

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

ARB-284-2016 (O&M)

Reserved on:- 23.03.2018

Date of decision:- 26.03.2018

MLGC-ECC-VIPL (Joint Venture)

...Petitioner(s)

Versus

Housefed, Punjab, The Punjab State Federation of
Cooperative House Building Societies Ltd. and another

...Respondents

CORAM: HON'BLE MR. JUSTICE S.J. VAZIFDAR, CHIEF JUSTICE

Present:- Mr. Sunil Chadha, Senior Advocate,
with Ms. Swati Verma, Advocate,
for the petitioners.

Mr. Nikhil Handu, Advocate,
for the respondents.

* * * *

S.J. VAZIFDAR, C.J.

This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short the Act) for the appointment of an arbitrator.

2. The respondents issued a tender for the construction of 96 flats. The same was awarded to the petitioners. The parties entered into a contract. The terms and conditions of the Notice Inviting Tender (NIT) and the General Conditions of Contract were incorporated in the contract. Clause 25A of the General Conditions of Contract contains an arbitration clause which in so far as it is relevant to this petition reads as under:-

"25A. Dispute Resolution

d. All disputes or differences in respect of which the decision is not final and conclusive as herein provided

shall, at the request of either party made through registered communication, be referred to the sole arbitration of the Managing Director HOUSEFED acting as such at the time of the reference.....

f. The provisions of the Arbitration and Conciliation Act 1996 or any other statutory enactment there-under or modification thereof and for the time being in force shall apply to the arbitration proceeding under this clause."

It would be convenient at this stage to also refer to clause 4 of the General Conditions of Contract which reads as under:-

"4. Compensation for Delay

Time shall be the essence of the contract and the time period of the contract shall be strictly adhered to by the parties. The contractual time period shall be reckoned from the date mentioned as such on the letter of acceptance issued to the successful tenderer, who shall pursue it with all due diligence, so as to achieve progress of work to meet the contractual mile stones listed below:-

(i) Upon lapse of 25% contractual time : 20% of work to be completed.

(ii) Upon lapse of 50% contractual time : 50% of the work to be completed.

(iii) Upon lapse of 75% contractual time : 80% of the work to be completed.

(iv) Upon lapse of full contractual time : 100% of the work to be completed.

Notwithstanding the issue of prior notice in this regard the contractor shall become liable to pay as liquidated damages an amount upto one percent of the contract cost or such lesser amount that the Engineer-in-

charge may levy for every week or part thereof that the work remains uncompleted after ten days of the issue of the letter of acceptance, and/or the proportionate progress of work stated above is not achieved or the work remains unfinished after the stipulated date of completion. In the event of continued default in terms of shortfall in progress, the Engineer-in-charge may enhance the levy of liquidated damages prospectively each time limited to one percent of the amount of work in default, subject to a maximum limit of five percent of the contract cost.

The Managing Director HOUSEFED Punjab may upon representation from the contractor and after hearing both the parties i.e. Engineer-in-charge and contractor, reduce the amount of liquidated damages and his decision in writing shall be final and binding on both the parties."

3. The Government of India, National Institution for Transforming India (NITI Aayog) issued an office memorandum dated 05.09.2016. Clause 2.1 thereof states that in contracts where the process of arbitration is initiated under the pre-amended Act, the PSUs/Departments may seek the consent of the contractors/concessionaires to transfer pending cases under the amended Act wherever possible as this was expected to make the arbitration process more cost effective and help in settling the disputes in a timely manner. The petitioners by a letter dated 23.09.2016 requested the respondents for transferring their pending cases from the purview of the un-amended Act to the purview of the amended Act. The respondents by their response dated 27.09.2016 did not accept the petitioners' contention.

4. The erstwhile arbitrator on 21.11.2016 passed the following order:-

\Order

Today Sh. Nikhil Handhu, Advocate on behalf of S.E. Housefed and Sh. Anjum Garg of M/s MLGC-ECC-VIPL (JV) were present. The issue regarding Deposit at Call @ 10% of claim amount/counter claim amount was discussed in detail. Both the parties argued for the matter. After listening both the parties and in the interest of natural justice, both the parties i.e. S.E. Housefed and M/s MLGC-ECC-VIPL (JV) are exempted to deposit the amount of Deposit at Call.

So far as the letter No. Nil dated 23.09.2016 submitted by M/s MLGC-ECC-VIPL (JV) is concerned vide which they have requested to transfer the ongoing arbitration matter to the new Act. Both the parties argued on the matter. In view of the letter issued by NITI Aayog and request made by the agency, after listening both the parties and in the interest of natural justice, now therefore this case is adjourned sine die and both the parties may obtain the order for further arbitration proceeding from competent Court/Authority and the parties remained failed to do so the proceeding of this case shall be considered after 15th February, 2017. I hereby relinquish my charge for further order from Court/Authority till 15.02.2017."

(emphasis supplied)

5. Mr. Chadha's contention that the arbitrator relinquished charge absolutely is not well founded. The order read as a whole clearly indicates that the arbitrator merely deferred the matter pending any order of a Court. The word "relinquish" cannot be read by itself. In the last sentence for instance, the arbitrator stated that he relinquished his charge for further order from the Court/authority till 15.02.2017. It

is clear, therefore, that the arbitrator merely awaited an order from the Court. The matter, however, does not end here.

6. If the amended Act applies, the Managing Director or his nominee could not be appointed as the arbitrator and it would be incumbent upon me to appoint an independent arbitrator. In view of the facts of the present case, it would not be permissible for the respondents' Managing Director to act as the arbitrator. It is, therefore, not necessary to consider whether the amended Act applies or not. I will for the purpose of this judgement presume that the Act as it stood prior to the amendment thereof applies to the present case despite clause 25 A(f) which makes applicable any statutory enactment thereunder or modification thereof and the Government of India's Office Memorandum dated 05.09.2016.

