

(1976) 09 MP CK 0005

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 105 of 1976

State of Madhya Pradesh

APPELLANT

Vs

Continental Construction (P) Ltd., New Delhi

RESPONDENT

Date of Decision : 22-09-1976

Acts Referred:

Arbitration Act, 1940 — Section 20, 37, 37(1)
Constitution of India, 1950 — Article 299

Citation : (1981) ILR (MP) 242 : (1978) MPLJ 474 : (1978) MPLJ 467

Hon'ble Judges : M.L. Malik, J

Bench : Single Bench

Advocate : M.V. Tamaskar, for the Appellant; S.C. Ninghanian with P.P. Naolekar, for the Respondent

Final Decision : Dismissed

Judgement

M.L. Malik, J.

The order in this appeal shall also govern the disposal of Miscellaneous (First) Appeals Nos. 103, 104, 106 and 107-all of 1976 and between the same parties.

Upon the application of the Respondent M/s. Continental Construction (P) Ltd. u/s 20 of the Arbitration Act, the Appellant State of Madhya Pradesh has been called upon to file the arbitration agreement and submit a panel of three names for the purpose of selecting an arbitrator. Aggrieved by the order, the State of Madhya Pradesh has filed this appeal.

The facts in brief are that the Respondents are Contractors who were assigned construction work in connection with Tawa Dam by the State of Madhya Pradesh. The separate agreements are in writing and contain an arbitration clause. The work could not be completed within the stipulated period. The period was, however, extended. The Contractors attribute the delay to the faults of the Engineer-in-charge of the work whereas the State Government attributes it to the Contractors. That is a disputed question. While the work was in progress, the

Contractors were required to meet extra expenditure on labour charges and material due to revision in wage-scale and escalation of prices. Additions, alterations and substitution of works also led to extra expenses. There were certain items for which rates were not provided, but all the same work had to be done. The Contractors, therefore, advanced claim for compensation before the Superintending Engineer, who dismissed it on the ground that the claim was barred by time under Clause 3.3.15. He also said that some of the claims were not covered by the Contract.

The Contractors sought to invoke the arbitration clause and the Appellant opposed it. The opposition was made on the following grounds:

- (i) That the dispute attracting the arbitration clause had not arisen.
- (ii) That the claim was barred by Clause 3.3.15 as it was not made within the time stipulated.
- (iii) That there was only one contract which could not be obeyed except in the manner provided under Article 299 of the Constitution:
 - (a) That there being no separate agreement for extended period of a contract, the rate as provided in the original contract alone was permissible.
 - (b) As there was no separate contract, no reference under Clause 3.3.29 could be made for the enhanced period beyond the terms of the contract.
- (iv) The decision of the Superintending Engineer being final on certain matters, such as extra work (addition, subtraction etc.), the dispute was outside the scope of the arbitration clause.
- (v) The Contractor failed to comply with Clause 3.3.29 as he did not invite the decision of Superintending Engineer within time stipulated under Clause 3.3.15, as such the claim cannot be said to fall within Clause 3.3.29.

The learned District Judge, Hoshangabad has overruled all these objections.

The arbitration clause may be reproduced here: Clause 3.3.29:

Decision of Superintending Engineer, to be final except where otherwise specified in the contract. The decision of the Superintending Engineer of the Circle for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or material used on the work or as to any other question, claim, right matter or thing whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders of those conditions or otherwise concerning the work of execution or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof.

Provided that if the contractor is dissatisfied with the final decision of the

Superintending Engineer in respect of any matter, he may within 28 days after receiving notice of such decision give notice in writing to the Superintending Engineer requiring that the matter may be referred to the arbitration and furnishing detailed particulars of the dispute of difference specifying clearly the point at issue. If the contractor fails to give such notice within the period of 28 days as stipulated above the decision of the Superintending Engineer already given shall be conclusive and binding on the contractor.

In case an arbitration is to be held, it shall be effected by an arbitrator to be appointed by the State Government with the concurrence of the contractor, and the decision of the arbitrator shall be final, conclusive and binding.

If the work under the contract has not been completed when a dispute is referred to arbitration, work shall continue during arbitration proceedings if it is reasonably possible and no payment due to contractor as admissible to him in accordance with the provisions of Clause 13 of the contract should be withheld on account of arbitration proceedings unless it is required by the arbitrator.

The first contention of the learned Counsel for the Appellant before me is that any claim for enhanced rates of labour charges and material, not permissible by any clause of the contract, would not be within the purview of the Arbitration Clause because neither could the contractor unilaterally change the schedule of rates nor could the Arbitrator do so. If anything new were to be read or incorporated in the contract, that would contravene the provisions of Article 299 of the Constitution. The reference, therefore, was required to be made strictly within the contractual stipulations.

In answer, the learned Counsel for the Contractors submits that these are clauses in the contract which entitle the Contractors to receive enhanced rates for work involving increase in quantity during execution, and for work added, substituted and altered. In particular, he says, reference may be made to Clauses 3.3.12 to 3.3.14. The counsel contends that the arbitration clause being very comprehensive and broad, the matter of interpretation, scope and effect of those clauses should better be left to the arbitrator. The Court's jurisdiction u/s 20 of Arbitration Act was limited. The Court was not expected to go into the details of the claims and the items involved. The Court was only concerned with the question whether there was a valid agreement of arbitration and whether the differences had arisen to which the agreement applied. If the answer was in the affirmative, a reference had to be made.

