

(2012) 04 P&H CK 0098

High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Revision No. 2247 of 2010 (O and M)

Chanchal Manohar
Singh and another

APPELLANT

Vs

Chandigarh Press
Club and others

RESPONDENT

Date of Decision: April 4, 2012

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 11(4), 11(5), 11(9), 16
- Societies Registration Act, 1860 - Section 12

Hon'ble Judges: Rajesh Bindal, J

Bench: Single Bench

Judgement

Rajesh Bindal, J.

The plaintiffs are before this Court challenging the order dated 5.3.2010, passed by the learned court below, whereby the dispute in the suit filed by them, has been referred for arbitration. Briefly, the facts are that the petitioners-plaintiffs filed a suit against the respondents seeking a declaration that amendments carried out in the Memorandum and Articles of Association of the Club are non-est and inoperative and further that the election of the President and other office bearers of respondent No. 1-Chandigarh Press Club (for short, "the Club") held on 29.3.2009 is illegal and against its Memorandum of Association. The suit was filed on 3.2.2010. Immediately after service, defendant No. 1/respondent No. 1 moved an application u/s 8 of the Arbitration and Conciliation Act, 1996 (for short, "the 1996 Act") for referring the dispute to arbitration. The same having been accepted by the learned court below, vide order dated 5.3.2010, the petitioners-plaintiffs are before this Court.

2. Learned Counsel for the petitioners submitted that challenge in the suit is not only to the elections of the Club, rather, it is also to the manner amendment was made in the Memorandum of Association. The Arbitrator will not have the jurisdiction to go into the same. He further submitted that in fact, in the

Memorandum of Association, produced on record by the petitioners, there is no arbitration clause. The petitioners have got the certified copy thereof from the Registrar of Firms and Societies, Union Territory, Chandigarh. In the absence thereof, otherwise also the matter could not be referred for arbitration. With reference to the challenge to the amendment, if any, made in the Memorandum and Articles of Association of the Club, reference was made to Section 12 of the Societies Registration Act, 1860 (for short, "the 1860 Act") to submit that mandatory procedure required for amendment of Memorandum and Articles of Association was not followed, hence no clause providing for arbitration in the amended Memorandum of Association can be relied upon. He further submitted that along with the application praying for reference of dispute to the arbitration, no document showing an arbitration clause was produced before the court. In the absence thereof, the application itself was not maintainable. Further, it was submitted that where allegations in dispute are pertaining to fraud, the matter should not be referred to arbitration even if there is a clause for arbitration. In support of the arguments, reliance was placed upon [Atul Singh and Others Vs. Sunil Kumar Singh and Others](#), and N. Radhakrishnan v. M/s Maestro Engineers and others, 2010(3) RCR (Civil) 445.

3. In response to the contentions raised by Learned Counsel for the petitioners, Learned Counsel for the respondents submitted that in the plaint itself, the petitioners have referred to the amendment in the Memorandum of Association carried out on 4.1.2009. Immediately after the amendment, the Registrar of Firms and Societies was informed about the same. He further submitted that in fact, the prayer made in the suit filed by the petitioners has been rendered infructuous as the term of the elected office bearers of the Club has already expired. The contention regarding non-filing of the document along with the application providing for an arbitration clause is controverted while referring to the statement of fact made in the application and also the copy of Memorandum of Association annexed with it, which is part of the record of the court below. The requirement is only for filing a copy. As regards the issue as to whether the matter could be referred to arbitration or not, Learned Counsel for the respondents submitted that Section 16 of the Act gives ample power to the Arbitral Tribunal to decide even about the existence of arbitration agreement. There is no specific plea of fraud raised in the suit filed. In support of the submissions, Learned Counsel placed reliance upon [Food Corporation of India Vs. Indian Council of Arbitration and Others etc. etc.](#), [Maharshi Dayanand University and Another Vs. Anand Coop. L/C Society Ltd. and Another](#), and M/s Golden Agri International Private Limited v. M/s Kundan Rice Mills Limited, 2009(3) PLR 589.

4. Heard Learned Counsel for the parties and perused the relevant referred record.

5. The suit was filed by the petitioners-plaintiffs with the following prayer:

That the prayer is that the suit may kindly be decreed declaring that the so called election of the President and other office Bearers of the defendant No. 1 Club held on March 29, 2009 is illegal, against the Articles of the Memorandum of Association and the Articles of Association and the Bye Laws of the Defendant No. 1 Club and the so-called/alleged amendments of the said Memorandum of Association and the Articles of Association of the Defendant No. 1 Club are against the Articles of the Memorandum of Association and the Articles of Association of the Defendant No. 1 Club and as such are non est, inoperative and violative of the Articles of the Memorandum of Association and the Articles of Association of the Defendant No. 1 Club and all the actions of the so-called President (Defendant No. 3) and other office Bearers (the Executive Committee) of the Defendant No. 1 Club are illegal, unjust, against the Articles of the Memorandum of Association and the Articles of Association, violative of the Bye Laws and the defendants Nos. 3 to 11 are liable to make good the loss caused to the Defendant No. 1 Club with a further prayer that the Defendants Nos. 3 to 11 may kindly be restrained from acting as the President and the Office Bearers (Executive Committee) of the defendant No. 1 Club.

