

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

FAO-1804-2023 (O&M)
Date of Decision:- 11.9.2023

Pt. BD Sharma University of Health Sciences

...Appellant

Versus

M/s A.P Security Services and another

...Respondents

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present: Mr. Sumeet Goel, Senior Advocate with
Mr. Harmanjot Singh Gill and Mr. Aarush Neeraj Vaid, Advocates
for the appellant.

Mr. S.K.Garg Narwana, Senior Advocate with
Mr. Nitin Sachdeva, Advocate for the respondents.

GURVINDER SINGH GILL, J.

1. The appellant - Pt. BD Sharma University of Health Sciences (hereinafter referred to as 'the University') assails order dated 23.3.2023 passed by learned Additional District Judge, Rohtak whereby the learned Judge while adjudicating upon an application under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') restrained the appellant-University from terminating contracts dated 22.3.2022 (Annexure P-4) and 20.4.2022 (Annexure P-5) and from creating any third party interest. The learned Judge vide impugned order dated 23.3.2023 further directed the parties to appear before the sole Arbitrator who had been appointed by this Court in respect of another contract amongst the parties.

2. The appellant is a State University of Health Sciences established in the year 2008 for the purpose of ensuring proper, systematic instruction, training and research in modern system of medicine. The appellant – University had been getting several types of services by way of outsourcing. In the year 2022, the University had entered into the following three service agreements/contracts with the respondent agency :-
- (i) Service Agreement dated 28.2.2022 (Annexure P-3) [hereinafter referred to as '*the first Contract*'];
 - (ii) Memorandum of Understanding/Service Agreement For Bearer and other Misc Services (Core Central Hospital Area, Part-A) dated 22.3.2022 (Annexure P-4) [hereinafter referred to as '*the second Contract*']; and
 - (iii) Memorandum of Understanding/Service Agreement For Bearer and other Misc services (Peripheral Hospital Area, Part-B) dated 20.4.2022 (Annexure P-5) [hereinafter referred to as '*the third Contract*'].
3. The State of Haryana took a policy decision on 13.10.2021 and incorporated Haryana Kaushal Rozgar Nigam Limited (HKRNL) under the Companies Act, 2013 and pursuant thereto all the Departments, Boards, Corporations etc. under the State of Haryana were directed to port all the persons engaged under Outsourcing Policy on the Portal of Nigam, in case the manpower was still required vide letter dated 5.12.2022 (Annexure P-6). It had also been clarified that the existing term of the contract would be allowed to expire and that no existing contract should be extended beyond the original term. Apparently, the object behind incorporation of HKRNL was not only to have a data of the outsourced employees but to ensure that they are not exploited

either by the employers or by the private agency providing contractual labours/employees.

4. The appellant-University served a one month's notice dated 13.12.2022 (Annexure P-8) regarding termination of contract wherein it was specifically stated that as per HKRNL Portal, the Data Entry Operators engaged through the respondent agency was required to be uploaded on HKRNL Portal. The respondent agency challenged the said notice by way of filing a writ petition in this Court i.e. CWP 1156 of 2023 wherein the appellant-University put in appearance and made a statement to the effect that it would submit to the arbitration and accordingly the Writ Petition was disposed of vide order dated 31.1.2023 (Annexure P-9) by appointing an Arbitrator so as to enable the parties to get their claims adjudicated. However, the appellant-University passed an order dated 2.3.2023 (Annexure P-11) not to extend the service contract of the respondents.
5. Pursuant to the aforesaid order dated 31.1.2023 (Annexure P-9) passed by this Court, the arbitration proceedings had commenced before the learned Arbitrator. The respondent moved an application under Section 17 of the Act before the Arbitrator which was accepted wherein the Arbitrator issued interim directions vide order dated 3.3.2023 (Annexure P-12) to the effect that operation of the order dated 2.3.2023 passed by appellant terminating the first Contract dated 28.2.2022 (Annexure P-3) shall remain stayed till the next date i.e. till 18.3.2023.
6. It may here be mentioned that the aforesaid proceedings were only in respect of the first contract i.e. contract dated 28.2.2022 (Annexure P-3), which according to the appellant-University was to expire on 28.2.2023. The

respondent agency, after passing of order dated 31.1.2023 (Annexure P-9) by this Court, had subsequently moved an application in this Court seeking modification of the said order dated 31.1.2023 (Annexure P-9) so as to include the second contract dated 22.3.2022 (Annexure P-4) and third contract dated 20.4.2022 (Annexure P-5) in the scope of arbitration which had already commenced with respect to the first contract. However, the application was dismissed leaving it open to the respondent agency to invoke arbitration, if so advised. The relevant extract from the said order dated 1.3.2023 (Annexure P-10) is reproduced herein-under :-

