

IN THE SUPREME COURT OF INDIA

Decided On: 01.03.2002

Appellants: **General Manager Northern Railways and Anr.**

Vs.

Respondent: **Sarvesh Chopra**

Hon'ble

R.C. Lahoti and Brijesh Kumar, JJ.

Judges:

Counsels:

For Appellant/Petitioner/Plaintiff: Mukul Rohtagi, Additional Solicitor General, A.D.N. Rao and Anil Katiyar, Advs.

For Respondents/Defendant: K.R. Gupta, Neena Gupta, S. Chakraborty and Sudhir Kumar Gupta, Advs.

Subject: Arbitration

Subject: Contract

Acts/Rules/Orders:

Arbitration Act, 1940 - Section 20 and 20(1); Indian Contract Act, 1872 - Sections 55 and 56

Equivalent Citation: AIR2002SC1272, 2002(3)ALD30(SC), 2002(1)ARBLR506(SC), 2002(2)BLJR841, 96(2002)DLT447(SC), JT2002(2)SC445, 2002(2)SCALE394, (2002)4SCC45, [2002]2SCR156

Cases Referred:

Vishwanath Sood v. Union of India and Anr., (1989) 1 SCC 657; Food Corporation of India v. Sreekanth Transport, (1999) 4 SCC 491; Union of India v. Popular Builders, Calcutta, (2000) 8 SCC 1; Steel Authority of India Ltd. v. J.C. Budharaja, Government and Mining Contractor, (1999) 8 SCC 122; Ramalinga Reddy v. Superintending Engineer and Anr., (1994) 5 Scale 12, 1994 (5) Scale 67; Aloi Parshad v. Union of India, (1960) 2 SCR 793, 804; Prabartak Commercial Corporation Ltd. v. The Chief Administrator Dandakaranya Project and Anr., (1991) 1 SCC 498; Continental Construction Co. Ltd. v. State of Madhya Pradesh, (1988) 3 SCC 82; State of A.P. v. Associated Engineering Enterprises, Hyderabad, AIR 1990 A.P. 294

Disposition:

Appeal allowed

Citing Reference:

**** Distinguished

Vishwanath Sood v. Union of India and Anr.,

Food Corporation of India v. Sreekanth Transport,	****
Union of India v. Popular Builders, Calcutta,	****
Steel Authority of India Ltd. v. J.C. Budharaja, Government and Mining Contractor,	****
Ramalinga Reddy v. Superintending Engineer and Anr.,	****
Alopi Parshad v. Union of India,	****
Prabartak Commercial Corporation Ltd. v. The Chief Administrator Dandakaranya Project and Anr.,	****
Continental Construction Co. Ltd. v. State of Madhya, Pradesh,	****
State of A.P. v. Associated Engineering Enterprises, Hyderabad,	****

Case

Note:

Arbitration – Reference - Excepted matters - Petition under Section 20 of the Arbitration Act, 1940 for arbitration agreement being filed in the court - Court is obliged to examine whether a difference which is sought to be referred to arbitration is one to which arbitration agreement applies - To be an excepted matter it is not necessary that a departmental or 'in-house' remedy for settlement of claim must be provided by contract - Issue as to arbitrability of the 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.

Contract - Delay in performance of contract - Contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim entertainable-i). If the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, ii). The employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, iii). If the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor inspite of delay and such notice by the contractor putting the employer on terms.

JUDGMENT

R.C. Lahoti, J.

