
(2009) 08 AP CK 0046

In the Andhra Pradesh High Court

Case No : Arbitration Application No. 101 of 2008

Sai Engineering Contractors

APPELLANT

Vs

General Manager, South Central Railway and Others

RESPONDENT

Date of Decision : 06-08-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(12), 11(5), 11(6), 11(9), 45

Citation : (2009) 5 ALT 417 : (2009) 3 APLJ 391

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

Bench : Single Bench

Advocate : Padmavathi, for the Appellant; C.V. Rajeeva Reddy, for the Respondent

Final Decision : Dismissed

Judgement

V.V.S. Rao, J.—This application by M/s.Sai Engineering Contractors - a firm represented by its Managing Director u/s 11(6) of the Arbitration and Conciliation Act, 1996 (Arbitration Act, for brevity) seeks appointment of sole arbitrator to resolve dispute in relation to and arising out of the Agreement, dated 23.01.2006 between applicant and respondents.

2. The applicant is a contractor inter alia undertaking various works with Railways. Construction of Steel Structural Foot Over Bridge (FOB) on the northern side connecting TTD choultry and reservation complex at Tirupathi was entrusted to applicant under an agreement, dated 23.01.2006. The same is governed by terms and conditions of tender notification, contract entered into between the parties, and General Conditions of Contract (GCC) as well as Special Conditions of Contract (SCC). Clauses 63 and 64 of GCC provide for arbitration in the event of disputes between parties. Be that as it is, the work entrusted to applicant is required to be completed on or before 25.11.2005 and to be maintained for a period of six months from the certified date of completion. The applicant procured steel from reputed manufacturer, got it approved by Engineer-in-Chief and utilised the same. However, the firm was asked to remove FOB and

execute additional works which allegedly had no bearing with the work entrusted. This, according to applicant, was due to change in the thinking wherein it was decided to have the existing road extended at the site where structures were raised. Therefore, applicant refused to do so and thereafter respondents got the structure removed and measured quantity of steel. In spite of repeated requests, bills were not paid and therefore, applicant demanded payment for the work done. Respondents refused. Applicant raised dispute and finally on 14.09.2007, applicant requested respondents to refer the matter to arbitration. As there was no response, applicant approached the Chief Justice/His Designate of this Court.

3. Initially counter affidavit has been filed on behalf of respondents 1 and 2 on 19.12.2008. Subsequently, when applicant filed additional affidavit on 19.03.2009 denying execution of that part of contract containing Clause 21 of SCC, respondents 1 and 2 filed additional counter thereto. Application is opposed on three grounds. As per Clause 21 of SCC, application is not maintainable as claims/disputes raised by applicant for adjudication through arbitration exceeding the value of more than 20% of contract value. Secondly, applicant has signed main agreement and even if there is no signature on relevant page containing Clause 21 of SCC, it is bound by the agreement and lastly, even if an arbitrator is appointed, the Chief Justice/His Designate has to direct parties to appoint arbitrators as per the agreement conditions and an outsider cannot be appointed as sole arbitrator. In this connection, they point out that as per procedure contemplated a panel of arbitrators would be communicated to contractor out of which he has to choose one and the General Manager of the Railways would appoint another contractor out of panel communicated and also nominate the Chairman of the Tribunal. Respondents also contend that clauses 63 and 64 have no application in view of the Clause 21 of SCC.

4. Learned Counsel for applicant made elaborate submissions touching upon various aspects of the case. Reliance is placed on G. Ramachandra Reddy and Co. Vs. Chief Engineer, Madras Zone, Military Engineering Service, ; Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, ; Union of India Vs. Vengamamba Engineering Co., Juputi, Krishna Dist. and another, ; S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, ; Punj Lloyd Limited v. Petronet MHB Limited (2006) 2 SCC 638; Union of India (UOI) and Another Vs. V.S. Engineering (P) Ltd., ; Bharat Sanchar Nigam Ltd. and Another Vs. Motorola India Pvt. Ltd., ; National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., and Union of India (UOI) Vs. Singh Builders Syndicate, . These decisions are cited in support of the contention that when once application is moved u/s 11(6) of the Arbitration Act, respondents lose the right to appoint arbitrator and that when there is likelihood of bias on the part of Department Arbitrators, Court must ignore arbitral procedure under the agreement and appoint sole arbitrator on its own. Learned standing counsel for Railways in support of the three contentions noticed hereinabove relied on State of Andhra Pradesh v. Obulu Reddy (2001) 10 SCC 30; Union of India v. Chandalavada Gopalakrishna Murthy (2008) 4 SCJ

