

(1998) 05 P&H CK 0087
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 1123 of 1995

Punjab State Cooperative Supply and Marketing Federation Ltd. and another APPELLANT

Vs

Lakhmir Singh Chadha and Co. and others RESPONDENT

Date of Decision : 14-05-1998

Acts Referred:

Arbitration Act, 1940 — Section 8

Citation : (1998) 120 PLR 529 : (1998) 3 RCR(Civil) 77

Hon'ble Judges : V.S. Aggarwal, J

Bench : Single Bench

Advocate : Sh. D.K. Gupta, for the Appellant; Sh. P.C. Markanda and Sh. Naresh Markanda, for the Respondent

Judgement

V.S. Aggarwal, J.—The present revision petition has been filed by the Punjab State Co-operative Supply & Marketing Federation Limited (for short "the Markfed") directed against the order passed by the learned Senior Sub-Judge, Chandigarh, dated 14-2-1995. By virtue of the impugned order, learned trial Court appointed Shri S. S. Mongia, Former/Retired Chief Engineer, Markfed, as Arbitrator to make his award on the dispute between the parties.

2. The relevant facts are that respondent M/s. Lakhmir Singh Chandra & Co. had filed an application u/s 8 of the Arbitration Act, 1940 praying for appointment of an independent arbitrator to resolve the dispute between the parties. It had been alleged that the Executive Engineer, Markfed, had invited tenders for the construction of Markfed offices complex at an estimated cost of Rs. 230 lacs. The tender of respondent M/s. Lakhmir Singh Chandra & Co. was accepted. As per terms of the contract, if there was any dispute or differences between the parties to the contract, the same was to be resolved through arbitration of the Chief Engineer of Markfed. As dispute arose between the parties. The respondent invoked the arbitration clause vide its letter dated 3-12-1992. Chief Engineer was called upon to enter into the reference within one month. He addressed another

communication on 19-12-1992 to the Chief Engineer, Markfed. No reply was received. It was followed by another letter written by the respondent. Superintending Engineer of Markfed had called upon the parties to file their replies. The respondent informed him that only the Chief Engineer could act as arbitrator and not the Superintending Engineer. The respondent suggested that markfed could give a panel of five names of independent and impartial officers so that they could be considered and one of them appointed as arbitrator. No reply was received. It was pointed out that the post of Chief Engineer, Markfed, had been abolished when respondent had laid his claim. It was pleaded that, therefore, the Court should appoint the arbitrator. Petitioners No. 1 and 2 have submitted their reply. It was asserted that the respondent is not registered with the competent authority and cannot file the petition. Plea was raised that no notice required u/s 8 of the Arbitration Act, 1940 was served on the petitioners before filing the present application before the court. Furthermore, it was contended that since the arbitrator is not available, therefore, application deserves to be dismissed. On merit it has been pleaded that no dispute existed between the parties. Chief Engineer, Markfed, was originally the Superintending Engineer on deputation from Punjab Government was incharge and Head of the Engineering Wing of the Markfed. After his transfer, only a Superintending Engineer has been appointed. He was performing all the functions of Engineering Wing. It was reiterated that there was no officer designated as Chief Engineer, there was no question of Superintending Engineer being not interested to act as arbitrator.

3. Learned trial court framed the issues and held that if the post of Chief Engineer had been abolished, the arbitration agreement will come to an end. It was further held that notice u/s 8 of the Arbitration Act had been served. The plea that respondent was estopped from filing the petition was rejected. With these findings, the impugned order was passed.

4. Aggrieved by the same, present revision petition has been filed.

5. During the course of arguments only two questions were raised :

(i) effect of abolition of the post of Chief Engineer who had been mentioned to be the arbitrator in case dispute arose between the parties;

(ii) whether notice u/s 8 of the Arbitration Act, 1940 had been served by the respondents or not ?

Taking up the first contention admitted facts are that in the arbitration agreement it had been mentioned that if any dispute arises between the parties, the same shall be referred to the arbitration or the Chief Engineer, Markfed. It is not it controversy that when reference could be made, there was no Chief Engineer, Markfed. It is in these facts that the controversy arises if the court can appoint arbitrator or not. Section 8 of the Arbitration Act, 1940 which is applicable reads as under :

"8. Power of Court to appoint arbitrator or umpire :

(1) In any of the following cases :

(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after service of the said notice, the court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties."

