

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Case No. : C. R. No. 3398 of 2010

Date of Decision : January 22, 2015

Gian Chand Garg Petitioner

Vs.

Haryana State Agricultural
Marketing Board Respondent

CORAM : HON'BLE MR. JUSTICE SATISH KUMAR MITTAL.

HON'BLE MR. JUSTICE DEEPAK SIBAL.

* * *

To be referred to Reporters or not ?

Whether the judgment should be reported in the digest ?

* * *

Present : Mr. Sanjeev Manrai, Senior Advocate
with Mr. Partap Singh, Advocate
for the petitioner.

Mr. R. K. Hooda, Advocate
for Mr. Rajesh Sheoran, Advocate
for the respondent.

* * *

DEEPAK SIBAL, J. :

The petitioner – Contractor executed some work of the respondent – Marketing Board. A dispute having arisen between the parties, the same was referred to an Arbitrator vide order dated 09.04.1993.

At that time, the Arbitration Act, 1940 (hereinafter referred to as – the 1940

Act) was in force. The Arbitrator gave his Award dated 06.01.1994. When the respondent – Marketing Board filed an application under Sections 14 and 17 of the 1940 Act for making the Award as Rule of the Court, the petitioner – Contractor filed objections under Section 30 of the 1940 Act. The objections filed by the Contractor were considered and allowed by the learned Civil Judge (Senior Division), Karnal, vide his judgment dated 11.02.2005. Resultantly, the Award dated 06.01.1994 was set aside and the matter was remitted back to the Chief Engineer of the respondent – Marketing Board to appoint another Arbitrator to settle the dispute between the parties. Accordingly, vide order dated 27.03.2002, another Arbitrator was appointed, who was later ordered to be changed by the Court, vide order dated 14.09.2004. Thereafter, yet again, another Arbitrator was appointed, who gave his Award dated 11.02.2005 and sent it to the Court of Civil Judge (Senior Division), Karnal. The respondent – Marketing Board made an application in the said Court for sending the Award to the District Judge for execution in accordance with provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as – the 1996 Act), as according to the 1996 Act, the Award was directly executable through the Court of the District Judge. The petitioner – Contractor filed objections to the application filed by the respondent – Marketing Board pleading that the provisions of the 1996 Act would not apply and since the proceedings in the Arbitration had been initiated prior to the promulgation of the 1996 Act,

therefore, they would be governed by the 1940 Act. The trial court, vide the order impugned in the present revision petition, held that the 1996 Act would apply and not the 1940 Act. The reason given by the trial court was that in the case in hand, the Arbitrator had entered into reference on 12.10.2004 and announced the Award on 11.02.2005, while the 1996 Act was in force. The above said order passed by the trial court has been challenged before this Court through the present petition.

A learned Single Judge of this Court heard the matter and vide order dated 22.07.2013, referred the matter to a Larger Bench, by observing as under :-

*“I have heard counsel for the parties
and perused the case file.*

*Counsel for the parties could not cite
any judgment directly applicable to the
facts of the case in hand. In the instant case,
the arbitration proceedings initially
commenced while the 1940 Act was in force.
Award was also made while the 1940 Act
was in force and, accordingly, petition and
objections under the 1940 Act were filed.
The said objections were allowed vide
judgment dated 01.02.2002 and the matter*

was remitted to the Board for appointment of Arbitrator afresh while the 1996 Act had come into force. Award dated 11.02.2005, which is now the bone of contention between the parties, was passed by the Arbitrator who was appointed after coming into force of the 1996 Act and all the arbitration proceedings culminating into the said award were held by the said Arbitrator after coming into force of the 1996 Act.

In the aforesaid circumstances, significant question that arises for determination is as to whether the 1940 Act is applicable to the case because initially arbitration proceedings commenced when the said Act was in force or the 1996 Act is applicable to the case because the Arbitrator who made award dated 11.02.2005 was appointed while the 1996 Act was in force and the arbitration proceedings culminating into award dated

11.02.2005 were held thereafter. Ancillary question would be as to whether the arbitration proceedings by the Arbitrator who has made award dated 11.02.2005 are continuation of the arbitration proceedings which had resulted in award dated 06.01.1994 (which was set aside vide judgment Anneuxre P-2), thereby award dated 11.02.2005 coming within the purview of the 1940 Act or the arbitration proceedings resulting in award dated 11.02.2005 would be treated as fresh proceedings coming within the net of the 1996 Act.

The aforesaid questions may arise frequently in many cases. These are important questions of law arising in this revision petition. I am of the considered opinion that these questions should be authoritatively answered by Larger Bench. The papers, therefore, be placed before Hon'ble the Chief Justice for constituting

Larger Bench for determining the aforesaid questions.”

