Punjab Agro Rice Bran Extractions Ltd. Vs M/s. Banwari Lal Surech Kumar

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: Jan. 24, 2001

Acts Referred: Arbitration Act, 1940 â€" Section 10, 12, 12(2), 12(3)
Arbitration and Conciliation Act, 1996 â€" Section 13, 13(4), 16(2), 34, 86
Constitution of India, 1950 â€" Article 226, 227

Citation: (2001) 2 RCR(Civil) 244

Hon'ble Judges: Bakhshish Kaur, J

Bench: Single Bench

Advocate: Mr. Ashwani Talwar, for the Appellant; Mr. P.S. Rana and Ms. Kumud Sharma, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Bakhshish Kaur, J.
This order will dispose of CR No. 1796 of 2000 as well.

This is a petition under Articles 226/227 of the Constitution of India for holding that the proceedings before the Arbitral Tribunal comprising of Shri

A.C. Sharma, Shri S.D.K. Puri and Shri S.R.K. Agnihotri are void ab-initio and nullity as the Tribunal was not constituted in accordance with the

law. It is further prayed that the order passed by the Tribunal Annexure P-1 be quashed and the proceedings shall be governed in accordance with

the provisions of Arbitration Act, 1940 rather than the Arbitration and Conciliation Act, 1996.

2. The Arbitral Tribunal which was constituted for adjudication of the dispute between the parties, passed the impugned order Annexure P-1 on

January 22, 2000, which reads as under :-

4. Arbitral Tribunal has carefully gone into the evidence produced before it and has heard the oral arguments of the parties and hold the

unanimous view that :-

(i)(a) It was on persistent suggestion/pressurization by respondent No. 1 (PARBEL) that claimant agreed to participate in the settlement of dispute

under the new Act i.e. Arbitration and Conciliation Act, 1996 and such a change over is allowed u/s 85 of the said Act.

(b) The provisions of this Section do not debar the parties to come under the New Act even after proceedings commenced under the old Act.

Further there is no stipulation therein that these provisions will not come into play if arbitral proceedings under the old Act commenced with the

intervention of a Court.

(ii) The application of the respondent is time-barred u/s 13(2) and Section 16(2) of the Act i.e., it has neither raised objections within 15 days of

the appointment of Arbitration Tribunal nor challenged its jurisdiction before filing its written statement of the claim.

(iii) Furthermore, respondent (PARBEL) is estopped by its own act and conduct from raising any objection as it continued participating in the

proceedings for about 14 months after constitution of the Tribunal and raised objections only on 13.10.1999 just 3 days before 12th hearing in the

case and that too as an additional matter while submitting its reply to the application made by respondent No. 2 for deleting its name from arena of

the parties.

5. In view of the above findings, application of respondent No. 1 for closing the proceedings forthwith is hereby dismissed.

3. The order has been challenged on the ground that the Tribunal did not appreciate that in the first instance. Shri A.K. Mislira and Shri K.C.

Mohindru were appointed as Arbitrators as per order of the Court Annexure P-2 and Shri V.P. Duggal was appointed as Umpire by the two

Arbitrators in accordance with the terms and conditions of the agreement. His appointment was intimated to the Court vide Annexure P-5. Thus,

these members of the Tribunal had sanction of the Court of law. Shri A.K. Mishra died and Shri K.C. Mohindru withdrew from the Tribunal. Shri

S.R.K. Agnihotri and Shri S.D.K. Puri were nominated on their behalf, but their names were not ratified by the Court in place of the Arbitrators

initially appointed. These Arbitrators are. therefore, estopped from conducting arbitral proceedings. These Arbitrators had also no authority to

appoint the new Umpire, namely Shri A.C. Sharma, as Shri V.P. Duggal was already appointed as Umpire and his appointment was never

revoked. The authority of the Arbitrators who had been duly appointed by the Court can be revoked only with the permission of the Court.

Similarly, the substitution can be made by the Court alone. It is averred that the Arbitral Tribunal has also erred in holding that as both the parties

have requested for adopting the procedure as mentioned in the Arbitration and Conciliation Act, 1996, the arbitration proceedings before the

Tribunal shall be governed by the procedure as laid down in the 3996 Act, rather than than the 1940 Act. Similarly, the order of the Tribunal that

the objections have not been filed within 15 days of the appointment of the Arbitration Tribunal, challenging its constitution or jurisdiction, is not

relevant because this point will come into play when the Court comes to the conclusion that the proceedings are to be governed by the new Act i.e.

