Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4151 OF 2009
(Arising out of SLP [C] No.11118 of 2006)

M.K. Abraham & Co. … Appellant

Vs.

State of Kerala & Anr. ... Respondents

WITH

CIVIL APPEAL No. 4155/2009
(Arising out of SLP (C) No11119/2006)

Vijay Constructions … Appellant

Vs.

State of Kerala & Anr. ... Respondents

J U D G M E N T

R.V. RAVEENDRAN, J.

Delay condoned as appellants were pursuing the remedy by way of writ petition till 14.12.2005. Leave granted.

FACTS (M.K. ABRAHAM & CO.)

2. A section of the work relating to NH-49 was awarded to the appellant under letter of acceptance dated 1.12.1999 issued by the second respondent [Project Director (SE), National Highway (ADB), Circle Edappally, Cochin]. A formal contract agreement was executed by them on the same day. By letter dated 9.10.2001, the appellant-contractor called upon the Executive Engineer, National Highways (Roads) Division to pay certain amounts as compensation for the losses caused on various accounts. The Executive Engineer denied the claim by a reply sent in December, 2001 contending that there was a full and final settlement of the claims by paying the amounts due under the final bill. Being dissatisfied with the said rejection, the appellant by notice dated 1.4.2002 called upon the Executive Engineer to refer the disputes in regard to its claims aggregating to Rs.42,26,432/58 to arbitration. As there was no response, the appellant by letter dated 26.8.2002 nominated his arbitrator and called upon the second respondent to nominate the department's arbitrator in terms of the contract so that the Director-General (Road Development), Ministry of Surface & Transport, could nominate the Chairman - Arbitrator. The second respondent failed to comply. Therefore, the appellant by letter dated 28.10.2002 requested the Director-General to appoint the arbitrator on behalf of the

employer as also the Chairman of the Arbitration Committee. As the Director-General also failed to comply, the appellant filed an application dated 9.4.2003 under section 11 of the Arbitration & Conciliation Act, 1996 (for short 'the Act'). The designate of the Chief Justice dismissed the application by order dated 19.12.2003.

FACTS (VIJAY CONSTRUCTIONS)

3. A section of the work relating to NH-49 was awarded to the appellant under letter of acceptance dated 7.9.2000 issued by the second respondent. A formal contract agreement was executed on 26.9.2000 between them. The work was completed on 30.4.2001. According to Appellant, the Executive Engineer informed him that unless it gave a no claim certificate, even the admitted dues would not be released. Under such coercion, it gave such a certificate on 23.1.2002, so that it can receive at least the admitted amounts. Immediately on receiving the admitted dues, the appellant claims to have informed the respondents by letter dated 2.2.2002 that it signed the no claim undertaking under coercion and therefore, it had no legal effect. It also called upon the respondent to redress its grievances and claims. As there was no response, the appellant by notice dated 19.8.2002 called upon the Executive Engineer, who was the "Engineer" under the contract to give his decision on its claims, in terms of the contract. As the "Engineer" failed to

do so within 60 days, the appellant wrote to the Director-General (Road Development), Ministry of Surface & Transport on 26.10.2002, to appoint a sole Arbitrator to adjudicate upon the disputes. The appellant filed a petition under section 11 of the Arbitration & Conciliation Act, 1996 (for short 'the Act') contending that the contract between the parties provides for settlement of disputes by arbitration and that in spite of appellant taking necessary pre-arbitration steps in terms of the arbitration clause, there was no compliance. The designate of the Chief Justice dismissed the application by order dated 19.12.2003.

