M/S. Harsha Constructions vs Union Of India & Ors on 5 September, 2014

Equivalent citations: AIR 2015 SUPREME COURT 270, 2014 AIR SCW 5809 AIR 2015 SC (CIVIL) 256, AIR 2015 SC (CIVIL) 256

Bench: Vikramajit Sen, Anil R. Dave

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.534 OF 2007

M/s Harsha Constructions … Appellant

Versus

Union of India & Ors. … Respondents

J U D G M E N T

3 ANIL R. DAVE, J.

1. Aggrieved by the judgment dated 9th September, 2005 delivered by the High Court of Judicature, Andhra Pradesh at Hyderabad, in CMA No.476 of 2005, this appeal has been filed by M/s Harsha

Constructions, a contractor, against Union of India and its authorities. Hereinafter, the appellant has been described as a 'Contractor'.

2. The Union of India had entered into a contract for construction of a road bridge at a level crossing and in the said contract there was a clause with regard to arbitration. The issue with which we are concerned in the instant case, in a nutshell, is as under:-

> "When in a contract of arbitration, certain disputes are expressly "excepted", whether the Arbitrator can arbitrate on such excepted issues and what are the consequences if the Arbitrator decides such issues?"

3. For the purpose of considering the issue, in our opinion, certain clauses incorporated in the contract are relevant and those clauses are reproduced hereinbelow :-

> "Clause 39. Any item of work carried out by the Contractor on the instructions of the Engineer which is not included in the accepted schedule of rates shall be executed at the rates set forth in the "Schedule of Rates, South Central Railway" modified by the tender percentage and where such items are not contained in the latter at the rates agreed upon between the Engineer and the Contractor before the execution of such items of work and the Contractor shall be bound to notify the Engineer at least seven days before the necessity arises for the execution of such items of work that the accepted schedule of rates does not include a rate or rates for the extra work involved.
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> The rates payable for such items shall be decided at the meeting to be held between the Engineer and the contractor in as short a period as possible after the need for the special item has come to the notice. In case the contractor fails to attend the meeting after being notified to do so or in the event of no settlement being arrived at the Railway shall be entitled to execute the extra works by other means and the contractor shall have no claim for loss or damage that may result from such procedure. Provided that if the Contractor commences work or incurs any expenditure in regard thereto before the rates are determined and agreed upon as lastly mentioned, then and in such a case the Contractor shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the date of the rates as aforesaid according to the rates as shall be fixed by the Engineer. However, if the contractor is not satisfied with the decision of the Engineer in this respect he may appeal to the Chief Engineer within 30 days of getting the decision of the Engineer supported by the analysis of the rates claimed. The Chief Engineer's decision after hearing both the parties in the matter would be final and binding on the contractor and the Railway." "Clause-63. 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 a reasonable time after receipt of the contractor's presentation make and notify decisions on all matters referred to by the contractor in

> writing provided that matters for which provision has been made in Clause 18, 22(5), 39, 45(a), 55, 55-A(5), 61(2) and 62(1)(xiii)(B)(e)(b) of the General Conditions of contract or in any Clause of the Special conditions of the contract shall be deemed as 'Excepted matters' and decisions 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 shall not be referred to arbitration."

4. Upon perusal of Clause 63 of the aforestated contract, it is quite clear that the matters for which provision had been made in Clauses 18, 22(5), 39, 45(a), 55, 55-A(5), 61(2) and 62(1)(xiii)(B)(e)(b) of the General Conditions of Contract were "excepted matters" and they were not to be referred to the arbitrator.

5. In the instant case, we are concerned with a dispute which had arisen with regard to the amount payable to the contractor in relation to extra work done by the contractor.

6. Upon perusal of Clause 39, we find that in the event of extra or additional work entrusted to the contractor, if rates at which the said work was to be done was not specified in the contract, the amount payable for the additional work done was to be discussed by the contractor with the concerned Engineer and ultimately the rate was to be decided by the Engineer. If the rate fixed by the Engineer was not acceptable to the contractor, the contractor had to file an appeal to the Chief Engineer within 30 days of getting the decision of the Engineer and the Chief Engineer's decision about the amount payable was to be final.

7. It is not in dispute that some work, which was not covered under the contract had been entrusted to the contractor and for determining the amount payable for the said work, certain meetings had been held by the contractor and the concerned Engineer but they could not agree to any rate. Ultimately, some amount was paid in respect of the additional work done, which was not acceptable to the contractor but the contractor accepted the same under protest.

8. In addition to the aforestated dispute with regard to determination of the rate at which the contractor was to be paid for the extra work done by it, there were some other disputes also and in order to resolve all those disputes, Respondent No.5, a former Judge of the High Court of Andhra Pradesh, had been appointed as an Arbitrator.

9. The learned Arbitrator decided all the disputes under his Award dated 21.9.2002 though the contractor had objected to arbitrability of the disputes which were not referable to the Arbitrator as per Clause 39 of the Contract. Being aggrieved by the Award, Union of India had preferred an appeal before the Chief Judge, City Civil Court, Hyderabad under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") and the said appeal was allowed, whereby the Award was set aside.

