
(2019) 01 SHI CK 0023
In the High Court Of Himachal Pradesh
Case No : Arbitration Case No. 67 Of 2018

Five Star Builders

APPELLANT

Vs

State of Himachal Pradesh And Others

RESPONDENT

Date of Decision : 09-01-2019

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(8) 12, 14, 15, 23, 29A

Citation : (2019) 01 SHI CK 0023

Hon'ble Judges : Sandeep Sharma, J

Bench : Single Bench

Advocate : Parmod Negi, S.C. Sharma, Dinesh Thakur, Sanjeev Sood, Amit Kumar

Final Decision : Allowed

Judgement

Sandeep Sharma, J.

1. By way of present petition filed under Ss. 14 and 15 of the Arbitration and Conciliation Act, 1996, prayer has been made on behalf of the petitioner for terminating the mandate of the arbitrator and for appointment of an independent and impartial arbitrator to adjudicate the dispute inter se parties.

2. Undisputed facts, as emerge from the record are that the petitioner-Firm, which is an 'A' class contractor, registered with the Himachal Pradesh Public Works Department, was awarded work namely, Oi) C/o Tikkari to Kitorwari/Kawar road (Portion Larot to Chansel Pass Km. 11/375 to 30/00) package No. HP-09-59 A. and (ii) C/o Tikkar to Kitorwari/Kawar road (Portion Chansel Pass to Dodra Km. 30/00 to 49/500) Package No HP-09-59 B., vide award letter dated 26.4.2006 for a sum of `2,98,15,082/- and time for completion of the work was twelve working months (six months in each year). However, the fact remains that certain disputes arose inter se parties and as such, matter came to be referred to Engineer-in - Chief, HPPWD, Shimla-2, under Clause 24.3 of the Agreement, who subsequently, vide letter dated 18.6.2015, appointed

Superintending Engineer, Arbitration Circle, HPPWD Solan, as the sole arbitrator to decide and make his award regarding claims/disputes submitted by the contractor qua the work awarded to it. Copy of letter dated 18.6.2015 is annexed as Annexure P-1. Learned Arbitrator so appointed by the Engineer-in-Chief entered upon reference on 17.6.2015 and fixed date of preliminary hearing on 9.9.2015, whereafter, claimant and respondents filed statement of claim and reply, respectively, in the year 2015 itself. During pendency of the proceedings before the learned arbitrator, claimant preferred an application laying therein challenge to the jurisdiction of the arbitral tribunal to adjudicate upon the counter claims, which were never raised before the competent authority, as per requirement of contract (Annexure P-2). However, the fact remains that such application was never decided by the learned arbitrator and matter came to be repeatedly adjourned by the learned arbitrator on one pretext or the other. Claimant has specifically averred in the petition that since the time, arbitrator has entered upon reference, matter is being adjourned by him, on one ground or the other without any substantial progress in the case. Claimant has alleged that the arbitrator has not concluded hearing of even a single claim in the last more than three years, and dates are being given by the learned arbitrator after three months, thereby entire purpose of resolving the dispute in a speedy manner by arbitration, has been defeated. Petitioner has further submitted that the learned arbitrator has been appointed by the respondents on whole-time basis to adjudicate the disputes, like the present one, however, due to the unpragmatic approach of the learned arbitrator, matter has been delayed for almost three years, since the time, arbitrator entered upon reference, as such, very purpose of resolving dispute through speedy arbitration has been defeated. By way of petition, petitioner has prayed that the mandate of the learned arbitrator is liable to be terminated in view of the matter, in which proceedings are being conducted for the last three years, without any substantial progress. Petitioner has further averred that in view of the amendment to Section 12 of the Arbitration and Conciliation Act, wherein it has been provided that an arbitrator should disclose in writing, circumstances, which are likely to affect his ability to devote sufficient time to arbitration and in particular his ability to complete the entire proceedings within a period of twelve months., mandate of the arbitrator appointed in the instant proceedings deserves to be terminated. Petitioner has further stated in the petition that in view of the amended provisions of S.12 of the Act *ibid*, learned arbitrator i.e. Superintending Engineer, Arbitration Circle, HPPWD, Solan is not legally competent to decide the matter since the proceedings have been delayed for over three years.

