
(2010) 07 P&H CK 0061
In the Punjab And Haryana At Chandigarh
Case No : C.R. No. 2886 of 2010

Punjab Water Supply and Sewerage Division	APPELLANT
Vs	
Shree Bala Ji Construction Company and Another	RESPONDENT

Date of Decision : 15-07-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8

Citation : (2011) 1 RCR(Civil) 119

Hon'ble Judges : Vinod K. Sharma, J

Bench : Single Bench

Judgement

Vinod K. Sharma, J.—This revision petition is directed against the order dated 7.4.2010 passed by the learned Additional Civil Judge (Senior Division), Bathinda, vide which the application moved by the Petitioner u/s 8 of the Arbitration and Conciliation Act, 1996 for staying the proceedings of the suit and referring the matter to the Arbitral Tribunal, stands declined.

2. The parties had entered into a contract vide agreement No. 131 of 2007-08 for Integrated Development of Urban Infrastructure Project Bathinda. Construction of S&S tank of Av size 885"X735"X9" and construction of inlet channel of size 4"X3" and all other works contingent thereto near Rose Garden, Bathinda. Approximate cost of the project was Rs. 218.25 lacs with time limit of 9 months. The execution of agreement is not disputed. However, for the present we are concerned with Clause 2 and Clause 25 of the contract for the purposes of determining the question in this revision. Clauses 2 and 25 read as under:

Clause-2. - The time allowed for carrying of the work shall be the essence of the contract and shall be strictly observed. It shall be reckoned from the date on which the order to commence the work is given to the contractor who shall ensure all due diligence to achieve progress of work not less than indicated below.

(i) On lapse of 25% contractual time: 20%

(ii) On lapse of 50% contractual time: 50%

(iii) On lapse of 75% contractual time: 80%

(iv) On lapse of full contractual time: 100%

3. In case of default, the contractor shall notwithstanding issuance of a prior notice in this regard pay prospectively as liquidated damages an amount up to 1% of the amount of contract or such lesser amount that the Engineer-in-charge may levy for every week that the work remains uncommenced after 10 days of acceptance letter or the minimum progress of work stated above is not achieved or the work remains unfinished after the completion date. In case of continued default or shortfall in progress the Engineer-in-charge may go on enhancing the levy of liquidated damages prospectively, each time limited to 1% of the total estimated amount of work Per week of further default subject to maximum limit of five percent of the amount of the contract. The Superintending Engineer of the work on representation from contractor after hearing both the parties i.e. Engineer-in-charge and contractor may reduce the amount of liquidated damages and his decision in writing shall be final.

Clause-25. - DISPUTES AND ARBITRATION

i) If any dispute or difference of any kind whatsoever shall arise between the PWSSB its authorised representative and the contractor in connection with or arising out of this contract or the execution of work there under.

ii) Whether before its commencement or during the progress or work or after the termination, abandonment or breach of the contract, it shall, in the first instance, be referred for settlement to the Engineer-in-charge of the work and he shall within a period of sixty days after being requested in writing by the contractor to do so convey his decision to the contractor. Such decision in respect of every matter so referred shall, subject to arbitration as hereinafter, provided, be final and binding upon the contractor in case the work is already in progress, the contractor shall proceed with the execution of the work on receipt of the decision of the Engineer-in-charge as aforesaid with all due diligence, whether any of the parties requests arbitration as hereinafter provided or not.

iii) If the Engineer-in-Chief has conveyed his decision to the contractor and no claim for arbitration has been filed by the contractor within a period of first sixty days from the receipt of the letter communicating the decision the said decision shall be final and binding upon the contractor and will not be a subject matter of arbitration at all.

iv) If the Engineer-in-charge fails to convey his decision within a period of sixty days after being requested aforesaid the contractor may within further sixty days of the expiry of the first sixty days from the date on which the said request was made by the contractor refer the dispute for arbitration as hereinafter provided.

v) All disputes or differences in respect of which the decision is not final and conclusive shall at the request of either party made in a communication sent through registered A.D. post be referred to the sole arbitration of the

Superintending Engineer of the circle concerned in the PWSSB acting as such at the time of reference unless debarred from acting as an Arbitrator by an order of the MD, PWS SB/Court, in which event, the MD shall appoint any other technical officer not below the rank of Superintending Engineer to act as an arbitrator on receipt of a request from either party.

