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

(107)

ARB-126-2017
Date of decision:- 12.09.2024

M/s Supreme Infrastructure India Pvt. Ltd.

... Petitioner

Versus

M/s HSSC (India) Ltd. and others

... Respondents

CORAM: HON'BLE MR. JUSTICE SUVIR SEHGAL

Present:- Mr. A.S.Talwar, Advocate
for the petitioner.

Mr. Sanjeev Sharma, Advocate
for the respondents No.1 and 2.

Mr. Sharad Aggarwal, DAG, Haryana
for the respondents No.3 and 4.

SUVIR SEHGAL, J. (ORAL)

1. By way of instant petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short "the Act"), petitioner has approached this Court for appointment of an Arbitrator to adjudicate the dispute between the parties.

2. Counsel for the petitioner submits that an agreement dated 03.12.2014, Annexure P-1, was executed between the petitioner and M/s HSCC (INDIA) Ltd. (for short "HSCC/respondents No.1 and 2"), who were representatives of respondent No.4, for construction of Housing Complex, Teaching Block, Auditorium Block etc. for Kalpana Chawla Government

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Medical College at Karnal. He submits that the construction work was to be completed within 20 months from the date of the commencement. However, the respondents failed to hand over an encumbrance free site, which resulted in the delay in the commencement of the work. It is his positive case that the respondents created a hindrance in the implementation and by letter dated 10.02.2015, Annexure P-1/A, the contract was terminated. Counsel asserts that the petitioner served a notice dated 25.07.2016, Annexure P-2, invoking Clause 25 of the agreement and requested the respondents to refer the dispute for adjudication to an Arbitrator, but by their response dated 17.08.2016, Annexure P-3, respondents No.1 and 2 called upon the petitioner to withdraw the notice. He submits that in the meantime, petitioner filed a suit for declaration challenging the termination letter and for permanent injunction restraining the respondents from re-tendering the project. He submits that the suit was contested by the respondents and on an application filed under Section 8 of the Act, the Trial Court by judgment dated 23.03.2016, referred the parties to arbitration. Counsel submits that as the Arbitrator was not appointed, petitioner approached this Court by filing the instant petition in December, 2016.

3. Upon notice by this Court, separate replies have been filed by the respondents contesting the petition. In their response, filed by respondents No.1 and 2, it has submitted that the petitioner has not exhausted the pre-reference mechanism. In a separate response filed on behalf of respondents No.3 and 4, an objection has been taken to the effect that they have not been served with a valid notice invoking the Arbitration Clause and as they are



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not signatory to the agreement, Annexure P-1, they are not a necessary party.

4. I have heard counsel for the parties and considered their respective submissions.

5. In so far as the objection pertaining to non-service of a valid notice under Section 21 of the Act is concerned, a glance at the notice dated 25.07.2016, Annexure P-2, shows that it has been addressed to the Engineer-in-charge, i.e., respondent No.2 and a copy has been forwarded to respondent No.4. Although, respondents No.1 and 2 responded, but respondent No.4 chose to remain silent. The service of the notice upon respondent No.4 has not been denied. This Court is of the view that the notice, Annexure P-2, meets the mandate of Section 21 of the Act and it is a valid notice.

6. Another objection taken by the respondents is that pre-reference mechanism has not been exhausted. Relevant extract of Clause 25 of the Arbitration Clause is reproduced hereunder:-

“(i) If the contractor considers any work demanded of him to be outside the requirements 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 authority as indicated in Schedule 'F' (Reviewing Authority) in writing for written instruction or decision. Thereupon, the Reviewing Authority shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Reviewing Authority fails to give his instructions



or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Reviewing Authority, the contractor may, within 15 days of the receipt of Reviewing Authorities's decision, appeal to the authority as indicated in Schedule 'F' (Appealing Authority) 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 Appealing Authority shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Client for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.”

7. An examination of the above reproduced Clause shows that any decision taken by the Engineer-in-charge on any matter in connection with carrying out of the work has to be challenged by the petitioner before the Reviewing Authority. It cannot be disputed that in terms of the agreement, Engineer-in-charge is the General Manager, Projects, HSCC and the Reviewing Authority has been defined as Executive Director of HSCC. A perusal of letter dated 24.07.2017, Annexure R-3, appended with the short reply filed on behalf of respondents No.1 and 2, shows that the decision to terminate the contract had been taken in a meeting held on 13.12.2014 under the Chairmanship of the Chief Minister, Haryana. Once a decision had been taken at the highest level in the State, the filing of the appeal or review before the authorities would have been an empty formality. Therefore, the non-adherence to pre-reference mechanism by the petitioner cannot be said

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to be fatal.

8. Another aspect deserves to be noticed. By the same letter, i.e., Annexure R-3, respondents had taken a decision and had appointed a retired Additional Director General, CPWD as an Arbitrator by invoking Clause 25 of the Agreement. However, for reasons best known and which cannot be deciphered from the record, the appointment was withdrawn on 30.01.2018, as is revealed from affidavit dated 06.09.2024 filed on behalf of respondents No.3 and 4. In this background, it does not lie in the mouth of the respondents to oppose the prayer for appointment of an Arbitrator.

9. Coming to the last objection raised by the respondents No.3 and 4 that they are not a necessary party. It may be noticed that this objection was raised in another petition arising in similar circumstances and it was dealt with by this Court vide order dated 12.08.2024 passed in **ARB-325-2022** titled as **“Kalpataru Projects International Ltd. Versus Director, Kalpana Chawla Govt. Medical College, Karnal and another”**. The relevant extract of the judgment passed by this Court is reproduced hereunder:-

“6. The objection raised by the State deserves to be noticed and rejected. A perusal of the contract agreement shows that firstly the construction work was being executed on behalf of respondent No.1 and respondent No.1 has an active role in its execution. Respondent No.1 has been defined as the client in the contract agreement and exercises the power of Appellate Authority against any decision taken by the Engineer In-charge as well as the Reviewing Authority. Notice invoking the arbitration clause is also required to be served upon it, which has been done but respondent No.1 has failed to appoint an Arbitrator in terms of the arbitration clause. However, without

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delving further while accepting the petition, this Court deems it appropriate to leave it open for the learned Arbitrator to decide this aspect.”

10. For the afore-going reasons, petition is accepted. Mr. Justice (Retd.) Rajive Bhalla, a former judge of this Court, H. No. 257, Sector 10-A, Chandigarh, Mobile No.9780008111, is nominated as a sole Arbitrator to adjudicate the dispute between the parties.

11. Liberty is granted to respondents to raise all the objections before the learned Arbitrator including the necessity of their presence in the arbitral proceedings.

12. Liberty is further granted to the said parties to raise all claims, counter claims, defences, pleas etc. before the Arbitrator.

13. Needless to mention that all the questions arising between the parties in this matter shall remain open for determination in the arbitral proceedings and any observation made hereinabove will not be binding on the learned Arbitrator.

14. A request letter alongwith a copy of this order be sent to Mr. Justice (Retd.) Rajive Bhalla.

12.09.2024
Kamal

(SUVIR SEHGAL)
JUDGE

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No