

Commander Works Engineer Vs Diplomat Engineer and Another

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: Feb. 7, 2011

Acts Referred: Arbitration and Conciliation Act, 1996 â€” Section 2, 2(1), 34, 37, 42

Constitution of India, 1950 â€” Article 11, 145, 6

Limitation Act, 1963 â€” Section 11, 11(6), 2(1), 31, 9

Citation: (2011) 3 ARBLR 413 : (2011) 162 PLR 752 : (2011) 5 RCR(Civil) 673

Hon'ble Judges: Rajesh Bindal, J

Bench: Single Bench

Judgement

Rajesh Bindal, J.

Challenge in the present appeal is to the order dated 14.10.2003 passed by the learned court below, whereby the

objections filed by the Appellant u/s 34 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") against the award of the Arbitrator,

were dismissed.

2. Briefly, the facts are that a contract for repair of Central A.C. Plant at Bhatinda was executed between the parties on 22.4.1993. The work

commenced on 21.5.1993 and was to be completed on 20.1.1994, but was completed on 16.6.1997. At the time of preparation of the final bill,

the contractor (Respondent No. 1) asked for appointment of Arbitrator. He filed a petition before Delhi High Court. As during the pendency

thereof, the Arbitrator was appointed, the same was withdrawn. The Arbitrator gave award on 13.11.2001, against which the Appellant filed

objections before the learned court below, which were dismissed on 14.10.2003 on the ground that the court did not have the jurisdiction. It is

against this order that the Appellant is before this Court.

3. Learned Counsel for the Appellant submitted that the order passed by the learned court below dismissing the objections on account of

jurisdiction is totally erroneous. He submitted that the agreement between the parties was entered into at Bhatinda. The work for which the

agreement was entered into was to be executed at Bhatinda. The entire payments were made at Bhatinda. The courts at Bhatinda only had the

jurisdiction to entertain and decide the dispute regarding that agreement. Merely because the contractor had his establishment at Delhi and at one

given point of time, he filed a petition for appointment of Arbitrator before Delhi High Court, it cannot be said that only Delhi High Court will have

the jurisdiction to entertain all disputes pertaining to arbitration in the present case. In fact, Delhi High Court did not have the jurisdiction and the

petition filed by the contractor was ultimately withdrawn there and no opinion was expressed on merits. Referring to Section 42 of the Act, it was

submitted that the word ""court"" mentioned therein would certainly be read as the court of competent jurisdiction, which has so been defined in

Section 2(e) of the Act. By no stretch of imagination, jurisdiction of the dispute could be conferred on courts at Delhi.

4. He further submitted that in the agreement signed between the parties, in terms of Clause 71 thereof, it has been agreed that the courts at the

place where acceptance of the tender has been issued and the work is executed/executable, has the jurisdiction. He further argued that in terms of

that clause as well, the only court competent to entertain and decide the lis between the parties pertaining to the agreement, would be the courts at

Bhatinda and not elsewhere. Reliance was placed upon order dated 29.3.2007, passed by Hon"ble the Supreme Court in Arbitration Petition No.

17 of 2005 - Hbm Print Ltd. v. Scantrans India Pvt. Ltd., Rajasthan State Electricity Board v. M/s Universal Petrol Chemicals Ltd. 2009 (1) RCR

849 (SC) and Shree Baidyanath Ayurved Bhawan Pvt. Ltd. Vs. Praveen Bhatia and Others, .

5. Heard learned Counsel for the Appellant and perused the paper book. No one had appeared for the Respondents.

6. The provisions of the Act and the terms of agreement, which are relevant for the purpose of decision of the issue involved in the present appeal

are extracted below:

Section 2(e) of the Act

2. Definitions.- (1) In this Part, unless the context otherwise requires,

xx xx xx

(e) ""Court"" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil

jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a

suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

Section 42 of the Act 42. Jurisdiction.- Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force,

where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction

over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that court

and in no other court.

Clause 71 of the agreement

Irrespective of the place of issue of tenders, the place of acceptance of tenders, the place of execution of contract or the place of payment under

the contract, the contract shall be deemed to have been made at the place from where the acceptance of tender has been issued and the work is

executed/executable. The court of the place from where the acceptance of tender has been issued or the place where the work is executed/under

execution shall alone have jurisdiction to decide any dispute arising out of or in respect of the contract.

