

and by considering the eligible candidates. If respondents 7 and 8 also applies and are found eligible, they may also be considered for the same.

(15) Since the State Government and the Commission have acted in violation of law laid down by the Supreme Court and have extended undue benefit to respondents 7 and 8 by making their selection and appointment and had deprived the other candidates thereby violating the fundamental rights enshrined in constitution of India, a duty is cast upon the State, being protector of rights of citizens, to make fair and free selection and appointment. We are of the considered view that the ends of justice will be met if the persons responsible for sending/recommending the candidates over and above the posts and making selection and appointment of respondents 7 and 8 are burdened with costs, which are quantified at Rs. 10,000, to be shared equally by the functionaries of respondents 1 and 2. The costs are to be deposited in the Haryana State Legal Aid Fund within two months.

(16) Writ Petition is allowed partly in the manner indicated above.

R.N.R.

Before M. L. Koul, J.

M/S KARNATAKA VIDYUT KARKHANA LTD. BANGLORE
AND ANOTHER,—*Petitioners.*

versus

HARYANA STATE ELECTRICITY BOARD,
PANCHKULA,—*Respondent.*

C.R. No. 2712 of 1995.

October 14, 1996.

Arbitration Act, 1940—S. 39—Code of Civil Procedure, 1908—S. 115—Appealable orders—Application for removal of arbitrator filed under provisions of Ss. 5 & 33 of the Act—Order passed on application is not appealable—Revision competent.

Held, that in order to find out whether the said order purporting to have been passed by the Sub Judge under section 5 read with

Section 33 of the Act is appealable or not it is relevant to refer to Section 39 of the Act which provides as under :—

“S. 39 Appealable orders :

- (1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order :

An order :

- (i) superseding an arbitration ,
- (ii) on an award stated in the form of a special case ;
- (iii) modifying or correcting an award :
- (iv) filing or refusing to file an arbitration agreement ;
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement ;
- (vi) setting aside or refusing to set aside an award :

Provided that the provisions of this section shall not apply to any order passed by a small Cause Court.

- (2) No second appeal shall lie from an order passed in appeal under this Section, but nothing in this Section shall affect or taking away any right to appeal to the Supreme Court.”

The order in question is not covered under sub-clause (i) to (vi) of Section 39 set out above. It is quite obvious that an order revoking the appointment of an arbitrator self-appointed by one of the parties who is not at all concerned in the matter for arbitration is not appealable. It is well settled under the law that any order passed under Section 33 of the Act is not at all appealable.

(Paras 17 & 18)

Further held, the preliminary objection raised by the counsel for the petitioner that the revision petition is not maintainable for no appeal was preferred against the order is not sustainable for the fact that no appeal lies against the order passed within the purview of Sections 5 and 33 of the Act.

(Para 20)

P. S. Pana, Advocate, for the petitioners.

K. K. Gupta, Advocate, for the respondent.

JUDGMENT

M. L. Koul, J.

(1) These nine revision petitions are directed against the nine orders dated 31st January, 1995 of the learned Sub Judge 1st Class, Chandigarh. By the said orders the learned Sub Judge allowed the applications of the opposite party—Haryana State Electricity Board (hereinafter referred to as the petitioner) under Section 33 of the Arbitration Act, 1940 (hereinafter referred to as the Act).

(2) It appears that the petitioner entered into nine contracts for supply of transformers to be supplied by M/s N.G.E.F. Ltd. (hereinafter referred to as respondent No. 1). The first contract sent by respondent No. 1 under question No. 4701/168 dated 27th December, 1976 was accepted,—*vide* petitioner's telegram dated 15th February, 1977 and confirmed,—*vide* endorsement No. 4916/QH-932/Cell-4 dated 15th February, 1977. The contract came into effect between the petitioner and respondent No. 1 and the terms and conditions of the contract were signed by their authorised representatives. There was a stipulation in the contract that the transformers which were to be supplied by respondent No. 1 to the petitioner should be of the make of M/s Karnataka Vidyut Karkhana Ltd. (hereinafter referred to as respondent No. 2).

(3) In terms and conditions of the contract, purchase order bearing No. HH—1154 dated 1st March, 1977 was placed with respondent No. 1 for despatch of material mentioned therein to be supplied by him at different stations. With regard to the damaged transformers the payments were adjusted between the petitioner and respondent No. 1 and the balance payment was made to respondent No. 1 and nothing was outstanding against the above purchase order. Against this order the last consignment of material was received on 9th August, 1977 and the last bill was submitted on 30th November, 1977 which was duly satisfied. The respondent No. 2 who was the manufacturer of the transformers had never entered into any agreement with the petitioner for supply of the material. However, he claimed that a sum of Rs. 1,40,742.13 was due to him from the petitioner and in this regard through its Advocate,—*vide* letter dated 5th February, 1992 informed that the matter had been referred to the arbitration of Shri R. Doreswamy (hereinafter referred to as respondent No. 3) at Bangalore.

