

(1990) 06 P&H CK 0008

High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Revision No. 4513 of 1998

The Punjab State and Another

APPELLANT

Vs

Pritam Singh and Sons

RESPONDENT

Date of Decision: June 4, 1990

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 13, 14, 15, 27, 37

Citation: (2000) 1 ILR (P&H) 98

Hon'ble Judges: Iqbal Singh, J

Bench: Single Bench

Advocate: J.S. Brar, D.A.G, for the Appellant; Pawan Bansal, for the Respondent

Final Decision: Allowed

Judgement

Iqbal Singh, J.

M/s. Pritam Singh and Sons (hereinafter referred to as the Respondent-firm) was awarded the work of construction of Tanda side approach to high level bridge over River Beas near Siri Hargobindpur on 10th March, 1997. An agreement No. 13 of 96/97 was signed between the parties in regard to this work of construction. The agreement contained Clause 25 which states that in case of any dispute, the matter will be referred to the sole arbitration of the Superintending Engineer of the Circle concerned in the Public Works Department (B and R) Branch, acting as such at the time of reference.

2. A dispute arose between the parties as a result of which the Respondent-firm submitted claim before the above-said Arbitrator on 7th August, 1997. At that time, Mr. T.S. Kamboj was the Superintending Engineer of the Central Works Circle, P.W.D. (B and R) Branch, Jalandhar. The arbitrator started the proceedings. The first sitting of the Arbitrator was held on 19th June, 1997. The above-said Superintending Engineer retired on 28th February, 1998 and thereafter he could not act as an Arbitrator because he was appointed as Arbitrator Ex-officio. Thereafter, Mr. J.P.

Chandra and Mr. S.C. Kalra, working as Superintending Engineer of Central Work Circle, P.W.D. (B and R) Branch, as per the agreement, became sole Arbitrators, respectively, in this case. They fixed as many as seven hearings, but the arbitration proceedings could not proceed because of the fact that the Respondent-firm did not turn up to attend any of the hearings.

3. A dispute was raised by the Respondent-firm over the removal of Mr. T.S. Kamboj as Arbitrator and thereafter the working of Mr. J.P. Chandra and Mr. S.C. Kalra as Arbitrators. An application u/s 27 of the Arbitration and Conciliation Act, 1996 (hereinafter referred-to as the Act,) was moved by the Respondent-firm before the learned District Judge, Hoshiarpur who,-vide order dated 11th September, 1998, allowed the same directed the Petitioners to produce the relevant record before the Arbitrator Mr. T.S. Kamboj and to co-operate with him in finalising the award.

4. The Petitioners, aggrieved by this order of the learned District Judge, Hoshiarpur, have come up by way of the present revision petition in this Court. I have heard the learned Counsel for the parties and have gone through the records of the case. Clause 25 of the agreement reads as under:

Clause 25. DISPUTES AND ARBITRATION.

(i) If any dispute or difference of any kind whatsoever shall arise between the Government/its authorised representative and the contractor in connection with or arising out of his contract or the execution of work hereunder.

(ii) Whether before its commencement or during the progress of work or after the termination, abandonment or breach of contract, shall, in the first instance be referred for settlement to the Engineer-in-charge of the work and he shall within a period of sixty days after being requested in writing by the contractor to do so, convey his decision to the contractor. Such decision in respect of every matter so referred shall, subject to arbitration as hereinafter provided, be final and binding upon the contractor. In case the is already in progress, the contractor shall proceed with the execution of the work on receipt of the decision of the Engineer-in-charge as aforesaid with all due diligence, whether any of the parties requires arbitration as hereinafter provided or not.

(iii) If the Engineer-in-charge has conveyed his decision to the contractor and no claim for arbitration has been filed by the contractor within a period of sixty days from the receipt of the letter communicating the decision, the said decision shall be final and binding upon the contractor and will not be a subject matter of arbitration at all.

(iv) If the Engineer-in-charge fails to convey his decision within a period of sixty days after being requested as aforesaid the contractor may within further sixty days of the expiry of first sixty days from the date on which the said request was made by the contractor refer the dispute for arbitration as hereinafter provided.

