of appeal has not been sufficiently stamped, an opportunity should be given by the court to the appellant to make good the balance court fee within a time to be indicated and if there was failure to comply with such direction of the court, the memorandum of appeal could be rejected.

(10) After hearing learned counsel for the parties and also perusing the record, I am of the opinion that the learned Appellate Court should have given an opportunity to the petitioner to affix the deficient court fee before it could reject the memorandum of appeal. Accordingly, the impugned order dated 19th May, 2005 passed by the learned District Judge, Bhiwani is hereby set aside and the revision petition is allowed. One month's time is allowed to the petitioner to pay the deficiency in court fee. In case, the same is done on or before 20th January, 2006, the Appellate Court shall decide the appeal on merits in accordance with law.

R.N.R.

Before D.K. Jain, C.J. & Hemant Gupta, J.

SOM DATT BUILDERS PVT. LIMITED,—*Petitioners*

versus

STATE OF PUNJAB & OTHERS,—*Respondents*

C.W.P. No. 4707 of 2005

26th September, 2005

Constitution of India, 1950—Art. 226—Arbitration & Conciliation Act, 1996—Ss. 16 & 43—Contract Act, 1872-S.28—Agreement between a Contractor & State Government—Dispute between the parties—Petitioner sought intervention of the Engineer in terms of the agreement—Engineer finding the petitioner entitled to certain amount from respondent—Respondent failing to challenge the decision of the Engineer within the time prescribed—Petitioner invoking arbitration clause seeking compliance of the final & binding decision of the Engineer—State Government concurring to the reference and appointing its Arbitrator—Challenge thereto—Whether State Government can constitute another Arbitral Tribunal in respect of disputes which are already pending adjudication before another

Arbitral Tribunal constituted earlier—Held, no-State Government has a right to prove before such Arbitral Tribunal that the claims of the petitioner, though decided by the Engineer, are not sustainable either in law or in fact—All issues arising between the parties are required to be decided in one proceedings—Constitution of another Tribunal is neither contemplated under the argeement between the parties nor under any of the provisions of law—Action of State Government in constituting Arbitral Tribunal in respect of subject matter which is already pending consideration before another Tribunal cannot be permitted being patently illegal and arbitrary—Petition allowed while queshing the constitution of Arbitral Tribunal at the instance of State Government holding the same illegal, unwarranted and not sustainable in law.

Held, that when an Arbitral Tribunal is seized of the disputes between the parties, the constitution of another Arbitral Tribunal in respect of those very issues, which are already pending adjudication is clearly without jurisdiction and not sustainable. All issues arising between the parties are required to be decided in one proceedings. The constitution of another Tribunal is neither contemplated under the argeement between the parties nor under any of the provisions of law. This Court cannot permit patently illegal and arbitrary action of the State in constituting Arbitral Tribunal in respect of subject matter which is already pending consideration before another Tribunal. Therefore, we are of the opinion that continuance of proceedings before the Arbitral Tribunal consisting of respondents No. 3 & 4 is wholly illegal, unwarranted and, thus, not sustainable in law.

(Para 15 & 16)

A.K. Chopra, Senior Advocate

Ashish Chopra, Mr. Arvind Minocha and

Rajbir Wasu, Advocates, for the petitioner.

Sarup Singh and Gurpal Singh Advocates for respondent No. 1.

JUDGMENT

HEMANT GUPTA, J.

(1) The challenge in the present writ petition is to the constitution of the Arbitral Tribunal at the instance of respondent No. 1 consisting of respondents No. 3 and 4 ostensibly in terms of Clause 67 of an agreement between the parties.

