
(2005) 09 AP CK 0075
In the Andhra Pradesh High Court
Case No : C.M.A. No. 476 of 2005

Sri Harsha Constructions

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 09-09-2005

Acts Referred:

Arbitration Act, 1940 — Section 20

Arbitration and Conciliation Act, 1996 — Section 34, 37

Citation : (2005) 6 ALD 287 : (2005) 5 ALT 728 : (2006) 1 ARBLR 308

Hon'ble Judges : G. Rohini, J; D.S.R. Varma, J

Bench : Division Bench

Advocate : Prasada Rao Vemulappali, for the Appellant; S.R. Ashok, S.C., for the Respondent

Final Decision : Dismissed

Judgement

D.S.R. Varma, J.—Heard both sides.

2. This appeal is directed against the order and decree, dated 8-4-2005, passed by the XIV Additional Chief Judge, City Civil Court, Hyderabad, allowing the petition in O.P. No. 72 of 2003, filed u/s 34 of the Arbitration and Conciliation Act, 1996 (for brevity "the Act") seeking to set aside the Award, dated 21-9-2002, passed by the Arbitrator.

3. The appellant herein is the respondent No. 1, the respondents 1 to 3 herein are the petitioners and the respondent No. 4 herein is the respondent No. 2 respectively in O.P. No. 72 of 2003 before the Court below.

4. For the sake of convenience, in this judgment, the appellant, the respondents 1 to 3 and the respondent No. 4 will be referred to as "the contractor", the "Railways" and "the Arbitrator", respectively.

5. The contractor is the successful tenderer for certain Railway works, particulars of which are not relevant. An agreement was entered into, which contains a clause to the effect that whenever extra work is entrusted, the same rate should

be applied upto 25% and in case the works exceed 25%, the rates shall be decided by mutual discussions. The work entrusted to the contractor was completed in the month of August, 1996, and finalized on 31-3-1997. It appears that final bill was also paid on 22-11-1999. Since the amounts as demanded by the contractor were not paid, the arbitration clause was invoked.

6. Initially though no Arbitrator was appointed, by judicial intervention of this Court, a learned retired Judge of this Court was appointed as the sole Arbitrator. Before the Arbitrator, the contractor made as many as 7 claims, some of which are partly allowed and some were rejected.

7. Claim Nos. 4 and 5 are among the claims which were rejected. Insofar as claim No. 1 is concerned, the same was partly allowed by directing the Railways to pay a sum of Rs. 40,000/- towards execution of work over and above 25% of the tender schedule; insofar as claim No. 2 is concerned, the same was partly allowed by directing the Railways to pay a sum of Rs. 58,62, 182-24 paise towards difference in rates; insofar as claim Nos. 3 and 6 are concerned, the Railways was directed to pay the interest at the rate of 12 per cent per annum from September, 1996, till the date of payment; and insofar as claim No. 7 is concerned, the Railways was directed to pay a sum of Rs. 1,50,000/- and Rs. 75,000/- towards the costs of arbitration.

8. The said award was challenged before the Court below.

9. The Court below formulated the following points for consideration:

(i) Whether the dispute is an "excepted matter" and is not arbitrable?

(ii) Whether the claimant is entitled to the amounts awarded by the Arbitrator?

10. The Court below, on considering the material available on record, held against the contractor on both the points and eventually set aside the award. Hence, the present Civil Miscellaneous Appeal.

11. The whole controversy revolves around two points viz.,

(a) Whether the claim of the appellant under claim No. 2 for a sum of Rs. 69,13,214/- i.e., difference in rates, is an "excepted matter" and hence a non-arbitrable item?

(b) Whether the appellant is entitled for the interest as claimed?

12. Mr. Vemulaplli Prasada Rao, the learned Counsel appearing for the contractor, contended that the Court below erroneously held that the amount awarded by the Arbitrator under claim No. 2 is an "excepted matter" as per Clause 39 of the General Conditions of the Contract (for brevity "the GCC") and hence the said claim is not arbitrable. He further contended that since the procedure prescribed under Clause 39 of the GCC is not followed, the rates prescribed or offered by the Chief Engineer cannot be termed as "the rates determined in the appear by the contractor and hence the same cannot be brought into the fold of Clause 39 of

the GCC and consequently cannot attract Clause 63 of the GCC as "excepted matter". In other words, it is his contention that it was not the decision of the Chief Engineer in the appeal preferred by the contractor but it was only in the nature of a counter offer put to the contractor and such a counter offer cannot be termed as "binding decision" on both the parties so as to bring the same into the fold of Clause 63 of the GCC as an "excepted matter", which can neither be disputed nor arbitrated.

