

F-19

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision : February 28, 2008.

+ **ARB.P. 273/2007**

MOHD. IQBAL Petitioner
Through Mr.Sanjay Poddar, Advocate.

Versus

UOI Respondent
Through Mr.C.Mohan Roy, Advocate.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

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| 1. Whether reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

Mr. Justice S. Ravindra Bhat (Open Court)

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996; the petitioner seeks reference of disputes to arbitration.

2. The pleadings and undisputed facts are that the petitioner was awarded a work for water supply arrangements including construction of new underground tank and its connection with existing pumps house and other allied works for new washing lines at New Delhi Yard (Lahori Gate Area). The work order was issued on

14.7.2003 by the respondents. The petitioner/contractor was given seven months to complete the work. It is alleged that the consideration agreed was approximately Rs.17 lakhs per month. The petitioner further alleges that due to fundamental breach of terms of contract, the work would not commence. These acts of omissions and commissions, it is alleged included failure to handover the site of the work and failure to handover the drawings till date etc. In this background, the respondents terminated the contract on 3.3.2004. The petitioner sought by a letter dated 17.5.2004, compensation of two counts and also cost of litigation/arbitration. The respondent received and acknowledged this letter on 24.5.2004. The petitioner sought reference of the disputes to arbitration in accordance with clause 64 of the Agreement/tender condition which binds the parties.

3. It is alleged that the respondents by letter dated 30.3.2005 communicated that the General Manager had appointed an arbitral tribunal. Yet the claims sought to be agitated in these proceedings were not referred to the said tribunal.

4. The respondent's reply avers, and its counsel urged, during the hearing, that the three disputes mentioned in paragraph 8 of the petition cannot be referred as they fall with the excepted category, in terms of clauses 21.5 and 9.2 of the special conditions of

Contract. The said two stipulations reads as follows:-

“21.5 - “No claim for idle labour and or idle machinery etc. on any account will be entertained. Similarly no Claim shall be entertained for business loss or any such loss.”

9.2 -“No material price variation or wages escalation on any account whatsoever the compensation for 'Force Majure' etc. shall be payable under this contract except price escalation clause payable as per price escalation clause, if any, provided separately in the tender documents.”

5. Learned counsel has sought to place reliance upon the decision of the Supreme Court reported as **GENERAL MANAGER, NORTHERN RAILWAY AND ANOTHER VS. SARVESH CHOPRA**, (2002) 4 SCC 45. It was submitted that the Court considered and interpreted the same conditions, i.e. clause 9.2 and 21.5. After noticing this as well as other contentions, Court held that two categories of excepted matters existed in such a clause contract. One was an absolute bar on reference of the dispute to arbitration and the second clause comprised of disputes which were to be determined by a departmental authority.

6. Learned counsel submitted that the claim for compensation of overhead expenditure at 10% of the contract value of Rs.11 lakhs and compensation for loss of business profit amounting to Rs.16.5 lakhs were expressly excluded from matters that could be arbitrated. It was submitted that a careful reading of the Supreme

Court in *Sarvesh Chopra (supra)*, would show that the Court upheld the contention that similar claims were not arbitrable and in fact allowed the appeal.

7. Learned counsel for the petitioner submitted, on the other hand, that precise content of what are excepted matters would vary from circumstance to circumstance and much would depend upon the nature of the claim raised. He relied upon the observations in *Sarvesh Chopra (supra)*, where the Court observed that the American jurisprudence had developed so as to avoid the effect of such clauses and permitted the contractor to claim in four situations, namely, (i) where the delay is of a different kind from that contemplated by the clause, including extreme delay, (ii) where the delay amounts to abandonment, (iii) where the delay is a result of positive acts of interference by the owner, and (iv) bad faith.

8. It was submitted, by placing reliance on the reasoning of the Supreme Court in that decision that the situations contemplated under Section 55 of the Contract Act would also apply to limit the exception rule in contracts prohibiting arbitrariness.

9. The decision in *Sarvesh Chopra (supra)*, is undoubtedly an authority as to what kind of disputes cannot be referred to the arbitration in the background of exception clauses. The nature of dispute sought to be raised were described in paragraph 5 of the

judgment. Each of the claims had a co-relation with the time stipulated and the damages claimed.

10. In the light of the discussion, the Supreme Court, in that decision, concluded in paragraph 18 that all the claims were covered by excepted matters. However, in the course of its discussion, the Court importantly noted the limitations to the exception rule and held that there can be situations such as an extreme delay, bad faith and applicability of the Section 55 of the Contract Act would be pressed into service to avoid or limit the exception clause.

11. In this case, the dispute that is the subject matter of the present petition has arisen on account of the termination of the contract. The correctness of the termination, i.e. whether it is in conformity with the contract or justified in the circumstances of the case or whether the petitioner can claim damages on the basis of the materials is within the scope of this Court's jurisdiction. What the Court to see in the light of the *Sarvesh Chopra (supra)* judgment is whether the disputes raised would be the subject matter of clauses 9.2 and 21.5, to be "excepted matters". The claim No.2 as raised is directly co-relative of the facts here, i.e. the termination. That has no bearing on the issue of performance. Whether the petitioner is ultimately able to establish the case would depend on evidence. If the Court accepts the respondent's plea, the result would be that although

the parties have agreed for arbitration as the dispute resolving mechanism yet the justification or otherwise termination and the logical corollary flowing would be outside the scope of arbitration. Such a situation did not exist in the *Sarvesh Chopra (supra)* case. Similarly, as far as a compensation for loss overhead expenditure is concerned, it does not fall facially within the excepted clauses, i.e. 9.2 and 21.5.

12. In the light of the above conclusion, the Court is of the opinion that the disputes sought to be raised are arbitrable. Since the other disputes between the parties have already been referred to arbitration and the arbitral tribunal is seized of them, the respondents are directed to refer the matter for arbitration to the same arbitral tribunal for its decision in accordance with law, within four weeks.

13. All rights and contentions of the parties are hereby reserved. The petition is allowed in the above terms. No costs.

S. RAVINDRA BHAT,J

FEBRUARY 28, 2008
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