

(1999) 09 GAU CK 0001
In the Gauhati High Court
Case No : O.J. (Arbitration) No. 52 of 1997

Subodh Sharma

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 03-09-1999

Acts Referred:

Arbitration Act, 1940 — Section 20

Arbitration and Conciliation Act, 1996 — Section 11

Citation : (1999) 3 GLT 190

Hon'ble Judges : Brijesh Kumar, C.J

Bench : Single Bench

Advocate : A.K. Bhattacharyya, B.M. Sarma, A. Bhattacharyya and A. Kalita, for the Appellant; B.K. Sharma and P.K. Tiwari, for the Respondent

Final Decision : Dismissed

Judgement

Brijesh Kumar, C.J.—This is a petition u/s 11 of the Arbitration and Conciliation Act, 1996 for appointment of Arbitrators to resolve the dispute arising out of Contract Agreement No. 1/90 dated 18.9.90.

2. Heard learned Counsel for the Petitioner Shri A.K. Bhattacharyya and Shri P.K. Tiwari on behalf of the Respondents.

3. The facts which do not admit of any dispute between the parties are that an agreement was entered into on May 18, 1990 between the Petitioner and the Respondents (Railway Department) under which the Petitioner was to execute the work of design supply, erection, testing and commissioning of 0.433/11 KV, 2.5 MVA Sub-station etc. at New Bongaigaoa The Petitioner executed the work entrusted to them under the contract. According to the Petitioner the agreement contained certain special conditions of contract in respect of price variation formula. The Petitioner is said to have moved the authorities for payment on account of price variation formula in August, 1991. It is further submitted that getting no response from the Respondents, they again approached the authorities, namely, the Chief Electrical Engineer, N.F. Railway, Maligaon giving

details of the price variation calculation through representation dated 25.1.94. This representation too brought no result, hence they again represented on 2.11.94, upon which the District Electrical Engineer (W), N.F. Railway, New Bongaigaon forwarded the representation to the Chief Electrical Engineer, N.E. Railway, Maligaon for his consideration. The District Electrical Engineer (W), N.F. Railway, New Bongaigaon again wrote letter to the Chief Electrical Engineer for his consideration of price variation calculation of the Petitioner, but there was no response. Ultimately the Petitioner served a pleader's notice on 5.7.96 requiring the Respondents to appoint Arbitrators to settle the dispute. But neither the payment has been made nor the Respondents appointed arbitrators in pursuance of the arbitration clause of conditions of contract.

4. An affidavit-in-opposition has been filed on behalf of the Respondents. According to the Respondents, the full and final payment of the bill of the Petitioner has been made in respect whereof the Petitioner has also given his no claim certificate on 5.2.98. It is also averred that the amount of security deposit has also been refunded. Hence there is no occasion of preferring a claim or making a request for appointment of arbitrators after issuance of no claim certificate by the Petitioners. It is also submitted on behalf of the Respondents that the work was completed on 15.4.94 and the final payment was made on March 30, 1995. The Petitioner had issued the certificate of no claim at that stage also and such final certificate on 5.2.98 on refund of security amount.

5. A reply to the affidavit-in-opposition has been filed by the Petitioner. It has not been denied that in full and final settlement of the bill the Petitioner received the payment and also issued no claim certificate on 5.2.98. The refund of security amount has also been admitted. In regard to the no claim certificate issued by the Petitioner on March 30, 1995, it is averred that the Petitioner was made to put his signature on the pointed format which the Petitioner bona fide signed never realising that his claim for price variation shall not be considered after signing of a no claim certificate dated 30.3.95. As noticed earlier, the no claim certificate dated 5.2.98 on refund of the security amount has also not been disputed.

