

**(2012) 11 P&H CK 0156**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** First Appeal from Order No. 5272 of 2010

M/s. Era Infra Engineering Ltd.

APPELLANT

Vs

Union of India and Another

RESPONDENT

**Date of Decision:** Nov. 16, 2012

**Acts Referred:**

- Arbitration and Conciliation Act, 1996 - Section 34

**Citation:** (2013) 2 ARBLR 377 : (2013) 169 PLR 312 : (2013) 2 RCR(Civil) 999

**Hon'ble Judges:** L.N. Mittal, J

**Bench:** Single Bench

**Advocate:** Madhu Deyal, for the Appellant; Karminder Singh, for the Respondent

**Final Decision:** Allowed

**Judgement**

L.N. Mittal, J.

Contractor M/s. Era Infra Engineering Ltd. has filed this first appeal assailing order dated 16.5.2009 passed by learned Additional District Judge, Jalandhar thereby allowing petition u/s 34 of the Arbitration and Conciliation Act, 1996 (in short, "the Act") filed by respondent No. 1-Union of India and thereby setting aside award dated 7.4.2006, Annexure A2 passed by respondent No. 2-Arbitrator (Rajender Prasad). Respondent no. 1-Union of India awarded contract for construction of Army Public School to the appellant-contractor. Dispute arose between the parties. The dispute was referred to respondent No. 2-Arbitrator who was then Chief Engineer (Air Force), Jalandhar Zone, Jalandhar Cantt., as per the clause contained in the agreement between the parties. The said Arbitrator has given award dated 7.4.2006, Annexure A/2.

2. Union of India challenged the aforesaid award by filing petition u/s 34 of the Act inter alia on the ground that during pendency of the arbitration proceedings, the Arbitrator had retired as Chief Engineer on 30.6.2004 and therefore, he ceased to be Arbitrator. Consequently, award dated 7.4.2006 passed subsequently by him is

invalid and without authority.

3. Appellant-contractor controverted the averments made by Union of India and defended the award to be legal and valid.

4. Learned lower court vide impugned order dated 16.5.2009 has allowed the petition filed by Union of India and has accordingly set aside the arbitral award. Feeling aggrieved, the contractor has filed this appeal.

5. Record of the Arbitrator has also since been received whereas record of the lower court had already been received.

6. I have heard learned counsel for the parties and perused the case file.

7. Counsel for the appellant contended that respondent No. 2 was validly appointed as Arbitrator and therefore, he did not cease to be Arbitrator merely on retirement. Reliance in support of this contention has been placed on judgment of Hon'ble Supreme Court in Construction India Vs. Secretary, Works Department, Government of Orissa and Others, . It was also contended that judgment of Hon'ble Supreme Court in Union of India and others Vs. M/s. Prabhat Kumar and Bros. and another, relied by the trial court is not applicable to the facts of the instant case because in the said case, there was specific provision in the arbitration clause that if the Arbitrator resigned his appointment or vacated his office....., the authority appointing him may appoint a new Arbitrator to act in his place, but there is no such corresponding provision in the arbitration clause in the instant case.

8. On the other hand, counsel for respondent no. 1-Union of India relying on judgment in the case of Prabhat Kumar and Bros. (supra) contended that respondent no. 2 ceased to be Arbitrator on his retirement and therefore, the award passed by him after his retirement has been rightly set aside by the lower court.

9. I have carefully considered the rival contentions.

10. Judgments in the case of M/s. Construction India (supra) and Prabhat Kumar and Bros. (supra) are not directly applicable to the facts of the case in hand. In the case of M/s. Construction India (supra), the Arbitrator was appointed by name by court, although for fixing identity of the Arbitrator, he was described by the designation he was then holding. In these circumstances, it was held by Hon'ble Supreme Court that the said Arbitrator did not cease to be Arbitrator on ceasing to hold that designation. In the instant case, however, respondent No. 2 was appointed as Arbitrator because he was holding the post of Chief Engineer as per arbitration clause and not by his name in individual capacity and therefore, judgment in the case of M/s. Construction India (supra) is not applicable to the facts in the case in hand.

11. In the case of Prabhat Kumar and Bros. (supra), there was specific provision in the arbitration agreement itself for appointment of new Arbitrator if the Arbitrator

already appointed vacated the office. The said part of the arbitration clause is reproduced hereunder:-

...If the arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reasons whatsoever, the authority appointing him may appoint a new arbitrator to act in his place.

12. In the instant case, however, there is no such specific provision in the arbitration clause and therefore, this judgment is also not directly applicable to the facts of the case in hand.

13. In view of the aforesaid, the matter has to be adjudicated in the facts and circumstances of the instant case. For doing so, arbitration clause contained in the agreement between parties is reproduced hereunder:-

22. Should any dispute arise during currency of the project or otherwise. Chief Engineer (Air Force) Jalandhar Zone, Jalandhar Cantt. will act as SOLE ARBITRATOR for adjudication of any claims referred by any of the parties to the contract.

14. A perusal of the aforesaid arbitration clause reveals that the Arbitrator to be appointed had to be only Chief Engineer (Air Force), Jalandhar Zone, Jalandhar Cantt. and none else. Consequently, the person holding said office only could act as Arbitrator. In the instant case, respondent No. 2 was appointed as Arbitrator because he was holding the said post when he was appointed as Arbitrator. However, during the pendency of the arbitration proceedings, respondent No. 2 ceased to hold the said post. Consequently, he also ceased to have authority to act as Arbitrator under the aforesaid arbitration clause. Specific objection to this effect was taken by Union of India before respondent No. 2 during pendency of the arbitration proceedings, but respondent No. 2 over-ruled the same. However, it is manifest from the arbitration clause in the instant case that respondent No. 2 ceased to have authority to act as Arbitrator on retirement from the aforesaid post by virtue of which only he had been appointed as Arbitrator. In this view of the matter, arbitration award Annexure A2 passed by respondent No. 2 is without authority and therefore, null and void and has been rightly set aside by the lower court.

15. However, before parting with the order, it has to be noticed that Union of India had to be directed to appoint new Arbitrator in accordance with arbitration clause 22 reproduced herein before so that arbitration proceedings could be taken to logical end. Impugned order of the lower court has to be modified to this extent. For the reasons aforesaid, this appeal is allowed partly. While upholding the impugned order of the lower court thereby setting aside arbitration award dated 7.4.2006 Annexure A2 passed by respondent No. 2 Arbitrator, it is directed that respondent No. 1-Union of India shall within three months from today appoint the designated Arbitrator for deciding the dispute between the parties. The proceedings conducted by respondent No. 2 till before his retirement shall hold valid and the new Arbitrator

shall continue the proceedings from the said stage onwards.