vi) MD, PWSSB shall have the authority to change the arbitrator on an application by either the contractor or the Engineer-in-charge requesting change of arbitrator giving reasons thereof, either before the start of the arbitration proceedings or during the course of such proceedings. The arbitration proceedings would stand suspended as soon as application for change of arbitrator is filed before the MD, PWSSB and a notice thereof is given by the applicant to the arbitrator. The MD after hearing both the parties may pass the speaking order rejecting the application or accepting to change the arbitrator simultaneously, appointing a technical officer not below the rank of a Superintending Engineer as arbitrator under the contract. The new arbitrator so appointed may enter upon the reference a fresh or he may continue the hearings from the point these were suspended before the previous Arbitrator, vii) The reference to the Arbitrator shall be made by the claimant party within one hundred twenty days from the date of dispute of claim arises during the executing of work. If the claim pertains to rates or recoveries introduced in the final bill, the reference to the arbitrator shall be made within six calendar months from the date of payment of the final bill to the contractor or from the date a registered notice is sent to the contractor to the effect that his final bill is ready by the Engineer-in-charge (whose decision in this respect shall be final and binding) whichever is earlier.

viii) It shall be an essential term of this contract that in order to avoid frivolous claims, the party invoking arbitration shall specify the disputes based on facts and calculations stating the amount claimed under each claim shall furnish a "deposit-at-call" for ten percent of the amount claimed on a scheduled bank in the name of the Arbitrator, by his official designation who shall keep the amount in deposit till the announcement of the award. In the event of an award in favour of the claimant, the deposit shall be refunded to him in proportion to the amount awarded with respect to the amount claimed and the balance, if any, shall be forfeited and paid to the other party,

ix) The provisions of the Indian Arbitration Act 1940 or any other statutory enactment there under or modification thereof and for the time being in force shall apply to the arbitration proceedings under this clause.

x) The Arbitrator shall award separately giving his award against each claim and dispute and counter claim raised by either party giving reasons for his award. Any lump sum award shall not be legally enforceable.

xi) The independent claims of the party other than the one seeking arbitration as also the counter claims of any party shall be entertained by the Arbitrator, xii)

The venue of arbitration shall be such place or places, as may be fixed by the Arbitrator in his sole discretion. The work under the contract shall continue during the arbitration proceedings, xiii) The stamp duty due on the award shall be payable by the party as desired by the Arbitrator and in the event of such party's default, the stamp fee shall be recoverable from any other sum due to such party under this or any other contract.

xiv) Neither any party shall be entitled to bring a claim for arbitration, if it is not filed as per the time period already specified or within six months of the following: -

- a) Of the date of completion of the work as certified by the Engineer-in-charge or
- b) Of the date of abandonment of the work or breach of contract under any of its clauses, or commencement or resumption as applicable, or
- c) Of its non-commencement or no resumption of work within 10 days of written notice for commencement or resumption as applicable, or
- d) Of the cancellation, termination or withdrawal of the work from the contractor in whole or in part and/or revision or foreclosure of the contract, or
- e) Of receiving intimation from the Engineer-in-charge that the final payment due or recovery from the contractor had been determined, for the purpose of payment/adjustment whichever is the latest.

If the matter is not referred to arbitration within the period prescribed above, all the rights and claims of either party under the contract shall be deemed to have been forfeited and absolutely barred by time for arbitration and even for civil litigation, xv) No question relating to this contract shall be brought before any civil court without first invoking and completing the arbitration proceedings, if the issue is covered by the scopes of arbitration under this contract. The pending of arbitration proceedings shall not disentitle the Engineer-in-charge to determine the contract and to make alternate arrangements for completion of the works.

xvi) The arbitrator shall be deemed to have entered on the reference on the day, he issues notices to the parties fixing the first date of hearing. The arbitrator may from time to time with the consent of the parties enlarge the initial time for marking and publishing the award.

xvii) The expiry of the contractual time limit, whether originally fixed or extended shall not invalidate the provisions of this clauses.

4. The learned trial Court, by placing reliance on the judgment of the Hon We Supreme Court in Vishwanath Sood Vs. Union of India (UOI) and Another, dismissed the application by holding that the reading of Clause 2 and Clause 25, would only lead to a conclusion that imposition of penalty for delay in execution of work was an accepted matter, and was not referable to the arbitration. The application u/s 8, therefore, was liable to be dismissed.

