

Gauhati High Court

General Manager, N.F. Railway And ... vs Nasim Khan on 16 July, 2003

Equivalent citations: 2003 (3) ARBLR 572 Gau

Author: P Agarwal

Bench: P Agarwal

JUDGMENT P.G. Agarwal, J.

1. Heard Mr. B.K. Sharma, learned senior counsel appearing for the N.F. Railways and Mr. C. Baruah, learned senior counsel assisted by P.J. Saikia for the respondent.

2. The facts, in brief, are that the respondent Md. Nasim Khan, hereinafter referred as the contractor for the purpose of convenience, entered into a contract work with the appellant N.F. Railway, hereinafter referred as the Railways, for extension of Carriage and Wagon Department. There was a written agreement in between the parties executed on 19.02.1981. The work, however, could not be completed within the due date or extended date. There was allegations and counter allegations as regards the clauses for non fulfillment of the contract work and we do not propose to enter into the same at this stage. The contractor, thereafter, filed Misc. (Arb.) Case No. 7/88 under Section 8(2) read with Section 20(3) of the Arbitration Act and the Arbitrator was appointed by the Court. The said Arbitrator Mr. Guna Gogoi, thereafter, gave his Award and the said Award was made rule of the Court vide the impugned order dated 13.03.1997 in M.S. No. 14/97. The appellant Railways have challenged the said order in this appeal.

3. The learned counsel for the Railways has submitted that for non completion of the contract work, the contract work was determined and thereafter the work was measured by the Railways with notice to the contractor; but inspite of notices, the contractor did not attend the measurement. The contractor was thereafter asked to sign final bill vide letter dated 20.08/09.1983. The above letter shows that 30.09.1983 was fixed for witnessing the measurement and signing of final bill. However, the contractor refused to attend the same. Thereafter, the final bill was prepared and the contractor had knowledge and information about the same. It is submitted that when the final bill was prepared, nothing had been left for the Arbitrator as per the Arbitration clause and hence, the appointment of the Arbitrator was not in accordance with law.

4. We have perused the records of the Arbitration proceeding/Misc. (Arbitration) Case No. 7 of 1988 and we have also perused the letters issued by the Railways and the receipt of the same is not in dispute, as a matter of fact, the contractor sent a letter on 17.02.1985 alleging dispute regarding preparation of the final bill against the said work order. It is submitted by the petitioner Railways that the final bill was prepared in the year 1985, under Clause 45(a) of the General Conditions of Contract, the appointment of Arbitrator in the year 1988 was not permissible and hence, the appointment of Arbitrator was bad in law.

5. Clause 63 of the General Conditions of Contract reads as follows :

"(63) All disputes and difference or any kind whatsoever arising out of or in connection with the contract, whether during the progress of the works or after their 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 their presentation make and rectify decisions thereon in writing except the decisions for which provisions has been made in Clauses 18, 22(5), 39, 45(a), 55(1), 55(2)(v), 61(2) and 62(1)(b) of the General Conditions of Contract or in any clause of the Special or Additional Special Conditions of contract shall be final and binding on the contractor, provided further that "Excepted Matters" stand specifically excluded from the purview of the Arbitration clause and shall not be referred to Arbitration."

Thus, we find that Clause 45(a) has been included in the Excepted matters. Clause 45(a) reads as follows :

"It shall be open to the Contractor to take specific objection to any recorded measurement of classification on any ground within seven days of the date of such measurements. Any re-measurements taken by the Engineer or the Engineer's representative in the presence of the Contractor or in his absence after due notice has been given to him in consequence of objection made by the Contractor shall be final and binding on the Contractor and no claim whatsoever shall thereafter be entertained regarding the accuracy and classification of the measurement."

