
(1996) 03 SHI CK 0005
In the High Court Of Himachal Pradesh
Case No : Civil Suit No. 125 of 1994

M/s. Hindustan Electricals and Others	APPELLANT
Vs	
Himachal Pradesh State Electricity Board and Another	RESPONDENT

Date of Decision : 26-03-1996

Acts Referred:

Arbitration Act, 1940 — Section 33

Citation : (1997) 1 ShimLC 379

Hon'ble Judges : R.L. Khurana, J

Bench : Single Bench

Advocate : R.L. Sood, for the Appellant; R.S. Jamalra, for the Respondent

Final Decision : Allowed

Judgement

R.L. Khurana J.

1. The Plaintiff is a registered partnership firm of which the Plaintiffs 2 to 4 are the partners The Plaintiff No. 1 had business dealing with Defendant No. 1, Himachal Pradesh State Electricity Board, hereinafter referred to as "the Defendant Board".

2. The Plaintiff contracted to supply distribution transformers to the Defendant No. 1. Six agreements in respect of six purchase orders came to be executed between the parties. On a dispute having arisen between the parties in relation to and in connection with the contract for the supply of transmission transformers, such dispute was referred to the sole arbitration of Engineer M.L. Gupta, Director (System Planning) Himachal Pradesh State Electricity Board, Shimla, vide office order dated 18-11-1991. The said arbitrator has been impleaded in the present case as Defendant No. 2.

3. The Plaintiffs by virtue of the present petition made u/s 33 of the Arbitration Act, 1940 have challenged the existence/validity of the arbitration agreements between the parties The following prayers have been made by the Plaintiffs:

(a) Declare that there is no subsisting arbitration agreement between the Plaintiffs and Defendant No. 1.

(b) It may further be pleased to hold that Defendant No. 2 has not been properly or legally appointed as an Arbitrator and thus, has no jurisdiction to proceed in the matter and may further be pleased to quash his appointment as an Arbitrator.

(c) It may further be pleased to hold that the claim of Defendant No. 1 Board is barred by limitation.

(d) Allow any other relief which this Hon"ble Court deems fit in favour of the Plaintiffs-applicants and against the Defendant No. 1.

(e) Allow costs of the present petition against Defendant No. 1 and in favour of the Plaintiffs. These orders may kindly be passed in the interest of law and justice.

The Plaintiffs have averred that as per Clause 14 of the purchase orders, the warranty period of transmission transformers was stipulated to be 12 months from the date of putting into service of the transformers or 18 months from the date of despatch of such transformers by the Plaintiffs to the Defendant Board, whichever of the two being earlier. First purchase order was made on 15-11-1983 and the last purchase order was placed on 23-1-1987. The last supply by the Plaintiffs was made on 12-5-1987. Therefore, in case any claim which was to be preferred by the Defendant Board could have been preferred only by December 1988 by taking into consideration the warranty period of 18 months from the date of last supply. The dispute has been referred to the arbitration only in November 1991, when there was no subsisting arbitration agreement between the parties.

4. Alternative case of the Plaintiffs is that as per the arbitration clause, the dispute between the parties, if any, was required to be referred for arbitration of the Chairman of the H.P. State Electricity Board or his nominee. The matter has been referred to the sole arbitration of Engineer M.L. Gupta, vide office order dated 18-11-1991 by the Secretary of the Defendant Board and the Defendant No. 2 has entered into the arbitration proceedings on the strength of such order. The appointment of Defendant No. 2 as arbitrator having been made by a person/ authority who was not competent to do so, is bad, illegal and without jurisdiction.

5. The petition was resisted and contested on behalf of the Defendant Board who admitted that purchase orders for the supply of distributors transformers were placed with the Plaintiff; by the Defendant Board and that agreements came to be executed between the parties in respect of such purchase orders. The Plaintiffs made the supply of the material as per the supply order but out of such supplied material, some material was found defective/damaged/disputed. The details of such defective/damaged/disputed material have been given in para 1 of the legal submissions in the counter-affidavit filed on behalf of the Defendant Board. It has been averred that the Plaintiff were approached for the repair/

replacement of such defective material. Out of 133 transformers which got damage/defective within the warranty period, only 79 were repaired by the Plaintiffs. The remaining 56 distributor transformers were not repaired by the Plaintiffs despite continuous correspondence made by the Defendant Board with the Plaintiffs. Such 56 defective/damaged transformers are still lying unrepaired in the store of the Defendant's Board. Since the Plaintiffs did not respond to the request of the Defendant Board, on disputes differences having arising between the parties, the matter was referred to the sole arbitration of Engineer M.L. Gupta, Director (System Planning) Himachal Pradesh State Electricity Board. It was further averred that there was a subsisting and valid contract between the parties and the matter was rightly referred to the sole arbitration of Defendant No. 2. Further case of the Defendant Board is that the appointment of Defendant No. 2 as arbitrator was approved by whole time members of the Board of which Board the Chairman, Himachal Pradesh State Electricity Board is also one of the members. The appointment of Defendant No. 2 as arbitrator was made by the competent authority in accordance with the provisions of the contract containing the arbitration clause.

