

(1998) 09 DEL CK 0009
In the Delhi High Court
Case No : Suit No.278-A of 1997

Tilak Raj Katyal

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 17-09-1998

Acts Referred:

Arbitration Act, 1940 — Section 20

Citation : (1998) 6 AD 781 : (1998) 76 DLT 358 : (1998) 47 DRJ 246 : (1999) 121 PLR 7 : (1999) RLR 227

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : Mr. R.K. Sharma, for the Appellant; Mr. B.K. Aggarwal, for the Respondent

Judgement

Dr. M.K. Sharma, J.—This is a petition u/s 20 of the Arbitration Act filed by the petitioner praying for appointment of an arbitrator for adjudicating the disputes arising between the parties herein. The petitioner was awarded with a work contract by the respondent for providing a Security Wall and Fencing/Gate Hill Mukkunimala at Trivendrum. During the course of execution of the works, certain disputes arose between the parties. The aforesaid disputes/claims of the petitioner which were stated to have arisen have been set out in paragraph 6 of the petition. The petitioner also stated that the contract between the parties contains an arbitration agreement being clause No.17. A copy of the said arbitration clause is also annexed to the petition as Annexure P-5. Since the aforesaid disputes have arisen between the parties the petitioner has sought for adjudication of the said disputes through the process of arbitration in terms of clause 17 placed on record.

2. During the pendency of the present petition it appears that the respondent has appointed an arbitrator to adjudicate the disputes mentioned in paragraph 6 of the petition except for 2 claims which are claim No.s VI & VII of the claims set out in paragraph 6. The remaining claims have been referred to the arbitrator

appointed by the respondents in terms of clause 17 of the arbitration agreement and the same are pending adjudication before the said arbitrator. This petition, Therefore, is pressed for by the petitioner seeking for reference of the said two claims which are stated to be disputes arising out of the contract.

3. Claim No. vi relates to a claim of Rs.3,50,000/- towards loss of damages caused by MES due to prolongation of the contract period, whereas claim No.vii relates to claim for an amount of Rs.2,00,000/- towards escalation of material, labour and fuel.

4. The respondent has filed an additional reply contending inter alias that in terms of clause 17 of the arbitration agreement, all disputes between the parties to the contract other than those for which the decision of the C.W.E. or any other person is by the contract expressed to be final and binding, shall after written notice by either party to the contract, to the other of them be referred to the sole arbitration of an Engineer Officer to be appointed by the authority mentioned in the tender documents. According to the respondents the aforesaid two claims for loose of damages caused due to prolongation of the contract period and payment towards escalation of material, labour and fuel are not referable to the sole arbitrator as the said disputes are excepted matters under the contract.

5. I have heard the learned counsel appearing for the petitioner as also the counsel appearing for the respondent. Counsel for the petitioner submitted that it is for the arbitrator to decide as to whether a particular claim is covered by the arbitration clause or not and the court should not exercise such powers. In support of his submission the learned counsel relied upon the decision of the Supreme Court in Union of India (UOI) and Another Vs. L.K. Ahuja and Co., and the decision of Allahabad High Court in U.P. Seeds and Tarai Development Corporation Ltd. and another Vs. M/s. Mishra and Company and another, .

6. On the other hand the learned counsel appearing for the respondent drew my attention to condition No.11 of the IAFW-2249 forming part of the contract. Condition 11 thereof which is annexed with the additional reply provides that no claim in respect of compensation or otherwise howsoever arising as a result of extension of time granted under conditions (A) & (B) therein would be admitted. Conditions (A) & (B) thereof stated that all extensions granted by the Accepting Officer and communicated to the contractor shall be final and binding and no claim shall be accepted in respect of compensation or otherwise however, arising as a result of the extension granted. The decision of the accepting officer for granting extension was made final and binding and the contractor was made bound to complete the works within such extended time. It is thus apparent that the decision of the accepting officer giving extension to the contract is made final and binding and that the contractor is bound to complete the contract within the aforesaid extended period for which no claim whatsoever could be entertained. Thus any claim of the contractor for prolongation of the contract could not be adjudicated upon by the arbitrator and such claims were taken out of the arbitration agreement by consent of the parties. In Sudhir Brothers Vs. Delhi

Development Authority, reported in 1995(2) AD (Delhi) 643 a division bench of this court following the ratio of the decisions in Vishwanath Sood Vs. DDA, AIR 1989 SC 592, Ishwar Singh & Sons Vs. DDA, 1994 (1) ALR 527, Associated Engineering Co. Vs. Government of Andhra Pradesh and another, and Tarapore and Co. Vs. State of M.P., , held that if the decision of the Superintending Engineer was made final and the arbitration clause excluded the question forming subject matter i.e. the decision of the Superintending Engineer from being referred to arbitration, that decision on such disputes are not covered by the arbitration agreement and no reference of such disputes could be made to arbitrator.

7. In M/s. Prabartak Commercial Corporation Ltd. Vs. The Chief Administrator Dandakaranya Project and another, it was held that any dispute arising under clause 13A may not be covered by the arbitration agreement and the same cannot be referred to the arbitrator. In the said decision it was further held that independent clause in a contract providing for dispute over rates of payment and making decision of Superintending Engineer final, such dispute regarding rates does not fall within arbitration clause and thus reference as well as award on such dispute is without jurisdiction. In my considered opinion, the ratio laid down in the aforesaid decisions are fully applicable to the claim No.6 as raised by the petitioner in the present petition, and as such the said dispute is an excepted matter and does not fall within the Arbitration clause. Such dispute has been specifically excluded from the purview of the application of arbitration clause and thus, cannot be referred to an arbitrator.

8. As regards the second dispute namely claim No.7 relating to payment of escalation of material, labour and fuel, the stand of the respondent is that the said dispute is also not referable to the arbitrator in view of condition No.25 & 26. According to the respondent as per note 4 of condition No.25 and note 6 of condition No.26 any dispute arising out of the interpretation or application of the said condition would be referred to the Accepting Officer whose decision would be final and binding. Admittedly the petitioner has raised dispute in respect of the aforesaid claim which calls for interpretation or application of the aforesaid special condition. Notice was also issued by the petitioner to the respondents for a decision on the aforesaid. The petitioner placed his claim on the aforesaid account before the competent authority but no records have been placed before me to prove and establish that any decision has been taken by the Accepting Officer on the aforesaid claim. Since the respondent has failed to prove and establish that the Accepting Officer has taken a decision on the aforesaid dispute arising out of interpretation or application of condition No.25 and condition No.26, in my considered opinion, it cannot be said at this stage that the dispute does not fall within the arbitration clause. So long as a decision is not given by the Accepting Officer it cannot be said that the same is final and binding and is Therefore, not referable to arbitration and is outside the scope of arbitration agreement.

Thus claim No.7 is also referred to the arbitrator appointed by the respondents for his adjudication. It is however, made clear that while deciding the aforesaid claim it shall be the duty of the arbitrator to consider the records placed before it and also to adjudicate and decide whether any decision has been taken by the Accepting Officer in respect of the aforesaid dispute which would take away jurisdiction of the arbitrator to decide the dispute. After such consideration if the arbitrator finds that the said dispute is outside the arbitration agreement he would refuse to answer the claim giving his reasons for the same otherwise he shall adjudicate upon and answer the said claim also in accordance with law. In terms of the aforesaid order the present petition stands disposed of.