

(2007) 10 AP CK 0082

In the Andhra Pradesh High Court

Case No : Arbitration Application No. 52 of 2007

Lakshmi Builders

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 23-10-2007

Acts Referred:

Arbitration Act, 1940 — Section 20

Arbitration and Conciliation Act, 1996 — Section 11, 11(5), 11(6), 11(7), 16

Citation : (2008) 3 ALD 66 : (2007) 6 ALT 617

Hon'ble Judges : V.V.S. Rao, J

Bench : Single Bench

Advocate : B. Nalin Kumar, for the Appellant; C.V. Vinitha Reddy, for the Respondent

Final Decision : Dismissed

Judgement

V.V.S. Rao, J.—The applicant is a firm dealing with civil contracts. On 1-10-2001 first respondent entered into contract agreement No. 62/CAO/ C/SC/2001 for "development of sports complex at RRC ground", Secunderabad, construction of swimming pool, construction of building complex, construction of spectrogallery and other connected works. The estimated value of the work is Rs. 1,86,74,718.49 ps. The award of contract was preceded by tender process, acceptance of offer of the applicant by letter dated 18-4-2001. The work is to be completed within a period of nine months from date of acceptance. Applicant alleges that the work is of specialized nature and the actual quantities in the agreement exceeded over and above 25% of agreement quantities. It is also alleged that new items of works cropped up for which rates and quantities have to be fixed. Without doing this, applicant was pressurized to go ahead with new items of work pending settlement of rates and applicant estimates the work at Rs. 2,75,63,975/-. It is also alleged that during the course of execution, changes were made in the orientation of swimming pool as well as pre-structure plans due to which the completion period was extended from time to time upto 31-10-2005.

2. A supplementary agreement dated 31-3-2003 was entered into. The applicant allegedly accepted the rates under protest, but while entering into other two supplementary agreements on 25-3-2004 and on 29-11-2004, applicant was forced to sign without protest and therefore he wrote a letter on 3-4-2004 demurring free will and consent in signing those agreements. After completing the work applicant addressed a letter on 20-3-2006 raising final list of nine claims which are: (i) payment of final bill as prepared by the department; (ii) refund of security deposit; (iii) difference in the amount due towards excavation in cutting rock requiring blasting but done by chiseling; (iv) difference in rates for excavation in rock for laying the diverted AC Pressure Pipe Line; (v) amount due on account of difference in rates as accepted by the Railways and quoted by the applicant for additional items/quantities offered during the negotiations and those given as counter offer by the administration; (vi) extra expenditure due to maintaining the operation of the main pool by purification with bleaching powder and alum; (vii) additional expenditure involved in continuing the Head Office and site establishment, machinery etc., beyond the date of completion on Railway account; (viii) loss of profit due to prolongations of work on Railway account at 10% P.A.; (ix) interest on all the claims at 18% p.a. He also gave "no claim certificate" dated 20-3-2006 reserving right to claims as enumerated herein.

3. The applicant was paid an amount of Rs. 11,17,761/- towards final bill of 6-4-2006 and therefore he sent another letter dated 13-9-2006 modifying the claims made earlier. Thereafter he addressed a letter dated 13-9-2006 to the General Manager to refer the dispute to arbitration in terms of Clause 14 of General Conditions of Contract (GCC). In response thereto, the General Manager - second respondent herein; constituted Arbitration Tribunal consisting of Presiding Arbitrator and two joint arbitrators to adjudicate claims (i) to (iv) and (vi) to (ix). Claim (v), namely, amount due on account of difference in rates as accepted by the Railways and quoted by the applicant for additional items/ quantities offered during the negotiations and those given as counter offer by the administration. Aggrieved by the same, applicant moved this application u/s 11(5) of the Arbitration and Conciliation Act, 1996 (the Act, for brevity), praying this Court to appoint an arbitrator to adjudicate the disputes between the parties.

