V.K. Sood Engineer and Contractor Vs Union of India (UOI)

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: March 31, 2011

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 11(6), 11(8)
Constitution of India, 1950 â€" Article 136

Hon'ble Judges: Hemant Gupta, J

Bench: Single Bench

Judgement

Hemant Gupta, J.
This is a petition u/s 11(6) of the Arbitration and Conciliation Act, 1996 (for short "the Act") for appointment of an

Arbitrator in respect of disputes between the parties arising out of an Agreement dated 18.03.2005 executed in pursuance of the notice inviting

tenders for the work of fabrication and supply of various Components of Calender Hamiltion (CH) Span of 200" with Launching Nose of 250" as

per list of Components in the Schedule of items and quantities etc.

2. As per the contract Agreement, the work was to be completed within 12 months. It is asserted by the Petitioner that complete set of drawings

were not supplied to the Petitioner. Few drawings were supplied after long delay, but important drawings were still missing. Due to delay in

providing drawings and for other reasons, the work could not be completed and that the execution of the work had become impossible. The

Respondent terminated the Agreement by invoking Clause 62 of the General Conditions of Contract on 05.02.2009. The Petitioner requested for

appointment of an Arbitrator vide communication dated 09.04.2009 (Annexure P-4) to decide the disputes arising out of the agreement executed

between parties. The said letter was addressed to the Deputy Chief Engineer, Northern Railway, Bridge Workshop, Jalandhar Cantt. Since the

Arbitrator was not appointed within one month of such request, the present petition was filed for appointment of an Arbitrator in this Court on

12.05.2010.

3. In reply to the present petition, the Respondent has, inter alia, pointed out that vide letter dated 10.02.2009 (Annexure R-1), the Petitioner was

requested to approach General Manager (Engineering) for appointment of an Arbitrator. On 17.04.2009 again, the Petitioner was informed to

approach the General Manager (Engineering), but the Petitioner has not approached General Manager of the Railways in terms of the Contract

Agreement. Subsequently Respondent, vide communication dated 05.10.2010 (Annexure R-4), sought option of the Petitioner to opt for the

names for appointment as Arbitrator out of the four Gazetted Railway Officers for appointment of arbitrator by the General Manager.

4. Learned Counsel for the Petitioner has vehemently argued that though in terms of Clause 64 of the Agreement, the request for appointment of an

Arbitrator was required to be made to the General Manager, but the request of the Petitioner for appointment of an Arbitrator has been forwarded

by the Deputy Chief Bridge Engineer to the General Manager (Engineering) vide communication dated 17.04.2009. Since the Arbitrator has not

been appointed by the General Manager for almost one year before the filing of the present petition, therefore, the Respondent is precluded in law

from seeking consent of the Petitioner for appointment of Gazetted Railway Officers as the Arbitrator in view of the judgment of Hon''ble Supreme

Court in M.S. Grewal and Another Vs. Deep Chand Sood and Others, .

5. Learned Counsel for the Petitioner has also relied upon the judgments of Hon''ble Supreme Court reported as Union of India and Anr. v. M/s

V.S. Engineering (P) Ltd. 2006 (13) SCC 240 and Union of India (UOI) Vs. Singh Builders Syndicate, as well as the judgment passed by this

Court in Arbitration Case No. 51 of 2008 titled ''Kurali Toll Bridge Co. Pvt. Ltd. v. State of Punjab and Ors.'' to contend that this Court is

competent to appoint an independent and impartial Arbitrator in view of the conduct of the Respondent in not appointing an Arbitrator with due

dispatch.

6. On the other hand, learned Counsel for the Respondent raised preliminary objection regarding maintainability of the petition for non joinder of

Union of India through General Manager of Railways as a necessary and proper party and that the communication dated 09.04.2009, 20.4.2009

and 18.9.2009 not being addressed to the General Manager. It is contended that the Petitioner has not approached the General Manager,

Northern Railways for appointment of an Arbitrator even though the Petitioner was informed on 17.04.2009 of such requirement. Therefore, there

was no valid and legal request made to the competent authority for appointment of an Arbitrator which alone will preclude the right of the

Respondent to appoint an Arbitrator. In view thereof, the judgment in Datar Switchgears (supra) is not helpful to the arguments advanced by the

learned Counsel for the Petitioner. It is contended that the present petition was filed on 12.05.2010 before this Court, but the same was not

properly presented, as the General Manager was not impleaded as a party, therefore, the communications addressed by the Respondent on

05.10.2010 and 21.12.2010 (Annexures R-4 and R-5 respectively) are legal and valid and the Petitioner has to chose Arbitrator out of the panel

submitted by the Respondent alone. Learned Counsel for the Respondent relies upon the judgments of the Hon''ble Supreme Court in Union of

India and Anr. v. M.P. Gupta (2004) 10 SCC 504 and Civil Appeal No. 6324 of 2004 titled ''Union of India v. Krishna Kumar'' as well as the

order passed by this Court in Arbitration Case No. 44 of 2009 titled ''M/s Jagdamba Supplier & Construction Civil & P-Way Contractor Sirsa v.