Under Section 8(1)(b) of the Act, if the arbitrator neglects or refuses to act or is incapable of acting and the arbitration agreement shows that it was intended that vacancy should be supplied, the court can appoint the Arbitrator. Further discussion in this regard may be unnecessary because answer is provided by a large number of precedents. In the case of Union of India Vs. R.B. Ch. Raghunath Singh and Co., , Supreme Court held that if agreement showed that parties intended to supply the vacancy, the same could be so done by the Court. When there was a named arbitrator by office, even his vacancy would be supplied. In the cited case, arbitration agreement provided that the dispute shall be referred to the Chief Commissioner/Director of Storage, Ministry of Foods, Government of India. The post of Director of Storage, Ministry of Food, Government of India, had been abolished. It was held that under these circumstances the Court could appoint another Arbitrator or in other words could supply the vacancy u/s 8(1)(b) of the Act. Allahabad High Court in the case of Union of India (UOI) Vs. Om Prakash, , was concerned with similar situation. In the said case also the Arbitrator as designated had ceased to exist. The Court held that application u/s 8(1)(b) of the Arbitration Act was maintainable. In paragraph 9 of the judgment, the court held as under :

"Having given careful consideration to the facts of the case I am clearly of the view that the arbitration clause does not lay down that the parties had agreed that vacancy was not to be supplied and, therefore, one has to presume that the

intention of the parties was to supply the vacancy. I have already held above that the Arbitrator as designated in the agreement had ceased to exist and must be deemed to have become incapable of acting or having died and in the circumstances the application u/s 8(1)(b) was clearly maintainable."

Even Andhra Pradesh High Court in the case of State of A.P. and another v. Chelaman Ramlinga Reddy (1990(1) Arb. LR 287), took into consideration the said controversy. The post of Director of Storage in the Ministry of Food, Government of India, was abolished. It was held that reference could indeed be made u/s 8(1)(b) of the Act and the court recorded the following findings :

"..... Therein, the post of Director of Storage in the Ministry of Food, Government of India, was abolished no person holding that post was available for arbitration under the contract. The contention was that when there was a named arbitrator even though he was named by office it was not open to the court to supply the vacancy in his place u/s 8(1)(b) of the Act. It was negative holding that the court had no power to supply the vacancy u/s 8(1)(b) only if the arbitration agreement did not show that the parties did not intend to supply the vacancy. If no such intention could be called out from the arbitration clause, the court could supply the vacancy. Accordingly, the appointment of the sole arbitrator was upheld. The decision in Government of A.P. v. G. Ramachandra Reddy Co. is of little assistance to the State. Therein, the question was whether the Deputy Secretary, Finance is equivalent to the Deputy Secretary, Finance and Planning Department. In that context the Division Bench has held that it is only nomenclature and the intention was that the Deputy Secretary, Finance and Planning after merger, therefore, there is no vacancy in the office of the Deputy Secretary, Finance and Planning."

Same view prevailed in the subsequent decision of the Andhra Pradesh High Court in the case of Yelluru Mohan Reddy Vs. Rastriya Ispatnigam Ltd., Visakhapatnam, .

6. Supreme Court more recently in the decision rendered in the case of State of West Bengal Vs. M/s. Naional Builders, , took into consideration the same controversy. The answer was on the same lines and it was held as, under :

".... When the agreement provides that dispute between parties shall be referred to the person named in an agreement it is an appointment by consent. But where the arbitrator so appointed refuses to act the next appointment could again be made either as agreed between the parties and provided for in the arbitration clause or by consensus. But where either is absent no party to the arbitration agreement can be forced to undergo same procedure, for the simple reason that the arbitrator having refused to act he cannot be asked to arbitrate again. In view the result of such refusal is that the agreement clause cannot operate. It, therefore, follows that in a case where the arbitration clause provides for appointment of a sole arbitrator and he had refused to act then the agreement clause stands exhausted. And it is for the court to intervene and

appoint another arbitrator u/s 8(1)(b), "if arbitration agreement does not show that it was intended that the vacancy shall not be supplied". That is the agreement should not debar any further arbitration. If it is provided in the agreement that if the arbitrator appointment in accordance with the agreement refuses to act then the dispute shall be resolved by another arbitration."

7. It is obvious from the aforesaid that when the post of the arbitrator so named is abolished and it was intended as in the present case that vacancy should not be supplied, the court can act u/s 8(1)(b) of the Arbitration Act. When the post is abolished and arbitrator is not available it would tantamount that arbitrator named was incapable of acting. The trial Court in these circumstances rightly so concluded.

