
(2003) 07 P&H CK 0051
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 3448 of 2003

Union of India (UOI)

APPELLANT

Vs

Harbans Singh Tuli and Sons

RESPONDENT

Date of Decision : 28-07-2003

Acts Referred:

Arbitration Act, 1940 — Section 8

Citation : (2004) 3 ARBLR 307 : (2004) 136 PLR 553 : (2003) 4 RCR(Civil) 863

Hon'ble Judges : M.M. Kumar, J

Bench : Single Bench

Advocate : Kamal Sehgal, for the Appellant;

Final Decision : Dismissed

Judgement

M.M. Kumar, J.—This petition filed u/s 115 of the Code of Civil Procedure, 1908 (for brevity "the Code") challenges order dated 22.3.2003 passed by the Civil Judge (Jr. Division), Chandigarh allowing the application of the contractor-respondent in which prayer for appointment of Arbitrator was made.

2. Brief facts of the case are that in pursuance of a contract for providing additional accommodation in Harding and Chillianwala Lines the respondent-contractor executed the work and thereafter some differences had arisen. The Engineer-in-Chief of the petitioner i.e. Union of India appointed and nominated an Arbitrator in pursuance of Clause 70 of the agreement. The dispute remained unresolved despite appointment of the successive arbitrators by the Engineer-in-Chief. The last Arbitrator appointed by the Engineer-in-chief resigned on 29.9.1987 and in spite of 15 days notice dated 28.3.1988 served upon the Engineer-in-Chief by the petitioner, the Engineer-in-Chief did not fill up the vacancy and himself abdicated the power to appoint an Arbitrator. It is further urged that application u/s 8 of the Arbitration Act 1940 (for brevity "the Act") was filed and on 30.5.1989, the Sub Judge appointed one Shri A.J. Kumaresan as an Arbitrator. The aforementioned Arbitrator retired and Shri B.K. Wadhwa was appointed by the Court on 16.9.1991. Shri Wadhwa entered upon the reference

on 8.3.1989. He also resigned on 19.10.1993.

3. It is in the afore-mentioned circumstances, that the application was made before the Sub Judge. The application has been decided and the existence of the dispute between the parties stand admitted. The fact of appointment of Shri A.J. Kumaresan and Shri B.K. Wadhwa has also been admitted. The Id. Civil Judge has recorded an order allowing the application and its operative part reads as under:

"The contention of the petitioner is that Shri B.K. Wadhwa arbitrator was appointed in the present case by the Court and upon his resignation, the arbitrator cannot be appointed by the respondent, but the arbitrator can only be appointed by the Court. The order dated 16.2.1991 by which, Sh. B.K. Wadhwa was appointed as arbitrator was challenged by the respondents before the Hon"ble High Court, but their revision was dismissed and the SLP filed by them against the order of the Hon"ble High Court was also dismissed by the Hon"ble Supreme Court having become infructuous, because B.K.Wadhwa arbitrator appointed by the Court had resigned. Learned counsel for the respondent had argued that only the Engineer-in-Chief had authority to appoint a new arbitrator. But from the perusal of the arbitration clause contained in condition 70 it is evident that a new arbitrator can be appointed by the designated authority, which is the Engineer-in-Chief in the present case, only if the Arbitrator so appointed resigns or vacates his office or is unable or unwilling to act due to any reasons whatsoever. It is provided that only under that circumstances, the authority appointing him i.e. designated authority of the respondent may appoint new arbitrator to act in the place. No doubt earlier certain arbitrators were appointed by the designated authority. Subsequently, on the application of the petitioner, firstly A.J. Kumaresan, arbitrator appointed by the Court was approved and subsequently by order dated 16,2.1991 Shri B.K.Wadhwa was appointed as arbitrator by the court in place of A.J. Kumaresan, therefore, it cannot be said that B.K.Wadhwa arbitrator was appointed in terms of the arbitration clause by the designated authority and as discussed herein above, the designated authority of the respondent was competent to appoint arbitrator only when the arbitrator appointed by the designated authority resigned or vacated his office, That is not the case here. Therefore, the contention of the Id. counsel for the respondent that only designated authority as per the condition 70 of arbitrator clause contained in contract agreement was competent to appoint arbitrator is not tenable,"

4. Shri Kamal Sehgal, learned counsel for the petitioner has argued that once there is a clause in the agreement giving power to the petitioner to appoint an Arbitrator the Court cannot assume jurisdiction to appoint anyone. According to the learned counsel, the Court would not have jurisdiction even in respect of appointing an Arbitrator who have been approved by the Department, In order to buttress his stand, the learned counsel has submitted that if the department has appointed an Arbitrator he will demit the office and would not work as such on

his retirement but in case the Court appoints the Arbitrator he would continue to work despite his retirement. In support of his submission, the learned counsel has placed reliance on a judgment of the Supreme Court in the case of M/s. Indian Drugs and Pharmaceuticals Ltd. Vs. M/s. Indo Swiss Synthetics Gem Manufacturing Co. Ltd. and others, and a Division Bench judgment of the Bombay High Court in the case of Union of India Vs. M/s. Ajit Mehta and Associates, Pune and Others, and argued that the award passed by the Arbitrator appointed in violation of the Clause of the arbitration agreement would be non est.

5. I have thoughtfully considered the submissions made by the learned counsel and regret my inability to accept the same because in the instant case, the Arbitrator appointed by the Court as well as by the department is the same person namely Shri Rajinder Prashad. Moreover, on two earlier occasions, the Arbitrators have been appointed by the Court and on their retirement they have tendered their resignations after conducting arbitration proceedings upto that time, Dispute continues to be alive despite the lapse of 15 years, It is admitted position that there is existence of a dispute between the parties. Shri B.K. Wadhawa who was appointed Arbitrator by the Court on 16.9.1991 entered into reference and resigned on 19.10.1993. Earlier also Shri A.J. Kumaresan was appointed on 30.5.1989 and he also resigned after he retired. Therefore, the petitioner-department has been accepting the Court orders appointing Arbitrator despite the provisions of Clause 70 of the agreement. Such an acceptance on earlier two occasions would lead to the conclusion that the orders passed by the Court concerning appointing of Arbitrators have not been disputed by filing revision etc. but have been readily accepted, Still further it would be in fitness of things to allow the Arbitrator to conduct the arbitration proceedings without any further delay,

6. The argument that on retirement such an Arbitrator is not to continue has not impressed me because there is a time limit imposed on the Arbitrator to announce his award. The learned counsel has not been able to give me the date of retirement of Shri Rajinder Parshad, CSW nor he has mentioned as to when he is likely to enter upon the reference. Moreover, the judgments relied upon by the learned counsel for the petitioner to argue that the Court cannot assume jurisdiction in the presence of a Clause in the arbitration agreement, when the appointment of arbitrator is to be made by the petitioner-department, would not require any detailed consideration because in none of the judgments, the department had earlier accepted the appointment of the Arbitrator by the Court as are the facts in the present case. In those cases, the power of the department to appoint Arbitrator has been upheld but once it willingly accepted the order passed by the Court appointing Arbitrator despite the provision of Clause 70 in the arbitration agreement then the legal consequences would be entirely different. The acceptance of order of the Court appointing Arbitrator on earlier two occasions amounts to even negation of the arbitration agreement. Therefore, the judgments relied upon by the learned counsel are not applicable to the facts

of the present case.

For the reasons recorded above, this petition fails and the same is dismissed.