6. Learned Counsel for the Petitioner has urged that the Petitioner had been pursuing for the payment on account of price variation since 1991. The Railway authority, namely, the District Electrical Engineer had also been forwarding his claim to the Chief Electrical Engineer for his sanction, but the claim of the Petitioner was never considered and the payment made in 1995 is not the full payment to which the Petitioner is entitled. It is further submitted that merely because of signing of the no claim certificate the Petitioner may not be disentitled to the payment of price variation. The petition was filed in 1997 before no claim certificate dated 5.2.98 was issued by the Petitioner. It is submitted that the dispute still remains and it is for the arbitrators to decide as to whether any claim of the Petitioner under the contract still remains to be satisfied or not. Unless all the claims as forwarded by the Petitioner are not

settled it cannot be said that the Petitioner cannot ask for appointment of arbitrator for settlement of the dispute.

7. The payment of final bill was made in March, 1995. The Petitioner issued no claim certificate in full and final settlement of the bill. Again no claim certificate was issued in February, 1998 at the time of refund of the security amount. It is submitted on behalf of the Petitioner that issuance of such certificate would not come in the way of the Petitioner to get an arbitrator appointed in terms of the agreement.

8. Learned Counsel for the Respondent has drawn the attention of the Court to Condition No. 43(2) of the General Conditions of Contract according to which after no claim certificate has been issued by the Contractor after final measurement of the work, the contractor is debarred from disputing the correctness of the same or demand a reference to arbitration. According to the Petitioner, such a clause contained in the agreement will not affect the powers of the Court to appoint an arbitrator as provided under the statute, namely, Arbitration and Conciliation Act, 1996. It is vehemently urged that for such a clause, the statutory powers cannot be defeated and it is still open to the Court to exercise such powers to appoint arbitrator.

9. In support of the contention that in spite of giving no claim certificate, the Petitioner would be entitled to claim the dues and for appointment of an arbitrator, reliance has been placed upon a decision of the Hon''ble Supreme Court reported in Union of India (UOI) and Another Vs. L.K. Ahuja and Co., . In that case, the contractor had applied for reference of the dispute to the arbitrator u/s 20 of the Arbitration Act, 1940. Railway Administration seems to have raised the plea that since the work had been completed and the final bill was also settled and no claim declaration in respect of the same was given, there was no occasion to raise any claim and to make a request for reference of the dispute to the arbitrators. Hon''ble Supreme Court in the above noted decision observed in paragraph 8 of the judgment as follows:

...It is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of the final bill, the right to get further payment gets weakened but the claim subsists and whether it does subsist, is a matter which is arbitrable.

From the above observation it is clear that despite full and final settlement of bill, if one party asserts some other payment which is denied by the other, the dispute still remains which can be referred to the arbitration. The mere fact that the claim may not be on strong footing or it may be a weak claim, would not amount to saying that there exists no dispute at all which may be referred to the arbitration.

10. On behalf of the Respondents, reliance has been placed upon a decision reported in Union of India Vs. M/s. Ajit Mehta and Associates, Pune and Others, . Several decisions of the Hon''ble Supreme Court including in the case of L.K.

Ahuja and Co. (supra) have been considered and a distinction has been made between the cases in which the full and final payment was accepted with reservation of protest and the other cases where it was without any such protest. It is submitted that in the present case the Petitioner had never made any reservation about the full and final settlement of the bill and in giving no claim certificate. In one of the affidavits filed in this Court, the Petitioner has averred that he had signed the no claim certificate under the belief that it would not come in his way to make other claims. It is also averred that the Petitioner was made to put his signature on a printed format. A case has been sought to be made out that the issuance of the no claim certificate and receipt of the payment of the final bill was not wilful, nor on own accord of the Petitioner, without knowing that he would not be entitled to raise a dispute for reference to arbitration. This may itself be a disputed question which the arbitrator may have to decide.

