
(2012) 09 P&H CK 0216
In the Punjab And Haryana At Chandigarh
Case No : Arbitration Case No. 164 of 2011

M/s. Trehan Construction Engg. and Govt. Contractor	APPELLANT
Vs	
Union of India and Another	RESPONDENT

Date of Decision : 28-09-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11

Citation : (2012) 09 P&H CK 0216

Hon'ble Judges : A.K. Sikri, C.J

Bench : Single Bench

Advocate : S.K. Mahajan, for the Appellant; Nitin Kumar, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, C.J.—Respondent herein, namely, General Manager, Northern Railway, had issued notice inviting tenders regarding the construction of washable Apron at Platform No. 2 along with the drain between lines No. 1 and 2 and through ancillary work in the replacement of washable apron at Jalandhar City station. The petitioner was also one of the bidders who responded to the aforesaid notice. After evaluating the bids received by the respondents, the petitioner emerged as successful bidder and was awarded contract vide letter dated 03.08.2009. The work was for an estimated cost of Rs. 1,24,35,962/-. According to the petitioner, after awarding of this work, with an intention to complete the same within the stipulated period, he made all necessary arrangements spending huge amount thereupon. The respondents did not provide complete block at the site where the work was to be executed and which was a fundamental pre-condition and obligation of the respondents. Ultimately, the respondent i.e. Deputy Chief Engineer (Construction) Northern Railway, Jalandhar City wrote a letter dated 01.04.2011 (Annexure P-6) to the Senior DOM, Northern Railway, DRM Office, Ferozepur Cantt. stating that though the work had been awarded to the petitioner on 13.08.2009 but traffic block to execute the work has not been sanctioned till date by the said Division despite regular chasing. The said Division

was accordingly requested to sanction traffic block of line No. 2 for 45 days at the earliest to enable the petitioner to execute the work. It was followed by another communication dated 07.04.2011 (Annexure P-7) from the office of Deputy Chief Engineer (Const.) Northern Railway, Jalandhar City to the same Senior DOM, Northern Railway, DRM Office, Ferozepur Cantt. In this communication, there is a reference to meeting held between the two authorities on 06.04.2011 wherein after discussion the office of Deputy Chief Engineer (Const.) was told that "no traffic block will be sanctioned for above mentioned work as there is no need of this work by the operating department".

2. Since the traffic block was not sanctioned by the concerned authorities, obviously, it could not be handed over by the respondents to the petitioner for undertaking the work awarded to the petitioner. This was treated as breach on the part of the respondents by the petitioner and in these circumstances the petitioner issued legal notice dated 10.08.2011 (Annexure P-8) pointing out aforesaid violations on the part of the respondents in fulfilling its contractual obligations by not providing the block. It was accordingly stated that the petitioner was no more legally bound to execute the work because of the said failure and stipulated the claims therein with request to refer the same to the Arbitrator. A perusal of this legal notice further shows that as many as 9 claims are made and at the end this legal notice calls upon the respondents to refer those claims to the Arbitrator in the following manner:-

Now by means of this legal notice I hereby call upon you to refer all the aforesaid claims to the arbitrator within the stipulated period of one month from the date of receipt of this notice failing which my client concern shall be constrained to avail legal remedy in the competent court of law in that eventuality you shall be held responsible for all the costs and consequences in suing therefrom.

3. As one month period was given for appointment of the Arbitrator and the respondents did not appoint the Arbitrator, the present petition u/s 11 of the Act is filed on 18.11.2011 for appointment of the Arbitrator contending that the respondents have forfeited its right to appoint the Arbitrator in accordance with the arbitration clause and therefore, it is the Court which has the necessary jurisdiction to appoint the Arbitrator.

4. In the reply filed to this petition, the petition is contested on various grounds. It is not necessary to even take note of all those grounds. The main case set up by the respondents is that this petition is pre-mature, inasmuch as the procedure which is agreed to between the parties as per the General Conditions of the Contract (GCC) has not been followed. In this behalf, reliance is placed on Clauses 63 and 64 of the said GCC. It is pointed out that as per Clause 63, before making a demand for arbitration, it was necessary for the petitioner to make reference of disputes/claims to the Railway Authorities and the Railway Authorities after receipt of dispute/claims within 120 days have to give decision thereupon and if that decision was not palatable to the petitioner or on failure to take this decision that demand for arbitration could be made in accordance with

Clause 64 thereof.

5. After going through these clauses, I am of the opinion that there is force in the submission made by learned counsel for the respondents. These clauses are 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 GM and the GM shall within 120 days after receipt of the contractor's representation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in clauses 8, 18, 22(5), 39, 43(2), 45(a), 55, 55-A(5), 57, 57-A, 61(1), 62(2) and 62(1) to (xiii) (B) of General Conditions of contractor or in any clause of the special conditions of the contract shall be deemed as "excepted matters" (matters not arbitrable) and decisions 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.

64. Demand for Arbitration:-(1)(i) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, save the "excepted matter" referred to in clause 63 of these conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to Arbitration.

A conjoint reading of these two clauses makes it abundantly clear that the matters are to be first determined by the Railway Authorities. For this purpose, all the disputes and differences of any kind whatsoever arising out of or in connection with the contract, are to be referred by the Contractor to the Railway and within 120 days after the receipt of those disputes and differences, the Railway Authority is to take decision thereupon. Clause 63 further mentions that this decision shall be final and binding on the contractor. Only after this decision is taken and if the contractor is aggrieved thereby, which would mean that if the decision is not acceptable to the contractor (that eventuality would be when the claims are rejected in full or partial) that contractor is entitled to make a demand for arbitration in accordance with clause 64 of the Northern Railway General Conditions of Contractor Regulations and Instructions.

Clause 64 of GCC categorically states that such demand is to be made if the decision is not taken within 120 days by the Railway Authorities or the disputes

or differences still subsist after the decision is taken.

6. In the present case, as noted above, there was not even a communication by the respondents to the petitioner for non-providing the traffic block. No doubt, inter departmental communication clearly reveals that the concerned authority had decided not to sanction traffic block forming an opinion that there was no need of this work by the operating department. In that sense, in so far as the present work is concerned, the Railway had taken the decision not to go ahead with the execution thereof and therefore, such a decision of the respondents would definitely give rise to the claims by the petitioner treating the aforesaid inter departmental communication as breach of the contract. At the same time, when there was no communication from the respondents to the contractor i.e. the petitioner and even when the petitioner was treating the failure on the part of the respondents to fulfill its contractual obligation thereby absolving the petitioner from execution of the work, the petitioner was supposed to follow the procedure contained in clauses 63 and 64 of the GCC as mentioned above. However, the petitioner jumped the gun and straight away resorted to the arbitration as per clause 64 skipping over the rigours of Clause 63. In the legal notice dated 10.08.2011, which is the only communication by the petitioner to the respondents, after making the claims, the petitioner straightway demanded arbitration. Such a demand is clearly pre-mature. Law on this aspect is no more in dispute or res-integra and stands conclusively determined by the Supreme Court in the case of M/s. Shetty's Construction Company Pvt. Ltd. Vs. M/s. Konkan Railway Corpn. Ltd. and Another, . This petition is accordingly dismissed as pre-mature.

However, at the same time, liberty is granted to the petitioner to take recourse to clauses 63 and 64 in the manner stated in the contract. There shall be no order as to costs.