Union of India and Ors.'' on 25.10.2010, as modified on 06.01.2011.

7. Having heard learned Counsel for the parties, I am of the opinion that the Respondent has failed to appoint an Arbitrator even though the

request is deemed to be received by the General Manager. The communication dated 17.04.2009 (Annexure R/2) to the Petitioner is to approach

General Manager (Engineering), New Delhi. A copy of the said letter was sent to General Manager (Engineering), Baroda House, New Delhi.

Though in terms of Clause 64 of the Agreement, the request was required to be made to the General Manager, but the fact that such request was

made to the Deputy Chief Engineer and such Deputy Chief Engineer has forwarded the request of the Petitioner to the General Manager for

appointment of an Arbitrator, cures the irregularity in not submitting the request to the General Manager. The General Manager is authorized to

appoint an Arbitrator. Whether he receives such request from the Petitioner or from one of the Offices of the Railways is immaterial. The fact is

that such letter was received by the General Manager, which originated from the Petitioner.

8. The argument that the present petition is not properly presented i.e. non joinder of necessary party i.e the General Manager is only an

irregularity. The Hon''ble Supreme Court in Jai Jai Ram Manohar Lal v.

Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon, held that:

5. .... Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of

some mistake, negligence, inadvertance or even infraction of the Rules of procedure. The Court always gives leave to amend the pleading of a

party, unless it is satisfied that the party applying was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not

be compensated for by an order of costs. However negligent or careless may have been the first omission, and, however late the proposed

amendment, the amendment may be allowed if it can be made without injustice to the other side. In Amulakchand Mewaram Vs. Babulal Kanalal

Taliwala, , Beaumont, C.J., in delivering the judgment of the Bombay High Court set out the principles applicable to cases like the present and

observed:

... the question whether there should be an amendment or not really turns upon whether the name in which the suit is brought in the name of a non-

existent person or whether it is merely a misdescription of existing persons. If the former is the case, the suit is a nullity and no amendment can cure

it. If the latter is the case, prima facie, there ought to be an amendment because the general rule, subject no doubt to certain exceptions, is that the

Court should always allow an amendment where any loss to the opposing party can be compensated for by costs.

In Amulakchand Mewaram''s case, a Hindu undivided family sued in its business name. It was not appreciated at an early stage of the suit that in

fact the firm name was not of a partnership, but was the name of a joint Hindu family. An objection was raised by the . Defendant that the suit as

filed was not maintainable. An application to amend the plaint, by substituting the names of the three members of the joint family for the name of the

family firm as Plaintiffs, was rejected by the Court of First Instance. In appeal the High Court observed that a suit brought in the name of a firm in a

case not within Order 30 Code of CPC being in fact a case of misdescription of existing persons, leave to amend ought to have been given.

6. This Court considered a somewhat similar case in Purushottam Umedbhai and Co. Vs. Manilal and Sons, . A firm carrying on business outside

India filed a suit in the firm name in the High Court of Calcutta for a decree for compensation for breach of contract. The Plaintiff then applied for

amendment of the plaint by describing the names of all the partners and striking out the name of the firm as a mere misdescription. The application

for amendment was rejected on the view that the original plaint was no plaint in law and it was not a case of misnomer or misdescription, but a

case of a non-existent firm or a non-existent person suing. In appeal, the High Court held that the description of the Plaintiff by a firm name in a

case where the Code of CPC did not permit a suit to be brought in the firm name should properly be considered a case of description of the

individual partners of the business and as such a misdescription, which in law, can be corrected and should not be considered to amount to a

description of a non-existent person. Against the order of the High Court an appeal was preferred to this Court. This Court observed:

Since, however, a firm is not a legal entity, the privilege of suing in the name of a firm is permissible only to those persons who, as partners, are

doing business in India. Such privilege is not extended to persons who are doing business as partners outside India. In their case they still have to

sue in their individual names. If, however, under some misapprehension, persons doing business as partners outside India do file a plaint in the

name of their firm they are misdescribing themselves, as the suit instituted by them, they being known collectively as a firm. It seems, therefore, that

a plaint filed in a court in India in the name of a firm doing business outside India is not by itself a nullity. It is a plaint by all the partners of the firm

with a defective description of themselves for the purpose of the Code of Civil Procedure. In these circumstances, a civil court could permit, under

the provisions of Section 153 of the Code (or possibly under Order 6, Rule 17, about which we say nothing), an amendment of the plaint to enable

a proper description of the Plaintiffs to appear in it in order to assist the Court in determining the real question or issue between the parties.

These cases do no more than illustrate the well settled rule that all amendments should be permitted as may be necessary for the purpose of

determining the real question in controversy between the parties, unless by permitting the amendment injustice may result to the other side.

