
(1983) 11 KAR CK 0030
In the Karnataka High Court
Case No : Misc. First Appeal No. 1471 of 1979

Asia Engineering Co.

APPELLANT

Vs

Life Insurance Corporation of India

RESPONDENT

Date of Decision : 28-11-1983

Acts Referred:

Arbitration Act, 1940 — Section 20, 8, 9

Citation : AIR 1985 Kar 13 : (1984) 1 KarLJ 458

Hon'ble Judges : R.S. Mahendra, J;G.N. Sabhahit, J

Bench : Division Bench

Advocate : Ravindra, for S.G. Sundaraswamy, for the Appellant; C. Srinivasa Iyengar, for the Respondent

Judgement

Sabhahit, J.—This appeal by the Asia Engineering Company is directed against the Judgment and order made by the Principal Civil Judge, Bangalore District, Bangalore, on 14-6-1979 in Original Suit No. 181 of 1978, on his file on a petition filed under S. 20 read with Ss. 8 and 9 of the Arbitration Act, dismissing the petition registered as a suit with costs.

2. The petitioner prayed that the arbitration agreement as embodied in Cl. 39 of the conditions of Contract dated 4-9-1973 between him and the respondent be called and the dispute referred to the arbitrator, namely D. Venkatakrishnaiah as sole arbitrator to decide the dispute. It was alternatively prayed that in case the Court held that the reference must be made to two arbitrators the Court might give such direction.

3. The facts leading up to the said petition and prayer are as under:

According to Asia Engineering Company, (the plaintiff), the respondent, namely, the Life Insurance Corporation of India entrusted the work of construction of 48 buildings on Sector-1. 68 buildings in Sector-11 and 40 buildings in Sector III in its township at Jeevan Bima Nagar, near H. A. L. III Stage, Bangalore, to him, by accepting his tender dated 19-3-1973 and 13-4-1973. The plaintiff further

averred that an agreement was also entered into between them in this behalf on 4-9-1973.

Pursuant to the contract, the plaintiff commenced the work in June 1973 and completed it in April 1976. According to him, the Respondent/Corporation settled the final bill in Dec. 1976 except three claims, which he had raised in his letter-dated 18-9-1974. When these claims were raised, the respondent/Corporation called for some clarifications from time to time and they were furnished to the satisfaction of the respondent/ Corporation. Though these claims were under consideration for a long time, at the time of settling the final bill, these were not admitted or settled. According to the plaintiff, he made the following three claims:

(i) Claim on account of increase in labour rates. Rs 8,76,668-83 P. (ii) Claim on account of increase in cost of material. Rs 8,98,170-00 P. (iii) Increase on account of indirect increase. Rs 2,17,000-00 P. Total Rs 19.94,838-83 P.

The respondent, according to the plaintiff declined to accept these three claims after the completion of work and, after payment of the final bill, the Contractor sent a reminder dated 3-8-1977. The respondent/ Corporation sent a reply on 17-8-1977 stating that they were not, entertaining these claims. Thus, a dispute arose between them in respect of these three claims.

According to the plaintiff the dispute arose out of the terms of the contract under CL 39 of the contract. He demanded that the dispute should be referred to an arbitrator as contemplated under Cf. 39 of the Contract. The respondent Corporation sent a reply dated.10-3-1978 stating that the Contract dated 4-9-1973 had been

Discharged by the performance and, therefore, there was no scope for invoking CL 39 of the conditions of the contract. But the respondent did not agree. According to the respondent, the dispute was not arbitrable. Hence, the petition was made to the Court for referring the dispute to the arbitrator.

4. The respondent contested the petition. Hence, it was registered as a suit.

5. The learned Civil Judge raised the following issues as arising for his consideration in the suit:

(1) Whether the claims raised by the plaintiff arise under the contract and whether they are arbitrable?

(2) Whether the "No Claim Certificate" was given by the plaintiff in full settlement of all the claim in respect of the contract dated 4-9-1973?

(3) Whether this dispute can be referred to arbitration in view of the "No Claim Certificate" issued by the petitioner?

(4) What Order?

6. The learned Civil Judge, on hearing, answered issues Nos.1 and 2 in the negative. Under Issue No. 3, he held that the "No Claim Certificate" issued by

the petitioner/ plaintiff was no bar and, in that view, he ultimately dismissed the suit with costs. Aggrieved by the said Judgment and order, the petitioner/ plaintiff has instituted the above appeal before this Court.

