

(1998) 06 KAR CK 0018

In the Karnataka High Court

Case No : Civil Miscellaneous Petition No. 26 of 1997

Lachmanna B. Horamani

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 11-06-1998

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 21

Citation : AIR 1998 Kar 405 : (1998) ILR (Kar) 2385 : (1998) 5 KarLJ 614

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

Bench : Single Bench

Advocate : Sri B.P. Gandhi, for the Appellant; Sri A.S. Mahesh, Government Advocate, for the Respondent

Judgement

1. The petitioner has prayed for appointment of an Arbitrator on the basis of the dispute having arisen in the execution of contract taken by him from the respondent. Notice dated 22-1-1996 was served by the petitioner on the Chief Engineer. Reminder was sent on 2-2-1996 and ultimately this petition was filed on 3-9-1997.

2. Learned counsel for the respondent has pointed out that the agreement does not contain any clause for arbitration. Clause 29 could not be construed as a clause for arbitration. Reliance is placed on the decision given in the case of State of U.P. Vs. Tipper Chand, , where there was clause empowering Superintending Engineer with power of supervision. The said Clause 22 was as under:

"Except where otherwise specified in the contract the decision of the Superintending Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, design, drawing and instructions herein mentioned. The decision of such Engineer as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or things whatsoever in any way arising out of or relating to the contract, designs, drawing specifications,

estimates, instructions, orders or these conditions, or otherwise concerning the works, or the execution or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment of the contract by the contractor, shall also be final, conclusive and binding on the contractor".

The Apex Court came to the conclusion that the clause does not contain any express arbitration agreement nor such an agreement can be spelt out from its terms by implication, there being no mention in it of any dispute, much less of a reference thereof.

In this very judgment decision in the case of Governor General v Simla Banking and Industrial Company Limited and Dean Chand v State of Jammu and Kashmir and Ram Lal Jagan Nath Vs. Punjab State and Another, , were referred. In the case of Dean Chand, supra, the relevant clause was.--

"For any dispute between the contractor and the Department the decision of the Chief Engineer, PWD, Jammu and Kashmir, will be final and binding upon the contractor".

The language of this clause was considered materially different from the clause in the case of Tipper Chand, supra. In the case of Ratnlal, the clause was as under:--

"In matter of dispute, the case shall be referred to the Superintending Engineer of the Circle, whose order shall be final".

3. Learned counsel for the respondents have also relied on the decision given in the case of State of Karnataka v K. Sudhakar Reddy. Clause 30 of the agreement in this case was as under:

"Except where otherwise specified in the contract and subject to powers delegated to him by Agricultural Produce Market Committee, under the Code Rules, then in force the decision of the Chairman for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of specifications, designs, and instructions herein before mentioned and as to the quality of workmanship; or materials used on the work or as to any other question, claim, right, matter, thing whatsoever if any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or those conditions, failure to execute the same whether arising during the progress of work, or after the completion or abandonment thereof."

It was interpreted that the clause does not spell out an arbitration agreement.

4. On the other hand, the learned counsel for the petitioner has referred to the case of Balkishan A. Devidayal Vs. State of Maharashtra, . Clause 15 of the agreement was as under:--

"15. Whenever any doubt, difference or dispute shall hereafter arise touching the construction of these presents or anything herein contained or any matter or

things connected with the said lands or the working or non-working thereof or the amount or payment of any rent or royalty reserved or made payable hereunder the matter in difference shall be decided by the lessor whose decision shall be final".

It was interpreted that this clause spells out an arbitration.

5. This judgment was again considered by the Apex Court in the case of State of Orissa v Damodar Das and it was observed that agreement to refer disputes or differences to arbitration must be expressly or impliedly spelt from the clause. The relevant clause 25 of the agreement was as under:--

"25. Decision of Public Health Engineer to be final.--Except where otherwise specified in this contract, the decision of the Public Health Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications; drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work, or as to any other question, claim, right, matter or thing whatsoever in any way arising out of, or relating to, the contract, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or the sooner determination thereof of the contract".

It was also held that Clause 25 of the agreement does not contain an arbitration agreement nor does it envisage any difference or dispute that may arise or had arisen between the parties in execution of the works for reference to an Arbitrator.

6. Reliance is also placed on the decision in the case of M. Keshava Raju v Karnataka State Road Transport Corporation. Clause 29 of the arbitration agreement in the said case was interpreted as under:

"Clause 29(a) -- If any dispute or difference of any kind whatsoever were to arise between the Executive Engineer/ Engineer-in-Chief and the contractor regarding the following hereinbefore mentioned.--

(i) The meaning of the specifications, designs, drawings and instructions hereinbefore mentioned;

(ii) The quality of workmanship or materials used on the work; and

(iii) Any other question, claim, right, matter, thing whatsoever, in any way arising out of or relating to the contractor, designs, drawings specifications, estimates, instructions or orders or those conditions or failure to execute the same whether arising during the progress of the work or after completion, termination or abandonment thereof, the dispute shall, in the first place, be referred to the Vice-Chairman and Managing Director who has jurisdiction over the work specified in the contract. The Vice-Chairman and Managing Director shall, within a period of

90 days from the date of being requested by the contractor to do so, give written notice of his decision to the contractor.

Managing Director's decision is final:

(b) Subject to other form of settlement hereafter provided, the Vice-Chairman and Managing Director's decision in respect of every dispute or difference so referred shall be final and binding upon the contractor. The said decision shall forthwith be given effect to and contractor shall proceed with the execution of the work with all due diligence".

It was held that a perusal of the clause shows that the parties had agreed to refer their disputes to the Vice-Chairman and Managing Director having jurisdiction over the work specified in the contract. The reference to the words "dispute" and "reference" clearly indicate the intention of the parties of getting their disputes settled through an Arbitrator under the Act.

7. I have considered over the matter. The Arbitration and Conciliation Act, came into force on 25-1-1996. Section 21 refers to commencement of arbitral proceedings as the date on which the request for referring the dispute to arbitration is received by the respondent. The petitioner sent the notice on 22-1-1996. In the absence of any averment to the contrary, it is considered that it must have been received by the respondent after 25-1-1996.

8. Now coming to the point as to whether Clause 29 of the agreement in the present case could be impliedly considered as a clause for referring the matter to arbitration in a dispute. The judgment which has been relied on by both sides are very clear. If there is a clause for reference in case of dispute to any authority then it has to be considered as a clause for arbitration by implication. Clause 29 in the case of the petitioner is construed as a clause for making the arbitration to the Chief Engineer in case of dispute. It is not simply a case of conferring the power of supervision as was in the case of Tiperchand. The present clause clearly mentions all the disputes and reference to the Chief Engineer. Therefore the judgment relied by the learned Counsel for respondent are not applicable. It is considered that there is a clause for making the reference to an Arbitrator in case of dispute. The petitioner has already served the notice and there was no response. I therefore consider that the Arbitrator has to be appointed on account of failure of the respondent in responding to the request of the petitioner. It may also be observed that a suit has been filed by the petitioner in respect of part of the claim in a Civil Court in 1995. Since the matter now sought to be covered under notice is for the entire dispute, the filing of the suit will not come in the way of the petitioner.

I accordingly appoint the present Chief Engineer as the sole Arbitrator in exercise of the power conferred u/s 11 of the Arbitration and Conciliation Act, 1996. Both the parties would be free to submit their claims and counter-claims.

9. Petition is accordingly, allowed.