

HIGH COURT OF JAMMU AND KASHMIR & LADAKH
AT JAMMU

Reserved on : 05.10.2024

Pronounced on : 08.11.2024

Arb P No. 47/2023

M/s Pardeep Electricals and Building Pvt. Ltd.
Through its Managing Director,
Shri Pardeep Jain, age 62 years,
S/O Sh. Bansi Lal Jain,
R/O H.No. 121 A/D, Gandhi Nagar,
Jammu.

..... Petitioner(s)...

Through:- Mr. Pranav Kohli, Sr. Advocate with
Mr. Arun Dev Singh, Advocate and
Mr. Vastav Sharma, Advocate

Vs.

1. Union of India
Through its Secretary,
Ministry of Defence,
New Delhi-110 011

2. Chief Engineer Pathankot Zone,
Pathankot-145 001

.....Respondent(s)...

Through:- Mr. Sandeep Gupta, CGSC

CORAM:

HON'BLE THE CHIEF JUSTICE.

JUDGEMENT

1. The instant petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as '*the Act*') is for seeking appointment of an independent sole Arbitrator.

2. The petitioner herein is the Private Limited Company registered with the Registrar of Companies under the Companies Act, 1956 with Mr. Pardeep Jain

as is its Managing Director and competent person to represent, file the present petition on behalf of the company being authorized by the Board of Directors in terms of a Board Resolution. The petitioner-company is engaged in the business of construction of buildings and all connected services like roads, Electrification, water supply, Central heating, Air Conditioning etc. and is said to have successfully executed and completed various works. Moreover, the petitioner had acquired work experience and turn over from the execution of the works of similar nature and is registered as SS CLASS Contractor with Index no SS-70.

3. The facts in brief are that in response to a NIT floated by the respondents for Provn. of KLP ACCN at Samba dated 29.03.2017 (Tender Id No. 2017-MES-113571-1) and subsequently amended and revised tender uploaded vide letter no. T-89125/78/E8 dated 04.08.2017 (Tender ID No. 2017-MES-113571-5), the petitioner was declared as a successful bidder and the order for execution of the work was issued in its favour for a lumpsum amount of **Rs. 42,73,55,375.01/- (Rupees Forty-Two Crores Seventy-Three Lakhs Fifty-Five Thousands Three Hundred and Seventy-Five and Paise One only)** vide CA No. CEPZ-16/2017-18. The contract agreement for **CA No. CEPZ-16/2-17-18 PROVIN of KLPACCN** at Samba came to be executed between the petitioner, M/s Pardeep Electricals and Builders Pvt. Ltd., and the respondents on 14.10.2017. As per the terms and conditions of the contract, the period for completion of work was 30 months and project site was handed over on 24.10.2017 and the work at site commenced on 24.10.2017. The date of completion of work was scheduled to be 23.04.2020. The petitioner was to execute the construction of 63 Nos. of buildings out of which sites of 19 buildings were made available and rest could not be

finalized by the respondents within time, thus, leading to delay in progress of the contract work.

4. The petitioner invested time, money, energy in the contract assigned, but, except assurances made by the respondents for release of the amount nothing substantial came to be done and performed from the respondents' end. The said buildings, structures etc. were required to be constructed in accordance with the drawings and structures provided to the petitioner by the Chief Engineer. Out of 69 buildings to be constructed, the petitioner has completed 34 No's of buildings in all respects. Action/inaction on the part of the Respondents in granting of the extension of the work in a delayed and piece meal manner led to substantial delay in completion of the work. The petitioner sought extensions from time to time but the same were granted by the Respondents for few months only and that too only once when the said period of extension was about to expire. At present the extension stands expired on 04.09.2023 and petitioner applied well in time, but, the same has not been granted till date. There has been abnormal delay on the part of Department in finalization of location of various assets to be undertaken for construction. The petitioner exchanged various letters with the respondents, therein intimating about exigencies arising on account of various repeated failures on the part of the respondents in fulfilment of their contractual obligations. Despite various letters by the petitioner, the Respondents did not pay any attention and till date, respondents have failed to fulfil its contractual obligation.

5. The disputes and differences have arisen relating to and arising out of the Tender Notice in accordance with clause 70 of the IAFW 2249, which is reproduced hereunder: -

“70. Arbitration- All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of the them, be referred to the sole arbitration of any [Serving Officer having degree in Engineering or equivalent or having passed final./ direct final Examination of sub-Division II of Institution of Surveyor (India) recognized by the Govt. of India.] to be appointed by the authority mentioned in the tender documents..... ”

6. It is contention of the learned counsel for the petitioner that the petitioner served various notices upon the respondents seeking redressal of the grievances through Arbitration mode, but, no response was received from the respondents. The petitioner on 19.08.2023 issued notice seeking resolution of disputes through Disputes Resolution Board (hereinafter referred to as ‘DRB’) mechanism as provided under the Contract. The Respondents have failed to appoint the members of the DRB for adjudication of the disputes inter se the parties. Though the Respondents are/were under the contractual obligation to appoint the DRB members within 30 days from the allotment of the contract. The Respondents failed to perform the contractual obligation and even after issuance of the notice by the claimant the Respondents chose not to reply and appoint members of DRB.