“.....The petitioner firm was awarded a contract which was signed between the parties on 28.02.2022. It was valid upto 28.02.2023. However, on the creation of Haryana Kaushal Rozgar Nigam Limited, the contract was sought to be nullified, which led to the filing of the present writ petition.....

After the writ petition was disposed of, the present application has been filed in the writ petition stating that the petitioner in fact entered into two more similar contracts for providing Bearer and other misc. services, which contracts were entered into between the petitioner and the respondents on 21.03.2022 and 19.4.2022.....

.....The agreements as entered into between the respondent-University and the petitioner provide for arbitration and there is a process as envisaged under the Arbitration and Conciliation Act, 1996, as amended from time to time, for appointment of an Arbitrator in case there is a dispute that arises.

Consequently, the application is dismissed leaving it open to the applicant-petitioner to invoke the arbitration clause, if so advised.”

7. After dismissal of the aforesaid application on 1.3.2023, the respondent agency moved an application under Section 9 of the Act before the Court of Additional District Judge, Rohtak on 16.3.2023 (Annexure P-14) wherein a specific prayer was made to issue directions to the appellant-University to restrain them from terminating any of the contracts. The learned Additional District Judge, Rohtak considered the said application and while accepting

the same vide impugned order dated 23.3.2023 restrained the appellant-University from terminating contract dated 22.3.2022 (Annexure P-4) and 20.4.2022 (Annexure P-5), while further directing the parties to appear before the sole Arbitrator who had been appointed by this Court vide order dated 31.1.2023 (Annexure P-9).

8. The learned counsel for the appellant-University, while assailing the impugned order made the following submissions :-

- (i) that the learned Additional District Judge, Rohtak has exceeded his jurisdiction by directing the parties to appear before the sole Arbitrator who had been appointed by this Court in respect of first contract amongst the parties. It has been submitted that the power to appoint an Arbitrator rest solely with the High Court in terms of Section 11 of the Act;
- (ii) that it was very much within the competence of the appellant-University to terminate the contracts after expiry of one year and that the terms of the contract itself provided for the same;
- (iii) that the action of the appellant in terminating the contract does not have any oblique motive or any vested interest but was on account of the policy of State of Haryana leading to incorporation of the Haryana Kaushal Rozgar Nigam Limited, as per which all the outsourced employees were to be ported on the Portal of Nigam and that as a matter of fact the State agencies could not directly hire manpower through outsourcing at their own level and which has apparently been done to check exploitation of labourers;

- (iv) that the State of Haryana is taking strict measures to ensure compliance of the directives of the HKRNL and dead-lines had been fixed for uploading the data on the Portal of the Nigam and Action Plan had been called for, as would be evident from various letters issued by the State of Haryana;
- (v) that the nature of the contract i.e. providing services is such, the breach of which could adequately be compensated with damages and that the appellant-University cannot be forced to utilize the services of the respondent agency. The learned counsel, in this regard, has drawn the attention of this Court to Section 14 of the Specific Relief Act, which reads as under :-

“14. Contracts not specifically enforceable.

(1) The following contracts cannot be specifically enforced, namely:--

- (a) where a party to the contract has obtained substituted performance of contract in accordance with the provisions of section 20;
 - (b) a contract, the performance of which involves the performance of a continuous duty which the court cannot supervise;
 - (c) a contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms; and
 - (d) a contract which is in its nature determinable.”
- (vi) while referring to Section 14(1)(b) of the Specific Relief Act, it has been submitted that the respondent agency, at best, could have filed a suit seeking damages on account of alleged non-performance of contract and that given the nature of contract, its performance cannot be enforced.