4. Respondents filed elaborate counter affidavit through Deputy Chief Engineer, Construction-III, South Central Railway (SCR), Hyderabad, fifth respondent herein. The gist of the counter, to the extent relevant, may be indicated as follows. The application filed u/s 11(5) of the Act is not maintainable in view of the ratio laid down by the Supreme Court in Ace Pipeline Contracts Private Limited Vs. Bharat Petroleum Corporation Limited, . That claim (v) is an excepted matter, which is not arbitrable, was informed by SCR to applicant by letter dated 19-10-2006 and therefore the same is not arbitrable. Reference is made to the decisions in General Manager Northern Railways and Another Vs. Sarvesh Chopra, , Sri Harsha Constructions Vs. Union of India (UOI) and Others, and A.R.K. Murthy Vs. Senior Divisional Engineer, South S.C. Railway and Others, . Respondents have elaborately adverted to the pre and post-contract transactions

on claim (v) made by the applicant. It is however not necessary to deal with these averments for the purpose of this application. Alternative plea of respondents may also be noticed here. The General Manager already constituted Arbitration Tribunal referring eight claims for adjudication. As held by the Supreme Court in *Union of India v. M.P. Gupta* (2004) 10 SCC 504, as per Clause 64 of GCC only Railway officials have to be appointed as arbitrators and therefore the application for appointment of sole arbitrator for adjudication of claim (v) is not maintainable.

5. The applicant has filed rejoinder affidavit denying the allegation that claim (v) is an excepted matter. He also asserts that there is no decision within the meaning of Clause 39 of GCC. It is also asserted that dispute raised by the applicant imminently falls for consideration before the arbitrator.

6. Learned Counsel for the applicant submits that notwithstanding the qualified no due certificate issued by his client, an arbitrable dispute exists under Clause 64 of GCC, that excepting the plea of applicant the General Manager, SCR, referred eight claims to a Departmental Arbitral Body and the communication on the part of the employer in not referring claim (v) gives rise to an action u/s 11(6) of the Arbitration Act. Adverting to the plea of respondents that it is an excepted item, learned Counsel submits that when the work quantity exceeds 25% of contract works, rates for such extra items of work have to be fixed as per Clause 39 of GCC and Clauses 2.5 and 2.6 of Special Conditions of Contract (special conditions, for brevity). In the absence of any decision with regard to fixation of rates for extra items of work by the competent authority, the matter shall not be rendered excepted from the arbitration field. In this regard learned Counsel distinguished the decisions of Supreme Court in *Food Corporation of India Vs. Surendra, Devendra and Mahendra Transport Co.*, as well as the decisions of this Court in *Sri Harsha Constructions* (3 supra) and *A.R.K. Murthy* (4 supra).

7. While reiterating counter contentions in opposing the application, learned Standing Counsel for SCR relies on decisions cited herein above. He submits that when applicant made claims, claim (v) was rejected as not arbitrable and the same was communicated to applicant. Therefore the matter squarely falls under Clause 63 of GCC as "excepted matter". He also submits that special conditions are also referred in Clause 63 and therefore whether Clause 39 of GCC or Clauses 2.5 and 2.6 of special conditions apply, the situation would be the same.

8. The only point that arises for consideration is whether claim (v), namely, payment of amount due on account of difference in rates and for additional items, is an excepted item or not within the scope of Clause 63 of GCC and therefore is not arbitrable?

9. Learned Counsel for the applicant does not dispute that if an item or a claim or a dispute is an excepted item within the scope of Clause 63 of GCC, the same is not arbitrable, but learned Counsel would contend that claim (v) is not an

excepted item. According to him, unless a decision is taken regarding the rates for items in excess of 25% in accordance with Clauses 2.5 and 2.6 of special conditions and Clause 39 of GCC and such decision results in denying the claim of applicant, the matter cannot be treated as an excepted item. Whether there is any decision on this aspect.

10. The Deputy Chief Engineer, Construction-III, SCR-fifth respondent; filed elaborate counter affidavit. In paragraph 4 of counter affidavit, respondents have taken irretrievable stand that the claim (v) towards difference in rates is covered by Clause 39 of GCC. It is also averred that the claim made by the applicant in connection with the amount due on account of difference in rates as accepted by SCR and quoted by applicant for additional items offered during negotiations and the counter offer made by fifth respondent is not arbitrable. It is also averred that by letter dated 19-10-2006, applicant was informed about non-arbitrability of claim (v). In the rejoinder affidavit filed by applicant, receipt of letter dated 19-10-2006 is not denied except reiterating the allegation that there is no decision within meaning of Clause 39 of GCC. Letter No. W.Con.29/A/329, dated 19-10-2006 reads as under:

SOUTH CENTRAL RAILWAY Head Quarters Officer, Works Const. Branch, Secunderabad. Letter No. W.Con.29/A/329 Dt. 19-10-2006 M/s. Lakshmi Builders, No. 12-5-38/2, Vijayapuri, South Lallaguda, Secunderabad - 500 017. Sirs,

Sub: In the matter of Arbitration Claims/ Disputes arising out of Development of Sports Complex at RRC Grounds - Construction of Swimming Pool.