7. The learned counsel appearing for the appellant strenuously urged before us that though the Court has the power to find out the matters excepted from the purview of arbitration, since that dispute was not so excepted, the Court below ought to have referred the matter to arbitration. Hence, according to him, the Court below was not justified in dismissing the suit holding that the dispute was not arbitrable.

8. As against that, the learned counsel appearing for the respondent/ Corporation argued supporting the judgment and order passed by the Court below.

9. The sole point, therefore, that arises for our consideration in this appeal is:

"Whether the Court below was justified in holding that the dispute was not arbitrable?"

10. Clause 39 of the contract speaks of settlement of dispute by arbitration. It reads:

"All disputes and differences of any kind whatever arising out of or in connection with the contract or carrying out of the work (whether during the progress of the work or after its completion and whether before or after determination, abandonment or breach of the contract) shall be referred to and settled by the Chief Engineer, who shall state his decision in writing. The decision of the Chief Engineer with respect to any of the excepted matters shall be final and without appeal as stated in clause No. 36, but if the Contractor be dissatisfied with the decision of the Chief Engineer or any other matter, the question of dispute of any kind (except any of the excepted matters) or to the withholding by the Chief Engineer of any payment to which the contractor may claim to be entitled, then and in any such case, the contractor shall within 28 days after receiving notice to such decision give a written notice to the employer requiring that such matters in, dispute be arbitrated upon. Such written notice shall specify the matters which are in dispute or difference of which such written notice has been given and no other shall be and is hereby to be referred to the arbitration and final decision of a single arbitrator, or to the arbitration of two arbitrators, one to be appointed by each party, which arbitrators shall before taking upon themselves the burden of Reference appoint an Umpire".

11. "Thus, it is clear that the Clause is very wide in its scope. Differences of any kind whatever arising in connection with the Contract are made the subject matter of Arbitration except the excepted matters, as contemplated in C1.36 and matters which have become final by the terms of the Contract by the opinion of the Chief Engineer.

12. The present dispute is with regard to escalation of the prices of materials as

also payment of higher wages on account of the amendment in law, It is obvious, there fore, that the dispute as such is arbitrable under CL 39 of the contract as it arises from out of the contract.

13. The next question that would arise for our consideration is: " Whether it is excepted in the contract from the arbitration clause?"

14. Clause 36 of the contract speaks of disputes to be finally entertained by the Chief Engineer. It reads:

"The instructions, decision, opinion, direction, certificate, or valuation with respect of all or any of the matter " s tinder Clauses 2, 6, 9, 15 and 2 1 (a), (b), (c), (d), (f) and (h), 29, 33, 34 and 38 hereof (which matters are herein referred to as excepted matters) of the Chief Engineer shall be final and conclusive and binding on the parties hereto and shall be without appeal any other decision, opinion, direction, certificate or valuation of the Chief Engineer or any refusal of the Chief Engineer to give any of the same shall be subject to the right of arbitration and review in the same in all respects including the provision as to opening the reference as if it were a decision of the Chief Engineer under Cl No.39)."

15. Thus, it is obvious that the matters accepted, which are finally excluded from the scope of arbitration has been enumerated exhaustively in CL 36 of the contract.

16. Bearing this in mind, we will proceed to read CL 8 of the Special Conditions in the, Contract, which reads:

"Price Fluctuation: Rates quoted by the Contractor shall be firm throughout the currency of the contract (including extensions of time, if any granted) and will not be subject to any fluctuation due to variation in cost of materials or labour. Only in case of cement, price fluctuation will be allowed as described in Clause No. 9(h) below".

17. It is relying on this clause that the learned Counsel appearing for the respondent/ Corporation strenuously urged before us that if during the pendency of the contract or even during the extended time if there is fluctuation in prices, the Contractor shall stick to the prices quoted in the tender as the prices shall be firm throughout the contract and any fluctuations due to rise in cost are immaterial. This clause, however, is not treated as an excepted clause in CL 36 of the General Contract.

