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Kusuma Constructions Vs. Union of India (Uoi), Rep. by the General Manager, South Central Railway and ors.

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Court : Andhra Pradesh

Decided On : Jul-10-2002

Reported in : 2002(4)ALT743

Judge : N.V. Ramana, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 11(5); [Arbitration Act, 1940](#)
; Arbitration Rules

Appeal No. : Arbitration Application No. 9 of 2002

Appellant : Kusuma Constructions

Respondent : Union of India (Uoi), Rep. by the General Manager, South Central Railway and ors.

Advocate for Def. : Gouri Shankar Sanghi, S.C.

Advocate for Pet/Ap. : T. Ravikumar, Adv.

Disposition : Application allowed

Judgement :

ORDER

N.V. Ramana, J.

1. This is an application filed by M/s. Kusuma Constructions, Vijayawada, seeking appointment of Sole Arbitrator to adjudicate the claims arising out of the Contract Agreement No. 110/DEN/I/ BZA/90 dated 25-12-1990 entered into between the Applicant and the South Central Railway.

2. The Applicant was allotted the work 'proposed trolley path in through yard and NRY yard to facilitate C and W staff to attend repairs to wagons etc' by the South Central Railway, vide acceptance letter dated 12-12-1990 at a value of Rs. 2,87,762/- and the period of completion of the work was three months from the date of acceptance i.e., 12-3-1991 and to be maintained for two months. According to the applicant, the Respondent-Railways asked the applicant to slow down the work as they were expecting change of cement concrete to black topping. Due to this, the applicant sought for extension of currency of the contract upto 30-11-1991 without penalty and the respondent agreed for the same. The applicant asked the respondent-Railway to pay + 35% above SSR or close the contract and pay the final bill for the work done stating that it suffered loss due to the above said change. By letter dated 29-10-1991 the Railways asked the applicant to attend its office on 4-11-1991 for negotiations to fix up rates for new/additional items. The applicant asked extension of the period upto 15-1-1992 to facilitate the Railway administration to speed up their decision and arrange payment. The contracted work was completed in September 1991, was measured and signed by the Contractor on 9-10-1991. The applicant requested the Railways for payment of the amounts on 6-12-1991 and issued several reminders. As per the advice of the Railways, the applicant asked for extension of agreement upto 31-10-1992. Again applicant was asked to seek extension upto 31-12-1992. Meanwhile an amount of Rs. 2,00,000/- was released from the CC.I. Bill dated 24-12-1991 (valuing Rs. 2,77,341/-), but the CC.I bill was not finalised. Since 10-11-2002, the applicant has been requesting the Railways for balance payment of CC.I Bill and payment of N.S. Items and additional quantities carried out by the applicant. Pursuant to the letter 28-8-1996 of the DEN-I of the Railways, the applicant verified the final bill and wrote a letter on 12-9-1996 asking him to revise the deviation statement giving reasons therefor. By letter dt. 5-2-2001, the

applicant asked the respondent Railways to settle the claims/ disputes under Clause 63 of the General Conditions of Contract. As the Railways failed to comply with the above said request of the applicant, on 10-6-2001 the applicant submitted another representation putting forth its claims for reference to arbitration under Clause 64-(1) (i) of General Conditions of the Contract. The respondent-Railways refused to refer the claims to arbitration stating that the additional items were executed without prior approval of the administration as provided under Clause 39 of the GCC and the applicant kept quiet for four and half years; that the applicant did not prefer its claims within 90 days from the date of intimation dated 28-8-1996 as provided under Clause 64 of GCC and that the deviation statement and final bill were ready and thus the claims are barred by limitation. Hence, the present application.

3. The respondents filed counter-affidavit disputing the claims of applicant, contending, inter alia, that the claims are barred by limitation and that the balance amount could not be paid because the applicant did not comply with standard procedure, and that the present arbitration application is not maintainable as the agreement dated 25-12-1990 specifically provides for a procedure under Clause 64 of the General Conditions of Contract.

