
(1988) 07 DEL CK 0038
In the Delhi High Court
Case No : Suit No. 1534-A of 1985

Competent Construction Company	Vs	APPELLANT
State of Himachal Pradesh and others		RESPONDENT

Date of Decision : 06-07-1988

Acts Referred:

Citation : (1988) 2 ARBLR 89 : (1989) 65 CompCas 703 : (1988) 36 DLT 26 : (1988) 15 DRJ 249

Hon'ble Judges : B.N. Kirpal, J

Bench : Single Bench

Advocate : G.L. Sanghvi, R.K. Sanghi, Rajender Dutt and Jayant Bhushan, for the Appellant;

Judgement

B.N. Kirpal, J.—This order will dispose of the application filed u/s 20 read with sections 5, 9, 12 and 41 of the Arbitration Act, by a company which had entered into a contract with respondent No. 1 for the construction of "Himachal Bhavan" at New Delhi.

2. On August 22, 1978, the work for construction of the said Bhavan was awarded to the petitioner. The contract provided that the work was to be completed on or before September 5, 1980. There was, however, delay in completion of the work. According to the petitioner, the delay was on account of the late handing over of the site of the work by respondent No. 1; besides, there were other acts of omission and commission on the part of respondent No. 1 which prevented the construction being completed within the stipulated time.

3. After the work was completed, the final bill was submitted. The bill, as submitted, was not passed in toto and certain deductions were made. According to the petitioner, the agreement between the parties contained an arbitration clause, namely, clause 25 of the contract which, inter alia, stipulated that in the event of any dispute arising between the parties, the same shall be referred to the sole be referred to the sole arbitration of an arbitrator appointed by the Chief Engineer, Himachal Pradesh Public Works Department. The clause further

provided that it would not be objectionable if the arbitrator so appointed is a Government servant.

4. Certain disputes arose between the parties, inter alia, regarding the interpretation of some of the clauses of the contract. The petitioner then wrote on February 26, 1984, to the respondent asking it to appoint an arbitrator. The respondent appointed Shri S. C. Kohli, Superintending Engineer, as the arbitrator. After sometime, Shri S. C. Kohli resigned and thereupon Shri P. C. Bisht, another Superintending Engineer was appointed in his place.

5. The petitioner desired that the person who is appointed as an arbitrator should have a legal background, inasmuch as, according to the petitioner, the case involved interpretation of different clauses of the contract which were questions of law. The petitioner then filed the present petition, inter alia, contending that the arbitrator who had been appointed did not have a legal background and furthermore, there had been delay in the conduct of the proceedings. The petitioner prayed that another arbitrator should be appointed, having a legal background, and that he should be an independent person.

6. In the reply filed on behalf of the respondents, it is not disputed that the arbitration agreement exists. The respondents have stated that it is not obligatory on them to appoint an arbitrator with a legal background and the case of the respondents is that the arbitrators who have been appointed were persons who were competent enough to decide the disputes arising in the present case.

7. The respondent in their reply, have also raised a preliminary objection with regard to the territorial jurisdiction of this court to decide this application. The contention of the respondents is that the agreement between the parties restricts the jurisdiction of the courts to decide any dispute between the parties to the courts in Himachal Pradesh and thereby, the jurisdiction of this court is ousted. It is also the case of the respondents that in any event in view of the provisions of section 2(c) of the Arbitration Act, this court is not the appropriate court.

8. Before dealing with the aforesaid preliminary objection, I may notice that during the pendency of this petition, Shri Bisht has also resigned and a new arbitrator had to be appointed. A suggestion was mooted that the respondents may appoint a Legal Remembrancer to the Government, the Advocate-General or the Secretary (Law) as the arbitrator. Counsel for the respondents took time to seek instructions and then informed the court that the Government was not willing to appoint any of the three persons. I am told that after the resignation of Shri Bisht, one Shri I. C. Kapoor has already been appointed as the sole arbitrator.

9. In order to decide which court has jurisdiction to hear such an application, reference has to be made to the provisions of section 31 read with section 2(c) of the Arbitration Act. Section 31(1) provides that an award may be filed in any court having jurisdiction in the matter to which the reference relates. Sub-section (2), inter alia, provides that all applications regarding the conduct of arbitration

proceedings are to be made to the court where the award had been be filed, and to no other court, Therefore, an application like the present one u/s 20 read with sections, 5, 8, 9, 12 and 41 has to be filed in the court where the award may be filed. This is so provided by section 31(3) of the Act. The term "court" is defined by section 2(c) to mean a civil court having jurisdiction to decide the question forming the subject matter of the reference "if the same had been the subject-matter of a suit". This court has had occasion to deal with this provision in S.C. Malik Vs. Union of India, and Gulati Constructions Co. Vs. Betwa River Board, and it has been held that it is that court that will have jurisdiction t entertain applications, awards, etc., u/s 31 of the Act in which court a suit could have been filed. To put it differently, the jurisdiction of the court which can hear proceedings under the Arbitration Act will be determined by finding out which court would have jurisdiction to try a suit, if a civil suit was filed, for the reliefs which were being claimed by way of arbitration. If a civil suit for a claim of money could be filed in Delhi, then, by virtue of the provisions of section 2(c) read with section 31(3) of the Act, the present application would also be maintainable in this court.

10. The respondents have strongly relied upon the provisions of clause 32 of the contract in order to contend that it is only the courts at Himachal Pradesh which have the exclusive jurisdiction to decide all disputes between the parties. Clause 32 reads as follows :

"Clause No. 32 : In the event of any dispute leading to litigation in the court of law, it should fall within the legal jurisdiction of the High Court of Himachal Pradesh at Shimla or any court under the High Court of Himachal Pradesh."