13. Mr. S.R. Ashok, the learned Senior Counsel appearing on behalf of the Railways, contended firstly that Clause 63 of the GCC specifically deals with "excepted matters" which includes the items mentioned under Clause 39 and secondly when once it is "excepted matter" gets automatically included irrespective of the fact whether the procedure prescribed under Clause 39 of the GCC is valid or not. In other words, even though a specific mechanism or procedure is prescribed under Clause 63 of the GCC by virtue of mere mention of Clause 39 of the GCC is sufficient to treat the claim No. 2 as an "excepted matter" and there cannot be any dispute followed by arbitration.

14. The learned Senior Counsel appearing on behalf of the Railways further contended that the reasons of the Arbitrator can be gone into by the Court in cases where it appears to be apparently illegal. He further submits that the Arbitrator cannot decide the question as to whether a particular item is "arbitrable item" or not, and the Arbitrator can adjudicate only on arbitrable issues. Therefore it is his contention that since the "excepted item" is already agreed to in the agreement itself, the question of jurisdiction of the Arbitrator to decide the issue as to whether a particular item is an "arbitrable item" or not, does not arise. It is also his contention that if a mechanism is provided like the one provided under Clause 63 of the GCC it is enough to identify a particular item as an "excepted item" and inasmuch as the claim No. 2 of the contractor falls within the scope of Clause 39 of the GCC which has been specifically mentioned in Clause 63 of the GCC that issue cannot be treated as an "arbitrable issue" and the Arbitrator has no jurisdiction to decide whether it is arbitrable or not.

15. In view of the above rival contentions, it is necessary to examine Clause 39 and Clause 63 of the GCC, which are extracted hereunder, for ready reference and better appreciation:

"Clause 39: Any item of work carried out by the Contractor on the instructions of the Engineer which is not included in the accepted schedule of rates shall be executed at the rates set forth in the "Schedule of Rates, South Central Railway" modified by the tender percentage and where such items are not contained in the latter at the rates agreed upon between the engineer and the Contractor before the execution of such items of work and the Contractor shall be bound to notify the Engineer at least seven days before the necessity arises for the execution of such items of work that the accepted schedule of rates does not include a rate or rates for the extra work involved.

The rates payable for such items shall be decided at the meeting to be held between the Engineer and the contractor in as short a period as possible after the need for the special item has come to the notice. In case the contractor fails to attend the meeting after being notified to do so or in the event of no settlement being arrived at the Railway shall be entitled to execute the extra works by other means and the contractor shall have no claim for loss or damage that may result from such procedure. Provided that if the Contractor shall commence work or incurs any expenditure in regard thereto before the rates are determined and agreed upon as lastly mentioned, then and in such a case the Contractor shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the date of the rates as aforesaid according to the rates as shall be fixed by the Engineer. However, if the contractor is not satisfied with the decision of the engineer in this respect he may appeal to the Chief Engineer within 30 days of getting the decision of the engineer supported by the analysis of the rates claimed. The Chief Engineer's decision after hearing both the parties in the matter would be final and binding on the contractor and the Railway."

"Clause-63: 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 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 Clause 18, 22 (5), 39, 45 (a), 55, 55-A(5), 61(2) and 62 (1) (xiii)(B) (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."

16. In Re point No. 1: It is to be seen from the arbitral award that as against the claim of the contractor for a sum of Rs. 69,13,214/-, under claim No. 2, a sum of Rs. 58,62,182-24 paise had been awarded towards difference in rates.

17. In this connection, it is to be remembered that the Arbitrator has to arbitrate within the ambit of the General Conditions of the Contract.

18. As per Clause 2 of the variation clause embodied in the GCC, the Railways may modify, change the drawings, reduce or increase the quantities. Such variation is permissible upto 25% of the agreed quantities.

19. The above mentioned Clause 2 if read in conjunction with Clause 39 of the GCC, it is obvious that for determination of the rates for the contracts upto 25% of the agreed quantities, there cannot be any dispute. However, if the works exceed 25% of the agreed quantity, and for extra items Clause 39 of the GCC

prescribes the procedure to be followed for determination of such exceeded quantities i.e., beyond 25%. Hence, it is imperative to look into the scope of Clause 39 of the GCC.

