

Cimmco Birla Limited Vs The State of Haryana and Another

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: Dec. 10, 2010

Acts Referred: Arbitration and Conciliation Act, 1996 â€” Section 10, 12, 13, 13(2), 13(3)
Civil Procedure Code, 1908 (CPC) â€” Order 39 Rule 1, Order 39 Rule 2

Citation: (2011) 161 PLR 632

Hon'ble Judges: Rakesh Kumar Jain, J

Bench: Single Bench

Judgement

Rakesh Kumar Jain, J.

The contractor, having been unsuccessful in its objection petition filed u/s 34 of the Arbitration and Conciliation

Act, 1996 [for short "the Act"] against the ex-parte arbitral award dated 28.04.2006, has come up in appeal before this Court u/s 37 of the Act to

challenge the order dated 08.12.2008 passed by the learned Additional District Judge, Jind.

2. The factual matrix involved in this case is being noticed in brief. The Appellant (contractor) entered into an agreement with the Engineer-in-

Chief, Haryana, PWD (B&R) Branch, Chandigarh on 09.02.2000 for the work of periodic maintenance of SH-14 Jind-Mundhal-Bhiwani road

vide Contract No. HHUP/M-6 for a sum of Rs. 89,800,289/- to be granted by the World Bank and was to be executed within 12 months with

effect from 24.02.2000. Due to some change in the specifications, the amount of contract price was enhanced to Rs. 9,92,93,336/- vide letter

dated 05.09.2000 and time limit was also extended from 23.02.2001 to 23.04.2001. On account of some dispute between the parties, the

Appellant terminated the contract vide its letter dated 12.12.2000. It was replied by the Respondents vide Memo No. HHUP-II-302 dated

08.03.2001 and terminated the contract vide their memo No. HHUP-II/1525 dated 28.08.2001. Since there was an arbitration clause in the

agreement dated 09.02.2000, therefore, the Appellant invoked it and asked the Respondent to refer the dispute for arbitration. In terms of Clause

25(a) of the agreement dated 09.02.2000, the Respondents appointed Shri B.L. Goyal as an Arbitrator vide its letter dated 15.03.2002 and the

Appellant appointed Shri I.J. Mamtani as an Arbitrator on its behalf on 30.03.2002. Both the Arbitrators agreed and appointed Shri J.P. Gupta,

retired CE/EIC, R/o 634, Sector 28, Faridabad as the presiding Arbitrator. Thus, the tribunal of three Arbitrators was constituted headed by Shri

J.P. Gupta. On 23.12.2002, the Appellant submitted an application u/s 12 of the Act questioning the independence of Shri J.P. Gupta, Presiding

Arbitrator, in which it was alleged as under:

That Shri J.P. Gupta, the Presiding arbitrator has been found to have very close relation i.e. brother-in-law (Sadhhu) of Shri M.K. Aggarwal, the

present Chief Engineer, incharge of the HHUP program and the present dispute pertains to the case of that Deptt. Mr. Gupta has claimed his

expenses & fees on account of three arbitration meetings wherein he has claimed Rs. 2,000/- per day for stay with his own arrangements and the

local transport charges @ Rs. 500/- per day as decided by the Arbitral Tribunal in the meeting on 24.05.2002. Shri Gupta has not incurred such

expenses as he has been enjoying the free and total hospitality of staying with Shri M.K. Aggarwal and using his official transport. Shri Aggarwal is

the concerned party to the arbitration. Under the circumstances Shri J.P. Gupta has not been maintaining to remain as an independent and impartial

manner also because of his earlier extremely close association with the Haryana Govt. enjoying very senior position and now his close family

relationship with Shri M.K. Aggarwal concerned Chief Engineer HHUP a party to the arbitration.