3. Respondents, by way of reply, have refuted the claim set up by the petitioner and stated that no ground for terminating the mandate of the learned arbitrator has been made out by the petitioner in the petition. It has been further stated in the reply that appointment of arbitrator was agreed upon by the petitioner and now it can not seek termination of mandate of the learned arbitrator without any ground, as provided in the Act *ibid*. Averments with regard to proceedings being

delayed unnecessarily by the learned arbitrator, have been also denied by way of reply by the respondents. It has been stated by the respondents that dates of proceedings are being given on the choice of the parties, with their consent and as such, learned arbitrator can not be accused for any delay in the conclusion of the proceedings. Petitioner, at no point in time, raised issue with regard to delay being caused in the proceedings, rather, petitioner itself is guilty of causing delay in conclusion of the proceedings by the learned arbitral tribunal, appointed with its consent. Respondents have further stated that since the Superintending Engineer, Arbitration Circle,, Solan, came to be appointed as an arbitrator prior to coming into force of the provisions of S.12 of the amending Act, same are not applicable to the present case, as such, petitioner can not take any advantage on the basis of amended provisions of the Act *ibid*.

4. I have heard the learned counsel for the parties and gone through the record carefully.

5. Having heard the learned counsel for the parties and perused material available on record, this court finds that the Superintending Engineer, Arbitration Circle, HPPWD, Solan, came to be appointed as sole arbitrator to decide the dispute inter se parties vide Annexure P-1. It is also not in dispute that he entered into reference on 17.6.2015. Very purpose and object of arbitration is to provide speedy justice and as such, it is always expected from the arbitrator so appointed in terms of the agreement entered inter se parties to conclude the proceedings expeditiously, without wasting much time. Though, now as per amended provisions of the S.12 of the Act *ibid*, entire proceedings are required to be completed within a period of twelve months, but time for making award can be further extended with the consent of the parties, but, in the case at hand, pleadings adduced on record by the respective parties reveal that no headway has been made by the learned arbitrator appointed by the Engineer-in-Chief, HPPWD, pursuant to agreement inter se parties, rather, matter has been repeatedly adjourned, on one pretext or the other. Allegations contained in the petition that till date, learned arbitrator has not concluded hearing on even a single claim for the last three years, have not been specifically denied by the respondents, which certainly compels this court to infer that the learned arbitrator so appointed in terms of the provisions contained in the agreement, has become *de jure* or *de facto* unable to perform his functions and he has failed to act without undue delay.

6. At this stage, it would be profitable to take note of Ss.14 and 15 of the Act *ibid*, which provide as follows:

"14. Failure or impossibility to act.-

(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if-

(a) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

15. Termination of mandate and substitution of arbitrator.-

(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate-

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

7. Careful perusal of aforesaid provisions of the Act *ibid*, clearly provide that mandate of an arbitrator shall terminate in case, he fails to act without undue delay. Aforesaid provisions of law further provide that where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

8. In the case titled *Union of India and Ors. v. Uttar Pradesh State Bridge Corporation Limited*, (2015) 2 SCC 52, the Hon'ble Apex Court has held as under:-

11. At this stage, we may take note of the scheme of the Act as well, by noticing those provisions which would be attracted to deal with such a situation. Relevant provisions are extracted below for ready reference:

"14. Failure or impossibility to act.-(1) The mandate of an arbitrator shall terminate if-

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of Section 12.

15. Termination of mandate and substitution of arbitrator.-(1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate-

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the Arbitral Tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the Arbitral Tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the Arbitral Tribunal.

32. Termination of proceedings.-(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the Arbitral Tribunal under subsection (2).