20. The essential ingredients of Clause 39 of the GCC are:

"(i) Any item of work, which is not included in the accepted schedule of rates, shall be executed at the rates prescribed by the railways,

(ii) Such of those items which are not agreed upon between the engineer and the contractor before execution of such items of work, the contractor shall notify the engineer at least 7 days before the actual necessity arises.

(iii) The rates payable for such items shall be decided at the meeting to be held between the engineer and the contractor after the notification of the special items by the contractor.

(iv) If for any reason the contractor commences the work and incurs any expenditure in regard thereto before the rates are determined or agreed in the meeting held between the Engineer and the Contractor to that extent only as per the old rates, the contractor is entitled to be paid to that extent only as per the old rates in respect of the work, prior to the date of the rates, however, from the date of agreement of the rates, as fixed by the Engineer.

(v) If the contractor is not satisfied with such fixation of the rates by the Engineer, he may apply to the Chief Engineer within 30 days of getting the decision of the Engineer.

(vi) The decision of the Chief Engineer on such an appeal by the contractor, on hearing both parties, is final and binding on both parties."

21. Mr. Vemulapalli Prasada Rao, the learned Counsel appearing for the contractor, (sic) places strong reliance on the decision of the (sic) apex Court in General Manager Northern Railways and Another Vs. Sarvesh Chopra, , wherein their Lordships dealt with a similar situation. In the said case, the opposite party was the Railways only. Therefore, notwithstanding some variation, depending upon the works, the General Conditions are mutatis mutandis the same. In that case, the scope of Clauses 39 and 63 of the GCC, though the matter arose under the old Act (1940 Act), had fallen for consideration.

22. Further, in the said case, certain clauses of special conditions and claims made by the contractor have been extracted at paragraph Nos. 4 and 5 in that judgment, respectively. Eventually, it was held by the apex Court that the claims of the contractor in that case before the Arbitrator were not arbitrable since the same were to be treated as "excepted items".

23. While dealing with the said aspect, particularly Clause 63 of the GCC, the relevant observations made by their Lordships of the Apex Court, which are worth noticing, run thus:--

"A bare reading of Clause 63 shows that it consists of three parts. Firstly, it is an arbitration agreement requiring all disputes and differences of any kind whatsoever arising out of or in connection with the contract to be referred for adjudication by arbitration, by the railways, on a demand being made by the contractor through a representation in that regard. Secondly, this agreement is qualified by a proviso which deals with "excepted matters". "Excepted matters" are divided into two categories: (i) matters for which provision has been made in specified clauses of the general conditions, and (ii) matters covered by any clauses of the special conditions of the contract. Thirdly, the third part of the clause is a further proviso, having an overriding effect on the earlier parts of the clause, that all "excepted matters" shall stand specifically excluded from the purview of the arbitration clause and hence shall not be referred to arbitration. The source of controversy is the expression --"matters for which provision has been made...in any clauses of the special conditions of the contract shall be deemed as "excepted matters" and decisions thereon shall be final and binding on the contractor."

24. It further appears from the facts of the said case that an argument was advanced on behalf of the contractor that when an "in-house remedy" was provided, the consequential decision would be final and binding on the contractor and where there was no remedy provided by way of decision by the authority of the Railways, then such matter shall not be treated as an "excepted matter". It was further argued in the said case that so long as the remedy of decision by someone, though he may be an authority of the Railways is not provided for, the contractor's claim cannot be left in lurch by including the same in the category of "excepted matters". The abovementioned contentions were not accepted by their Lordships of the Apex Court.

25. In this context, we may usefully notice the following observations (paragraph No. 8) made by their Lordships of the apex Court while drawing the silver line between the two categories of claims in Clause 63 of the GCC:

"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 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 railway", or "no claim whatsoever will be entertained by the railway", 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 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 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", (emphasis supplied by us)

26. After surveying the case law on the subject, in the said decision, it was concluded by their Lordships at paragraph No. 17 thus:

"To sum up, our conclusions are:

(i) While deciding a petition u/s 20 of the Arbitration Act, 1940, the Court is obliged to examine whether a difference which is sought to be referred to arbitration is one to which the arbitration agreement applies. If it is a matter excepted from the arbitration agreement, the Court shall be justified in withholding the reference,

(ii) to be an excepted matter it is not necessary that a departmental or "in-house" remedy for settlement of claim must be provided by the contract. Merely for the absence of provision for in-house settlement of the claim, the claim does not cease to be an excepted matter,

(iii) an issue as to arbitrability of claim is available for determination at all the three stages-while making reference to arbitration, in the course of arbitral proceedings and while making the award, a rule of the Court."