(v) All disputes or differences in respect of which the decision is not final and conclusive shall at the request of either party made in communication sent through registered A.D. post be referred to the sole arbitration of the Superintending Engineer of the Circle concerned in the Public Works Department, Building and Roads Branch acting as such at the time of reference unless debarred from acting as an Arbitrator by an order of the Punjab Government, in which event, the Chief Engineer shall appoint any other technical officer, not below the rank of Superintending Engineer to act as an arbitrator on receipt of a request from either party.

(vi) Chief Engineer-in-charge at work shall have the authority to change the arbitrator, on an application by either the contractor or the Engineer-in-charge requesting change of arbitrator giving reasons thereof ; either before the start of arbitration proceedings or during the course of such proceedings. The arbitration proceedings would stand suspended as soon as an application for change of Arbitrator is filed before the Chief Engineer and a notice thereof is given by the applicant to the Arbitrator. The Chief Engineer, after hearing both the parties may pass a speaking order rejecting the application or accepting to change the Arbitrator simultaneously, appointing a technical officer not below the rank of a Superintending Engineer as Arbitrator under the contract. The new Arbitrator so appointed may enter upon the reference afresh or he may continue the hearings from the point these were suspended before the previous Arbitrator.

(vii) The reference to the Arbitrator shall be made by the claimant party within one hundred twenty days from the date of dispute of claim arises during the execution of work. If the claim pertains to rates or recoveries introduced in the final bill, the reference to the Arbitrator shall be made within six calendar months from the date of the final bill to the contractor or from the date a registered notice is sent to the contractor to the effect that his final bill is ready by the Engineer-in-charge, (whose decision in this respect shall be final and binding) whichever is earlier.

(viii) It shall be an essential term of this contract that in order to avoid frivolous claims, the party invoking arbitration shall specify the disputes based on facts and calculations stating, the amount claimed under each claim and shall furnish a "deposit-at-call" for ten percent of the amount claimed, on a scheduled bank in the name of the Arbitrator, by his official designation who shall keep the amount in deposit till the announcement of the award. In the event of an award in favour of the claimant, the deposit shall be refunded to him in proportion to the amount awarded with respect to the amount claimed and balance, if any, shall be forfeited and paid to the other party.

(ix) The provisions of the Indian Arbitration Act, 1940 or any other statutory enactment there under or modification thereof and for the time being in force shall apply to the arbitration proceedings under this clause.

(x) The Arbitrator shall award separately given his award against each claim and dispute the counter claim raised by either party giving reasons for his award. Any lumpsum award shall not be legally enforceable.

(xi) The independent claims of the party other than the one seeking arbitration as also the counter claims of any party shall be entertained by the Arbitrator.

(xii) The venue of arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion. The work under the contract shall continue during the arbitration proceedings.

(xiii) The stamp fee due on the award shall be payable by the party as desired by the Arbitrator and in the event of such party's default, the stamp fee shall be recoverable from any other sum due to the party under this or any other contract.

(xiv) Neither party shall be entitled to bring a claim for arbitration, if it is not filed as per the time period already specified or within six months of the following:

(a) of the date of completion of the work as, certified by the Engineer-in-charge; or

(b) of the date of abandonment of the work or breach of contract under any of its clause, or

(c) of its non-commencement or no resumption of work within 10 days of written notice for commencement or resumption as applicable, or

(d) of the cancellation, termination or withdrawal of the work from the contractor in whole or in part and/or revision or foreclosure of the contract, or

(e) of receiving an intimation from the Engineer-in-charge that the final payment due or recovery from the contractor had been determined, for the purpose of payment/adjustment whichever is the latest. If the matter is not referred to arbitration within the period prescribed above, all the rights and claims of either party under the contract shall be deemed to have been forfeited and absolutely barred by time for arbitration and even for civil litigation.

(xv) No question relating to this contract shall be brought before any civil court without first invoking and completing the arbitration proceedings, if the issue is covered by the scope of arbitration under this contract. The pendency of arbitration proceedings shall not disentitle the Engineer-in-charge to terminate the contract and to make alternate arrangement for completion of the works.

(xvi) The Arbitrator shall be deemed to have entered on the reference on the day he issues notices to the parties fixing the first date of hearing. The arbitrator may, from time to time, with the consent of the parties enlarge the initial time for making and publishing the award.

