

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

1) **Arbitration Case No. 80 of 2006**
Date of decision: February 27, 2009

M/s Bhagwan Dass & Sons, through Shri Sudesh
Kumar son of Shri Bhagwan Dass, it s partner,
179, The Mall, Ambala Cantt. ...Petitioner

Versus

Union of India represented by the Garrison
Engineer, Air Force, Ambala Cantt.
and other ...Respondents

2) **Civil Revision No. 3888 of 2006**

M/S Bhagwan Dass & Sons. ...Petitioner

Versus

Union of India and another. ...Respondents

3) **Arbitration Case No. 84 of 2006**

M/s Unique Construction co. 1024, Subhash
Street, Amrik Singh Road, Bathinda through
its partners ...Petitioner

Versus

Union of India and others ...Respondents

4)

Arbitration Case No. 47 of 2007

M/s Precto Engineers 188-B Industrial
Area-I, Chandigarh through its Partner

...Petitioner

Versus

Punjab State Electricity Board through the
Chief Engineer/ MM The Mall Patiala

...Respondents

5)

Arbitration Case No. 48 of 2007

M/s Precto Engineers 188-B Industrial
Area-I, Chandigarh through its Partner

...Petitioner

Versus

Punjab State Electricity Board through the
Chief Engineer/ MM The Mall Patiala

...Respondents

CORAM: HON'BLE MR. JUSTICE T.S.THAKUR, CHIEF JUSTICE

Present: Mr. S.K.S. Bedi, Advocate

for appellant in Arbitration Case No. 80 of 2006

Mr. Ashwini Bansal , Advocate

for respondents in Arbitration Case No. 80 of 2006

Mr. S.K.S. Bedi, Advocate

for appellant in C.R. No. 3888 of 2006

Mr. Ashwini Bansal , Advocate

for respondents in C.R. No. 3888 of 2006

Mr. D.K.Singal, Advocate

for appellant in Arbitration Case No. 84 of 2006

Mr. Puneet Jindal, Advocate

for respondents in Arbitration Case No. 84 of 2006

Mr. P.S.Rana, Advocate,

for appellant in Arbitration Case No. 47 of 2007

Mr. Sunil Kaushik, Advocate

for respondents in Arbitration Case No. 47 of 2007

Mr. P.S.Rana, Advocate,

for appellant in Arbitration Case No. 48 of 2007

Mr. Sunil Kaushik, Advocate

for respondents in Arbitration Case No. 48 of 2007

T.S.THAKUR, CHIEF JUSTICE

A common question of law arises for consideration in all these petitions filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'). The question precisely is whether the appointment of an Arbitrator by the respondents in each one of these cases after the filing of the present petitions is legally valid? While the respondents argue that the appointments are valid, the petitioners contend that such appointments are of no legal consequence as the same were made after the authority competent to make the appointment had forfeited its right to do so. Reliance, in support of that submission, is placed upon the decisions of the Supreme Court to which I shall presently refer. Suffice it to say that the validity of appointments already made is the only impediment in the grant of the prayers made by the petitioners and in the making of fresh appointments in each one of these cases.

In Arbitration Case No.80 of 2006 and so also in all the connected petitions being disposed of by this order, the existence of

an Arbitration Clause providing for adjudication of disputes between the parties is not denied. It is also not denied that a demand for reference of disputes to the Arbitrator was made on 30.12.2002 in Arbitration Case No.80 of 2006. Upon failure of competent authority to make such an appointment an Arbitration application under Section 11(6) of the Act was filed before the Civil Judge (Senior Division), Ambala on 17.2.2003, which upon transfer to this Court has been registered as Arbitration Case No.80 of 2006. The Arbitrator appointed by the competent authority, in the meantime, appears to have entered upon the reference and started proceedings but since the petitioners did not participate in the proceedings on account of the petitions filed by it for reference of disputes to an independent Arbitrator, the said proceedings were terminated by the Arbitrator. That order of the Arbitrator was challenged by the petitioner before the Additional District Judge in a petition under Section 34 of the Act, who declined the prayer holding that the appointment of Arbitrator made by the competent authority was valid. The order passed by the Additional District Judge has been assailed in Civil Revision No.388 of 2006 by the petitioners, which too has been heard alongwith these petitions and shall stand disposed of by this order.

In Arbitration Petitions No. 47 and 48 of 2007 also, a demand for reference of the disputes to an Arbitrator in terms of the clause appearing in the agreement, executed between the parties, was made on 28.3.2007 and 2.4.2007 respectively. On the failure of the competent authority to make an appointment in terms of the agreement, the petitioners filed the said petitions in this Court on

24.5.2007. An Arbitrator was, however, appointed by the competent authority on 12.9.2007 in both the cases. The validity of that appointment is under challenge in these proceedings as noticed earlier.

