

In the High Court of Punjab and Haryana, at Chandigarh

Arbitration Case No. 115 of 2020 (O&M)

Date of Decision: 27.01.2021

M/s Manhas Builder

... Petitioner(s)

Versus

Wisdom Ark School

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. Naresh Markanda, Senior Advocate
with Ms. Kavita Sharma and Ms. Lakshita Sahni, Advocates
for the petitioner(s).

Mr. Nikhil Handu, Advocate
for the respondent.

Anil Kshetarpal, J.

An application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act of 1996”) has been filed for the appointment of an independent and impartial Arbitrator. The detailed facts of the case are not required to be noticed. The existence of an agreement containing an arbitration clause is not in dispute between the parties. The clause reads as under:-

“44 ARBITRATION:

All disputes or differences of any kind whatsoever which shall at any time arise between the parties hereto touching or concerning the work or the execution or maintenance thereof this contract or the rights touching or concerning the work or the execution or maintenance thereof of this contract or the construction operation or effect thereof or to the right or liabilities of the parties or arising out of relation thereto

whether during or after determination, foreclosure or breach of the contract (other than those in respect of which the decision of any 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 and to the Appointing Authority who shall be appointed for this by the Employer be referred for adjudication to a sole Arbitrator to be appointed as hereinafter provided.

If the dispute or difference pertain to the under noted matter (called excepted matters) the decision in writing of the Architect, conclusive and binding on the parties.

- i. Instructions*
- ii. Transactions*
- iii. Proof of quality of materials*
- iv. Assigning or under letting of the contract*
- v. Certificate as to the causes of delay on the part of contractor and justifying extension of time*
- vi. Rectifying of defects pointed out during the “Defect liability period”*
- vii. Notice to the contractor to the effect that he is not proceeding with due diligence*
- viii. Certificate that the contractor has abandoned the contract*
- ix. Notice of determination of the contract by the Employer.*

For the purpose of appointing the Sole Arbitrator referred to

above, the Employer will send within thirty days of the receipt of the notice to the Contractor a panel of three names of persons who shall all be presently connected with the organization for which the work is executed.

The Contractor shall on receipt of the names as aforesaid, select any one of the persons named to be appointed as a Sole Arbitrator and communicate his name to the Appointing Authority within seven days of receipt of names. The Appointing Authority shall there upon without any delay appoint the said person as the Sole Arbitrator. If the Contractor fails to communicate such selection as provided above within the period specified the Appointing Authority shall make the selection and appoint the selected person as the Sole Arbitrator. If the Appointing Authority fails to send to the Contractor the panel of three names as aforesaid within the period specified the Contractor shall send to the Appointing Authority a panel of three names of persons who shall all be unconnected with either party. The Appointing Authority shall on receipt of the names as aforesaid select any one of the persons named and appoint him as the Sole Arbitrator. If the Appointing Authority fails to select the person and appoint him as the Sole Arbitrator within 30 days of receipt of the panel and inform the Contractor accordingly, the Contractor shall be entitled to appoint one of the persons from the panel as the Sole Arbitrator and communicate his name to the Appointing Authority. If the

Arbitrator, so appointed, is unable or unwilling to act or resign his appointment or vacate his office due to any reason whatsoever another Sole Arbitrator shall be appointed as aforesaid.

The WORK under the contract shall however continue during the Arbitration proceedings. And no payment due or payable to the contractor shall be withheld on account of such proceeding.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties fixing the date of the first hearing. The Arbitrator may from time to time with consent of the parties enlarge the time for making publishing the award.

The Arbitrator shall give a separate award in respect of each dispute or difference referred to him. The arbitrator shall decide each dispute in accordance with the terms of the contract and give a reasoned award. The venue of arbitration shall be such place as may be fixed by the arbitrator in his sole discretion.

The fee, if any, of the Arbitrator shall, if required to be paid before the award is made and published be paid half and half by each of the parties. The costs of the reference and of the award including the fee, if any, of the Arbitrator shall be in the discretion of the Arbitrator who may direct to and by whom and in what manner such costs or any part there of shall be paid and fix or settle the amount of costs to be so paid. The award of

the Arbitrator shall be final and binding on both the parties.

The provisions of the Indian Arbitration and Conciliation Act 1996 or any statutory modification or reenactment thereof and the rules made there under and for the time in force shall apply to the Arbitration proceeding under this Clause.

The Employer and the Contractor hereby also agree that Arbitration under Clause shall be a condition precedent to any right to action under the contract with regard to the matters hereby expressly agreed to be so referred to Arbitration”.

The contractor applied for reference to the respondent vide communication dated 30.07.2020. It was indicated that in view of the amendment in the Act of 1996, none of the contracting party has a right to unilaterally make an appointment. In response thereto, the respondent, vide communication (Annexure P7) dated 12.08.2020, informed that the appointing authority would be the Managing Director of the respondent-School. It was informed that the respondent would send a panel of three independent and impartial persons and the petitioner would be entitled to choose one from the panel. On 25.08.2020, once again the petitioner, while drawing the attention of the respondent to the provisions of Section 12 read with VIIth and Vth Schedule of the 1996 Act, again made a request. No doubt, the respondent has claimed that it did suggest three names, however, the parties could not arrive at a consensus.

On 14.12.2020, learned counsel for the parties sought a short adjournment on the ground that the parties are close to an agreement to nominate an Arbitrator by mutual consent and hence, the case was adjourned

to 19.01.2021, when the learned counsels have stated that the parties could not arrive at a conclusion.

In view of the amendment in the 1996 Act, it is no longer possible for the party or its official to act as an Arbitrator or nominate an Arbitrator. Reliance in this regard is placed on the judgment in *TRF Limited v. Energo Engineering Projects Limited (2017) 8 SCC 377* and *Perkins Eastman Architects v. H.S.C.C. (India) Limited (2019) SCOnline Supreme Court 1517*.

Keeping in view the aforesaid facts, the petition is allowed and this Court is required to exercise its power under Section 11 and make an appointment of the sole arbitrator to decide the disputes and differences between the parties.

(a) Appointment of Arbitrator: Mr. Justice L.N.Mittal, Former Judge of this Court, is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties.

(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 today 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. Justice L.N. Mittal,
Former Judge, Punjab and
Haryana High Court.**

Address : House No. 93, M.D.C.,
Sector 4, Panchkula

Mobile No. : +91 9780008127

- (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 to 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 the Punjab Haryana and Union Territory, Chandigarh Arbitration and Conciliation Rules, 2003.
- (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 in Punjab, Chandigarh or Panchkula 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 counterclaim, if so advised, before the learned Sole Arbitrator within such time and subject to such terms as the learned Sole Arbitrator may direct.

The application is disposed of in these terms. Costs of the arbitration application may be included by both sides in their claims before the learned Sole Arbitrator.

The miscellaneous application(s) pending, if any, shall also stand disposed of.

(Anil Kshetarpal)
Judge

January 27, 2021
“DK”

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