7. On notice, respondents filed their objections resisting the petition. It is contended by the respondents that in view of Condition 70 of IAFW 2249 unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the work or termination or determination of the contract under Condition Nos. 55, 56 and 57. The petitioner abandoned the work on 12th Sep. 2023 and approached the Court. There is also a provision of DRB in the contract vide condition No.71 of IAFW-2249 and dispute, if any, during the execution of work is to be resolved through DRB. The argument of the respondents is that to approach the DRB in terms of Special Conditions of

Contract is a mandatory provision. It is also contended by the respondents that original period of completion was 30 months and the work had to be completed before 23rd April, 2020. The extension of time was granted as requested by the petitioner. The petitioner stopped the work w.e.f. 12th Sep. 2023 and has taken legal course with an intention not to complete the work in near future. The contention of petitioner that he has undergone financial losses due to non-grant of advance extension is beyond facts. However, the claimant has not submitted his claim to the DRB till date and unnecessarily approached this court. Thus, the respondents seek dismissal of the petition on the grounds mentioned in the objections

8. I have heard learned counsel appearing for the parties, considered their submissions and perused the record.

9. In the present case, in order to assess whether the petitioner is entitled to seek appointment of an Arbitrator under the facts and circumstances of the case especially in view of the language used in clause 70 of the contract/agreement, it becomes imperative to go through the aforesaid arbitration clause which is reproduced below:-

“70. Arbitration—All disputes, between the parties to the Contract (other than those for which the decision of the C. 3 Arbitration Petition No. 34 of 2020 W. E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of a Serving Officer having degree in Engineering or equivalent or having passed final/direct final Examination of sub-Division II of Institution of Surveyor (India) recognized by the Govt. of India] to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged

completion of the Works or termination or determination of the Contract under Condition Nos. 55, 56 and 57 hereof.

Provided that in the event of abandonment of the Works or cancellation of the Contract under Condition Nos. 52, 53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the Works completed by or through any other Contractor or Contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceedings hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the Contractor as provided in Condition 67 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of the case and pleadings in defence.

The Arbitrator may proceed with the arbitration, ex parte, if either party, in spite of a notice from the Arbitrator fails to take part in the proceedings.

The Arbitrator may, from time to time with the consent of the parties, enlarge, the time for making and publishing the award.

The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters referred to him and shall indicate his findings, along with the sums awarded, separately on each individual, item of dispute.

The venue of Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion.

The Award of the Arbitrator shall be final and binding on both parties to the Contract."

- 10.** A plain reading of the aforesaid clause reveals that all disputes between the parties to the contract after written notice by either of the parties are referable to arbitration. It further provides that the reference shall not take place until the completion or the alleged completion of the works or termination of the contract under condition Nos. 55, 56 and 57 of the contract unless both the parties agree in writing for such a reference. A further condition has been imposed that in the

event of abandonment of work or cancellation of contract under conditions 52, 53 or 54 of the contract, the reference shall not take place until alternative arrangements have been finalized by the Government to get the work completed by or through any other contractor or agency.

11. The first two proviso of the said clause place two riders in seeking appointment of Arbitrator. First, until completion of the works and second until alternate arrangements are made to get the works completed.

12. The following issues, taking into account the rival contentions of the parties arise for consideration in the present petition: -

(i) **Whether petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, for appointment of arbitrator is maintainable in view of condition 71 of the Dispute Resolution Board (DRB)?**

(ii) **Whether invoking of Arbitration clause 70 is permissible in view of the contract being incomplete, terminated or determined in view of condition of condition Nos. 55, 56 and 57?**

(iii) **Whether a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, is maintainable if the notice invoking arbitration clause is not served in terms of Section 11 (4)(a)?**

Issue No.1:

13. With regard to first issue i.e. “*whether petition under Section 11(6) of the Act for appointment of arbitrator is maintainable in view of condition 71 of DRB*”, it may be stated that in the existing contract, the amendment No.2 was carried out by virtue of an order dated 26.09.2018 which is not in dispute.

