
(2001) 03 AP CK 0052
In the Andhra Pradesh High Court
Case No : AA No. 41 of 2000

Y. Babu Rao

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 23-03-2001

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 16

Citation : (2001) 3 ALD 421 : (2001) 3 ALT 191

Hon'ble Judges : S.B. Sinha, C.J

Bench : Single Bench

Advocate : Mr. T. Ravi Kumar, for the Appellant; Mr. T. Rama Krishna Rao, for the Respondent

Judgement

1. In this application u/s 11 of the Arbitration and Conciliation Act, 1996 the applicant herein has prayed for appointment of a sole arbitrator for adjudication of the claims specified in his letter dated 28-1-2000. The said arbitration agreement is contained in a contract agreement bearing No.08/CAO/C/SC/98, dated 16-1-1998 entered into by and between the applicant and the respondents herein/ Admitted fact of the matter is that the respondents called for the tenders for the work of gauge conversion of CLM-VSG section from meter gauge to broad gauge and proposed construction of side drains and road work in MPT yard at Vasco station, the estimated value whereof was Rs.24,61,000/-. The applicant submitted the tender for a sum of Rs.19,77,910/- which was accepted. The applicant contends that he has successfully completed the work within the time extended by the respondent-authorities and executed 25% more than stipulated in the original contract.

2. He had raised ten claims for a total sum of Rs.1,12,97,951/-. Despite demand the claim of the applicant was not considered whereafter a lawyer's notice dated 8-5-2000 was served.

3. The arbitration clause contained in clause 64 of the General Conditions of Contract which admittedly forms part of the contract reads thus:

"64(1)(i) Demand for Arbitration:

In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway or any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the "excepted matters" referred to in clause 63 of these conditions, the contractor, after 120 days but within 180 - days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.

64(1)(ii) The demand for arbitration shall specify the matters which are in question or subject of the dispute or difference as also the amount of claim item-wise. Only such dispute (s) or difference (s) in respect of which the demand has been made, together with counter claims or set-off shall be referred to arbitration and other matters shall not be included in the reference.

64(1)(ii)(a) The arbitration proceeding shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway.

(b) The claimant shall submit his claim stating the facts supporting the claims along with all relevant documents and the relief or remedy sought against each claim within a period of 30 days from the date of appointment of the Arbitral Tribunal.

(c) The Railway shall submit its defence statement and counter claim (s), if any, within a period of 60 days of receipt of copy of claims from Tribunal thereafter, unless otherwise extension has been granted by Tribunal.

64(1)(iii) No new claims shall be added during proceedings by either party. However, a party may amend or supplement the original claim or difference thereof during the course of arbitration Proceedings subject to acceptance by Tribunal having due regard to the delay in making it.

64(1)(iv) If the Contractor (s) does/do not prefer his/their specific and final claims in writing, a period of 90 days of receiving the intimation from the Railways that the final bill is read for payment, he/they will be deemed to have waived his/their claim (s) and the Railways shall be discharged and released of all liabilities under the Contract in respect of these claims."

4. The claims of the applicant are:

Claim No. 1:-

Continue maintenance of labour set up due to prolongation of contract.

(Authority:- Law relating to building and engineering contracts in India page No.639)

Total period of contract for work to be completed 3 months.

But work was completed actually on 30-9-1999 i.e., total extra time taken 32 months

Extra time - 32 months (?) original period of 3 months

29/3 months : 9.5 times

15% on the total value of agreement

Rs.19,77,910x 9.5 times _____ 100 Rs.28,13,521/-
Claim No. 2:- Idling of machineries (Authority : Judgment in OS No.235/91) (a) Road-roller.... 1 No. Rent per month Rs. 19,200/- Including drivers" batta (Rent Rs. 18,000 driver batta 1,200 = Amount involved for 29 months x 19,200 Rs.5,56,800/- (b) Hot mix plant.... 1 No. Rent per day including crew charges Rs. 1500/- Rs.13,05,000/- (c) Lorry 2 Nos. Hire per month Rs.30,000/- Amount involved Rs.30,000 x 29 months Rs.8,70,000/- Claim No. 3:- Increase of rates @ 50% for the period from 12-2-1997 to 30-9-1999 on Rs.19,77,910/- Rs.9,88,955/-

Claim No.4:- Contingency expenses/incidentals expenditure @ 3% on Rs.19,77,910/- x 3% x 9.5 times Rs.5,63,704/- Claim No.5:- Overheads @ 10% on the agreement value of Rs. 19,77,910/- @ 10% = Rs.1,97,791/- Amt involved @ 1,97,791 x 9.5 times Rs.18,79,014/- Claim No.6:- Business loss and consequent profit and loss @ 10% on the agreement value of Rs. 19,77,910/- @ 10% = Rs. 1,97,791/- Rs.18,79,014/- Claim No. 7:- Less payment on Mooram item No.9 of agreement Amount as per agreement Rs.2,80,000 Less contractor"s + 19% Rs. 53,000 Rs.2,26,800 Amount paid Rs. 50,000 Balance payable Rs.1,76,800 Rs.1,76,800/- Claim No.8:- Cost of cement purchased under item No.3, but not paid Total quantity as paid 197.730 cum Cement required @ 4.4 bags x for cum Hence total cement required: 197.730 cum x 4.4 870 bags cost of cement per bag Rs.170/- Total amount Rs. 170 x 870 bags Rs.1,47,900/- Claim No.9 Original item No.10 of agreement Agreement quantity 4000 cum Plus 25% 1000 cum 5000 cum

