

(1986) 11 DEL CK 0012

In the Delhi High Court

Case No : Original Miscellaneous Petition No. 359 of 1985

Haryana Engineering and Foundry Works

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 18-11-1986

Acts Referred:

Citation : (1987) 12 DRJ 84

Hon'ble Judges : Mahesh Chandra, J

Bench : Single Bench

Advocate : Mukul Rohatagi and Vikramjit Sen, for the Appellant;

Judgement

Mahesh Chandra, J.

(1) I have heard the learned counsel for the parties and have gone through the file and after giving my considered thought to the matter before me, I have come to the following findings.

(2) The facts giving rise to this application are that the petitioner entered into an agreement with respondent No. I-Union of India through the Department of Railways and in pursuance thereof purchase order No. 211/S/ 163/TSO dated 30th September 1978 was placed upon the petitioner and when part of the supplies had been made there under by the petitioner, the said contract was rescinded by respondent No. I and respondent No. I thereafter proceeded with risk purchase against the petitioner. It was under these circumstances that the petitioner filed an application u/s 20 of the Arbitration Act in the court of Senior Sub-Judge, Ambala, but on the representation of respondent No. I made vide letter No. 211/S/163/TSO dated 20th May 1983 (annexure "P2") the said application was withdrawn by the petitioner and thereafter the matter in dispute between the parties was referred to the arbitration of respondent No. 2 vide letter No. 211/S/163/TSO dated 30th May 1983 (annexure "P3"). After the arbitrator had entered upon reference, the petitioner filed its statement of claim (annexure "P4") and when it was insisted by the petitioner upon the arbitrator

that the claim of the petitioner be also adjudicated upon, the arbitrator directed vide order dated 28th August 1985 (annexure "P7") that "the arbitrator will consider matters only referred to him in the term of reference", which has led the petitioner to file this petition. The contention of the petitioner is that the arbitrator should be categorically told to adjudicate upon the entire matter in dispute including the claim of the petitioner. These facts have not been disputed by the respondent but it is contended that the order of reference relates only to the claim arising out of risk purchase and as such the arbitrator cannot be directed to take into account the claim of the petitioner.

(3) The first question to be considered is whether the reference to the arbitrator relates to the entire dispute or it relates only with regard to the claim of the Union of India arising out of risk purchase. It would be appropriate to reproduce here annexure "P3" whereby reference was made. It reads as under: "NORTHERN Railway No. 211-S/163/TSO - Headquarters Office, Baroda House, New Delhi. Dated: 30-5-1983. Shri. Shyamji Singhal, Controller of Stores) N. Rly. Hd. Qrs. Office, Baroda House, . New Delhi. Sub : Supply of 2,22,000 nos. of Cast Iron. Anticreep Bearing Plates B.G. for 52 Kgs/90R rails to Rdso Drg. No. T-10142/Adv. Alt. Nil against this office Purchase order No. 211-S/163/TSO, dated 30-9-1978 placed on M/s. Haryana Engg. & Foundry Works, Kalka Chandigarh Road, Ambala City. Dear Sirs, . The General Manager, Northern Railway has appointed you the Sole Arbitrator to settle the dispute against the above noted purchase order. You are, Therefore, requested to kindly enter into the reference: The amount of claim involved in this case is Rs. 22,412.00 approximately. This claim is towards the extra expenditure incurred in risk purchase of 1,47,270 nos. of bearing plates and general damages. against the subject purchase order. The U.O.I, is the claimant. The latest address of the firm is given below :- M/s. Haryana Engg. & Foundry Works, Kalka Chandigarh Road, Ambala City. Thanking you, Yours faithfully, (Kamleshwar Nath) for General Manager/Engg.

