

(2019) 10 RAJ CK 0058

In the Rajasthan High Court

Case No : Arbitration Application No. 102 Of 2018

M/s Hari Narayan Khandelwal

APPELLANT

Vs

Secretary, Indian Institute Of Chartered Accountants Of India
And Ors

RESPONDENT

Date of Decision : 04-10-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 11(6)

Citation : (2019) 10 RAJ CK 0058

Hon'ble Judges : Alok Sharma, J

Bench : Single Bench

Advocate : Devidutt Sharma, Ankit Sareen, Hemant Kothari

Final Decision : Allowed

Judgement

The case of the applicant in this application under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act of 1996') is that work order dated 24.9.2014 was issued to it under a contract for construction of Centre of Excellence Phase - I at Chosala Village, Chaksu Tehsil, Jaipur. In terms of the general conditions of contract Clause 1.57 provided for arbitration. The clause reads as under:-

1.57 Arbitration:- In the event of any dispute in the interpretation of the terms and conditions of this contract/agreement or difference of opinion between the parties of any point in the order/contract arising out of or in connection with the agreement/accepted order/contract or with regard to performance of any obligation hereunder by either party, the parties hereto shall use their best efforts to settle such disputes or difference of opinion amicable by mutual negotiations. In case no agreement is reached, either party may forthwith give to the other, a notice in writing of the existence of such question, dispute or difference of opinion and the same shall be referred to the arbitration. Each party shall nominate one arbitrator and the two nominated arbitrators shall nominate a Presiding Officer. In case of difference between the two arbitrators, the matter

shall be referred to the Presiding Officer for resolution.

The Arbitration and Conciliation Act, 1996 and any statutory modification or re-enactment thereof, shall apply to these arbitration proceedings. Arbitration proceedings will be held at Jaipur and the language of the arbitration proceeding and that of all document and communications between the parties shall be in English. The decision of the arbitrator shall be final and binding upon both the parties. All arbitration awards shall be in writing and shall state the reasons for the award. The expenses of the arbitrator as determined by the arbitrator shall be shared equally by the parties. However, the expenses incurred by each party in connection with the preparation, presentation shall be borne by the party itself.

It has been submitted that the applicant successfully executed the contracted work albeit with some delay as evident from the work completion certificate dated 5.4.2018 issued by the architects nominated as per the technical bid i.e. Vivek Bhole Architects Pvt. Ltd. It has been submitted that certain disputes with regard to the non-payment of amounts under the final bills as also other due amounts and non-release of bank guarantee for the amount of Rs.1,32,66,135/- have arisen between the parties to the contract and not resolved amicably despite best efforts. Hence vide notice dated 16.5.2018, the applicant invoked the arbitration clause i.e. Clause 1.57 of the General Conditions of Contract and appointed one G.P. Sharma, Former Chief Engineer of PWD, Rajasthan (Retd.) as its nominee arbitrator. Despite receipt of the said notice the non-applicant-Indian Institute of Chartered Accountants has not nominated its arbitrator as required in the process for the formation of an Arbitral Tribunal under Clause 1.57 of the General Conditions of the Contract. In the circumstance the agreed procedure for appointment of the Arbitral Tribunal having failed, this application under Section 11 (6) of the Act of 1996 has been filed. It has been submitted that the court therefore appoint an arbitrator in terms of the arbitration agreement between the applicant and the non-applicant to resolve/ adjudicate the dispute arising out of and relating to the contract between the parties.

Reply to the application has been filed by the non-applicant Indian Institute of Chartered Accountants. It has been submitted that there is no dispute can be said yet arisen between the applicant and the non-applicant inasmuch as the recommendations with regard to the computation of delay in execution of work at the instance of the applicant as evident from the completion certificate dated 5.4.2018 has not been issued by the architect nominated under the contract between the parties. The work was to be completed as per the agreement on 3.4.2016. Yet it was completed only on 30.6.2017. The non-applicant cannot in the circumstance ascertain liquidated damages to be charged and adjusted against the amounts claimed by the applicant. And in the absence thereof the amounts finally, if at all, payable to the applicant cannot be ascertained. Hence neither any payment as allegedly due to the applicant can be made nor the bank guarantee released.

Heard. Considered.

From the facts on record, it is apparent that Clause 1.57 of the general conditions of contract between the applicant and the non-applicant provides for an arbitration between the applicant and the non-applicant in the event of any dispute arising from or in relation thereof obtains and has not been amicably resolved. Attempts of the amicable settlement of disputes between the parties have not been successful as is even otherwise evident from the reply to this application. Admittedly, notice for appointment of an arbitrator in terms of Clause 1.57 of the Conditions of Contract was also issued on 16.5.2018 by the applicant having nominated its arbitrator as provided for but remained unresponded to by the non-applicant inasmuch it did not nominate its arbitrator resulting in the agreed procedure for appointment of an Arbitral Tribunal under Clause 1.57 of the General Conditions of Contract having failed. Disputes as recorded above between the parties relating to the contract between them having arisen, this court has to exercise its jurisdiction under Section 11 (6) of the Act of 1996 and appoint an arbitrator.

Therefore this application deserves to be allowed. Hon'ble Mr. Justice Mahesh Bhagwati (Retd.) L-44 Sukhshanti, Income-Tax Colony Durgapura, Jaipur (94141-60666) is appointed as the sole arbitrator to adjudicate all disputes/ differences between the parties arising out of and relating to the work order/ contract dated 24.9.2014. Both the applicant and non-applicant will be free to file their claim/ counter claim and replies thereto. The arbitrator shall if warranted make requisite disclosure under Section 11 (6) of the Act of 1996. Payment of the cost of Arbitration proceedings and arbitration fee shall be made as per the fourth schedule of the Act of 1996 as amended from time to time and computed as directed by the Arbitrator.

A copy of this order be communicated to Hon'ble Mr. Justice Mahesh Bhagwati (Retd.) L-44 Sukhshanti, Income-Tax Colony Durgapura, Jaipur (94141-60666) for entering upon the reference and proceed thereon as per the Act of 1996 as amended from time to time and adjudicate all disputes/ differences (factual and legal) between the parties arising out of/ relating to the work order dated 24.9.2014.

The application stands allowed accordingly.