(4) In the same manner under quotation No. 4701/174 dattd 11th April, 1977 on the basis of another contract a purchase order bearing

M/s Karnataka Vidyut Karkhana Ltd. Bangalore and another 357
v. Haryana State Electricity Board, Panchkula (M. L. Koul, J.)

No. HH 1204 dated 26th July, 1977 was placed with respondent No. 2. In this case also respondent No. 2 informed the petitioner that a sum of Rs. 52,718.93 was due to him from the petitioner and the matter had been referred to the arbitration of respondent No. 3 at Bangalore.

(5) In the third case under quotation No. 4701/185 dated 24th December, 1977 another contract came into existence between the petitioner and respondent No. 1 and purchase order bearing No. HH 1363 dated 20th April, 1978 was placed with respondent No. 1 and accordingly the supply was made under this contract as well. The respondent No. 2 against without any contract having been executed by him with the petitioner gave a notice through his Advocate that a sum of Rs. 23,741.64 was due from the petitioner to him and also informed that the matter had been referred to arbitration of respondent No. 3 at Bangalore.

(6) In the fourth case under quotation No. 4701/186 dated 28th December, 1977 another contract came into being and the transformers were supplied by respondent No. 1 to the petitioner, the payments were cleared and nothing was due from respondent No. 1 towards the petitioner. Against the said purchase order a notice was received by the petitioner from respondent No. 2 that a sum of Rs. 459.66 was due from the petitioner towards respondent No. 2 and the matter had been referred to the arbitration of respondent No. 3 at Bangalore.

(7) In the fifth case also on the basis of quotation No. 4701/192 dated 28th June, 1978 another contract for supply of transformers was executed between the petitioner and respondent No. 1. Like other cases transformers were supplied and the bills were paid. However, respondent No. 2 through its Advocate.—*vide* letter dated 5th February, 1992 informed the petitioner that the matter had been referred to the arbitration of respondent No. 3 at Bangalore without specifying the amount involved in the matter.

(8) In the sixth contract which emerged out of quotation No. 4701/213 dated 20th February, 1979 between the petitioner and respondent No. 1 the transformers were supplied on the purchase order bearing No. HH 1585 dated 20th June, 1979 and the bills were settled. However, a notice was received from respondent No. 2 that a sum of Rs. 1,77,457.17 was due from the petitioner towards him and informed the petitioner through his Advocate.—*vide* letter dated 5th February, 1992 that the matter had been referred to the arbitration of respondent No. 3 at Bangalore.

(9) In the same manner upon purchase order bearing No. HH 1584 dated 2nd June, 1979 the material was supplied to the petitioner by respondent No. 1 and the bills were settled. However, a notice was received by the petitioner from respondent No. 2 that a sum of Rs. 2,04,752.91 was due from him to the respondent No. 2. In that case also matter was referred to the arbitration of respondent No. 3 at Bangalore.

(10) Another contract originated from quotation No. 4701/211 dated 28th February, 1979 and on the basis of purchase order bearing No. HH 1592 dated 26th June, 1979 transformers were supplied to the petitioner by respondent No. 1 and the bills were settled. In this case also respondent No. 2 informed the petitioner that a sum of Rs. 2,49,683.76 was due from him to respondent No. 2. The petitioner was informed that the matter had been referred to the arbitration of respondent No. 3 at Bangalore.

(11) The last order for supply of transformers was placed with respondent No. 1 in pursuance of purchase order No. HH 1593 dated 26th July, 1979 on the basis of quotation No. 4701/262 dated 28th February, 1979. The supply was received by the petitioner and nothing was outstanding against the said purchase order. Surprisingly the petitioner also received a notice from respondent No. 2 informing him that a sum of Rs. 1,57,390.72 was due from the petitioner to respondent No. 2 against the said order and through its lawyer,—vide letter dated 5th February, 1992 informed the petitioner that the matter had been referred to the arbitration of respondent No. 3 at Bangalore.

