
(1994) 03 SC CK 0024
In the Supreme Court Of India
Case No : Civil Appeal No. 4022 of 1994.

K. Sasidharan

APPELLANT

Vs

Kerala State Film Development Corpn.

RESPONDENT

Date of Decision : 17-03-1994

Acts Referred:

Arbitration Act, 1940 — Section 20

Citation : AIR 1994 SC 2534 : (1994) 2 ARBLR 86 : (1995) 1 BC 18 : (1994) 3 JT 578 : (1994) 2 KLT 1065 : (1994) 2 SCALE 811 : (1994) 4 SCC 135 : (1994) 3 SCR 82

Hon'ble Judges : N. Venkatachala, J;K. Ramaswamy, J

Bench : Division Bench

Advocate : G. Viswanatha Iyer, Dilip Pillai and E.M.S. Anam, for the Appellant; A.T.M. Sampath, for the Respondent

Final Decision : Dismissed

Judgement

1. Leave granted. Heard both the counsel.

2. The appellant had on January 27, 1982 had entered into a contract with the respondent to construct a theatre. He completed the work and handed over the same to the respondent in May, 1985. During the execution of the contract a dispute had arisen on certain items of the work which was sought to be decided by arbitration. The appellant, therefore, filed O.S. No. 20 of 1986 in the Court of Subordinate Judge, Trivandrum u/s 20 of the Arbitration Act, 1940, for short 'the Act' for reference to an Arbitrator. The respondent contended that there is no arbitrable agreement under the contract. Over-ruling the objection, the Subordinate Judge by his order dated June 5, 1986 held that Clause 73 of the Madras Detailed Standard Specifications for short MDSS would apply to the dispute which contains an arbitrable clause and, therefore, by order dated 2nd July, 1986 appointed a retired District Judge as an Arbitrator. On appeal by the respondent in M.F.A. No. 460 of 1986, by order dated December 15, 1986, the Division Bench of the Kerala High Court held that Clause 73 of MDSS is

inapplicable. There is no arbitrable agreement for reference to the Arbitrator. Thus, this appeal by special leave.

3. Sri E.M.S. anam, learned Counsel for the appellant, placing reliance on clause 12 of the "General Condition of the Contract" contended that all items of work referred to therein would include MDSS in the addenda volume. Clause 73 of the arbitrable agreement therein gets attracted to the dispute. Therefore, the trial court was right in its conclusion that the dispute is arbitrable under Clause 73. The High Court was not right in its contra conclusion.

4. Having given our anxious consideration, we find that the contention raised by the appellant is not tenable. Admittedly, the contract contains Article 60 which provides "arbitration of any dispute or difference between the parties to the contract either during the progress or after completion of the works or the interpretation of the contract or as any matter or thing arising thereunder except as to the matters left to the sole discretion of the Corporation Engineer under the Clauses of the contract". While entering into the contract this clause was admittedly excluded. In Article 2 of the "General Conditions of the Contract" Clause (b) provides that "the Original Agreement, with its accompanying Schedules form part of the Contract Documents and shall be kept by the Corporation but the Contractor shall be supplied with a copy of the agreement and copies of Tender Notification, General Conditions of the Contract, specifications, Drawings and relevant schedules all duly attested by the Contractor and the Managing Director". Clause (f) postulates that "the terms of the Contract cannot be added to, varied or reduced by any oral agreement previous or subsequent to its signature".

5. Clause 12 relied upon by Sri Anam, the relevant part reads thus : "And item of work shall be carried out as per Madras Detailed Standard Specifications and its addenda volume and shall be deemed to have been included here". What Clause 12 postulates is that the General conditions regarding the execution of the work will be as carried on 'in accordance with the conditions etc. contained in MDSS and addenda. General Conditions of the Contract provided the accepted rates, units, tentative quantities etc. which were given in the Schedule A and the time schedules for the work was given in Schedule B. The list and details regarding supply of drawings were given in Schedule C. The short description given in the schedule A for different items were only the General specifications. Thereafter, the above 12th clause has been added, namely, "All items of work shall be carried out as per Madras Detailed Standard Specifications and its addenda volume and shall be deemed to have been included here." The arbitration agreement is collateral to the substantial stipulation of the contract. It is merely procedural and ancillary to the contract and it is a mode of settling the disputes, though the agreement to do so is itself subject to the discretion of the Court. Arbitration is distinguishable from other clauses in the contract. The other clauses set out the obligations which the parties have undertaken towards each other binding them, but the arbitration clause does not impose on one of the

parties an obligation towards the other. It embodies an agreement of both parties with consensus ad idem that if any dispute arises with regard to the obligations undertaken therein which one party has undertaken towards the other, such a dispute shall be settled by a Tribunal of their own constitution. Therefore, arbitration clause in a contract, stands apart from rest of the contract, it must be construed according to its language and in the light of the circumstances in which it was made. Russell on Arbitration, 19th Edition, p.27 states that "a court cannot make a contract between the parties. In general its power would appear to end with interpretation. It applies equally to the establishment of an arbitration agreement".

6. The appellant and the respondent having specifically excluded the arbitration clause in the contract, by necessary implication they excluded the Clause 73 in MDSS. If it were to be contra it must expressly and specifically be incorporated in the contract which admittedly was not done. When the parties to the agreement, in terms of the documents, have not incorporated the arbitration agreement in Clause 73 of MDSS, it cannot, by implication, be imported by interpretation that the terms of Clause 73 including arbitration clause therein stands attracted. By necessary implication, it conflicts with the expressly agreed terms of the contract. Thereby, it is manifest that what the terms in the MDSS, referred to in Clause 12 is only of the terms referable to the execution of the work, etc. and not one concerned with an agreement to refer any dispute arising between the parties to an arbitration, at a later point of time, or during the course of the execution of the work or after the completion thereof any dispute arising between the parties in relation to the contract.

7. Therefore, the High Court is right in its conclusion that there is no arbitrable agreement for reference to the Arbitrator. The Civil Court in the circumstances cannot exercise its power u/s 20 of the Act to appoint an arbitrator and refer the dispute for arbitration.

8. The appeal is accordingly dismissed. No costs.