

Harbans Singh Tuli and Sons Builders Pvt. Ltd.

Vs

Union of India

Spl. Leave Petn. (Civil) No. 13530 of 1991

(Dr. T. K. Thommen, S. Mohan JJ)

11.02.1992

JUDGEMENT

MOHAN,J.:-

1. The facts relating to the case are as follows:-

The petitioner herein offered his tender for entering into a contract for provision of officer's mess and single officer's quarters. On 13-3-1970, the tender was accepted and the acceptance was communicated. Thereafter, a contract was signed at Lucknow. Between 1973, the petitioner executed the contract. During the course of contract, he was required to do some extra work for which he made a claim. A dispute arose concerning this. Clause 70 of the contract enabled the parties to go by way of arbitration. He applied to the Engineer-in-Chief, Army Headquarters, New Delhi for appointment of arbitrator. Accordingly, Brig. EMA Da Costa, Chief Engineer, Pune and Rajasthan zone was appointed as an arbitrator on 23-11-73. The petitioner vide his letter dated 2-12-73, protested against the appointment of Brig. Da Costa. It appears that the proceedings were dragged on and nothing useful turned out. In February 1976, when Brig. Da Costa was relieved from the Army, his appointment as arbitrator came to an end. Thereafter by an order dated 27-4-76, Brig. SDL Jaini was appointed as an arbitrator. Even then no progress took place in the arbitration, he also retired on 18-3-76. On 29-4-78, one Mr. G. R. Mirachandani was appointed as an arbitrator. He relinquished the appointment on 11-4-80 since he was to retire on 31-7-80. The next appointment was that of Mr. V. Badrinath dated 12-6-80. He also relinquished the charge on 14-9-84 since the petitioner did not co-operate with him for more than 4 years. In the meanwhile, the question arose as to who had the competence to represent the contractor in the arbitration proceedings. The petitioner was required to obtain the succession certificate from the Collector, since the original contractor died in June, 1982. Thereafter, the matter was pending without any adjudication. Therefore, a notice was issued under section 8 of the Arbitration Act. On (sic) upon the respondent to appoint an arbitrator but no such appointment was made. Therefore, he filed an application for the appointment of an arbitrator before the learned Subordinate Judge, Chandigarh. One of the contentions raised was after the filing of the application under Section 8 since the respondent had not appointed an arbitrator, as required under Section 8 (1)(b) of the Act, the right to make such an appointment had been forfeited. Therefore, the only course left open to the court was

to appoint an arbitrator as required under Section 8 of the Act.

2. The application was contested on behalf of the respondent not only on merits but also on the ground of want of territorial jurisdiction of the court. It is seen that the appointment of Mr. YNR Rao and Mr. Gopalkrishnan took place during the pendency of the application of the petitioner under Section 8 before the learned Subordinate Judge, Chandigarh.

The following 5 issues were set down for trial:

- (i) Whether there are sufficient grounds for the appointment of an Arbitrator for referring the matter in dispute?
- (ii) Whether the petition is within time?
- (iii) Whether the present petition is not maintainable?
- (iv) Whether this court does not have the territorial jurisdiction to try the present suit.
- (v) Relief.

3. On issue number 1, the learned Subordinate Judge came to the conclusion that there exists a dispute between the parties and hence there was a need to appoint an arbitrator.

4. Issue number 2 was answered in favour of the petitioner, while issue number 3 was not pressed. As regards issue number 4, the court was of the view that having regard to the clause 26 and in view of the case A.B.C. Laminart Pvt. Ltd. v. A. P. Agencies, Salem, AIR 1989 SC 1239, the Civil Court at Chandigarh had jurisdiction, as part of cause of action arose at Chandigarh. This order was pronounced on 30th July, 1990. In continuation of that judgment by order dated 20th August, 1990, Mr. Puranjit Singh, Superintending Engineer, Capital Project, Chandigarh was appointed as arbitrator with effect from 1-9-90. It was specifically mentioned that the order revoked the appointment of Mr. A. V. Gopal Krishnan who was appointed as arbitrator on 25-7-90 for the second time during the pendency of the petition.