It is further prayed that an ad interim, ex-parte injunction may kindly be issued restraining the Defendants No. 3 to 11 from functioning as the Office Bearers of the defendant No. 1 Club and incurring any expenditure and creating any liabilities and/or charges on the property of the Defendant No. 1 Club.

It is still further prayed that any other relief to which the plaintiffs are entitled to may also be granted to the plaintiffs.

6. A perusal of the aforesaid prayer shows that challenge is to the election of President and other office bearers of the Club held on 29.3.2009 restraining them from functioning as such with a further direction to them to make good the loss caused by them to the Club. Further prayer is that the amendments allegedly made in the Memorandum of Association, are non-est and inoperative.

7. As far as the first prayer is concerned, the same has been rendered infructuous considering the contention raised by Learned Counsel for the respondents that term of the office bearers has already expired.

8. The only prayer, which remains in the suit, is pertaining to the amendment in the Memorandum of Association. The contention raised by Learned Counsel for the petitioners is that the same is in violation of the Memorandum of Association of the Club and has been carried out in violation of the mandatory procedure laid down in Section 12 of the 1860 Act. Regarding maintainability of the application for referring a dispute to the Arbitrator, it was submitted that the document in support of the arbitration clause was not placed on record along with the application and considering the nature of the issue involved, the matter could not be referred to arbitration.

9. Taking up the issue as to whether the document showing that there is an arbitration clause was placed on record along with the application, a perusal of the application filed by respondent No. 1 before the court below shows that a copy of the Constitution of the Club was annexed in support of the contentions made in the application. Section 8 of the Act does not require filing of original arbitration agreement. A duly certified copy thereof can also be annexed, which was filed in the present case as the copy placed on record is certified by the office of the Registrar of Firms and Societies. A perusal of the record of the learned court below also shows that the amended Memorandum of Association of the Club providing for an arbitration clause is on record. It is shown to have been amended w.e.f. 4.1.2009. This satisfies the requirements of Section 8 of the 1996 Act.

10. The arbitration clause reads as under:

ARBITRATION

Any dispute arising in the interpretation of this constitution or in the functioning of the Chandigarh Press Club may be referred to the Advisory Committee consisting of former Presidents of the Chandigarh Press Club, either by the aggrieved party or by the Governing Council. The decision of the Advisory Committee or any such committee set up by the Advisory Committee on the issue would be binding on both parties. However, routine complaints should be dealt by the Governing Council. Any decision of the Advisory Committee will be decided by the majority vote. The quorum of the meeting will not be less 50 per cent of the total member of the Advisory Committee.

11. Now coming to the issue as to whether the matter could be referred to arbitration or not, a reference to Section 8 of the 1996 Act is required, which is extracted hereunder:

8. Power to refer parties to arbitration where there is an arbitration agreement. -(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

12. The jurisdiction of a judicial authority, while dealing with application u/s 8 of the Act, came up for consideration before a Constitution Bench of Hon"ble the Supreme Court in [S.B.P. and Co. Vs. Patel Engineering Ltd. and Another](#), and it was opined that in a matter before the judicial authority in case the other party raises objection

and there is an arbitration clause, the judicial authority has to consider that objection and in case it is found that there is a valid arbitration clause, the parties are to be referred to arbitration. Judicial authority is entitled and bound to decide the jurisdictional issue before making or declining to make a reference. Relevant paragraph 16 thereof is extracted below:

16. We may at this stage notice the complementary nature of Sections 8 and 11. Where there is an arbitration agreement between the parties and one of the parties, ignoring it, files an action before a judicial authority and the other party raises the objection that there is an arbitration clause, the judicial authority has to consider that objection and if the objection is found sustainable to refer the parties to arbitration. The expression used in this section is "shall" and this Court in [P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju \(Died\) and Others](#), and in [Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums](#), has held that the judicial authority is bound to refer the matter to arbitration once the existence of a valid arbitration clause is established. Thus, the judicial authority is entitled to, has to and is bound to decide the jurisdictional issue raised before it, before making or declining to make a reference. Section 11 only covers another situation. Where one of the parties has refused to act in terms of the arbitration agreement, the other party moves the Chief Justice u/s 11 of the Act to have an arbitrator appointed and the first party objects, it would be incongruous to hold that the Chief Justice cannot decide the question of his own jurisdiction to appoint an arbitrator when in a parallel situation, the judicial authority can do so. Obviously, the highest judicial authority has to decide that question and his competence to decide cannot be questioned. If it is held that the Chief Justice has no right or duty to decide the question or cannot decide the question, it will lead to an anomalous situation in that a judicial authority u/s 8 can decide, but not a Chief Justice u/s 11, though the nature of the objection is the same and the consequence of accepting the objection in one case and rejecting it in the other, is also the same, namely, sending the parties to arbitration. The interpretation of Section 11 that we have adopted would not give room for such an anomaly.

