

(2000) 11 KL CK 0020
In the High Court Of Kerala
Case No : C.R.P. No. 1617 of 1999

Anilkumar

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 17-11-2000

Acts Referred:

Arbitration Act, 1940 — Section 8, 8(1)
Arbitration and Conciliation Act, 1996 — Section 85

Citation : (2000) 11 KL CK 0020

Hon'ble Judges : M.R. Haritharan Nair, J

Bench : Single Bench

Advocate : K.L. Varghese and Santha Varghese, for the Appellant; M.C. Cherian, for the Respondent

Final Decision : Dismissed

Judgement

M.R. Hariharan Nair, J.—The petitioners and respondents in both the cases are one and the same. Common questions also arise in the two cases. Hence, they are dealt with and disposed of through a common order.

The petitioner is a contractor working in the Southern Railway. The petitioner entered into contracts with 4th respondent relating to certain works at Tirur and Parappanangadi. The works were completed subsequently. But disputes arose with regard to the amounts due to the Contractor. The petitioner alleged that there was lapse on the part of the Railways to provide certain materials like welding rods, red lead, primer etc, and that the cost of purchasing them for completing the work has to be reimbursed. Since there was failure to pay the amount, the petitioner invoked the arbitration provision contained in the relevant contract and filed O.P. (Arb.) Nos. 3/97 and 5/97 before the Sub Court, Palakkad under the Arbitration Act seeking reference of the dispute to the Arbitrator as fixed in the contract. The disputed amount of Rs.50,000/- relating to the work at Parappanangadi is the subject matter of O.P. 3/97 whereas the amount of Rs. 38,000/- relating to the work at Tirur is the subject matter of O.P. 5/97.

2. The Sub Court, Palakkad, which considered the question, passed orders finding that the claims were barred by limitation and accordingly dismissed the petitions. There are the subject matter of present C.R.P. Nos.1617/99 & 1683/99 respectively.

3. In both these cases cross-objections have been filed on behalf of the respondents wherein contention is taken that the petitions were not at all filed under S. 8 of the Arbitration Act 1940 as contended by the petitioner. It is also pointed out that the dispute in question, if at all it comes under the Arbitration Act, is to be dealt with under the Arbitration and Conciliation Act, 1996, which has come into force on 1.8.1996. This contention is on the ground that the O.Ps. were filed on 22.1.1997 by which time the Act of 1940 had already been repealed.

4. On the arguments advanced in the case the points that arise for decision are:-

(1) Whether it is the Arbitration Act, 1940 or the Arbitration and Conciliation Act, 1996 that applies to the case in hand?

(2) Whether the dispute in question come within the scope of S. 8 invoked by the petitioner?

(3) Whether the Sub Court has jurisdiction to appoint an Arbitrator as prayed for by the petitioner?

(4) Whether the impugned orders warrant interference?

5. Point No. 1:- In order that the dispute relating to the Act applicable to the contract in question can be decided, it is necessary to refer to the relevant dates. In the O.P. involved in C.R.P. 1617/99, the final claim was presented by the petitioner on completion of the contract on 2.1.1994. The demand for reference to Arbitrator was made as per Ext. A6 presented on 5.4.1994. The statutory notice required under S. 8 was issued as per Ext. A2 on 15.2.1995.

6. As far as the other O.P. involved in C.R.P. No. 1683/99 is concerned, the final claim on completion of the contract was presented as per Ext. A6 on 15.8.1995; the demand for arbitration was made as per Ext. A9 dated 18.11.1995 and the notice under S. 8(2) of the Act was presented as per Ext. A2 on 22.1.1996.

7. As already mentioned the new Act came into force on 1.8.1996 and it was thereafter that O.Ps. were filed on 22.11.1997. S. 85 of the Arbitration and Conciliation Act, 1996 (New Act) provides, inter alia that the Arbitration Act, 1940 stands repealed. S. 85(2) further provides that notwithstanding such repeal, the said Act shall apply in relation to arbitral proceedings which commenced before the new Act came into force unless otherwise agreed by the parties; but the new Act shall apply in relation to arbitral proceedings which commence on or after the new Act comes into force. S. 21 of the new Act provides that unless otherwise agreed by the parties, the arbitral proceedings in respect of a dispute commence on the date on which a request for that dispute

to be referred to arbitration is received by the respondent. In the instant case, the relevant notices involved in the two cases are Exts. A6 and A9 respectively and both these admittedly were received by the respondents before 1.8.1996 on which day only the new Act came into force. It is therefore beyond doubt that it is the old Act of 1940 that applies in relation to arbitral proceedings relating to the contracts in question albeit the said Act stood repealed by the new Act as on the date of which the present O.Ps. were filed before the Sub Court.