(12) The respondents filed objections in the Court below and controverted the averments made in the application on the ground that the said Court had no jurisdiction to entertain the application for the fact that the petitioner had concealed important facts before the Court below. It was further alleged that respondent No. 1 was acting as sole selling agent of respondent No. 2 and had entered into the agreement with respondent No. 2 for manufacturing and supply of transformers to the petitioner and thus had to receive the commission only from the payment received by respondent No. 2 from the petitioner. It was averred that the purchase orders were actually placed with respondent No. 2 through respondent No. 1 and the material was to be supplied by respondent No. 2. It was respondent No. 2 who was required to repair the damaged transformers as per the terms of the said contracts. The petitioner did not release the payment and withheld it to the extent of Rs. 10.7 lacs and in addition

to that bank guarantee was encashed worth Rs. 6.24 lacs and thus respondent No. 2 was entitled to a balance payment of money from the petitioner to the tune of Rs. 16,31,156.91.

(13) The following issues were framed in the matter :—

- (1) Whether there is any legal and valid arbitration agreement between the petitioner and the respondent No. 2 ? OPR
- (2) If issue No. 1 is proved, whether respondent No. 3 is liable to be removed as an Arbitrator ? OPA
- (3) Whether the claim of the respondent No. 2 is time barred ? OPA
- (4) Whether this Court has the jurisdiction to try this petition ? OPR
- (5) Relief.

(14) The Court below in view of the findings arrived at on all the issues in favour of the petitioner, ordered removal of respondent No. 3 as an arbitrator in the matter and revoked the reference made by respondent No. 2 to him and also set aside all the proceedings initiated by respondent No. 3 in the matter for being illegal and arbitrary. However, it was observed that respondent No. 1 was at liberty to refer the matter in dispute, if any, to the arbitration as per the original contract executed between the petitioner and respondent No. 1.

(15) Aggrieved of the said orders of the Court below these nine revision petitions have been filed by it has been held that :—

“The revocation of the authority of an Arbitrator or an Umpire as provided in Section 5 contemplates the cancellation of the appointment of the Arbitrator or Umpire. If on an interpretation of an arbitration agreement under Section 33, the Court determines its effect, as a result of which the Arbitrator will not be entitled to decide a particular dispute between the parties, such determination would not be revocation of the authority of the Arbitrator under Section 5 of the Act. In any event, Section 5 should be read subject to the provision of Section 33 of the Act. Moreover, it is clear from Section 5 that the authority of an Arbitrator or Umpire can be revoked with the leave of the Court.”

(16) As the application for removal of the Arbitrator has been filed within the provisions of Sections 5 and 33 of the Act and the determination held by the Court below was that respondent No. 3 was never appointed as an Arbitrator in the matter and he without any legal authority usurped the authority of an Arbitrator, therefore, his appointment was declared as *null and void*.

(17) In order to find out whether the said order purporting to have been passed by the Sub Judge under Section 5 read with Section 33 of the Act is appealable or not it is relevant to refer to Section 39 of the Act which provides as under :—

“S. 39 *Appealable Orders* :

(1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order :

An order :

- (i) superseding an arbitration ;
- (ii) on an award stated in the form of a special case ;
- (iii) modifying or correcting an award ;
- (iv) filing or refusing to file an arbitration agreement ;
- (v) staying or refusing to say legal proceedings where there is an arbitration agreement ;
- (vi) setting aside or refusing to set aside an award :

Provided that the provisions of this Section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this Section, but nothing in this Section shall affect or take away any right to appeal to the Supreme Court.”

(18) The order in question is not covered under sub-clauses (i) to (vi) of Section 39 set out above. It is quite obvious that an order revoking the appointment of an arbitrator self-appointed by one of the parties who is not at all concerned in the matter for arbitration is not appealable. It is well settled under the law that any order passed under Section 33 of the Act is not at all appealable. A Divi

sion Bench of the Allahabad High Court in AIR 1979 Allahabad 342 have held that the person who has the authority to appoint has always got the authority to withdraw or to revoke the appointment. The parties cannot be left without remedy in such a case. In that case it was found that the parties were fully competent to apply for leave of the Court under Section 5 to revoke the authority of the appointed Arbitrator.

(19) In the instant case the respondent No. 3 who is a self-appointed Arbitrator of respondent No. 2 has no *locus* to enter into reference upto some non-existent matter referred to him by respondent No. 2 for arbitration. In this view I am fortified in AIR 1983 Patna 3 wherein the Division Bench of that Court has held that "the basic and fundamental difference between an order passed under Section 33 and Sections 19 and 25 of the Act is that an order passed under Section 33 of the Act makes the arbitration agreement itself non-existent but under the order under Sections 19 and 25 enforceability of arbitration agreement is superseded however the agreement may remain valid".

(20) Therefore in my opinion the preliminary objection raised by the counsel for the petitioner that the revision petition is not maintainable for no appeal was preferred against the order is not sustainable for the fact that no appeal lies against the order passed within the purview of Sections 5 and 33 of the Act.