13. In [State of Goa Vs. Praveen Enterprises](#), Hon"ble the Supreme Court considered a similar issue and opined that Section 8 of the Act provides for referring the parties to arbitration, whereas Section 11 of the Act contemplates appointment of arbitrator. Jurisdiction u/s 8 of the Act enables the judicial authority to examine the issue as to whether subject-matter of dispute is covered by a valid arbitration agreement or not. Relevant paragraph 12 thereof is extracted below:

12. Reference to arbitration can be in respect of reference of disputes between the parties to arbitration, or may simply mean referring the parties to arbitration. Section 8 of the Act is an example of referring the parties to arbitration. While Section 11 contemplates appointment of arbitrator [vide sub-sections (4), (5) and (9)] or taking necessary measure as per the appointment procedure under the

arbitration agreement [vide sub-section (6)]. Section 8 of the Act does not provide for appointment of an arbitrator, nor referring of any disputes to arbitration, but merely requires the judicial authority before whom an action is brought in a matter in regard to which there is an arbitration agreement, to refer the parties to arbitration. When the judicial authority finds that the subject matter of the suit is covered by a valid arbitration agreement between the parties to the suit, it will refer the parties to arbitration, by refusing to decide the action brought before it and leaving it to the parties to have recourse to their remedies by arbitration. When such an order is made, parties may either agree upon an arbitrator and refer their disputes to him, or failing agreement, file an application u/s 11 of the Act for appointment of an arbitrator. The judicial authority referring the parties to arbitration u/s 8 of the Act has no power to appoint an arbitrator. It may however record the consent of parties to appoint an agreed arbitrator.

[Emphasis supplied]

14. this Court in *M/s Sharda Ginning Pressing & Oil Mills & Ors. v. Smt. Bimla Devi*, 2007(1) RCR (Civil) 818, while referring to an earlier judgment of Hon'ble the Supreme Court in *Sukanya Holding Pvt. Ltd. v. Jayesh H. Pandya*, 2003(3) RCR (Civil) 647 opined that when a dispute is outside the arbitration agreement, the same cannot be referred to arbitration.

15. Delhi High Court in *Akshay Kapur and others v. Rishav Kapur and others*, 2003(2) Arbi LR 508 opined that before referring the parties to arbitration u/s 8 of the Act, the court must be satisfied that action pending before it is the subject of an arbitration agreement. If the finding is contrary, the court should continue with the proceedings. Relevant paragraph thereof is extracted below:

10. Significantly, before referring the parties to arbitration u/s 8 of the present Act, the Court must be satisfied that the action pending before it is "the subject of an arbitration agreement". If the Court or Judicial Authority comes to the contrary conclusion, it must continue and conclude the proceedings before it. To my mind, therefore, a little change has been brought about by the amending Act. It also seems to me that while it is no longer possible for a party to have the arbitrability of a dispute decided by a court, the same position can be brought about through the device of a legal action such as the present suit. In the regime of the 1940 Act it was felt that such questions could not be left to the Arbitrator to decide and rule upon; he could not be a Judge in his own cause, so to speak. Since the intention of the Legislature to ensure the continuance of arbitral proceedings is palpably present, giving the Arbitrator the untrammelled power to decide all questions touching upon his jurisdiction, I would have readily read down the opening words of Section 8 to achieve this objective. But such an interpretation would do violence to and would be irreconcilable with the plain meaning of the words used therein, and therefore I shall refrain from undertaking such an exercise. The essence of the erstwhile Section 34, as extracted in the *Kotharicase* (supra) makes the judgment's ratio

relevant even in respect of the new Act.

16. If the enunciation of law, as referred to above, is considered in the light of the dispute in the present case, the suit has been filed by the petitioners-plaintiffs for declaring the election of the President and other office bearers of the Club as illegal and against its Memorandum of Association and that the amendments made in the Memorandum and Articles of Association of the Club are non-est, having been carried out without following due procedure. The arbitration clause, even if it is assumed that amendment has been carried out after following due procedure, provides for reference of all disputes pertaining to the interpretation of the Constitution or functioning of the Club. As to whether amendment of the Constitution has been carried out following the procedure established in law cannot be the subject-matter of dispute which could be referred to the arbitrator. In view of the above, the order passed by the learned court below referring the parties to arbitration is totally erroneous and is liable to be set aside. Ordered accordingly. The petition stands disposed of.