11. The submission of learned counsel for the respondents is that even assuming that the courts in Delhi would also have jurisdiction in the present case, by virtue of the provisions of clause 32, the jurisdiction has been limited to the courts in Himachal Pradesh. In other words, the courts in Delhi will have no jurisdiction to decide any dispute between the parties relating to the contract and, Therefore, it is only the courts at Himachal Pradesh which will have jurisdiction to decide matters under the Arbitration Act.

12. On behalf of the petitioner, it has been strongly contended that clause 32 extracted above does not oust the jurisdiction of this court. It is first submitted that the said clause applies only to civil suits and would not be applicable to proceedings under the Arbitration Act. It is submitted that clause 32 refers to "litigation in the court of law" and this can only mean a civil suit and nothing else. I am afraid I am unable to agree with this contention. Clause 32 refers to "any dispute" which may lead to "litigation in the court of law". The expression "any dispute" is of a wide amplitude. The contention by one party for the appointment of a particular type of arbitrator and the rejection of that contention leads to a dispute coming into existence. This dispute has led to the filing of the present application, which means that it has led to litigation in a court of law. Therefore, it cannot be said that clause 32 would not apply to a case like the present. I may, at this juncture, also refer, in greater detail, to the aforesaid

decision of this court in *S.C. Malik Vs. Union of India*, . In that case also, the contract between the parties provided that the courts at the place where the acceptance of tender has been issued "shall alone have jurisdiction to decide any dispute arising out of or in respect of the contract". This court held that by virtue of the aforesaid provision, the jurisdiction was limited to the courts where the tender was issued and, in that case, the acceptance of tender issued was one from Kanpur and so the courts in Delhi had no jurisdiction to entertain an application u/s 20 of the Arbitration Act. The court expressly rejected the contention that an application u/s 20 of the Arbitration Act was not a dispute arising out of or from the contract. I am in respectful agreement with the aforesaid decision and in my view also, the present application is a dispute arising between the parties, which has led to litigation and is, Therefore, covered by the provisions of clause 32 set out above.

13. It was then contended by learned counsel for the petitioner that the wording of clause 32 is ambiguous. It was submitted that clause 32, inter alia, states that the dispute "should fall within the legal jurisdiction of the High Court of Himachal Pradesh" The submission is that the use of the word "should" renders the said clause meaningless. It is true that the said clause is not very happily worded. The use of the word "should" is possibly, grammatically incorrect, but in the setting and the context in which the clause exists, the word "should" must mean "shall". It will be seen that the aforesaid contract contains an arbitration clause. There are, of course, some matters which are accepted matters and which fall outside the jurisdiction of the arbitrator. But the intention of clause 32 clearly is to decide as to which court will have exclusive jurisdiction to try any dispute which exists between the parties. It is now well-settled that if two or more courts have jurisdiction to decide a particular dispute, then, by agreement of parties jurisdiction can be limited to any one of them. At the same time, if a court does not have jurisdiction, then, by agreement of parties, jurisdiction cannot be conferred on that court. The clear implication of clause 32 is that the jurisdiction of the courts which will decide the dispute should be restricted and it is only those courts which are in Himachal Pradesh which should have exclusive jurisdiction. Of course, this clause will be applicable only where the cause of action, in whole or in part, arises in Himachal Pradesh. If, for instance, no part of the cause of action had arisen in Himachal Pradesh, then clause 32 would not have been applicable. But, in the present case, it is not disputed that at least a part of the cause of action does arise in the cause of action does arise in the State of Himachal Pradesh. Therefore, by virtue of clause 32, the jurisdiction is limited to the courts in Himachal Pradesh. If the word "should" is given any other meaning, it would render the said clause completely meaningless. As opined by Anson in his *Law of Contracts*, 23rd edition, page 140, "an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement" Reading the agreement as a whole, in the present case, it is clear that the intention of inserting clause 32 was to oust the jurisdiction of courts other than

those in Himachal Pradesh.

14. In view of the provisions of clause 32, a suit, if it had to be filed by the petitioner, could only have been filed in Himachal Pradesh. That being so, by virtue of the provisions of section 2(c) of the Arbitration Act, it is only the courts of Himachal Pradesh which will have jurisdiction to decide the present application. In my opinion, Therefore, this court has no territorial jurisdiction to decide the present application.

15. Before parting, I must refer to a decision relied upon by Snehalkumar Sarabhai Vs. Economic Transport Organisation and Others, . That was also a case where there was an agreement between the parties to restrict the dispute to a particular court. It was held by the Gujarat High Court that such a clause was very oppressive and a new approach to this question deserves to be made. The learned judge had observed "The ouster clause can operate as estoppel against the parties to the contract. It cannot tie the hands of the court and denude it of the powers to do justice". It is not doubt true that, ordinarily, courts would respect the agreement between the parties which is born out of a meeting of their minds and out of considerations of convenience. But the courts are not obliged to do so in every case. With respect, I am unable to agree with the learned judge that notwithstanding the agreement between the parties, the court can, contrary to the express terms of the agreement, act on its own and remove the restriction of jurisdiction which was placed on itself. In any case I find that the attention of the Hon"ble Judge was possibly not drawn to the decision of the Supreme Court in Hakam Sing Vs. Gammon (India) Ltd., , in which it was clearly held that an agreement which restricts the jurisdiction to one of the courts to try the dispute is not contrary to public policy.

16. For the view I have taken hereinabove, it is not necessary for me to express any opinion on merits on the other contentions raised in this petition.

17. I, accordingly, direct that the present petition be returned to the petitioner for being presented in the court of competent jurisdiction.

18. There will be no orders as to costs.