The learned Counsel further submitted that while inviting reference, the Contractors were not traversing beyond the stipulations of the contract, nor were they substituting new terms of their own nor were they offending Article 299. Whatever claim was covered by reasonable interpretation of the terms of the contract or whatever compensation or damages was permissible under the contract which the arbitrator decides to give, that alone was the relief asked. The point was, he argued that the differences had arisen under the contract or

concerning the contract which had to be resolved by the arbitrator with reference to the contract and not de hors it. The case, the counsel submitted, was fully covered by the pronouncements of their Lordships of the Supreme Court in Union of India (UOI) Vs. Salween Timber Construction (India) and Others, . That was a case where excess quantity of timber was supplied and the argument was that the supply not being covered by the stipulations, the claim in that regard could not be referred to the arbitrator. The Supreme Court overruled the argument. The placitum need be cited:

The test for determining whether a dispute is one "arising out of the contract" or "in connection with the contract" is whether recourse to the contract by which both the parties are bound is necessary for the purpose of determining whether the claim of the party is justified or otherwise. If it is necessary to take recourse to the terms of the contract for the purpose of deciding the matter in dispute, it must be held that the matter is within the scope of the arbitration clause and the arbitrators have jurisdiction to decide that dispute.

Their Lordships have quoted with approval Heyman v. Darwins Ltd. 1942 AC 356 at page 366, Stebbing v. Liverpool and London and Globe Insurance Co. Ltd. (1917) 2 KB 433 and Ruby General Insurance Co. Ltd. Vs. Pearey Lal Kumar and Another,

The arbitration agreement as 1 read it, is broad and comprehensive and covers all conceivable disputes relating to "claims, right, matter or thing whatsoever in anyway arising out of or relating to the contract whether the work is in progress or had been completed or there had been a failure on the part of any of the contracting parties in the execution thereof. The meaning, effect and scope of the various clauses of the contract is again a matter which rested solely on the interpretation and construction of the clauses by the Arbitrator. To such an agreement, the dictum of Viscount Simon L.C. in Heyman v. Darwins Ltd. to the following effect aptly applies:

An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such contract is illegal), the arbitration Clause cannot operate, for on this view the clause itself is also void.

If, however, the parties are at one in answering that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance, such

differences should be regarded as differences which have arisen in respect of or "with regard to" or "under" the contract, and an arbitration clause which uses these, or similar expressions, should be construed accordingly... such an arbitration clause would also confer authority to assess damages for breach, even though it does not confer upon the arbitral body express power to do so.

I do not agree that an arbitration clause expressed in such terms as above ceases to have any possible application merely because the contract has "come to an end" as for example, by frustration. In such cases it is the performance of the contract that has come to end. If, otherwise, when parties have entered into a contract, circumstances arise before the performance of the contract is completed which in the view of one party bring the contract to an end by frustration and therefore discharge both parties from further performance but the other party does not agree, this is difference about the applicability of the implied term and is just as much within the arbitration clause as if it were a difference about an express term of the contract.

Such an arbitration clause would confer authority on the arbitrator to assess damages in whatever circumstances, even where the contract stood frustrated or had to be completed under strained circumstances or at an extra cost. The Court will not assume jurisdiction to say anything on the merits of the controversy when the parties have chosen the forum of an arbitrator.

The second contention of the Appellant is that the claim not having been preferred within one month of the cause of such claim occurring, the contractors should be deemed to have abandoned the claim. Clause 3.3.15 of the Contract would disentitle the contractors from putting up their claim for compensation.

This again is a question which must be left for the decision of the Arbitrator. I would only quote the observations of the Supreme Court in *Wazirchand Mahajan and Another Vs. Union of India (UOI)*,

There is no doubt that Clause (1) of Section 37 of the Arbitration Act deals only with the authority of the arbitrator to deal with and decide any dispute referred to him; it has no concern with an application made in the Court to file an arbitration agreement and to refer a dispute to the arbitrator. After an agreement is filed in Court and the matter is referred to the arbitrator, it is for the arbitrator to decide by the application of the law contained in the Limitation Act whether the claim is barred. But Section 37(1) does not confer authority upon the Court to reject the application for filing of an arbitration agreement u/s 20 of the Arbitration Act because the claim is not made within three years from the date on which the right to apply arose. In dealing with an application for filing an arbitration agreement, the Court must satisfy itself about the existence of a written agreement which is valid and subsisting and which has been executed before the institution of any suit, and also that a dispute has arisen with regard to the subject matter of the agreement which is within the jurisdiction of the

Court. But the Court is not concerned in dealing that application to deal with the question whether the claim of a party to the arbitration agreement is barred by the law of limitation; that question falls within the province of the arbitrator to whom the dispute is referred.

It is again to be noted that the decision of the Superintending Engineer becomes final if the arbitration Clause 3.3.29 is not invoked. But when the parties invoke the arbitration clause, his decision is subject to confirmation by the arbitrator. The question of limitation, on which the Superintending Engineer had rejected the claim, becomes a question to be canvassed over again before the arbitrator. He may agree with the Superintending Engineer and reject the claim, or disagree with him and assess compensation.

The learned Counsel for the Appellant then argued on the basis of *The Vulcan Insurance Co. Ltd. Vs. Maharaj Singh and Another*, that they had repudiated the liability completely on the ground that the claim fell outside the arbitration clause and, therefore, it could not be referred. But I do not find the authority much to the Appellants' support. The arbitration clause there was very restricted. It was only the quantum of loss of damages which was made arbitrable and not the entire dispute. In the present case, every conceivable dispute concerning the contract is referable. And that makes the difference.

In the result, therefore, the appeals must fail. It has been brought to my notice that in three out of the five cases, the Arbitrator has to be selected out of a panel of three names and in two cases, the State Government has to name a sole Arbitrator. If that be so, let the District Judge direct accordingly by modifying his order.

The appeals are dismissed. Costs on Appellant. Counsel's fee as per schedule or certificate, whichever is less.