
(2007) 01 MP CK 0049
In the Madhya Pradesh High Court

Diwan Jodharam, Contractor

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 05-01-2007

Acts Referred:

Arbitration Act, 1940 — Section 20, 8

Citation : (2007) 3 ARBLR 229 : (2007) 2 MPLJ 369

Hon'ble Judges : Arun Mishra, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Arun Mishra, J.

These appeals have been preferred by the contractor aggrieved by an order passed by the learned court below refusing to appoint an arbitrator on the ground that contractor had failed to resort to the Clause 63 of General Conditions of Contract, 1956 framed by the Engineering Department of Central Railway, thus, occasion to appoint an arbitrator did not arise.

Facts are similar in these appeals, they are being reflected from MA No. 259/1996. An application was filed under Sections 8 and 20 of Arbitration Act, 1940 by the contractor-M/s. Diwan Jodharam. He had undertaken work of electrification on Khandwa-Harsood section, an agreement was entered into on 12.12.1989 pursuant to acceptance of tender. The work was to be completed by 21.05.1990, time was extended till 31.08.1991, after the aforesaid period a sum of Rs. 13,72,750.73 paise became due, out of which payment of Rs. 1,55,000 remained towards running and final bill. Several times request was made to prepare running and final bill but the prayer was not acceded to. The Railways has also not refunded the earnest money and security of Rs. 45,000 and guarantee amount of Rs. 45,000 was not released. Bank guarantee was encashed without intimation to the contractor, there was, thus, dispute between the parties as to payment of Rs. 2,20,000. Notice was given on 20.03.1992 but

still the amount was not paid. Thus, prayer was made to appoint an arbitrator and to refer the dispute and difference. Reply was submitted by Union of India contending that as per Clause 63 of General Conditions of Contract the claim was not raised by the contractor before the Railways as such notice seeking appointment of an arbitrator was premature. In spite of extension of time, work was not completed by the contractor. Amount has to be paid by the contractor, security and bank guarantee were forfeited.

Learned District Judge, Hoshangabad, as per the impugned orders passed in these appeals has declined to appoint an arbitrator as contractor had failed to take resort to Clause 63 of the General Conditions of Contract, 1956. Having failed to raise a dispute before the Railways, it was not open to contractor to seek appointment of an arbitrator. No claim was submitted as envisaged under Clause 63. Aggrieved by the impugned orders, these appeals have been preferred.

Shri V.R. Rao, learned senior counsel appearing with Shri S. Rao for appellant has submitted that it is apparent from notice dated 20.03.1992, particularly paragraph 3 thereof that dispute as contemplated under Clause 63 was raised, final bill payment and refund of security and bank guarantee are the only disputes between the parties and these disputes were specifically raised in notice dated 20.03.1992 in which there is a reference to an earlier notice dated 30.09.1991, thus, the learned District Judge had erred in not appointing an arbitrator, there was clearly a dispute which has arisen between the parties as contemplated under the contract. He has contended that these aspects are to be considered within the ambit of arbitration clause by the arbitrator and not by the court at the time of dealing with an application seeking appointment of an arbitrator. He has placed reliance on a decision of this Court in *State of M.P. v. Continental Construction (P) Ltd.* 1978 MPLJ 474.

Shri Prakash Upadhyay, learned Counsel appearing for respondents has placed implicit reliance on Clause 63 of General Conditions of Contract, 1956. He has submitted that merely by serving a notice it cannot be said that any claim was raised by the contractor, contractor has failed to refer the dispute to Railways as such there was no occasion to seek appointment of an arbitrator under Clause 64. He has relied upon a decision of Apex Court in *M/s. Shetty's Construction Company Pvt. Ltd. Vs. M/s. Konkan Railway Corpn. Ltd.* and Another, . He has submitted that final claim must be definite, certain and crystallized under diverse heads, simple notice served for appointment of an arbitrator cannot be treated to be a claim raised within the purview of Clause 63 of General Conditions of Contract.