The position is no different in Arbitration Case No.84 of 2006 in which a demand for appointment of the arbitrator was made by the petitioner on 20.12.2004. The failure of the competent authority to make an appointment, led to the filing of the said petition under Section 11 of the Act in the Court of Civil Judge at Bhatinda in March, 2005, which was later transferred to this Court in terms of the decision of the Supreme Court in SBP & Co. Vs. Patel Engineering Company Limited and Others 2005(8) SCC 618 and registered as Arbitration Case No.84 of 2006. An appointment of Arbitrator was, however, made by the respondents on 26.6.2006. The petitioners' case is that the contract between the parties in that case was signed at Bhatinda and although a reference has been made by the respondents for adjudication of the disputes between the parties, the same has been restricted to a claim of Rs.8,24,690/- only. Reference of the remainder of the claims made by the petitioners has been refused on the ground that the said claims are based on excepted matters, which are not arbitrable.

I have heard learned counsel for the parties at considerable length and perused the record.

The legal position as regards the power of a party designated to make an appointment of an Arbitrator to do so after the filing of the petitions under Section 11 of the Act stands authoritatively decided by a series of decisions rendered by their

Lordships' of the Supreme Court. The first of these decisions was delivered in Datar Swithchgears Ltd. Vs. Tata Finance Ltd. and Anr. (2000)8 SCC 151. The Court was in that case examining whether there was any time limit applicable to cases filed under Section 11(6) of the Act as was the position in cases filed under Section 11(4) and 11(5) thereof. Answering the question in the negative, the Court observed that in so far as cases filed under Section 11(6) of the Act were concerned, no time limit was statutorily prescribed. Consequently, if one party demands that the opposite party should appoint an arbitrator but the opposite party does not make an appointment within thirty days, the power to make an appointment is not lost after the expiry of 30 days. The appointment of an Arbitrator made even after 30 days of the demand would remain valid provided the party demanding the appointment of the Arbitrator had not, in the meantime, moved the Competent Court under Section 11 of the Act. It is only in cases where the party demanding the appointment of an Arbitrator has moved the court under Section 11 of the Act, that the power to make an appointment is forfeited by the party competent to make such an appointment under the agreement. The following passage is in this regard apposite:-

“So far as cases falling under Section 11(6) are concerned -- such as the one before us -- no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite

party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.”

Datar Switchgears (Supra) was followed by the Apex Court in Punj Lloyd Ltd. Vs. Petronet MHB Ltd. (2006) 2 SCC 638. That too was a case in which a similar question arose, which a three Judge Bench of the Supreme Court answered relying upon the earlier decision of their Lordships in Datar Switchgears Ltd. case (supra). To the same effect is the decision of their Lordships in Union of India and another Vs. M/s V.S Engineering (P) Ltd., 2007(1) RCR (Civil) 293 where the Court reiterated the legal position stated in the case of Datar Switchgears Ltd. case (Supra) and held:-

“However, before parting with this case we may also observe that Railways and Public institutions are very slow in reacting to the request made by a contractor for appointment of the arbitrator. Therefore, in case appointment is not made in time on the request made by the contracting party, then in that case the power of the High Court to appoint arbitrator under Section 11 of the Act will not be denuded. We cannot allow administrative authorities to sleep over the matter and leave the citizens without any remedy. Authorities shall be vigilant and their failure shall certainly give rise to cause to the affected party. In case, the General Manager, Railway does not appoint the arbitral tribunal after expiry of the notice of 30 days or before the party approaches the High Court, in that case, the High Court will be fully justified in appointing arbitrator under section 11 of the Act. It is the discretion of the High Court that they can appoint any railway officer or they can appoint any High Court Judge according to the given situation.”

Reference may also be made to the decision of the Supreme Court in Union of India Vs. Bharat Battery Manufacturing Co.(P) Ltd., 2007(3) Arbitration Law Reporter, 282, where again the Court declared that once a party filed an application under Section 11(6) of the Act, the other party forfeits its right to appoint an arbitrator in terms of the agreement. Reliance was placed by their Lordships

upon the decision of the Supreme Court in Datar Switchgears Ltd. case (supra) and Punj Lloyd Ltd. case (supra). The Court held that the appointment of the sole arbitrator after a petition under Section 11(6) of the Act had been filed was invalid as the right to make such an appointment ceased after the aggrieved party had approached the Court seeking the appointment of an arbitrator. The Court observed:-

“As already noticed, the respondent filed Section 11(6) petition on 30.03.2006 seeking appointment of an arbitrator. The appellant, thereafter, said to have appointed one Dr. Gita Rawat on 15.05.2006 as a sole arbitrator, purportedly in terms of Clause 24 of the agreement. Once a party files an application under Section 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. The right to appoint arbitrator under the clause of agreement ceases after Section 11(6) petition has been filed by the other party before the court seeking appointment of an arbitrator. ”

