

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH`

FAO No.4210 of 2003 (O&M)

Date of Decision:11.02.2015

M/s ESPN Inc.

....Appellant

Versus

M/s Ishan Credits Ltd.

....Respondent

CORAM: HON'BLE MS. JUSTICE NAVITA SINGHPresent: Mr. M.L. Sarin, Senior Advocate with
Mr. Rohit Khanna, Advocate for the appellant.

Mr. Vaneet Soni, Advocate for the respondent.

NAVITA SINGH, J.

1. This appeal was filed against the order dated 7.10.2003, whereby Additional District Judge, Chandigarh, dismissed the objections filed by the appellant under Section 34 of the Arbitration and Conciliation Act (Act for short). The award by the Arbitrator was passed ex parte against the appellant.

2. The backdrop of the matter was that the parties entered into an agreement on 4.8.1994, whereby the respondent was to set up a terrestrial television channel for sports in India. According to Clause 3 of the agreement, advance payment was made by the appellant in foreign currency as the appellant was a firm based in United States of America. The respondent claimed that they had performed their part of the contract and asked the appellant to make payment of the balance fee. Various demands were made by the respondent and the appellant through its representatives wrote a letter dated 4.1.1996 to Mr. RK. Sharma, of the respondent firm and informed in unambiguous words that conditions of the agreement had not been met by the respondent. Thereafter, there was no correspondence between the parties.

3. However, to the utter surprise of the appellant, the firm was served with a copy of plaint dated 22.5.1999 filed by the respondent before the Civil Judge (Senior Division), Chandigarh, in a suit for mandatory injunction. The appellant wrote various letters to the respondent but the former received a legal notice dated 13.6.2000 from the latter calling upon the appellant to appoint its Arbitrator. According to the agreement between the parties, in case of dispute, one Arbitrator was to be appointed by each party.

4. Reply to the legal notice was sent and thereafter there was no communication from the side of the respondent. Surprisingly, the appellant came to be served with copy of award dated 3.4.2002 purportedly delivered by Mr. H.L. Randev, Sole Arbitrator appointed for the respondent. From the perusal of the award (Annexure P1), appellant came to know that the Civil Judge (Senior Division), Chandigarh had passed an order dated 18.8.2001 on an application filed under Section 11 of the Act, by the respondent and appointed Mr. H.L. Randev as Sole Arbitrator despite the fact that respondent had prayed in the application that the defendant (appellant herein) be directed to communicate its Arbitrator in order to commence the arbitration proceedings by two Arbitrators, as per the agreement between the parties. The Arbitrator appointed by the court for the side of the respondent proceeded to deliver the award.

5. Counsel for the appellant argued that the order passed by Civil Judge (Senior Division), Chandigarh for appointment of Arbitrator was without jurisdiction in the first place, because this was a case of International Commercial Arbitration and reference of the disputes to arbitration could have been made only by the Chief Justice of India as envisaged by Section 11 of the Act. The court, which appointed the Arbitrator, had no power to do so and also in the second place, the order suffers from an infirmity because as per the agreement between the parties, one Arbitrator could not decide the dispute.

6. Section 11 (9) of the Act provides that in case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him, may appoint an arbitrator of a nationality other than the nationalities of the parties where they belong to different nationalities. Though the words used are `sole or third arbitrator' yet even the sole Arbitrator, who was appointed on the request of the respondent, could not have been so appointed by the Civil Judge (Senior Division).

7. Counsel for the respondent argued that since on the summons issued by the court, a report was received that the then defendant (now the appellant) had refused to accept the summons, the court had no option but to proceed in the absence of the appellant and, therefore, no Arbitrator could be appointed for the appellant. This argument would not hold force because the question was not whether the Arbitrator was appointed on the request of the respondent in a situation where the appellant had failed to appear, but was as to whether the court appointing the Arbitrator had the jurisdiction/authority to do so or not. The Civil Judge (Senior Division) had not been designated by the Chief Justice of India in that regard. It is also not shown that the power had flown down to the court through the Chief Justice of this High Court. Rather it was held in M/s S.B.P. and Company Vs. M/s Patel Engineering Ltd. and another JT 2005 (9) SC 219 that the power under Section 11 of the Act could be delegated by the Chief Justice of India to any other Judge of the Supreme Court or by Chief Justice of a High Court only to another Judge of that Court. The Civil Judge (Senior Division) thus did not come in the picture.

8. According to the award made by the Arbitrator, the final letter was written by the respondent for demand of money on 23.11.1995, whereas the respondent i.e. present appellant was requested to appoint its Arbitrator vide legal notice dated 13.6.2000. The delay was not explained by the respondent

herein nor the prolonged silence was broken. The respondent obtained an ex parte order regarding appointment of Arbitrator and even the Arbitrator did not bother to look into the terms of the agreement between the parties that the dispute was to be decided by two Arbitrators.

9. All said and done, even if the appellant was at fault in refusing to take the summons, an illegal order which was passed by Civil Judge (Senior Division) without jurisdiction/power, cannot be sustained. It was held in M/s S.B.P. and Company (supra) that the power exercised by the Chief Justice for the appointment of Arbitrator under Section 11 of the Act was a judicial power and further that designation of a District Judge as the authority under the said provision of law by the Chief Justice of High Court was not warranted under the scheme of the Act. It would, therefore, mean that even District Judge could not be delegated the power. Appointment of Arbitrators by the Chief Justice of India Scheme 1996 also shows that the request is to be received by the Chief Justice under Section 11 of the Act and on receipt of a request complete in all respect, as given in Clause-3 of the Scheme, the Chief Justice may either deal with the matter himself or designate any other person or institution for that purpose. It has already been mentioned above as to how the designation/delegation of powers could be made. The law laid down by the Full Bench consisting of seven judges of the Supreme Court in the reported case given above, must prevail.

10. The appeal is, therefore, allowed and as a sequel, the impugned order passed by Additional District Judge, Chandigarh as also the award passed by Mr. H.L. Randev is set aside.

**(NAVITA SINGH)
JUDGE**

11.02.2015
Ishwar

Whether to be referred to reporter: Yes