The central issue is whether contractor had exhausted Clause 63 of General Conditions of Contract. Clause 63 deals with settlement of disputes. It is necessary under the aforesaid clause that contractor shall refer all disputes or differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the works or after their completion and

Railways shall within a reasonable time notify the decision thereon in writing and the decision shall be final and binding upon the contractor and shall be without appeal. Clause 64 of the General Conditions of Contract provides if the contractor is dissatisfied with the decision of Railways or if the Railways fails to make a decision within reasonable time, but except in any of the excepted matters referred to in Clause 63, within ten days or after the expiry of reasonable time, demand in writing that such matter in question, dispute or difference be referred to arbitration. Such demand for arbitration shall be delivered to the Railways and only the specified matters shall be referred to arbitration. Clauses 63 and 64(1) of General Conditions of Contract, 1956 are quoted below:

63. All disputes or differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the works or after their completion and whether before or after the determination of the contract, shall be referred by the contractor to the Railway and the Railway shall within a reasonable time after their presentation make and notify decisions thereon in writing. The decisions, directions and certificates with respect to any matters decision of which is specially provided for by these conditions, given and made by the Railway, or by the Engineer on behalf of the Railway, which matters are referred to hereinafter as excepted matters shall be final and binding upon the contractor and shall not be set aside or be attempted to be set aside on account of any informality, omission, delay or error in proceeding in or about the same or on any other ground or for any other reason and shall be without appeal.

64(1) If the contractor be dissatisfied with the decision of the Railway 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 but except in any of the excepted matters referred to in Clause 63 of these conditions the contractor may within 10 days of the receipt of the communication of such decision or after the expiry of the reasonable time as the case may be, demand in writing that such matter in question, dispute or difference be referred to arbitration. Such demand for arbitration shall be delivered to the Railway by the contractor and shall specify the matters which are in question, dispute or difference and only such dispute or difference of which the demand has been made and no other shall be referred to arbitration.

In the application filed by the contractor no details have been mentioned how he claimed an amount of Rs. 1,55,000. Notice (Ex. P/I) dated 20.03.1992, specially para 3 has been relied upon by Shri Rao, learned senior counsel. Para 3 of notice (Ex. P/1) is quoted below:

3. By virtue of completion of above work, my client was due to receive his final bill amount to Rs. 1.25 lacs including security deposit amount. Though more than seven months have passed from the date of completion of work the final bill payment has not been arranged to my client till date, in spite of my client's notice dated 30.09.1991 through his lawyer Shri R.S. Bhatnagar of Bhopal.

Notice dated 30th September, 1991 has not been placed on record. Question is whether from paragraph 3 of notice (Ex. P/1) in which there is reference to notice dated 30.09.1991, it can be said that contractor had exhausted the remedy provided under Clause 63 of the General Conditions of Contract before the Railways and has obtained a final decision on the dispute or difference. Answer is "No". It is clear that notice (Ex. P/1) in para 3 only contains a demand of the amount, it does not amount to raising of the claim as envisaged under Clause 63 of the General Conditions of Contract, 1956. Final claim must be definite, certain and crystallized under various heads, merely vague averment made that up to the running and final bill aforesaid amount was due that too in a legal notice served by the counsel cannot be said to be a reference of dispute to the Railways under Clause 63 for final adjudication, it is only thereafter that final adjudication is made as per Clause 63, question of appointment of an arbitrator arises except in the case of excepted matters as provided in Clause 63 of General Conditions of Contract.

