



ARB-357-2023 (O&M)

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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

(222)

**ARB-357-2023 (O&M)
RESERVED ON 17.12.2024
DATE OF DECISION:- 07.01.2025**

DR. HARSHBIR SINGH PANNU AND ANR ...PETITIONERS

VERSUS

DR. JASWINDER SINGH ...RESPONDENT

CORAM: HON'BLE MR. JUSTICE SUVIR SEHGAL

Present:- Mr. Samarth Sagar, Advocate and
 Ms. Hanima Grewal, Advocate
 for the petitioners.

Mr. Aman Bahri, Additional Advocate General, Haryana
Amicus Curiae

SUVIR SEHGAL, J.

1. This petition has been filed under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996 (for short “the Arbitration Act”) for appointment of an Arbitrator.

2. In a nutshell, facts leading to the filing of the petition are that the petitioners and the respondent entered into a partnership vide deed dated 12.03.2014, Annexure P-1, and a firm by the name of M/s Amritsar Health and Hospitality Services was constituted. A Super Specialty Cardiac Hospital, namely, Holy Heart Hospital, was established at Amritsar in furtherance of the agreement between the parties. A dispute arose between the parties and the respondent filed a petition under Section 9 of the Arbitration Act for restraining the petitioners from revoking the partnership deed, which was

withdrawn from the Court of learned Additional District Judge, Amritsar on

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22.05.2018, Annexure P-3. A company, Amritsar Health and Hospitality Services Private Limited, was incorporated on 13.11.2017, Annexure P-4, to take over the business of the partnership firm. Differences arose between the parties, which could not be resolved and vide notice dated 13.06.2018, petitioners dissolved the firm. On a petition, filed by the petitioners, this Court by order dated 02.03.2020 appointed a former Judge of this Court as an Arbitrator under Clause 13 to determine the disputes between the parties. Both the parties appeared before the Arbitrator and filed their claim as well as their counter claim. By order dated 27.07.2021, the Arbitrator fixed the fee with the consent of counsel for both the parties and when the parties did not deposit their respective share of the arbitral fee, by order dated 28.03.2022, Annexure P-8, Arbitrator terminated the proceedings under Section 38 of the Arbitration Act. This order was challenged by petitioner No.1 by filing a writ petition, which disposed off by this Court on 15.02.2023 in view of a Supreme Court judgment in **Oil and Natural Gas Corporation Ltd. Versus Afcons Gunanusa JV, (2024) 4 SCC 481**. Petitioners served a notice, Annexure P-9, upon the respondent invoking the arbitration clause, before filing the present petition for appointment of an Arbitrator and for determination of the fee to be paid to him.

3. Despite service and representation through a counsel, no response was filed. Since the respondent stopped appearing, a final opportunity was granted on 23.08.2024 and by order dated 12.11.2024, Mr. Aman Bahri, Additional Advocate General, Haryana was appointed as an Amicus Curiae, to assist the Court.

4. Mr. Samarth Sagar, counsel for the petitioners has argued that by order, Annexure P-8, the learned Arbitrator terminated the proceedings under



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Sections 14 and 15 of the Arbitration Act and a substitute Arbitrator has to be appointed. He has made detailed reference to the observations of the Supreme Court in *Afcons's case (supra)*. Reliance has also been placed by him upon *Shailesh Dhairyawan vs Mohan Balkrishna Lulla, (2016) 3 SCC 619* as well as upon *Manish Engineering Enterprises Versus Indian Farmers Fertilizers Corporative Limited and others, 2018 SCC Online Allahabad 9166*.

5. On the other hand, Mr. Aman Bahri, learned Amicus, has urged that there is a difference between the termination of the mandate of the Arbitrator and the termination of the arbitral proceedings. He contends that as the proceedings have been terminated, the remedy available with the petitioners is to approach the Arbitral Tribunal by moving an appropriate petition for recall of the order and for revival of the proceedings. He has drawn strength from the judgments passed by the Supreme Court in *Lalitkumar V. Sanghavi (D) Th. LRs Neeta Lalit Kumar Sanghavi and another Versus Dharamdas V. Sanghavi and others, (2014) 7 SCC 255* and upon *Srei Infrastructure Finance Limited Versus Tuff Drilling Private Limited, (2018) 11 SCC 470*.