1. The respondent was granted by the appellants work of construction on bored piles 500 mm dia by cast in Situ method for widening and raising of Pul Mithai (S). A contract was entered into between the parties on 27.4.1985. The contract is subject to the General conditions of the contract of Railways read with Special Conditions. Disputes arose between the parties and the

respondent moved a petition under Section 20 of the Arbitration Act, 1940 praying for the arbitration agreement being filed in the Court and six claims set out in the petition being referred to the Arbitrator for settlement. The learned Single Judge of the High Court of Delhi (Original Side) directed two claims to be referred but as to claims numbers 3 to 6 formed an opinion that the claims being 'excepted matters' within the meaning of Clause 63 of General Conditions of Contract were not liable to be referred to arbitration. An intra-Court Appeal preferred by respondent has been allowed and the four claims have also been directed to be referred by the Division Bench to arbitrator on forming an opinion that they were not covered by 'excepted matters'. The appellants have filed this petition seeking special leave to appeal against the decision of Division Bench.

2. Leave granted.

3. Clause 63 of the General Conditions of the Contract provides as under:-

"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 a reasonable time after receipt of the Contractor's representation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in clauses 18, 22(5), 39, 45(a), 55, 55-A(5), 61(2) and 62(1) (XII)(B)(e)(b) of the General conditions of Contract or in any clauses 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 not be referred to arbitration."

4. Clauses 9.2., 11.3 and 21.5 of Special Conditions of contract are as under:-

"9.2. No material price variation or wages escalation on any account whatsoever and compensation for "Force Majeure" etc. shall be payable under this contract.

11.3. No claim whatsoever will be entertained by the Railway on a/c of any delay or hold up of the works arising out of delay in supply of drawings, changes, modifications, alterations, additions, omissions, omissions in the site layout plans or

detailed drawings or designs and or late supply of such materials as are required to be arranged by the Railway or due to any other factor on Railway Accounts.

21.5. No claim for idle labour and/or idle machinery etc. on any account will be entertained. Similarly no claim shall be entertained for business loss or any such loss."

5. Claims numbers 3 to 6 whereon reference is sought for by the respondent to the Arbitrator are as under:-
3. There occurred tremendous increase in cost of building materials. 52 Nos. of piles were bored after the expiry of stipulated completion period and particularly when the prices were too high. Additional cost incurred @ Rs.250/- for these 42 Nos. of piles may please be paid. This has also been verified by your staff at site, Rs.250 x 42 Rs.10500/-.
 4. Piling rig with diesel driven wench, mixture, machine, driving pipe, wheel barrows, hoppers and other tools and plants remained idle at site for 24 months, i.e. for 75 days. The entire machinery was procured from the market on hire charges. Rent was paid @Rs.1070/- per day for this machinery. Hire charges amounting to Rs.80,250/- (1070x75) may please be reimbursed.
 5. The site was not made available for one month. Changes took place and decisions were delayed. The Work which was required to be completed within 3 1/2 months but dragged on for additional period of 6 months. Establishment period of 6 months at a cost of Rs.10,000/- per month. These losses may please be paid. (Rs.10,000/-x6 Rs.60,000).
 6. The work of Rs.5,95,000/- was required to be completed within 3 1/2 months meaning thereby, monthly progress would not be less than Rs.1,75,000/-. As against the entire work could be completed within a period of 9 1/2 months i.e. Rs.75,000/- per month. The losses sustained for less output may be compensated and this comes to Rs.40,000/-."
15. In our country question of delay in performance of contract is governed by Sections [55](#) and [56](#) of the Indian Contract Act, 1872. If there is an abnormal rise in prices of material and labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option. Where time is "of the essence" of an obligation, Chitty on Contracts (Twenty-Eighth Edition, 1999, at p.1106, para 22-015) states "a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract- breaker on the basis that he has committed a fundamental breach of the contract ("a breach going to the root of the contract") depriving the innocent party of the benefit of the contract ("damages for loss of the whole transaction")." If, instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party, i.e. the contractor, cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, "unless, at the time of such acceptance, he gives notice to the promisor of

his intention to do so". Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) **if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act,** (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms.

20. For the foregoing reasons we are of the opinion that the view of the 'excepted matters' taken by the Division Bench of the High Court cannot be sustained. The appeal is allowed, the impugned decision of the Division Bench of the High Court is set aside and that of the learned Single Judge is restored. No order as to the costs.