5. Aggrieved by this, the matter was taken up in Civil Revision No. 2934 of 1990 by the Union of India to the High Court. The Division Bench consisting of the learned Acting Chief Justice and Justice Bedi heard the matter. On the two points argued before the Bench, viz. (1) territorial jurisdiction, and (2) the matter did not fall under the purview of Section 8 of the Arbitration Act, it came to the conclusion that in so far as the objection to jurisdiction had been taken at the earliest, and no part of cause of action had arisen within the jurisdiction of Chandigarh Court, there was want of jurisdiction.

6. On the second point, it found that Section 8(1)(b) of the Act would not apply to the instant case. The reasonings of the Bench were:-

- (i) There was no negligence or refusal by the Engineer-in-Chief in fact, but the arbitrator had been appointed.
- (ii) Having regard to the terms of clause 70, the vacancy was to be filled. In fact, on

20-8-90, an arbitrator had been appointed.

(iii) Where the arbitration clause in the contract provides for an appointment of an arbitrator by a named authority and not by consent of parties, the provisions of Section 8 could not be invoked. It relied on the ruling of the Bombay High Court in *Union of India v. Ajit Mehta and Associates*, Pune, AIR 1990 Bombay 45. Thus it was concluded that the appointment made by the learned Subordinate Judge was non est, and, therefore, the award rendered by him was liable to be set aside.

7. It was under these circumstances, the Special Leave Petition has come to be preferred. Mr. Rajinder Sachar, learned counsel for the petitioners submitted that the appointment of the arbitrator made by the Trial Court should not have been interfered with by the High Court. Section 8 occurs under Chapter II which deals with the case of arbitration without intervention of court, while Section 20 occurs under Chapter III through the intervention of court. It is incorrect to say that if the contract contains a clause that a named party is to appoint an arbitrator and if the appointment of arbitrator is not by consent of parties, Section 8(2) will not apply. The scope of Sections 8 and 20 has been succinctly dealt with in *Prabhat General Agencies v. Union of India*, (1971) 2 SCR 564: (AIR 1971 SC 2298) and *Union of India v. M/ s. Amarnath Aggarwal Construction Pvt. Ltd.* (1988) 94 Pun LR 678.

8. Then again, where a notice was issued by the petitioner calling upon the respondent to appoint an arbitrator after the expiry of 15 days of that notice, the right to appoint is forfeited, as laid down in *Executive Engineer, Prachi Division, Bhubansewar v. Gangaram Chhapolia*, AIR 1980 Orissa 51 at 52.

9. On the question of territorial jurisdiction, since a part of cause of action had arisen, within the territory of Chandigarh, namely, the payment by cheque at Chandigarh, there was no lack of territorial jurisdiction. For this argument reliance is placed on *A. B. C. Laminart Pvt. Ltd. v. A. P. Agencies, Salem*, AIR 1989 SC 1239 at 1243 (Para 15).

10. Lastly, it is submitted that prejudice or failure of justice should be with reference to trial. Merely because the arbitrator has hurried that would not constitute failure of justice under Section 21 of the Code of Civil Procedure. This important aspect of the matter had not been borne in mind by the Court.

11. The learned Additional Solicitor General, Mr. Reddy, after taking us elaborately through the various provisions of Arbitration Act would submit that Section 8(1)(a) is attracted unless the agreement provides for arbitrator by consent of parties or where there is no concurrence in the appointment. In other words, three ingredients are necessary to apply. Section 8 which are as follows:-

(i) There must be an agreement to appoint an arbitrator.

(ii) The parties do not concur in the appointment.

Therefore, the said sub-section has no application to a case in which the agreement provides for appointment of an arbitrator by one of the parties or by nominated persons.

12. Reliance is also placed on *Union of India v. Om Prakash*, (1976) 3 SCR 998,1002-3:(AIR 1976 SC 1745 at p. 1748) in support of the sub-section.