1996 Act.

4. The case of the petitioner is that M/s. Punjab Agro Industries Corporation Ltd. - respondent No. 2 promoted a company by the name of

Punjab Agro Rice Bran Extraction Ltd. (in short "PARBEL"), holding the entire paid up share capital of the Company. On 19.5.1982, an

agreement was executed between PAR-BEL and M/s Banwari Lal, Suresh Kumar - respondent No. 1 for construction of a factory and office

building and one of the clauses of the agreement was that the dispute shall be referred to three Arbitrators, two to be appointed by each party

nominating one Arbitrator. On 19.9.1985, the Punjab Agro Industries Corporation Ltd. - respondent No. 2 sold the company to M/s. Kewal

Singn Dhillen and Associates.

5. The petitioner has also filed another Civil Revision No. 1796 of 2000. The challenge in this Revision Petition is that the order dated January 22,

2000 Annexure P-1 vide which the Punjab Agro Industries Corporation Ltd. (in short "the Corporation") -respondent No. 2 has been ordered to

be deleted from the arena of the parties on the ground that clause 11 of the agreement Annexure P-2 specifically provides that no liability, which is

not reflected in the balance sheet as on 20.7.1985 shall be to the account of the Corporation. The Corporation is, therefore, a necessary and

proper party in the proceedings. Some of the records pertaining to respondent No. 2 are still available with respondent No. 2 and once its name is

deleted from the array of respondents, it will be difficult to get the records. No prior notice was issued to the petitioner before deleting the name of

the Corporation- respondent No. 2.

6. Both the Civil Revision Petitions have been resisted by the respondents by raising certain preliminary objections that the petitioner has an

alternative and effective remedy under the Arbitration and Conciliation Act, 1996 (in short the 1996 Act"). These revision petitions are, therefore,

liable to be dismissed because the High Court has got no jurisdiction to interfere under Article 227 of the Constitution of India for quashing the

orders passed by the Arbitral Tribunal and the petitioner is also estopped by its act and conduct from filing the present revision petitions, it having

participated in the arbitration proceedings after passing of the impugned order without any reservation/protests/objection. The impugned orders

are, therefore, legal and valid. Inter alia, it is averred that on persistent and repeated suggestions/pressurization of the petitioner, the answering

respondent i.e. respondent No. 1 gave its consent vide letter dated May 26, 1998 Annexure R-1 for adopting the Arbitration and Conciliation

Act, 1996, After the answering respondent had given its consent for the proceedings to be governed by the new Act, the substituted Arbitrators

appointed Shri A.C. Sharma as Presiding Arbitrator on August 25, 1998 and thereafter, the answering respondent filed the claim petition. The

petitioner filed reply thereto and after rejoinder was filed, the petitioner challenged the constitution of the Arbitral Tribunal after having participated

for about 14 months without any objection. Now, the petitioner cannot challenge the impugned orders by saying that the Court.

7. I have heard Shri Ashwani Talwar, learned counsel for the petitioner, Shri P.S. Rana, learned counsel for respondent No. 1 and Shri Kumud

Sharma, learned counsel for respondent No. 2.

8. The submission made by Shri Ashwani Talwar, learned counsel for the petitioner is that once the proceedings had started under the 1940 Act,

the revision under Article 227 of the Constitution of India is maintainable, especially when the impugned orders have not been passed in

accordance with law. Once the Court i.e. Sub-Judge First Class, Ferozepur, has appointed Shri A.K. Mishra and Shri K.C. Mohindru Arbitrators

to adjudicate the dispute between the parties vide order Annexure P-2 in Civil Revision No. 1795 of 2000, their appointment could be revoked

only with the permission of the Court. Annexure P-3 is a latter issued by the Court to Shri A.K. Mishra and Shri K.C. Mohindry, Arbitrators

requiring him to submit the award up to February 28, 1989 whereas on an earlier meeting held on November 30, 1988, Annexure P-4, Shri V.P.

Duggat was appointed as third Arbitrator and Umpire as per Section 10 of the 1940 Act, as it was mutually agreed between the parties. Again, as

per Annexure P-6, a letter was issued by Shri A.K. Mishra requesting for extension in the period of arbitration. Shri K.C. Mohindru had

withdrawn himself to act as Arbitrator as per Annexure P-8 dated May 14, 1997. Thereafter, no request for extension of time was made. Thus,

the appointment of the substituted Arbitrators is null and void. Similarly, no other Arbitrator can be appointed with the permission of the Court.

Nor the name of respondent No. 2 could be deleted from the array of respondents, who is a necessary party to the proceedings.

