IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH

(1) FAO No. 3707 of 2012 (O&M)
Date of decision: May 22, 2019

Punjab State Ware Housing Corporation

...Appellant

Versus

M/s Ralla Ram Ram Lal and another

...Respondents

(2) FAO No. 3708 of 2012 (O&M)

Punjab State Ware Housing Corporation

...Appellant

Versus

M/s J.I. Rice Mill and another

...Respondents

(3) FAO No. 5443 of 2015 (O&M)

Punjab State Ware Housing Corporation

...Appellant

Versus

M/s Shiv Shankar Trading Company and another

...Respondents

(4) FAO No. 1456 of 2019 (O&M)

Punjab State Ware Housing Corporation

...Appellant

Versus

M/s Romesh Rice Mills and another

...Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Mr. Harsh Aggarwal, Advocate,
Mr. J.S. Arora, Advocate, and
Mr. Karan Singla, Advocate,
for the appellants.

Mr. Sanjiv Ghai, Advocate,
for the respondents.

JAISHREE THAKUR, J.

1. This order shall dispose of the above mentioned First Appeals against Order, as they arise out of the similar set of facts and involving similar question of law. These four appeals have been filed seeking to challenge the impugned judgments passed by the Additional District Judge, Hoshiarpur, whereby the objection petition filed under Section 34 of the Arbitration and Conciliation Act against the award of the Arbitrator has been dismissed.

2. A few facts need to be noticed in the instant appeal, which are being taken from FAO No. 3707 of 2012, which seeks to challenge the order dated 7.1.2012 of the Additional District Judge, Hoshiarpur, who has dismissed the objections filed against the award of the Arbitrator dated 29.4.2005.

3. In nutshell, the appellant—M/s Punjab State Ware Housing Corporation, entered into an agreement pertaining to milling of paddy and delivery of rice by the Miller—respondent in these appeals. On account of a dispute that arose between the parties, an Arbitrator was appointed by letter dated 5.10.2000 and his fee was fixed to be paid at ₹4,000/- to be shared in equal by the appellants and the respondents. The fee of ₹4,000/- was to be

paid for the first case and negotiable on the lower side for similar type of cases. Having accepted the appointment, the Arbitrator entered into a reference and adjudicated upon the dispute. He dismissed the claim petition filed by the appellant herein and allowed the counter-claim of the Miller. Aggrieved against the said award and the conduct of the Arbitrator, objections were filed under Section 34 of the Arbitration and Conciliation Act of 1996 (henceforth called **'the Act of 1996'**), which was dismissed, leading to the instant appeals.

4. Mr. Harsh Aggarwal, learned counsel appearing on behalf of the appellant, urges that the Arbitrator has conducted himself in a fashion which does not behoove that of an arbitrator. After having accepted fee of ₹4,000/- per case, apart from travelling allowance, he subsequently started to claim an enhanced fee on the ground that he was an experienced Arbitrator. By his letter dated 19.6.2002, he pointed out to the administration of the Punjab State Warehousing Corporation that he was a practicing Arbitrator for the last 20 years and is also on the panel of Arbitrators of the Arbitration Council and his fee was in the range from ₹4,000/- to ₹15,000/- per hearing. It is also argued that the Department thereafter terminated his appointment with immediate effect by order dated 20.3.2003, endorsed on 25.3.2003 and consequently appointed another Arbitrator by order dated 3.4.2003. However, despite the appointment of the Arbitrator having been terminated by passing a specific order, the Arbitrator did not hand over the files and rather continued with the arbitration proceedings and, therefore, any award thereafter is not sustainable. It is also argued that bias of the Arbitrator can be seen as mentioned in the award

itself that he allowed a counter claim to filed as late as 13.9.2004 i.e. 50th proceedings before the Arbitrator. It is also urged that the arbitrator ought to have disclosed his fee structure before entering into reference, while relying upon the provision of Section 12 of the Act of 1996.