11. On consideration of the decisions cited by both sides, namely, the case decided by the Hon"ble Supreme Court in L.K. Ahuja and Co. (supra) and the decision of the Bombay High Court in the case of Ajit Mehta & Associates (supra) considering the decision of the Hon"ble Supreme Court, it is to be noticed that the case in hand stands on a different footing. It is true that according to the decisions referred to above, acceptance of payment in full and final settlement of the bill and issuance of no claim certificate would not come in the way of the party to seek reference of the dispute for arbitration more so where the party takes up the case that it was due to coercion, compulsion, misrepresentation or misunderstanding of the fact that it would close the chance of referring the dispute for arbitration. In the case in hand we find that there is a condition in the agreement which is applicable to the parties, namely, Condition No. 43(2) of the General Conditions of Contract. Its applicability has not been disputed by the Petitioner.

12. For appointment of an arbitrator there has to be an arbitration agreement between the parties by virtue of which statutory powers to appoint an arbitrator are to be exercised. It is based on agreement between the parties. The same agreement by virtue of which parties agree for appointment of an arbitrator to settle the dispute between them, the very same agreement provides yet Anr. clause according to which in a given condition, the contractor would be debarred from making any prayer for reference to arbitration parties are equally bound by the said clause as they are bound by the arbitration clause. If the two clauses, namely, the arbitration clause and the clause placing restriction on referring the matter to arbitrator under Condition No. 43(2) of the General Conditions of the Contract are read together, it will only lead to the conclusion that the disputes which are referable, in respect whereof an arbitrator is to be appointed, are such in respect of which full and final settlement of the bill on final measurement of the work has not been made nor no claim certificate has been issued by the contractor. Condition No. 43(2) of the General Conditions of Contract reads as under:

43(2) The Contractor shall not be entitled to make any claim whatsoever against the Railway under or by virtue of or arising out of this contract, nor shall the Railway entertain or consider any such claim, if made by the Contractor, after he shall have signed a "No Claim Certificate" in favour of Railway, in such form as shall be required by the Railway, after the works are finally measured up. The contractor shall be debarred from disputing the correctness of the items covered by "No Claim Certificate" or demanding a reference to arbitration in respect thereof.

The above noted condition debars the contractor from demanding a reference to arbitration in respect of matters for which final measurement has been made and the bill has been paid in full and final satisfaction of the same and a no claim certificate has also been issued. It would not be possible to argue that the arbitration clause may apply, but the clause, namely, Condition No. 43(2) which debars reference to arbitration in certain circumstances may not apply. Once the same agreement deals with the same subject-matter, all such relevant conditions are to be read together. No doubt under one clause a provision has been made for reference of the dispute between the parties to the arbitration, but by Anr. clause, it has been restricted in certain circumstances. The net result would be that a reference to arbitration would not be available in regard to the matters covered under Condition No. 43(2) of the General Condition of Contract. The whole matter is dependent upon the contract between the parties. Therefore, a reference to arbitration will have to be in accordance with the terms and conditions of the agreement. In this view of the matter, the case in hand differs from the decisions referred to above by the parties. In none of those cases, it appears, there was any provision like Condition No. 43(2) of the General conditions of Contract which places a bar to refer the matter to arbitration in certain conditions mentioned therein. An arbitrator would be entitled to decide any dispute between the parties as may be permissible under the terms of the agreement. His jurisdiction cannot be expanded unless agreed to by the parties. Hence, where a party is debarred from referring a dispute in certain circumstances, an arbitrator cannot assumed jurisdiction to decide such a dispute even though it may be existing. The disputes which are specifically barred in terms of the agreement cannot be referred. The parties to the agreement would be bound by General Condition No. 43(2) of the General Conditions of Contract as by the arbitration clause.

13. In this view of the matter the Petitioner is not entitled for the relief prayed for the appointment of arbitrator for settlement of the dispute. In case the Petitioner feels that no claim certificate was issued under some misconception or otherwise, which may not bind him, it will only be open for him to approach the appropriate forum for raising such pleas and raise his claim in a Court of law. So far the forum of arbitration is concerned, it would be available only in accordance with the terms of the contract which, in this case, under the facts and circumstances, bars the contractor from making any request for referring the dispute for arbitration.

14. In the result the petition is dismissed.