

PUNJAB AND HARYANA HIGH COURT

Shri Girdhari Lal Bansal

Vs

Bhakra Beas Management Board

First Appeal From Order No. 511 of 1984 and Cross Objection No. 87-CII/1984

(G.C. Mital, J.)

21.01.1985

JUDGMENT

Gokal Chand Mital, J.

1. Bhakra Beas Management Board, (hereinafter referred to as the 'Board') though Sub Divisional Officer Construction Sub-Division, allotted work for the construction of 12 quarters to Girdhari Lal vide work order No. 437 dated 22nd September, 1980. The contractor filed an application under sections 5, 8, 11 and 12 of the Indian Arbitration Act, 1940 (hereinafter called the 'Act'), before the Court below on 26th October, 1982 for revoking the authority of the Arbitrator and for appointment of some other impartial Arbitrator for decision of the dispute between the parties on the pleas that under the arbitration agreement the disputes had to be referred to the Arbitration of Superintending Engineer of the Circle and the applicant submitted the claim before the said Arbitrator in which all details were mentioned and a total claim of Rs. 1,05,984/- was made against the Board. The Arbitrator did not proceed with the matter and allowed the four months' time to expire, which amounted to misconduct and hence order of the Court was sought for appointment of another Arbitrator.

2. The application was contested by the Board and the following issues were framed :-

1. Whether the petition is barred under Order 23, Rule 1(4) of Civil Procedure Code ?
2. Whether the Civil Courts at Chandigarh lack jurisdiction to try the present petition ?
3. Whether there are sufficient grounds for the removal of the arbitrator ?

3. After the evidence was led, the Court below by order dated 17th February, 1984 dismissed the application after recording findings on issue No. 1 in favour of the Board and against the applicant; issue No. 2 was decided in favour of the applicant and under issue No. 3 it was held that although there was an arbitration agreement but the reference, which the contractor had made, was unilateral, and as such, was invalid and the inaction of the Arbitrator not to enter into the reference, was not sufficient ground for removal of the Arbitrator. This is contractor's appeal.

4. After hearing the learned counsel for the parties, I give the following findings issuewise.

Issue No. 1 - This issue relates to the matter whether the second petition filed by the contractor on the same allegations and for the same relief is barred under Order 23 Rules 1(4) Civil Procedure Code or not in view of the fact the earlier petition was got dismissed as withdrawn. The Court below relied on *Teja Singh v. The Union Territory of Chandigarh*¹, and decided the issue against the contractor and held that the present petition was barred. The learned counsel for the appellant has not challenged the dictum laid down in the aforesaid decision but has argued that on of the facts of this case that decision is not applicable because here the second application was filed before first application was withdrawn and to these facts the provisions of Order 23 Civil Procedure Code are not attracted in view of *Ram Mal v. Upendra Dutt*², and *Mangi Lal and another v. Radha Mohan*³, The earlier application was filed on 6th October, 1982 and the present application was fixed on 26th October, 1982 and the first application was withdrawn vide order dated 18th November, 1982. The learned counsel for the Board could not show if aforesaid two decisions were ever dissented from or over-ruled. The aforesaid two Lahore decisions clearly say that if second suit is filed before the first suit is withdrawn then Order 23 Civil Procedure Code is not attracted and the second suit cannot be dismissed under Order 23 Rule 1(4) of the Civil Procedure Code. Accordingly, I reverse the decision of the trial Court and hold that the present petition was not barred under Order 23 Civil Procedure Code

Issue No. 2 - No argument has been raised before me on this issue and hence the findings of the Court below on this issue are upheld.