(2) The petitioner and respondent No. 1 entered into an agreement for four laning of National Highway-2 on 4th January, 1995. Clause 67.1 of the said agreement contains procedure of settlement of disputes. It contemplates that in case of a dispute of any kind whatsoever between the employer (respondent No. 1) and the contractor (petitioner) in connection with, or arising out of the contract, whether during the execution of the works or after their completion, the matter in dispute, in the first place, be referred in writing to the Engineer. On receipt of such reference, the Engineer is required to give his decision in not later than the eighty-fourth day of receipt of such reference. After the decision of the Engineer, if the employer or the contractor is dissatisfied or if the Engineer fails to give notice of his decision on or before the eighty-fourth day of the receipt of reference, then clause 67.1 of the agreement empowers the employer or the contractor, on or before the seventieth day after the day on which notice of such decision is received, or after the expiry of seventieth day on which the period of 84 days expires, to give notice to the other party, with a copy for information to the Engineer of its intention to commence arbitration as per procedure prescribed therein.

(3) Clause 67.2 contemplates that where notice of intention to commence arbitration has been given, the parties shall attempt to settle their dispute amicably before the commencement of arbitration. It further provides that unless the parties agree otherwise, arbitration may be commenced on or before the fifty-sixth day after the day on which notice of intention to commence arbitration of such dispute was given, even if no attempt at amicable settlement thereof has been made. Clause 67.3 contemplates adjudication of a dispute by a Committee of three arbitrators in case any dispute in respect of which the decision of the Engineer has not become final and binding pursuant to clause 67.1 or amicable settlement has not been reached within the period stated in clause 67.2. The Committee of three arbitrators is to

consist of one arbitrator to be nominated by the employer and one to be nominated by the contractor. The third arbitrator, Chairman of the Committee, will be chosen jointly by the two nominees from a panel of five candidates supplied by the Executive Committee of the Indian Roads Congress and that he will not act as an Umpire. It also contemplates that if either of the parties fail to appoint its arbitrator or fail to agree on third nominee within sixty days after receipt of notice for the appointment of such arbitrator, the Chairman of the Executive Committee of the Indian Roads Congress shall appoint the arbitrator upon request from either party from such panel. Clause 67.4 contemplates that if a party fails to comply with the decision of the Engineer, other party may refer the failure to arbitration in accordance with Sub-clause 67.3.

(4) During the course of execution of work under the said contract, the petitioner earlier raised an arbitration dispute and the Arbitral Tribunal has given its award. The petition filed by respondent No. 1 challenging the said award is pending before the competent court. However, there is no dispute about the said proceedings in the present case.

(5) Later on further disputes having arisen between the parties, the petitioner sought intervention of the Engineer in terms of the agreement between the parties. On such disputes, the Engineer has given his decision on 7th June, 2001 (Claim No. 1), 29th June, 2001 (Claim No. 3) and on 4th July, 2001 (Claim No. 4). According to the petitioner, the respondent No. 1 did not challenge the decisions of the Engineer and, thus, the decisions of the Engineer became final and binding in terms of the contract. The petitioner invoked the arbitration clause for referring the failure to comply with the Engineer decision to arbitration. It is alleged that respondent No. 1 lost its right to challenge the decision of the Engineer and the petitioner alone has the right to seek compliance of the final and binding decision of the Engineer as per arbitration clause. The petitioner thereafter,—*vide* letter dated 3rd May, 2002 appointed Hon'ble Mr. Justice K.N. Singh, former Chief Justice of India, as its arbitrator on account of failure of respondent No. 1 to comply with the final and binding decision of the Engineer. Respondent No. 1 concurred to the said reference,—*vide* letter dated 17th June, 2002 and had appointed Shri G.S. Mann as their arbitrator. After some correspondence, the Indian Roads Congress, respondent No. 2, sent a panel of five persons and the two appointed arbitrators nominated Shri B.R. Jauhar as the Presiding Arbitrator.

Subsequently, Shri R.C. Kehar substituted the arbitrator appointed by the petitioner after the resignation of Hon'ble Mr. Justice K.N. Singh. Sometime later, Shri Hakam Singh, Superintending Engineer, filled up the vacancy caused on account of resignation of Shri G.S. Mann, the arbitrator appointed by respondent No. 2. The arbitration proceedings are now being conducted by the Arbitral Tribunal consisting of Shri B.R. Jauhar, Shri R.C. Kehar and Shri Hakam Singh in which respondent No. 1 is participating. The said proceedings are still pending final adjudication.