6. Mr. Sharma, learned counsel for the Railways has referred to a decision of the Apex Court in the case of Wild Life Institute of India, Dehradun v. Vijay Kumar Garg, (1997) 10 SCC 528 wherein the Apex Court held as follows :

"(6) It is also necessary to refer to the Arbitration clause under the contract which clearly provides that if the contractor does not make any demand for Arbitration in respect of any claim in writing within 90 days of receiving the intimation from the appellants that the bill is ready for payment, the claim of the contractor will be deemed to have been waived and absolutely barred and the appellants shall be discharged and released of all liabilities under the contract in respect of these claims. The liability, therefore, of the appellants ceases if no claim of the contractor is received within 90 days of receipt by the contractor of an intimation that the bill is ready for payment. This clause operates to discharge the liability of the appellants on expiry of 90 days as set out therein and is not merely a clause providing a period of limitation. In the present case, the contractor has not made any claim within 90 days of even receipt of the amount under the final bill. The dispute has been raised for the first time by the contractor 10 months after the receipt of the amount under the final bill."

7. In the instant case, during the year 1982 to 1985 the contractor was informed time and again to be present for measurement and to sign the final bill which he refused and thereafter, the final bill prepared in the year 1985 and the contractor had knowledge/information about the same but he kept mum and approached the Court in the year 1988 for appointment of Arbitrator. In view of the above, we hold that the reference of dispute to Arbitration by the Court was not justified.

8. In the case of General Manager, Northern Railways and Anr. v. Sarvesh Chopra, (2002) 4 SCC 45=2002(1) Arb. LR 506 (SC) wherein the plea of "excepted matters" was under consideration before the Apex Court and the Apex Court held as follows :

"(16) Thus, it may be open to prefer a claim touching an apparently excepted matter subject to a clear case having been made out for excepting or excluding the claim from within the four corners of "excepted matters". While dealing with a petition under Section 20 of the Arbitration Act, the Court will look at the nature of the claim as preferred and decide whether it falls within the category of "excepted matters". If so, the claim preferred would be a difference to which the Arbitration agreement does not apply, and therefore, the Court shall not refer the same to Arbitrator. On the pleading, the applicant may succeed in making out a case for reference, still the Arbitrator may, on the material produced before him, arrive at a finding that the claim was covered by "excepted matters". The claim shall have to be disallowed. If the Arbitrator allows a claim covered by an excepted matter, the Award would not be legal merely because the claim was referred by the Court to Arbitration. The Award would be liable to be set aside on the ground of error apparent on the face of the Award or as vitiated by legal misconduct of the Arbitrator. Russell on Arbitration (21st Edn., 1997) states vide para 1-027 (at p. 15) :

"Arbitrability--The issue of arbitrability can arise at three stages in an Arbitration; first, on an application to stay the Arbitration, when the opposing party claims that the Tribunal lacks the authority to determine a dispute because it is not arbitrable, second, in the course of the arbitral proceedings on the hearing of an objection that the Tribunal lacks substantive jurisdiction and third, on an application to challenge the Award or to oppose its enforcement. The New York Convention, for example, refers to non-arbitrability as a ground for a court refusing to recognize and enforce an Award."

(17) To sum up, our conclusions are :

(i) while deciding a petition under Section 20 of the Arbitration Act, 1940, the Court is obliged to examine whether a difference which 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."

9. As we find Clause 45(a) comes under the category of excepted matters, in the instant case, the claim entertained by the Arbitrator was covered by the excepted matters and hence, the Court had no jurisdiction to refer the matter to Arbitration and even if it was referred, the Arbitrator should not have decided the claim in respect of the excepted matters.

10. In a recent case of Food Corporation of India v. Surendra, Devendra & Mahendra Transport Co., (2003) 4 SCC 80=2003(1) Arb. LR 505 (SC).

the Apex Court further held that entertainment of reference by the Arbitrator on disputes which were excluded from reference and the adjudication thereupon would amount to exceeding the exercise of the jurisdiction.

11. In view of what has been stated above, we find that the term for appointment of Arbitrator was barred and the claim being on excepted matters, the reference to Arbitration was not in accordance with law and the decision of the Arbitrator on such excepted matters cannot be accepted or made rule of the Court.

12. In the result, the appeal is allowed and the impugned Award of the Arbitrator and the consequent Award and hence passed by the Court are set aside. However, in the facts and circumstances of the case, we make no order as to costs.