

(1999) 06 KAR CK 0062

In the Karnataka High Court

Case No : Civil Miscellaneous Petition No. 45 of 1998

Jose and Mani Constructions Private Limited, Bangalore

APPELLANT

Vs

Wheel and Axel Plant, Bangalore

RESPONDENT

Date of Decision : 08-06-1999

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 20, 45, 7, 8

Citation : (1999) 6 KarLJ 435

Hon'ble Judges : V.K. Singhal, J

Bench : Single Bench

Advocate : Sri A. S. Ramachandra Rao, for the Appellant; Sri N.S. Srinivasan, for the Respondent

Judgement

1. Petitioner entered into a contract with the Wheel and Axel Plant, Railway Administration, Bangalore. No claim certificate was given by the petitioner stating "we do hereby declare that no other claim is outstanding against the Wheel and Axel plant, Railway Administration, Bangalore, for the work done or for labour or for material supplied or any other account and the payment of this bill shall be in final settlement in respect of the work". This certificate appears to have been issued on 13-12-1997. Thereafter bill was prepared and it was mentioned that the bill was accepted under protest for claim. In the letter dated 26-11-1997, request was made to make the payment immediately. It is also stated that on completion of casting and curing of the tank 25% and on completion of other finishing works at 10% payment based on the schedule have not been made as per the agreement. Petitioner has written a letter on 15-12-1997 pointing out that a penalty of Rs. 4,14,950/- being 20% of the contract value have wrongly been imposed on him. The bill was signed under protest. Prayer was made to operate Clause 17(4) of the General Conditions of the Contract. Under this clause the time was to be extended subject to certain penalty.

2. The conditions of the contract provide the procedure for settlement of

disputes. Clause 43(2) provides as under:

"43(2) The contractor shall not be entitled to make any claim whatsoever against the Railway under or by virtue of or arising out of this contract, nor shall the railway entertain or consider any such claim, if made by the contractor, after he shall have signed a "No-claim" certificate in favour of the Railway in such form as shall be required by the Railway, after the works are finally measured up".

Reliance is placed on the decision given in the case of Damodar Valley Corporation Vs. K.K. Kar, , wherein it was observed as under:

"It appears to us that the question whether there has been a full and final settlement of claim under the contract is itself a dispute arising "upon" or in relation to or "in connection with" the contract. These words are wide enough to cover the dispute sought to be referred. The respondent's contention is that the contract has been repudiated by the appellant unilaterally as a result of which he had no option but to accept that repudiation because if the appellant was not ready to receive the goods he could not supply them to him or force him to receive them. In the circumstances, while accepting the repudiation, without conceding that the appellant had a right to repudiate the contract, he could claim for damages for breach of contract. Such a claim for damages is a dispute or difference which arises between himself and the appellant and is "upon" or "in relation to" or "in connection with" the contract".

Reliance is also placed on the decision of the Apex Court in the case of Union of India (UOI) and Another Vs. L.K. Ahuja and Co., . In that case also the appellant accepted the full and final payments of the agreements which had been executed by it and no claim declaration was given. It was contended that since there is no dispute, the application filed u/s 45 of the Arbitration Act is not maintainable. The Apex Court interpreted the provisions of Section 20 to find out as to whether there was any valid claim, and it was observed:

"8. In view of the well-settled principles we are of the view that it will be entirely wrong to mix up the two aspects, namely, whether there was any valid claim for reference u/s 20 of the Act, and, secondly, whether the claim to be adjudicated by the arbitrator, was barred by lapse of time. The second is a matter which the arbitrator would decide unless, however, if on admitted facts a claim is found at the time of making an order u/s 20 of the Arbitration Act, to be barred by limitation. In order to be entitled to ask for a reference u/s 20 of the Act, there must be an entitlement to money and a difference or dispute in respect of the same. It is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of the final bill, the right to get further payment would normally arise and it is also true that on settlement of the final bill, the right to get further payment gets weakened but the claim subsists and whether it does subsist, is a matter which is arbitrable. In this case, the claim for reference was made within three years commencing from April 16, 1976 and the application was filed on December 18, 1976. We are, therefore of

the view that the High Court was right in this case. See in this connection the observations of this Court in Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, .

In the case of Re Eyre and Corporation of Leicester, it was observed when the Court is satisfied that there is a dispute within the submission; the parties have failed to concur in the appointment of an arbitrator; there has been a proper notice given; the Court may appoint an arbitrator. The word "may" was interpreted as "must" and it was observed that there is no discretion and the Court below ought not to have the power to say there is to be an arbitration or not, but only to decide as to the choice of an arbitrator.

3. According to the submission of the learned Counsel for the petitioner the power which has been conferred u/s 11 of the Arbitration and Conciliation Act, 1996, is only for the appointment of an Arbitrator and therefore whether a dispute exists or not cannot be examined at this stage.

4. Section 7 of the Arbitration Act refers to Arbitration Agreement by which the parties to submit all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

5. u/s 8 a judicial authority before which an, action is brought in a matter which is the subject-matter of arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

6. Therefore it is necessary that there should be an arbitration agreement. If there is no stipulation for appointment of an arbitrator in the agreement then the arbitrator cannot be appointed. Similarly, if in the agreement if a particular matter is not considered to be a dispute, then also arbitrator cannot be appointed. It is in the light of this legal position, the power has to be exercised u/s 11. The judgments which have been relied by the learned Counsel for the petitioner are in respect of those agreements where the dispute existed and there was no clause of the nature of Clause 43(2) referred to above. If the no-claim certificate is issued, as specified in Clause 43(2) the petitioner is debarred from demanding a reference to the arbitration. In view of this specific agreement, it could be considered that the application submitted for appointment of an arbitrator is misconceived. For the parties to refer the matter for arbitration, there must be a dispute. The parties themselves have agreed by an agreement the circumstances under which particular matter could not be considered a dispute. In these circumstances, though the petitioner has received the amount under protest, the civil suit is the only remedy. Signing the no-claim certificate under Clause 43(2) disentitled the petitioner from referring the matter to arbitration.

7. Petition having no force is dismissed.