(vii) that once the relations between the two parties to a Contract get strained, there would be no element of trust and it is not possible to get work done efficiently and satisfactorily.

9. On the other hand, the learned counsel representing the respondents, while opposing the petition, has made the following submissions :-

- (i) that the appellant-University had violated the terms and conditions of the contract inasmuch as the contract even after expiry of one year was required to be renewed unless the respondent agency had not executed the work satisfactorily and that there is nothing on record to suggest that the respondent had not performed its duties satisfactorily. It is further submitted that it is the appellant-University who is resorting to exploitation of the outsourced employees by prematurely terminating the contracts;
- (ii) that the learned Court of Additional District Judge, Rohtak had correctly directed the parties to appear before the sole Arbitrator who was already seized of the matter in respect of the first Contract as the said sole Arbitrator had been appointed upon a consensus having been expressed by respective counsel before this Court, as is specifically recorded in order dated 31.1.2023 (Annexure P-9);
- (iii) that as a matter of fact, after passing of the impugned order by the learned Additional District Judge, Rohtak, the sole Arbitrator is already seized of the matter in respect of the second Contract and third Contract and wherein during the pendency of this petition order dated 30.6.2023 (Annexure R-1/4) has been passed while

adjudicating upon an application under Section 17 of the Act and the respondents had been restrained from terminating all the three Contracts and that in these circumstances, the appropriate course for the appellant-University is to get the said order set aside by filing an appeal in terms of Section 37 of the Act and that the instant appeal would rather be not maintainable.

10. This Court has considered rival submissions addressed before this Court.
11. First of all, it is apposite to consider the contentions raised by the appellant-University with regard to competency of learned Additional District Judge, Rohtak to direct the parties to appear before the sole Arbitrator while adjudicating upon an application under Section 9 of the Act. Section 9 of the Act provides for grant of interim relief to the parties to a Contract even before arbitration proceedings have commenced. Section 9 of the Act reads as under :-

9. Interim measures, etc. by Court.—

- (1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—
 - (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
 - (ii) for an interim measure of protection in respect of any of the following matters, namely:—
 - (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
 - (b) securing the amount in dispute in the arbitration;
 - (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or

experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

- (d) interim injunction or the appointment of a receiver;
- (e) such other interim measure of protection as may appear to the Court to be just and convenient and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

- (2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.
- (3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.”

12. In the present case, the parties had entered into three contracts, as already mentioned above. The respondents had earlier approached this Court challenging a notice which had been issued by the appellant-University as regards termination of Contract and this Court vide order dated 31.1.2023 (Annexure P-9) had appointed a sole Arbitrator as a consensus had been expressed. The relevant extracts from the said order is reproduced herein-under :-

“.....It is argued that in fact the one year period would expire on 28.02.2023 and there is no provision under the said agreement/contract for terminating the same.

At this stage, counsel appearing on behalf of the respondents- University would submit that there is an arbitration clause i.e. Clause 24 in the said agreement and in terms of said clause, the University is ready and willing to appoint an Arbitrator within a period of two weeks.

I have heard learned counsel for the parties and without going into the question whether the writ petition itself is maintainable on the very fair offer that has been made that an Arbitrator would be appointed, this Court disposes of the writ petition on the offer so made.....

On a common consensus, J. Sant Parkash (retired) is appointed as an Arbitrator in the matter. Fee would be fixed in terms of the Schedule.

Parties may lay their respective claims before the Arbitrator forthwith.”

13. A perusal of the aforesaid extracts would indicate that the same was with respect to only one Contract which was to expire on 28.2.2023. The fact that the other two Contracts i.e. 22.3.2022 (Annexure P-4) and 20.4.2022 (Annexure P-5) were not subject matter of the writ petition would stand clarified from the fact that the respondent himself had moved an application for modification of aforesaid order dated 31.1.2023 (Annexure P-9) so as to include the other two Contracts i.e. 22.3.2022 (Annexure P-4) and 20.4.2022 (Annexure P-5) within the scope of the arbitration proceedings which had commenced pursuant to order dated 31.1.2023 (Annexure P-9) in respect of the first Contract. However, said application had been dismissed by this Court vide order dated 1.3.2023 (Annexure P-10). It is, thus, more than amply clear that there was no such admission on part of the appellant-University for appointment of an Arbitrator in respect of the other two contracts and the consensus, as is mentioned in order dated 31.1.2023 (Annexure P-9), is only in respect of the first Contract. Under these circumstances, the Court of Additional District Judge, Rohtak certainly fell in error in directing the parties to appear before the Arbitrator in respect of other two Contracts. The relevant extract from the impugned order dated 23.3.2023, which is seriously assailed and is found to be lacking in jurisdiction is reproduced herein-under :-