18. In the General Instructions issued to the Contractor for building work, it is stated in Cl 27 thus.

"The Contractor shah pay rates it wages and observe hours of work and conditions of employment according to existing rules under Minimum Wages Act. Further, it shall be Contractor"s responsibility to ensure that he pays his workmen wages which are not lower than the minimum prescribed by the Union

Government and State Government in which area this contract is being operated."

19. Thus, it becomes obvious that the Corporation has issued special instructions that the workmen shall be paid wages, which are not lower than what is prescribed, in the Minimum Wages Act

20. Exhibit P-2 in the case shows that the Union Government revised the Wage Scale during the pendency of the Contract, on 2-5-4-1973, whereas the Contract was accepted on 13-4-1973.

21. Thus, it becomes obvious that during the pendency of the contract, the Minimum Wages were raised by the Union Government and the Contractor was specifically instructed by the Corporation to pay not less than what was prescribed under the Minimum Wages Act.

22. That being so, the learned Counsel appearing for the appellant submitted that it would not lie in the mouth of the Corporation to say that the rates could not be revised on account of the increase in the Wages made by the Union Government as the revision was statutory revision binding all parties concerned,

23. What is relevant to decide on the facts of the present case, however, is whether the dispute so arisen could be referred to the arbitrator under Cl. 39 of the Contract.

24. We have pointed out above that Cl. 39 of the Contract is so wide -in its amplitude that all disputes arising out of the execution of the work could be referred to the Arbitrator and we have further pointed out that Cl. 36 of the Contract speaks of excepted matters; Special Condition No. 8(c) is not mentioned as an excepted matter in Cl. 36 of the Contract. That being so, it is obvious that under Cl.39 of the Contract, the dispute becomes referable to arbitration.

25. The learned Civil Judge thinks that it is an excepted matter, without properly reading Cl. 39 and Cl. 36 of the contract. On a careful reading of these two clauses, we are satisfied that Special Condition No. 8(c) is not treated as an excepted matter.

26. This Court, by a Full Bench, has observed, inter alia in the matter referred to the Full Bench, in Misc. First Appeal No. 353 of 1974 (M. S. Ramaiah v. State of Mysore), by its opinion dated 24-11-1978, thus:

"It is true that a dispute to be arbitrable must at once arise out of the agreement and must also fall within the ambit of the arbitration clause. But the dispute with which we are concerned cannot be said to fall outside the agreement. It does arise under the agreement, but all that Cl.27 states is that the circumstances set out there under could not be made a ground for any claim for compensation for alleged loss of profits in respect of the omitted work. If, however, the contractor raises a dispute contending that he is entitled to compensation resulting from a unilateral termination of the agreement, that dispute must necessarily be

decided by some authority. It will be for that authority to say, upon an examination of the question, whether clause 27 is attracted, and that in view of that clause any claim for damages could be raised by the contractor. In conceivable cases, even the existence or non-existence of a dispute might itself assume the character of a dispute for adjudication by the Arbitrators. The Arbitrators are also competent to decide whether that dispute is excluded from the arbitration clause. "An Arbitration agreement may explicitly empower the arbitrator to decide whether or not a particular dispute is within the arbitration agreement". (See: Hudson's Building and Engineering Contractors, Ninth Edition, page 658). But even if there is no such express power unless the dispute is expressly excluded from the arbitration clause "an arbitrator is always entitled to enquire whether or not he has jurisdiction" (See: Russell on Arbitration, Eighteenth Edition, page 73)".

27. That being so, it becomes clear that the Contractor is not prevented from raising the dispute, Cl.8(c) of the Contract, if at all, may come in as a defence before the Arbitrator. Thus, the matter has to go before the Arbitrator and it is for the Arbitrator to decide whether escalation, of prices should be decided and allowed. That is a matter on merits with, which the Court is not concerned.

28. In the circumstances, therefore we are of the considered view that the dispute raised in the instant case does not fall within the excepted category and the power of the Arbitrator is not specifically excluded. That being so, we are of the considered view that the dispute shall be referred to the Arbitrator.

29. The appeal, therefore, is allowed. The impugned Judgment and decree of the learned Civil Judge are set aside. The matter is sent back to the learned Civil Judge with a direction that on hearing the Counsel, he shall proceed to refer the matter for arbitration in accordance with law.

30. Send back the concerned records to the learned Civil Judge, forthwith.

31. No costs of this appeal.

32. Appeal allowed.