7. The erstwhile Managing Director of the respondents one H.S. Sidhu was admittedly appointed as an arbitrator. The said H.S. Sidhu having been transferred, his successor in office was appointed as an arbitrator in his place. It is true that there was no application for the removal of the earlier Managing Directors on any ground including on the ground that they were biased and prejudiced or on the ground that they were not entitled to act as arbitrators. That as I will shortly indicate will not bar the petitioners from raising the contention in this petition.

8. The petition was filed on 21.12.2016. The respondents stated that one Ms. Apneet Riyait, was presently exercising the powers as a Managing Director of the respondents as delegated by the respondents' Chairman. The respondents stated that the acting Managing Director would act as an arbitrator. Pursuant to an order dated 09.03.2018, the acting Managing Director has filed an affidavit stating that so far she has not dealt with

the matter which is the subject matter of the present petition and that she would not be prejudiced by any of the orders passed by the previous Managing Directors of the respondents in the matter.

9. The question is whether the acting Managing Director ought to be permitted to act as an arbitrator in the matter.

10. As I noted earlier, the petitioners did not object to the earlier Managing Directors acting as arbitrators. The grounds now raised to oppose the present Managing Director from acting as an arbitrator were available even against the previous Managing Directors. This, however, in my view, ought not to preclude the petitioners from raising the contention that the present Managing Director ought not to act as an arbitrator. No prejudice is caused to the respondents in this case. Admittedly, only the statement of claim and the reply and a counter-claim thereto have been filed by the parties. The appointment of an independent arbitrator would, therefore, not prejudice the parties in any manner whatsoever. Even the present acting Managing Director is new to the matter.

11. The question is whether the petitioners have made out a ground for the appointment of an independent arbitrator.

In my view, the present acting Managing Director ought not to act as an arbitrator for more than one reason.

12. The previous Managing Director H.S. Sidhu had even before he entered upon reference passed an order which clearly dealt with the disputes between the parties in the reference under clause 4 which are set out earlier. The concluding part of clause 4 set out earlier entitles the Managing Director not as an arbitrator, but as the Managing Director to consider this issue.

The order stated that the petitioners had committed a breach of the contract and that the liquidated damages were rightly imposed by the respondents under clause 4. The concluding part of the previous Managing Director's order dated 18.12.2015 reads as under:-

"10. In the light of the above mentioned, all the averments raised by the contractor to assail the levy of liquidated damages are dismissed. The action of HOUSEFED in levying liquidated damages is adjudged as being correct in the light of the various provisions of the contract.

D. Decision

1. The levy of liquidated damages by HOUSEFED has been correctly done, based on the clause-4 of the contract agreement and on the basis of factual position. Hence the appeal of the agency is dismissed.

2. The request of the contractor to deposit the sum as in the form of fixed deposit pending Court enquiry is rejected since there is no such provision under the contract and in any case the undersigned is of the considered opinion that the levy of liquidated damages by HOUSEFED is sustainable.

3. The interest levied by HOUSEFED is legally valid and the undersigned does not see any reason to interfere with the same.

4. Since the levy of liquidated damages is upheld, there arises no question of ordering HOUSEFED to return the amount deducted, if any, to the contractor.

This order disposes off the representation dated 06.02.2014 filed by the contractor. A copy of this order is supplied to both the parties."

(emphasis supplied)

The previous Managing Director, therefore, clearly could not have been appointed as an arbitrator in view of the orders of the Supreme Court in *Denel (Proprietary Limited) Vs Bharat Electronics Ltd. and another* 2010(6) SCC 394 and the orders of this Court in *Vinod Kumar Angi Vs Punjab Water Supply and Sewerage Board, 1-B, Sector 27-A, Chandigarh and others* 2011(3) RCR (Civil) 171 and *M/s Great Indian Nautanki Company Private Ltd. Vs Haryana Urban Development Authority and others* 2015 SCC Online (P&H) 9616.

13. The present acting Managing Director has indeed filed an affidavit dated 22.03.2018 stating that she would not be prejudiced by any of the orders passed by the previous Managing Directors. That, however, would make no difference. The present Managing Director does not sit in appeal over the orders of the previous Managing Directors. The affidavit does not state that the order passed by the erstwhile Managing Director on the petitioners' application under clause 4 of the contract ceases to have effect.

14. That it would be difficult for the acting Managing Director to take a totally independent view of the matter is also established by the fact that an FIR was filed by the respondents with respect to the present contract. Pursuant thereto, charges have been framed and the proceedings are pending. It is not even suggested that the allegations and contentions contained therein are incorrect. This is understandably so. It would be difficult, if not impossible, for the acting Managing Director to come to the conclusion that the contents thereof are false or even incorrect.

15. Moreover, there is no Managing Director as on date. Ms. Apneet Riyait is only exercising the powers of the Managing

Director. It is doubtful whether a reference to the acting Managing Director is contemplated under clause 25A.

16. Moreover, there is no certainty as to when the new Managing Director would be appointed. Ms. Apneet Riyait is already the third arbitrator. Presumably, a full time Managing Director would soon be appointed and that would lead to the appointment of the fourth arbitrator. That defeats the very purpose of the arbitration agreement.

17. In these circumstances, the petition is disposed of by appointing Mr. Justice N.K. Sodhi, former Chief Justice of the Karnataka High Court, as the sole arbitrator.

(S.J. VAZIFDAR)
CHIEF JUSTICE

26.03.2018

Amodh

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|---------------------------|---------|
| Whether speaking/reasoned | √Yes/No |
| Whether reportable | √Yes/No |