5. Per contra, Mr. Sanjiv Ghai, learned counsel appearing on behalf of the respondents, contends that the Arbitrator was appointed at the instance of the appellant herein, who entered the reference on 20.10.2000. Thereafter, the appellants themselves filed the claim on 24.5.2001, to which written statement was filed and subsequently they filed revised claim on 3.12.2001, to which another written statement and counter-claim was filed on 26.3.2003 and a second revised claim was filed by the appellant to which again the respondents filed its written statement and a counter claim was filed on 13.9.2004. It is contended that having participated in the proceedings before the Arbitrator, the appellant cannot turn around and submit that that Arbitrator did not have the jurisdiction to hold the proceedings. It is also argued that after having been appointed an Arbitrator, his appointment could not have been terminated *simplicitor*. It is argued that Section 14 of the Act of 1996 provides for termination of the mandate of an Arbitrator, which is, if he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay or he withdraws from his office or the parties agree to the termination of his mandate. It is also argued that the appellant has not followed due procedure in the appointment of a new arbitrator.

6. This Court is seized of the question of, whether the objection petition ought to have been allowed by the Additional District Judge and the

award of the Arbitrator set aside. A co-ordinate Bench of this Court in **FAO 4943 of 2011** titled **Punjab State Warehousing Corporation, Moga Versus M/s V.P. Anand and another decided on 25.2.2019,** has already set aside the award of the very same Arbitrator, namely Sh V.P. Anand and this Court too in **FAO No. 4535 of 2009** titled **District Manager, Punjab State Warehousing Corporation, Faridkot Versus M/s Bhullar Mini Rice Mill and another** followed the ratio of judgment rendered by this Court in **FAO 4943 of 2011** and allowed the appeal on 11.9.2015. Apart from the fact that afore-mentioned two judgments have already set aside the award of the Arbitrator, counsel for the respondents has agitated the matter afresh stating that there are several issues, which have not been dealt with and therefore, the above mentioned two judgments are distinguishable.

7. I have heard learned counsel for the parties and with their assistance have perused the pleadings of the case.

8. There is no dispute that an Arbitrator was appointed on 14.9.2000. In his appointment order, his fee had been fixed, which was ₹4,000/- for the first case and subsequently to be negotiated on per case based on similar lines. The Arbitrator accepted the terms of appointment without any demur and it is only thereafter he addressed a letter dated 19.6.2002 asking for enhancement in his fee structure on the ground that being an experienced Arbitrator his fee in arbitration cases ranges from ₹4,000/- to ₹15,000/- per hearing. However, he continued with the arbitration proceedings, which no doubt were participated by the both the parties. Section 12 of the Act provides for a challenge to the appointment of an Arbitrator, Section 13 of the Act provides for challenge to the procedure,

whereas Section 14 of the Act provides for mandate of an Arbitrator to be terminated. Section 15 provides for substitution of an Arbitrator. The Arbitrator on his appointment ought to have disclosed that he is not satisfied with his fee and should have settled his fee structure before entering reference rather than leaving it open to fix his fee at a subsequent to the period when proceedings had already been commenced. Section 12 (1) of the Act makes it necessary for a person who has been approached for appointment as an Arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his independence or impartiality, whereas Section 12 (2) enjoins an Arbitrator to disclose to the parties in writing any circumstances referred to in Sub-Section (1) unless they have already been informed of them by him. If the Arbitrator addressed letter in 2002 to the Managing Director of the Punjab State Warehousing Corporation demanding an enhancement in fee, the appellant herein would be justified in terminating the mandate of the Arbitrator.

9. The argument as raised by the counsel for the appellant that the Arbitrator had entertained the claim petition after an inordinate delay and that too just before the award being passed would have no merit in the light of the fact that the appellant itself filed its claim petition and revised claim the 43rd proceeding before the arbitrator and it is subsequent thereto that another counter claim had been filed.

10. Mr. Sanjiv Ghai, learned counsel for the respondents, has argued that the order terminating the appointment of the Arbitrator on 20.3.2003 is on the ground that the Arbitrator has shown his *inability* to act as Arbitrator whereas that is not the case, as mentioned in the award itself. It

is argued the Arbitrator never expressed his inability to do so, but only asked for enhancement of his fee and, therefore, until and unless the Arbitrator himself expressed his inability, his appointment could not have been terminated. This argument is without any merit, since the Arbitrator himself wrote a letter stating that his fee ranges from ₹4,000/- to ₹15,000/- on account of being an experienced Arbitrator which can easily be construed that he was expressing his inability to act on a fee as specified in the appointment order. There is no doubt that the parties had appeared before the Arbitrator despite the fact that the appointment had been terminated, however, once the order terminating the mandate of the Arbitrator had been passed, judicial propriety demanded that the Arbitrator stayed his hand and handed over the files relating to the proceedings to the newly appointed Arbitrator. However, the act of the Arbitrator to continue with the arbitration proceedings in such a situation proves that he mis-conducted himself.