7. A perusal of the award of the Arbitrator shows that it was entered into between the parties for special repair of AC Plant at Bhatinda Military

Station. The contract on behalf of President of India was accepted by CWE, Bhatinda Military Station. It has been claimed by the Appellant that

entire payment for the work done was also made at Bhatinda. Condition No. 71 of the agreement executed between the parties clearly provided

that contract shall be deemed to have been made at a place from where the acceptance of tender has been issued and the work is

executed/executable. The court only at that place will have the jurisdiction to decide any dispute arising out of the contract.

8. The term "court" has been defined in Section 2(e) of the Act to mean the principal court of civil jurisdiction in a district including the High Court

in exercise of its ordinary original civil jurisdiction to decide the question forming the subject-matter of arbitration if the same had been the subject-

matter of a suit.

9. Considering condition No. 71 of the contract and definition of term "court" provided for under the Act, it can safely be opined that it would: be

the courts at Bhatinda or the High Court of the State concerned, which will have jurisdiction to decide any dispute arising out of the contract

between the parties.

10. In Shree Baidyanath Ayurved Bhawan Pvt. Ltd.'s case (supra), Hon'ble the Supreme Court opined that an ouster clause in an agreement

between the parties should be given effect to in case by agreement the parties chose to confer jurisdiction on either of the court, which otherwise

has jurisdiction to deal with the matter. Similar view was expressed in Rajasthan State Electricity Board's case (supra).

11. In terms of the provisions of Section 9 of the Act, a party may, before or during arbitral proceedings or at any time after the making of the

arbitral award but before it is enforced in accordance with the provisions of the Act, apply to the "court" for interim measure. Section 34 of the

Act enables any of the parties to the arbitration to take recourse to a court against an arbitral award by filing application for setting aside thereof in

terms of Sub-sections (2) and (3) thereof. Section 37 of the Act provides for maintainability of appeals against certain specified orders to the

court. Section 42 of the Act, beginning with non-obstante clause, provides that where with respect to an arbitration agreement any application

under this part has been made in a court, that court alone shall have the jurisdiction over the arbitration proceedings and all subsequent applications

arising out of that agreement and the arbitral proceedings shall be made in that court and no other court. Section 43 of the Act provides for

application of Limitation Act, as it applies to proceedings in court.

12. As against that, Section 11 of the Act, which provides for appointment of Arbitrator confers the jurisdiction therefor on the Chief Justice or any

person or institution designated by him. The Legislature has consciously used different terminology in different provisions of the Act while

conferring jurisdiction.

13. In the present case, the learned court below has dismissed the objections filed by the Appellant referring to the provisions of Section 42 of the

Act and also the fact that earlier the contractor had filed a petition in Delhi High Court for appointment of Arbitrator. Copy of the order passed by

Delhi High Court on 31.10.2001 in AA No. 189 of 2000 is on record. The order passed is extracted below:

Learned Counsel for the Petitioner submits that Respondents have already appointed an Arbitrator. He further submits that he does not press this

petition and petition be dismissed as withdrawn. Ordered accordingly, The petition is dismissed as withdrawn.

14. A perusal of the aforesaid order shows that no opinion as such was expressed by the court on any of the issues between the parties. It does

not even show as to whether notice was issued in the application filed by the contractor as the only order is for withdrawal of the application on the

statement of counsel for the contractor in view of the fact that the Appellant herein had already appointed the Arbitrator. It as such cannot be said

that Delhi High Court had consciously dealt with the issues involved in the case and decided any dispute between the parties on merits after

considering the issue regarding jurisdiction.

15. The application filed by the Respondent before Delhi High Court can, at the most, be termed as an application u/s 11 of the Act praying for

appointment of Arbitrator. Such a prayer in terms of the provisions of the Act could be made to the Chief Justice or any person or institution

designated by him. This application is not maintainable in a court. The bar u/s 42 of the Act regarding jurisdiction in any subsequent proceedings is

only in case the initial application by any of the parties with respect to any arbitration agreement has been made in a court. That should be the court

of competent jurisdiction. Accordingly, it can safely be opined that filing of application by Respondent No. 1 before Delhi High Court seeking

appointment of Arbitrator cannot be said to be an event which will lead to the conclusion that all other applications pertaining to the arbitration

disputes between the parties shall lie to Delhi High Court, which otherwise did not have the jurisdiction.