849; Great Offshore Ltd. Vs. Iranian Offshore Engineering and Construction Company, ; Wescare (India) Limited v. Subuthi Finance Limited 2009 (1) R.A.J. 695 (Mad) ; VISA International Ltd. Vs. Continental Resources (USA) Ltd., ; Shakti Bhog Foods Limited Vs. Kola Shipping Limited, ; Deepak Kumar Bansal Vs. Union of India (UOI) and Another, ; Union of India (UOI) Vs. Singh Builders Syndicate, ; Government of India, Ministry of Defence and Another Vs. Aluminium Photo Industries Private Limited, and Siddhardha Constructions Pvt. Ltd. Vs. Union of India (UOI) and Others, .

5. There is no dispute that applicant entered into contract agreement No. 20/06/GTL/Central on 23.01.2006 for the work of erecting steel structural FOB. It is not denied that contract agreement includes seven Schedules from Schedule A to Schedule G as well as general note for the schedule and SCC attached to contract agreement. There is also no dispute that conditions of tender, GCC and SCC form part of contract. Prescribed SCC also contains clause that if claim/dispute is in excess of 20% of the value of contract, it is not arbitrable under clauses 63 and 64 of GCC. The relevant Clause 21 reads as under.

21. WORKS CONTRACT PROCEDURE FOR SETTLING OF DISPUTES OF CONTRACTORS: The provision of clause - 63 & 64 of the General Conditions of Contract will be applicable only for settlement of claims/disputes, for values less than or equal to 20% of the original value (excluding the cost of materials supplied free of cost by Railway) of the contract or 20% of the actual value of work done (excluding the value of work rejected) under the contract, whichever is less. When claims/disputes are of value more than 20% of the value of the original contract or 20% of the value of the actual work done under the contract whichever is less, the contractor will not be entitled to seek such disputes/claims for reference to arbitration and the provisions of clause - 63 & 64 of the General Conditions of Contract will not be applicable for referring the disputes to be settled through arbitration.

2) The contractor shall furnish his monthly statement of claims as per Clause 43(i) of General Conditions of Contract. But the contractor should seek reference to arbitration to settle the disputes only once subject to the conditions as per para-1.

3) These Special Conditions shall prevail over the existing clause of 63 and 64 of General Conditions of Contract.

6. Paraphrasing of Clause 21 of SCC, extracted hereinabove, is not necessary as it is clear and self-explanatory. There is no dispute that claim of applicant is in excess of 20% of contract value and therefore, Clause 21 of SCC renders dispute unarbitrable. The legal position is also not seriously disputed. Indeed, it would not have been in view of the decisions of Supreme Court in Obulu Reddy (supra) and Deepak Bansal (supra).

7. Obulu Reddy (supra) is a decision, which arose under Arbitration Act, 1940. On an application made by contractor, Subordinate Judge appointed arbitrator,

State Government assailed the same in the High Court on the ground that claim is above Rs. 50,000/-, the dispute is to be decided in a suit and not by an arbitration. The contention having been rejected by High Court, the matter was then carried to Supreme Court. There were also connected appeals, wherein High Court had upheld the plea of the State. When the matters were listed before Supreme Court, having regard to difference of opinion expressed in *Vijayawada Urban Development Authority (VUDA) v. V. Narayana Raju* (1999) 9 SCC 572 : (1995) 2 SCALE 234 and *State of A.P. v. I. Devender Reddy* (1999) 9 SCC 571 : (1993) 2 SCALE 732, the matter was referred to a three Judge Bench. The three Judge Bench agreed with the view expressed in *VUDA* and held that under relevant Government Order, the question of deciding claims above Rs. 50,000/- by way of arbitration does not arise.