“.....then certainly the matter is required to be adjudicated and thus already discussed, with the common consensus the Sole Arbitrator Mr. Justice Sant Parkash (retired Judge from Hon’ble High Court of Punjab and Haryana) was appointed by the Hon’ble Punjab and Haryana High Court vide order dated 31.01.2023 in CWP NO. 1156 of 2023. No doubt, in the agreement, there was a provision for the sole Arbitrator to be appointed by the Vice Chancellor, University Health Services, but when the parties have

already given their consent before the Hon'ble High Court, therefore, the petition is hereby disposed of and both the parties are directed to put up their matter before Sole Arbitrator Mr. Justice Sant Parkash (retired Judge from Hon'ble High Court) within seven days from today and this Court can not go beyond that in Honour's and compliance of order dated 31.1.2023 and order dated 1.3.2023 passed in CM-3047-CWP-2023 in CWP 1156 of 2023 in which it was held, it is open to the petitioner that he can invoke the Arbitration clause, if so advised.....”

14. The Court of Additional District Judge, Rohtak has misread the order dated 31.1.2023 (Annexure P-9) to mean that there was a consensus amongst the parties for appointment of the sole Arbitrator in respect of all the three Contracts whereas the order dated 31.1.2023 (Annexure P-9) was confined only to the first Contract only. Consequently, the impugned order in so far as the same pertains to issuance of directions to the parties to appear before the sole Arbitrator already appointed in respect of the first Contract cannot sustain and the said directions, as such, are *non est* and are set aside. Although, the learned counsel for the respondent vehemently argued that since the appellant-University had also deposited the fee of the Arbitrator and had appeared before the Arbitrator, it shall be deemed that he had subjected himself to arbitration before the sole Arbitrator concerned, but this Court is unable to accept the aforesaid contention inasmuch as depositing of fee itself cannot be construed to be an admission on part of the appellant-University, particularly when the entire proceedings in respect of the second and third Contract are *void ab initio*, as the Additional District Judge, Rohtak does not have any jurisdiction to direct the parties to appear before

an Arbitrator when there is no such order for appointment of Arbitrator in respect of second and third Contract.

15. The petition, as such, is accepted in the following terms :-

- (i) that the impugned order dated 23.3.2023 is set aside as far as the same pertains to directing the parties to appear before the sole Arbitrator as he had been appointed only in respect of the first Contract;
- (ii) that the proceedings conducted by the sole Arbitrator in respect of the second and third Contract are set aside as the appointment of the Arbitrator qua the second Contract and third Contract is *void ab initio* and the proceedings are as a result of an assumed jurisdiction of the Additional District Judge, who was absolutely not competent and never had the jurisdiction to appoint an Arbitrator;
- (iii) that as far as the directions issued in the impugned order dated 23.3.2023 regarding restraining the appellant-University from terminating the Contract dated 22.3.2022 (Annexure P-4) and 20.4.2022 (Annexure P-5) are concerned, the said directions were to remain in operation for one week i.e. the time afforded to the parties to appear before the Arbitrator and since the said directions have already lost currency, this Court need not comment upon the same;
- (iv) that since the entire proceedings are being set aside in respect of the second and third contract on account of appointment of the sole Arbitrator being without jurisdiction, this Court need not go

further to consider the remaining contentions raised before this Court and the said contentions/objections are left open to the parties to agitate at appropriate stage; and

- (v) that the instant order is without prejudice to the rights of the parties to invoke arbitration afresh in accordance with law and in accordance with the terms and conditions of the Contract.

16. The petition stands accepted accordingly.

11.9.2023

kamal

(Gurvinder Singh Gill)
Judge

Whether speaking /reasoned	Yes / No
Whether Reportable	Yes / No