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**SooperKanoon Citation : [sooperkanoon.com/440497](http://sooperkanoon.com/440497)**

**Court : Andhra Pradesh**

**Decided On : Aug-31-2006**

**Reported in : 2006(6)ALT37**

**Judge : Goda Raghuram, J.**

**Acts : [Arbitration Act, 1940](#) - Sections 20; [Arbitration and Conciliation Act, 1996](#) - Sections 11 and 11(6)**

**Appeal No. : Arbitration Application No. 14 of 1997**

**Appellant : A.R.K. Murthy**

**Respondent : Senior Divisional Engineer, South S.C. Railway and ors.**

**Advocate for Def. : T. Ramakrishna Rao, S.C.**

**Advocate for Pet/Ap. : K.V.N. Bhupal, Adv.**

**Disposition : Application dismissed**

**Judgement :**

ORDER

**Goda Raghuram, J.**

1. This application filed seeks appointment of an Arbitrator for settlement of the claims and disputes between the parties herein with regard to the amounts

claimed as due and payable by the respondents to the petitioner in respect of an agreement NO.53/DEN/S/BG/ SC dated 3-10-1990.

2. The petitioner asserts that the 1st respondent issued a tender notice for the work-Warangal-Water Supply Bulk Water Drawal from Warangal Municipality and provision of overhead tank and pipelines. The petitioner was one of the bidders in the tender. His bid was accepted and he was awarded the work. The work could not be completed within the time stipulated and the petitioner's request for extension of time was also accorded.

3. During the currency of the work, the petitioner asserts, the capacity of the overhead tank was raised from 20,000 gallons to 33,000 gallons. The petitioner executed this increased quantum of work. The petitioner asserts that the scope of the work was enhanced in excess of the specifications as per the agreed items under the agreement between the parties and as a consequence, the value of the work increased from Rs. 4,20,858-25 ps., to Rs. 10,61,121-70ps. The respondents failed to settle and pay in full the amounts due to the petitioner and therefore he preferred writ petition W.P. No. 26369 of 1995 seeking settlement of the final bill. By the judgment dated 1-8-1996, W.P. No. 26369 of 1996 was disposed of by this Court directing the 1st respondent to pay the admitted amount of Rs. 1,00,000-00 to the petitioner for construction of the original specification of the overhead tank, within three weeks from the date of receipt of a copy of the judgment of this Court. This Court further directed the respondents to hold negotiations with the petitioner for payment with regard to the additional works claimed to have been executed by the petitioner viz., the construction of 33,000 gallons capacity overhead tank; and if the negotiations failed, the respondents were directed to pay to the petitioner the amounts admitted by them for both the works and refer the matter to the arbitrator or review committee for resolution of disputes that still remained unresolved and that such arbitration or review shall be completed within eight weeks from the date of reference.

4. As the respondents have, despite the order of this Court above, failed to refer the dispute between the parties to the arbitration, despite the petitioner making several representations in this behalf, this arbitration application is filed.

5. It is the defence of the respondents, in particular the 1st respondent that the total work executed by the petitioner (both the original and additional) is of a value of Rs. 10,40,164-87ps, (the value of the original work at Rs. 1,29,693-65 ps., and the value of the additional work at Rs. 9,10,471 -22 ps.). This was a figure arrived at in a negotiating committee meeting held on 28-10-1996. As against this amount payable to the petitioner, the amount due from the petitioner is Rs. 35,191-53 ps. some of the details are: the value of the unreturned cement bags at Rs. 390-00 and the unreturned value of the steel supplied for execution of the work Rs. 18,357-00. The petitioner was stated to have been paid Rs. 10,56,809-00. Thus, according to the respondents, the petitioner himself is due to the respondents a sum of Rs. 35,191-53ps.

6. The above is the dispute between the parties on the amounts claimed by the petitioner as due from the respondents and claimed by the respondents as due from the petitioner.

7. On the substantive merit of the petitioner's application seeking reference to arbitration, the respondents contend that as the dispute is with regard to the additional work done by the petitioner, the same is not covered by the arbitration clause and falls within the 'excepted matters' and therefore no reference to arbitration could be made and the petitioner cannot invoke the arbitration clause.

8. It is the admitted position between the parties to the agreement that they are governed, including in the matter of reference to arbitration, by the terms of the Standard General Conditions of Contract for short 'SGCC' which are terms that adhere and are integral to the agreement between the parties. Clause 39 of SGCC states that any item of work carried out by the Contractor, on the instructions of the Engineer, which is not included in the accepted schedule of rates, shall be executed at the rates set forth in the Schedule of Rates of South Central Railway modified by the tender percentage and where such items are not contained in the latter at the rates agreed upon between the Engineer and the Contractor before the execution of such items of work and the Contractor shall be bound to notify the Engineer at least seven days before the necessity arises for the execution of such items of work that the accepted schedule of rates does not include a rate or

rates for the extra work involved. As is apparent from Clause 39 of the SGCC if the Contractor is not satisfied with the decision of the Engineer in respect of the matters specified in Clause 39 of the SGCC, he may appeal to the Chief Engineer within thirty days of getting the decision of the Engineer supported by the analysis of the rates claimed. The clause further specifies that the Chief Engineer's decision, after hearing both the parties in the matter, is final and binding on the Contractor and the Railway.