8. In *Deepak Bansal* (supra), work of construction of staff quarters for Railways was entrusted to Deepak Kumar Bansal. The agreement contained GCC including Clause 64 providing for arbitration. When disputes arose, contractor sought for arbitration, in vain. He moved Rajasthan High Court u/s 11(6) of Arbitration Act for appointment of arbitrator. The claim was opposed by Railways inter alia on the ground that as value of claim is more than 20% of contract value, disputes could not be referred to arbitrator, in view of the circular issued by Railways intimating intention to incorporate Clause 18 to that effect. Accepting the plea, learned Judge of Rajasthan High Court in Jaipur Bench rejected application. Aggrieved by which, Deepak Bansal went in appeal. Supreme Court considered the question whether the circular issued by Railways bars applicability of Clause 64 of GCC. In other words, Supreme Court considered whether the circular intimating incorporating Clause 18 operates from 11.06.2003 or even to earlier cases. It was held that the said circular comes into force only from 11.06.2003 and it has no application to the case of Deepak Bansal and accordingly remitted the matter to Rajasthan High Court for appointment of arbitrator. The relevant observations are as follows.

The respondents, in their objection to the application u/s 11(6) of the Act, raised a plea that question of appointment of an arbitrator, in the facts and circumstances of the present case, could not arise in view of the fact that the claim, as put forward by the appellant, was an amount being an excess of 20% of total cost of the work, which is prohibited in terms of the circular issued on 11.06.2003. The High Court accepted this plea of the respondent and rejected the application on the grounds mentioned herein earlier. ... There cannot be any dispute that the Circular intimating Clause 18 and issued on 11.06.2003 could not be applied in the case of the appellant as the said Circular came into force only from that date i.e., 11.06.2003 and not before that, in the absence of any subsequent insertion of that clause in the original contract, namely, Clause 64 of the general conditions of contract. Accordingly, question of applicability of the said circular intimating intention of the respondent to insert Clause 18 could not arise at all.

9. A reading of Deepak Bansal (supra) would show that Clause 21 of SCC prohibiting arbitration if the value of dispute/claim exceeds 20% of contract value has to be strictly enforced. Therefore, in the present case, arbitrator cannot be appointed in view of Clause 21 of SCC. Learned Counsel for applicant, however, submits that applicant has not signed pages 4 and 5 (which contains Clause 21 of SCC) and therefore, the same is not binding on applicant. The submission cannot be accepted for more than one reason.

10. Learned standing counsel for Railways has placed before this Court the original file. It does not contain original contract agreement No. 20/06/GTC/Central, dated 23.01.2006 but the xerox copy of contract agreement, Schedules, note appended thereto, GCC and SCC are found in the file. Applicant has signed all pages. It is also submitted by learned standing counsel that necessary action is being taken against the concerned Dealing Assistant for missing of original agreement from the file. Be that as it is, actual contract agreement is only one page and seven Schedules, general note for Schedules, SCC containing specifications and SCC containing as many as 22 clauses form part of it. The relevant portion of contract agreement reads as under.

5. Now, this indenture witnesseth that in consideration of the payments to be made by the Railway, the Contractor will duly perform that the said work in the said schedules set forth and shall execute the same with great promptness care and accuracy in a work man like manner to the satisfaction of the Railway and will complete the same in accordance with the said specification and said drawings, said conditions of contract on or before the Twenty fifth day of November - 05 and will maintain the said work for a period of 6 months or one monsoon period whichever is later from the certified date of their completion and will observe, fulfill and keep all the conditions therein mentioned 9which shall be deemed and taken to be part of this contract as if the same has been duly set forth herein) and the Railway both hereby agree that if the contractor shall duly perform the said works in the manner aforesaid and observe and keep the said terms and conditions, the Railway will pay or cause to be paid to the contractor for the said works on the final completion thereof, the amount due in respect thereof, at the rates set forth in the standard schedule of rates 1996 as corrected and upto correction slip No. 4 and agreement No. _____ dated _____ for Guntakal Division Schedule A (+) 65% (Plus Sixty five per cent), Schedule B (+) 38% (Plus thirty eight per cent), Schedule C (+) 126% (Plus one hundred and twenty six per cent), Schedule E (+) 100% (Plus hundred per cent) covered by SSR-1996 and Schedule D (+) 60% (Plus sixty percent), Schedule (F) 99% (Plus ninety nine per cent) and Schedule G (+) 30% Plus thirty per cent NS items not covered by SSR-1196.

6. It is hereby agreed and declared that, all the provision of the said specifications, conditions of the contract which have been carefully read and understood by the contractor and the schedule of rates, including the special and general instructions contained therefore shall be binding upon the contractor and

upon the Railway Administration as if the same have been repeated herein and shall be read as part of these presents.