In contrast, Section 20 confers power -

(i) to order the agreement to be filed; and

(ii) to make an order of reference to the arbitrator appointed by the parties or where the parties cannot agree to the appointment of an arbitrator appointed by court.

Where, therefore, the clause in the agreement provided arbitrator to be appointed by Engineer-in-Chief, if he refuses, recourse to Section 8(1)(a) or (1)(b) cannot be had. It must be under Section 20(4). The case directly on point is Ved Prakash Mithal v. Union of India, AIR 1984 Delhi 325 (Full Bench) and Prabhat General Agencies v. Union of India, (1971) 2 SCR 564: (AIR 1971 SC 2298). It is further submitted that these two sections, i.e. Sections 8 and 20 operate in different fields, as laid down in Union of India through General Manager, South Eastern Railway, Calcutta v. S. V. Krishna Rao, AIR 1970 Madh Pra 49. Even under Section 8 the appointment of an arbitrator is not automatic. The court will have to exercise its discretion.

13. Finally, it is submitted, the authorities are uniform in that Section 8 will not apply where the Parties have consented to a named Person to appoint an arbitrator. As seen from Union of India v. M/ s. Ajit Mehta and Associates, Pune, AIR 1990 Bombay 45, which case has been relied upon by the High Court, hence no exception could be taken to the judgment of the High Court.

14. Clause 70 of the General Conditions of the Contract reads as follows:-

"70. All disputes between the parties to the contract (other than those for which the decision of the CWE or any other person is by the contract expressed to be final and binding) shall after written notice by either party to the contract to the either of them be referred to the sole arbitration of an Engineer Officer to be appointed by the authority mentioned in the tender documents. Unless the parties otherwise agree such reference shall not take place until after the completion, alleged completion or abandonment of the works or the determination of the contract.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new arbitrator to act in his place.

The arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, fixing the date of hearing.

The arbitrator may, from time to time, with the consent of the parties, enlarge the time, for making and publishing the award.

The arbitrator shall give his award on all matters referred to him and shall indicate his findings, along with the sums awarded, separately on each individual item of dispute.

The venue of the arbitration shall be such place or places as may be fixed by the arbitrator in his sole discretion.

The award of the arbitrator shall be final and binding on both the parties to the contract."

15. Therefore, it would be clear that the arbitrator is to be appointed by the Engineer-in-Chief. Of course, if that arbitrator resigns or vacates his office or is unable or unwilling for some reason or other, then he may appoint another arbitrator.

16. Section 8 of the Arbitration Act occurs under Chapter II which deals with arbitration without intervention of court, while Section 20 falls under Chapter III which deals with arbitration with intervention of court.

17. In our view, Section 8 provides a simple machinery for appointment of an arbitrator, initially, as seen from sub-section (1)(a) or for, supplying the vacancy as seen from sub-section (1)(b) if the said vacancy occurs during the period of arbitration.

18. Sub-section (1)(a) would apply to case of initial appointment of an arbitrator arbitrators. The implication is in the arbitration agreement, the arbitrator or arbitrators must not have been named. Where therefore, they are named, this section will have no application. Similarly, the arbitrator or arbitrators are required to be appointed by all parties to the reference with consent. On the contrary, if there is some other mode of appointment, for example, Section 4, where the parties to the agreement agree that the arbitrator has to be appointed by a person designated in the agreement either by name or hold, for the time being in office, certainly, this section will not apply. It has also been held by this Court in Chander Bhan Harbhanjan Lal v. State of Punjab, AIR 1977 SC 1210 that even in cases where by agreement between the parties, one of them alone is given power to make the appointment without consulting others, this sub-section would apply.

19. Now, we come to sub-section (1), clause (b). This sub-section covers such of those cases where the arbitration is pending. However, a vacancy has arisen in any one of the following contingencies:-

- (i) Death
- (ii) Incapacity
- (iii) Refusal
- (iv) Neglect to act.

