

J.G. ENGINEER'S PVT. LTD.
v.
CALCUTTA IMPROVEMENT TRUST AND ANR.

JANUARY 25, 2002

[G.B. PATTANAIK AND Y.K. SABHARWAL, JJ.]

Arbitration:

Termination of contract—Termination for non-completion of work on basis of engineer's certificate—Reference of the dispute of termination to arbitration—Arbitrator holding wrongful termination—High Court holding arbitrator has no jurisdiction to decide the issue of termination of contract, being an excepted matter—Validity of—Held, on facts, the arbitrator has jurisdiction to decide the issue of the validity of termination of contract—Arbitration Act, 1940—Sections 30 & 33.

Respondent-Trust terminated the contract given to appellant-contractor for non-completion of the contracted work on the basis of an Engineer's certificate. The dispute of the termination of contract was referred to arbitration. The arbitrator held in favour of the appellant on the ground of wrongful termination of contract by the respondent. The respondent filed an application before High Court challenging the award on the ground of non-arbitrability of the issue of termination of the contract by the arbitrator. The Single Judge dismissed the application of the respondent. The Division Bench of the High Court set aside the award of the arbitrator on two grounds—(i) that the question of wrongful termination of the contract was an excepted matter and hence not arbitrable; and (ii) that the arbitrator has failed to exercise the jurisdiction in not considering the counter claim of the respondent.

In appeal, the appellant contended that the respondent never objected to the arbitrability of the issue of the validity of the termination of the contract during arbitration proceedings; that the Engineer could only certify the quality or measurement of the work done; and that the arbitrator and not the Engineer can adjudicate as to who caused the breach of the contract.

The respondent contended that the arbitrator had no jurisdiction

A to adjudicate the issue of the validity of the termination of the contract as per the clauses of the Information and Instruction to Tenders; that the issue is an excepted matter and therefore not arbitrable; and that the contract was terminated on the basis of the Engineer's certificate stating non-completion of the work by the appellant.

B Allowing the appeal, the Court

C **HELD : 1.1.** On facts, it cannot be held that the arbitrator *per se* had no jurisdiction to decide the issue of the validity of the termination of the contract. The issue of termination of the contract does not relate to the jurisdiction of the arbitrator. Specific plea had to be taken by the respondent that the certificate of the Engineer was issued and, therefore, the aspect of termination of the contract was not arbitrable. No such fact was pleaded nor contended by the respondent. Hence, it is not necessary to decide whether the issue of termination of the contract could be brought within the ambit of the excepted matter or not or that the Engineer's certificate could be conclusive only as to the quality or measurement of the work done. The Division Bench of the High Court was not correct in coming to the conclusion that the fundamental terms of the agreement between the parties prohibited the arbitrability of the excepted matters.

[603-H; 604-A-D]

E *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 and *U.P. Rajkiya Nirman Ltd. v. Indure Pvt. Ltd. & Ors.*, [1996] 2 SCC 667, referred to.

F **1.2.** A perusal of the non-speaking award shows that the arbitrator has considered the claims and counter claims of the parties. In this view, the conclusion of the Division Bench, that the arbitrator has not considered the counter claim of the respondent, is contrary to the record. [604-E-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 689 of 2002.

G From the Judgment and Order dated 7.3.2001 of the Kolkata High Court in A.P.O. No. 267/2000 in A. No. 362/99 in Award Case No. 51 of 1999.

B.P. Gupta and Pranab Kumar Mullick for the Appellants.

H Biswajit Bhattacharjee, N.R. Choudhury, Somnath Mukherjee and Ms.

Puja Khattar for the Respondent.

The Judgment of the Court was delivered by

Y.K. SABHARWAL, J. Leave granted. The dispute and differences between the contractor - appellant and respondent - Calcutta Improvement Trust (CIT) were determined by award dated 30th September, 1999. The arbitrator held that the contract was wrongly terminated by CIT and awarded in favour of the contractor a sum of Rs. 24,80,000 besides interest. The award was challenged by the CIT by filing an application under Sections 30 and 33 of the Arbitration Act, 1940. That application was rejected by a learned Single Judge of the High Court. The appeal of the CIT was, however, allowed by the Division Bench and the award was set aside. The contractor has challenged the correctness of the decision of the Division Bench.