27. 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".

28. Therefore, the abovementioned 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.

29. 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.

30. As held by the apex Court in General Manager, Northern Railways v. Sarvesh Chopra (1 supra), it would be a futile exercise to refer "excepted matters" for arbitration and remanding the matter back to the Arbitrator upon a decision being rendered by the Arbitrator, on those matters also.

31. The next question we are called upon to answer is that as to what should happen when the procedure prescribed under Clause 63 of the GCC i.e., "in-house" procedure was not followed by the Railways?

32. The answer would be simple, which can be traced in the, observations of their Lordships of the apex Court in the same decision in General Manager Northern Railways v. Sarvesh Chopra (1 supra), which run thus:

"... On the pleading, the applicant may succeed in making out a case for reference, still the Arbitrator may, on the material produced before him, arrive at a finding that the claim was covered by "excepted matters". The claim shall have to be disallowed. If the Arbitrator allows a claim covered by an excepted matter, the award would not be legal merely because the claim was referred by the Court to arbitration. The award would be liable to be set aside on the ground of error apparent on the face of the award or as vitiated by legal misconduct of the Arbitrator. Russell on Arbitration (twenty-first edition, 1997) states vide para 1.027 (at p. 15) "Arbitrability".

33. The learned Counsel appearing for the contractor further places reliance on the decision of the Apex Court in B.V. Radha Krishna Vs. Sponge Iron India Ltd., , wherein it was held that the High Court cannot substitute its own view in place of arbitrator's view and that the High Court cannot examine the whole matter as a regular appellate Court.

34. In Indian Oil Corporation Ltd. Vs. Indian Carbon Ltd., , the Apex Court held thus:

"The Court does not sit in appeal over the award and review the reasons. The

Court can set aside the award only if it is apparent from the award that there is no evidence to support the conclusions or if the award is based upon any legal proposition which is erroneous."

35. In The Hindustan Construction Co. Ltd. Vs. Governor of Orissa and others, , the Apex Court held thus:

"The Court while considering the question as to whether the award is valid or not cannot examine the question as an appellate Court and reappreciate all the material on the record for the purpose of recording a finding whether in the facts and circumstances of a particular case the award in question could have been made."

36. Though all the abovementioned decisions (1 to 3 supra) were rendered in the cases arising under the old Act (1940 Act), we do not see any change, much less substantial, in the principles laid down by the apex Court in the abovementioned decisions insofar as the power of the High Court in arbitration matters is concerned.

37. Furthermore, it is to be seen that the entire exercise of appreciating both the factual and legal aspects had been done by the Civil Court while exercising its

jurisdiction under ? Section 34 of the new Act (1996 Act), and the High Court would function as an appellate Court u/s 37 of the new Act (1996 Act). But, the hierarchy of adjudicatory process is the same.

38. Therefore, if the abovementioned principles of the apex Court in the said decisions (1 to 3 supra) are to be applied, it is obvious that, in normal course, this Court cannot reappreciate the whole material on record for the purpose of arriving at a different conclusion than the one arrived at by the Arbitrator. But, as already discussed in the earlier paragraphs of this judgment, insofar as claim No. 2 is concerned, the same is "non-arbitrable in view of the specific conditions made in the shape of Clause 39 and Clause 63 of the GCC, particularly in the light of the specific interpretation made by the Apex Court in General Manager, Northern Railways v. Sarvesh Chopra (1 supra).

39. Accordingly, point No. 1 is answered against the contractor and in favour of the Railways.

40. In Re Point No. 2: In view of the finding recorded by us on Point No. 1, this point does not survive for consideration and accordingly we answer the same.

41. In the result, the Civil Miscellaneous Appeal is dismissed. However, there shall be no order as to costs.

Immediate upon pronouncement of the judgment the learned Counsel appearing for the appellant made an oral prayer to grant leave to appeal to the Supreme Court.

No question of law of general importance, to be decided by the Supreme Court, is involved in this case. We, therefore, decline to grant leave.