3. It was also alleged that the Respondent had raised the issue of partiality against Shri J.P. Gupta in the meeting held on 13.11.2002, but despite

that, proceedings were carried out. It was also averred in the application that in the meeting dated 13.11.2002, Shri J.P. Gupta did not give

enough freedom to permit the Appellant's representatives Shri R.K. Gupta to express his views and was forced to agree to the dates of

submissions not convenient to the Appellant and openly allowed the claimants (Respondents herein) to submit the claim statements very belatedly

without any formal request and Shri J.P. Gupta himself tried to justify the inaction of the claimants. Shri I.J. Mamtani, the Tribunal Member, tried to

place his point of view with the claimants in which he could not proceed due to the intervention by Shri J.P. Gupta, whereas the other member of

the Arbitral Tribunal remained silent during the proceedings as he was in total agreement with Shri J.P. Gupta. The said application dated

23.12.2002 was placed before the arbitral tribunal in the meeting dated 07.04.2003 in which the arbitrator appointed by the Appellant, namely,

Shri I.J. Mamtani submitted his resignation. Two orders were passed in the said meeting which are on record as Ex.P24 and Ex.P25. Both the

orders are being reproduced as under:

Order dated 07.04.2003 (Ex.P24)

Proceedings of the meeting of the Arbitrators held on 7.4.2003 at 12.00 noon in the committee Room of the office of Engineer-in-Chief, Haryana

PWD B&R Branch, Sector 19-B, Chandigarh.

The following were present:

1. Shri J.P. Gupta, Chairman, Arbitral Tribunal.

2. Shri B.L. Goyal, Arbitrator.

1. Shri I.J. Mamtani, has submitted his resignation. He has further mentioned in his letter of resignation that the challenge of Chairman Arbitrator

needs to be resolved by the parties of Arbitral Tribunal.

2. The matter referred by M/s Cimmco Birla Ltd. (Respondent) vide their application dated 23.12.2002 u/s 12 of the Arbitration & Conciliation

Act, 1996 against the Presiding Arbitrator Shri J.P. Gupta was discussed. The provisions of Section 12 of the Arbitration & Conciliation Act,

1996 regarding grounds for challenge were gone through by the Arbitrators. The provisions u/s 13 of the Act, which details the procedure for

challenge were also examined and discussed in detail.

3. In accordance with the provisions u/s 13(2), the other party namely Additional Project Director-cum-Superintending Engineer, Hisar Circle,

PWD B&R, was called in the meeting to give his views. He was apprised about the contents of the application submitted by M/s Cimmco Birla

Ltd. vide their application dated 23.12.2002. After hearing he gave the following statement recorded as under:

I do not agree with the challenge made by M/s Cimmco Birla Ltd. and take a strong exception to his interception at a belated stage. This is no

where covered under, the provisions of Arbitration & Conciliation Act, 1996. As a matter of fact, the Respondent i.e. M/s Commco Birla wants to

wriggle out as he has no defence to the plaint statement already given by the department. In fact, the proceedings should not be held up only on

account of unilateral interception and should be continued, as the Govt. interest in the shape of recovery to be made from the Respondents is

suffering badly.

4. Since neither Shri J.P. Gupta, Chairman, Arbitral Tribunal has withdrawn u/s 13(3) nor the other party has agreed to the challenge made by M/s

Cimmco Birla Ltd., so the Arbitral Tribunal shall continue arbitration proceedings, as provided u/s 13(4) of the Arbitration & Conciliation Act,

1996 and the grounds of challenge in the application made by Respondents are hereby rejected. It was also decided to convey this decision of the

Tribunal to both the parties.

5. In view of the resignation of one of the arbitrators nominated by the Respondent, it was decided that the matter should be referred to the

Employer (alongwith copy of resignation) asking the Respondent to nominate his substitute arbitrator u/s 15(2) of the Arbitration and Conciliation

Act, 1996 so that the Arbitral Tribunal can proceed further to adjudicate the dispute already referred.

Sd/- Sd/-

(B.L. Goyal) (J.P. Gupta)

Arbitrator Chairman, Arbitral Tribunal

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wriggle out as he has no defence to the plaint statement already given by the department. In fact, the proceedings should not be held up only on

account of unilateral interception and should be continued, as the Govt. interest in the shape of recovery to be made from the Respondents is

suffering badly.

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Cimmco Birla Ltd., so the Arbitral Tribunal shall continue arbitration proceedings, as provided u/s 13(4) of the Arbitration & Conciliation Act,

1996 and the grounds of challenge in the application made by Respondents are hereby rejected. It was also decided to convey this decision of the

Tribunal to both the parties.