6. I have heard counsel for the parties and considered their respective submissions, besides examining the documents appended to the petition.

7. The sole question that arises for determination in the instant petition is as to whether the petitioners can seek appointment of a substitute Arbitrator after the arbitral proceedings have been terminated under Section 38 of the Arbitration Act on account of non-deposit of the arbitral fee vide

order dated 28.03.2022, Annexure P-8.



8. Section 38 of the Arbitration Act confers power on the Arbitral Tribunal to fix the costs and fee for the proceedings, the mode and manner in which it is to be deposited and the consequences, which the parties may face on the failure to make the deposit. Section 38, which is relevant for the determination of the question involved in this petition, is reproduced hereunder:-

“38. Deposits:-

(1) *The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it:*

Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim.

(2) *The deposit referred to in sub-section (1) shall be payable in equal shares by the parties:*

Provided that where one party fails to pay his share of the deposit, the other party may pay that share:

Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.

(3) *Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be.”*

9. This provision gives power to the Arbitral Tribunal to direct the parties to deposit the advance cost for the claim and the counter claim



submitted by the parties. The provision stipulates that the amount shall be payable in equal share by the parties and proviso to Section 38(2) lays down that where one party to the reference fails to deposit the amount as per its share, the other party may deposit that share. If the other party also does not pay the share in respect of the claim or the counter claim, as the case may be, the Arbitral Tribunal has been empowered to suspend or terminate the arbitral proceedings in respect to such claim or counter claim, as the case may be. Sub Section 3 of Section 38 *ibid* casts an obligation upon the Tribunal to render accounts to the parties of the deposits received by it and to return the unspent amount.

10. After noticing the statutory provision, the learned Arbitrator proceeded to pass order dated 28.03.2022, Annexure P-8. The relevant extract of the order deserves to be noticed and is reproduced hereunder:-

“18. As is clear from the aforementioned provision of the Act, where one party fails to pay his share of the fee, the other party may pay that share and however if the other party also does not pay the aforesaid share in respect of claim or the counter claim, the Arbitral Tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter claim, as the case may be. As is clear from the aforementioned facts, I had been conducting proceedings in this manner for the last about two years and had been making efforts to decide the same expeditiously even during Covid-19 pandemic. Four hearings by video conference were also conducted at my residence. Five physical hearings were also conducted at Chandigarh Arbitration Centre. However, claimant was not interested in getting this matter decided expeditiously as is clear from various orders passed by the Tribunal. He is not ready to pay his share of the Arbitrator’s fee on the plea that he is



not in a position to pay the same as he suffered losses in the business and possession of hospital has also been taken away. Hence, in view of these facts, I have no other alternative, but to terminate the further proceedings of the Tribunal in this matter. I hereby order for termination of the present proceedings under Section 38 of the Act.”

11. The Arbitrator then proceeded to render the account of the proceedings and proposed to retain 20% of the total fee, which was agreed to by the counsel for the respondent. After working out the fee payable to him, the Arbitrator found that some amount had been paid in excess by the claimant, which was returned by way of a cheque. Respondent was found to pay an additional amount of Rs.1,45,000/-, which he was directed to deposit within four weeks of the order.

