

IN THE HIGH COURT OF UTTARAKHAND

AT NAINITAL

THE HON'BLE THE CHIEF JUSTICE SRI RAGHVENDRA SINGH CHAUHAN

ARBITRATION APPLICATION NO. 19 OF 2020

06TH AUGUST, 2021

BETWEEN:

Virendra Singh RawatApplicant.

And

Cantonment Board, DehradunRespondent.

Counsel for the applicant : Mr. Mahanand Joshi and Mr.
Kanti Ram.

Counsel for the respondent : Mr. B.S. Adhikari.

The Court made the following:

JUDGMENT

The present Arbitration Application has been filed under Section 11(6) the Arbitration and Conciliation Act, 1996 ('the Act' for short), for appointment of the sole Arbitrator.

2. According to the learned counsel for the applicant, the applicant is the contractor who undertakes government contracts for supplying material/goods in relation to contracts entered with the Government and the Semi-Government Organization.

3. The respondent, the Cantonment Board, had invited tenders for "*repair and maintenance of roads*" in the year 2016. Consequently, the applicant had submitted his rates for the work on 15.11.2016. By order dated

30.03.2017, the said tender was accepted by the respondent. Therefore, the work order contract was issued on 06.04.2017.

4. According to the work order contract, it was agreed that the respondent shall make payments within the time stipulated under the agreement. Moreover, the respondent was under the duty to clear all the bills of the applicant within 18 days' after which the amounts had become due.

5. According to the applicant, despite the fact that the work order was completed with utmost satisfaction, no payments were received by the applicant in relation to the for work orders, which are as under:-

S. No.	Work Order	Amount/Value (in INR)	Amount of Bill (in INR)	Date of Bill
1.	Repairs of cement concrete road leading from back side Janta Hotel to Veterinary Dr. Residence (20 th June, 2017)	56,70,300/-	58,96,982.28/-	-
2.	Repairs of cement concrete road near Jubli Qtrs. To Kailana	8,78,6008/-	9,52,523.86/-	25.10.2018
3.	Repairs of Jeep Road Dehradun Road to House No.80, Cantt. PGL (5 th March, 2018)	19,98,500/-	21,56,875.88/-	28.06.2018
4.	Repairs of Road providing interlocking leading from Jubli Quarters to 5-Vikas R.P. Post	12,03,000/-	13,49,326.51/-	27.10.2018

	Kailana (20 th January, 2019)			
5.	Estimate for providing chequered tile at Jadu Ghar (05.03.2018)	4,50,500/-	3,19,450.08/-	25.06.2018
Total Amounts of Works		1,02,00,900/	1,06,75,158.61/-	
		-		

6. Therefore, according to the learned counsel for the applicant, the respondent owes Rs.1,06,75,158.61/- along with the GST.

7. Since the respondent was not heeding to the request of the applicant, on 17.06.2020 the applicant sent a legal notice requesting the respondent to both clear the outstanding bills and, since disputes had arisen between the parties to appoint the sole Arbitrator, 'the Garrison Engineer'.

8. According to Clause 19 of the Agreement, the parties had agreed that, in case disputes were to arise, 'the Garrison Engineer' shall be appointed as the sole Arbitrator.

9. In the letter dated 17.06.2020, the applicant had clearly stated that the Garrison Engineer shall be appointed within a period of thirty days from the date of the letter.

10. According to the learned counsel for the applicant, letter dated 17.06.2020 was replied by the respondent on 14.08.2020. However, in the letter dated 14.08.2020, the respondent maintained a study silence with regard to the appointment of the sole Arbitrator. In the letter dated

14.08.2020, the respondent merely directed the applicant to submit further documents including photographs of the construction work carried out by the applicant. There was no whisper about the appointment of an Arbitrator.

11. Since, even after making a request for appointment of an Arbitrator, and due to laxity on the part of the respondent in appointing the Arbitrator, left with no other option, the applicant filed the present Arbitration Application under Section 11(6) of the Act.

12. The respondent has filed its counter-affidavit. According to Mr. B.S. Adhikari, the learned counsel for the respondent, on 15.10.2020, the respondent has appointed 'the Garrison Engineer' as the sole Arbitrator. The learned counsel for the respondent submits that, although, it is true that Section 12(5) of the Act, does contain a bar which prevents the appointment of any person whose relationship is with the parties or the counsel or the subject matter of the dispute. However, the proviso to said sub-section clearly provides that the parties may, subsequent to disputes having arisen between them waive the applicability of the sub-section by an express agreement in writing.

