

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO(OS) No. 275/2009**

Reserved on: July 13, 2009

Date of Decision : July 15, 2009

Jas Pal Singh

.....Petitioner

Through : Mr. Suresh Sharma, Advocates.

versus

NSIC Ltd. & Anr.

.....Respondents

Through : Mr.A.K. Thakur and
Mr. Anesh Paul, Advocates.

AND

+ **FAO(OS) No. 276/2009**

Satnam Singh

.....Petitioner

Through : Mr. Suresh Sharma, Advocates.

versus

NSIC Ltd. & Anr.

.....Respondents

Through : Mr.A.K. Thakur and
Mr. Anesh Paul, Advocates.

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE NEERAJ KISHAN KAUL

1. Whether the Reporters of local papers
may be allowed to see the judgment? YES
2. To be referred to the Reporter or not? YES
3. Whether the judgment should be
reported in the Digest? YES

%

JUDGMENT

15-07-2009

MUKUL MUDGAL,J.

1. These appeals challenge the judgment of the learned Single Judge dated 22nd April, 2009 dismissing the objections preferred by the appellant/petitioners against the Award dated 8th September, 1999 by the Sole Arbitrator.

2. The brief facts of this appeal, also illustrative of the issue involved in the other appeal, are as under: -

The appellant Satnam Singh had filed applications with the respondent for obtaining equipments under the Leasing Scheme. These applications of the appellant were allowed and the respondent agreed for supply of machinery/equipments under the equipment lease agreements dated 22nd February, 1993 and 9th July, 1993. The appellant deposited three months rental as interest free security with the respondent to be refunded on termination or expiry of the lease agreements after adjusting the outstanding rentals. The lease agreements dated 22nd February, 1993 and 9th July, 1993 signed between the parties created a binding contract between the parties. On the date of lease agreement of 22nd February, 1993, the value of the equipment was Rs.72,66,900/-. The appellant Satnam Singh was to pay

quarterly lease amount of Rs. 3,63,345/- for a period of five years and thereafter was to pay the residual value of equipment being Rs.7,56,960/-. Similarly, under lease agreement dated 9th July, 1993, the lease value of the equipment was Rs.13,98,300/- and the quarterly rent was Rs.69,950/-. The appellant was to pay 20 quarterly installments of the above amount. The appellant, Jaspal Singh stood guarantor for regular payment of installments by Satnam Singh and handed over title deeds of his property No.3006, Sector-19D, Chandigarh to the claimant and created an equitable mortgage in favour of the claimant. The equitable mortgage was created to secure the lease money and to ensure due performance of the contract.

3. The appellant secured the delivery of the equipment. However, the appellant did not adhere to the payment of installments as agreed to between the parties. A notice was given by the respondents/claimants to the appellant to clear all dues and pay the lease rentals regularly but the lease money was not paid. In fact, cheques issued by the appellant towards the lease rental got dishonoured and got returned. On 12th February, 1998, the arrears along with interest as agreed upon was demanded by the respondent in the sum of Rs.86,63,007/-. The relevant arbitration clause, the interpretation of which arises in this appeal, reads as follows: -

“31. ARBITRATION: (i) If any dispute or difference arises between the Corporation and the Lessee with regard to the construction, meaning and effect of these presents or any part thereof or any other matter under these presents, interpretation or termination of this agreement, the same shall be referred to the Sole Arbitration of the Chairman of the Corporation or such officer as he may appoint to be the Arbitrator. There would be no objection that the Arbitration is an employee of the Corporation, that he had to deal with the matters to which this agreement relates or that in the course of his duties as an employee of the Corporation he has expressed his views on all or any of the matters in dispute of difference. The award of the Chairman or the officer so appointed by him shall be final and binding on the parties hereto this agreement.

(ii) The venue of the arbitration shall be at Delhi or at any other place where Regional offices of the Corporation is situated, at the discretion of the Chairman and the courts at the places of respective Regional offices alone shall have exclusive jurisdiction.”

4. The only contention of the learned counsel for the appellant in respect of the legality of the award qua clause 31 is that the above agreement stipulated clearly that the Sole Arbitrator had to be either the Chairman of the Corporation or an officer of the corporation. His plea is based upon the fact that during the arbitration proceedings, the named Arbitrator, Sh. Rameshwar Dutta retired and since on the date of the Award, that is on 8th September, 1999, Sh. Rameshwar Dutta was not an officer of the Corporation, the award was vitiated. The appellants after receipt of notice from the respondent instead of clearing the arrears as claimed in the notice filed a suit at

Chandigarh for permanent and mandatory injunction against the respondent/claimant. The respondent/claimant moved an application under Section 8 of the Arbitration and Conciliation Act, 1996 alleging before the court that the suit was not maintainable and that it should stay the suit. The respondent appointed Shri Ramesh Dutta, Estate Officer in NSIC Ltd. vide letter dated 18th May, 1998 as the Arbitrator, in terms of the arbitration clause. The arbitration appointed by the respondent proceeded with the claim and passed an award on 8th September, 1999 thereby allowing the claims of the claimant/respondent. The learned counsel, in support of the above plea has relied upon the judgment of the Hon'ble Supreme Court in the case of **Union of India and others vs. M/s. Prabhat Kumar & Bros. and Another** AIR 1994 Supreme Court 649 to contend that the above judgment clearly states the position of law where during the interregnum of the arbitration proceedings, the Arbitrator gets superannuated or retired. The learned counsel relied upon paragraph 5 of the said judgment which reads as follows: -

“5. We are of the view that the Arbitrator who had been appointed by the Government ceased to be the Arbitrator on his retirement from Govt. service on 17th September, 1990. In terms of Condition 70, the Union of India is competent to appoint a new Arbitrator. Accordingly we set aside the impugned orders of the High Court and the courts below.”