7. ... In our view, there is no rule that unless in an application for amendment of the plaint it is expressly averred that the error, omission or

misdescription is due to a bona fide mistake, the Court has no power to grant leave to amend the plaint. The power to grant amendment of the

pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitations.

8. Since the name in which the action was instituted was merely a misdescription of the original Plaintiff, no question of limitation arises: the plaint

must be deemed on amendment to have been instituted in the name of the real Plaintiff, on the date on which it was originally instituted.

9. In view of the principles stated in the above said judgment, the mere non-impleading of the General Manager in the present petition does not

render that the present petition as not properly presented. It is more so, when the Respondent has put in appearance, produced all the documents

and contested the claim of the Petitioner on merits.

The judgment in M.P. Gupta''s case (supra) arises out of Arbitration Act, 1940. The said judgment is thus not stricto sensu applicable to the facts

of the present case arising out of the question of an arbitrator under the Act. In Krishna Kumar''s case (supra), the order in M.P. Gupta''s case has

been relied upon. In Patel Engineering Company Ltd. (Supra), the Hon''ble Supreme Court has held that proper attention to the several

circumstances are intended to be taken in the matter of appointment of an Arbitrator. Section 11(8) of the Act contemplates that in appointing an

Arbitrator, due regard shall be given to the qualifications of an Arbitrator agreed in the agreement. The Supreme Court has held that such

qualification is not must but while making appointment, the twin requirements of Sub-Section 8 of Section 11 have to be kept in view.

10. Therefore, such provision does not prohibit appointment of any other Arbitrator. This view was also taken by Hon"ble Supreme Court in M/s

Singh Builders Syndicate"s case (supra), when it was held to the following effect:

9. As noticed above, the matter has not been pending for nearly ten years from the date when the demand for arbitration was first made with

virtually no progress. Having regard to the passage of time, if the Arbitral Tribunal has to be reconstituted in terms of Clause 64, there may be a

need to change even the other two members of the Tribunal. The delays and frequent changes in the Arbitral Tribunal make a mockery of the

process of arbitration. Having regard to this factual background, we are of the view that the appointment of a retired Judge of the Delhi High Court

as sole Arbitrator does not call for interference in exercise of jurisdiction under Article 136.

11. The Hon"ble Supreme Court in M/s V.S. Engineering"s case (supra) has adversely commented upon reaction of the Railways and other public

institutions to the request made by the Contractor for appointment of an Arbitrator. It was held to the following effect:

5. However, before parting with this case we may also observe that Railways and Public institutions are very slow in reacting to the request made

by a contractor for appointment of the arbitrator. Therefore, in case appointment is not made in time on the request made by the contracting party,

then in that case the power of the High Court to appoint arbitrator u/s 11 of the Act will not be denuded. We cannot allow administrative

authorities to sleep over the matter and leave the citizens without any remedy. Authorities shall be vigilant and their failure shall certainly give rise to

cause to the affected party. In case, the General Manager, Railway does not appoint the arbitral tribunal after expiry of the notice of 30 days or

before the party approaches the High Court, in that case, the High Court will be fully justified in appointing arbitrator u/s 11 of the Act. It is the

discretion of the High Court that they can appoint any railway officer or they can appoint any High Court Judge according to the given situation.

12. This Court in Kurali Toll Bridge Co. Pvt. Ltd. case (supra) has also appointed an Arbitrator other than agreed arbitrator keeping in view the

facts of the case. Even in SBP & Co. v. Patel Engineering Ltd. (2005) 8 SCC 618, it was held that appointment of an Arbitrator other than the

agreed Arbitrator is not an absolute bar.

13. In the present case, there exist sufficient and plausible reasons, for appointment of an arbitrator other than an arbitrator having qualification

mentioned in the agreement. The Petitioner entered into an Agreement on 18.03.2005. It was after 4 years, the contract was terminated on

05.02.2009. The Respondent has sought the consent of the Petitioner for appointment of an Arbitrator after 18 months i.e. in October 2010 after

the request was forwarded by its Deputy Chief Engineer to the General Manager. The very purpose of arbitration is defeated by in-action and in-

different attitude of the Respondents. The agreement does not contemplate any other qualification for the arbitrator than that it shall be Gazetted

Railways Officer. Thus, what is necessary is that the arbitrator should be Gazetted officer and not that it should be an officer of railways.

Therefore, it is not mandatory for the Petitioner to opt for the names suggested by the Respondent vide communications dated 05.10.2010 and

21.12.2010 (Annexures R-4 and R-5 respectively).

14. Since the disputes between the parties are pending since long, Shri A.K. Sharma, District Judge (Retd.), resident of House No. 41, Indsor

Park, Near DAV Engineering College, Jalandhar, is appointed as an Arbitrator to adjudicate upon the disputes between the parties. The Arbitrator

shall be free to fix his fee in consultation with the parties on the first date of hearing.