9. Clause 39 of the SGCC reads as under:

39. Any item of work carried out by the Contractor on the instructions of the Engineer which is not included in the accepted schedule of rates shall be executed at the rates set forth in the 'Schedule of Rates of South Central Railway' modified by the tender percentage and where such items are not contained in the latter at the rates agreed upon between the Engineer and the Contractor before the execution of such items of work and the Contractor shall be bound to notify the Engineer atleast seven days before the necessity arises for the execution of such items of work that the accepted schedule of rates does not include a rate or rates for the extra work involved.

The rates payable for such items shall be decided at the meeting to be held between the Engineer and the contractor in as short a period as possible after the need for the special item has come to the notice. In case the contractor fails to attend the meeting after being notified to do so or in the event of no settlement being arrived at the Railway shall be entitled to execute the extra works by other means and the contractor shall have no claim for loss or damage that may result from such procedure. Provided that if the Contractor shall commences work or incurs any expenditure in regard thereto before the rates are determined and agreed upon as lastly mentioned, then and in such a case the Contractor shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the date of the rates as aforesaid according to the rates as shall be fixed by the Engineer. However, if the contractor is not satisfied with the decision of the Engineer in this respect he may appeal to the Chief Engineer within 30 days of getting the decision of the Engineer supported by the analysis of the

rates claimed. The Chief Engineer's decision after hearing both the parties in the matter would be final and binding on the contractor and the Railway.

10. Clauses 63 and 64 of the SGCC govern the area of settlement of disputes under the agreement entered into between the parties. To the extent relevant and material, Clauses 63 and 64 of the SGCC read as under:

63. 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 presentation 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 19, 22(5), 39, 45(a), 55, 55-A(5) 61(2) and 62(1)(xiii)(B)(e)(b) of the General conditions of contract or in any Clause 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 shall not be referred to arbitration.

(Emphasis supplied)

64. (1)(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 difference 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 decision within a reasonable time, then and in any such case, save the 'excepted matters' referred to in clause 63 of these conditions, the contractor after 90 days but within 180 days of his presenting his final claim on disputed matter, shall demand in writing that the dispute 'or difference' be referred to arbitration.

(Emphasis supplied)

11. As is apparent, on a true and fair construction of Clauses 63 and 64 of the SGCC, governing the relationship between the parties to the agreement, matters for which provision has been made in Clause 39 of the SGCC, are 'excepted matters' and the decisions under Clause 39 of the SGCC are to be treated as final and binding on the Contractor and it is further provided *ex abundanti cautela*, in Clause 63 of the SGCC that the 'excepted matters' stand specifically excluded from the purview of the arbitration clause and are not to be referred to arbitration. The exclusion is reiterated in Clause 64 of the SGCC.

12. The additional work executed by the petitioner is admittedly and demonstrably one falling within the matters specified in Clause 39 of the SGCC. The case of the petitioner is that the procedural and substantive discipline of Clause 39 of the SGCC was not followed by the respondents while calling upon the petitioner to execute the additional items of work. There was no prior agreement of the terms between the parties to the agreement nor on the rate, for execution of the additional items of work. The additional items were far beyond the quantities of work to be executed under the original agreement entered between the parties and the other parameters for a fair settlement of the compensation to the petitioner were also not determined, as required under Clause 39 of the SGCC, is the substance of the petitioner's grievance.

13. According to Sri K.V.N. Bhupal, learned Counsel for the petitioner, since the terms of Clause 39 of the SGCC were not followed by the respondents while calling upon the petitioner to execute the additional items of work, the arbitral remedy is available under Clause 64 of the SGCC. According to the learned Counsel for the petitioner, since there had been a breach of the terms of Clause 39 of the SGCC by the respondent-employer, though the additional items of work executed by the petitioner fall under Clause 39 of the SGCC, it is not an 'excepted matter' and falls within the purview of the arbitration clause under Clause 64 of the SGCC; and could be referred to arbitration.

14. The contentions urged on behalf of the petitioner constitute a creative reading of the terms of contract which does violence to the language employed in Clauses 39, 63 and 64 of the SGCC. The parties to the agreement have agreed that all

matters for which provision has been made inter alia in Clause 39 of SGCC are to be deemed 'excepted matters'. 'Excepted matters' are specifically excluded from the purview of arbitration and are not to be referred to arbitration.

15. Arbitration is not a process of compulsive adjudication as before a civil court of competent jurisdiction. The power, authority and jurisdiction of an arbitrator to arbitrate upon the disputes referred, is founded on agreement between the parties to an agreement, contained in an arbitration clause. In matters of arbitration, the parties to the agreement are at liberty to agree on which disputes are to be referred to arbitration. If any dispute or classes of disputes are excluded from the purview of arbitration, arbitration of such excepted matter is excluded and an arbitrator is denuded of power, authority or jurisdiction to arbitrate upon such areas. These principles are too well settled to invite an idle parade of familiar authority.

