

(1999) 04 AHC CK 0101
In the Allahabad High Court
Case No : C.M. Application No. 12 of 1996

N.K. Mehrotra and another

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 12-04-1999

Acts Referred:

Arbitration Act, 1940 — Section 20, 21
Arbitration and Conciliation Act, 1996 — Section 85(2)
Arbitration and Conciliation Ordinance, 1996 — Section 11(4)

Citation : (1999) 3 AWC 1810

Hon'ble Judges : Sudhir Narain, J

Bench : Single Bench

Advocate : Mahesh Gautam and Vijay Gautam, for the Appellant; V.K. Goel, for the Respondent

Judgement

Sudhir Narain, J.—The petitioner has prayed that an arbitrator be appointed in respect of the reference made by the petitioner in the matter of contract No. E/10/TC dated 12.8-1994.

2. The version of the petitioner is that North Eastern Railway, Izzatnagar, Bareilly issued a tender notice through the Civil Engineering Department of the Railway Division of North Eastern Railway No. 1 /94 dated 3.2.1994 in respect of the contract work. The petitioner submitted a tender which was duly accepted and he started working on the basis of the said contract. The terms and conditions of the contract which was assigned by the petitioner were governed by the Regulations for Tenders and Contracts of the Engineering Department. In this respect, clauses 63 and 64 of the Regulations for Tenders and Contracts are relevant which are quoted herein :

"63. All disputes and differences of any kind whatsoever arising but 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 a

reasonable time after receipt of the contractor's presentation 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 18, 22 (5), 39, 45 (a), 55, 55A (5), 61 (2) and 62 (1) (xiii) (5B) (e) (b) of the General Conditions of contract or in any clause of the special conditions of the contract shall be deemed as "excepted matters", and decisions 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 shall not be referred to arbitration."

64. (1) (1), In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective right and liabilities of the parties on any matter in question, dispute or difference on any account, or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within a reasonable time, then and in any such case, save the "excepted matters" referred to in clause 63 of these conditions, the contractor, after 90 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference, may be referred to arbitration.

(II) The demand for arbitration shall specify the matters which are in question dispute or difference only such dispute (a) or difference(s) in respect of which the demand has been made shall be referred to arbitration and other matters shall not be included in the reference.

(III) If the contractor(s) does not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Government that the final bill is ready for payment, he/they will be deemed to have waived his/their claims and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims.

....."

The petitioner sent a notice dated 24.8.1995 to the General Manager, North Eastern Railway, Gorakhpur submitting his claim and prayed that either the claim be accepted or a competent officer be appointed in respect of his claim. As the General Manager did not take any steps in the matter the petitioner submitted an application before the Civil Judge, Bareilly for appointment of an arbitrator u/s 20 of the Arbitration Act, 1940 on 13th August, 1996 alleging that he had given a notice on 24.8.1995 in respect of the claim and asking for appointing an arbitrator but as no action was taken, he submitted the application for appointment of the arbitrator. During the pendency of the said application, Arbitration and Conciliation Ordinance, 1996 (Ordinance No. 8 of 1996) came into force. Clause (II) of the Ordinance provided for appointment of an arbitrator and the authority for such appointment was vested with the Chief Justice of the High Court. The Civil Judge took the view that in view of the enforcement of the

said Ordinance, the application filed by the petitioner for appointment of the arbitrator u/s 20 of the Arbitration Act, 1940 was not maintainable. The application was returned on 24.8.1996 and the cause of the return was shown as "not maintainable." It did not disclose any reason as to why it was not maintainable. The petitioner, after the application was returned, has filed the application u/s 11(4) of the Arbitration and Conciliation Ordinance, 1996 for appointment of the arbitrator. The Ordinance has been repealed and has been replaced by Arbitration and Conciliation Act No. 26 of 1996 (In short the Act).

3. I have heard Sri Mahesh Gautam, learned counsel for the applicant and Sri V.K. Goel, learned counsel for the respondents.

4. Learned counsel for the respondent took a preliminary objection that the petitioner has not made any demand for arbitration before the appropriate authority and, therefore, his application for appointment of arbitrator is not maintainable and secondly, in accordance with para 64 of the terms of the contract, the claim should have been presented after 90 days but within 180 days of his presenting his final claim on disputed matters. The claim which was forwarded by the petitioner on 24.8.1995 has been annexed as Annexure-1 to the rejoinder-affidavit. It is a detailed claim submitted by the petitioner before the General Manager and the prayer is that the claim be accepted and if not accepted, a competent authority be appointed in respect of his claim. His prayer that competent authority be appointed relates only in respect of the arbitration matter. There was no question of appointment of any competent authority if it was not in respect of any arbitration under the contract. If the General Manager failed to appoint a person as an arbitrator, the petitioner was justified in approaching the Court for appointment of an arbitrator.

5. The second preliminary objection raised by Sri Goel, is that the arbitration proceedings having commenced prior to the enforcement of Act 26 of 1996, the provisions of Arbitration Act, 1940 were applicable. Section 85 of the Act provides for repeal and saving. Subsection (2) is a saving clause which reads as under :

"85. Repeal and savings.-

(1)

(2) Notwithstanding such repeal,--

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force ;

(b) all rules made and notifications published, under the said enactment shall to the extent to which they are not, repugnant to this Act, be deemed respectively to have been made or issued under this Act."

Section 21 of the Act provides that unless otherwise agreed by the parties, arbitration proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

6. The petitioner had submitted his claim on 24.8.1995. The date of the receipt of the notice has not been specifically stated in this petition. The petitioner had filed application u/s 20 of the Arbitration Act and in paragraph 20 of the said application, it has been stated that he had submitted his claim on 24.8.1995. In para 21, he has stated that the cause of action arose on 12.7.1994 and thereafter again on 30.12.1995 by registered post and lastly on 8.8.1996. The application itself was filed on 13.8.1996. These dates are prior to the date of the enforcement of the Ordinance as well as the Act 26 of 1996. The application filed by the petitioner was to continue before the learned Civil Judge. The learned Civil Judge without assigning any reason had returned the application filed by the petitioner. The said original application which has been filed by the petitioner has been annexed as Annexure-1 to the application. Considering the facts and circumstances of the case and in the interest of justice, the petitioner is permitted to take the petition which he had filed before the learned Civil Judge and present it again to the same Court who shall entertain it and proceed in accordance with law. He shall dispose of the same expeditiously possibly within six months.

7. The present application is disposed of with the direction given above. The parties shall, however, bear their own costs.