12. It is evident from the perusal of the above reproduced order that the Arbitrator had proceeded to terminate the proceedings on account of the attitude of the parties, who failed to fulfill their commitment and pay the arbitral fee. The order passed by the learned Arbitrator fell within the four corners of Section 38(2) of the Arbitration Act, which he was fully empowered to pass. Petitioners remained unsuccessful in a challenge to the said order when a writ petition filed by them was disposed off by this Court on 15.02.2023 by passing the following order:-

*“The issue(s) raised in this petition has already been decided by the Supreme Court in the case of **Oil and Natural Gas Corporation Ltd. Vs. Afcons Gunanusa JV, 2022 SCC OnLine SC 1122.** Therefore, the petition is disposed of, in terms of the said decision. However, the petitioner would be at liberty to avail the remedies, if any, available in law.”*



13. Section 32 of the Arbitration Act provides for the termination of the proceedings. This provision came up for interpretation before the Delhi High Court in *M/s. Chemical Sales Corporation and others Versus M/s. A & A Laxmi Sales and Service Private Limited and others, 2011 SCC Online Delhi 3847*. The Court proceeded to notice the statutory provision and observed as under:-

“10. Relevant it would be to refer to Section 32 of the Act which reads as under:-

“32. Termination of proceedings.

(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where-

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in, obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.”

11. The aforesaid provision specified the circumstances under which arbitral proceedings shall be terminated. It provides that arbitral proceedings shall stand terminated on Arbitral Tribunal making an award. Besides that, arbitral proceedings can also be terminated in case (a) claimant



withdraws his claim (b) parties agree on the termination of the proceedings. For example, if parties arrive at a settlement and agree for termination of proceedings, in such an eventuality also, arbitral proceedings shall stand terminated (c) if Arbitral Tribunal finds that continuation of the proceedings have become unnecessary or impossible for any other reason. In other words, if the arbitral tribunal finds, for any reason which includes non-cooperation of the parties, making the continuation of the proceedings impossible, then it can make an order for termination of the arbitral proceedings. In case of termination of the proceedings, the mandate of Arbitral Tribunal shall also stand terminated as envisaged under Sub-Section 3 of Section 32 of the Act except in cases where Section 33 and Section 34(4) of the Act are attracted. Arbitral Tribunal has power to terminate the arbitral proceedings under Section 25(a) upon default of the claimant to communicate his statement of claim; under Section 30(2) upon settlement of dispute by the parties and under Section 38(2) upon failure of the parties to pay the amount of deposit fixed by the Arbitral Tribunal. The termination of arbitral proceedings is different from termination of the mandate of arbitrator. The mandate of arbitrator, depending upon the facts and circumstances of a case, may come to an end but not the arbitral proceedings. For example, if the parties to the arbitration agreement had fixed a period of six months for completion of arbitral proceedings and making of an award by the Arbitral Tribunal and the Arbitral Tribunal fails to do so on or before expiry of six months, the mandate of Arbitral Tribunal shall come to an end but not the arbitration proceedings and in such an eventuality, if a substitute arbitrator is appointed than he shall have to continue with the arbitration proceedings from the stage the same had been left by the earlier arbitrator. However, in case



arbitration proceedings are terminated within the meaning of Section 32 of the Act resulting in termination of mandate of arbitrator, the same cannot continue merely by appointing another arbitrator. In such a scenario, first of all, the arbitration proceedings have to be revived after setting aside the order of Arbitral Tribunal terminating the arbitral proceedings.

12. *In view of the above discussions, I do not find any force in the contention of learned senior counsel for the petitioner that the termination of arbitral proceedings, in this case on the ground of alleged non-cooperation of the claimant including the ground of non-payment of fee, tantamount to withdrawal by the arbitrators resulting in termination of mandate of Arbitral Tribunal, within the meaning of Section 15(1)(a) of the Act thereby attracting sub-Section 2 of Section 15 of the Act. In this case, arbitrators have not withdrawn from office for any reason as stipulated in Section 14 or 15 of the Act but have, in fact, terminated the arbitral proceedings under Section 32 (2)(c). Thus, in my view, sub-Section 2 of Section 15 of the Act is not attracted in the facts of this case.”*

14. The above reproduced observations of the Delhi High Court clearly amplify that the termination of the arbitral proceedings is different from the termination of the mandate of the Arbitrator. The termination of the arbitral proceedings can be on account of the non-cooperative attitude of the parties, including the non-deposit of the arbitral fee, as is this situation in the present case. In such circumstances, there is no occasion for filing of a fresh petition for appointment of an Arbitrator, rather the remedy for the party concerned is either to file an application for recall of the order as has been held by the Supreme Court in **Srei Infrastructure Finance Limited's case**



(supra) or to challenge the legality of the order under Section 14(2) as observed by the Apex Court in Lalitkumar's case (supra). The judgments relied upon by the counsel for the petitioner are not attracted to the facts of the present case and in both the cases a substitute arbitrator was appointed under Section 15 of the Arbitration Act as the previous arbitrator had resigned/withdrawn from the proceedings.

