
(1990) 12 SHI CK 0014

In the High Court Of Himachal Pradesh

Case No : O.M.P. (M) No. 10 of 1990 connected with O.M.P. (M) No's. 9, 21, 22, 23 and 24 of 1990

New Model Industries

APPELLANT

Vs

Himachal Road Transport Corporation

RESPONDENT

Date of Decision : 28-12-1990

Acts Referred:

Arbitration Act, 1940 — Section 11, 30, 33, 8

Citation : (1991) 2 ShimLC 280

Hon'ble Judges : D.P. Sood, J

Bench : Single Bench

Advocate : Bhupender Gupta, for the Appellant; Deepak Gupta, for the Respondent

Judgement

D.P. Sood, J.—The order passed in the aforesaid O.M.P. would also dispose of the matters arising out of the arbitration claims similar in nature between the same parties registered as O.M.P. (M) Nos. 9 of 1990, 21 of 1990, 12 of 1990, 23 of 1990 and 24 of 1990 wherein, common question of law and facts have arisen

2. M/s. New Model Industries Private Limited, G.T. Road, Jalandhar City (herein shortly referred to as the Petitioner is the name and style in which at all material times, the Petitioner's Company used to carry out the business of fabricating the bus bodies. Petitioners had entered into agreements from time to time with the Respondents to get the bus bodies (on the chassis agreed to be supplied by the Petitioners under different work orders) fabricated from the later according to the plans and specification and at the rates as per the terms and conditions mentioned therein During the progress of the work, as per the different agreements referred to above, some disputes arose in between the parties which as per the Arbitration Clause contained in the agreement were referred to the sole Arbitrator of Secretary (Transport) to the Government of Himachal Pradesh, Shimla, who was otherwise ex-officio Director of the Respondent-Corporation.

3. The named Arbitrator entered on the reference with respect to each one of the

claims of the Petitioner pursuant to the orders passed by the High Court of Himachal Pradesh in Civil Suit No. 60 of 1986. Claims and counter claims were filed before the said Arbitrator. From the perusal of the proceedings conducted by the Arbitrator and the orders passed therein, it appears that the Arbitrator could not proceed with the arbitration proceedings either on account of the non-availability of the Petitioner or his Counsel or that of the Arbitrator being on tour or sometimes on leave, within the period commencing from 1-9-1*86 in the instant case till 9-3-1989. On this date, as none was present on behalf of the Petitioner despite registered notice having been sent to them, the Arbitrator again sent intimation to them in the following terms:

9-3-1989 "None on behalf of the Petitioner, M/s. New Model Industries, is present inspite of registered notice to them. It appears that they are not interested in pursuing the arbitration case filed by them. However, in the interest of justice one more opportunity is given to them and the case is adjourned to 25-4-1989. In case none appears on behalf of the Petitioner on the next date, the arbitration proceedings will be dropped and consigned to record. The parties be informed accordingly. To come up on 25-4-1989.

4. On the adjourned date i.e. April 25, 1989 again the Petitioners defaulted in putting up appearance as their registered A.D. cover containing the notice had been received back as "un-claimed". In view of this position, the Arbitrator finding no other alternative directed the dropping of the proceedings in five claim cases except the 6th case which was continued by him. However, no further action was taken in the other five claims of the Petitioners, the same having already been dropped and consigned to record.

5. The Petitioners in all the abovesaid petitions have assailed the order, dated 25-4-1989 as also that of the 6th case wherein no order had been passed and it was continued to be retained, on the ground firstly, that one registered notice in all the six cases had been sent under registered cover which was received back unserved with the endorsement "un-claimed", that is to say, the Plaintiff was not duly served and as such the Arbitrator could not pass the impugned order; secondly, that the Arbitrator failed to use all reasonable dispatch in entering on and proceeding with the reference and making the award and instead illegally directed the dropping of proceedings; thirdly, that the impugned order passed by the Arbitrator amounted to misconducting the proceedings and as such it was illegal and without jurisdiction which left the Petitioner with not remedy except to move the instant petition for revoking his authority under Sections b, 11 and Section 8 of the Arbitration Act, 1940, hereinafter shortly referred to be Act.

