

IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBA No.06 of 2014
(Through Hybrid mode)

Union of India and others ***Appellants***

Mr. Gyanaloka Mohanty, Advocate
(Central Government Counsel)

-versus-

Prabhat Kumar Mishra ***Respondent***

Mr. N. K. Jujharsingh, Advocate

CORAM: JUSTICE ARINDAM SINHA

ORDER
28.07.2022

Order No.

06. 1. Mr. Mohanty, learned advocate, Central Government Counsel appears on behalf of appellants (Union of India/Railway). He submits, his clients are aggrieved by order dated 19th December, 2013, whereby claim nos.1 to 9, 11, 28, 29, 32 and 34 were remanded to the Tribunal for fresh adjudication. He refers to paragraph 5 in impugned order and submits, said claims were 'excepted matters' under clause 63 in general conditions of contract and correctly not adjudicated by the Tribunal. He submits, said clause 63 provided further that 'excepted matters' shall stand specifically excluded from purview of the arbitration clause and shall not be referred to arbitration. The Court below erred in remanding those claims.

2. Mr. Jujharsingh, learned advocate appears on behalf of respondent (claimant). He submits, the reference was made by the employer in terms of sub-clause (3) (a) (ii) under clause 64. The employer appointed two arbitrators, who were Gazetted Railway Officers. There was also an Umpire appointed in terms of sub-clause (3) (b) under said clause 64. The reference having been made by the employer on disputes raised by his client, the employer could not thereafter turn around and say that some of the claims referred came under 'excepted matters'.

3. Clause 63 provides for 'excepted matters'. In context of contention made by respondent, it is seen that sub-clause (1) (i) in clause 64 says that, inter alia, in event of dispute between the parties, where Railway fails to make a decision within a reasonable time, save the 'excepted matters', the contractor, after 90 days but within 180 days of presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration. Court presumes, this condition had been complied with.

4. Sub-clause (3) under clause 64 makes it clear that the General Manager shall be the sole judge to decide whether or not the issues involved are of a complicated nature. The purpose is for constituting the Tribunal, with sole arbitrator or by two arbitrators and an Umpire, depending on judgment of the General Manager regarding nature of the disputes and differences. It also appears that under sub-clause (1)(iii) under clause 64 it has been provided that in event the contractor does not raise claims and disputes within the time prescribed, he

will be deemed to have waived his claims and the Railway shall be discharged and released of all liabilities under the contract in respect of those claims. Thereby it is clear that the Railway had imposed as a condition, contingency of waiver upon the contractor. It follows that when the Railway itself, on judgment of the General Manager, referred disputes raised by the contractor to the Tribunal for arbitration, any 'excepted matter' that stood referred was to be adjudicated by the Tribunal upon the Railway having waived its right to except those matters from adjudication in arbitration. In the circumstances, it is not necessary for Court to direct respondent to take those claims as are alleged to be 'excepted matters', to Court on settled law that a person cannot be rendered remediless by contract. There is clear waiver on part of the Railway in exercising its authority to firstly, rule on the disputed claims, secondly, in judging complexity of the claims for purpose of constitution of arbitral Tribunal and thirdly, in referring all of them to arbitration.

5. Sub-section (4) in section 34, Arbitration and Conciliation Act, 1996, prior to amendment effected in year 2015, stood as reproduced below.

“(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral Tribunal will eliminate the grounds for setting aside the arbitral award.”

6. Direction made by impugned order appears to be in line with above provision.
7. For reasons aforesaid impugned order is confirmed.
8. The appeal is dismissed.

(Arindam Sinha)
Judge

RKS