COMMON ISSUE

4. In both cases, the appellants contend that there is an arbitration agreement in their contracts dated 1.12.1999 and 26.9.2000. They submitted that each was entrusted a section of the project "National Highway 49 – Mathura Cochin Road" which was executed by the Ministry of Surface Transport, Government of India through the respect State Public Works Department. The Ministry of Surface Transport, Government of India, by communication dated 28.9.1994 informed all the State Public Works Departments and all Chief Engineers in all States dealing with National Highways, that a standard contract clause prescribing the procedure to be followed for appointment of arbitrators was finalized by the Ministry and

enclosed a copy of the arbitration provision and with instructions to incorporate the said clause in the bidding conditions for the National Highway works and to ensure that the said arbitration clause was compulsorily made a part of the bidding conditions in the respective States. The relevant portions of the 'contract clause for inclusion in the bidding conditions for wholly domestic funded NH works' enclosed to the Ministry's letter dated 28.9.1994 reads thus:

> "2. Arbitration
>
> All disputes or differences in respect of which the decision, if any, of the Engineer has not become binding as aforesaid and amicable settlement has not been reached, shall, on the initiative of either party, be referred to the adjudication. The sole Arbitrator for claims upto Rs.5.00 lakhs shall be appointed by the State Chief Engineer. Such appointed Arbitrator shall be a person not below the rank of Executive Engineer and not connected with the contract. The claims above Rs.5.00 lakhs and upto Rs.25.00 lakhs shall be settled by a sole arbitrator to be nominated by the Director General (Road Development), Ministry of Surface Transport, Government of India, New Delhi. A copy of the order shall be supplied to both the parties. The claims of more than Rs.25.00 lakhs shall be referred to the adjudication of a Committee of three arbitrators. The Committee shall be a composed of one arbitrator to be nominated by the Employer, one to be nominated by the Contractor and the third, who will also act as the Chairman of the Committee, to be nominated by the Director General (Road Development), Ministry of Surface Transport (Roads Wing); Government of India, New Delhi. If either of the parties abstain or fail to appoint his arbitrator, within 60 days after receipt of notice for the appointment of such arbitrator, then the Director-General (Road Development), Ministry of Surface Transport (Roads Wing), Government of India, shall also appoint such arbitrator(s). A certified copy of the appointment made by the Director General (Road Development), Ministry of Surface Transport (Roads Wing), Government of India, shall be furnished to both parties. The decision about the appointment of the arbitrators by the Ministry of Surface Transport shall be final and binding on both the parties. Any person appointed as Arbitrator shall not be connected with the work.
>
> Save as otherwise provided in the Contract, the Arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act

> 1940 or any statutory modifications or enactment thereof and shall be held at such place and time in India as the arbitrator or the Committee of Arbitrators may determine. The decision of the Arbitrator(s) shall be final and binding as may be determined by the Arbitrator(s)."

In view of the said communication, a slip signed by both parties was attached to the respective contracts of the appellants. The attachment slip reads thus:

> "Arbitration Clause as per Ministry of Surface Transport's letter No.RW/NH-34041/3/94-DO-III dated 28.9.94 will be applicable."

The contractors contend that the contracts entered by the respondents, contain a provision for arbitration.

5. The respondents contend that there was no provision for arbitration as it was specifically excluded, relying upon clauses 24 and 24(a) of the "Notice Inviting Tenders for Works" and clause (3) in the printed standard form of Agreement executed between the parties extracted below:

> "<u>Clauses 24 and 24(a) of Notice Inviting Tender for Works</u>
>
> 24. Arbitration shall not be a means of settlement of dispute or claim arising out of the contract relating to the work. (G.O.Ms.No.10/86/PW & T dated 27.10.1986)
>
> 24(a). All disputes and differences arising out of the contract that may be executed in pursuance of this notification shall be settled only by the Civil Court in whose jurisdiction the work covered by the contract is situated or in whose jurisdiction the contract was entered into in case the works extends to the jurisdiction of more than one Court. (G.O.Ms.53/88/PW & T dated 30.9.1988)
>
> <u>Clause (3) of standard form of Agreement</u>

> (3) The parties to this contract agreed to undertake the condition that arbitration shall not be a means of settlement of disputes or claim or anything on account of this contract."