(4) The first para of annexure "P3" shows that the -General Manager of Northern Railway has appointed respondent No. 2 as Sole Arbitrator "to settle the dispute against the above noted purchase order". The said purchase order. as given under subject to annexure "PS", is "Supply of 2,22,000 nos. of Cast Iron Anticreep Bearing Plates-B.G. for 52 kgs/90R . rails to Rdso Drg. No. 10142/Adv. Alt. Nil against this office purchase order No. 211-S/163/TSO, dated 30-9-1978 placed on M/s. Haryana Engg. & Foundry Works, Kalka Chandigarh Road, Ambala City". In the face of these facts, it would be difficult to accept the contention of the Union of India that the entire dispute arising out of the purchase order No. 211 S/163/TSO dated 30th September, 1978 has not been referred to the arbitration of respondent No. 2. The appointment of arbitrator was to adjudicate upon the dispute against the purchase order of supply of 2,22,000 nos. of Cast Iron Anticreep Bearing Plates- B.G. for 52 kgs/90R rails to Rdso Drg. No. T-10142/Adv. Alt. Nil. That being the position, the arbitrator cannot now limit himself to adjudicate upon the risk purchase of only 1,47,270 numbers of

bearing plates and general damages. The learned counsel for the respondent has relied upon para 2 of the said letter but it cannot be accepted on the face of it that second para of the said letter can limit the scope of arbitration to only the risk purchase of 1,47,270 numbers of bearing plates and general damages. At best, para 2 of the said order of reference can mean that the General Manager has while making the . reference made special mention of the claim of the Union of India which would even otherwise be included in the entire dispute arising out of purchase order No. 211-S/163/TSO dated 30/9/1978. The reference was to settle the entire dispute which, inter alia, included the claim of the Union of India for Rs. 22,97,412.00 approximately. Para 2 cannot control para I of the order of reference. It cannot in any manner limit, the jurisdiction of the arbitrator to adjudicate upon the entire dispute arising out of the main purchase order. That being the position, the arbitrator could not justifiably say that he would limit his inquiry only to risk purchase part thereof. Where the reference" is with regard to the entire dispute arising out of a contract it cannot be accepted that the arbitrator would look into the claim of only one party and not of the other party to the dispute. It would be rather incumbent upon the arbitrator to adjudicate upon the entire dispute otherwise the other party would suffer irreparably. Once reference has been made of the dispute arising out of the whole purchase order, it would be essentially necessary for the arbitrator to adjudicate it fully and finally and under the circumstances it would be difficult to accept that it could be deemed to be fully, and finally adjudicated-upon if the arbitrator considers the claim of only one party and ignores the claim of other party. It is the entire matter and the entire dispute, which has been referred, which has to be determined by the arbitrator. That being the position, it is difficult to accept in the instant case that the arbitrator can refuse to go into the claim of the petitioner-company. Under these circumstances, neither under law nor under equity it would be appropriate for the arbitrator to ignore the claim of the petitioner-company and consequently the petitioner is entitled to the relief claimed in this petition.

(5) Furthermore, what cannot be lost sight of is that it was the petitioner who had first approached the court of Senior Sub-Judge, Ambala, with his application u/s 20 of the Arbitration Act for reference of dispute to arbitrator and it was at the instance of the Union of India that the petitioner withdraw his petition. It cannot now be accepted that the petitioner had withdrawn his petition to be left in lurch ; rather the petition was withdraw because the respondent-Union of India was prepared to refer the matter in dispute to the arbitration in accordance with the arbitration agreement and it would be no gain saying now that reference was limited only to the claim of the Union of India merely because of para 2 of the order of reference. Even assuming for the same of argument though not accepting that in para, 2 of the ; order of reference the claim was mentioned as arising out of risk purchase of 1,47,270 number of bearing plates and general damages against the subject purchase order, this cannot control para I of the order of reference whereby the entire dispute arising out of purchase order No.