9. To support his view-point, Shri Ashwani Talwar has placed reliance on Union of India v. Darslian Singh Ahuja, 1992(1) Arbitration Law

Reporter 288 wherein it is held that according to sub-section (2) of Section 12, on the removal of arbitrator, two courses are open to the Court

i.e. (i) to appoint an arbitrator, or (ii) to supersede the reference. In view of the nature of Section 12 (of the 1940 Act) which is clear and

unambiguous, the petitioner could not appoint an arbitrator in place of the one who was so appointed by the Court. There is no provision in the

Act under which a party can remove an arbitrator appointed by the Court and can itself appoint another arbitrator in his place to enter into

reference. It may be noted here that the case cited by the learned counsel for the petitioner was under the 1940 Act and there is no dispute to the

proposition of law that a party cannot remove an arbitrator appointed by the Court and appoint another in his place. Here the fact of the matter is

that the petitioner had been repeatedly approaching/requesting the answering respondent to give its consent for proceeding with the matter under

the New Act i.e. Arbitration and Conciliation Act, 1996 so that the petitioner may request the Arbitrators to appoint the Presiding Arbitrator, This

is reflected from the correspondence between the petitioner and the answering respondent, as referred to by the respondent in the written

statement. Section 85 of the 1996 Act provides as under :-

85. Repeal and saving :-(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the

Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal :-

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless

otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act came into force :

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed

respectively to have been made or issued under this Act.

10. Shri P.S. Rana, learned counsel for the respondent contended that as Shri B.R. Rajaj, Arbitrator had re-fused to act as Arbitrator, therefore,

the petitioner vide letter Annexure R-1 had appointed Shri S.K. Agnihotri as its nominee Arbitrator. Therefore, the petitioner as well as the

answering respondent sent joint request Annexure R-2, requesting both the Arbitrators to proceed with the matter and to appoint Shri V.P. Dugeal

as Arbitrator and Umpire. Since Shri K.C. Mohinoru expressed his inability to act as Arbitrator due to his old age and ill-health, therefore, Shri

S.K.D. Puri was appointed as Arbitrator of the respondent. The petitioner, vide letter Annexure R.4, addressed to the answering respondent had

requested that Arbitration Act, 1940 stands repealed by the Arbitration and Reconciliation Act, 1996, therefore, he may consent for proceeding

with the matter under the new Act so that they can request the substituted Arbitrators to appoint the Presiding Arbitrator. Petitioner again sent

letter Annexure R-6 pointing out that it is provided in the new Act that parties by mutual consent can agree for proceeding further under the new

Act, The letter further reads that keeping in view the fact that both the Arbitrators under the new Act had yet to enter into reference, it is in the

interest of justice to avoid further complications, the respondent No. 1 was requested to give his consent for holding the proceedings under the

new Act, therefore, on account of repeated persuasiveness by the petitioner, the respondent gave its consent vide letter dated May 26, 1998

Annexure R-8 for opting the Arbitration and Conciliation Act, 1996, as suggested by the petitioner.

11. Whether a party can back out or withdraw from the position altered by his act and conduct i.e. proposing to be governed by the new Act and

then after persuading the other party to consent to be governed by the new Act and having participated in the proceedings held under the new Act.

whether the said party can be permitted to turn around and challenge the proceedings under the new Act ? The answer to the query is in the

negative. Once a party has itself come forward and repeatedly requested the other party to agree to be governed by the New Act to take its

advantage, it is estopped from backing out and deny to be governed by the new Act. It may be so that now the changed position is advantageous

to the other party. Once the parties agreed to be governed by the new Act i.e. Arbitration and Conciliation Act, 1996, they could challenge the

appointment of Arbitrators only under the provisions of the new Act. Section 13 of the 1996 Act provides the procedure for challenging the

appointment of Arbitrators and it reads as under :-

13. Challenge procedure :- (1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming

aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of Section 12, send a

written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal

shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral

tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an

arbitral award in accordance with Section 34.

(6) Where an arbitral award is set aside on an application made under sub- section (5), the Court may decide as to whether the arbitrator who is

challenged is entitled to any fees.

A somewhat similar issue arose in Punjab Slate Electricity Board v. Indure (India) Ltd. 2000(1) RCR 136 and it was observed that petition under

Article 227 of the Constitution of India is not maintainable in the facts and circumstances of the case in view of the law laid down in Harike Rice

Mills v. State of Punjab, 1997 Arbitration Law Reporter 32 decided by a Division Bench of this Court, in Harike Rice Mills case (supra) also, a

similar challenge to the persons appointed as Arbitrators was made and it was held that sub- sections 4 and 5 of Section 13 of the 1996 Act do

not permit a party to challenge the appointment immediately. As such, the parties can make the challenge only after the Arbitrators" award has

been made. The petitioner had been participating in the proceedings before the Tribunal, rather it was the petitioner who had proposed to be

governed under the new Act, which is evident from the correspondence referred to above and once it has agreed to the jurisdiction of the Tribunal

under the new Act, it is estopped from withdrawing therefrom. Thus, this Court cannot interfere in the exercise of its extra-ordinary jurisdiction

under Article 227 of the Constitution of India.

In view of the aforesaid, these petitions are dismissed as not maintainable.

12. Petitions dismissed.