

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

AA no. 21/2009

Date of order: 21.04.2013

Chenab Construction Joint Venture v. Union of India and ors

Coram:

Hon'ble Mr. Justice M. M. Kumar, Chief Justice

Appearing counsel:

For the Petitioner(s) : Mr. K. S. Johal, Sr. Advocate with
Mr. Aashray Choudhary, Advocate.

For the respondent(s) : Mr. H. H. Singh, Advocate.

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| i) | Whether to be reported in
Press, Journal/Media | : | Yes |
| ii/ | Whether to be reported in
Digest/ Journal | : | Yes |

M. M. Kumar, CJ

1. M/S Chenab Construction Joint Venture who has filed the present petition is engaged in carrying on work of civil engineering. They have been working for the Indian Railways for the last 24 years and claims to have unblemished record. The petitioner-firm was allotted construction work on 08.02.1996 which was worth Rs. 14,88,35,000/-. In that regard a contract agreement No. 74-W/8/144/WA/Pt.1 was executed on 17.02.1996 between the parties (Annexure-B). As per the stipulation in the contract agreement the work was to be executed in accordance with the General Conditions of Contract 1989 which form part and parcel of the agreement. The claim of the petitioner is that those conditions for

settlement of dispute by way of arbitration would also be available. Hence this petition.

2. The petitioner claims that the work was finally completed satisfactorily and a completion certificate was recorded in the Measurement Book by the officials of the respondents Railways. However, while preparing the final bills the claims made by the petitioner firm were not minutely considered and the payments were not made to the petitioner. The petitioner-firm has, however, conceded that during the course of execution of the work the respondents went on forcing it to receive the payment as and when it was released without protest and, therefore, there was no option except to abide by the instructions of the respondents. Eventually vide letter dated 15.05.2006 the petitioner-firm addressed a letter to the General Manager/Engineering, Northern Railways Baroda House, New Delhi with a request to refer 31 issues of dispute to an Arbitral Tribunal as contemplated by Clause 64 of the General Conditions of Contract. On 10.11.2006 the respondents sent a communication rejecting the claim made by the petitioner-firm (Annexure-D). The petitioner then responded vide letter no. CCJV/07/30 dated 25.06.2007 and raised additional claims (Annexure-E).

3. The respondents vide communication No. 74-W/8/144/WA/Arb dated 05.12.2007 made a reference partially accepting the demand raised by the petitioner. The respondents excluded certain items and no reference was made in that regard claiming they are excluded items. In respect of other items the respondents appointed Shri R. K. Sarkar, C.E/HQ Northern Railways, Baroda House, New Delhi and Shri Devender Rai, FA&CAO/Traffic, Northern Railways, Baroda House, New Delhi as arbitrators with a request to them to nominate the presiding arbitrator (Annexure-F).

4. The petitioner filed a protest petition against excluded items and for not referring the claims vide letter dated 18.12.2007 with a request to make reference of the left out claims to the arbitration for adjudication. The petitioner claimed that the claim was made by them in respect of 42 items which include item of interest for an amount of Rs. 1105.85 lacs plus interest and P. V. C, as per actual. However, the items referred to arbitration for adjudication are 25 in number which are for an amount of Rs. 498.48 lacs only. The items which were left out from the list have been given in the letter dated 18.12.2007, which are as under:-

Claim no.	Description	Amount (Rs: in lakhs)
1.	Claim for extra expenses incurred due to change In scope of work by adopting revised mix-design For construction of piers/abutments as compared To the tendered work/agreement.	65.00

2.	Claim for extra expenses incurred in consuming Additional quantity of steel in reinforcement/ Structural steel as compared to the tendered ones.	95.00
18.	Claim for extra expenses incurred due to prolongation Of contract period.	115.00
23.	Claim for extra-expenses due to casting of girders In one go instead of stages.	58.00
30.	Claim on account of cost of arbitration	1.00

Additional Claims.

3.	Claim for re-imbursement of interest deducted on Mobilization advance and machinery advance Beyond original contract period.	As per actual
4.	Claim for compensation for loss of market Reputation mental harassment due to faulty Rescinding/termination and subsequent Re-instatement of contract, encashment of BG-from UCO Bank.	100.00
8.	Claim for payment of P.V.C as per RBI indices On all extensions with out any ceiling limit.	As per actual
9.	Claim for not utilizing labour and machineries, Staff etc. due period of rescinding/termination Of contract (Oct.200 to 2001).	90.00
10.	P.V.C on all the claims	As per actual
11.	Interest on the claims.	-do-

Claims no. 20, 25, 27 & 28 and no.7 of additional claims stand withdrawn vide our letter CCJV/07/30, dated 25.6.2007 and no. nil dated 2.7.2007.

It is requested that the left out claims as listed above be also referred to the arbitrators for adjudication. In the meantime, we shall proceed and participate for adjudication of claims which have been referred but our this participation be deemed under protest for not referring remaining claims and it be not taken to be waiver of rights to get these referred through competent court as well."

5. The petitioner agreed to participate in the arbitration proceedings in respect of the claims which stood already referred subject to the condition that its participation would not be construed as waiver of the excluded claims. The aforesaid facts are clear from the letter dated 18.12.2007 (Annexure-G).

6. In response to the aforesaid communication the respondents vide letter dated 31.07.2008 rejected the claim of

the petitioner by taking the stand that non-referred claims would fall within the category of 'Excepted Matters' (Annexure-H). However, the aforesaid stand of the respondents was again controverted and a communication was sent by the petitioner on 05.09.2008 by asserting that all disputes were referable to arbitration (Annexure-J). The petitioner also conveyed vide letter dated 25.04.2008 (Annexure-K) that the left out claims did not fall in the category of 'Excepted Matters'. Accordingly, a request was made to reconsider the decision and grant hearing to the petitioner. However, the respondents did not refer the 'Excepted Matters' to the arbitration despite the demand raised by the petitioner.