(xvii) The expiry of the contractual time limit, whether originally fixed or extended, shall not invalidate the provisions of this clause.

7. Admittedly, the dispute has been referred to the Arbitrator, as mentioned above. It is also not disputed that the Arbitrator has retired on 28th February, 1998. Now, it is to be seen whether after the retirement, the Arbitrator can continue with the proceedings of the case because it has come on record that after his retirement, Mr. J. P. Chandra and Mr. S.C. Kalra came, to occupy the post of the Superintending Engineer of the Central Works Circle, P.W.D. (B and R) Branch, Jalandhar.

8. A perusal of the record shows that on account of dispute between the parties, claim was submitted by the Respondent firm before the Arbitrator on 7th August, 1997 and the first hearing took place on 16th September, 1997. On that date, a request was made on behalf of the Respondent-firm that the case will be presented by engaging a lawyer by the name of Mr. H.K. Sharma and an undertaking to this effect was given that "vakalatnama" will be submitted by the next date of hearing. The Respondent also sought adjournment to prepare the case and, accordingly, the Arbitrator adjourned the case to 14th October, 1997. On 14th October, 1997, the following order was passed:

Shri H.K. Sharma claiming to be counsel for Shri Gurjeet Singh, Prop, of M/s. Pritam Singh and sons promised during the previous hearing held on 16th September, 1997 that he would be submitting his Vakalatnama by the next date of hearing. This he had promised through an undertaking. But today again Shri H.K. Sharma has stated that he has not brought the Vakalatnama as such the hearing in the case cannot proceed and is hereby adjourned. The next date of hearing shall be fixed after receipt of the "Vakalatnama".

Sd/-
(T.S. Kamboj) Arbitrator

The case was adjourned to 21st October, 1997. The Arbitrator again adjourned the hearing of the case without specifying the date stating that "the next date of hearing, shall be fixed after receipt of "Vakalatnama"". On 28th October, 1997, the case was adjourned by the Arbitrator by passing the following order:

As per hearing held on 14th October, 1997 the case was adjourned and it was intimated that the next date of hearing shall be fixed after receipt of Vakalatnama. Now the Vakalatnama has been received, the next date of hearing is hereby fixed as 10th November, 1997 at 3.30 P.M.

Sd/-
(T.S. Kamboj) Arbitrator,

9. On 10th November, 1997, statements of the Executive Engineer and counsel for the Respondent-firm were recorded and the case was adjourned to 27th November, 1997, on which date the case was adjourned to 29th December, 1997. On 29th December, 1997, the case was adjourned to 15th January, 1998 on account of the absence of the Executive Engineer. On 13th January, 1998, an application was moved by the Executive Engineer for adjournment of the case on account of the meeting of District Planning Board on 15th January, 1998. On 16th January, 1998, when the proceedings were taken up by the Arbitrator, an objection was raised by the counsel for the Respondent-firm to the request for adjournment made by the Executive Engineer on the ground that he would like to have legal assistance in the matter by engaging a lawyer. The Arbitrator adjourned the hearing of the case to 17th February, 1998. Thereafter,-vide its letter dated 29th January, 1998, the Arbitrator adjourned the case to 19th February, 1998 on account of the Parliamentary Elections. The case was again adjourned to 23rd February, 1998 by the Arbitrator due to administrative reasons and then to 24th February, 1998, on which date the parties were absent and the case was adjourned sine die stating that both the parties were absent and the Arbitrator (T.S. Kamboj) was to retire on 28th February, 1998.