6. The following points arise for determination in the present case:

1. Whether there is a subsisting arbitration agreement between the Plaintiffs and the Defendant Board ?
2. Whether the appointment of Defendant No. 2 as sole arbitrator has not been properly and legally made in terms of the arbitration agreement ?
3. Relief.

I have heard Shri R.L. Sood, the learned Counsel for the Plaintiffs and Shri R.S. Jamalta, Advocate the learned Counsel for the Defendant Board and have also gone through the record of the case. My findings on the above points are as under:

Point No. 1:

7. It is not disputed that as many as six purchase orders for the supply of transmission transformers were placed by the Defendant Board with the Plaintiffs during the period 15-11-1983 and 23-1-1987. Each of such purchase order was followed by the execution of an agreement between the parties. The case of the Plaintiffs is that as per Clause 14 of the purchase orders, the Plaintiffs were to replace free of costs the defective transformers or to repair such transformers or the defective parts thereof within the warranty period of 12 months from the date of putting into service of these transformers or within 18 months from the date of the despatch of the transformers, whichever was earlier. Supplies were made by the Plaintiffs in accordance with the purchase orders placed with them by the Defendant Board and last of such supply was made on 12-5-1987. Therefore, if there was any dispute between the parties with regard to transformers, such a dispute as per arbitration clause could have been referred

to the arbitration within the said warranty period. The dispute between the parties was referred to the sole arbitration of Defendant No. 2 on 18-11-1991, much after the expiry of the prescribed warranty period. The learned Counsel for the Plaintiff has contended that as on the date the dispute was referred to the sole arbitration of Defendant No. 2, no arbitration agreement was subsisting between the parties and as such, the matter could not have been referred to the arbitration.

8. It will not be out of place to state that copy of the purchase orders containing Clause 14, relied upon by the Plaintiffs, has not been placed on the record of the present case in order to see the terms of the said clause. Clause 14 has been quoted by the Plaintiffs in para 2 of their petition, the correctness of which has not been denied by the Defendant Board. The said clause reads:

The supplier shall be responsible to replace free of cost with no transportation and insurance expenses to the purchaser, upto the destination, whole or any part of the material which under normal and proper use and maintenance, proves defective in material and workmanship, within 12 months from the date of putting into service or 18 months from the date of despatch whichever is earlier, provided the consignees give prompt written notice for such defects to the suppliers. Such replacement shall be effected by the suppliers within the reasonable time required to do so. The supplier's liabilities arising out of the supply of the material or its use whether on warranty or otherwise shall not in any case exceed the cost of correcting the defects or replacing the defective material and upon the expiry of the period mentioned above, all such liabilities shall terminate. The above provision shall also apply to the material replaced by the supplier under the clause in case the same is again found to be defective within 12 months of its replacement.

9. The purchase orders also contain a clause, as clause number 18, relating to arbitration. This clause has been quoted by the Plaintiff in para 3 of his petition, the correctness of which again has not been disputed by the Defendant Board, It reads:

In case of any dispute, question or difference whatsoever between the supplier and purchaser, upon or in relation to or in connection with contract, the same shall be referred to the sole Arbitration of Chairman, HPSEB, Shimla or his nominees and shall be subject to the provision of Arbitration Act, 1940 and rules framed thereunder or any statutory modifications thereof.

A bare reading of Clause 14, quoted above, shows that it provides for the replacement/repair of the defective/damage transformer within the stipulated warranty period. This clause does not in any manner provide for the time within which reference of the dispute is to be made to arbitration. The time stipulated therein is only with regard to replacement/repair of the damaged transformers.

10. Clause 18 of the purchase order, quoted above, simply provides that in case of any dispute, question or difference whatsoever between the supplier and the

purchaser, upon or in relation to or in connection with the contract, the same shall be referred to the sole arbitration of Chairman, Himachal Pradesh State Electricity Board, Shimla or his nominee. In this clause also, no time has been fixed within which a reference of the dispute between the parties is required to be made for arbitration.

11. Clause 10 of Article III of the agreement entered between the parties in respect of the supply of the transmission transformer provides as under:

If at any time any question, dispute or difference, whatsoever, shall arise, between the purchaser or the Engineer and the Company upon or in relation to or in connection with the contract, either party may forthwith give to other, notice in writing of the existence of such question dispute or difference and the same shall be referred to the arbitration of Chairman, HPSEB, or his nominee and shall be subject to the provision of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules framed thereunder and for the time being in force. The award of the Arbitrator shall be final and binding on both the parties to the contract.

The objection that the arbitrator so appointed is a Government servant that he had to deal with the matters to which the contract relates and that in the course of his duties as Government servant, he had expressed his views on all/or any of the matters in dispute or difference, shall not be considered as a valid objection/bar to his acting as such in the arbitration proceedings under this clause.