8. Learned Standing Counsel for the respondents argued that the O.Ps. have to fail for the simple reason that in the Original Petition, beneath the cause title portion the petitioner has referred to S. 8 of the Arbitration Act (Act 26/96). He would therefore contend that the application has hence to be treated as one under the new Act and hence it has to fail. A perusal of the aforesaid portion shows that the wording adopted by the petitioner is as under:-

"Petition under S. 8 of the Arbitration Act (Act 26/96) for appointment of an Arbitrator."

The relevant provision relating to filing such an Original Petition, as far as the new Act is concerned is not S. 8. Of course, the words "Act 26/96" is given in brackets; but a perusal of the petition as a whole and especially, the reference to S. 8 makes it clear that the petition is one filed under the Act of 1940. A hyper technical stand need not be taken in the matter and I, therefore, treat the application as one under the Act of 1940 as done by the Court below. I also find that the dispute in question is to be decided invoking the provisions of the old Act and not under the new Act.

9. Point No. 2- Several authorities were cited by the learned counsel for the petitioner in support of his contention that the dispute in question comes within the scope of S. 8(1) (a) and (b) of the old Act, which reads as under:-

"8. Power of Court to appoint arbitrator or umpire-(1) In any of the following cases-

(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b) if any appointed arbitrators umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c) where the parties or the arbitrators were required to appoint an umpire and do not appoint him;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after service of the said notice, the court may, On the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties."

The stand of the respondents is that the agreement in question does not provide for one or more Arbitrators to be appointed by consent of the parties and hence S. 8(1)(a) aforementioned is inapplicable. They also contended that S. 8(1)(b) would apply only in a case where the General Manager of the Railway exercises the power under the agreement in question and makes a specific appointment of an Arbitrator and such Arbitrator refuses to act or becomes incapable of acting or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators do not supply the vacancy.

10. As far as S. 8(1)(b) is concerned, the matter does not require elaborate consideration because that Section obviously applies only in a case where appointment of an Arbitrator has already taken place. In the instant case, the prayer of the petitioner itself is that Arbitrator might be appointed and the dispute referred to him. This is not a case where the appointment has already been made, though the Arbitrator to be "appointed is named in the agreement. The case in hand therefore does not come under S. 8(1)(b) of the Act. Neither side has a case that the parties or Arbitrators are required to appoint an umpire. Hence S. 8(1)(c) also is not applicable. What remains is the question whether there is scope for applying S. 8(1)(a) of the Act.

11. The learned counsel for the petitioner cited rulings of several High Courts including the decision in *Mehta & Co. v. Union of India* 1983 (1) ALR 71. He submitted that the agreement in question provides that there shall be reference to an Arbitrator; that there is consent of parties in the agreement itself for such appointment and that there is failure on the part of the respondents to refer the dispute to an Arbitrator by appointing him and hence S. 8(1)(a) of the Act applies. A contention is made by the respondents stating, on the basis of the memorandum of cross-objection filed in the case, that the agreement as above is not after the differences have arisen between the parties and hence S. 8(1)(a) is inapplicable. It is also the case of the respondents that this is not a case where even the original agreement was not for appointment of one or more Arbitrators to be appointed by consent of both parties; but the exclusive jurisdiction to appoint an Arbitrator is given to the General Manager of Railways.

12. In view of the controversy, it is necessary to go into the agreement concerned, the relevant portions of which find a place in para 3 of the C.R.Ps. concerned. For easy reference these are quoted herein:-

"64(1)(i) In the event of any dispute or difference between the Parties hereto as

to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the Contractor may claim to be entitled to, or if the Railway fails to make a decision within a reasonable time, then and in any such case, save the "excepted matters" referred to in Clause 63 of these conditions, the contractor, after 90 days, but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.

64(2) xxx xxx xxx 64(3)(a) Matters in question, dispute or difference to be arbitrated upon shall be referred to-

(i) a sole arbitrator who shall be either the General manager or a Gazetted Railway Officer nominated by him in that behalf in cases where the claim in question is below Rs. 5,00,000/- (Rs. Five Lakhs) and in cases where the issues involved are not of a complicated nature."

There is provision for appointment of two Arbitrators also in the agreement; but that would apply only in cases where the claims exceed Rs. 5,00,000/-. In the instant case, the claims are only below the said amount and hence it is not necessary to go into that provision herein.