8. Record shows that after the retirement of Mr. T.S. Kamboj, Mr. J.P. Chandra took over as Superintending Engineer and he fixed the hearing in the case for 27th March, 1998, on which date it was adjourned due to administrative reasons and it was ordered that the next date would be intimated separately. Thereafter, vide letter dated 15th April, 1998, the case was fixed for 20th April, 1998 and then for 22nd April, 1998 and 28th April, 1998. On 28th April, 1998, both the parties were absent when the matter was taken up by the Arbitrator, Accordingly, it was adjourned to 11th May, 1998, on which date nobody was present on behalf of the Respondent-firm. The case was then adjourned to 27th May, 1998. On this date again, nobody turned up on behalf of the Respondent-firm and the case was adjourned to 4th June, 1998 by the Arbitrator. On 4th June, 1998, a telephonic message had been received from Executive Engineer, C.W, Division, Hoshiarpur, that he was unable to attend the hearing due to some urgent work and counsel for the Respondent-firm was also not present., Accordingly, the Arbitrator adjourned the matter to 12th June, 1998, on which date counsel for the Respondent-firm did not appear before" the Arbitrator and he adjourned the case to 18th June, 1998. On 18th June, 1998, the Executive Engineer made the statement that the counsel for the Respondent-firm was not attending the arbitration proceedings for the last about two months. Neither, it (Respondent-firm) has deposited requisite amount as required under Clause 25 of the agreement to avoid frivolous claims. The Arbitrator passed the following order on 18th June, 1998:

A notice be given to M/s Pritam Singh and Sans the claimant in this case that in case he failed to attend the next hearing Which will be held on 3rd July, 1998 at 12.00 noon in the office of the undersigned, ex parte decision will be taken.

9. On 3rd July, 1998, the hearing of the case was postponed to 8th July, 1998 due to administrative reasons. On 8th July, 1998, the hearing was postponed to 16th July, 1998 on which date counsel for the Respondent-firm again did not appear and the Arbitrator; had to adjourn the matter to 28th July, 1998. On 28th July, 1998 also the matter had to be adjourned to 17th August, 1998 due to the absence of the counsel for the Respondent-firm. On 17th August, 1998, the matter was adjourned to 14th September, 1998.

10. On 16th October, 1998, the Arbitrator passed an order to proceed with the case in spite of a request for adjournment by the; Executive Engineer on the ground that the department has filed an appeal in the High Court against the order dated 11th September, 1998 passed by Mr. R.M. Gupta, District and Sessions Judge, Hoshiarpur. The Arbitrator overruled the objection and ordered the proceedings to continue and adjourned the case to 26th October, 1998. Thereafter, vide order dated 25th November, 1998, this Court passed an order that the Arbitrator shall not proceed with the proceedings.

11. Mr. T.S. Kamboj, the then Superintending Engineer of the Central Works Circle, P.W.D. (B and R) Branch, Jalandhar, was appointed as an Arbitrator and the matter in dispute between the parties came to be referred to him. A perusal of the various orders passed by Mr. T.S. Kamboj goes to show that no effective Proceedings were taken by him for one reason or the other. The Arbitrator Mr. T.S. Kamboj, vide last order passed by on 24th February, 1998, adjourned the case sine die stating that both the parties were absent and that the arbitrator was to retire on 28th February, 1998. Now the question is whether after passing of this order, Mr. Kamboj continued to be an Arbitrator. It is noteworthy that after the retirement of Mr. Kamboj and adjournment of the case sine die by him on 24th February, 1998, arbitration proceedings were taken by Mr. J.P. Chandra, Superintending Engineer of Central Work Circle, P.W.D. (B and R) Branch, Jalandhar, and thereafter by another Superintending Engineer who succeeded Mr. J. P. Chandra on his transfer. The successors of Mr. T.S. Kamboj in the office of the Superintending Engineer of the Circle concerned also kept on adjourning the case for one reason or the other, as detailed in the earlier part of the judgment.

12. The above narration of facts goes, to show that no intimation was sent to the successor of Mr. T.S. Kamboj that the Respondent-firm did not accept him as an Arbitrator. The Respondent-firm also did not make any application to Mr. T.S. Kamboj to proceed further in the matter nor Mr. Kamboj wrote any letter to any of the parties to appear before him for further progress of the case after 24th February, 1998. Rather, his adjourning the proceedings sine die goes to show that he never intended to continue as an Arbitrator. The parties never appeared before Mr. T.S. Kamboj on any date thereafter. The intimation sent to Respondent-firm by the successor of Mr. T.S. Kamboj remained unanswered by the Respondent-firm.

