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

+ **FAO(OS) 143/2016**

UNION OF INDIA (MINISTRY OF RAILWAYS) & ORS

..... Appellants

Through: Mr.R.V.Sinha, Mr.A.K.Singh and
Mr.Amit Sinha, Advocates.

versus

M/S J SONS ENGINEERING CORPORATION LTD

..... Respondent

Through: Mr.Raman Kapur, Sr.Advocate with
Mr. Ali Anwar and Mr.Varun Kapur,
Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

ORDER

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06.09.2018

1. The appellant/Indian Railway's grievance is with regard to the decision of the learned Single Judge, who rejected its objections under Section 34 of the Arbitration and Conciliation Act, 1996. This meant that the award to the tune of Rs.10,37,000/- with 12% simple interest in favour of the claimant from the date the award was made till the date of payment and the rejection of the counter claim of the appellant by the Arbitrator, was upheld.

2. The principal argument advanced on behalf of the appellant/ Indian Railways is that by virtue of Clause 63 of the Agreement entered into between the parties - which was for supply of steel girder

for construction of New Bridge of 10 x 18.3m span over river Dhakai (in Bihar) in terms of the Agreement, subject matter of the arbitration, was in the category of “excepted matters”. The relevant clause in this regard reads as follows:

“63. Matters finally determined by the Railway:--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 120 days after receipt of the contractor’s representation 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 8, 18, 22(5), 39, 43(2), 45(a), 55, 55-A(5), 57, 57A, 61(1), 61(2) and 62(1) (i) to (xiii)(B) of General conditions of contract or in any clause of the special conditions of the contract shall be deemed as “excepted matters” and decisions of the Railway authority, 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 not be referred to arbitration.”

3. Learned counsel for the appellant submits that learned Single Judge overlooked the fact that the Tribunal did not possess the jurisdiction *per se* in view of Clause 63, which barred arbitration in regard to all matters covered by Clause 62 (1) (i to xiii). It is submitted that in the present case, default events occurred, which were covered by Clause 62 (1) i.e. [(vii) - have persistently disregard the instructions of the engineer or contravene any provision of

contract; and, (viii) - fail to adhere to the agreed programme of work by a margin of 10% of the stipulated period]. It was submitted that learned Single Judge proceeded on a mis-appreciation of the legal proposition placing reliance on *J.G. Engineers Pvt. Ltd. vs. Union of India & Another*, AIR 2011 SC 2477 in holding that the issue of legality of termination was the subject matter of arbitration but the quantification of compensation/damages had to be gone into or determined by the Court. Learned counsel submitted in this regard that the reliance placed in *J.G. Engineers* (supra), upon an earlier decision (*Bharat Sanchar Nigam Ltd. vs. Motorola India Pvt. Ltd.*, AIR 2009 SC 357) and an earlier judgment in *General Manager, Northern Railways & Anr. vs. Sarvesh Chopra*, (2002) 4 SCC 45 was incorrect. It was submitted that in the facts of this case the condition that excluded arbitrability was far more than the one relied upon in *J.G. Engineers* (supra) and *Bharat Sanchar Nigam Ltd.*(supra) (to the extent it was cited and relied upon in *J.G. Engineers*). Learned counsel underlined that the conditions in those reported judgments were more ambiguous and rather relied upon finality of decision in *J.G. Engineers* (supra) and other functionaries and postulated that arbitration was excluded.

4. Clause 62 of the Agreement between the parties in the present case visualised every possible situation that included bankruptcy/ insolvency of the contractor; arrangement of the contractor or assignment in favour of its creditors in respect of its business liquidation events; and the unforeseen and involuntary situations such

as execution levied on its goods or property besides voluntary acts of the contractors such as assignment of the contract or any part to a third party, abandonment. The other events which form the subject matter of the termination include failure to remove material from sites, failure to employ competent or additional staff, failure to afford the engineer or engineer's representative proper facilities for inspection, promise, offer or give any bribe, commission, gift or advantage either himself or through his partner, agent etc. to an official of Indian Railways at any time after execution of the contract, admit to its partnership or employ under it to elect or nominate or allow to act as a Director any retired engineer of the Indian Railways etc. and also withholding the vital information at the time of tendering.

5. A careful reading by this Court into every eventuality that can and ought to be visualised has in fact been articulated in this clause 62. Now, on a plain interpretation of clause 63, if, all matters that fall within clause 62 are to be held as excluded, clause 64, which talks of arbitration and constitutes arbitration agreement between the parties, is virtually rendered useless. In other words, the plain terms of clause 62 negate and are completely at variance with the intendment of clause 64. If the meaning is to be given to clauses 62 and 63 in the manner suggested by the Indian Railways, there would in fact be no subject matter left for decision by the Tribunal.

6. Keeping this peculiarity in mind, this Court is of the opinion

that the segregation of the matters that fall within clause 62 (hereinafter referred to as broadly “Termination Event”) and the legality of the action of the Railways – which can be arbitrable on a proper reading of the principles enunciated in *Bharat Sanchar Nigam Ltd.* (supra) and *J.G. Engineers* (supra), renders clause 64 meaningful. This would necessarily mean that the legality of the termination would be the subject matter of the arbitration; quantification of the compensation payable, if any, to the contractor, would properly be the subject matter of ensuing civil proceedings in the form of a suit. Although, what the learned Single Judge did in this case was to follow *J.G. Engineers* (supra) – it may not be in the direction this Court has interpreted clause 63, having regard to the contents of clause 62, nevertheless, the conclusions in the impugned judgment are sound and unimpeachable. The appeal is consequently dismissed.

7. The amounts deposited in the Court by the appellant Railways, alongwith accrued interest shall be released to the respondent Contractor, within two weeks.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

SEPTEMBER 06, 2018

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