
(2003) 02 BOM CK 0132
In the Bombay High Court
Case No : Arbitration Petition No. 44 of 2003

Union of India (UOI)	Vs	APPELLANT
Anupam Builder and Shri Krishan Kumar, Chief Engineer, Sole Arbitrator		RESPONDENT

Date of Decision : 15-02-2003

Acts Referred:

Citation : (2003) 3 ALLMR 215 : (2003) 6 BomCR 381 : (2003) 4 MhLj 509

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : Suresh Kumar and Dubey, instructed by T.C. Kaushik, for the Appellant; S.U. Kamdar and H. Too(Sic), instructed by Craford Bayley and Co., for the Respondent

Final Decision : Partly Allowed

Judgement

F.I. Rebello, J.—Heard forthwith.

The Petitioner Union of India have impugned various claims awarded by the arbitral tribunal by its award dated 10.8.2002. For the purpose of deciding the controversies, it may be pointed out that the main challenge advanced at the bar though other challenges have been raised in the petition, but not argued may be summarized under the following heads:

(a) Claim No. 2 which forms ground (e) in respect of Award for sand from other than at Mumbra.

(b) Claim No. 8 which is ground (h) in the petition.

(c) Claim No. 10 which is the subject matter of grounds (a) and (b). It is contended that this was an excepted matter and consequently could not have been the subject matter of reference before the arbitrator.

(d) Claim 13 which is again raised and forms ground raised in grounds (a), (b) and (c). In addition it is pointed out that after rejecting the Claim 6 and 13, claim

13 could not have been awarded.

(e) Claim No. 16 is in respect of interest. It is contended that interest could not have been awarded on damages.

With the above, we may consider the challenges.

2. In so far as claim 2 is concerned, it is contended on behalf of the Petitioners by their learned counsel that the Respondents were not bound to bring only sand from Mumbra. They could have brought it from other places. However, option was available to bring it from Mumbra and if brought from elsewhere, the price would be the same and consequently three respondents could not claim amounts for sand brought from outside Mumbra. The learned arbitrator has addressed himself to the issue and the contentions raised therein by the Petitioner's. The learned arbitrator found that on account of action by statutory authorities sand at Mumbra was not available and it is under those circumstances, that the respondents who ordinarily would have brought sand from Mumbra had to get it from other places at considerable cost. Considering the reasons and finding given and as the Respondents had to bring the sand for reasons beyond their control other than from Mumbra, it would not be fit case for this court to interfere. The award to that extent cannot be said to be beyond the terms of the contract. The challenge in so far as claim No. 2 is concerned, will have to be rejected.

3. We then come to claim No. 8. In this claim, the learned arbitrator has assessed loss suffered by respondents on account of failure by the Petitioners to make payments within time stipulated in condition No. 64. The learned counsel for the Petitioner had sought to place reliance on condition No. 65. Condition No. 65 applies to final bill and not to running bills. The learned arbitrator has addressed himself to the question and consequently, I find no reason to interfere with the said finding as he has considered the correct clause, namely Clause 64 in awarding the said amounts.

4. We may address ourselves to Claim No. 13. It is contended on behalf of the Petitioners that considering Clause 70 and also finding on claim Nos. 6 and 13, the learned arbitrator could not have awarded the said amounts as they were not falling within the terms of the contract. The learned arbitrator has discussed the issue in Paragraph 67 to 72. The Judgment of the Apex Court referred to have been considered as can be seen from the discussion as also provisions of the Indian Contract Act. These amounts have been given on account of over heads for supervisory and administrative expenses etc. At the same time, the learned arbitrator has rejected claim No. 6 for idle labour etc. and Claim Nos. 14 and 15. After considering Clause 11. Findings have been recorded that there has been breach of contract on the part of the Petitioners. Considering this breach of contract, the learned arbitrator has held that it was permissible considering unusual long delay to award compensation for a period of 12 months to the Respondents, as the contractor had to employ extra resources in the form of over heads. This argument is based on a view earlier taken by this court that it would

not be within the jurisdiction of the arbitrator to consider the claim, which was the view taken in Shamprasad v. Union of India. That view was reversed by the Apex Court considering its judgment in K.K. Ravindranath v. State 1998 (4) S.C.C. 410. The learned counsel also points out before me two judgments of two learned Single Judges of this court, who have subsequently allowed the claims in the case of Union of India v. Mukesh Construction Co. and Anr. in Arbitration Petition No. 141 of 1997 decided on 17.6.2002 and Arbitration Petition No. 234 of 2002 in Union of India v. Moti Enterprises and Anr. in that light of the matter, no interference is called for.