13. The Respondent-firm, in its application u/s 27 of the Act before the learned District Judge, Hoshiarpur, stated that the sole Arbitrator was Mr. T.S. Kamboj and that the successor of Mr. Kamboj had not provided any assistance to the sole arbitrator Mr. Kamboj. There is no evidence produced on the record to show that Mr. T.S. Kamboj, at any time, intimated the parites to produce evidence before him; In para 8 of the application Annexure R-I, the ground taken is that the sole Arbitrator (Mr. T.S. Kamboj) had fixed the next date of hearing on 20th June, 1998 and had given his approval for making of the request in this regard. My attention was not drawn to any document on the record to show as to when the Arbitrator directed the Executive Engineer concerned to produce the record or other relevant evidence. Various letters were issued by the successor of Mr. T.S. Kamboj to the Respondent firm intimating the dates of hearing to it (Respondent-firm), but they were not replied to.

14. Section 15 of the Act goes to show that in addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate-(a) where he withdraws from office for any reason; or (b) by or pursuant to agreement of the parties. The narration of the various dates in extenso above shows that Mr. T.S. Kamboj, the sole Arbitrator withdrew from the office on account of his retirement. He did not proceed with the matter after 24th February, 1998. In fact,, once an Arbitrator had demitted his office on account of his retirement and proceedings were taken up by his successor and parties to the agreement never objected to the proceedings before the successor of the sole Arbitrator, it can be safely held that the parties agreed to get the matter being taken up by the successor of Mr. T.S. Kamboj, the sole Arbitrator. The proceedings after the retirement of Mr. Kamboj, having been taken up by his successor further goes to show that the Respondent-firm waived its right to object to the proceedings being taken by the successor of Mr. T.S. Kamboj as envisaged u/s 4 of the Act. It is not a case where Mr. T.S. Kamboj, in spite of his retirement, continued conducting the proceedings and the Appellant-Department did not produce any record, or did not render any assistance to the Arbitrator for completing the Arbitration proceedings. Not even an iota of evidence was pointed out by the learned Counsel for the Respondent-firm in this regard.

15. Another submission of the learned Counsel for the Respondent-firm is that revision petition does not lie against the order of the District Judge and only appeal could be filed as provided u/s 37 of the Act. In support of his contention, the counsel relied upon the cases of The Managing Director (MIG) Hindustan Aeronautics Ltd. and Another, Balanagar Vs. Ajit Prasad Tarway, and M/s Herike Rice Mills, Mehalkalan, District Sangrur v. State of Punjab and Ors. (1998-1) 118 PLR 395. There is no dispute with the proposition of law as laid down in the case of Managing Director (MIG), Hindustan Aeronautics Ltd. Balanagar, Hyderbad's case (supra). The facts of M/s Herike Rice Mills's case (supra) are distinguishable from the facts of present case inasmuch as in this case the challenge is not to the appointment of the

Arbitrator, but to the order of the learned District Judge in an application moved u/s 27 of the Act.

16. Another submission of the learned Counsel for the Respondent-firm is that no interference is called for in this revision petition because there is no illegality or material irregularity committed by the learned District Judge in passing the impugned order. I do not find any force in this submission of the learned Counsel. By the impugned order, the District Judge, Hoshiarpur, has allowed the application filed by the Respondent-firm u/s 27 of the Act ; thereby directing the Appellant-Department to produce the relevant records before the Arbitrator Mr. T.S. Kamboj and to co-operate with him in finalising the award. The District Judge further directed the Arbitrator to give his award expeditiously, In view of the peculiar facts and circumstances of this case, narrated above, in my opinion, the learned District Judge exercised his jurisdiction with material irregularity inasmuch by the impugned order he has issued direction to Mr. T.S. Kamboj to continue with the Arbitration proceedings and decide the same expeditiously in spite of the fact that Mr. Kamboj had ceased to act as Arbitrator on his retirement from the post of Superintending Engineer, Central Works Circle, P.W.D. (B and R) Branch and the proceedings were being taken by his successors. The District Judge did not take note of the above facts while passing the impugned order ; more so when, at no point of time, the Appellant-Department refused to co-operate with Mr. T.S. Kamboj in proceeding with the case so long as he continued to act as an Arbitrator till 24th February, 1998. Besides, no proceedings were taken by him after 24th February, 1998, much less after 28th February, 1998 when he retired.

17. For the aforesaid reasons, this petition deserves to be allowed. The same is hereby allowed and the impugned order passed by the learned District Judge, Hoshiarpur, is set aside.