Agt. No. 63/CAO/C/SC/01, dt. 1 -10-2001.

Ref: Your Lr. No. LB/3, dt. 13-9-2006.

With reference to your Lr cited above it is to state that negotiations were conducted, Rates were fixed and all the amounts as due have been paid duly releasing the Security Deposit.

Claim No. 5 towards difference in Rates indicated in your Lr is an "EXCEPTED MATTER" under Clause 39 of General Conditions of Contract and is not arbitrable. Hence claim No. 5 is not tenable. As such claim No. 5 is not being referred for Arbitration.

However the remaining claims viz., claims at Nos. 1, 2, 5, 6, 7, 8 and 9 though outside the Terms/purview of the agreement but are Arbitrable. Hence these claims are being referred for arbitration.

This is for your information please.

Yours faithfully, Xxx For (S.K. Mittal) CE/C-I Chief Admn. Officer/Con., Copy to Dy CE/C-I II/SC

For information and necessary action please

11. Reading Clause 63 together with Clause 39 of GCC and Clauses 2.5 and 2.6 of special conditions, there cannot be any doubt that a decision was taken by the respondents after negotiations with the applicant that claim (v) towards difference in rates indicated in the letter of the applicant dated 13-9-2006 is an "excepted matter". There was a decision thereon and therefore the submission of learned Counsel for the applicant that no such decision was taken is misconceived. Even otherwise absence of decision does not make any difference insofar as treating a claim as "excepted matter" within the scope of Clause 63 of GCC.

12. In *Sarvesh Chopra* (2 *supra*), the Supreme Court considered the scope of Clause 63 of GCC of Northern Railway. Be it noted the same is in pari material with clause 63 of GCC of SCR. In that case, *Sarvesh Chopra* was contractor for the work of construction of bored piles of 500 Mts. dia for widening and raising a bridge. When disputes arose he moved an application u/s 20 of Arbitration Act, 1940, for referring to arbitrator with six claims. A learned single Judge of Delhi High Court directed two claims to be referred and declined to make such an order insofar as claims 3 to 6 treating them as "excepted matters" within the meaning of Clause 63 of GCC. The Division Bench however reversed the order of learned single Judge and directed to refer four claims to arbitration. The matter then came up before Supreme Court. A submission was made on behalf of the contractor that so long as the remedy of decision by someone in the Railways is not provided for, the claim of the contractor cannot be left in the lurch by including the same in "excepted matters". The Supreme Court considered this question in paragraphs 7 and 8 of reported judgment and held as below.

In our opinion those claims which are covered by several clauses of the Special Conditions of the contract can be categorized into two. One category is of such claims which are just not leviable or entertainable. Clauses 9.2, 11.3 and 21.5 of the Special Conditions are illustrative of such claims. Each of these clauses provides for such claims being not capable of being raised or adjudged by employing such phraseology as "shall not be payable", "no claim whatsoever will be entertained by the Railways", or "no claim will/shall be entertained". These are "no claim", "no damage", or "no liability" clauses. The other category of claims is where the dispute or difference has to be determined by an authority of the Railways as provided in the relevant clause. In such other category fall such claims as were read out by the learned Counsel for the respondent by way of illustration from several clauses of the contract such as General Conditions Clause 18 and Special Conditions Clauses 2.4.2 (b) and 12.1.2. The first category is an "excepted matter" because the claim as per the terms and conditions of the contract is simply not entertainable; the second category of claims falls within "excepted matters" because the claim is liable to be adjudicated upon by an authority of the Railways whose decision the parties have, under the contract, agreed to treat as final and binding and hence not arbitrable. The expression

"and decision thereon shall be final and binding on the contractor" as occurring in Clause 63 refers to the second category of "excepted matters".

13. As can be seen from the above observations, as per terms and conditions of the contract, certain matters are "excepted matters" and insofar as other matters are concerned a decision by a Railway authority renders them "excepted matters". In the case on hand, claim (v) admittedly involves the payment of amount on account of difference in rates and rates for additional items/quantities of work, which are allegedly accepted by the railways as quoted by the applicant. When once a decision is taken thereon by letter dated 19-10-2006, extracted herein above, there cannot be any doubt that claim (v) no more remains an arbitrable dispute.