It also requires to be noted that two other conditions are required to be satisfied before the vacancy is sought to be filled up -

- (i) The arbitration agreement did not indicate the vacancy was not intended to be filled up.
- (ii) The parties could not concur in the choice.

20. Therefore, without going into the question as to whether Section 20(4) would have been resorted to or not, we find that the conditions under Section 8(1)(b) listed above, are not satisfied in this case.

21. It has already been seen that successive arbitrators had been appointed and they are De Costa, Jaini, Mirchandani and Badrinath, who ultimately came to resign on 14 -9-84. The contractor A. B. Tuli died on 16-6-82. The legal heirs were required to submit and prove their succession certificate.

There was an inordinate delay in the production of such certificate. Thereafter, during the pendency of the proceedings, YNR Rao was appointed. Even after his relinquishment on 23-4-90, A. V. Gopal Krishnan was appointed on 25-7-90. Thus, it would be clear that there was no refusal or neglect to act (the question of death or incapacity not arising here).

22. From the above, it will follow that even the vacancy was actually supplied by the Engineer-in-Chief. The last condition about the concurrence in relation to the choice also does not arise here. It is somewhat strange that when it was brought to the notice of the trial Court about the appointment of YNR Rao, the court did not even take cognizance of the same. As a matter of fact, para 4.5 of the Counter Affidavit of Union of India specifically states as follows:-

"That vide application dated 8-1-1990, the Union of India brought it to the notice of the court that as per Clause 70 of the Contract Agreement, Shri YNR Rao, Chief Engineer, a member of the combined panel of Arbitrators had been appointed arbitrator in this case vide letter dated 4-12-1989."

23. Even thereafter, on 25-7-90, Gopal Krishnan was appointed. That is taken cognizance of and by the order dated 20-8-90, the said appointment was revoked and Puranjit Singh was appointed arbitrator. The court apparently was of the view that since notice had been given by the petitioner for the appointment of the arbitrator, on the expiry of 15 days of the notice, the respondent forfeited the right to appoint an arbitrator. As an abstract proposition of law, Mr. Sachar is right in relying on Executive Engineer, Prachi Division, Bhubaneswar v. Gangaram Chhapolia, AIR 1980 Orissa 51. Having regard to the facts of the case, as stated above, such a situation does not arise at all.

24. The relevant facts as to what happened during this period can be gathered from the following averments made in the counter affidavit filed on behalf of Union of India -

"That Shri Harbans Singh Tuli, sole proprietor of the firm died on 16-6-1982. Till , 26July, 1983, no steps were taken by anybody on behalf of the contractor in connection with the Arbitration proceedings. On 26 July 1983, Shri Harkishan Singh Tuli, son of late Shri Harbans Singh Tuli submitted to the Arbitrator an affidavit stating that all legal heirs (six in numbers) have authorised him to represent this case on their behalf.

That on 12-7-84, the Arbitrator wrote to the Union.of India that Shri Har Kishan Singh Tuli son of late Shri Harbans Singh Tuli has informed that the sole proprietor of the firm M/ s. Harbans Singh Tuli and Sons had expired on 16-6-1982 and is survived by six legal heirs. It may be confirmed that the legal heirs have been brought on record of enlistment and they can represent the case on behalf of the firm and Arbitration can be continued. On 8-8-1984, the Union of India wrote to the Arbitrator that the legal heirs of the firm may please be asked to produce necessary succession certificate.

That on 4-9-1984, Shri Har Kishan Singh Tuli without submitting the succession certificate wrote to the Arbitrator that the firm has been reconstituted and it has the approval of the Chief Engineer, Western Command, Shimla.

That on 14-9-1984, the Arbitrator wrote to the Engineer-in-Chief on the lines that "I was appointed as Arbitrator to adjudicate the dispute that has arisen between the parties to the above mentioned contract. That more than four years have elapsed, but the Contractor has still to collect the information from the Govt. Due to the preoccupation with the other work, it may not be possible for me to finalise the case. I am, therefore, resigning appointment as Arbitrator in the above case."