14. As per the relevant clause of Special Conditions of Dispute Resolution Board (DRB), the respondents were under an obligation to constitute a DRB and intimate the same to the petitioner-contractor within a specified period of time, i.e., one month. Since time period for constitution and intimation of DRB was incorporated in the contract by way of amendment of 2018, therefore, it was an

obligation upon the respondents to intimate the same within a period of one month from the date of incorporation of amendment, i.e., 26.09.2018. The respondents had to constitute a DRB by or before 26.10.2018 i.e. 30 days from 26.09.2018. Admittedly, neither the DRB was constituted nor the same was intimated to the claimant-contractor within stipulated period under the relevant clause. Therefore, the respondents have failed to fulfill their obligation, resultantly, reference of dispute to the DRB did not arise.

15. When the present petition came to be filed on 06.10.2023, the respondents filed their objections. It was for the first time that the claimant-contractor was informed with regard to constitution of DRB by virtue of letter dated 30.09.2023. By the time, the petition was filed and pending, constitution of DRB was intimated to the claimant/applicant which otherwise was also time barred in terms of clause (iii) of the Special Conditions made applicable w.e.f. 26.09.2018 and thus the petition is to be considered by this Court in terms of the provisions of Section 11(6) of the Act.

16. Similar issue arose in a case titled **Pardeep Electricals and Building Pvt. Ltd. V/s Union of India** in Arb. P No. 37/2022 decided on 21.02.2023 in which this Court took a considered opinion with regard to the non-adherence of obligation for the constitution and intimation of DRB and resultantly this Court appointed Hon'ble Shri Justice Virender Singh, Ex Chief Justice of Jharkhand High Court as an Arbitrator. The relevant paragraph is reproduced here as under:-

“16. The present petition has been filed in the month of July 2022 and the respondents in their objections have taken the plea that they have written to the higher authorities for notifying the Dispute Resolution Board (DRB) vide their letter dated 12.08.2022 which is admittedly now constituted. This exercise has been undertaken by the respondents only after filing of present

petition by the petitioner. It is pertinent to mention here that the petitioner had already approached the respondents for referring the matter to the Dispute Resolution Board (DRB) and therefore, has exhausted the statutory remedy well before approaching this Court. Thus, the petitioner cannot be relegated back to approach the Dispute Resolution Board (DRB) at this stage.”

17. The ratio of the judgment aforesaid is securely applicable to the present case and, as such, it is held that once the respondents have failed to adhere to constitute and intimate the DRB, there is no alternative remedy for adjudication of the dispute, but, for the arbitration.

Issue No.2:

18. With regard to second issue, “*whether invoking of arbitration clause 70 is permissible in view of the contract is incomplete, terminated or determined in view of the condition Nos. 55, 56 and 57*”, it may be noted that the contention of the respondents is that no reference to the arbitration is maintainable in view of clauses 70 and 71 of IAFW-2249 for the reason that the contract is not completed in terms of clauses 55, 56 and 57. It is pertinent to mention here that original period of completion was 23.04.2020, and the last extension was also upto 04.09.2023 and extended period has also expired and there has been no extension thereafter. This Court in the judgment titled “**Mohinder Bros and Others V/s Union of India**” which is relied upon and re-confirmed by this Court in the judgment titled: “**Pardeep Electricals & Building Pvt. Ltd. V/s Union of India**”, has held in paragraph No.12 as under: -

“12. In M/s Mohindra Bros versus Union of India & others, 2012 IV JKJ 602, it has been held that even if there is a prohibition of seeking reference under the arbitration clause till the completion of the work, such condition would not come into play after the period of contract has expired”

19. Therefore, the plea about bar for non-reference to the arbitration in terms of clause 70 of IAFW-2249 is also not applicable in the present case. Admittedly, there is an alternative dispute resolution mechanism, that is, by way of an arbitration between the parties under the contract – agreement, and this dispute has arisen out of the agreement between the parties to the petition which is also subject to the arbitration agreement. The scope of section 11(6), while dealing with the appointment of an arbitrator has been defined by the Apex Court in a case titled **Ajay Madhusudan Patel and others vs. Jyotrindra S.Patel and others.**

The relevant paragraph No. 62 is reproduced here as under:-

“62. This very Bench in SBI General Insurance Co. Ltd. v. Krish Spinning reported in (2024) SCC OnLine SC 1754 dealt with the scope and standard of judicial scrutiny in an application made under Section 11(6) of the Act, 1996 specifically when a plea of “accord and satisfaction” is taken by the defendant. It was observed that in a scenario where the Courts delve into the domain of the arbitral tribunal at the Section 11 stage and reject the application, there is a risk of leaving the claimant forum-less for the adjudication of its claims. It was stated that a detailed examination at this stage would also be counterproductive to the objective of expediency in deciding a Section 11 application and simplification of pleadings. It was also stated that even if ex-facie frivolity is made out by the referral court, the arbitral tribunal has the benefit of extensive pleadings and evidentiary material and therefore, it would be incorrect to doubt that the arbitral tribunal would not be able to arrive at a similar conclusion. The relevant observations are reproduced hereinbelow:

“123. The power available to the referral courts has to be construed in the light of the fact that no right to appeal is available against any order passed by the referral court under Section 11 for either appointing or refusing to appoint an arbitrator. Thus, by delving into the domain of the arbitral tribunal at the nascent stage of Section 11, the referral courts also run the risk of leaving the claimant in a situation wherein it does not have any forum to approach for the adjudication of its claims, if its Section 11 application is rejected.