6. The designate of the Chief Justice of the High Court held that having regard to the specific bar against arbitration contained in clauses 24 and clause 24(a) of the 'Notice inviting Tenders for Works' and clause (3) of the standard form of Agreement, there cannot be any reference to arbitration. The Court also rejected the claim of the contractors that there is a provision for arbitration by holding :

> "The notification relied on by the applicant has not been accepted by the respondents and it had not become part of the contract. The file did not disclose the acceptance of any such notification."

The appellants challenged the orders of the designate of the Chief Justice holding that there was no arbitration agreement, in writ petitions which were dismissed by a common order dated 14.12.2005 as not maintainable. Thereafter, the appellants have challenged the orders of the designate of the Chief Justice in these appeals by special leave contending that the High Court ignored the relevant attachment to the contract which incorporated the arbitration clause by special reference.

7. The common question that arises for consideration in these appeals is whether there is an arbitration agreement between the parties.

THE CONTRACT DOCUMENT

8. To decide the issue, it is necessary to refer to and understand the evolution of the contract document. In Kerala, in regard to the construction contracts, the Public Works Department, enters into a short 'contract agreement' to serve as a preamble to which are annexed a standard printed form of Articles of Agreement, the conditions of contract, notice inviting tender for works, special conditions, and Madras Detailed Standard Specifications (MDSS for short). All these attachments are printed forms with added amendments in cyclostyled forms. In addition there will be other annexures including tender schedule, plans, additional special conditions etc.

8.1. Clause 73 of the MDSS contained a provision for arbitration. The State Government took a decision in or about 1986 to delete the provision for arbitration clause in PWD contracts. As a consequence, the standard form of 'Notices inviting Tenders for Works' [clauses 24 and 24(a)] and the standard form of Agreement (clause 3) contain specific printed conditions which bar arbitration. Further the preamble to the standard form of Agreement also clearly states "whereas the contractor has also signed the copy of the Madras Detailed Standard Specifications excluding clause 73 and other clauses relating to arbitration contained therein……"

9. If the contract was a contract entered into by the Public Works Department contract of the State Government, necessarily the said bar against arbitration would operate. There is no doubt that if the contract contained a provision specifically barring arbitration, there can be no reference to arbitration. But the position is different where the standard format of the State PWD is used with modifications in regard to construction contracts of another department which has taken a policy decision to have a provision for arbitration compulsorily in all its contracts, and in view of it, the arbitration clause is made a part of the contract by a further addition to the standard form of Agreement. In fact Government of Kerala by its G.O. (MS). No. 68/88/PWD dated 19.11.1988 clarified, while barring arbitration in regard to PWD contracts, that if any work is financed by an agency which requires a provision for arbitration, then a provision for arbitration may be provided in the agreements relating to such works. In these cases, we are concerned, not with regular PWD contracts, but contracts relating to another agency, that is the National Highway Project, entered by Project Director (S.E.), National Highway (ADB) Project Circle. The said National Highway Projects has special provision relating to arbitrations which does not find a place in the Kerala PWD contracts. In such a situation, merely because the standard forms of PWD were used for entering into contracts, or because the

contracts were executed through PW Department of the State Government, it cannot be contended that special provisions applicable to National Highway Projects specifically added to the contract should be ignored.

10. If a contract consists of a printed form with cyclostyled amendments, typed additions and deletions and handwritten corrections, an endeavour shall be made to give effect to all the provisions. However, in the event of apparent or irreconcilable inconsistency, the following rules of construction will normally apply :

(i) The cyclostyled amendments will prevail over the printed terms;

(ii) The type-written additions will prevail over the printed terms and cyclostyled amendments;

(iii) Hand written corrections will prevail over the printed terms, cyclostyled amendments and typed written additions.