(21) Once it is found that the revision petition is maintainable, it is to be seen whether any illegality or impropriety has been committed by the Court below in passing the impugned order. It is correctly urged by the counsel for the petitioner that the word 'parties' used in Section 4 of the Act contemplates only the parties to the arbitration agreement and does not include any other person who is authorised by them to appoint an arbitrator on their behalf. In this regard my attention has been drawn to Section 4 of the Act which reads as under :—

"Section 4 Agreement that arbitrators be appointed by third party :

The parties to an arbitration agreement may agree that any reference thereunder shall be to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment."

(22) The terms and conditions of the contract executed between the petitioner and respondent No. 1 as contained in Ex. P3 in all the nine contracts nowhere relates that respondent No. 2 is a party to any of such contracts expressly or impliedly. Clause 4 sub-clause (iii) of the contract specifically provides that supplier (i.e. respondent No. 2) shall not save with the previous consent in writing of the purchaser (i.e. the petitioner) sublet transfer or assign the contract or any part thereof or interest therein or benefit or advantage thereof in any manner whatsoever.' This provision of the contract specifically postulates that the respondent No. 1 in no manner could sublet transfer or assign the contract executed with the petitioner or any part thereof interest therein or benefit or advantage thereof in any manner whatsoever with any body else except with the previous permission of the petitioner. Respondent No. 2 is a non-entity party and by no stretch of imagination he can be deemed to be a party to the privity for the fact that he is the maker of the transformers supplied by respondent No. 1 to the petitioner. No doubt as per the terms of the contract the transformers to be supplied by respondent No. 1 to the petitioner were to be of the make of respondent No. 2, but that does not in itself imply or mean that the respondent No. 2 was a party to the contract.

(23) Suppose 'A' provides an order to 'B' to supply him pencils made of 'C' (a manufacturer of pencils) and those pencils are supplied directly by 'C' to 'A'; does it entitle 'C' to become a party to the contract executed between 'A' and 'B' and seek an arbitration by appointing an arbitrator of his choice to enter into reference over a dispute for payment. The answer is 'no' for there was no stipulation in the agreement that 'C' shall be entitled to receive the payment directly from 'A' for the pencils supplied to 'A' as per contract even at the instance of 'B'. In the instant case, there is a stipulation in the agreement Ex. P. 3 that all the matters, questions, disputes, differences which would arise between the parties from time to time shall be referred to the sole arbitration of the Chairman (of the petitioner Board) or an officer appointed by the Chairman as his nominee. The award of the Arbitrator was deemed to be final and binding on the parties to this contract.

(24) One feels surprised to take note of an assignment deed dated 14th April, 1989 to have been executed between respondent Nos. 1 and 2 whereby respondent No. 1 has authorised respondent No. 2 that he shall be successor in interest by assignment of the contract to have been executed with the petitioner. On the bare perusal it is found that the last contract came to close by 28th February, 1979

and the bills have finally been settled down between the parties. Respondent No. 1 did not claim any amount from the petitioner till 14th April, 1989 when by a strange method executed an assignment deed with respondent No. 2 who made use of this deed claiming that Rs. 16,31,156.91 was due to him from the petitioner and in this regard issued notices to the petitioner informing him that the matters have been referred to the arbitration of respondent No. 3 who in no way was the appointed Arbitrator in the matter by the parties.

(25) The Court below has dealt with all the aspects of the case and has found on evidence recorded on behalf of the parties that respondent No. 2 was in no way connected with the contract and therefore has rightly removed respondent No. 3 who was a non-entity in the matter as an arbitrator. The Court below has rightly set aside all the proceedings initiated by him after having declared these proceedings to be illegal and arbitrary against the provisions of the Act. He has rightly said that respondent No. 1 who was the party to the contract if at all was affected by the terms of the contracts could refer the dispute to the sole arbitration of the Chairman of the petitioner as contained in Ex. P.3. In no way any illegality or impropriety has been committed by the Sub Judge, Chandigarh in passing the impugned order. Therefore, all the nine revision petitions fail and are dismissed.

J.S.T.

Before G. S. Singhvi & M. L. Singhal, JJ.

BRIJ LAL H. C.—Petitioner.

versus

THE STATE OF HARYANA AND OTHERS,—Respondents.

C.W.P. No. 2704 of 96.

5th August, 1996.

Constitution of India, 1950—Arts. 226/227 Punjab Police Rules, 1934—Rls. 13.5, 13.8 & 13.18—Ad hoc promotions—Promotions made on account of outstanding performance of sportsmen—Promotion purely on ad hoc and fortuitous basis—Petitioner did not fulfil basic criteria—Reverted—Reversion order does not suffer from any illegality—Petitioner not eligible for promotion.