
(2003) 11 SHI CK 0003
In the High Court Of Himachal Pradesh
Case No : Arbitration Appeal No. 14 of 2003

Inderjit Singh Avtar Singh

APPELLANT

Vs

State of H.P. and Another

RESPONDENT

Date of Decision : 10-11-2003

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10, 10(1), 11(3), 21, 29

Citation : (2003) 3 ShimLC 301

Hon'ble Judges : V.K. Gupta, C.J.; M.R. Verma, J

Bench : Division Bench

Advocate : Suneet Goel, for the Appellant; M.S.Chandel, General and R.M. Bish, Dy. A.G., for the Respondent

Final Decision : Dismissed

Judgement

V.K. Gutpa, C.J.—This appeal u/s 37 of the Arbitration and Conciliation Act, 1996 (1996 Act for short) has been filed by M/s. Inderjit Singh Avtar Singh against the judgment dated 16.9.2003 passed by the learned Single Judge of this Court in OMP (M) No. 94 of 2001 whereby, after setting aside arbitral award forming the subject matter of the aforesaid OMP, the learned Single Judge issued directions that the Arbitral Tribunal shall consider afresh the subject matter of the arbitration proceedings and after deliberating upon the same pass the final arbitral award in accordance with law.

2. Work relating to the construction of a bridge over Ali Khud near village Kothi in the district of Bilaspur, was awarded to the Appellant by the Respondents some time in September, 1989 and the same had to be completed within a period of three years. However, disputes arose between the parties and these were referred for arbitration. The arbitral award ultimately was passed which was challenged before the learned single Judge in the aforesaid OMP in terms of Section 34 of 1996 Act, and as noticed above, the learned Single Judge while allowing the application u/s 34 (supra) set aside the award and issued directions as noticed.

3. Clause 16 of the agreement between the parties related to the reference to and adjudication by arbitration and as per this arbitration agreement, the arbitration was to be conducted by two arbitrators, one to be appointed by each party and in case of difference of opinion between the two arbitrators, the matter was to be referred to an Umpire. Even though, the agreement between the parties was executed some time in the year 1989 and apparently the arbitration agreement provided for reference of disputes to two arbitrators, one to be appointed by each party, since admittedly the arbitral proceedings had not commenced before the coming into force of the 1996 Act, in terms of Section 85 of 1996 Act, because of the repealing of the Arbitration Act, 1940, the provisions of 1996 Act alone were applicable to the arbitration proceedings arising out of the agreement in question, governing the parties in this petition. We are saying so because, even though the agreement between the parties had been executed at a point of time when Arbitration Act, 1940 was applicable, and presumably because of the applicability of the provisions of 1940 Act at that time, the arbitration agreement had provided for the arbitration being done by two arbitrators, one to be nominated by each party and also the appointment of an Umpire in the case of differences between the two arbitrators, when the disputes actually arose between the parties necessitating the reference of such disputes to Arbitration, 1996 Act had in the meantime come into force. As already observed, by virtue of Section 85 of 1996 Act, Arbitration Act, 1940 had stood repealed on the coming into force of 1996 Act and consequently, at that point of time, the provisions of 1996 Act alone were applicable to these arbitration proceedings. Admittedly, by application of Section 21 of 1996 Act also because the arbitral proceedings had not commenced at the relevant time, provisions as contained in 1996 Act were applicable, and not those contained in 1940 Act.

4. Once, therefore, it is clearly understood and hence established, beyond any doubt whatsoever, that with respect to the arbitration proceedings in hand the provisions of 1996 Act were applicable (and not 1940 Act), because of the mandatory statutory requirement as contained in Section 10 of 1996 Act, in a multi-member Arbitral Tribunal, the number of arbitrators could not be even; this number had to be odd. Reading Section 10(1) with Section 11(3) of 1996 Act together, therefore the two nominee arbitrators of the parties rightly appointed the third as the Presiding Arbitrator, and thus the Arbitral Tribunal consisted of three members, two of them being the nominees of the parties, and the third as the Presiding Member.