As per sub-agreement No.B/CAO/C/SC/98/ SA III Date 2-4-1998 556 5556 But actually paid for 1581 Balance quantity to Be paid @ Rs. 30-25 3975 cum Item No.1 of sub-agent Rs.3-00 Item No.2 of sub-agent Rs. 10-25 Item No.3 of sub-agent Rs.17-00 Rs.30-25 Amount involved 3975 cum x Rs.30-25 Rs.1,20,243/- Claim No.10 Interest To be worked out, 5. The respondents, however, contend that the applicant herein had accepted final variation statement on 2-11-1999 and signed the final bill on 12-11-1999. The learned Counsel appearing on behalf of the respondents would urge that the acceptance of such final statement was an unconditional one and the payment was accepted without any demur. It appears that on 15-11-1999 the applicant has wrote to the respondents in the following terms:

"The above subjected work has been completed on 30-9-1999 with all respect

and final bill passed. It is requested to kindly issue credentials for the above agreement."

6. By another letter dated 16-1-1999 he submitted a no claim certificate in the following terms:

"We hereby further admit that my/our claim which now subsists against the SC Railway administration under or by virtue of arising out of the aforesaid contract is in respect of-- Nil.

We hereby further agree and undertake not to make any claim or claims whatsoever against the South Central Railway Administration at any time after, under or by virtue of arising out of the aforesaid contract save and except the subsisting claim more particularly specified preceding paragraph."

7. The applicant received a sum of Rs.3,34,186/- in settlement of all demands on account of the work in question. Such payment has been received without prejudice to the rights and contentions of the parties and without any demur whatsoever. He also received a cheque on 18-11-1999 for a sum of Rs.3,29,331/- towards payment of final bill.

8. However, despite the same the respondents have stated that even claim No.10 annexed to the applicant's letter did not exist on or about 9-2-2000. He laid a demand and ultimately appointed an arbitrator.

9. The learned Counsel appearing on behalf of the applicant submitted that in terms of clause 64 of the General Conditions of Contract, when there exists an arbitration agreement irrespective of any purported no claim certificate the matter should be referred to arbitration. The learned Counsel in support of his contention relies on Union of India (UOI) and Another Vs. L.K. Ahuja and Co., , V. Ramana Reddy Vs. Union of India (UOI) and Another, , Malaysian Airlines Systems Bhd (II) v. M/s. Stic Travels (Private) Limited 2000 (8) Supreme 145. The learned Counsel appearing on behalf of the respondents on the other hand would urge that having regard to the fact that the applicant herein has accepted full and final settlement, the question of referring the matter to the arbitrator does not arise.

10. The only question which can be determined is as to whether having regard to the aforementioned factual aspect, any prayer for referring the dispute for arbitration is maintainable.

11. Before an arbitration clause can be invoked the procedure laid down in clause 63 has to be fulfilled which reads thus:

"63. Matters finally determined by the Railway :--All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract shall be referred by the contractor to the Railway and the Railway shall within 120 days after receipt of contractor's

representation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provisions has been made in clauses 8 (a), 18, 22 (5), 39 , 43 (2), 55, 45 (A), 55-A (3), 57, 57-A, 61 (1), 61(2) and 62(1) of General Conditions of Contract or in clause of the special conditions of the contract shall be deemed as "expected matters" and decision of the Railway authority, thereon shall be final and binding on the contractor provided further that "excepted matters" shall stand specifically excluded from the purview of the Arbitration clause and not be referred the arbitration."

12. Clause 64(IXiv) provides for a time frame. Once the parties entered into a fresh agreement normally the Court would not go into such a question. The arbitration clause contained in clause 64 although is of wide amplitude, in Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others, , the apex Court observed:

"14. It will be noticed that under the Act of 1996 the arbitral Tribunal is now invested with power under subsection (1) of Section 16 to rule on Us own jurisdiction including ruling on any objection, with respect to the existence or validity of the arbitration agreement and for that purpose, the arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract and any decision by the arbitral Tribunal that the contract is null and void shall not entail ipso jure affect the validity of the arbitration clause. This is clear from clause (b) of Section 16(1) which states that a decision by the arbitral Tribunal that the main contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