8. The only other controversy was as to if notice u/s 8 of the Arbitration Act had been served upon the petitioners. The first notice so served is dated 3-12-1992. It is addressed to Chief Engineer, Markfed and reads as under :

"I hereby invoke the provisions of Clause 40 of the Contract Agreement between our firm and the Executive Engineer(C), MARKFED, Chandigarh and call upon you to enter into reference and call upon the parties to submit their statement on Claims and defence thereto within a period to be prescribed by you. Our "List of Claims" is enclosed herewith.

We may further add that failure to enter upon reference within one month of the receipt of this letter shall amount to neglect of duty in terms of Arbitration Act and it is, therefore, requested that you may enter upon reference forthwith.

Extract of Clause 40 are also attached herewith.

Thanking you,

Yours faithfully,

for LAKHMIR SINGH CHADHA & CO. Sd/- HARMOHINDER SINGH CHADHA
PROPRIETOR

It is followed by reminder dated 19-12-1992 and also another notice dated 7-1-1993 which is to the following effect :

"We are really amazed to read the contents of your letter No. se/pa/fed/92/2941-42 dated 30-12-1992. We fail to understand as to how you have assumed jurisdiction to act as, an arbitrator. You will be well advised to read the arbitration clause. It is only the Chief Engineer of Markfed who is competent to be the arbitrator. Moreover, our letter was addressed to the Chief Engineer and not to you.

In case the Chief Engineer of Markfed is not interested to be the arbitrator or that the post ceases to exist, we have a right to seek intervention of the Court for the appointment of the arbitrator. However, in fairness and to avoid litigation, we request you to give us a panel of five names of independent and impartial

officers (serving or retired) not below the rank of S.E. for our consideration and in case we find any name acceptable to us, we shall communicate the same to you who in that event shall act as the sole arbitrator. In case we do not find any name suitable, we shall seek intervention of the Court.

In the event of your failure to send a panel as aforesaid within a period of 15 days of the receipt of this letter, we shall be constrained to proceed against Markfed in a court of competent jurisdiction, in which case costs and expenditure shall be to your account which please note.

Yours faithfully,

Sd/- HARMOHINDER SINGH CHADHA for M/s. LAKHMIR SINGH CHADHA & CO."

It is true that both these notice were addressed to the Chief Engineer and Superintending Engineer respectively and copies had been endorsed even to the Executive Engineer (C), Markfed.

9. The purpose of notice is to inform the other party about the dispute. The same must be construed objectively. The object is not to find fault. If no prejudice is caused and the other party know that notice is being served under the arbitration clause, in that event such a claim that notice is not proper should not be entertained. Section 8 of the Arbitration Act does not prescribe any specific form of notice. In the present case, notices mentioned above clearly gave the intention of the respondents that an arbitrator should be appointed and should so Act. Petitioners were informed about it and they cannot now be heard to state that in the absence of proper notice any prejudice has been caused in this regard. Somewhat similar situation arose in the case of Fertiliser Corporation of India Ltd. Vs. Ravi Kumar Ohri, . It was held that when notice is served on the Project Manager then he is not an outsider and the said notion cannot be construed as a notice to the Corporation. In para No. 8 of the judgment, it has been held as under :

"It is contended by Mr. Mohanty that there was no notice u/s 8(1) of the Arbitration Act. Parties had already agreed as to the person to whom reference is to be made. The General Project Manager is not an outsider, but admittedly is principal administrative officer of the Corporation. Notice to the General Project Manager can be construed as notice to the corporation itself because he is the principal officer at Talcher Project. Notice having been issued to him and he having been already named by the parties in the agreement to be arbitrator, amounts to notice contemplated u/s 8 of the Act. I have already held that there is nothing in Clause 65 of the agreement to show that unless the conditions of Clause 64 are complied with, no action can be taken under Clause 65. It is admitted by the petitioner that the notice has been received by the Corporation. Therefore, the corporation cannot challenge the question of notice at this stage."

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10. Same is the position herein. One find in reasonable agreement of the same.

Notices have been served on the Chief Engineer as well as Superintending Engineer, Markfed, and a copy even has been endorsed to the Executive Engineer (C), Markfed. The petitioner knew about the dispute. No prejudice has been caused and thus it is held that notice has been served.

11. For these reasons, the revision petition being without merit must fail and consequently dismissed.

12. Revision petition dismissed.