13. According to Mr. B.S. Adhikari, the learned counsel for the respondent, since the request to appoint 'the Garrison Engineer' as the sole Arbitrator was made by the applicant by letter dated 17.06.2020, the applicant has waived the bar

contained in Section 12(5) of the Act. Therefore, the applicant is not entitled to pray to this Court for appointment of the sole Arbitrator. Hence, according to the learned counsel for the respondent, only 'the Garrison Engineer' can be appointed as the sole Arbitrator.

14. On the other hand, Mr. Mahanand Joshi, the learned counsel for the applicant, submits that, in the letter dated 17.06.2020, the period for appointment 'the Garrison Engineer' as the sole Arbitration was clearly stated '*within thirty days*'. Therefore, if there is any waiver of the bar contained in Section 12(5) of the Act, the waiver extends only for a period of thirty days and not beyond. Secondly, despite the option of the waiver made by the applicant for a period of thirty days, the respondent did not accept the request, in fact, made mentioned hereinabove. Even in its reply dated 14.08.2020, there was not a single word about the appointment of an Arbitrator. Thus, there silence is a clear indication that it has rejected the request of the applicant for appointing 'the Garrison Engineer' as the sole Arbitrator. Thirdly, since the respondent maintained a study silence and did not appoint the Arbitrator, as requested within a period of thirty days, the applicant had no option but to approach this Court under Section 11(6) of the Act for appointment of the sole Arbitrator. Therefore, according to the learned counsel for the applicant, once this Court is seized of the matter under Section 11(6) of the Act, it is only this Court which has

the power to appoint the sole Arbitrator. Hence, according to the learned counsel for the applicant, the contentions raised by Mr. B.S. Adhikari, the learned counsel for the respondent is highly misplaced.

15. Heard the learned counsel for the parties and perused the record.

16. Section 12(5) of the Act is as under:-

*“**12(5)**. Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:*

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing”.

17. A bare perusal of the proviso clear reveals that it creates a bar with regard to the appointment of an Arbitrator who is in relationship with the parties or with the counsel or with the subject matter of the dispute. However, the proviso contained an exception. The exception is that, after disputes have arisen between the parties, both the parties agreed by *‘an express agreement in writing’*, only then can the bar

contained in Section 12(5) of the Act be said to be the waiver by the parties.

18. Admittedly, in the letter dated 17.06.2020, the applicant had requested for appointing 'the Garrison Engineer' as the sole Arbitrator. However, the request had to be acted upon within a period of thirty days. Undoubtedly, the respondent did not act on the said request within a period of thirty days. Moreover, in the present case, there has been no '*express agreement in writing*', with regard to the waiver of the bar contained in Section 12(5) of the Act. Therefore, the learned counsel for the respondent is not justified in claiming that, by letter dated 17.06.2020, the applicant had waived the bar imposed by Section 12(5) of the Act. Moreover, admittedly, the applicant had filed the present application on 24.09.2020 before this Court. Even after the filing of the present application, the respondent sat quietly over the request of the applicant for appointing 'the Garrison Engineer' as the sole Arbitrator till 15.10.2020. Therefore, the learned counsel for the respondent is not justified in claiming that the respondent is legally justified in appointing 'the Garrison Engineer' as the sole Arbitrator in accordance with the arbitral clause. Hence, the contention raised by the learned counsel for the respondent is clearly unacceptable.

19. Admittedly, the disputes continue to exist between the parties. Obviously, the dispute needs to be resolved through the arbitral proceedings. Therefore, this Court

appoints Mr. B.C. Kandpal, Retd. Judge, High Court of Uttarakhand, R/o 117 Rajeshwar Nagar, Phase-I, Sahastradhara Road, Dehradun, as the sole Arbitrator after his disclosure in writing is obtained in terms of Section 11(8) of the Act; and only after receipt thereof, shall his appointment, as an arbitrator, come into force.

20. On giving consent to arbitrate the disputes between the parties, Mr. B.C. Kandpal, Retd. Judge, High Court of Uttarakhand, R/o 117 Rajeshwar Nagar, Phase-I, Sahastradhara Road, Dehradun, shall enter reference, and shall pass an award in accordance with law. The learned arbitrator shall fix his fees in consultation with both the parties.

21. The arbitration application is disposed of accordingly.

(RAGHVENDRA SINGH CHAUHAN, C.J.)

Dated: 06th August, 2021

NISHANT