11. Another glaring misconduct of the Arbitrator can also be gauged from the fact that he created an embargo from the parties approaching the court under Section 34 of the Act till such time his fee was not cleared and he had issued a 'No Objection Certificate'. The operative part of the award reads as under:-

> *"Under Section 39 (1) of the sole arbitrator has a lien on the arbitrator's award for the unpaid cost of arbitration.*
>
> *I am making and delivering the award and not withholding the award till the payment of fee and cost though the fee and cost had not been paid by both the parties. However, I decide under Section 39 (1) that the above award will be operative in the competent Hon'ble Court for admission only in case when the fee and cost fixed by the arbitrator is paid and no objection*

> *from the arbitration is attached with objections or execution application filed under Section 34 or 36 of the Arbitration and Conciliation Act, 1996. The parties had not paid the fee amounting to Rs. 50,225 each party plus Rs. 400 by claimant in addition as fixed by the arbitral tribunal, the sole arbitrator, from the 31st proceedings to 53rd proceeding, though demanded in each proceeding. I further hold that in case the other party elects to pay the said whole fee and cost by draft, the said party is allowed to pay the said amount as recoverable the shareable amount from the defaulting party, so as to have a "No Objection Certificate" from the sole arbitrator in order to enable the said party succeed in filing his case before the court in order to enforce his right and entitlement as under per the award Section 34 and 36 of the Arbitration and Conciliation Act, 1996."*

Meaning thereby the Arbitrator insisted payment on the basis of the arbitration fee fixed by the Arbitral Tribunal which was over and above the fee fixed at the time of his appointment. By the said order, the Arbitrator created a situation that did not allow either party to approach the Court in proceedings under Section 34 of the Act of 1996. This in fact is nothing other than an attempt to recover his outstanding fee, if any. The Act of 1996 already has a provision under Section 39 for the recovery of any outstanding due to the Arbitral Tribunal by the Court, which jurisdiction has been usurped.

12. In the light of the provision under Section 34 of the Act, the Court has power to set aside the award of the arbitrator if any of the conditions as specified in Section 34 (2) of the Act of 1996 are satisfied, one of them being that the award is against Public policy. The term *'public*

policy' though not defined, has been discussed in several judgments, one of them being **Oil and Natural Gas Corporation Limited and Others vs Saw Pipes Ltd. 2003 (2) RCR (Civil) 554.** The judgment rendered in **Saw Pipes (Supra)** concluded that an award can be set aside if it is patently illegal and if it is contrary to Fundamental Policy of Indian law; the interest of India; justice and morality, while also holding that the award can be set aside if it shocks the consciousness of the Court. The term *'Public Policy'* has again been interpreted by the Supreme Court in **ONGC VS Western Geco International Limited 2014 (9) SCC 263,** wherein the Supreme Court added three other distinct and fundamental juristic principles which must be understood to be part and parcel of the fundamental policy of Indian law. The Court held as under *"Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge."*

13. The argument as raised that a fresh arbitrator could not have been appointed looses significance as no arbitration proceedings were ever held before the new Arbitrator as Sh. V.P. Anand the Arbitrator did not hand over the files.

14. In the present case, the opinion of this court is that the Arbitrator had acted with impropriety considering he raised a demand of additional fee during the proceedings and once his appointment was terminated he continued with the said proceedings and proceeded to dismiss

all claim petition filed, while allowing the counter-claims. Apart from that, he placed a restriction on the parties from approaching the Court under Section 34 of the Act of 1996 till such time he had b not issued a 'No objection certificate'. Thus, the award passed by the Arbitrator is vitiated.

15. Consequently, the appeals are allowed. The award as well as the impugned order passed by the Additional District Judge is set aside. However should the parties so desire they are at liberty to invoke fresh arbitration proceedings in accordance with law.

May 22, 2019 **(JAISHREE THAKUR)**
prem **JUDGE**

Whether speaking/reasoned Yes
Whether reportable No