"That on 19 Nov. 1984, Har Kishan Singh Tuli purporting to act on behalf of Tuli Construction Company Private Ltd., Chandigarh, wrote to the Engineer-in-Chief to appoint another arbitrator. Again on 20-12-1984, Shri Har Kishan Singh Tuli purporting to act on behalf of Tuli Construction Company Ltd., Chandigarh again wrote to the E-in-C that since the contract for the subject work was entered into with M/s. Harbans Singh Tuli and Sons with late Sardar Harbans Singh Tuli as sole proprietor all the legal heirs have decided to incorporate their Sole Proprietorship into a Pvt. Ltd. Company under the name and style M/s. Harbans Singh Tuli & Sons Builders Pvt. Ltd., and this company is under incorporation. Till the incorporation is completed, please suspend all the action with the firm for the time being. This aspect is worth-noting to account for delay on the part of the petitioner-Contractor.

That for two years, nothing was heard in connection with the Arbitration proceedings from the claimant and then on 5-7-1986, Shri Har Kishan Singh Tuli, purporting to act on behalf of Harbans Singh Tuli & Sons Builders Pvt. Ltd. wrote to E-in-C's to appoint another Arbitrator.

That on 29-7-1986, the Engineer-in-Chief, Army Headquarters, New Delhi wrote to Shri Har Kishan Singh Tuli, 359 Section (Sector) 9-D, Chandigarh that as per their records S. Harbans Singh Tuli & Sons expired long time ago, and were requested to intimate direct to Chief Engineer, Bareilly Zone, Bareilly as to what was his status with the sole proprietorship firm with whom the contract under reference was entered into with the Chief Engineer, along with succession certificate and their legal documents so that further action can be taken in the matter.

That instead of supplying necessary information Shri Har Kishan Singh Tuli & Sons sent to E-in-C, a copy of Memorandum and Articles of Association of M/s. Harbans Singh Tuli & Sons and claimed that the new Company is the successor of the Sole Proprietorship firm. Union of India asked Shri Har Kishan Singh Tuli to submit legal certificate issued by the competent Civil Court."

25. Therefore, the trial Court ought not have appointed the arbitrator. The appointment of arbitrator by the court, namely 'Puranjit Singh has caused immense prejudice to the respondent. First and foremost there was not even an application on behalf of the petitioner under Section 12 for revocation of the appointment of A. V. Gopal Krishnan. Then, again, Puranjit Singh took charge on 1-9-90 issued a direction to the Union of India to submit his defence on or before 20-9-90 The hearing date was fixed between 4th and 7th of October, 1990, at Chandigarh. A request was made through a telegram from the Chief Engineer not to proceed with the arbitration. However, the arbitrator not finding the statement of defence forthcoming before 20th September, directed the same be filed before 1st of October. Even then no statement was filed. The Union of India had not entered appearance. An ex parte award was made on 8-10-1990 for a huge sum of Rs. 90.67 lakhs. While the petitioner could not give detail of the four claims before the arbitrator earlier appointed,

he would file as many as 29 claims before this arbitrator and they are accepted. The arbitrator had given 335% as escalation with regard to claims No. 1 to 24. Apart from the haste with which the arbitrator had proceeded, the matter has not been considered in its proper perspective through a process of reasoning. Therefore, we conclude that the High Court is right in its conclusion. The learned Additional Solicitor General's submission that the appointment of Puranjit Singh had caused prejudice to the Union of India is fully justified. Therefore, without going into the other legal aspects, we dismiss the Special Leave Petition.

26. In view of the peculiar facts and circumstances of the case I agree with my learned brother, Mohan, J., that the challenge against the impugned judgment is unsustainable. Accordingly the Special Leave Petition is dismissed. In view of our concurring judgments dated 11th February, 1992, the Special Leave Petition is dismissed. Petition dismissed.

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