The above rules have evolved from the well known maxim of construction that "written, stamped or typed additions, when inconsistent with the printed terms, would normally prevail over the printed terms" and proceeds on the assumption that the printed form contained the original terms, and changes thereto were incorporated by the cyclostyled amendments, followed by changes by type-written additions and lastly the hand written additions. The logical explanation for such assumption is this: The printed form contains standardized terms to suit all contracts and situations. It is not drafted with

reference to the special features of a specific contract. When such a standard form is used with reference to a specific contract, it becomes necessary to modify the standard/general terms by making additions/alterations/deletions, to provide for the special features of that contract. This is done either by way of an attachment of an annexure to the standard printed form, incorporating the changes, or by carrying out the required additions/alterations/deletions in the standard form itself. Such additions/alterations/deletions are done by typing/stamping/hand. We may refer to the following oft-quoted enunciation of the legal position by *Lord Ellenborough in Robertson* v. *French* [1803-13] All ER Rep.350 with reference to printed form of contract with hand-written additions :

> "..... that the words super added in writing are entitled, nevertheless, if there should be any reasonable doubt on the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning and the printed words are a general formula adapted equally to their case and that of all other contracting parties on similar occasions and subjects".

Another parallel principle that is equally relevant is that where the contract has several annexures/attachments, prepared at different points of time, unless a contrary intention is apparent, the latter in point of time would normally prevail over the earlier in point of time.

11. In this case, as noticed above, the contract consists of a type-written contract agreement between appellant and second respondent (which does not contain any terms and conditions, but which merely states that the contract is for execution of the described work as per the accompanying Articles of agreement, plan, specification and conditions of contract approved by the Project Director (S.E.), National Highway (ADB), Circle Adappally, Cochin) with several printed forms with cyclostyled additions as annexures and hand written corrections. The printed form of Articles of agreement has an attachment slip. The contract does not contain any hand written terms in regard to arbitration. The contract has printed clauses barring arbitration (clauses 24 and 24(a) of the Notice inviting Tenders for Works and a preamble clause and clause 3 in the articles of agreement). A cyclostyled slip signed by both parties containing the words "arbitration clause as per Ministry of Surface Transport's letter No. RW/NH-34041/3/94-DO-III dated 28.9.1994 will be applicable" is attached to the printed articles of agreement. By applying the well settled principles relating to construction of contract the following position will emerge: (i) the terms of the articles of agreement will prevail over the terms of Notice inviting Tenders for Works and (ii) the term contained in the cyclostyled attachment to the printed form of articles of agreement will prevail over the terms of the printed articles of agreement. Consequently, the contents of the attachment

slip to the printed form of Articles of Agreement providing for arbitration will prevail over the bar on arbitration contained in the Notice inviting Tenders for Works and the articles of agreement. As a result, it has to be held that there is a provision for arbitration in regard to the disputes between the respective appellant and the respondents.

12. In this case, the entire confusion arose on account of using outdated printed forms and also adding deleting and modifying the terms and conditions contained in several distinct documents which are made annexures to the formal agreement. The contract terms and conditions will have to be gathered from the Articles of Agreement, notice inviting tenders for works, conditions of contract, Madras Detailed Standard Specifications, Special Conditions and Additional Special Conditions. There are printed forms, cyclostyled amendments and attachments and typed agreement. In fact there is a typed 'contract agreement' and printed 'Articles of Agreement' with blanks filled in hand. Standard forms which contain provisions for several contingencies, most of which are inapplicable or redundant were used, without making any effort to edit the various documents and have a consolidated Agreement. For example, we fail to understand why State of Kerala in 1999-2000 should use Madras Detailed Standard Specification of 1930 vintage. Nor are we able to understand why

parties should execute a contract agreement and articles of agreement on the same day. Be that as it may.

