A

DEEPAK KUMAR BANSAL

V.

UNION OF INDIA & ANR.

Civil Appeal No. 1089 of 2009

FEBRUARY 17, 2009

B

[TARUN CHATTERJEE AND V.S. SIRPURKAR, JJ.]

Arbitration and Conciliation Act, 1996:

s.11(6) – Appointment of arbitrator – Denial of in view of Circular limiting arbitration proceedings only to claims which C *were less than 20% of value of contract – Held : Claim was not in excess of 20% of total cost – Thus referable to arbitration proceeding – Cost of supplementary work orders issued from time to time to be added to the original cost of work for determining total cost of work orders.*

D *Original contract entered in 1996 – Circular issued in 2003 intimating intention to incorporate a clause – Applicability of the circular – Held: Not applicable as the said Circular came into force only from 2003 and not before that, in the absence of any subsequent insertion of that Clause in the original* E *contract – Accordingly, question of applicability of the said Circular could not arise at all.*

An agreement was executed between the parties which contained arbitration clause. In terms thereof, work order was issued to the appellant on 22.9.1996. The F **estimated cost of work was Rs.32.75 lacs. Since the quantity of work was much more than the work order issued, supplementary work orders were issued from time to time for Rs.4.99 lacs, Rs.3.26 lacs, Rs.2.17 lacs, Rs.2.17 lacs. The total work orders for the cost of Rs.42.60 were issued to the appellant. Some dispute arose between the** G **parties and appellant invoked arbitration clause. High Court dismissed the application for appointment of an arbitrator under s.11(6) of the Arbitration and Conciliation Act, 1996 on the ground that since the value of the claim was more than 20% of the value of the work, the disputes**

H

could not be referred to Arbitrator in view of the Circular dated 11.6.2003 issued by the respondent intimating their intention to incorporate Clause 18 in the General Conditions of Contract limiting arbitration proceedings to only such claims, which were less than 20% of the value of the contract. Hence the instant appeal.

Partly allowing the appeal, the Court

HELD: 1. The High Court mis-directed itself in holding that the claim was in excess of 20% of the total cost of the work. Admittedly, the work was for a sum of Rs.32.17 lacs (original) and three additions viz. Rs.4.99 lacs, Rs.3.25 lacs and Rs.2.17 lacs totalling Rs. 42.60 lacs, which cannot be in excess of 20% of the total cost of the work. The High Court has only considered the original work order that was Rs.32.17 lacs, which must be taken into account along with three supplementary work orders. Even assuming that the claim was in excess of 20% of the total cost of the work, even then, the Circular, which came into effect from 11.06.2003 would not be applicable in the case of the appellant. There cannot be any dispute that the Circular intimating Clause 18 and issued on 11.06.2003 could not be applied in the case of the appellant as the said Circular came into force only from that date i.e. 11.06.2003 and not before that, in the absence of any subsequent insertion of that Clause in the original contract, namely, Clause 64 of the General Conditions of Contract. Accordingly, question of applicability of the said Circular intimating intention of the respondent to insert Clause 18 could not arise at all. [Paras 9-11] [935-F, G, H; 936-A, B]

State of AP. & Another v. Obulu Reddy (1999) 9 SCC 568 – referred to.

Case Law Reference

1999) 9 SCC 568	referred to	Para 6

A CIVIL APPELLATE JURISDICTION : Civil Appeal No 1089 of 2009

From the final Judgement and Order dated 25.5.2007 of the High Court of Judicature for Rajasthan at Jaipur Bench in Arbitration Application No. 31 of 2005.

B

Saahila Lamba and Sudhir Nandrajog, for the Appellant.

B. Sunita Rao, Sushma Suri and B. Krishna Prasad, for the Respondent.

C The Judgement of the Court was delivered by

TARUN CHATTERJEE, J.

1. Leave granted.

2. This appeal is directed against the judgment and order D dated 25th of May, 2007 passed by a learned Judge of the High Court of Judicature for Rajasthan at Jaipur Bench in S.B. Arbitration Application No.31 of 2005 by which the learned Judge had rejected the application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short 'the Act') filed at E the instance of the appellant.

3. The respondent–Union of India invited tenders for construction of 6 unit Type-II and 24 unit Type-I new quarters at Phulera Sub Division Office under Railway Inspector, F Kishangarh. An agreement was executed between the parties on 24th of April, 1996 under which in response to the said tender, the appellant submitted his offer, which was accepted and after completion of all kinds of formalities, the work order was issued to the appellant on 22nd of September, 1996. The initial G estimated cost of the work was Rs.32,74,904.37. In the said agreement, there is a Clause 64 in which the arbitration clause has been inserted. Clause 64 of the arbitration clause runs as under:-

H "(i) In the event of any dispute or difference between the

parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or differences on any account, or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to or if the Railway fails to make a decision within 120 days then and in any such case but except in any of the excepted matters referred to in clause 63 of these conditions, the contractor after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.

(ii) The demand for arbitration shall specify the matters which are in question. Dispute or difference only such disputes or differences in respect of which the demand has been made shall be referred to arbitration and other matters shall not be included in the reference."

