

(2004) 09 DEL CK 0158
In the Delhi High Court
Case No : CS (OS) No. 1246-A of 1992

Vaish Brothers and Co.

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 06-09-2004

Acts Referred:

Arbitration Act, 1940 — Section 20

Citation : (2004) 3 ARBLR 225 : (2004) 114 DLT 354 : (2004) 77 DRJ 206

Hon'ble Judges : Mukul Mudgal, J

Bench : Single Bench

Advocate : George Thomas and Jeeman Raju, for the Appellant; Kailash Gambhir and Amit Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Mukul Mudgal, J.—Appointment of an arbitrator is claimed by the petitioner by this petition u/s 20 of the Arbitration Act, 1940. The petitioner is a contractor and respondent No.1 is a Military Engineer Services an organization under Ministry of defense and respondent No. 2 is the Engineer in chief of respondent No. 1. Tenders were invited by respondent No. 1 for the work of construction of production shop at Project Site in Andhra Pradesh. The petitioner being a eligible contractor participated in the tender and submitted his tender and upon acceptance of the terms of the tender, the same was awarded to the petitioner by virtue of the order dated 15th February 1985. It is not disputed that the work was completed beyond the stipulated time and the petitioner thereafter raised certain disputes which were not referred to arbitration leading to the present petition.

2. The petitioner has relied upon clause 70 of the General Conditions of Contract IAFW 2259 which indisputably is the Arbitration Clause comprised in the agreement between the parties. The relevant portion of the said clause 70 reads as under:

"Arbitration - All disputes, between the parties to the contract (other than those for which the decision of the C.W.E. Or any 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."

3. It is the petitioner's case that the demand for appointment of an arbitrator was raised by the petitioner by its letter dated 31st December 1990 which also listed the claims raised. However, paragraph 2 of the said letter acknowledged that the final bill had been paid though said to be under protest.

4. This appointment of an arbitrator has been resisted by the respondent inter alia, by placing reliance on clause 65 of the IAFW 2259 General Conditions of Contract, which stipulates as under:

" No further claim shall be made by the contractor after submission of final bill and these shall be deemed to be waived and extinguished."

5. It is also submitted that since requests for extension of time were made at the behest of the petitioner/contractor as per condition 11 it could not have any financial effect upon the respondent. The learned counsel for the petitioner, Shri Thomas, submitted that this Court may proceed to decide this case on the basis that final bill had been submitted by the petitioner. Reliance was placed on Union of India (UOI) and Another Vs. L.K. Ahuja and Co., and M/s Navbharat Dal Mills vs. Food Corporation of India and another reported as AIR 1993 Delhi 97 to contend that submission of final bills were not a bar to reference of disputes to Arbitration. The relevant portion of the judgment in Union of India vs. L.K. Ahuja and Co. (supra) relied upon by the petitioner reads as under:

"4. The sole question involved in this appeal, is whether the High Court was right in dismissing the application. In matters of this nature, the main question is whether the application under S. 20 was within time. "

... .. "8.. In view of the well settled principles, we are of the view that it will be entirely wrong to mix up the two aspects, namely, whether there was any valid claim for reference under S. 20 of the Act, and secondly, whether the claim to be adjudicated by the arbitrator, was barred by lapse of time. The second is a matter which the arbitrator would decide unless, however, if on admitted facts a claim is found at the time of making an Order under S. 20 of the Arbitration Act, to be barred by limitation. In order to be entitled to ask for a reference under S. 20 of the Act, there must be an entitlement to money and a difference or dispute in respect of the same. 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..."

6. The above decision decided the main issue which was whether the application u/s 20 of the Arbitration act was within limitation and final bills were referred to

incidentally. However, in the absence of any other decision of the Hon''ble Supreme Court the observation qua settlement of final bills not being a bar to disputes being referred to arbitration would have governed the present case. However, since there is a direct decision of the Hon''ble Supreme Court in General Manager Northern Railways and Another Vs. Sarvesh Chopra, on this issue, Therefore, in my view the above decision is not applicable.

7. It was also held by the Division bench of this Court in M/s Navbharat Dal Mills (supra) that whether the claim is filed within time or whether there is accord or satisfaction between the parties is required to be decided by the arbitrator and not by the Court. In my view both judgments relied upon by the learned counsel for the petitioner are not materially relevant for the issue recorded in the petition which involves the interpretation of clause 65 extracted hereinabove. The above judgments essentially dealt with the question of limitation.

8. In respect of excepted matters in similar circumstances, the Hon''ble Supreme Court in General Manager Northern Railways and Another Vs. Sarvesh Chopra, it was held as follows"

" 17. To sum up, our conclusions are: (1) while deciding a petitioner u/s 20 of the Arbitration Act, 1940 the court is obliged to examine whether a difference 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 an "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 and (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."

"19. After the hearing was concluded the learned counsel for the respondent cited a few decisions by making a mention, wherein the view taken is that "interpretation of contract" is a matter for the arbitrator to decide and the court cannot substitute its own decision in place of the decision of the arbitrator. We do not think that the cited cases have any relevance for deciding the question arising for consideration in this appeal. None of the cases is an authority for the proposition that the question whether a claim is as "excepted matter" or not must be left to be decided by the arbitrator only and not adjudicated upon by the court while disposing of a petition u/s 20 of the Arbitration Act, 1940. We cannot subscribe to the view that interpretation of arbitration clause itself can be or should be left to be determined by the arbitrator and such determination cannot be done by the court at any stage."

9. In my view the above principle of law laid down squarely applied to the facts of the present case and not the Supreme Court judgment in Union of India v. L.K. Ahuja (supra) relied upon by the petitioner's counsel. Since this petition has

proceeded on an admission of the learned counsel for the petitioner that the final bill was submitted and clause 65 providing for excepted matters and barring raising of any claim after submission of the final bills, clearly comes into play and the petitioner is not entitled to seek the reference of the dispute and even the issue of existence of a dispute cannot be referred to the Arbitrator.

In view of the foregoing discussion, the petition deserves to be dismissed and is accordingly dismissed.

All the pending applications, if any, also stand disposed of.