4. The Tribunal also revised the schedule already decided under para 2 of the proceedings of the third meeting of the Tribunal since the fourth

meeting was not held on 30.01.2003, as decided and was postponed due to interruption created by the application submitted by Respondent i.e.

M/s Cimmco Birla Ltd. u/s 12 of the Act. The revised schedule is fixed as under:

a) Date of counter & counter: 30.04.2003

claim by the Respondent.

b) Date of rejoinder by the claimant.. 15.05.2003

c) Date of counter rejoinder: 02.06.2003

by the Respondent.

5. Next meeting of the Tribunal will be held on 6th June, 2003 at 11.00 A.M. in the Canal Rest House, 3 Alipur Road, Delhi, as mutually agreed

by all concerned.

Sd/- Sd/-

(B.L. Goyal) (J.P. Gupta)

Arbitrator Chairman, Arbitral Tribunal

4. After the resignation of the Arbitrator Sh.I.J. Mamtani, appointed at the instance of the Appellant, the Respondents allegedly gave a notice to

the Appellant on 16.04.2003 (Ex.P26) intimating them that Shri IJ. Mamtani, Arbitrator appointed by them has since resigned, therefore, in terms

of Section 15(2) of the Act they should nominate their arbitrator in his place within a period of 30 days as provided in the contract, otherwise the

matter would be referred to the President, Indian Roads Congress for appointment of the arbitrator. According to the Respondents, the Appellant

did not nominate any arbitrator to substitute Shri I.J. Mamtani, consequently, in terms of Clause 25(3)(c) of the agreement, Shri D.S. Nirmohi was

appointed as a substituted arbitrator by the Indian Roads Congress. The appointment of Shri D.S. Nirmohi, the substituted arbitrator, was

challenged by the Appellant by way of Civil Suit No. 646 dated 21.09.2004 in the Civil Court at Jind. In the said suit, an application under Order

39 Rules 1 and 2 of the Code of Civil Procedure, 1908 [for short ""Code of Civil Procedure""] was also filed for interim injunction to restrain Shri

D.S. Nirmohi, the substituted arbitrator, from acting as an arbitrator in the three member Tribunal. The said application was dismissed by the

learned Trial Court vide order dated 29.07.2005 and the said order was upheld by the learned First Appellate Court vide his order dated

06.10.2005 against which the Appellant had filed Civil Revision No. 6223 of 2005 in which notice of motion was issued but ultimately the said

revision petition was disposed of by this Court with the observations that:

Ld. Counsel for the Petitioner states that the Arbitration Tribunal has since announced the award and, therefore, he seeks to withdraw the present

petition with liberty to challenge the Arbitrator award in accordance with law.

Dismissed as withdrawn with liberty as prayed for.

It shall be open to the Petitioner to raise all the objections in appropriate proceedings including the objections raised in the present petition. As and

when such objections are raised before the competent court, the same shall be considered in accordance with law.

5. Besides these proceedings before the Civil Court, in order to challenge the very appointment of Shri D.S. Nirmohi as the substituted arbitrator

by the Indian Roads Congress, the Appellant had also submitted an application dated 25.02.2004 (Ex.P32) to the Tribunal raising the issue of the

continuation of Shri J.P. Gupta, who had not rescued himself despite the fact that his neutrality, impartiality or independence was doubted and the

appointment of Shri D.S. Nirmohi as a substituted arbitrator by the Indian Roads Congress was also disputed by the Appellant. According to the

Appellant, only the Chief Justice is empowered to appoint a substituted Arbitrator. In any case, the arbitral proceedings continued in which the

Appellant stopped appearing out of protest since the aforesaid objections about the rescuing of Shri J.P. Gupta and the illegal appointment of Shri

D.S. Nirmohi were not addressed to. Ultimately, the Tribunal vide its impugned award dated 28.04.2006 gave the following reliefs to the

Respondents under four separate heads of claim:

Claim No. I Rs. 1,49,82,316/-.