4. The appellant, upon sanction of the work, requested the respondents for issuing him a work order so that he could commence the work. On his request, work order dated 22nd of February, 1996 for a sum of Rs.32, 17, 641.29 indicating the date of completion of work as 21st of February, 1997 was issued to the appellant, which was received by him on 7th of May, 1996. Since the quantity of the work was much more than the work order was issued, supplementary work order was subsequently issued by the respondents on 30th of December, 1997 for a sum of Rs.4,99,471.36 and further another supplementary work order issued on the same date i.e. 30th of December, 1997 for a sum of Rs.3,25,865.02. Thereafter, another work order to the tune of Rs. 2,17,748.63 was issued on 22nd of June, 1998. Hence, the total work orders for a cost of Rs. 42,60,726.30 were issued to the appellant. When some disputes arose between the parties on the question of payment of money, which was withheld by the respondents, the appellant requested the respondent from time to time to take deposition of the material remained and prepare his final bill, but his request was not

A acceded to. Accordingly, finding no other alternative, the appellant raised a dispute by issuing a notice dated 27th of December, 2004 and requested for appointment of an Arbitrator in terms of Clause 64 of the General Conditions of Contract appended with the agreement. When the respondent had failed B to appoint an arbitrator in terms of Clause 64 of the General Conditions of Contract, the appellant filed an application under Section 11(6) of the Act before the High Court of Rajasthan at Jaipur Bench for appointment of an Arbitrator.

5. As noted herein earlier, by the impugned order, the C application for appointment of an Arbitrator under Section 11(6) of the Act was rejected by the High Court on the ground that since the value of the claim was more than 20% of the value of the work, the disputes could not be referred to Arbitrator in view of the Circular issued by the respondent intimating their intention D to incorporate Clause 18 in the General Conditions of Contract limiting arbitration proceedings to only such claims, which are less than 20% of the value of the contract. It may be mentioned herein that the Circular was issued on 11th of June, 2003 whereas the agreement entered into by the parties was long before E issuance of the said circular and it is also not in dispute that the original work order and supplementary work orders were issued on 22.02.1996 (original) and 30.12.1997, 30.12.1997 and 22.06.1998.

6. The application for appointment of an Arbitrator was F also rejected by relying on a decision in the case of **State of AP. & Another vs. Obulu Reddy [1999(9) SCC 568].** It is this order, which is under challenge before us by way of a Special Leave Petition, which on grant of leave, was heard by us in presence of the learned counsel for the parties.

G

7. We have heard Ms. Saahila Lamba, learned counsel for the appellant and Ms. B. Sunita Rao, learned counsel for the respondents/Union of India. We have examined the impugned order of the High Court rejecting the application under Section 11(6) of the Act and also the materials on record including the

H

notice issued by the appellant for appointment of an Arbitrator to the respondents and also the application itself under Section 11(6) of the Act and the objections filed by the respondents thereto. Having heard the learned counsel for the parties and after going through the materials on record, we are of the view that the impugned order of the High Court is liable to be set aside for the reasons stated hereinafter.

8. The respondents, in their objection to the application under Section 11(6) of the Act, raised a plea that question of appointment of an Arbitrator, in the facts and circumstances of the present case, could not arise in view of the fact that the claim, as put forward by the appellant, was an amount being an excess of 20% of total cost of the work, which is prohibited in terms of the Circular issued on 11.06.2003. The High Court accepted this plea of the respondent and rejected the application on the grounds mentioned herein earlier.

9. In our view, the High Court has mis-directed itself in holding that the claim was in excess of 20% of the total cost of the work. Admittedly, the work was for a sum of Rs.32,17,641.29 (original) and three additions viz. Rs.4,99,471.36, Rs.3,25,865.02 and Rs.2,17,748.63 totalling Rs. 42,60,726.30/-, which cannot be in excess of 20% of the total cost of the work.

10. The High Court has only considered the original work order that was Rs.32,17,641.29, which, in our view, must be taken into account along with three supplementary work orders of Rs.4,99,471.36, Rs.3,25,865,02 and Rs.2,17,748.63 as mentioned herein earlier. Therefore, the High Court was wrong in holding that since the value of the claim of the appellant was more than 20% of the value of the work and in view of the Circular issued by the respondent, the claim must be held to be more than 20% of the value of the work and, therefore, disputes could not be referred to Arbitration. Even assuming that the claim was in excess of 20% of the total cost of the work, even then, the Circular, which came into effect from 11.06.2003 would not be applicable in the case of the appellant. There cannot be any

A dispute that the Circular intimating Clause 18 and issued on 11.06.2003 could not be applied in the case of the appellant as the said Circular came into force only from that date i.e. 11.06.2003 and not before that, in the absence of any subsequent insertion of that Clause in the original contract, namely, Clause B 64 of the General Conditions of Contract.

11. Accordingly, question of applicability of the said Circular intimating intention of the respondent to insert Clause 18 could not arise at all. That being the position, we are unable to sustain the impugned order of the High Court and accordingly, the appeal C is allowed and the application under Section 11(6) of the Act stands allowed. In view of our discussions made hereinabove, the decision cited by the High Court in the case of State of AP & Anr. Vs. Obulu Reddy (supra) may not be dealt with. The application is now directed to be posted to the concerned Judge D of the High Court and to appoint an Arbitrator in compliance with Clause 64 of the General Conditions of Contract entered into by the parties.

12. The impugned order is set aside. The appeal is thus allowed to the extent indicated above. There will be no order as E to costs.

D.G. Appeal party allowed.