(2) The Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings where-

(a) the claimant withdraws his claim, unless the respondent objects to the order and the Arbitral Tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the Arbitral Tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to Section 33 and sub-section

(4) of Section 34, the mandate of the Arbitral Tribunal shall terminate with the termination of the arbitral proceedings." (emphasis supplied)

12. As is clear from the reading of Section 14, when there is a failure on the part of the Arbitral Tribunal to act and it is unable to perform its function either de jure or de facto, it is open to a party to the arbitration proceedings to approach the court to decide on the termination of the mandate. Section 15 provides some more contingencies when mandate of an arbitrator can get terminated. In the present case, the High Court has come to a categorical finding that the Arbitral Tribunal failed to perform its function, and rightly so. It is a clear case of inability on the part of the members of the Tribunal to proceed in the matter as the matter lingered on for almost four years, without any rhyme or justifiable reasons. The members did not mend their ways even when another life was given by granting three months to them. Virtually a peremptory order was passed by the High Court, but the Arbitral Tribunal remained unaffected and took the directions of the High Court in a cavalier manner. Therefore, the order of the High Court terminating the mandate of the Arbitral Tribunal is flawless. This aspect of the impugned order is not even questioned by the appellant at the time of hearing of the present appeal. However, the contention of the appellant is that even if it was so, as per the provisions of Section 15 of the Act, substitute arbitrators should have been appointed "according to the rules that were applicable to the appointment of the arbitrator being replaced". On this basis, it was the submission of Mr Mehta, learned ASG, that the High Court should have resorted to the provision contained in Clause 64 of GCC.

13. No doubt, ordinarily that would be the position. The moot question, however, is as to whether such a course of action has to be necessarily adopted by the High Court in all cases, while dealing with an application under Section 11 of the Act or is there room for play in the joints and the High Court is not divested of exercising discretion under some circumstances? If yes, what are those circumstances? It is this very aspect which was specifically dealt with by this Court in *Tripple Engg. Works*. Taking note of various judgments, the Court pointed out that the notion that the High Court was bound to appoint the arbitrator as per the contract between the parties has seen a significant erosion in recent past. In paras 6 and 7 of the said decision, those judgments wherein departure from the aforesaid "classical notion" has been made are taken note of. It would, therefore, be useful to reproduce the said paragraph along with paras 8 and 9 hereinbelow: (SCC pp. 291-93)

"6. The 'classical notion' that the High Court while exercising its power under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter for short 'the Act') must appoint the arbitrator as per the contract between the parties saw a significant erosion in *ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.* 2007 5 SCC 304, wherein this Court had taken the view that though the contract between the parties must be adhered to, deviations therefrom in

exceptional circumstances would be permissible. A more significant development had come in a decision that followed soon thereafter in *Union Of India v. Bharat Battery Manufacturing Co. (P) Ltd.* 2007 7 SCC 684 wherein following a three-Judge Bench decision in *Punj Lloyd Ltd. v. Petronet Mhb Ltd.* *Punj Lloyd Ltd. v. Petronet Mhb Ltd.*, 2006 2 SCC 638, it was held that once an aggrieved party files an application under Section 11(6) of the Act to the High Court, the opposite party would lose its right of appointment of the arbitrator(s) as per the terms of the contract. The implication that the Court would be free to deviate from the terms of the contract is obvious.

7. The apparent dichotomy in *ACE Pipeline and Bharat Battery Mfg. Co. (P) Ltd.* was reconciled by a three-Judge Bench of this Court in *Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd.* *Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd.*, 2008 10 SCC 240, wherein the jurisdiction of the High Court under Section 11(6) of the Act was sought to be emphasised by taking into account the expression 'to take the necessary measure' appearing in subsection (6) of Section 11 and by further laying down that the said expression has to be read along with the requirement of sub-section (8) of Section 11 of the Act. The position was further clarified in *Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.* 2009 8 SCC 520 Para 48 of the Report wherein the scope of Section 11 of the Act was summarised may be quoted by reproducing sub-paras (vi) and (vii) hereinbelow: (*Indian Oil case*, SCC p. 537)

'48.(vi) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded, ignore the designated arbitrator and appoint someone else.'