In view of the above order passed by the learned Single Judge, this petition has been placed before us.

We have heard learned counsel for the parties and with their able assistance, have also gone through the record of the case.

A perusal of the above quoted relevant portion of the reference order shows that the matter referred to a Larger Bench was whether in the facts of the case in hand, the provisions of the 1940 Act or the 1996 Act would apply.

At the very outset, learned counsel appearing on behalf of the respondent – Marketing Board has produced before us the application made by the petitioner, for appointment of an Arbitrator, after the matter had been referred back by the learned Civil Judge (Senior Division), Karnal, vide his judgment dated 01.02.2002. Copy of the application is taken on record as **Annexure – X**. A perusal of the application leaves no room for doubt in our minds that the petitioner had applied for appointment of an Arbitrator under the 1996 Act. The relevant portions of the application are reproduced below for ready reference :-

*“The application is being filed under
Section 11 (5) of the Arbitration and
Conciliation Act, 1996 read with the Scheme*

framed by the Chief Justice under Section 11 (10) of 1996 Act, vide Notification No. 398/Rules/XVI.A.120 dated 19.12.1996 and Gazette Notification No. GAZ.11/XXI/A.5 dated January 18, 1998.

xx xx xx

That under the 1996 Act, the parties are free to agree to on a procedure appointing the Arbitrator as per provisions contained in Sub-section (2) of Section 11 of the Act.

xx xx xx

(b) That the Arbitration Act, 1940 has since been repealed with effect from 25.1.1996 and the Arbitrator is to be appointed in terms of the provisions of Section 11 of the 1996 Act.

(c) Disclosure by the Arbitrator in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality under section 12 (1) of the 1996 Act.

xx xx xx

The appointment of an Arbitrator not below the status of Chief Engineer who may be independent and impartial.

xx xx xx

That an affidavit that the conditions as per Section 11 (5) of the 1996 Act have been satisfied as required vide para 2 (b) of the Scheme framed by the Chief Justice, is enclosed.”

The above said application was duly supported by an affidavit of the petitioner and the relevant paragraph from the same is reproduced below for ready reference :-

“AFFIDAVIT

I, Gyan Chand Garg son of Shri Tipper Chand, Resident of Barwala, do hereby solemnly affirm and state on oath as under :-

1.

xx

xx

xx
2.

xx

xx

xx
3.

That the Arbitration Act, 1940 was repealed with effect from 25.1.1996 vide Section 85 of the Arbitration and

Conciliation Act, 1996.

4.	xx	xx	xx
5.	xx	xx	xx
6.	xx	xx	xx
7.	xx	xx	xx
8.	xx	xx	xx
9.	xx	xx	xx
10.	xx	xx	xx
11.	xx	xx	xx
12.	xx	xx	xx
13.	xx	xx	xx

VERIFICATION

I, the above named deponent, do hereby further solemnly affirm and state on oath that contents of para Nos. 1 to 13 of the above affidavit of mine are true and correct to my knowledge and that no part of it is false and nothing has been concealed therefrom.”

A perusal of the above relevant portions of the application supported by an affidavit of the petitioner clearly show that the petitioner had made the application for appointment of an Arbitrator under the

provisions of the 1996 Act. He had thus agreed by implication to the settlement of the dispute between him and the respondent – Marketing Board to be decided through arbitration under the provisions of the 1996 Act.

The contents of the above application and the affidavit were put to the learned counsel for the petitioner, who did not dispute the same.

Once the above facts are undisputed, then relying on the provisions of Section 85 (2) of the 1996 Act, we have no hesitation to hold that in the facts of the case in hand, the Award dated 11.02.2005 would be considered to be an Award under the 1996 Act and would be executable under the same Act. Section 85 (2) of the 1996 Act is reproduced below for ready reference :-

“85. Repeal and saving -

(1) xx xx xx

(2) *Notwithstanding such repeal, -*

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after

this Act comes into force;

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.”

It is unfortunate that the above facts, especially with regard to the filing of the above application by the petitioner along with his affidavit for having his dispute settled under the 1996 Act, were withheld by the petitioner from this Court. There is no reference of this crucial fact in the petition. Thus, we are convinced that the petitioner has not approached this Court with clean hands.

The answer to the question referred to us, in fact, decides the main petition itself as this was the only issue raised in the petition. That being so, and to avoid unnecessary delay in decision of the present petition, we hold that the Award dated 11.02.2005 would be executable under the 1996 Act and accordingly, dismiss the present petition.

No costs.

(SATISH KUMAR MITTAL)
JUDGE

(DEEPAK SIBAL)
JUDGE

January 22, 2015