7. The petitioner through its counsel sent a legal notice dated 10.10.2008 calling upon the respondents to refer all disputes raised by it in the notice dated 15.05.2006 to arbitrator. The notice (Annexure-L) was duly received by the respondents. The grievance of the petitioner was not redressed despite the fact that the demand was raised for appointment of the Arbitral Tribunal in terms of Clause 64(I)(i) of the General Conditions of Contract. The petitioner has claimed that the decision of the respondents to treat the non-referred matters as 'excepted matters' by itself is a dispute which could be adjudicated upon by the arbitrator alone.

8. The petitioner has made a reference to Clause 64 (I) (i) of the General Conditions of Contract and has proceeded to plead the implications of that Clause. According to the petitioner, after the demand for appointment of the arbitrator has been made, the respondents were required to take a decision within 120 days. If the arbitrator was not appointed within 120 days then the claim of the petitioner for reference of the dispute to the arbitrator was deemed to be rejected. It is in these circumstances that the petitioner has approached this Court with a prayer for appointment of an arbitrator.

9. In the objections filed by the respondents it has been claimed that petition is not maintainable because the dispute raised did not fall under the purview of arbitration. According to the respondents the contract agreement itself creates a bar to refer the 'Excepted Matters' to the adjudication of the arbitrator. The respondents, therefore, claims that there has been no refusal for appointment of arbitrator by the competent authority. Respondents have also made reference to the Arbitral Tribunal in respect of certain items on 05.12.2007 (Annexures R-1 and R2). The respondents have also claimed that a completion certificate has been recorded in the Measurement Book but the petitioner has failed to execute the work on time forcing the respondents to grant extension of time to complete the work.

The work was scheduled to be completed on 07.02.1998 but on account of slow progress, a series of extensions were granted in favour of the petitioner and the work was finally completed on 31.07.2004. A tabulated information, granting extensions, has been given in para 5. The respondents have also explained that the “Excepted Matters’ are covered by the prohibition created by General Conditions of Contract, as such these claims were not referable to the arbitration. A reference has been made to various items and the schedule of payment to show that the claims within the four corners of the General Conditions of Contract have been satisfied.

10. I have heard the learned counsel for the parties and have perused the paper book with their able assistance.

11. The question which emerges for consideration is ‘whether the parties to the contract agreement are permitted to decide the issue concerning ‘Excepted Matters’ or it has to be adjudicated upon by referring the dispute to the arbitrator’.

12. The issue is no longer *res integra* and has been the subject matter of various judgments of Hon’ble the Supreme Court. In **J.G.Engineers (P) Ltd. v. Union of India and ors, (2011) 5 SCC 758** the issue with regard to ‘Excepted Matters’ was raised before Hon’ble the Supreme Court. It was held that clauses in a contract like the one in hand do not make the decision of the

Chief Engineer or Engineering-in-Chief as final. The decision as to who was responsible for execution of the extra work contract and who was responsible for committing breach has not been made subject matter of any decision of the respondents or its officers. The decision, as to who was responsible for prolongation of contract period or for late delivery of site, have not been subject matter of any decision of the respondents or its officers. Such issues have also not been excepted from arbitration under any provisions of the contract. Therefore, it could not be successfully argued that claim for extra expenses incurred on account of change of scope of work, casting of girders in one go instead of stages, prolongation of contract period or the additional claim, could not be subject to the decision of the respondents or its officers nor they could be covered by the expression "Excepted Matters". The aforesaid conclusion flows from the fact that the issue concerning extra expenses for various reasons, like change of scope of work, prolongation of contract period etc. is not made subject of any decision of the respondents or its officers by affixing the responsibility whether the extra expenses were incurred at the instance of which of the two parties. Moreover if the decision of the arbitrator on any issue is doubtful then it could always be subject matter of challenge under Section 34(2) (b) (i) of the

Act. Therefore, I am of the view that the issue has to be left to the decision of the Arbitral Tribunal.

13. Following the aforesaid principle it has been concluded by Delhi High Court in **Earnest Builders Pvt. Ltd. v. Union of India and ors, 2007 (3) ALR 183 (Delhi)** that the decision with regard to arbitrability of a claim made by a claimant cannot be left to the discretion of the respondents because it involves adjudicatory process which has to be left to the Arbitral Tribunal. It has further been held that it is not for the respondents on its own to exclude the claims made by the petitioner in respect of the contract from consideration of the Arbitral Tribunal. Even the issue concerning arbitrability has to be left to the adjudication of the Arbitral Tribunal. It would then be for the arbitrator to rule whether he has the jurisdiction to decide a particular issue or claim.

14. In view of the aforesaid legal position I am of the view that the left out issues ought to have been referred by the respondents to the Arbitral Tribunal along with the issue as to whether the Arbitral Tribunal has the jurisdiction within the meaning of contract agreement to adjudicate and settle those disputes. If such disputes fall within the terms of the contract agreement then the arbitrator would proceed to decide the claims.

15. As a sequel to the above discussion this petition succeeds. The respondents are directed to refer all the disputes to the already constituted Arbitral Tribunal. In case the same Tribunal is not available then the members of the Arbitral Tribunal may be picked from the panel currently in force. The needful shall be done within a period of two months from the date of receipt of a copy of this order.

16. The arbitration petition stands disposed of.

(M. M. Kumar)
Chief Justice

Jammu,
21.04.2013
Anil Raina, Secy.