
(2014) 06 SHI CK 0156
In the High Court Of Himachal Pradesh
Case No : Arb. Case No. 31 of 2014

Madhava Hytech Engineers Pvt. Ltd.

APPELLANT

Vs

N.K. Bahri

RESPONDENT

Date of Decision : 02-06-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 12, 13, 13(2), 34, 9

Citation : (2014) 2 ShimLC 1006

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Advocate : Seema K. Guleria and Mr. N. Raja Raman, Advocate for the Appellant

Final Decision : Dismissed

Judgement

Rajiv Sharma, J.—Pertinent facts necessary for the adjudication of this petition are that the petitioner's bid dated 19.9.2007 for execution of the work "construction of High Level Bridge including approaches at Km. 45/370 on PCM road NH-20 (Dehri Khad Bridge) in H.P." for the contract price of Rs. 7,48,47,682/- was accepted vide letter dated 17.4.2008. The work was awarded to the petitioner on 7.5.2008. The work was to be executed within two years, i.e. 7.5.2010. The work was terminated by invoking clause 59 of contract agreement No. 13 for 2008-09 for fundamental breach of the contract by the Executive Engineer, National Highway Division, HP PWD Joginder Nagar on 18.4.2013. The petitioner invoked arbitration clause for appointment of an Arbitrator as per the agreement. The Chief Engineer (National Highway), HP PWD, Shimla on 8.5.2013 appointed K.R. Singh, Engineer-in-Chief (Retd.) as one of the Arbitrators. The petitioner also appointed Pawan Kumar, Chief Engineer, (Retd.) CPWD, New Delhi as an Arbitrator. Both the Arbitrators chose N.K. Bahri as third Arbitrator and also to act as Presiding Arbitrator. The arbitral tribunal was constituted vide letter dated 5.7.2013.

2. According to the petitioner 1st and 2nd hearings of the case went smoothly. However, N.K. Bahri, respondent No. 1, on 3rd hearing used harsh words and

tried to subdue the counsel appearing on behalf of the petitioner. Petitioner's counsel was not permitted to make detailed submissions on preliminary objections by respondent No. 1. Respondent No. 1 on 4th hearing even said that "AAP KAAM CHODAKE BHAGNA NAHI CHAIYE THA". On 5th hearing at Dharamshala, when the counsel for the petitioner was cross-examining witness No. 1, P.C. Katoch, he did not understand and asked the petitioner's counsel to clarify the question put to him. When the petitioner's counsel tried to explain the question to the witness, immediately respondent No. 1 in harsh tone and in a manner to overawe the petitioner's counsel observed that the witness did not need any clarification. The petitioner's counsel was not able to put full questionnaire to the witness. On 6th hearing, respondent No. 1 made certain observations against the petitioner. According to the petitioner, the observations made hereinabove by respondent No. 1 show the bias attitude of respondent No. 1 towards the petitioner. According to the petitioner, respondent No. 1 was not independent and impartial.

3. The petitioner filed an application on 18.4.2014 before the Arbitral Tribunal seeking removal of respondent No. 1 by invoking Section 13(2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act" for the sake of convenience).

4. According to Ms. Seema K. Guleria and Mr. N. Raja Raman, learned Advocates, no decision has been taken by the Arbitral Tribunal on this application till date.

5. Sub-section (3) of Section 12 of the Act reads as under:-

(3) An arbitrator may be challenged only if -

a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

b) He does not possess the qualifications agreed to by the parties.

6. The procedure to challenge an Arbitrator is provided u/s 13 of the Act. As per sub-section (2) of Section 13 of the Act, failing any agreement referred to in sub-section (1), a party who intends to challenge the appointment of an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal. Sub-section (3) of Section 12 provides that unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

7. In the instant case, the petitioner has made statement of reasons as per sub-section 2 of Section 13 of the Act before the Arbitral Tribunal vide Annexure P-14 dated 18.4.2014. The Arbitral Tribunal has to decide on the challenge as per sub-section (3) of the Section 13 of the Act.

8. As per sub-section (4) of Section 13 of the Act, if a challenge under any

procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. The petitioner was required to wait for decision of the Arbitral Tribunal instead of rushing to this Court by invoking Section 9 of the Act.

9. The instances, quoted hereinabove, by the petitioner to show that respondent No. 1 was biased, are not borne out from the record. There is no tangible and convincing evidence on record to show that respondent No. 1 was not independent and impartial. The Presiding Arbitrator is bound to put queries to the learned Advocates appearing on behalf of the parties and the witnesses. The Presiding Arbitrator is to control the evidence. He cannot remain mute spectator during the proceedings. It is also made clear, by way of an abundant precaution that where an arbitral award is made under subsection (4) of Section 13 of the Act, the party challenging the appointment of an arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34 and not by invoking section 9 of the Act.

10. Accordingly, in view of the observations and analysis made hereinabove, there is no merit in the petition and the same is dismissed with costs quantified at Rs. 25,000/-. Pending application(s), if any, also stand dismissed. No costs.