5. With the above, we may now consider the issue in so far as claim No. 10 is concerned. The relevant portion of Clause 70 reads as under:

"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 express 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 a serving officer having degree in Engineering or equivalent or having posed final/direct examination of surveyor (India) recognized by Government of India an Engineer Officer to be appointed by the authority mentioned in the tender documents."

The other relevant Clause is 62(g) which reads as under:

"For all Contracts:-

If any work, the rate for which cannot be obtained by any of the methods referred to in paras (A) to (E) above has been ordered on the Contractor, the rate shall be decided by the G.E. on the basis of the cost of the Contractor at site of Works plus 15% to cover all overheads and profit. Provided that if the Contractor is not satisfied with the decision of the G.E. he shall be entitled to represent the matter to the C.W.E. within seven days of receipt of the G.E.'s decision and the decision of C.W.E. thereon shall be final and binding.

If any alterations or additions (other than those authorized to be executed by day work or for an agreed sum) have been covered up by the Contractor without his having given notice of his intentions to do so, the Engineer-in-charge shall be entitled to appraise the value thereof and in the event of any dispute the decision of the G.E. thereon shall be final and binding."

From this it is pointed out that the Claim No. 10 would fall under excepted items and therefore, cannot be subject matter of the arbitration. The Respondents in fact it is pointed out referred the matter for decision of the G.E. who decided the same on 30.11.1998. Though the Respondents protested and accepted the decision without prejudice, none the less they did not refer the matter for decision of the C.E. within 7 days of receipt of the G.E.'s decision. On the contrary Petitioners themselves referred the matter and the C.E. has given his decision on 1.3.2000. They had also raised objection before the Arbitrator about arbitrability of the claim.

On the other hand, on behalf of the Respondents, their learned counsel contends relying on Clause 439 of Section 23 of the Rules and Regulations that decision had to be taken before expiry of the period of contract. That decision was not taken. The contract itself was completed as record would show on 30.8.1997. Reference to arbitration was made on 23.12.1998. Considering all these aspects, as the decision had not been taken before the reference to arbitration, it was not open to the arbitrator to so decide and consequently it being within jurisdiction, no interference is called for. Both the parties have relied on Judgment in support of their respective arguments which will be adverted to hereafter. The arbitrator himself in so far as this claim is concerned in proceeding to award the claim has recorded the following finding:

"I agree with the contractor contention that this claim can be arbitrated since the never represented to CWE about star rate but signed star rate under protest. if representation is made to CWE under condition 62(G) of IAFW-2249 about star rate if fixed by GE within seven days then only decision of CWE is final and binding. Also Hon"ble High Court order is very clear wherein it has been ordered to refer all disputes to arbitration of arbitrator to decide the legality and validity of these claim. In view of representation of both the parties, find that it is legal and valid to arbitrate these claims as correct procedure has not been followed by UOI in arriving at final and binding powers."

In the first instance, to an Arbitral Tribunal reference u/s 11 does not decide issue or arbitrability of claims. That issue is for consideration of the tribunal u/s 16 of the Act of 1996. Clause 62(g) read with Clause 70 provides for exclusion in the event the party aggrieved chooses not to invoke the arbitral provisions against the decision. It is in these circumstances, therefore, that the issue will have to be considered whether considering the terms of the contract, the claim was arbitrable and could have been subject matter of the submission to arbitration.

Let me therefore, consider the judgments cited above before adverting to Clause 439 and Section 23 of the Regulations. My attention was invited to a judgment of a learned Single Judge of this court in Mahesh Vakharia v. Union of India and Anr. in Arbitration Suit No. 1610 of 1978 decided on 17.1.1980. Perusal of the said judgment would disclose that the issue therein was whether the competent authority was right in refusing to refer the matter under excepted items to arbitration. That was under the Act of 1940. The second judgment is also of the same learned Single Judge in the case of L.I.C. v. A.M. Rasool & Co. in Arbitration Petition No. 139 of 1979 decided on 31st July, 1984. That again was a challenge to the award under the Act of 1940. To my mind considering the Act of 1996 and Section 16 and the subsequent judgments of the Apex Court, it is not necessary to advert to the said judgments in L.I.C. (supra). In M/s. Prabartak Commercial Corporation Ltd. Vs. The Chief Administrator Dandakaranya Project and another, , the issue was whether certain disputes can be referred considering independent clause in the contract providing for dispute over rates of payment