12. In this clause also, no time has been fixed within which the dispute between the parties was required to be referred for arbitration. In the absence of period within which the dispute between the parties is required to be referred for arbitration, it cannot be said that there is no subsisting arbitration agreement between the parties.

13. Reference of a dispute for arbitration being barred by time and the claim with respect to which the dispute has arisen between the parties being barred by time are two different things. While the question whether reference of the dispute for arbitration being barred by time is to be decided by the Court, the question whether the claim with respect of which a dispute has arisen between the parties being barred by time, is to be decided by the arbitrator. In *M/s. Ram Nath Mehra and Sons, New Delhi v. Union of India and Anr.* AIR 1982 Del 164 and *S. Rajan Vs. State of Kerala and another*, relied upon by the learned Counsel for the Plaintiffs, the arbitration clause itself provided the time within which the dispute between the parties was required to be referred for arbitration and such a question was decided by the Court while arriving at the conclusion whether there was a subsisting arbitration agreement between the parties or not. In both the cases, the question whether the claim in respect of which there was a dispute between the parties was barred by time or not, never came up for consideration.

14. The Hon'ble Supreme Court in *Mohd. Usman Military Contractor, Jhansi Vs. Union of India (UOI), Ministry of Defence*, has held that when there is a dispute

whether the claim is barred by limitation, it will be the duty of the arbitrator to consider the matter and to decide whether or not the claim was so barred.

15. This Court also in *M/s. Himalayan Construction Co. v. The National Hydroelectric Power Corporation Ltd.* 1992 (1) Sim LC 314, has held that the dispute whether the claim was waived or forfeited or barred by time has to be determined by the arbitrator to be appointed in terms of the arbitration agreement as such the question falls within his ambit and not that" of the jurisdiction of the Court.

16. Taking into consideration the entire material coming on the record, I hold that since no time limit was prescribed in the arbitration agreement within which the dispute between the parties was required to be referred for arbitration, there was a subsisting arbitration agreement between the parties. The question whether the claim raised on behalf of the Defendant Board is barred by time cannot be gone into by this Court. As such, the question has to be adjudicated upon only by the arbitrator to be appointed in terms of the arbitration agreement between the parties.

The point is accordingly answered in the affirmative.

Point No. 2:

17. Admittedly, the arbitration agreement between the parties as contained in the purchase orders as well as the agreements, quoted while discussing point No. 1, provides for reference of the dispute between the parties to the sole arbitration of the Chairman, Himachal Pradesh State Electricity Board or his nominee.

Defendant No. 2 came to be appointed as sole arbitrator in the present case vide office order dated 18-11-1991 issued by the Secretary of the Defendant Board. The said order reads:

It is informed that as per the decision of the store purchase Committee/Whole Tim-Members of the Board held on 9-8-1991, you are hereby appointed as arbitrator in the arbitration case titled HPSEB v. Hindustan Electricals Chhanni. The proceeding of the case shall commence immediately.

The appointment of Defendant No. 2 as sole arbitrator vide order referred to above, on the face of it is bad since the same has not been made in accordance with the arbitration agreement between the parties. As stated above, the dispute was required to be referred to the sole arbitration of the Chairman of the Himachal Pradesh State Electricity Board or his nominee. Therefore, it was incumbent upon the Chairman of the Defendant Board either to himself act as sole arbitrator for adjudicating upon the dispute between the parties or to appoint a nominee to act as an arbitrator for the said purpose.

The Defendants have averred in para 5 of their reply on merits as under:

The contents of this para, as state d are wrong and hence denied. In reply the

answering Defendants submit that the appointment of the Ld. Arbitrator namely Mr. M.L. Gupta (SP), HPSEB, SHIMLA-4 was approved by the Whole Time Members of the Board wherein Chairman, HPSEB, is also one of the members. Thus the appointment has been made by the competent authority in accordance with the provisions of contract agreement. The action of the answering Defendants is perfectly legal, just, bona fide and consequently maintainable in the eyes of law.

18. Therefore, as per the Defendants' own showing, the Defendant No. 2 was appointed as sole arbitrator not by the Chairman of the Himachal Pradesh State Electricity Board but by the whole time members of the Board. Such an appointment of Defendant number 2 as sole arbitrator is, therefore, bad and not in accordance with the arbitration agreement between the parties and as such, the Defendant No. 2 cannot continue with the arbitration proceedings between the parties.

The point is accordingly answered.

Relief:

19. As a result, the present petition is allowed and Defendant No. 2 is held to have not been properly and legally appointed as an arbitrator. He has, therefore, no jurisdiction to proceed with the arbitration proceedings. His appointment as an arbitrator vide order dated 18-11-1991 of the Secretary, Himachal Pradesh State Electricity Board is set aside. The Chairman of the State Electricity Board shall either himself act as an arbitrator or nominate an arbitrator to adjudicate upon the dispute between the parties in terms of Clause 10 of Article III of the agreement between the parties within a period of 30 days from today.

20. No orders as to costs.