On behalf of the respondents, reliance was placed upon the decision of the Supreme Court in Ace Pipelines Contracts (P) Ltd. Vs. Bharat Petroleum Corpn. Ltd. (2007) 5 Supreme Court Cases 304. The contention was that the decision rendered by the Supreme Court in Datar Switchgears Ltd. case (supra) and Punj Lloyd Ltd. case (supra) had not found favour with their Lordships in the said case. The law declared in Ace Pipelines Contracts (P) Ltd case

(supra) , argued the learned counsel, permitted the appointment of arbitrators even beyond the period of 30 days stipulated for such appointments under Section 11(4) and 11(5) of the Act in cases filed under Section 11(6) thereof. The appointments made in the cases at hand could not, therefore, be faulted on the ground that the same were beyond the period stipulated by the statute. I regret my inability to accept that contention. I have carefully gone through the decision rendered in Ace Pipelines Contracts (P) Ltd (supra) but find it difficult to accept the legal position has been stated differently from what has been stated in the case of Datar Switchgears Ltd. case (supra) and affirmed in Punj Lloyd Ltd. case (supra). Apart from the fact that Punj Lloyd Ltd. case (supra) is a decision by a three Judge Bench of the Supreme Court, which affirmed the view taken in Datar Switchgears Ltd. case (supra), I am of the view that the proposition of law stated in the said two decisions remains unaltered by the decision of their Lordships in Ace Pipelines Contracts (P) Ltd (supra). As noticed earlier, the legal position as stated in Datar Switchgears Ltd. case (supra) and affirmed in Punj Lloyd Ltd. case (supra) is that although the period of 30 days stipulated in terms of Section 11(4) and 11(5) of the Act has no application to cases under Section 11(6) of the Act and although an appointment under Section 11(6) of the Act could be made even after the expiry of 30 days, yet the power to do so is forfeited by the party concerned once the aggrieved party demanding the appointment of an arbitrator approaches the Court under Section 11(6) of the Act. There is nothing in Ace Pipeline's case that can constitute a divergent view so

far as forfeiture of the right of the party to make an appointment by filing of the petition under Section 11(6) of the Act is concerned. I have, in that view, no hesitation in holding that the appointments made in the cases in hand after the filing of the petition under Section 11(6) of the Act are nonest in the eyes of law and would not prevent the appointment of independent arbitrators by this Court. That being the position, the failure of the petitioner in Arbitration case No.80 of 2006 to appear and participate in the proceedings before the Arbitrator, the termination of the arbitration proceedings by the latter on that ground and the order passed by the Additional District Judge in proceedings under Section 34 of the Act, holding the appointment to have been properly made must also be rendered inconsequential. If the appointment itself was nonest in the eyes of law, the Additional District Judge before whom the same was challenged in the proceedings under Section 34 of the Act was not justified in holding otherwise. Civil Revision No.388 of 1986 filed by the petitioner in the said case challenging the order of the Additional District Judge must also consequentially succeed.

That brings me to the argument that the filing of a petition under Section 11(6) of the Act in a Court, which was not competent to entertain the same would not result in forfeiture of right to make an appointment. In Arbitration Case No.84 of 2006, the aggrieved party had approached the Court of Civil Judge at Bhatinda in terms of 11 (6) of the Act, which Court, according to the respondents, had no jurisdiction to entertain the petition. Consequent upon the decision of the Supreme Court in Patel Engineering Company Limited case

(supra) and with the transfer of the case from the Court of Civil Judge, Bhatinda to this Court, the question of jurisdiction of the Civil Court to entertain the petition under Section 11(6) of the Act is in my opinion rendered academic. The petition under Section 11(6) of the Act filed by the petitioner must be deemed to have been presented in the Court of competent jurisdiction especially when the agreement between the parties, which contain the arbitration clause relied upon by the petitioner, was executed at Bhatinda. Since the appointment of the arbitrator in that case was also made after the filing of the said petition, the same too is nonest in the eyes of law.

In the result, I allow Arbitration Case Nos. 80, 84 of 2006 and 47 and 48 of 2007. I also allow Civil Revision No.388 of 2006 and set aside the order dated 10.12.2005 passed by the Additional District Judge and appoint Justice Bakhshish Kaur as an Arbitrator in all the cases to adjudicate upon the disputes between the parties, and make an award in each one of them. The Arbitrator shall be free to fix her fee.

The parties shall through their respective counsel appear before the Arbitrator on 28th March, 2009 at 3.00 P.M. for further directions.

February 27, 2009
'Kalra'

(T. S. THAKUR)
CHIEF JUSTICE