 16.12.2013 has been placed before me. Despite the aforesaid, none has put in appearance for the respondents who are proceeded ex-parte.

List again on 21.02.2014.”

9. Since no one had appeared on that day, hence, the respondent was proceeded ex parte and the matter was ordered to be listed on 21.2.2014. No one is again present.

10. As per Arbitration Clause, the place of arbitration is at Mansa. Learned Senior Counsel for the petitioner states that in another matter relating to same plant, Justice N.K.Aggarwala, retired, has been appointed as Arbitrator. In that case also, the venue of arbitration was at Mansa but with the consent of the parties, the proceedings are being held at Panchkula. He prays that same Arbitrator may be appointed in this matter.

11. In view of the facts recorded aforesaid, I am inclined to accept the plea and accordingly appoint Justice N.K.Aggarwala, (Retd.) as sole Arbitrator to enter upon the reference and adjudicate the disputes *inter-se* the parties. The fee of the Arbitrator would be governed as per the schedule of the High Court Rules.

Petition is accordingly allowed leaving the parties to bear their own costs.

A copy of the order be sent to the Arbitrator.

(SANJAY KISHAN KAUL)
CHIEF JUSTICE

21.02.2014
'ravinder'