5. The Hon'ble Supreme Court in paragraph 2, refers to clause 70 of the general conditions of contract, which reads as follows: -

“Arbitration - All disputes between the parties to the contract (other than those for which the decision of the CWE or any other person is by the Contract expressed to be viable and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an Engineer Officer to be appointed by the authority mentioned in the tender documents”.

“...If the Arbitrator so appointed re signs his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new arbitrator to act in his place.”

6. Thus, it is clear that the above judgment is based on the clause of the contract which says that if the Arbitrator vacates his office, the authority appointing him may appoint a new arbitrator to act in his place.

7. Accordingly, the arbitration clause itself clearly stipulated unlike the present case that in the event of the vacating of the office of the Arbitrator, the new Arbitrator can be appointed by the authority. A similar view was taken by the learned Single Judge of this Court on the interpretation of the above judgment of the hon'ble Supreme Court in the case of **Siri Ram Syal and Sons vs. Union of India** CS(OS) No. 1425A and 1481A/1988 decided on 12th January, 2008 in the following terms: -

“11. As pointed out above, there is no clause in the agreement that if a person ceases to be a Gazetted Officer, he ceases to be Arbitrator as well. therefore, he could continue as Arbitrator though it was permissible for the appointing authority to appoint another Arbitrator in his place.....”

8. We respectfully agree with and reiterate the view taken by the learned Single Judge. A perusal of the Arbitration Clause clearly shows that there is no stipulation in the arbitration clause that the Arbitrator appointed had to be an officer of the Corporation even at the time of rendering of the Award. The only requirement at the time of the appointment of the Arbitrator was that the Arbitrator had to be either the Chairman of the Corporation or the officer of the corporation. That condition having been clearly fulfilled, we are satisfied that the above plea of the appellant cannot be sustained.

9. In addition, we are fortified in our view by the view taken by the learned Single Judge of this Court in the case of **Lloyd Insulations (India) Pvt. Ltd. vs. Cement Corporation of India Ltd. and Anr.** 1994 (31) DRJ 86

in the following terms: -

“(4) Even otherwise it appears to be against common sense that an officer who was appointed as an Arbitrator while he was in service, should certainly cease to be so on his retirement. I think for the purpose of any reference made to him as an arbitrator, he should be deemed to have continued as an officer of the Corporation. Even otherwise, an arbitrator is deemed to be an independent person and his retirement has no relevance for his continuation as an arbitrator. The contention in that respect is not

well founded.”

10. We respectfully agree with and reiterate the said view. Accordingly, there is no merit in this plea of the counsel for the appellant which must accordingly fail and is rejected.

11. The learned counsel further contended that the proceedings were *ex parte* against him. He, therefore, submitted that the matter proceeded *ex parte* against the appellant and he was not kept posted with the notice of every hearing by the Arbitrator. In our view, since the appellant admittedly had notice of the arbitration, as is evident from the letter sent by it to the respondent stating that the proceedings before the Arbitrator would constitute contempt of the Civil Judge in Chandigarh, it is not thereafter open to him to contend that not having appeared before the Arbitrator, nevertheless, the Arbitrator was duty bound to give notice to him of every hearing.

12. However, in the present case the learned Single Judge has recorded a finding of fact which we duly confirm, that the appellant was informed of the proceedings and at every step had been telling the Arbitrator not to proceed further with the matter and commit contempt of Court. To accept the said contention of the learned counsel for the appellant would be putting

premium on the conduct of the party which deliberately chooses to stay away from the arbitration and in such a situation we are clearly of the view that once the Arbitrator decides to proceed *ex parte* against a party, he is not duty bound to give notice of every proceeding. Reliance has been placed by the learned counsel for the appellant on paragraph 7 of the judgment in the case of **Balkishan (Shri) vs. M/s. Mohini Finance Company 2007 V AD(Delhi)**

97 which reads as under: -

“7. I find force in the argument urged by the counsel for the appellant in a measure. The appellant is entitled to get one opportunity of being heard subject to further conditions. In **C.P. Madan (Shri) vs. National Small Scale Industrial Corporation Ltd.** (Supra) 1 came to the following conclusion: -

“3.I am of the considered view that the said order passed by the learned Arbitrator is not tenable in law. Under the old Act, this Court in case of *Lovely Benefit Chit v. Purandutt*, 1983 Rajdhani Law Reporter 420 held: -

“From these authorities, it is apparent that an arbitrator ought not to proceed ex-parte against a party if he has failed to appear at one of the sittings. The arbitrator should fix another date for hearing and give notice to the defaulting party, of his intention to proceed ex-parte on a specified date, time and place. Even after notice if the defaulting party does not take part in the proceedings the arbitrator may proceed in his absence.”

13. In our view, the above judgment has no application in the present case as it is not the appellant's case that it only failed to appear in one of the

hearings. In fact, the appellant has failed to appear before the Arbitrator repeatedly as evident from several letters sent to the arbitrator by the appellant seeking a stay of arbitration in view of his civil suit in Chandigarh and is now seeking to raise such an ultra technical plea only to defeat the course of justice. The above judgment has no application to the facts of the present case.

14. Accordingly, there is no merit in these appeals and the appeals stand dismissed. All pending applications stand disposed of.

(MUKUL MUDGAL)
JUDGE

(NEERAJ KISHAN KAUL)
JUDGE

July 15, 2009
sk