15. The question posed is, therefore, answered in the negative and the prayer made in the instant petition cannot be acceded to.

16. There is another reason as to why the petition must fail. When the dispute initially arose between the parties, petitioners served a legal notice dated 03.04.2019, Annexure P-19, and approached this Court by filing a petition for appointment of an Arbitrator, which was disposed off vide order dated 02.03.2020. The order passed by this Court, which has not been appended to the petition, is reproduced hereunder:-

“Written statement filed on behalf of the respondent in Court today is ordered to be taken on record.

The present application has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, the Act) for appointment of an Arbitrator.

On 12.03.2014 the parties entered into a partnership deed as per clause 13 of which any misunderstanding, disagreement, differences, controversy, disputes or claims arising out of the deed or relating thereto was to be settled through the mode of arbitration.

Disputes having arisen between the parties the applicants, through legal notice dated 13.09.2017, sought resolution of the same to which no response was received. Thereafter through another legal notice dated 03.04.2019 the applicants invoked the arbitration clause and sought



consent of the respondent to the name of the proposed arbitrator. No response to this notice was also made by the respondent occasioning the filing of the present application for the aforesaid relief.

After hearing learned counsel for the parties and leaving them to raise all their claims/defences/counter-claims which may be available to them in law to be raised before the arbitrator, Justice Ram Chand Gupta, a former Judge of this Court is appointed as the sole Arbitrator. However, such appointment would be subject to the declaration to be made by Justice Ram Chand Gupta under Section 12 of the Act with regard to his independence and impartiality to settle the dispute between the parties.

The Arbitrator is requested to complete the proceedings within the time limit specified under Section 29A of the Act.

The Arbitrator shall be paid fee in accordance with the Fourth Schedule of the Act, as amended or as may be mutually settled by the parties and the Arbitrator.

As per agreement expressed by learned counsel for the parties, for the sake of the convenience of their respective clients as also of the Arbitrator, the venue of the arbitration shall be at Chandigarh.

A copy of the this order be forwarded to Justice Ram Chand Gupta (Retd.) at the given address:-

*#215 CP, Sector-4,
M.D.C., Panchkula
(Mobile No.97800-08147)*

After seeking the convenience of the Arbitrator, the parties are directed to appear before the Arbitrator on 12.03.2020 or on any other date suitable to all concerned.

The matter is disposed of in the above terms.”

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17. From the examination of the above reproduced order, it is clear that the petitioners had served two legal notices upon the respondent. The first notice was sent on 13.09.2017 and by second notice, Annexure P-9, petitioners invoked the arbitration clause. The earlier petition filed by the petitioners was accepted by the above reproduced order and an Arbitrator was appointed, who had terminated the proceedings vide order, Annexure P-8. On the basis of the same legal notice dated 03.04.2019, Annexure P-9, petitioners have approached this Court once again for appointment of an Arbitrator under Section 11 of the Arbitration Act. Once an Arbitrator already stood appointed pursuant to the legal notice, Annexure P-9, petitioners are debarred from approaching this Court all over again and the present petition is not maintainable.

18. For the afore-going reasons, this Court does not find any merit in the petition, which is dismissed with no order as to cost.

19. In the end, this Court records its appreciation for the invaluable assistance rendered by Mr. Aman Bahri, learned Amicus.

20. Pending application(s), if any, is disposed off.

(SUVIR SEHGAL)
JUDGE

07.01.2025

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Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No