(6) Respondent No. 1,—*vide* letter dated 30th June, 2004 invoked cluase 67 of the contract and nominated Shri G.S. Mann, Superintending Engineer (Retd.) as their arbitrator for arbitration of disputes against the decision of the Engineer dated 7th June, 2001 (Claim No. 1), 29th June, 2001 (Claim No. 3) and 4th July, 2001 (Claim No. 4). The said appointment of arbitrator is to seek adjudication of disputes in respect of those very claims which are being adjudicated upon in an earlier constituted Tribunal. Subsequently, respondent No. 1 appointed respondent No. 3 as an arbitrator on its behalf and also sought appointment of an arbitrator on behalf of the petitioner. Respondent No. 2 appointed respondent No. 4 as an arbitrator on behalf of the petitioner,—*vide* letter dated 7th March, 2005, Annexure P-29, as the petitioner has failed to nominate an arbitrator in terms of the agreement.

(7) In the written statement filed on behalf of respondent No. 1, by way of preliminary objections, *inter-alia*, it has been stated that the decision of the Engineer dated 7th June, 2001 was challenged by giving notice dated 30th August, 2001, whereas two other alleged decisions of the Engineer dated 29th June, 2001 and 4th July, 2001 were also challenged by notice to commence arbitration dated 30th June, 2004. It is pointed out that said respondent has a duty to protect public money and not to adopt a passive attitude giving the petitioner a walkover and claim crores of rupees of public money without any justification. It is pointed out that the petitioner has failed to show as to how the judicial intervention is called for in accordance with Part I of the Act.

(8) On merits, it has been pleaded that in view of the provisions of Section 28 of the Contract Act, the limit of 70 days in disputing the decision of the Engineer is to be ignored. Reliance is placed upon Section 43 of the Act to contend that the Court has power to extend

the time fixed for objecting to such decision of the Engineer as well. It was also pleaded that constitution of the Tribunal cannot be objected to in a writ petition.

(9) At this stage, reproduction of Clause 67 of the agreement would be relevant to determine the controversy between the parties.

"Sub-Clause 67.1

Engineer's Decisions

If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the Contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause. Not later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor. Such decision shall state that it is made pursuant to this Clause.

Unless the contract has already been repudiated or termination, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award.

If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the eighty-fourth day after the day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before seventieth day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence

arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party given the same to commence arbitration, as hereinafter provided, as to such dispute and, subject to sub-clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.

If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor.

Sub-Clause 67.2

Amicable Settlement

Where notice of intention to commence arbitration as to a dispute has been given in accordance with sub-clause 67.1, the parties shall attempt to settle such dispute amicably before the commencement of arbitration. Provided that, unless the parties otherwise agree, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of intention to commence arbitration of such dispute was given, even if no attempt at amicable settlement thereof has been made.

Sub-clause 67.3

Any dispute in respect of which :

Arbitration

(a) the decision, if any, of the Engineer has not become final and binding pursuant to sub-clause 67.1 ; and

(b) amicable settlement has not been reached within the period stated in sub-clause 67.2

shall be referred to the adjudication of a Committee of three arbitrators. The Committee shall be composed of one arbitrator to be nominated by the Employer, one to be nominated by the Contractor. The third who will act as the Chairman of the committee, but not as umpire, will be chosen jointly by the two nominees from a panel of five candidates, none of whom would be in regular

employment of the Central and/or State Government, supplied by the Executive Committee of the Indian Roads Congress. If either of the parties fail to appoint his arbitrator, or fail to agree on third nominee within sixty days after receipt of notice for the appointment of such Arbitrator, the Chairman of the Executive Committee of the Indian Roads Congress shall appoint upon request from either party and from such panel. The decision of the majority of the Arbitrators shall be final and binding on the parties. All awards shall be in writing and such awards shall state reasons for the amounts awarded. Save as aforesaid and/or otherwise provided in the contract, the arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory modification or enactment thereof and shall be held at such place and time in India as the Committee of Arbitrators may determine.

Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or arguments put before the Engineer for the purpose of obtaining his decision pursuant to Sub-clause 67.1. No such decision shall disqualify the Engineer from being called a witness and giving evidence before the arbitrator/s on any matter whatsoever relevant to the dispute. Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employer, the Engineer and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works.

Sub-Clause 67.4

Failure to comply with Engineer's decision.

Where neither the Employer nor the Contractor has given notice of intention to commence arbitration of a dispute within the period stated in Sub-Clause 67.1 and the related decision has become final and binding, either party may, if the other party fails to comply with such decision, and without prejudice to any other rights it may have, refer the failure to arbitration in accordance with Sub-Clause 67.3. The provisions of Sub-clauses 67.1 and 67.2 shall not apply to any such reference."

(10) Learned counsel for the petitioner has vehemently argued that no parallel or concurrent reference can be made to another Tribunal when the dispute in respect of the same subject matter is pending before a duly constituted Arbitral Tribunal in terms of the agreement between the parties. Such Tribunal held large number of sittings as well. The reference to arbitration in respect of claims, which are subject matter of proceedings before an Arbitral Tribunal consisting of respondents No. 3 and 4, is wholly without jurisdiction and, in fact, a wholly perverse action of respondent No. 1. Such arbitration is not permissible under any term of the agreement. It is further argued that respondent No. 1 had raised the dispute about the constitution of the Arbitral Tribunal in terms of Section 16 of the Act before the Tribunal. The Tribunal declined such objections. Therefore, respondent No. 1 cannot constitute a parallel Tribunal in respect of those very claims which are subject matter of Tribunal constituted at the instance of the petitioner. It is further argued by the learned counsel for the petitioner that the decision of the Engineer is final between the parties and the respondent having failed to raise the dispute in terms of agreement within the stipulated period, the respondent State is bound by the decision of the Engineer which is now sought to be implemented by an Arbitral Tribunal.

(11) Mr. Sarup Singh, learned counsel for the respondent No. 1, rebutted the stand of the petitioner and argued that failure to raise dispute against the decision of the Engineer within the time prescribed does not confer any legal right in favour of the petitioner as such time limit is to be ignored in terms of the provisions of Section 28 of the Contract Act. Still further, the respondent is entitled to seek extension in time in filing of objections as it is a case of extreme hardship, in terms of Section 43(3) of the Act. It is submitted that, in fact, a petition to seek extension of time is pending before the learned District Judge, Patiala. It is submitted that the objection against decision in respect of Claim No. 1 dated 7th June, 2001 is delayed by only 12 days, whereas the decisions of the Engineer dated 21st June, 2001 and 4th July, 2001 had been disputed within three years of such decisions. Therefore, the dispute between the parties is liable to be adjudicated upon by an Arbitral Tribunal in terms of the agreement between the parties. It is in exercise of such right, the Arbitral Tribunal stands constituted consisting of respondents No. 3 and 4. It is further argued that the petitioner had a right to challenge the constitution of such Arbitral Tribunal in terms of Section 16 of the Act. Since the petitioner has not objected to such an Arbitral Tribunal in terms of the remedy provided under the Act, the writ petition is not maintainable.

(12) It was further argued that the respondent has a right to defend the claim of the petitioner before the arbitrator on all possible grounds *de hors* the decision of the Engineer. The Arbitral Tribunal has to adjudicate the dispute between the parties by considering the respective contentions of the parties. The Arbitral Tribunal is not to mechanically execute the decision of the Engineer. It is argued that the arbitral Tribunal is not an executing machinery of the decision rendered by the Engineer but a fact finding authority which is to resolve the issue raised between the parties on the basis of the material brought on record by the parties. Lastly, it was submitted that the Court may order clubbing of both the references and appoint another Arbitral Tribunal to resolve all the issues between the parties.

