

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Arbitration Case No. 168 of 2013 (O&M)  
Date of Decision: 04.04.2014

Levelone Communications Headquarters Munich, Germany

..Petitioner

Versus

State of Haryana and another

..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. Amit Rawal, Senior Advocate with  
Mr. Gaurav Rana, Advocate, for the petitioner.  
Mr. R.S.Kundu, Addl. Advocate General, Haryana,  
for respondent No.1.  
Mr. Pankaj Gupta, Advocate, for respondent No.2.

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**SANJAY KISHAN KAUL C.J.** (Oral)

CM Nos. 6540 and 6565 of 2014

Leave is granted to place on record replications of respondents  
No.1 and 2 respectively and the applications are allowed.

**Arbitration Case No. 168 of 2013 (O&M)**

The petitioner was a successful tenderer qua supply, installation, commissioning and project management of outdoor surveillance system for Gurgaon and Faridabad on turn-key basis which resulted in an agreement executed *inter-se* the parties on 20.05.2011. The Agreement contains an Arbitration Clause which reads as under:-

**“6.28 Arbitration**

(i) In the event of any dispute or difference arising between the Successful Bidder and tenderer out of or in connection with the Contract or RFP or any of the terms and conditions contained therein or as to the interpretation or any other matter, both the parties shall resolve such dispute or difference first by

mutual discussions. If any dispute or difference still persists, it shall be referred to Home Secretary, Govt. Haryana, for Arbitration to be conducted in accordance with Arbitration and Conciliation Act, 1996. The arbitration will be held in Chandigarh and the proceedings shall be conducted in English. The parties to the dispute will instruct the Arbitrator(s) to render a decision within 30 days of the date of their appointment and such a decision shall be binding on both the parties.

ii) This RFP and the Contract shall, in all respects, be governed by and construed in all respects in accordance with laws of the Republic of India.

iii) In relation to any legal action or proceedings to enforce the contract, the parties to the contract irrevocably submit to the exclusive jurisdiction of the Courts in Chandigarh to the exclusion of any other Court or Courts that may otherwise have had such jurisdiction and waive any objection to such proceedings on grounds of venue or on the grounds that the proceedings have been brought in an inconvenient forum.”

The agreement in question is stated to have been terminated in exercise of the powers conferred under Clause 6.25 of the contract, relevant portion of which is extracted as under:-

**“ 6.25 Termination of the Contract:-**

(i) In the event of the bidder failing duly and properly to fulfill the contract or committing breach of any of the terms and conditions of this contract or repeatedly supplying goods liable to rejection hereunder or failing, declining, neglecting or delay to comply with any demand or requisition or otherwise, not executing the same in accordance with terms of this contract or not achieving the milestones mentioned at Clause No. 6.4 or if the bidder or his agent or servants being guilty of fraud in respect of this contract or any of his partners or representatives found directing, giving, promising or offering any bribes, gratuity, gift loan, perquisite, reward or

advantage pecuniary or otherwise to any person in the employment of Government in any way relating to such officers or person or persons, officer or employment or if the bidder or any of his partners become insolvent or apply for relief as insolvent debtor or commence any insolvency proceedings or make any composition with his/their creditors or attempts to do so, then without prejudice to tenderer rights and remedies otherwise, tenderer shall be entitled to terminate this contract forthwith and may claim back all or part of the money already paid to the bidder.”

The petitioner approached this Court by filing Application being Arbitration Case No. 75 of 2013 for appointment of an Arbitrator. This application was, however, dismissed on 23.08.2013 on account of the fact that the petitioner had not approached the named Arbitrator under Arbitration Clause 6.28 to enter upon the reference and adjudicate the disputes *inter-se* the parties and thus there was no refusal or negligence on the part of the Arbitrator to act in that capacity.

It is, thereafter, that the petitioner approached the named Arbitrator being Home Secretary, Government of Haryana, vide letter dated 10.09.2013 (Annexure A-11) to proceed with the arbitration. There was, however, no response to this letter and as a consequence thereof, the present application has been filed under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as ‘the said Act’) on 06.11.2013, after having failed to elicit any response for almost two months. Notice of this application was issued on 21.02.2014.

I may note that there was some controversy qua receipt of letter dated 10.09.2013 (Annexure A-11) by the named Arbitrator i.e. Home Secretary, Government of Haryana. The receipt was sought to be denied. The petitioner in its replication has filed proof of receipt dated 13.09.2013 (Annexure P-2/3).

Learned counsel for respondent No.1 has filed an affidavit in Court today in pursuance of the last order fairly conceding that the notice was received but clarifying that there appears to be slip-up in the office qua putting up the same.

The stand of learned counsel for the petitioner is that the named Arbitrator having failed to act, an Arbitrator ought to be appointed by this Court in view of judgment of the Hon'ble Supreme Court in case **Deep Trading Company Vs. Indian Oil Corporation and others 2013(4) Supreme Court Cases 35**, where it is held that in such a situation, a person other than the named Arbitrator can be appointed.

Learned counsel for respondent No.1 seeks to contend that the power had been exercised for termination of the contract as per clause 6.25 as the respondents have the right to terminate the contract 'forthwith' in the eventualities which may arise as specified in the clause. He submits that such an eventuality had arisen as according to the respondents the petitioner had played a fraud upon the respondents by giving incorrect information and making misrepresentation. He further submits that the petitioner had approached the learned District Judge by filing an application under Section 9 of the said Act where findings have been given against the petitioner qua these aspects.

On hearing learned counsels for the parties, I am of the view that the aforesaid plea cannot defeat the right of the petitioner to claim arbitration. There can be claims and counter claims including qua the factual matrix. There has to be a forum to determine the same. The process of arbitration is one such forum where there is a chosen Judge to adjudicate upon the disputes *inter-se* the parties rather than the Civil Court determining the disputes. On query, learned counsel for respondent No.1 has not been able to point out as to how, as per plain reading of Clause 6.28 being Arbitration Clause, could there have been an exception in case there is termination in exercise of the powers under clause 6.25. Further, the observations made on an application under Section 9 of the said Act are always prime-facie in nature, as the provision is akin to Order 39 Rules 1 and 2 of the Code of Civil Procedure, 1908. The aforesaid being the position, it is not for this Court to determine whether what has been alleged against the petitioner is correct or not and what are the consequences thereof, whether the agreement has been validly terminated or not and whether any of the parties have any further claims against each other. It is for the Arbitrator to determine the same. The termination of the agreement does not mean that the arbitration clause comes to an end as the validity of the termination is to be determined under the Arbitration Clause.

As far as the named Arbitrator is concerned, it has already been noticed that having been called upon to act and having failed to act after receipt of the notice, he has lost the right to conduct himself as the named Arbitrator in the arbitration proceedings and thus this Court would be well within its rights to appoint an Arbitrator at the request of the petitioner in place of the named Arbitrator.

The result of the aforesaid is that the present petition is allowed. Justice Permod Kohli, retired Chief Justice of Sikkim High Court, # 22, Ist Floor, Sant Nagar, East of Kailash, New Delhi, is appointed as sole Arbitrator to enter upon the reference and adjudicate the disputes inter-se the parties. It is agreed that the arbitration be conducted under the aegis of Chandigarh Arbitration Centre and the Rules and Procedure including of fee and expenses would accordingly apply.

Parties are left to bear their own costs.

A copy of this order be sent to the Arbitration Centre as well as to the Arbitrator.

**04.04.2014**  
'ravinder'

(SANJAY KISHAN KAUL)  
CHIEF JUSTICE