The main grounds on which the award has been set aside by the impugned judgment are two. First, that the question of the wrongful termination of the contract was an excepted matter and, thus, not arbitrable. Second, the arbitrator has not considered the counter claim of the CIT and thereby has failed to exercise jurisdiction vested in him by law.

Regarding the ground of arbitrability, clause 1.9 of the Information and Instructions to Tenders stipulates that the disputes between the parties to the contract shall be referable to an arbitrator, other than those for which the decision of the Engineer is by contract expressed to be final, binding and conclusive. Clause 15 of the contract provides that the certificate of the Engineer as to the happening of any of the events referred to in the said clause shall be conclusive proof as between the contractor and the CIT of the statements contained in such certificate.

According to the CIT, in view of Engineer's certificate dated 3rd November, 1995 certifying that the contractor has miserably failed to complete the work and with a view to effecting completion of the work and remedying the breach, it is a fit case for taking action under clause 16 of the works contract for termination, the question of the validity of termination is an excepted matter and, therefore, not arbitrable. According to the contractor, however, the Engineer's certificate could only certify as to the quality or measurement of the work done and it could not give a binding statement as to who caused the breach or was responsible for delay and these matters are essentially within the jurisdiction of the arbitrator to be adjudicated upon and to hold otherwise would render arbitration clause nugatory. Further the case of the contractor is that the issue as to whether the termination is wrongful

A was initially framed by the first arbitrator who was the officer on special duty of the CIT on 3rd March, 1997 at the instance of the CIT itself. In place of the said arbitrator, the Court appointed the arbitrator who has made and published the award in question. The arbitrator adopted the said issue on 24th June, 1998 with consent of both the parties.

B Learned counsel for the appellant submits that there were 16 hearings before the earlier arbitrator and 82 before the present arbitrator. In those proceedings, the respondent never objected to framing of the issue as to the termination of the contract or to hearing of the said issue and no objection was taken to the arbitrability of the issue. The issue of termination was left to be decided by the arbitrator. In respect of Engineer's certificate dated 3rd November, 1995, it was pointed out that the same was produced before the arbitrator only on 3rd November, 1998 in the 46th sitting before the arbitrator. The contention is that under these circumstances, it is not open to the CIT to urge that the issue of termination of the contract cannot be adjudicated by the arbitrator.

D We have perused the counter statement of facts filed by the CIT before the arbitrator. It is clear therefrom that no objection as to the arbitrability of the issue of the validity of termination has taken in the said counter statement. On 3rd March, 1997, the following three issues were framed by the arbitrator:

- E
- “1. Was the contract wrongfully terminated?
 2. Is the Claimant entitled to any claim referred to in the Statement of Facts?
 3. Is the Respondent entitled to any claim referred to in the Counter Statement of Facts and Counter Claim?”

F The arbitration proceedings of 23rd sitting dated 10th July, 1998 show that Engineer's certificate had not been filed. It is clear that the certificate dated 3rd November, 1995 was produced for the first time on 3rd November, 1998 in the 46th sitting before the arbitrator.

G On the aforesaid facts, learned Single Judge came to the conclusion that the issue about termination having been gone into by the arbitrator, it was not permissible for the CIT to take the plea about the non-arbitrability thereof. Learned counsel for the CIT, however, contends that issue of arbitrability being a matter of jurisdiction of the arbitrator, learned Single Judge was not correct in concluding that the CIT could not take that plea and