6. The Respondent resisted and contested the application by contending that the impugned order so passed amounted to award and as such was legal and valid and consequently the instant application for revoking the authority of the Arbitrator and for appointment of a fresh Arbitrator in his place, was not maintainable; that the delay in proceeding with the proceedings was on account of the conduct of the Petitioner in not putting up appearance before the

Arbitrator on various dates filed up by him which ultimately culminated into the passing of the impugned order ; that no changed address having been furnished by the Petitioner to the Arbitrator, the non-service of the notice under registered cover was not due to the fault of the Arbitrator and he had no other alternative except to pass the impugned order. In other words, the Arbitrator in all fairness gave several opportunities to the Petitioner to co-operate with the Arbitrator to proceed with the reference, but of no avail. That the slackness of the Petitioners in not putting up appearance before the Arbitrator or one reason or the other cannot amount to the Arbitrator having misconducted the proceedings or his having failed to use all reasonable dispatch in entering on and proceeding with the reference and making the Award.

7. The pleadings of the parties being based on legal grounds, the parties did not adduce any evidence. However arbitration agreement and orders passed in all proceedings being the same, during the course of argument copy of the agreement containing the Arbitration clause and the orders passed in one of the case No. 3-69/86 pertaining to the proceedings before the Arbitrator have been placed on record. On the basis thereof, I have heard the learned Counsel for the parties at length.

8. The learned Counsel for the Petitioner has urged that the Arbitrator had no power to drop the proceedings, as he did; that the only course open to him was to enforce compliance with his orders and was to deliver an ex parte award. Further, it is submitted that despite having committed the illegality referred to above, the Arbitrator is proved to have failed to expedite the proceedings within the period of four months or extended period whatsoever and thus he having failed to make an award, has left the parties with no remedy to the Petitioner except to get his authority revoked and get a fresh Arbitrator appointed in his place. Reliance has been placed on the case of *Mis. Phoenix Cotton Tape Factory, Delhi and Anr. v. Union of India* (1974) 10 DLT 340.

9. Shri Deepak Gupta, Advocate on behalf of the Respondent contended that the impugned order amounts to award and the remedy of the Petitioner was under Sections 30 and 33 of the Arbitration Act and resultantly the petition is not maintainable. Regarding the other argument with respect to the failure of the arbitrator to expedite the proceedings, he has pointed out that on the perusal of the proceedings and the order passed by the arbitrator, the failure can alone be attributed to the Petitioner and as such the arbitrator's authority to proceed with the reference cannot be revoked in the facts and circumstances of the instant case.

10. From the above, primary point is whether the arbitrator had power to direct the dropping of the proceedings and consigning the file to the records as he did. In order to appreciate this point, reference to the arbitration clause No. 16 is absolutely essential, which lays down as under:

16. All disputes and difference arising out or in any way touching or concerning

this agreement whatsoever shall be referred to the sole arbitrator or Secretary Transport to the Government of Himachal Pradesh, Simla acting as such at the time of the reference. It will be no objection to such appointment that the arbitrator so appointed is ex-officio Director of Corporation that he had to deal with the matters to which this agreement relates that he expressed view on all or any of the matters in dispute or difference. The award of such arbitrator shall be final and binding on the parties to this agreement.