(13) The primary question in this petition is whether respondent No. 1 can constitute another Arbitral Tribunal in respect of disputes which are already pending adjudication before another Arbitral Tribunal constituted earlier.

(14) After hearing learned counsel for the parties and going through the record of the case, it transpires that earlier, an Arbitral Tribunal has been constitued at the instance of the petitioner,—*vide* letter dated 3rd May, 2002 in respect of Claim No. 1, Claim No. 3 and Claim No. 4 arising out of the decisions of the Engineer dated 7th June, 2001, 29th June, 2001 and 4th July, 2001 respectively. Respondent No. 1 has not only nominated an arbitrator in terms of the agreement but is also participating in such proceedings. The objection raised against the constitution of the Arbitral Tribunal has since been declined by the Tribunal. Respondent No. 1 has a right to seek remedy against such decision of the Arbitral Tribunal at appropriate stage in appropriate proceedings. The Engineer,—*vide* its decisions on Claim Nos. 1, 3 and 4, as referred to above, has found that the petitioner is entitled to certain amount from the respondent.

(15) As per the case of the petitioner, the respondent has failed to comply with the final and binding decision of Engineer. The remedy in the agreement is to an arbitration in accordance with sub-cluase 67.4 read with sub-clause 67.3. Thus, the decision of the Engineer is final subject to adjudication of dispute in terms of sub-clause 67.3 of the agreement. If such claim is required to be adjudicated under the aforesaid provision, the respondent has a right to establish before the Arbitral Tribunal that the decision of the Engineer in respect of Claim Nos. 1, 3 and 4 are not legally or factually sustainable. The failure to lodge any protest within the time prescribed cannot be extended to mean that the Arbitral Tribunal is denuded of the power

and jurisdiction to adjudicate the dispute between the parties. The reference of dispute to the arbitration itself connotes that the Arbitral Tribunal has to decide on the legality, validity and justiciability of the claim of the parties. The Arbitral Tribunal constituted at the instance of petitioner is not analogous to Executing Court but is required to decide the claim raised by the petitioner on merits. Respondent no. 1 has a right to prove before such Arbitral Tribunal that the claims of the petitioner, though decided by the Engineer, are not sustainable either in law or in fact. Thus, when an Arbitral Tribunal is seized of the disputes between the parties, the constitution of another Arbitral Tribunal in respect of those very issues, which are already pending adjudication is clearly without jurisdiction and not sustainable. All issues arising between the parties are required to be decided in one proceedings. The constitution of another Tribunal is neither contemplated under the agreement between the parties nor under any of the provisions of law.

(16) The argument raised by learned counsel for respondent No. 1 that the petitioner is bound to raise objection regarding the constitution of the Arbitral Tribunal before the Tribunal itself in terms of Section 16 of the Act is not justified. The action suggested by the respondent will lead to totally anomalous situation whereby two parallel Tribunals are permitted to continue adjudication on the same dispute and, thus, giving rise to possibility of contradictory decisions. Apart from such possibility of conflict of decisions, it will be sheer wastage of public time and energy of all parties in conduct of proceedings before the Arbitral Tribunal constituted at the instance of respondent No. 1 when, admittedly, both the Tribunals are to resolve the disputes arising out of the decision of the Engineer in respect of Claims No. 1, 3 and 4. This Court cannot permit patently illegal and arbitrary action of the State in constituting Arbitral Tribunal in respect of subject matter which is already pending consideration before another Tribunal. Therefore, we are of the opinion that continuance of proceedings before the Arbitral Tribunal consisting of respondents No. 3 and 4 is wholly illegal, unwarranted and, thus, not sustainable in law.

(17) In view of the above discussion, we allow the present writ petition, quash the constitution of Arbitral Tribunal consisting of respondents No. 3 and 4 at the instance of respondent No. 1. However, in the facts and circumstances of the case, the parties are ordered to bear their own costs.

R.N.R.