Issue No. 3 - On issue No. 3 while the contractor wants to challenge the findings of the Court below for coming to the conclusion that the reference was invalid because it was unilateral and for refusing to remove the named arbitrator the Board has filed cross-objections for reversal of the findings of the trial Court on issue No. 3 to the effect that there was an arbitration agreement between the parties. I first proceed to decide the matter whether there was an arbitration agreement or not. At the back of the work order, certain conditions have been laid down and these conditions have also been signed by the parties. Those conditions are as follows :-

1. The Officer in charge of the work will accept or reject the work executed, according to his judgment.
2. The work will be measured up and paid for from time to time as the officer in charge may deem necessary, usually once a month when the progress is satisfactory.
3. This order can be cancelled and the work stopped at any time by the officer incharge of the work or by any officer superior to him in authority. Similarly, the contractor is at liberty to cease work at any time.
4. The work shall be executed strictly according to the specifications attached.
5. In matter of dispute the case shall be referred to the Superintending Engineer of the Circle, whose order shall be final.
6. All work executed shall be paid for according to measurements taken by or under the

orders of the officer in charge of the work, and not according to the quantity given in any estimate."

Shri Munishwar Puri appearing for the Board has strenuously argued that these are conditions for the carrying out of the work order and powers has been bestowed either on the officer-in-charge or on the Superintending Engineer of the Circle for deciding certain matters but none of the conditions shows any arbitration clause. The Court below had referred to condition No. 5 in order to come to the conclusion that it was an arbitration clause. The learned counsel states that it is not an arbitration clause and confers authority on the Superintending Engineer of the Circle to decide the dispute under the work order and for this argument reliance is placed on *The State of U.P. v. Tipper Chand*⁴. I have gone through the decision relied upon and find that the relevant clause was wholly different. The clause which the Supreme Court considered in that case was as follows :

"Except where otherwise specified in the contract the decision of the Superintending Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specification, design, drawing and instructions herein-before mentioned. The decision of such Engineer as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or things whatsoever, in any way arising out of or relating to the contract, designs, drawing specifications, estimates, instructions, orders, or these conditions, or otherwise concerning the works, or the execution or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment of the contract by the contractor, shall also be final conclusive and binding on the contractor."

A bare perusal of the aforesaid conditions shows that it was not even remotely agreed between the parties if the officer concerned was to settle any dispute between the parties on being referred to him. He was given authority to supervise and to have administrative control over the work. It was also taken notice of that the clause reproduced above was under the marginal note of 'direction of work'. So, while the work was to go on and any question was to arise about the interpretation of meaning of the specifications, decision and instructions, the matter had to be decided by the Superintending Engineer, for the time being and if during the contract any difficulty to find out the meaning arose, at different times, during the posting of the different Superintending Engineers the Superintending Engineer for the time being had to decide these matters, which means that the matters at different times could be decided by different Superintending Engineers. This may not be so in the case of arbitration proceedings. Therefore, the words 'decision of the Superintending Engineer for the time being shall be final' clearly go to show that the decision was not to be an award but with regards to directions to be issued in regard to the work to be completed.

5. In the present case clause 5 is quite clear. It talks of dispute between the parties and for reference of the same to the Superintending Engineer of the Circle. The terms 'dispute and reference' were conspicuously absent in the clause which fell for consideration in *Tipper Chand's* case (*supra*).

6. The learned counsel for the Board then argued that it is nowhere mentioned in clause 5 that

the Superintending Engineer was to be the arbitrator or that he had to give an award, and, therefore, it is not a case where there was an agreement of arbitration. It is true that the words 'arbitrator and award' are not mentioned but the clause is clear enough to show that the dispute which was to arise between the parties had to be referred to the Superintending Engineer of the Circle and this gives sufficient indication of the Superintending Engineer being an arbitrator and his decision to be an award. Therefore, I am in agreement with the Court below and hold that there was an arbitration agreement between the parties.