10. Before the City Civil Court, in the appeal filed under Section 34 of the Act, the following two issues had been framed :-

(a) Whether the dispute was in relation to an "excepted matter" and was not arbitrable?

(b) Whether the claimant was entitled to the amounts awarded by the Arbitrator?

11. The Court decided the appeal in favour of the respondent and against the contractor. Being aggrieved by the order dated 8.4.2005 passed by the XIVth Additional Chief Judge, City Civil Court, Hyderabad, CMA No.476 of 2005 was filed by the contractor before the High Court and the High Court was pleased to dismiss the same by virtue of the impugned judgment and therefore, the contractor has filed this appeal.

12. The learned counsel appearing for the appellant-contractor had mainly submitted that as per Clause 39 of the contract, the Engineer of the respondent authorities was duty bound to decide the rate at which payment was to be made for the extra work done by the contractor, through negotiations between the parties. A final decision on the said subject was taken by the respondent authorities without the contractor's approval and therefore, there was a dispute between the parties. He further submitted that no decision was taken by the Engineer and therefore, there was no question of filing any appeal before the Chief Engineer and as the Chief Engineer did not take any decision, the aforestated clauses, viz. Clauses 39 and 64 would not apply because clause 64 would "except" a decision of the Chief Engineer, but as the Chief Engineer had not taken any decision, there was no question with regard to "excepting" clause 39. He had, therefore, submitted that the Award in toto was correct and the High Court had wrongly upheld the dismissal of the Award by the trial Court.

13. The learned counsel had, thereafter, referred to the judgments delivered by this Court in General Manager, Northern Railway and another v. Sarvesh Chopra [(2002) 4 SCC 45] and Madnani Construction Corporation (P) Limited v. Union of India & ors.[(2010) 1 SCC 549] to substantiate his case.

14. The learned counsel had, thereafter, submitted that the appeal deserved to be allowed and the judgment delivered by the High Court confirming the order passed by the City Civil Court deserved to be quashed and set aside.

15. There was no representation on behalf of the Union of India and therefore, we are constrained to consider the submissions made by learned counsel for the appellant only.

16. Upon perusal of both the clauses included in the contract, which have been referred to hereinabove, it is crystal clear that all the disputes were not arbitrable. Some of the disputes which had been referred to in Clause 39 were specifically not arbitrable and in relation to the said disputes the contractor had to negotiate with the concerned Engineer of the respondent and if the contractor was not satisfied with the rate determined by the Engineer, it was open to the contractor to file an appeal against the decision of the Engineer before the Chief Engineer within 30 days from the date of communication of the decision to the contractor.

17. In the instant case, there was no finality so far as the amount payable to the contractor in relation to the extra work done by it is concerned, because the said dispute was never decided by the Chief Engineer. In the aforestated circumstances, when the disputes had been referred to the Arbitrator, the disputes which had been among "excepted matters" had also been referred to the learned Arbitrator.

18. Upon perusal of the case papers we find that before the learned Arbitrator, the contractor did object to the arbitrability of the disputes covered under Clause 39, but the Arbitrator had decided the said issues by holding that the same were not "excepted matters" but arbitrable.

19. The question before this Court is whether the Arbitrator could have decided the issues which were not arbitrable.

20. Arbitration arises from a contract and unless there is a specific written contract, a contract with regard to arbitration cannot be presumed. Section 7(3) of the Act clearly specifies that the contract with regard to arbitration must be in writing. Thus, so far as the disputes which have been referred to in Clause 39 of the contract are concerned, it was not open to the Arbitrator to arbitrate upon the said disputes as there was a specific clause whereby the said disputes had been "excepted". Moreover, when the law specifically makes a provision with regard to formation of a contract in a particular manner, there cannot be any presumption with regard to a contract if the contract is not entered into by the mode prescribed under the Act.

21. If a non-arbitrable dispute is referred to an Arbitrator and even if an issue is framed by the Arbitrator in relation to such a dispute, in our opinion, there cannot be a presumption or a conclusion to the effect that the parties had agreed to refer the issue to the Arbitrator. In the instant case, the respondent authorities had raised an objection relating to the arbitrability of the aforestated issue before the Arbitrator and yet the Arbitrator had rendered his decision on the said "excepted" dispute. In our opinion, the Arbitrator could not have decided the said "excepted" dispute.

22. We, therefore, hold that it was not open to the Arbitrator to decide the issues which were not arbitrable and the award, so far as it relates to disputes regarding non-arbitrable disputes is concerned, is bad in law and is hereby quashed.

23. We also take note of the fact that the contract had been entered into by the parties on 24.4.1995 and the contractual work had been finalised on 31.3.1997. The Award was made on 21.9.2002 and therefore, we uphold the portion of the award so far as it pertains to the disputes which were arbitrable, but so far as the portion of the arbitral award which determines the rate for extra work done by the contractor is concerned, we quash and set aside the same.

24. Needless to say that it would be open to the contractor to take appropriate legal action for recovery of payment for work done, which was not forming part of the contract because the said issue decided by the Arbitrator is now set aside.

25. For the reasons recorded hereinabove, the appeal is partly allowed with no order as to costs.

.....J. (ANIL R. DAVE) .....J. (VIKRAMAJIT SEN) New Delhi September 05, 2014.