11. A deep scrutiny of the arbitration clause shows that the award of the named arbitrator has been made final and binding on the parties to this agreement. The agreement here admittedly confers no powers to drop the proceedings. Obviously, the arbitrator did not make an award. By dropping the proceedings and consigning the file to the records, prejudice has been caused to the absenting party i e. the Petitioner. He is left wholly without any remedy. The underlying object to choose this forum is to give speedy justice through a person of the choice of the parties in disputes in between them inter se The Arbitration Act, 1940 also lays down certain statutory provisions for the scrutiny of the awards made by the arbitrators. In the instant case, it cannot be said that the powers of the arbitrators to continue with the proceedings after having passed the impugned order, still continue and the aggrieved party, in fact, should apply to the arbitrator for the restoration of the proceedings In that view of the matter, the claim of the Petitioner remains undetermined on merits. Such a result seems contrary to the assumptions underlying the procedures established by the arbitration Act 1940, which contemplates the bringing up of arbitration proceedings and the award to the Court in every case for scrutiny. As observed above, the direction for dropping the proceedings, in fact, entails rejection of the claim. The consequences may be of equal gravity as those of an award. It is difficult to find any reason or principle for excluding scrutiny by the Court when there is such an order directing dropping of the proceedings by an arbitrator. Yet, the Arbitration Act furnishes no relief in such a case. Thus the question is whether such an order can be termed as an award? To my mind, the answer is in the negative. The powers to the arbitrator under the arbitration clause have been given to finally settle the disputes arising in between the parties. At the most, such an order passed by the arbitrator cm be viewed that the arbitrator has, in fact, neglected or refused to proceed with the reference. The right course for him was to enforce compliance by the parties with respect to their appearance before him and in case despite duly serving the notice to the absenting parties, he (absenting party) again repeated the same fault of non-appearance, the arbitrator could have proceeded with the claim and delivered an ex parte award. That has not been done so in the instant case. The true test is, has the complainant, who took exception to the passing of such an order, been in fact, prejudiced by the omission of the arbitrator to serve the purpose underlying the arbitration proceedings. If it is established that arbitrator failed to perform his duty for any reason whatsoever, then the Court has the power to refer the disputes in question separately to new arbitrator by obviating the technical

difficulties, if any, and superseding the arbitration agreement also.

12. As discussed above, the Arbitrator, in the instant case, even did not proceed to make an ex-parte award. He did not take the trouble even to see as to whether the Petitioners were or were not duly served much less proceeding ex-parte against them resulting into making of an ex-parte award. Thus, in the circumstances referred to above, the impugned order amounting to rejection of the claim is illegal and without jurisdiction.

13. The next question which arises for consideration is what is the legal effect of what the Arbitrator has done? I have already observed that by passing the impugned order, the Arbitrator, in fact, has indirectly neglected or refused to proceed with reference. In fact, finding the notice in terms as "un-claimed" on the registered A/D cover, the Arbitrator should have again attempted to serve the Petitioners directing them to appear before him and associate in the proceedings, but instead doing so he has brought up a stalemate not envisaged by law. This he did by making an order which he had no power or jurisdiction to make. It was a serious error of law and procedure which has rendered the reference abortive and caused miscarriage of justice. In the circumstances, the allegations and counter allegations as to the responsibility regarding the causing of delay in the disposal of the arbitration proceeding on the part of the either party or even that of the Arbitrator becomes immaterial. In any case, it cannot justify the illegal closure of the proceedings by the Arbitrator.

14. The above said facts give rise to another question as to what then is the remedy of the Petitioner. I have already observed that Court has the power to supersede the agreement in such circumstances. This view finds favour by the view taken by the learned Judge of Delhi High Court in the case relied upon by the Petitioners in this respect. So far as I can see the only section in the Arbitration Act able to rescue the Petitioner is Section 8(b). The close perusal of the arbitration agreement does not show that it was intended that the vacancy should not be supplied and the parties do not supply the vacancy. In the instant case, the reference as per agreement has to be entrusted with the Secretary (Transport) to the Government of Himachal Pradesh, Shimla acting as such at the time of the reference. There is no dispute that there is only one office of the kind envisaged under the arbitration clause. In the circumstances, this Court has got the power to substitute an arbitrator in place of the appointed arbitrator referred to above. At this stage, the learned Counsel Shri Deepak Gupta appearing on behalf of the Respondent has stated at the Bar that the appointed arbitrator has already been transferred and a new Secretary (Transport) to the Government of Himachal Pradesh, Shimla is working as such at this time. In the circumstances, with the consent of both the parties through their learned Counsel this Court directs the appointment of the Secretary (Transport) to the Government of Himachal Pradesh, Shimla acting as such today i.e. the date of passing of this order and refer all the disputes to him for final adjudication and to make an Award within four months from today. The Arbitrator is directed to proceed from

the stage at which the proceedings were before 25th April, 1989. The petitions stand disposed of accordingly. Let a copy of this order be placed on the record of each one of the petitions referred to above.

15. The Registry to send the file of the proceedings, if any, immediately to the Arbitrator appointed atresh. The parties are directed to appear before the said Arbitrator on January 5, 1991. In the meantime, the Registry is directed to send the copy of this order to the Arbitrator.