and making decision of Superintending Engineer final. The Apex Court held that once there was such a clause, dispute regarding rates does not fall within the arbitration clause and as such the arbitrator would have no jurisdiction. In *Food Corporation of India Vs. Sreekanth Transport*, again the issue was of excepted matter. The Apex Court noted that while considering the issue, what has to be noted is whether on the set of facts there was positive relinquishment or abandonment of a right so far as the adjudication of the excepted matters are concerned. On the facts therein the court held that as the appellant before it itself wanted the matter to be adjudicated by the Civil Court then that issue can also be referred to arbitration. In other words, the position in law would be that, if there is provision under the Contract providing for arbitration and if the parties chooses to decide to give go bye to the contract even in respect of excepted matters, then in that event it cannot be said that the arbitrator would have no jurisdiction to decide considering the relinquishment or abandonment by the parties themselves. In *Executive Engineer R.E.O. v. Suresh Chandra* 1999 (9) S.C.C. 922 under the Act of 1940, the Apex Court held that in a contract containing a clause the arbitral tribunal would have no jurisdiction. In *J.G. Engineer's Pvt. Ltd. Vs. Calcutta Improvement Trust and Another*, , again was a case where there were provisions stating that the disputes in which Engineers Decision was expressed to be conclusive, would not be arbitrable. In that case the court held that the disputes regarding terminating of contract by the exception clause in the arbitration agreement did not relate to the jurisdiction of the arbitrator. The law has been reiterated in the case of *General Manager Northern Railways and Another Vs. Sarvesh Chopra*, . The Apex Court once again considering the provisions of Act of 1940 has held that in respect of excepted matters, the claim cannot be referred to arbitration. From all these judgments what emerges clearly is that when there are excepted matters those matters cannot be referred to arbitration, except in the cases where the authorities themselves positively relinquish or abandon their right. In the instant case, in so far as Petitioners are concerned, they have neither relinquished or abandoned their right. They have been raising objections including before the arbitrator. From the record what emerges is that the Petitioners has been agitating the issue of the claim right from the year 1995. On 22.5.1995, the Chief Engineer decided that hammer dressing was payable as extra. Thereafter the board was set up and final decision was rendered on 16.11.1998 holding that the star rate payable is Rs. 2.40. We have already adverted to the clause which provided for appeal within seven days. The Respondent choose not to appeal. But the Petitioners themselves referred the matter which otherwise they were not bound to do and which decision was given on 1.3.2000 by CWE. Will this make any difference considering the regulations referred to above by the learned counsel. In my opinion, regulation 439 of Section 23 does provide for fixation of rates for items of work which were not provided. It further provided that CWE is authorized to fix the rates before the expiry period of contract rates. Would that mean that Clause 62(c) would be ineffective or inoperative. At the highest the said clause can be read to mean that the authority concerned, has been called

upon to decide the dispute within time frame. That by itself cannot mean that a term in the contract accepted by the parties has to be given a go bye. The parties agreed to a particular procedure namely that in so far as excepted matters are concerned, the disputes would not be arbitrated but would be subject matter of separate clause and that the decision given by the authorities so specified would be final. Once having so accepted the contractual clause, on failure by the respondents to act in terms of the contract, cannot result in the arbitrator assuming jurisdiction to decide the claim which otherwise he had no jurisdiction to decide. To my mind, therefore, the arbitral tribunal has decided the claims which was not arbitrable. In the light of that, there is merit in the contention of the Petitioner in so far as claim No. 10 is concerned and consequently the award of the arbitrator in so far as Claim No. 10 is concerned, is liable to be set aside. That claim is severable from the rest of the award.

6. That leaves us with the last issue of interest being claim No. 16. The arbitrator has awarded simple interest at the rate of 12%. To my mind even considering that there was no provisions for interest and considering the interest rates prevailing, this will not be a fit case for interfering, considering that it was within the jurisdiction of the Arbitral Tribunal to award reasonable rate u/s 34. It will not be possible to interfere with the same except in so far as claim No. 8 is concerned which is by way of damages. Interest or damages could have been awarded only from the date of the award.

7. It is sought to be contended that under Clause 70 it is only those items in respect of which there is decision which would not be subject matter of references to arbitration. It will be difficult to so accept considering that there can be disputes raised even at the stage of presentation of final bill. Even other what Clause 70 provides is "other than those for which the decision of the C.W.E. or any other person is by the Contract express to be final and binding". This does not lend to a construction that there must be decision on the date of reference. The clause correctly read would mean that where an authority has been named to decide, and his decision is made final, then those claims would not be subject of arbitration.

In the light of the above, following order:

Petitioner is party allowed to the extent, that the award of the arbitral tribunal in so far as claim No. 10 is concerned is set aside. In so far as Claim No. 16 is concerned, it is modified in as much as interest on claim 8 will be from the date of the award. The award stands modified accordingly. Award stands modified accordingly.

P.A. to issue authenticated copy of this order.