H the Division Bench by the impugned judgment rightly reversed the decision

of the learned Single Judge. Learned counsel relies upon the decision in the case of *Union of India v. Popular Builders, Calcutta*, [2000] 8 SCC 1 by a three Judge Bench to which one of us (G.B. Pattanaik, J) was a member in support of the contention that the existence of an arbitrable dispute is a condition precedent for exercise of power by the arbitrator. We have no quarrel with this proposition. In the decision relied upon, on facts, it was found that the final bill that was prepared by the appropriate authority was accepted by the contractor without any protest and that the said question had been raised by the Government before the arbitrator in respect of claim No. 2. On these facts, the Court held that insofar as claim No. 2. is concerned, the same could not have been a matter of reference of an arbitrable dispute and as such, the award to that extent must be set aside. In fact, this decision is against the respondent inasmuch as in the said case other claim items in respect whereof the Union of India had not taken any objection on the same score as in respect of claim No. 2, the Bench held that it was not appropriate to allow the Government to raise that objection, so far as other items of the claim are concerned and except to the extent of claim Item No. 2. The rest of the award was affirmed.

Reliance has also been placed on *Steel Authority of India Ltd. v. J.C. Budharaja, Government and Mining Contractor*, [1999] 8 SCC 122. That is, however, a case of a speaking award where it was apparent from the award that the arbitrator had awarded the amount for the items for which there was prohibition in the contract and thereby he had travelled beyond his jurisdiction and it is in that context that the Court reiterated that to find out whether the arbitrator has travelled beyond his jurisdiction and beyond the terms of the agreement between the parties, the agreement is required to be looked into. This decision has no applicability to the present case.

Lastly, reliance is placed on *U.P. Rajkiya Nirman Nigam Ltd. v. Indure Pvt. Ltd. & Ors.*, [1996] 2 SCC 667. This is again a decision by a three Judge Bench of which one of us (G.B. Pattanaik, J.) was a member. The said decision arose out of an application filed under Section 33 of the Arbitration Act pending the arbitration proceedings for a declaration that there existed no arbitration agreement between the parties on the basis of which dispute could be referred for arbitration. The contention urged was that the arbitrator having been appointed by the appellant, they could not seek a declaration under Section 33 of the Act. It was held that the arbitrator cannot clothe themselves with jurisdiction to decide conclusively the arbitrability of the dispute and it is for the Court to decide that question and, therefore, the appellant is not estopped to file an application under Section 33 of the Act. This decision again

A is of no assistance for deciding the present case. In the case in hand it cannot be held that the arbitrator *per se* had no jurisdiction to decide the issue of the validity of the termination of the contract. It depended upon the factual matrix.

The issue of termination of the contract in question, on the facts under consideration before us, does not relate to the jurisdiction of the arbitrator.

B Without going into the scope of clause 1.9 of the Information and Instructions to Tenders or that of clause 15 of the contract and assuming that issue of termination of contract can be brought within the scope of the said clauses and, thus, made an excepted matter but that would depend upon the fact whether Engineer's certificate under clause 1.9 has been issued or not. Therefore, specific plea had to be taken that such a certificate was issued and, therefore, the aspect of termination was not arbitrable. As already noticed, no such fact was pleaded or contention urged in the counter statement of facts. In this view, it is not necessary to decide whether the issue of termination of the contract could be brought within the ambit of the excepted matter or not or that the Engineer's certificate could be conclusive only as to the quality or measurement of the work done.

D The Division Bench was, thus, not correct in coming to the conclusion that the fundamental terms of the agreement between the parties prohibited the arbitrability of the excepted matters. The first ground on the basis of which the judgment of the learned Single Judge was reversed is, thus, not sustainable.

E Regarding the second ground on which decision of learned Single Judge was reversed by the impugned judgment, we are concerned in this case with a non-speaking award. Perusal of the award shows that the arbitrator has considered the claims and counter claims of the parties. The arbitrator says that "AND WHEREAS I have considered the claim and counter claim amounts as per statement of facts and the counter statement of facts..." Again while formulating the award, the arbitrator awards the amount in full and final settlement of the claim of the claimant as set out in the statement of facts and the counter claims of the respondent. In this view, the conclusion of the Division Bench that the arbitrator has not considered the counter claim of the CIT is contrary to the record. Therefore, the second ground is also not sustainable.

G For the foregoing reasons, we set aside the impugned judgment of the Division Bench and restore that of the learned Single Judge. The appeal is, thus, allowed with costs.

H B.S.

Appeal allowed.