16. A similar issue came up for consideration before Hon'ble the Supreme Court in Rodemadan India Limited Vs. International Trade Expo center

Limited, , where referring to a passage from the earlier judgment of Hon'ble the Supreme Court in SBP & Company v. Patel Engg. Ltd. (2005) 8

SCC 618, it was opined that power exercisable by the Chief Justice u/s 11 of the Act is not the power of the Supreme Court. Relevant paragraphs

7 and 8 thereof are extracted below:

7. In my view, this contention is entirely misconceived for two reasons. In the first place, Article 145 of the Constitution itself proceeds by

declaring that the provisions of the article were "subject to the provisions of any law made by Parliament". The Act is definitely a "law made by

Parliament" and it does not prescribe that a petition u/s 11(6) has to be heard by a Bench consisting of at least two Judges. Second, the power

under Article 145 of the Constitution and the Rules framed thereunder, are intended to govern the practice and procedure of the Supreme Court. 1

am unable to persuade myself to believe that the power exercisable by the Chief Justice u/s 11(6) of the Act is the power of the Supreme Court

under the Constitution. My first impression on this issue is also confirmed by the judgment of this Court in Patel Engg. where it was observed that:

13. It is common ground that the Act had adopted the UNCITRAL Model Law on International Commercial Arbitration, but at the same time it

has made some departures from the Model Law. Section 11 is in the place of Article 11 of the Model Law. The Model Law provides for the

making of a request under Article 11 to "the court or other authority specified in Article 6 to take the necessary measure". The words in Section 11

of the Act are "the Chief Justice or the person or institution designated by him". The fact that instead of the court, the powers are conferred on the

Chief Justice, has to be appreciated in the context of the statute.

"Court" is defined in the Act to be the Principal Civil Court of original jurisdiction of the district and includes the High Court in exercise of its

ordinary original civil jurisdiction. The Principal Civil Court of original jurisdiction is normally the District Court. The High Courts in India exercising

ordinary original civil jurisdiction are not too many. So in most of the States the court concerned would be the District Court. Obviously,

Parliament did not want to confer the power on the District Court, to entertain a request for appointing an arbitrator or for constituting an Arbitral

Tribunal u/s 11 of the Act. It has to be noted that u/s 9 of the Act, the District Court or the High Court exercising original jurisdiction, has the

power to make interim orders prior to, during or even post-arbitration. It has also the power to entertain a challenge to the award that may

ultimately be made. The framers of the statute must certainly be taken to have been conscious of the definition of "court" in the Act. It is easily

possible to contemplate that they did not want the power u/s 11 to be conferred on the District Court or the High Court exercising original

jurisdiction. The intention apparently was to confer the power on the highest judicial authority in the State and in the country, on the Chief Justices

of the High Courts and on the Chief Justice of India.

8. In short, the power u/s 11(6) is the power of a designate referred to under the section and not that of the Supreme Court, albeit that it has now

been held to have judicial characteristics by reason of the judgment in Patel Engg. Since this is the power of the Chief Justice and not the power of

the Supreme Court, the specification in Order 7 Rule 1 of the Rules as to the minimum number of Judges, would have no application thereto. If the

argument of learned Counsel is right, then even the Chief Justice cannot pass such an order unless he is sitting in a Bench with one or more

companion Judges. No such intention is evidenced by Parliament in enacting Section 11(6) of the Act. Since Parliament has enacted a law under

which the power is exercisable by the Chief Justice or his designate, who could be "any person or institution", I do not think that the requirement of

Order 7 Rule 1 of the Rules would apply to such a situation at all. The contention is, therefore, rejected.

[Emphasis supplied]

17. An issue similar to the one in hand was also considered in the aforesaid judgment and it was held that neither the Chief Justice nor his designate

u/s 31 of the Act is a court, as contemplated under the Act. Bar of jurisdiction u/s 42 of the Act is only intended to apply to a court. Paragraph 25

thereof is extracted below:

In my view, this contention has no merit as I have held earlier, neither the Chief Justice nor his designate u/s 11(6) is a "court" as contemplated

under the Act. Section 2(1) (e) of the Act defines the expression "court". The bar of jurisdiction u/s 42 is only intended to apply to a "court" as

defined in Section 2(1)(e). The objection, therefore, has no merit and is rejected.

18. For the reasons mentioned above, the order passed by the learned court below holding that it did not have the jurisdiction to decide the

objections filed by the Appellant in view of the bar contained in Section 42 of the Act as earlier Respondent No. 1 had filed an application before

Delhi High Court for appointment of Arbitrator is totally erroneous and is set aside. The matter is remitted back for consideration on merits. The

parties are directed to appear before District Judge, Bhatinda for further proceedings on 5.3.2011. As Respondent No. 1 remained

unrepresented, his service be effected again by the court below.

19. The appeal stands disposed of in the manner indicated above.