5. It appears because of some misconception on the part of the functionaries of the State Government, resultantly also some misunderstanding based on this misconception having crept in their minds, the functionaries of the State Government by misconstruing and misapplying the true scope of the applicability of 1996 Act, wrongly thought and felt that since the arbitration agreement (which admittedly and been executed at a point of time of 1989, when 1996 Act was not applicable and 1940 Act was applicable) had provided for appointment of only two arbitrators, appointment of the third arbitrator was untenable and,

therefore, the State nominated arbitrator at the crucial stage of arbitration proceedings did not participate in the proceedings, giving rise to this avoidable controversy. In the judgment under challenge before us, in this appeal, the learned Single Judge has rightly rejected this untenable plea of the State and has rightly held that Arbitral Tribunal comprising of three members was rightly constituted and was intra vires of the contract agreement and also was in conformity with Section 11(3) of 1996 Act. The learned Single Judge, accordingly rightly refused to set aside the award on the ground of the Arbitral Tribunal not having properly been constituted.

6. We are in full agreement with the aforesaid approach of the learned single Judge and hold that even though the arbitration agreement as originally executed had provided for appointment of two arbitrators, this provision was to be read at the relevant time in conformity with Section 10(1) and Section 11(3) of 1996 Act because, on application of Section 21 of 1996 Act since arbitral proceedings had not commenced, provisions of 1996 Act alone were applicable and, therefore any Arbitral Tribunal comprising of even number of arbitrators would have been a nullity in the eyes of law. Similarly, the provisions regarding the appointment of an Umpire and his role being relevant only in the eventuality of the two arbitrators dissenting was no more an applicable proposition of law after coming into force of 1996 Act since this was a stipulation contained in 1940 Act alone which had stood repealed as already noticed above by virtue of Section 85 of 1996 Act.

7. The arbitral Award, however, has been set aside by the learned Single Judge on the ground that in the decision making process, one of the arbitrators, namely, the nominee of the State Government did not participate. Even though as rightly argued by Mr. Suneet Goel, learned Counsel appearing for the Appellant, that Section 29 of the 1996 Act clearly provides that the decision of the arbitral Tribunal shall be made by a majority of all its members and even though out of the three members of the arbitral Tribunal, two members are parties to the decision in the present case, what we found is that the/non-participation of the third member of the arbitral Tribunal was owing to a bona fide misunderstanding on his part that perhaps the Arbitral Tribunal should have comprised of only two members, or that the proceedings should have started de novo. It was because of such bona fide misunderstanding on his part that the third arbitratotor did not participate in the decision making process. That being the case, therefore, in the peculiar facts and circumstances of this case, the majority rule as envisaged in Section 29 of the Act cannot be pressed into aid for sustaining the award. In our considered opinion, the learned Single Judge has adopted a very rational, right and correct approach and has charted a right course of action by remitting the matter to the arbitral Tribunal to consider the matter afresh, in a joint meeting of all the three Members and pass the arbitral award. Any other course of action could have been detrimental and prejudicial to the interests of justice.

8. We therefore, while upholding the judgment of the learned Single Judge and dismissing the appeal in limine, direct that (if not already done) the meeting of the Arbitral Tribunal comprising of all the three members of the Tribunal shall be held in the shortest possible time and in any case within four weeks from the date of communication of this order and in the light of the observations made hereinabove, the Arbitral Tribunal shall decide the matter afresh on its merits, in accordance with law and pass the Arbitral award in the shortest possible time.

9. We have been informed at the Bar that the State nominee arbitrator, namely Superintending Engineer (Arbitration) is not available any more because of the abolition of this post. That being the case, we direct Respondent No. 1 to nominate the State nominee arbitrator within two weeks from today. He shall fill up the vacancy caused owing to the abolition of the post of Superintending Engineer (Arbitration) and be the third member of the arbitral Tribunal.

10. Appeal dismissed. No order as to costs.