211-S/163/TSO dated 30/9/1978 was referred to the arbitration of respondent No. 2 and respondent No. 2 cannot dispose of finally and come to a final conclusion with regard to the claim of the Union of India even without going into the claim of the petitioner and, for that reason also it would be in the fitness of things that the arbitrator adjudicates upon the entire matter including the claim of the petitioner. In fact, after withdrawal of the petition u/s 20 of the Arbitration Act by the petitioner at the instance of the Union of India, the Union of India would be now estopped from alleging that the arbitrator cannot adjudicate upon the claim of the petitioner.

(6) Let us consider the matter from yet another angle. The petitioner has already withdrawn his application u/s 20 of the "Arbitration Act at the instance of the respondent-Union of India. The Union of India has made a reference thereby referring the entire dispute arising out of purchase order No. 211-S/163/TSO dated 30th September 1978 to the arbitrator for settling the dispute against the said order. If the arbitrator were to limit himself only to the claim of the Union of India, in that event the petitioner would be left with practically no remedy thereafter to enforce his claim inasmuch as the principles of res judicata may come in his way. In any case it would only result in multiplicity of proceedings and if it so chances that the arbitrator makes a non-speaking award it might be difficult for the petitioner to even challenge the award u/s 30 with the result that the petitioner would suffer an irreparable loss which this Court cannot permit. Keeping in view my discussion above, I hold that under the circumstances of the present case, it is incumbent upon the arbitrator to adjudicate upon the entire dispute arising out of purchase order No. 211-S/163/TSO dated 30/9/1978 which includes the claim of the petitioner as also the claim of the Union of India.

(7) The last question to be considered in this petition is whether this Court can give any direction to the arbitrator u/s 33 of the Arbitration Act. Section 33 of the Arbitration Act read as under : Section 33. "Any party to an arbitration agreement or any person claiming under desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits:

Provided that where the Court deems it just and expedient it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit."

(8) A bare reading of this Section shows that any party to an arbitration agreement can have the effect of arbitration agreement or an award determined by applying to the Court and the Court shall decide that question. This would, inter alia, include the scope of reference also because when a reference is made under an arbitration agreement, the question of scope of reference flows from the arbitration agreement and in view thereof it would follow that it would be open to this Court to issue necessary directions under this Section on the request of the petitioner. It was held in Municipal Board Vs. Eastern U.P. Electric Supply

Co. Ltd. and Others, , that where the question to decide was "whether the arbitration agreement was operative and effective or not, whether it should be enforced or not, or whether it was frustrated or not, or whether it fell along , the other clauses of the contract or not, are all questions regarding the effect of arbitration agreement and Sections 32 and 33 Arbitration Act bar suits for decision of such questions. The fact must be determined only by means of an application u/s 33 of the Arbitration Act." It was further held therein that "an arbitrator may decide whether he has jurisdiction over the dispute riot but his decision is not binding upon the court because he cannot confer jurisdiction upon himself by a wrong decision. It is for the court to decide exclusively whether he has. jurisdiction or not and this is done through an application u/s 33." In the instant case also the question before this Court is whether the reference made covers the claim of the petitioner also or not and this is a question which can only be determined in a petition u/s 33 of the Arbitration Act and not by a separate suit. Obviously in view of the bar contained in the Arbitration Act it cannot be presumptuous to accept that it should be decided after the award has been made by the arbitrator either u/s 30 or u/s 33 of the Arbitration Act because that would not only result in multiplicity of proceedings but further also may not be feasible where the award is non-speaking one. The best remedy under these circumstances would be that it should be determined by the Court u/ s 33 of the Arbitration Act. Placed as the petitioner is, there is no other provision under the Arbitration Act to which he may have recourse to. Under these circumstances, it is only u/s 33 of the Arbitration Act that he can get the scope of reference determined and get necessary directions for the arbitrator to look into his claim.

(9) No other point has been urged before me.

(10) In view of my discussion and findings above, I allow this petition and hold that the arbitrator is bound to consider the claim raised by the petitioner in the arbitration proceedings and the arbitrator shall make his award after taking into account the claim of the petitioner. A copy of this order may be sent to the arbitrator.