4. Heard the learned Counsel for the applicant and the learned Standing Counsel for Railways.

5. Learned Counsel for the applicant contended that when there is no response from the Railways to the repeated requests of the applicant to settle the final bill and when the contract is still in existence and when the final bill was not settled after completion of the contract work successfully and the additional work and as money has not been paid, a notice has been issued by the applicant to the respondent-Railways on 5-2-2001 for settlement of final bill amount. As there is no response to the said notice, the applicant issued the statutory notice Under Section 11(5) of the [Arbitration and Conciliation Act, 1996](#) to the respondent-Railways on 9-11-2001 seeking reference of the disputed claims to arbitration. Eventhough the respondent-Railways received the said notice on 12-11-2001, they did not give any reply. So he has filed the present arbitration application.

6. The learned Standing Counsel for the respondent-Railways contended that the claims sought to be referred to arbitration are barred by limitation and that new Act ([Arbitration and Conciliation Act, 1996](#)) has no application to this case because the agreement was entered into by the parties in the year 1990.

7. So far as the first contention regarding limitation is concerned, the Supreme Court in *Konkan Railway Corporation Ltd. v. Rani Construction (P.) Ltd.* (2002 AIR SCW 426) clearly held that all contentious issues must be raised before the Arbitrator only, and the Court cannot decide these issues. In this connection, reference may be had to the order dated 9-4-2002 passed by a learned Single Judge of this Court also in A.A. No. 41 of 2001 following the judgment of the Supreme Court in *Konkan Railway Corporation Ltd.* (stated supra) wherein it was held that the question of limitation has also to be raised before the Arbitrator, and the nominee of the Chief Justice cannot decide this question.

8. Similarly about the second contention, as rightly relied upon by the Counsel for the applicant, Clauses 63 and 64 of the General Conditions of Contract which govern the agreement provides for reference of the disputed claims between the parties to arbitration. Clause-64(3) (f) of the General Conditions of Contract reads:

'Subject as aforesaid, [Arbitration Act, 1940](#), and the Rules thereunder and any statutory modification thereof shall apply to the arbitration proceedings under this clause'.

9. According to the Counsel for the applicant, when there is any change of law, the new law will be applicable to the agreement existing by that time. Counsel for the applicant has relied upon the decision of the Supreme Court in *Thyssen Stahlunion GMBH v. Steel Authority of India Ltd.* (1999 (3) Arb. LR 532(SC)). In that decision at paragraphs 36 and 37, while referring to the decision of the Bombay High Court (Goa Bench) rendered by a Single Judge in *Reshma Construction v. State of Goa*, (1999(1) MLJ 462) and considering a similar question and interpreting a similar clause, it was held:

'36. Mr. Desai had referred to a decision of the Bombay High Court (Goa Bench), rendered by Single Judge in *Reshma Construction v. State of Goa* (1999 (1) MLJ

462.) In that case arbitration clause in the contract provided as under:

'Subject as aforesaid, the provisions of the [Arbitration Act, 1940](#) or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause'.

37. The Court held that these terms in the clause disclosed that the parties had agreed to be governed by the law which was in force at the time of execution of the arbitration agreement as well as by any further statutory changes that may This is how the High Court considered the issue be brought about in such law.'

10. Admittedly, the disputed claims between the parties in this case are arbitrable by an Arbitrator, as per Clauses 63 and 64 of the General Conditions of Contract. In view of the above said settled legal position, the contentions of the respondents' Counsel are rejected. The Arbitration Application is allowed. The Hon'ble Sri Justice Y.V. Narayana, former Judge of this Court, is appointed as the Sole Arbitrator to resolve the disputes between the parties. The parties are entitled to putforth all their claims and contentions before the Sole Arbitrator. The Arbitrator is at liberty to fix his fee.

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