11. In view of categorical covenant (highlighted in extract supra), whereunder contractor agreed to be bound by the provisions of specifications, conditions of contract, schedule of rates, special and general conditions contained therefor, applicant cannot now be heard that he is not a party to SCC especially Clause 21 thereof. Even otherwise as has been held in decided cases referred to herein below, even if by inadvertence signature of applicant is not obtained on relevant page containing Clause 21 of SCC, it makes no difference and applicant is bound by covenants of contract agreement which includes GCC and SCC.

12. In Wescare (India) Limited (supra), Hon"ble Chief Justice of Madras High Court considered the case wherein it was urged by opposing parties that it is not a signatory of agreement and that there is no privity of contract. The existence of contract however was not denied. Therefore, it was held

13. It has been argued by the learned Counsel for the second respondent that since the second respondent has not signed the agreement, he cannot be said to be a party to the agreement. Going by the Section 7 of the Arbitration and Conciliation Act, 1996 (ACA, for brevity) it cannot be said in order to constitute an arbitration agreement, it must be signed by all the parties. Section 7(3) of the ACA provides that the arbitration agreement shall be in writing. It is a mandatory requirement. Section 7(4) says that the arbitration agreement shall be in writing, if it is a document signed by all the parties. But a perusal of Clauses (b) & (c) of Section 7(4) would show that a written document which may not be signed by the parties even then it can be arbitration agreement. Section 7(4)(b) provides that an arbitration agreement can be culled out from:

An exchange of letters, telex, telegrams or other means of telecommunication, which provide a record of the agreement;

14. It is well known that in these days of E-commerce, an arbitration agreement even though in writing need not be signed by the parties if the record of agreement is provided by exchange of letters, telex, telegrams or other means of telecommunication. Section 7(4)(c) provides there can be arbitration agreement in the exchange of statements of claims and defence in which the existence of the agreement is alleged by one party and not denied by the other. If it can be prima facie shown that the parties are at ad idem, then mere fact of one party not signing the agreement cannot absolve himself from the liability under the agreement. In the present day E-commerce, in cases of internet purchases, tele purchases, ticket booking on internet and in standard forms of contract, terms and conditions are agreed upon. In such agreements, if the identity of the parties is established, and there is a record of agreement it becomes an arbitration agreement if there is an arbitration clause showing ad idem between the parties. Therefore, signature is not a formal requirement of arbitration agreement either u/s 7(4)(b)) or Section 7(4)(c) or under 7(5) of the ACA.

15. Referring to Judgment of Supreme Court, it was observed as under.

The Hon"ble apex Court also in the case of The Union of India (UOI) Vs. D.N. Revri and Co. and Others, similarly held in para 7 at page 2262 of the report that a commercial document between the parties must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. The learned Judges clarified it by saying:

It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a commonsense approach and it must not be allowed to be thwarted by a narrow pedantic and legalistic interpretation.

16. Going by the aforesaid well known principles, I am of the opinion that in the facts and circumstances of the instant case, it is prima facie clear that the second respondent is a party to the arbitration agreement, even though it was not signed by it.

17. In this context, a reference may be made to the decision in Great Offshore Limited (supra). In this, Supreme Court dealt with an arbitration application under Sections 11(5) (6) (9) and (12) of the Arbitration Act. The prayer for appointment of arbitrator is opposed by respondent on the ground that parties had not progressed beyond the stage of negotiations and that there is no concluded contract between parties. Two inter-related questions also arose as to whether every page of contract should be signed and whether parties must stamp and seal agreement so as to bring into existence an enforceable covenant for arbitration. Noticing factual background and contemporaneous events of exchange of correspondence and fax messages between parties and in the light of Section 7 of the Arbitration Act, Supreme Court observed as follows (paras 55, 56 and 60 of SCC).