14. In *Sri Harsha Constructions* (3 supra), a Division Bench of this Court considered the scope of Clause 63 read with Clause 39 of GCC. It was contended therein for the Railways that Clause 39 having been included in Clause 63, all the items mentioned in Clause 39 in respect of which a dispute is raised, would automatically become "excepted matter". The Division Bench placed reliance on paragraph 8 of *Sarvesh Chopra* (2 supra), and laid down as under.

From the above conclusions, particularly conclusion No. (ii), which is more relevant and necessary in the present context, it is clear that "in-house" remedy for settlement of claims need not necessarily be provided for under the GCC; and merely because a special provision with regard to settlement of claims through "in-house" procedure was not made, still the claim has to be treated as an "excepted matter"...

...Therefore, the above mentioned decision (1 supra) of the Apex Court is more helpful to the Railways rather than the contractor and lends support to the contentions urged by the learned Senior Counsel appearing on behalf of the Railways....

...As could be seen from Clause 63 of the GCC, the claims in Clause 39 of the GCC are the claims among various claims made in the clauses of the agreement. When such claims are agreed to be "excepted items", and as such they shall not come within the four corners of arbitrable items.

(emphasis supplied)

15. Yet again in *A.R.K. Murthy* (supra), a learned single Judge of this Court considered a similar question. After referring to the case-law and Seven Judge Bench (Full Bench) decision in *Pampa Hotels Ltd. Vs. A.P. Tourism Development Corporation Ltd. (APTDCL)* and Another, , this Court laid down as under:

Section 16 is said to be the recognition of the principle of *Kompetenz-Kompetenz*. The fact that the Arbitral Tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction, only means that when such issues arise before it, the Tribunal can, and possibly, ought to decide them. This can happen when the parties have gone to the Arbitral Tribunal

without recourse to Section 8 or 11 of the Act. But where the jurisdictional issues are decided under these sections, before a reference is made, Section 16 cannot be held to empower the Arbitral Tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the Arbitral Tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it. That is the position arising out of Section 11(7) of the Act read with Section 16 thereof. The finality given to the order of the Chief Justice on the matters within his competence u/s 11 of the Act are incapable of being reopened before the Arbitral Tribunal. In *Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co.*, what is considered is only the fact that u/s 16, the Arbitral Tribunal has the right to rule on its own jurisdiction and any objection, with respect to the existence or validity of the arbitration agreement. What is the impact of Section 11(7) of the Act on the Arbitral Tribunal constituted by an order u/s 11(6) of the Act was not considered. Obviously, this was because of the view taken in that decision that the Chief Justice is not expected to decide anything while entertaining a request u/s 11(6) of the Act and is only performing an administrative function in appointing an Arbitral Tribunal. Once it is held that there is an adjudicatory function entrusted to the Chief Justice by the Act, obviously, the right of the Arbitral Tribunal to go behind the order passed by the Chief Justice would take another hue and would be controlled by Section 11(7) of the Act.

16. Learned Counsel for the applicant made an effort to distinguish the decision/determination with reference to Clause 39 of GCC and Clauses 2.5 and 2.6 of special conditions. The submission is that the special conditions prevail over general conditions and in the absence of any decision with regard to Clause 63 of GCC, it cannot be treated as "excepted matter". The submission ignores the fact that Clause 63 also refers to special conditions. Clause 63 of GCC reads as under:

63. Matters finally determined by the Railway - All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its 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 120 days after receipt of contractor's representation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provisions has been made in Clauses 8 (a), 18, 22(5), 39, 43(2), 45(A), 55, 55-A, 57, 57-A, 61(1), 61 (2) and 62(1)(b) of General Conditions of contract or in clause of the special conditions of the contract shall be deemed as "excepted matters" and decision of the Railway authority, thereon shall be final and binding on the contractor provided further that "excepted matters" shall stand specifically excluded from the purview of the Arbitration clause and not be referred to arbitration.

17. A plain reading of the above would show that all disputes and difference of any kind in respect of which provisions have been made for adjudication by

authority of Railways, namely, Clauses 8(a), 18, 22 (5), 39 etc., of GCC or in any clause of special conditions shall be deemed as "excepted" for the arbitration clause. Any reference to an arbitrator on such disputes would amount to dragging the party to arbitration. This has to be avoided as held by Supreme Court in Patel Engineering Ltd. (7 supra).

18. The Arbitration Application, for the above reasons, devoid of any merit and is accordingly dismissed. There shall be no order as to costs.