13. In the present context subsections (2) and (3) of Section 16 are relevant, They refer to two types of pleas and the stages at which they can be raised. Under sub-section (2) a plea that the arbitral Tribunal does not have jurisdiction shall be raised not later than the submissions of the statement of defence: however, a party shall not be precluded from raising such a plea merely because he has appointed or participated in the appointment of an arbitrator. Under sub-section (3) a plea that the arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. These limitations in subsections (2) and (3) are subject to the power given to the arbitrator under sub-section (4) of Section 16 that the Tribunal, may, in either of the cases referred to in subsection (2) or sub-section (3), admit a later plea if it considered the delay justified. Subsection (5) requires the arbitral Tribunal to decide on the pleas referred to in subsection (2) or sub-section (3) at that stage itself. It is further provided that if either of the pleas is rejected and the arbitral Tribunal holds in favour of its own jurisdiction, the Tribunal will continue with the arbitral proceedings and proceed to make the arbitral award. Then comes sub-section (6) which states that the party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34."

14. It was further held:

".....If there is a situation where there are disputes and differences in connection with the main agreement and also disputes in regard to "other matters " "connected" with the subject-matter of the main agreement then in such a situation, in our view, we are governed by the general arbitration clause 39 of the main agreement under which disputes under the main agreement and disputes connected therewith can be referred to the same arbitral Tribunal. This clause 39 no doubt does not refer to any named arbitrators. So far as clause 5 of the Interior Design Agreement is concerned, it refers to disputes and differences arising from that agreement which can be referred to named arbitrators and the said clause 5, in our opinion, comes into play only in a situation where there are no disputes and differences in relation to the main agreement and the disputes and differences are solely confined to the Interior Design Agreement. That, in our view, is the true intention of the parties and that is the only way by which the general arbitration provision in clause 39 of the main agreement and the arbitration provision for a named arbitrator contained in clause 5 of the Interior Design Agreement can be harmonised or reconciled. Therefore, in a case like the present where the disputes and differences cover the main agreement as well as the Interior Design Agreement, -- (that there are disputes arising under the main agreement and the Interior Design Agreement is not in dispute) - it is the general arbitration clause 39 in the main agreement that governs because the questions arise also in regard to disputes relating to the overlapping items in the schedule to the main agreement and the Interior Design Agreement, as detailed earlier. There cannot be conflicting awards in regard to items which overlap the two agreements. Such a situation was never contemplated by the parties. The intention of the parties when they incorporated clause 39 in the main agreement and clause 5 in the Interior Design Agreement was that the former clause was to apply to situations when there were disputes arising under both agreements and the latter was to apply to a situation where there were no disputes or differences arising under the main contract but the disputes and differences were confined only to the Interior Design Agreement. A case containing two agreements with arbitration clauses arose before this Court in Agarwal Engineering Co. Vs. Technoimpex Hungarian Machine Industries Foreign Trade Co., . There were arbitration clauses in two contracts, one for sale of two machines to the appellant and the other appointing the appellant as sales representative. On the facts of the case, it was held that both the clauses operated separately and this conclusion was based on the specific clause in the sale contract that it was the "sole repository" of the sale transaction of the two machines. Krishna Iyer, J, held that if that were so, then there was no jurisdiction for travelling beyond the sale contract. The language of the other agreement appointing the appellant as sales representative was prospective and related to a sales agency and "later purchases", other than the purchases of these two machines. There was therefore no overlapping. The cause before us and the above case exemplify contrary situations. In one case the disputes are connected and in the other they

are distinct and not connected. Thus in the present case, clause 39 of the main agreement applies."

15. As indicated hereinbefore no claim certificate was filed at the time of preparation of the final bill. Such acceptance was unconditional. Final bill was also prepared after the measurement was taken in presence of the applicant. He signed the final bill and the amount thereunder had been paid. He had received the cheque for the same amount without any protest or demur whatsoever. All other consequential steps pursuant to or in furtherance thereof have been taken. In this situation, having regard to the nature of the claim as referred to hereinbefore I am of the opinion that as a fresh contract has come into being in terms whereof the applicant had agreed not to lay any further claim in the matter and unless the same is set aside by a competent Court of law, it must be held that the dispute is not an arbitrable one. In *Nathani Steels Ltd. v. Associated Constructions* it was held:

"3.....Even otherwise we feel that once the parties have arrived at a settlement in respect of any dispute or difference arising under a contract and that dispute or the difference is amicably settled by way of a final settlement by and between the parties, unless that settlement is set aside in proper proceedings, it cannot lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and proceed to invoke the arbitration clause, if this is permitted the sanctity of contract, the settlement also being a contract, would be wholly lost and it would be open to one party to take the benefit under the settlement and then to question the same on the ground of mistake without having the settlement set aside."

16. In an unreported judgment in Arbitration Application No.44 of 2000 this Court has held thus:

"10. Although in terms of the provisions of the Arbitration and Reconciliation Act, 1996 the question as regards the jurisdiction of the arbitrator can also be adjudicated upon by him having regard to the conduct of the parties, this Court is of the opinion that as a new agreement has been entered into, the arbitration clause has perished."

17. For the reasons aforementioned, this arbitration application is dismissed. There shall be no order as to costs.