5. Reliance to reach this conclusion was placed on para 9 of the judgment, which reads as under:

The Division Bench has construed the expression in Clause 2 in parenthesis that "the Superintending Engineer's decision shall be final" as referring only to a finality qua the department; in other words, that it only constitutes a declaration that no officer in the department can determine the quantification and that the quantum of compensation levied by the Superintending Engineer shall not be changed without the approval of the Government. After referring to certain judicial decisions regarding the meaning of the word "final" in various statutes, the Division Bench concluded that the finality cannot be construed as excluding the jurisdiction of the arbitrator under Clause 25. We are unable to accept this view. Clause 25 which is the arbitration clause starts with an opening phrase excluding certain matters and disputes from arbitration and these are matters or disputes in respect of which provision has been made elsewhere or otherwise in the contract. These words in our opinion can have reference only to provisions such as the one in parenthesis in Clause 2 by which certain types of determinations are left to the administrative authorities concerned. If that be not so, the words "except where otherwise provided in the contract" would become meaningless. We are therefore inclined to hold that the opening part of Clause 25 clearly excludes matters like those mentioned in Clause 2 in respect of which any dispute is left to be decided by a higher official of the Department. Our conclusion, therefore, is that the question of awarding compensation under Clause 2 is outside the purview of the arbitrator and that the compensation, determined under Clause 2 either by the Engineer-in-charge or on further reference by the Superintending Engineer will not be capable of being called in question before the arbitrator.

6. Learned Counsel appearing on behalf of the Petitioner contended that the impugned order passed by the learned trial Court cannot be sustained, as the learned trial Court has mis-interpreted Clauses 2 and 3 of the contract, as Clause 2, referred to above, was to be read with Clause 3 and the imposition of compensation could not be said to be an accepted matter, so as to hold that the matter in dispute was not covered under the arbitration clause.

7. On the other hand, Mr. Puran Singh Rana, learned Counsel, appearing on behalf of Respondent No. 1, has supported the judgment by referring to Clause 2 of the agreement, which provides for imposition of liquidated damages upto 1% of the amount of contract or such lesser amount that the Engineer-in-charge may levy for every week that the work remains uncommenced.

8. The main stress of the learned Counsel for Respondent No. 1 was to the last words of Clause 2 i.e. "In case of continued default or shortfall in progress the Engineer-in-charge may go on enhancing the levy of liquidated damages prospectively, each time limited to 1% of the total estimated amount of work per week of further default subject to maximum limit of five percent of the amount of the contract. The Superintending Engineer of the work on representation from

contractor after hearing both the parties i.e. Engineer-in-charge and contractor may reduce the amount of liquidated damages and his decision in writing shall be final." The learned Counsel for Respondent No. 1 referred to Sub-clause (v) of Clause 25, stipulating that all disputes or differences in respect of which the decision is not final and conclusive are only to be adjudicated to contend that the decision of imposition of compensation for delay in execution of work would be one such final decision which debars the arbitrator, to adjudicate the dispute raised, in view of the decision of the Hon''ble Supreme Court in Vishwanath Sood v. Union of India and Anr. (supra).

9. On consideration, I find force in the contentions raised by the learned Counsel for the Petitioner. The learned trial Court mis-read Clause 2 of the contract.

10. It is only the decision taken by the Superintending Engineer on the representation made by the contractor with regard to reduction of the compensation, which is final and not the dispute regarding compensation imposed under Clause 2 of the contract, which is not challenged before the Superintending Engineer, and when no decision for reduction is taken. It is the decision on representation of contractor which is final and binding between the parties to take it out of the purview of the arbitrator.

11. The arbitrator appointed is Superintending Engineer, who has been vested with the power to adjudicate all the disputes arising out of the contract, with the exception regarding accepted matter.

12. The accepted matter has further been clarified to mean, the decision taken by the Superintending Engineer on the representation made and the order is to be passed after hearing the parties, and the decision given in writing to take it out of the purview.

The decision, in view of the wording of Clause 2, was to be treated to be an independent arbitration award. In absence thereof, there is no bar to deal with all the disputes arising out of the contract.

The learned trial Court, therefore, mis-applied the judgment of the Hon''ble Supreme Court to non-suit the Petitioner.

13. It is well settled law that if the parties to an agreement containing an arbitration clause approach a judicial authority without invoking arbitration, then on an application u/s 8 made as per the provisions of the Section, the Court is bound to refer the matter to the arbitral tribunal.

For the reasons stated, this revision petition is allowed, the impugned order is set aside, application of the Petitioner u/s 8 of the Arbitration and Conciliation Act is allowed and dispute is ordered to be referred for arbitration.