

(1994) 04 SHI CK 0026

In the High Court Of Himachal Pradesh

Case No : Civil Suits No's. 145 and 146 of 1993

Sh. Puran Chand

APPELLANT

Vs

The H.P. Forest Corporation

RESPONDENT

Date of Decision : 29-04-1994

Acts Referred:

Arbitration Act, 1940 — Section 20, 8, 8(1)

Citation : (1994) 2 ShimLC 290

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

Bench : Single Bench

Advocate : J.S. Bhogal, for the Appellant; B.M. Chauhan, for the Respondent

Judgement

D.P. Sood, J.—The sole question in both these Civil Suits Nos. 145 and 146 of 1993, which arise for the determination of this Court is:

In case one of the named arbitrator to whom notice to take cognizance of the dispute having arisen in between the parties, neglects to discharge his duties and as such, he abdicates his authority to intimate either of the parties, whether the Court gets jurisdiction to appoint one of the Ors. arbitrators so named by the parties?

Accordingly, both these suits are being decided together by a common judgment.

2. The facts lie in a short compass which are stated as under:

3. The Petitioners concluded a contract with the Respondent pursuant to an agreement entered into in between them inter se. This agreement pertains to the working of the lots Nos. 2/83-88-Kaban, 6/89-91- Barra Bumbal, 2/89-90- Chhota Bumbal, 1/86-88-Kalatope and 2/87-89- Chilkot. Some difference with respect to the payments claimed by the Petitioners pursuant to the work executed by them arose in between the parties, consequent to which he served a notice dated 27-7-1993 upon the Managing Director to act as arbitrator pursuant to the arbitration clause contained in the aforesaid agreement. The said clause

reads:

That the contractor(s) L.S. M(s). agrees/agree that in case of any difference/ dispute the decision of the Managing Director/ Director, Shimla/North Zone, Dharamsala, H.P.S.F.C. Ltd., shall be final and binding.

The Managing Director did not enter upon the reference himself nor nominated any arbitrator within 15 days of the receipt of the aforesaid notice as required by the Petitioner and thereby abdicated his duties which ultimately culminated into the filing of this application under Sections 8 and 20 of the Arbitration Act, 1940 (Act No. X of 1940) (hereinafter shortly referred to as the Act).

4. Respondents have admitted the agreement as also the execution of the work pursuant to the agreement entered into in between the parties to the instant lis. Arbitration clause contained in the said agreement has also not been disputed. The only plea raised by the Respondents is that pursuant to the arbitration clause, the Managing Director is empowered to nominate the arbitrator and this Court has no jurisdiction. In short, according to the Respondents, Section 8(1)(b) of the Act does not come into play in the peculiar facts and circumstances of the case.

5. The exercise of jurisdiction by a Civil Court u/s 8(1)(a) of the Act is hedged with the existence of the contract. Section 8(1)(a) of the Act reads:

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 appointments; or... Any party may serve the Ors. parties or the arbitrators, as the case may be, with a written notice to concur in the appointments or in supplying the vacancy.

For its applicability, the following conditions must be fulfilled.

- (1) There must be an arbitration agreement.
- (2) The agreements must provide that in case of difference one or more arbitrators to be appointed by consent of parties and did not concur in the appointment of the arbitrator/arbitrators.
- (3) Disputes have arisen to which the agreement applies.
- (4) The parties had been consented in the appointment or appointments.
- (5) The appointment is not made within 15 clear days of the service of the written notice to do so; and
- (6) The application is made to the Court by any party to the agreement.

It would be thus clear that if no arbitrator had been appointed in terms of the contract within 15 days from the date of the receipt of notice, the Managing Director is to be deemed to have abdicated himself of the power to enter upon the reference or to appoint an Ors. arbitrator under the contract. Parties have

already consented to the appointment of the arbitrator out of the three categories referred to in the arbitration clause. The Court gets jurisdiction to appoint arbitrator by operation of Section 8(1)(a). The fact that notice was given to the Managing Director and he having not entered upon the reference as envisaged under the arbitration clause does not mean that the Managing Director having so done is empowered to then nominate one of the Ors. arbitrators consented to by the parties to enter upon in. accordance with the arbitration clause. I am fortified in taking this view by the observations of the Apex Court in the case of Nandyal Co-operative Spinning Mills Ltd v. K.V. Mohan Rao 1993 (1) ALR 469.

6. If the contention of the learned Counsel for the Respondent is accepted, it would amount to put a premium on inaction depriving the contractor i.e. the Petitioner, of the remedy of arbitration frustrating the contract itself.

7. In view of the above and further keeping in view that the working of lots in the instant case pertains to District Chamba, Director North Zone, H.P. Forest Corporation, Dharamsala is appointed as arbitrator and directed to inter upon the reference in relation to the contract in question. Parties will file their claim and counter claim(s), if any, within two months from the date of this order. Let a copy of this order be also placed in Civil Suit No. 146 of 1993, besides one copy thereof the above- said arbitrator.

8. Both the civil suits are disposed of in terms of the above.