124. Section 11 also envisages a time-bound and expeditious disposal of the application for appointment of arbitrator. One of the reasons for this is also the fact that unlike Section 8, once an

application under Section 11 is filed, arbitration cannot commence until the arbitral tribunal is constituted by the referral court. This Court, on various occasions, has given directions to the High Courts for expeditious disposal of pending Section 11 applications. It has also directed the litigating parties to refrain from filing bulky pleadings in matters pertaining to Section 11. Seen thus, if the referral courts go into the details of issues pertaining to “accord and satisfaction” and the like, then it would become rather difficult to achieve the objective of expediency and simplification of pleadings.

125. We are also of the view that ex-facie frivolity and dishonesty in litigation is an aspect which the arbitral tribunal is equally, if not more, capable to decide upon the appreciation of the evidence adduced by the parties. We say so because the arbitral tribunal has the benefit of going through all the relevant evidence and pleadings in much more detail than the referral court. If the referral court is able to see the frivolity in the litigation on the basis of bare minimum pleadings, then it would be incorrect to doubt that the arbitral tribunal would not be able to arrive at the same inference, most likely in the first few hearings itself, with the benefit of extensive pleadings and evidentiary material.” (Emphasis supplied)

Issue No.3:

20. The third issue is “*whether a petition under section 11(6) of the Arbitration and Conciliation Act, 1996 is maintainable, if the notice invoking arbitration clause is not served in terms of Section 11(4)(a)*”. It may be noted that Notice invoking arbitration has not been served as alleged by the respondents. But it is admitted case that the petitioner had issued the notices/letters both dated 19.08.2023 in terms of which the contractor had made a request for constitution of DRB as also for invoking of clauses 70 and 71 of IAFW-2249 for adjudication of disputes through arbitration. These notices/letters were duly sent through registered posts; the postal receipts are part of the record as Annexure-B with CM No. 3342/2024. However, the respondents have averred in their response/objections that notice invoking arbitration was not served upon them.

This court vide order dated: 30.05.2024 directed the petitioner to file an affidavit in this regard. Thereafter, the petitioner had filed an application for placing on record certain documents and it has been categorically pointed out that the respondents' letter dated 20.01.2024 finds mention of the letter dated 19.08.2023 bearing No. PEBPL/CEPZ-16/2017-18/397 which is indeed a notice invoking arbitration clause. The reference of the notice invoking arbitration letter of the claimant in respondents' letter dated 20.01.2024 clearly demonstrate that a notice invoking arbitration was duly served upon and replied too. Therefore, the contention of respondents that there is non-compliance of the service of notice of invoking arbitration is also not borne out of the record, rather it is contrary to the same.

21. It is pertinent to mention here that the petitioner had already approached the respondents for referring the matter to the Dispute Resolution Board (DRB) and therefore, has exhausted the statutory remedy well before approaching this Court. Thus, the petitioner cannot be relegated back to approach the DRB at this stage. The record clearly indicates that the work could not be progressed due to the inaction on the part of the respondents and the said inaction on the part of the respondents itself creates a dispute *inter alia* parties to the agreement and the same is liable to be referred to the arbitration.

22. In the given circumstances and in view of the fact that the respondents have failed to appoint an Arbitrator in terms of the work allotment order, Shri Vinod Sharma (Retd.) Chief Engineer, R/O H.No. 42, Sector No.1-A, Trikuta Nagar, Jammu is appointed as the sole Arbitrator who shall proceed in the matter in accordance with the provisions of the *Act* to make an award within the time

provided in the *Act* itself, after charging the prescribed fee along with incidental expenses to be shared by the parties in equal proposition.

23. Registry to communicate a copy of this order to Shri Vinod Sharma (Retd.) Chief Engineer, R/O H.No. 42, Sector No.1-A, Trikuta Nagar, Jammu forthwith.

24. The Arbitration petition stands disposed of accordingly.

(Tashi Rabstan)
Chief Justice

Jammu
8th November, 2024
(Madan Verma-Secretary)

Whether the order is speaking : Yes/No.
Whether the order is reportable : Yes/No.