13. What can be seen from Clause 64(3)(a)(i) above is that the sole Arbitrator who is to decide the disputes shall be appointed by the General Manager. He can either appoint himself as the Arbitrator or appoint a Gazetted Railway Officer of his choice. As far as such choice is concerned, the petitioner-Contractor has no voice. The appointment is in his own discretion and consent of the Contractor for such appointment is unnecessary. So, even on a plain reading of S. 8(1)(a) it can be seen that this is not a case where the arbitration agreement provides that reference shall be to one or more Arbitrators to be appointed by consent of the parties even if we ignore the further condition that the consent for appointment should be after differences have arisen. In such a case the Contractor cannot invoke S. 8(1) of the Act. If any authority is required on the point, reference may be made to the decision in *Food Corporation of India v. Salam Traders* 1998 (1) KLT 790, which was decided by a Full Bench of this Court. In view of the said decision rendered by this Court itself, it is unnecessary to refer to the decisions of other High Courts to which reference was made by the learned counsel for the petitioner, though they take a contrary view.

14. The contract involved in the FCI case aforementioned was between the Food Corporation of India and its Contractors. It provided that all disputes and differences arising out of the contract were to be referred to the sole Arbitration of any person appointed by the Managing Director of the Food Corporation of India. The contractor had no choice at all with regard to the Arbitrator and the discretion in choosing the Arbitrator lay exclusively with the Managing Director of the Food Corporation of India. There was also a provision that no person other than a person appointed by the Food Corporation of India as aforesaid would act

as Arbitrator and if for any reason, that is not possible, the matter shall not to be referred to any Arbitrator at all. After a survey of all the relevant decisions on the point and also the observations contained in certain decisions of the Supreme Court, the Full Bench came to the conclusion that on the wording of S. 8(1)(a) it is not applicable to a case where the power to appoint or nominate the Arbitrator is given to a designated person under the relevant Arbitration Clause and that the petition under S. 8 of the Act would not lie for appointment of an Arbitrator in such a case. The question whether an Arbitrator can be appointed in such a case under S. 20(4) of the Act was left open.

15. There is also an authority of the Supreme Court on the point. In *M/s. Harbans Singh Tuli and Sons Builders Pvt. Ltd. Vs. Union of India*, it was found that that S. 8(1)(a) applies where the Arbitrator is not named in the agreement and where he is required to be appointed by the Parties with consent. If there is some other mode of appointment, for example, S. 4, where the parties to the agreement agree that the Arbitrator has to be appointed by a person designated in the agreement either by name or hold, for the time being in office, this Section would not apply.

16. The learned counsel for the petitioner placed reliance on certain observations contained in the decision in *Madras Port Trust Vs. Hymanshu International* by its Proprietor *V. Venkatadri (Dead)* by L.R.s, in support of the contention that limbs of the Government should not take hyper technical pleas in such matters. That was a case where the plea of limitation was taken by the Port Trust. The Court observed that it would look upon with disfavour such contentions and that public authority, in all morality and justice, should not take up such pleas to defeat just claims of the citizens. It further held that it is high time that the Governments and Public Authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens.

17. The said observation made on the facts of that case cannot be extended to such a limit as to prevent the Government and its subsidiaries from putting forth contentions where that is legally sustainable and cannot be styled as hyper-technical. It is not as though the Supreme Court, through the said decision, has prohibited all such bodies and Government departments from contesting claims put forth by private parties on genuine grounds. What is under consideration now is the scope and ambit of S. 8(1) and this court has already found that a case of this nature does not fall within the scope of S. 8(1)(a). I do not think that the petitioner, in the circumstances, can take shelter under the decision in *Madras Port Trust* case aforementioned to defeat the contentions of the respondents. The further fact that in similar other claims the Railways have already invoked the Arbitration Clause in favour of the Contractors including the present petitioner also is no reason to find that the petitioner can invoke S. 8(1)(a) of the Act. The principles laid down in the Full Bench decision in *F.C.I.* case cited supra clearly stand in the way of the petitioner getting relief under S. 8(1)(a) of the Act.

18. Points No. 3 & 4:- In view of my finding under Point No. 2, the question whether the claim is barred by limitation or not and whether it should have been considered by the Trial Court without leaving it to the Arbitrator do not deserve to be considered.

19. As already found, S. 8(1) (a), (b) and (c) are unavailable to the petitioner in the nature of the wording relating to the arbitration contained in the agreement in question. There is hence no scope for appointment of Arbitrator through the intervention of Court under S. 8 of the Act and the Sub Court had no jurisdiction to make any such appointment. The Court was therefore right in its conclusion that there is no scope for any such appointment and in dismissing the petitions.

20. Revision Petitions are found without merit and they are dismissed.