Claim No. II NIL

Claim No. III Rs. 1,79,067/-

Claim No. IV Interest @ 12% per annum on Rs. 1,49,82,318/- from the date

of award i.e. 28.04.2006 till the realization of payment and

an amount of Rs. 25,000/- paid by the Respondents to the Indian

Roads Congress for appointment of the arbitrator.

6. While challenging the arbitral award u/s 34 of the Act, objection with regard to continuation of Shri J.P. Gupta as the Presiding Arbitrator of the

Arbitral Tribunal coupled with the illegal appointment of Shri D.S. Nirmohi was raised, inter alia, with other objections including the liability

assessed by the Tribunal of an amount of Rs. 1,49,82,316/-. In particular, the objections raised by the Appellant are provided in objection Nos.

(ii) and (iv) noticed by the learned Court below in para 2 of the judgment, which reads as under:

(ii) Arbitral Tribunal proceedings on 7.4.2003 were conducted by only two arbitrators Sh.J.P. Gupta and Sh.B.L. Goyal in the absence of Sh.I.J.

Mamtani, the third arbitrator who had already resigned on 7.4.2003. The Id. Tribunal (consisting of two arbitrators) had considered and rejected

the matter referred by M/s. Cimmco Birla Limited vide their application dated 23.12.2002, u/s 12 and 13 of the Arbitration and Conciliation Act,

1996 wherein a prayer was made that Hon"ble Presiding Arbitrator, Shri J.P. Gupta should rescue himself from the post of an Arbitrator in the

interest of justice. Arbitral Tribunal has acted illegally in as much as incomplete quorum of tribunal was incompetent to decide the application of

Applicant/Contractor objecting to continuation of Sh.J.P. Gupta as Presiding Arbitrator.

(iv) The Id. Tribunal did not consider the fact that to supply vacancy caused by withdrawal of Sh.I.J. Mamtani, only Hon"ble Chief Justice is the

competent authority to appoint an arbitrator.

7. In respect of the appointment of Shri D.S. Nirmohi, the learned Court below has observed that Clause 25(3)(c) of the agreement is applicable

and not Clause 25(3Xa) and that the Indian Roads Congress was competent to fill up the vacancy created by Shri I.J. Mamtani since the

Appellant had failed to nominate a substituted arbitrator within a period of 30 days of the notice. In respect of the continuation of Shri J.P. Gupta

as the Presiding Arbitrator, it observed that the Arbitral Tribunal has acted legally in accordance with Sections 13(3) and 13(4) of the " Act while

deciding the application dated 03.12.2002 and proceeded further to make an arbitral award as there is no evidence on record that there is any

misconduct on the part of the Presiding Arbitrator or any member thereof.

8. Assailing the award of the Arbitral Tribunal and the order of the Court below, learned Counsel for the Appellant has opened his arguments by

submitting that the proceedings dated 07.04.2003, when Shri I.J. Mamtani had resigned, could not have been carried out by two members of the

Tribunal who had decided to continue with the arbitral proceedings. It is submitted that Section 10 of the Act provides that number of the

Arbitrators can never be even number, whereas in the proceedings dated 07.04.2003, after resignation of Shri I.J. Mamtani, there were two

members of the Arbitral Tribunal, i.e. Shri J.P. Gupta and Shri B.L. Goyal, which forms the Tribunal of even number and not odd number. It is

stated that the Tribunal should have stopped the proceedings then and there and should not have carried out the proceedings further on the

principle of coram non juris. Learned Counsel for the Appellant has relied upon a decision of the Supreme Court in the case of Karnal

Improvement Trust, Karnal Vs. Parkash Wanti (Smt) (Dead) and Another, and a judgment of this Court in the case of Haryana State Cooperative

Supply and Marketing Federation Ltd. v. National Trading Company 2003 (4) R.C.R.156. He also relies upon the decisions in the cases of

Bharat Sanchar Nigam Ltd. and Another Vs. Motorola India Pvt. Ltd., , Gas Authority of India Ltd. and Anr. v. Ket Construction (I) Ltd. and

Ors. 2007 (3) R.C.R.133 and Food Corporation of India Vs. Chandu Construction and Another, .