The Apex Court has considered what can be said to be final claim in *Shetty's Construction Co. Pvt. Ltd. v. Konkan Railway Corporation Ltd. and Anr.* (supra) and has laid down thus:

In short, the final claims must be definite, certain and crystallized under diverse heads either flowing from the final bill or even earlier arising out of the working of the contract even when the final bill is still not prepared by the authorities. Therefore, instead of reading down the term "final claims" on disputed matters as found in Clause 63.1.1 to mean only "final claims" arising out of final bills, it must be held that the term "final claims" on disputed matters as employed by Clause 63.1.1 would cover final claims on disputed matters either lodged during the currency or even after its termination or even after preparation and submission of final bills by the authorities. In all these cases, the final claims on disputed matters contemplated by Clause 63.1.1 must be crystallized and firm final claims which are required to be considered by the authorities for giving their response. In other words, the claims should not be in a fluid state and the appellant-contractor should not consider them to be not final but tentative to be revised or reconsidered at his end in future for raising ultimate claims on the relevant heads of dispute. If the appellant-contractor himself treats these claims at an earlier stage to be in a fluid state and not final, neither he can expect the authorities to respond thereto nor can he treat the authorities to have failed to respond thereto so as to lose the benefit of the procedure of arbitration binding between the parties as per the contractual terms.

Considering the averments made in the notice (P/1) and as conceded by Shri Rao, Senior Counsel that earlier notice dated 30th September, 1991 is not available and was not placed on record, it cannot be said that any final claim of definite nature was placed before the Railways for decision as per Clause 63 on which decision was required to be taken as such question of appointment of an arbitrator did not arise. Having failed to exhaust the remedy under Clause 63 it

cannot be said that any breach was committed by the Railways in not appointing an arbitrator, hence, no prayer could have been made in the court below to seek appointment of an arbitrator. The question before the Apex Court was similar in Shetty's Construction Co. Pvt. Ltd. v. Konkan Railway Corporation Ltd. and Anr. (supra), was thus:

8. In the light of the aforesaid rival contentions, the following points arise for our determination:

(1) Whether the appellant-contractor had followed the procedure laid down by Clause 63.1.1 of the contracts in connection with the demand for appointing arbitrators for resolving the disputes between the parties ?

The Apex Court in Shetty's Construction Co. Pvt. Ltd. v. Konkan Railway Corporation Ltd. and Anr. (supra) has laid down that without following procedure of agreement arbitrator cannot be appointed thus (para 11 of Arb. LR):

10. It is not in dispute between the parties that if it is found on facts that the appellant-contractor had followed the gamut of the aforesaid clauses and had carried out his part of the contractual obligations and if the respondent-authorities have not responded to the demand for arbitration raised by the appellant-contractor after following the aforesaid procedure, then there would remain no occasion for the respondent-authorities for submitting that the procedure of arbitration and appointment of arbitrators and umpire as laid down by the remaining Clauses 63.3(a), 63.3(b) and other clauses up to Clause 63.3(g) should remain binding between the parties. Then it would be open to the court to pass appropriate orders regarding appointment of independent arbitrators for resolving the disputes raised by the appellant-contractor even dehors the machinery laid down by Clauses 63.3(a) to 63.3(g) dealing with the procedure of arbitration. On the other hand, if it is found that the appellant-contractor had not followed the procedure of Clause 63.1.1 and not raised appropriate demand within the time schedule laid down therein, then the respondent-authorities cannot be treated to have committed breach of the said provisions so as to leave an open field for the court to appoint independent arbitrators for resolving the disputes between the parties.

Reliance has been placed by Shri V.R. Rao, Senior Counsel on a decision of this Court in State of M.P. v. Continental Construction (P) Ltd. (supra), question was altogether different in the aforesaid case, it was with respect to the reach and ambit of arbitration clause. Question is altogether different here in the instant case about failure of the contractor to exhaust the remedy provided in Clause 63 of the General Conditions of Contract, 1956, only after recourse to it arbitrator could have been appointed not otherwise. Thus, decision provides no sustenance to the cause espoused by the appellant.

Thus, it is clear from the aforesaid discussion that contractor having failed to approach the Railways under Clause 63 could not have prayed for appointment of an arbitrator before the court below.

Resultantly, I find no merit in these appeals. Appeals being devoid of merit are hereby dismissed. No order as to costs.