18. Second, the plain language of Section 7 once again governs my conclusion. Section 7 does not require that the parties stamp the agreement. It would be incorrect to disturb the Parliament's intention when it is so clearly stated and when it in no way conflicts with the Constitution. ... Third, nothing in Section 7 suggests that the parties must sign every page. Once again, if I take the respondent's argument to its logical conclusion, I would have no choice but to read language into the Act that is not there. Even if the faxed CPA is construed as a "document," it need only be "signed by the parties" pursuant to Section 7(4) (a). Every page does not need to be signed. If it is considered a "document," then this requirement would be met. As established above, both parties signed the faxed CPA in the signature box at the bottom of Part I. That said, the faxed CPA more closely fits within Section 7(4)(b))'s requirements. ... Technicalities like stamps, seals and even signatures are red tape that have to be removed before the parties can get what they really want - an efficient, effective and potentially cheap resolution of their dispute. The *autonomie de la volonte* doctrine

is enshrined in the policy objectives of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International

19. Commercial Arbitration, 1985, on which our Arbitration Act is based. [See Preamble to the Act]. The courts must implement legislative intention. It would be improper and undesirable for the courts to add a number of extra formalities not envisaged by the legislation. The courts directions should be to achieve the legislative intention. The courts must implement legislative intention. It would be improper and undesirable for the courts to add a number of extra formalities not envisaged by the legislation. The courts directions should be to achieve the legislative intention.

20. In Shakti Bhog Foods Limited (supra), Supreme Court was considering a civil appeal that arose out of an order of this Court in Civil Revision Petition whereunder this Court conformed the order of III Additional District Judge, Kakinada, allowing an application u/s 45 of the Arbitration Act. Appellant so as to export cereals/grains (cargo) from Kakinada Port to Cotonou, State of Niger entered into an agreement with Kola Shipping Company Limited for transportation. As per terms of Charter Party Agreement (CPA), appellant had to load cargo within nine (9) days i.e., on or before 06.08.2005. The vessel M.V. Kapitan Nazarev arrived at Kakinada Port on 24.07.2005, but the proposal of appellant did not fructify. As per CPA, appellant was required to load maize to Colombo from Kakinada Port in case he fails to get export order from Niger. Appellant, however, could not do so and addressed respondent expressing willingness to compensate with specified amount as demurrage. Respondent was not satisfied with this and raised a dispute with regard to quantum of demurrage. Some time thereafter appellant loaded 1100 Metric Tonnes (MT) of cargo in the vessel as against 13,500 MT of agreed cargo. Respondent moved Delhi High Court u/s 9 of the Arbitration Act seeking interim orders in the matter of discharge of 1100 MT. Appellant then filed suit claiming damages. Respondent moved an application u/s 45 to refer the dispute to arbitration in London under the provisions of English Arbitration Act, 1996, as per CPA. It was inter alia alleged that there was no CPA existence and that appellant was not signatory for the same. Repelling the contention, Supreme Court held as follows (paras 14 and 15 of SCC)

21. We have already noted that by the Charter Party Agreement dated 18th of July, 2005 the appellant agreed to load and the respondent agreed to carry 13,500 tons of the cargo from Kakinada to the port of Cotonou. We have also observed that the said Charter Party Agreement provided for arbitration in Box 25 and Clause 19 and that the disputes pertaining to the same were to be referred to arbitration in London under the English Arbitration Act. The appellant herein has not refuted the signature on the front page of the Charter Party Agreement. We cannot entertain his claim that such a signature would not amount to a valid arbitration agreement.... Therefore, it is clear from the provisions made u/s 7 of the Act that the existence of an arbitration agreement

can be inferred from a document signed by the parties, or an exchange of letters, telex, telegrams or other means of telecommunication, which provide a record of the agreement. In the present case, the appellant had not denied the fact that it had signed the first page of the Charter Party Agreement. Moreover, the subsequent correspondences between the parties also lead us to conclude that there was indeed a Charter Party Agreement, which existed between the parties. We cannot accept the contention of the appellant that u/s 7 of the Act the letter/faxes or mails or any other communications will have to contain the arbitration clause in the absence of any agreement. The expressions of Section 7 do not specify any requirement to this effect.

22. Therefore, even if every page of the contract agreement between applicant and respondent is not signed, both of them are bound by arbitration clause because as mentioned supra, GCC and SCC by reason of binding covenant in contract agreement itself form part of contract. Therefore, the dispute is not arbitrable in view of Clause 21 of SCC. Though, other questions are raised by both parties, this Court is not inclined to go into them as the dispute itself cannot be referred to arbitration in view of Clause 21 of SCC.

23. The arbitration application fails and is accordingly dismissed. No costs.