9. In reply, learned Counsel for the Respondents has submitted that the question of violation of Section 10 of the Act does not arise because after

the resignation of Shri I.J. Mamtani, no decision on merits was taken by the other two members of the arbitral Tribunal and the matter has been

finally adjudicated by the arbitral Tribunal comprising of three members which is in accordance with Section 10 of the Act. He has also submitted

that the substituted member Shri D.S. Nirmohi was appointed by the Indian Roads Congress on account of failure on the part of the Appellant to

nominate the Arbitrator and since there is a provision in the agreement itself under which the Indian Roads Congress is empowered to fill in the

vacancy caused due to the resignation of Shri I.J. Mamtani, therefore, the Appellant cannot take the plea that the substitution has to be done with

the order of the Chief Justice. In respect of the continuation of Shri J.P. Gupta, the Presiding Arbitrator, it is submitted that there is no allegation of

any misconduct on his part in the proceedings and his impartiality and neutrality cannot be challenged on the ground that he happened to be an Ex-

Senior officer of the Government of Haryana or related to the Chief Engineer in some manner. He has further submitted that there is a categoric

finding recorded by the Tribunal while deciding claim No. 1 which has been upheld by the learned Court below while interpreting Clause 60 of the

agreement. In support of his submission, learned Counsel for the Respondent has also relied upon a decision of the Supreme Court in the case of

Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others, .

10. I have heard both learned Counsel for the parties and have perused the record with their able assistance.

11. The first question raised by learned Counsel for the Appellant is with regard to the quorum of the arbitral Tribunal in respect of which he has

relied upon a decision of the Supreme Court in the case of Karnal Improvement Trust (supra). Admittedly, the Appellant had appointed Shri I.J.

Mamtani as an Arbitrator, whereas Respondents had appointed Shri B.L. Goyal as an Arbitrator and both of them agreed and appointed Shri J.P.

Gupta as the Presiding Arbitrator. In this manner, a Tribunal comprising of three members came into being. As per record, while the arbitral

Tribunal was proceeding with the arbitration, an application was filed by the Appellant raising doubt about the impartiality and neutrality of the

Presiding Arbitrator on the ground that he has some relation with the Chief Engineer. In-charge of the HHUP programme. In the 4th meeting held

on 07.04.2003, the Arbitrator appointed at the instance of the Appellant, namely Shri I.J. Mamtani, had resigned on the ground that the issue of

continuation of Shri J.P. Gupta, the Presiding Arbitrator needs to be resolved. In the said meeting itself, the Presiding Arbitrator decided not to

withdraw and as a matter of fact, the said issue was resolved. Thereafter, the Respondents gave notice to the Appellant on 16.04.2003 intimating

that the Arbitrator appointed by them has since resigned, therefore, in terms of Section 15(2) of the Act they should nominate their Arbitrator in his

place within a period of 30 days as provided in the contract, but since the Appellant failed to nominate their Arbitrator to fill in the vacancy caused

due to the resignation of Shri I.J. Mamtani, the vacancy was filled up through the aegis of the Indian Roads Congress. Admittedly, thereafter, the

Appellant stopped appearing before the Tribunal despite notice. It is recorded in para No. 11 of the arbitral award that ""the Respondents never

submitted any counter and counter claims to the Tribunal nor sent their representative during the course of future hearings"". After taking into

consideration the entire facts and circumstances, the Tribunal of three members which constitutes complete quorum, decided the lis between the

parties. In the background of the aforesaid facts, the judgment relied upon by learned Counsel for the Appellant in the case of Karnal Improvement

Trust (supra) is not applicable because in that case it was held that if there is a Tribunal consisting of three members including the President, then all

the 3 members should be present, participate, hear the matter and decide either unanimously or as per majority as the functions of the Tribunal is

not directory and the adjudication by three members Tribunal is imperative and mandatory. The law laid down in the said judgment has no bearing

in the present case because this case has been decided by a Tribunal of three members and no final decision has been taken by a Tribunal which

was not duly constituted in terms of Section 10 of the Act. Therefore, I do not agree with the first contention raised by learned Counsel for the

Appellant.