7. Adverting to the remaining points arising in this issue, it is categorical stand of the contractor that he submitted his claim Exhibit, All to the Superintending Engineer, Bhakra Dam Circle, Nangal, requesting him to adjudicate the dispute between the parties on the basis of arbitration agreement and after giving detailed facts in 14 paragraphs, 10 items of claim were mentioned and sought an award of Rs. 1,05,984.00 along with 18 per cent interest per annum, from the date of reference till realization. This was not controverted. The Arbitrator did not enter into reference and kept quiet till the application was moved in the Court. It has to be seen whether this amounts to unilateral reference and as such illegal, clothing no jurisdiction on the Arbitrator to adjudicate the dispute. In this behalf the Court below relied on *Union of India, Bombay v. Hari Krishan Joshi*⁵, , to decide the issue against the contractor. Before me the learned counsel for the contractor has relied on *State of Orissa v. Laxminarayan Samantaray*⁶, which has followed the judgment reported as *P.C. Aggarwal v. K.N. Khosla*⁷, and *Bhusawal Borough Municipality v. Amalgamated Electricity Co. Ltd., Bhusawala*⁸, , and also referred to *Thawardas Pherumal and another v. Union of India*⁹, . The decision of other High Courts, which have been referred in the aforesaid Laxminarayan Samantaray's case, had not referred to Bhusawal Borough Municipality's case (supra) and had merely taken notice of certain observations in Thawardas Pheruman's case (supra) and on that basis they were also commented upon. Reliance was also placed on the latest decision of this Court in *M/s Guru Nanak Trunk House, Amritsar v. M/s Chanan Finance and Chit Fund (P) Limited, Amritsar*¹⁰, , which is in line with Laxminarayan Samantaray's case (supra). For the detailed reasons given in Laxminarayan Samantaray's case (supra), which is based on latest decision of the Supreme Court in Bhusawal Borough Municipality's case (supra) I am of the view that it would be wrong to say that if there is a named arbitrator one of the aggrieved parties to the agreement cannot ask the Arbitrator to arbitrate or that it would be an illegal reference. If the Arbitrator is satisfied that he is the Arbitrator under the agreement he will be duty bound to call upon the opposite party to file their counter claim and then to proceed to arbitrate the matter in accordance with law. If he fails to proceed with the arbitration and allows 4 months' time to pass, it may be a fit case for his removal and for appointment of another Arbitrator.

8. In view of Laxminarayan Samantaray's case and M/s Guru Nanak Trunk House's case (supra) the decision of the Court below on issue No. 3 is hereby reversed and it is held that reference of dispute by the contractor to the Superintending Engineer, Bhakra Dam Circle, Nangal, was not illegal.

9. Since sufficient time has elapsed between the reference and the dispute by the contractor till this date, it is quite possible that there may be a different Superintending Engineer who may be holding the post of the Circle and in that view the relief can be moulded.

10. For the reasons recorded above, this appeal is allowed, the order of the Court below dated

17th February, 1984 is set aside and direction is issued to the Superintending Engineer, Bhakra Dam Circle, Nangal, to enter into the arbitration on the basis of claim Exhibit. All made by the contractor. It is possible that the original claim made by the contractor to the Superintending Engineer may not be available, the parties through their counsel are directed to appear before the Superintending Engineer Bhakra Dam Circle, Nangal, on 20th February, 1985 when the contractor will file copy of claim Exhibit. All before the said officer and the Board would be given six weeks' date to file its counter claim. On the filing of the counter claim it will be deemed that the Arbitrator has entered into reference and he would decide the matter between the parties within four months' thereafter i.e. within 4 months of filing of the counter claim by the Board. If parties agree to extend the time of 4 months before the Arbitrator he may take the matter beyond 4 months and in case the parties do not agree for the extension of time and the Arbitrator does not decide the matter within 4 months in accordance with law, the Superintending Engineer of the Circle shall stand removed as arbitrator and the parties would be at liberty to move the Court for the appointment of a new Arbitrator in accordance with law. There will be no order as to costs.

Appeal allowed.

Cases Referred.

11981(1) S.L.R. 275

2AIR 1928 Lah 710

3AIR 1930 Lah 599

4AIR 1980 SC 1522

5AIR 1972 Pun and Har 207

6AIR 1982 Ori 93

7AIR 1975 Del 54

8AIR 1966 SC 1652

9AIR 1955 SC 468

10(1976) 78 P.L.R. 534