GENERAL OBSREVATIONS

13. The use of multi-layered agreements, with several printed annexures, each with cyclostyled amendments, typed and hand written additions and deletions lead to confusion, uncertainty, delays in execution and apart from giving rise to avoidable disputes. Having a contract with different annexures dealing with the same issues with various attachments, in construction contracts (and some times insurance contracts) is a nightmare to anyone wanting to understand, implement or enforce them. Complicating contracts with several annexures and attachments with inconsistent, irrelevant, superseded or redundant provisions results in creating a lush dispute generating field. It helps greedy and unscrupulous contractors to make bloated imaginary claims. It enables Rule-Minded or corrupt officers to play havoc with honest and bonafide contractors. The best form of agreement is where all the relevant clauses/terms are incorporated in a single document with several sections dealing with different aspects/subjects, avoiding any overlapping. The difficulty arises if the same subject is dealt with in more than one section or in more than one document. Confusion and difficulties also arise using certain forms with conditions which were

finalized and printed at an earlier point of time and using other sets of conditions which are finalized and printed at different subsequent points of time, without taking care to specify which of the earlier terms were deleted or modified. For example in this case, we have the 1959 terms that is Madras Detailed Standard Specifications forming part of the contract, and we have the general conditions of the Kerala Government which were modified from time to time in particular 1986 and we have the standard instructions of the Ministry of Surface Transport of 1994 which were applicable to National Highway Projects. The result is several years after completing of the work, parties are still trying to find out what the agreed terms and conditions are and whether there is a specified dispute resolution process by way of arbitration. On account of such confusion, several efficient and honest contractors stay away from participating in such tenders. The vagueness and confusion give unwarranted discretion and freedom to officers, leading to corruption and nepotism. Clear, simple and straight forward agreement is the need of the hour. Tens of thousands of engineering contracts are being entered all over the country everyday in regard to infrastructural works, without the necessary clarity, leading to avoidable disputes and considerable strain on the exchequer. With use of computers, with user friendly editing procedures with cut and paste facilities, it is fervently hoped that contract forms appropriate to the work would be prepared, to avoid redundancy,

confusion, vagueness and inconsistency and to increase efficiency, expedition, reduction of disputes and saving of funds. Be that as it may.

CONCLUSION

14. Where a contract consisted of standard terms finalized in 1959 and further terms which were finalized subsequently, necessarily the terms that were finalized subsequent to 1959 terms, would prevail. That is why if it is a PWD contract, even though the MDSS which is made a part of the contract, specifically provided for arbitration in clause 73, the same is held to be inapplicable, having regard to the subsequent additions incorporated by the Government of Kerala in 1986 and 1988 barring arbitration. Where the said form of PWD barring arbitration is used in respect of National Highways Contracts, which has a policy of having arbitrations to settle disputes, a slip signed by both the parties is attached to the standard form of agreement stipulating that the arbitration clause will be applicable. It is clear that the said slip will prevail over the printed conditions that there can be no arbitration. We therefore conclude that there is an arbitration agreement between the parties in terms of the standard arbitration clause prescribed by the Ministry of Surface Transport, Government of India.

15. We find from the record that the respondents, apart from contending that there was no arbitration agreement at all, had also contended that the appellants had given full and final settlement receipt with a no claim undertaking in regard to the respective contract and therefore no dispute much less arbitral disputes can exist. On the other hand, appellants had contended that such certificates have been obtained by coercion and pressure. Whether no claim certificate were obtained by coercion or by applying pressure is a question of fact that will have to be considered in the proceedings under Section 11 of the Act. The High Court while deciding the petitions under Section 11, considered only the question whether there is an arbitration agreement or not. As it held that there was no arbitration agreement, it did not examine the further objection of the respondents that there was a full and final settlement and consequently there is no arbitral dispute. In the absence of any material on that issue, we are not in a position to decide the same.

16. We therefore allow these appeals and set aside the order of the High Court, holding that there is an arbitration agreement between the parties in both appeals. We remand the matter to the High Court to consider and decide the other objections raised by the respondents in accordance with law.

…….J.
(R V Raveendran)

New Delhi;
July 7, 2009.

……..J.
(J M Panchal)