8. The above discussion will not be complete without reference to the view of this Court expressed in *Union Of India v. Singh Builders Syndicate* *Union Of India v. Singh Builders Syndicate*, 2009 4 SCC 523, wherein the appointment of a retired Judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that the arbitration proceedings had not concluded for over a decade making a mockery of the process. In fact, in para 25 of the Report in *Singh Builders Syndicate* this Court had suggested that the Government, statutory authorities and government companies should consider phasing out arbitration clauses providing for appointment of serving officers and encourage professionalism in arbitration.

9. A pronouncement of late in *Deep Trading Co. v. Indian Oil Corpn.* 2013 4 SCC 35 followed the legal position laid down in *Punj Lloyd Ltd.* which in turn had followed a two-Judge Bench decision in *Datar Switchgears Ltd. v. Tata Finance*

Ltd. 2000 8 SCC 151 The theory of forfeiture of the rights of a party under the agreement to appoint its arbitrator once the proceedings under Section 11(6) of the Act had commenced came to be even more formally embedded in Deep Trading Co. subject, of course, to the provisions of Section 11(8), which provision in any event, had been held in Northern Railway Admn. not to be mandatory, but only embodying a requirement of keeping the same in view at the time of exercise of jurisdiction under Section 11(6) of the Act."

(emphasis in original)

9. It is quite apparent from the aforesaid exposition of law that when there is failure on the part of the Arbitral Tribunal to act and it is unable to perform its function either de jure or de facto, it is open to a party to the arbitration proceedings to approach the court to decide on the termination of the mandate. Section 15 provides some more contingencies when mandate of an arbitrator can be terminated. In the case at hand, it is quite apparent that Arbitral Tribunal failed to perform its functions and as such, prayer made in the instant application for termination of mandate and to appoint new arbitrator deserves to be accepted.

10. Though, in the instant case, it is an admitted fact that the Superintending Engineer, Arbitration Circle, HPPWD, Solan, was appointed as an arbitrator prior to amendment to S.12 of the Act *ibid*, but as has been observed above, Arbitrator appointed by the aforesaid authority failed to act without undue delay and as such, prayer made in the instant application for appointment of an impartial and independent arbitrator deserves to be accepted. Otherwise also, perusal of S. 14 of the Act *ibid*, already reproduced herein above, suggests that, in the event of failure or impossibility to act, mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay.

11. In the case at hand, respondents have failed to rebut the allegations levelled by the petitioner that the learned arbitrator has failed to conclude hearing even on a single claim despite period of three years having elapsed after the learned arbitrator entered into reference. This court is in agreement with the contentions raised on behalf of the petitioner that the learned arbitrator so appointed by the respondents is not able to devote sufficient time for arbitration and he is not able to complete the arbitration proceedings within a reasonable time and as such, mandate of the learned arbitrator deserves to be terminated.

12. Consequently, in view of aforesaid detailed discussion as well as law laid down by the Hon'ble Apex Court *supra*, instant petition is allowed and order dated 3.6.2015 (Annexure P-1), whereby Superintending Engineer, Arbitration Circle, HPPWD, Solan came to be appointed as an arbitrator, is quashed and set-aside and with the consent of the learned counsel representing the parties, Shri N.K. Thakur, Senior Advocate, HP High Court, Shimla, is appointed as an

arbitrator to adjudicate the dispute inter se parties. His consent/declaration under Section 11(8) of the Arbitration & Conciliation Act has been obtained. He has no objection to his appointment as an arbitrator in the present matter. He is requested to enter into reference within a period of two weeks from the date of receipt of a copy of this order. It shall be open to the Arbitrator to determine his own procedure with the consent of the parties. Otherwise also, entire procedure with regard to fixing of time limit for filing pleadings or passing of award stands prescribed under Sections 23 and 29A of the Act.

13. Needless to say, award shall be made strictly as per provisions contained in Arbitration & Conciliation Act. A copy of this order shall be made available to the learned arbitrator named above, by the Registry of this court