16. In *General Manager, Northern Railway v. Sarvesh Chopra* : [2002]2SCR156 . on an extensive survey of earlier authorities, the Supreme Court, on an analysis of Clause 63 of the SGCC which is same as in the case on hand held:

7. A bare reading of clause 63 shows that it consists of three parts. Firstly, it is an arbitration agreement requiring all disputes and differences of any kind whatsoever arising out of or in connection with the contract to be referred for adjudication by arbitration, by the Railways, on a demand being made by the contractor through a representation in that regard. Secondly, this agreement is qualified by a proviso which deals with 'excepted matters'. 'Excepted matters are divided into two categories: (i) matters for which provision has been made in specified clauses of the General Conditions, and (ii) matters covered by any clauses of the Special Conditions of the contract. Thirdly, the third part of the clause is a further proviso, having an overriding effect on the earlier parts of the clause, that all 'excepted matters' shall stand specifically excluded from the purview of the arbitration clause and hence shall not be referred to arbitration.

17. In the above decision, the Apex Court also dealt with a contention urged on behalf of the Contractor therein that in case of a grey area in the interpretation of the arbitration clause and in particular whether a particular dispute falls within the

'excepted matter' or otherwise, the issue should be left to be determined by the arbitrator. The court declined to countenance this contention and held that while dealing with a petition under Section 20 of the [Arbitration Act, 1940](#), the court has to examine whether there is an arbitration agreement entered into between the parties, whether the difference, which had arisen, is one to which the arbitration agreement applies; and whether there is a cause, shown to be sufficient, to decline an order of reference to the arbitrator. Existence of an arbitration agreement is the foundation for the jurisdiction to refer to arbitration, held the Supreme Court. The Apex Court further held, relying upon an earlier decision in *Prabartak Commercial Corporation Ltd. v. Chief Administrator, Dandakaranya Project* : AIR 1991 SC957 . that when an arbitrator has no jurisdiction in the matter and reference of a dispute to an arbitrator was invalid, the entire proceedings before the arbitrator, including the award made by him, were null and void.

18. It further requires to be noticed that in several decisions, including *Alopi Parshad and Sons Ltd. v. Superintending Engineer* : [1960]2SCR793 . *Continental Construction Co. Ltd. v. State of M.P.* : [1988]3SCR103 . *Steel Authority of India Ltd. v. J.C. Budharaja, Govt. and Mining Contractor* : AIR 1999 SC3275 . *Ch Ramalinga Reddy v. Superintending Engineer* : (1999)9SCC610 . and *Union of India v. Popular Builders* : AIR 2000 SC3185 . the Supreme Court clearly spelt out the principle that an award by an arbitrator over a claim which was not arbitrable as per the terms of the contract entered into between the parties, would be liable to be set aside. In *Food Corporation of India v. Sreekanth Transport* : [1999]3SCR699 . the Supreme Court held to be the consistent view that in the event of the claims arising within the ambit of 'excepted matters', the question of assumption of jurisdiction by any arbitrator either with or without the intervention of the court would not arise.

19. The decision of the Constitution Bench of the Supreme Court in *SBP and Co. v. Patel Engineering Ltd.* : 2005(6)ALD43 . while considering the scope of the power of the Chief Justice of the High Court and the Chief Justice of India under, Section 11 of the [Arbitration and Conciliation Act, 1996](#) Act 26 of 1996 for short 'the Act, did not mark a departure from the settled principle that existence of an arbitration agreement is the foundation for the exercise of an arbitral jurisdiction

and the authority by an arbitrator. Emphasizing this aspect of the matter, P.K. Balasubramanian, J. speaking for the majority pointed out: 'Dragging a party to an arbitration when there existed no arbitration agreement or when there existed no arbitrable dispute, can certainly affect the right of that party, and, even on monetary terms, impose on him a serious liability for meeting the expenses of the arbitration, even if it be the preliminary expenses and his objection is upheld by the Arbitral Tribunal'. The Supreme Court majority held that it is not possible to accept the position that no adjudication is involved in the constitution of an Arbitral Tribunal, while exercising jurisdiction under Section 11(6) of the Act.

20. From the abundance of precedential authority, the position is beyond disputation and the legal principle is established that 'excepted matters' are not to be referred to arbitration. On text and authority and the clear text of the provisions of Clause 39 of SGCC, the additional items claimed to have been executed by the petitioner and the disputes in relation to those additional items of work that have arisen between the parties to the agreement, clearly comprise 'excepted matters' and are therefore not liable to be referred to arbitration as arbitral jurisdiction is specifically excluded in respect of 'excepted matters'. This is the unambiguous position on a true and fair construction of the provisions of Clauses 39, 63 and 64 of the SGCC which govern the relationship between the parties and define the contours of the jurisdiction, power and authority of an arbitrator.

21. In the light of the aforesaid analysis, there are no merits in this arbitration application. The relief sought cannot be granted. The application is accordingly dismissed. The petitioner is however at liberty to pursue appropriate remedies before the appropriate forum in respect of the grievances for which he seeks reference to arbitration. No costs.