12. In respect of the second contention about the substitution of the Arbitrator that he should have been appointed with the order of the Chief

Justice, learned Counsel for the Appellant has relied upon the judgment in the case of Haryana State Cooperative Supply and Marketing

Federation Ltd. (supra) in which it has been held by this Court that in the absence of any agreement in the contract, only the Court can supply the

vacancy of an arbitrator during pendency of arbitration proceedings, whereas in the present case, there is a provision in the contract itself about the

substitution of the member of the Tribunal during pendency of the arbitration proceedings in terms of Clause 25.3(c). The findings recorded by the

learned Court below in this regard are as follow:

The Applicant/contractor should have appointed its arbitrator within 30 days of the notice and in the event of his failure, Clause 25.3(c) of the

contract agreement was applicable and not Clause 25.3(a). Sh.D.S. Nirmohi, Chief Engineer (Retired) HP (PWD), 1076 Phase-V, S.A.S. Nagar

(Mohali) was appointed as Arbitrator by the Indian Road Congress after resignation of Sh.I.J. Mamtani, as the Applicant/contractor had failed to

appoint substituted arbitrator within 30 days of the notice to appoint arbitrator.

It was also observed that:

The agreement is the soul of the Arbitration and Conciliation Act, 1996, hence there is no violation of law. Since Applicant/contractor had failed to

appoint its arbitrator within 30 days of the notice, so the President Indian Road Congress was requested to appoint substituted arbitrator and

hence there was no violation or illegality in the appointment of the substituted arbitrator.

13. Moreover, there is no explanation with the Appellant for not associating with the arbitration proceedings and now raising hue and cry when the

award has been passed against them. Insofar as claim No. 1 is concerned, the learned arbitral Tribunal as well as the learned Court below have

held that the same is based upon interpretation of Clause 60.1 and 60.2 of the contract regarding which detailed finding has been recorded in para

No. 12 of the impugned order which does not call for any interference by this Court. The other judgment relied upon by learned Counsel for the

Appellant in the case of Bharat Sanchar Nigam Limited (supra) is with regard to the considerations to test impartiality and independence. In that

case, the officer had already taken a decision in favour of the Appellants about the imposition of the liquidated damages upon the Respondent

which was the very issue in dispute and as such could not have been decided by him as an Arbitrator on the principle of nemo debet esse judex in

propria sua causa, i.e. a party cannot be a judge in his own cause. To my mind, this judgment is not applicable to the facts of the present case

because there is no allegation against Shri J.P. Gupta, the Presiding Arbitrator, that he had already decided the lis between the parties. Insofar as

the judgment relied upon by learned Counsel for the Appellant in the case of Ms Gas Authority of India Ltd. (supra) is concerned, it pertains to the

raising of grievance about the improperly constituted Tribunal of the arbitrators. It is held in that case that if the plea is not taken before the

Tribunal, then it would be deemed to have been waived off. This case again does not improve the case of the Appellant because the allegation

about the neutrality and impartiality of the Presiding Arbitrator was raised before him which was rejected by him in the same meeting and after

resignation of one of the arbitrators, namely Shri I.J. Mamtani, no decision on merits was taken except for adjourning the case and giving an option

to the Appellant to fill in the vacancy. Insofar as the judgment relied upon by learned Counsel for the Appellant in the case of Food Corporation of

India (supra) is concerned, it only deals with as to what should constitute misconduct. The Appellant has failed to prove any misconduct on the

part of the Presiding Arbitrator even before the Court below or before this Court except for making allegation that he happens to be a relative of

the Chief Engineer and was an Ex. Senior officer in the Government of Haryana.

14. The judgment relied upon by learned Counsel for the Respondents in the case of Narayan Prasad Lohia (supra) deals with the situation where

parties had appointed two arbitrators to resolve their differences, they had participated in the arbitral proceedings on the basis of which an award

was passed, but later on objection was raised that two arbitrators could not have decided their dispute in terms of Section 10 of the Act. The

Supreme Court held that the said plea cannot be taken if both the arbitrators unanimously decided the dispute between the parties.

15. Thus, from the aforesaid discussion, I have come to the conclusion that there is no error in the order of the learned Court below which has

been challenged before this Court in this appeal and as such, the present appeal is hereby dismissed, however, without any orders as to costs.