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UNION OF INDIA
v.
M/S. POPULAR BUILDERS, CALCUTTA

OCTOBER 17, 2000

B

[G.B. PATTANAİK, M.B. SHAH AND S.N. PHUKAN, JJ.]

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Arbitration Act, 1940—Sections 30 and 33—Award of arbitrator—Non-existence of arbitrable dispute—Plea of—Held, there must be a dispute at the time of reference to arbitration; if such plea is raised before arbitrator and was not taken into consideration, then the award is bad.

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Respondent-Builder entered into an agreement with appellant for construction of a building. After the construction of the building, the appellant drew up a final bill and sent it to the respondent for acceptance. The bill was accepted and money was paid. Therefore, the respondent communicated to the appellant that several additional works were executed pursuant to the directions of the appellant and such works had not been included in the final bill. At the request of the respondent, the appellant appointed an arbitrator. The arbitrator passed an award in favour of the respondent, which was filed before High Court to make it a rule of Court. Single Judge made the award a rule of Court. Division Bench of the High Court dismissed the appeal of the appellant.

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In appeal to this Court, the appellant contended that since the respondent accepted the final bill without any objection and received the amount, there is no dispute subsisting which can be referred to arbitration.

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The respondent, on the other hand, contended that the plea of the appellant, that there is no dispute subsisting, was not argued during arbitration proceedings and in the High Court; that such a plea cannot be taken up before the Court; and that appointment of the arbitrator was made by the appellant at the request of the respondent on the ground that a dispute subsists for arbitration.

Partly allowing the appeal, the Court

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HELD : The existence of an arbitrable dispute is a condition precedent for appointment of an arbitrator. The final bill prepared by the appropriate

authority was accepted by the respondent without protest. In respect of the claim, where the appellant objected before the arbitrator on the aforesaid score, the award of the arbitrator to that extent is set aside. So far as the other claims are concerned, the appellant not having taken any objection to the same on the aforesaid score and that even the objection filed under Sections 30 and 33 of the Arbitration Act, 1940 not being specific on the issue, it is not appropriate to allow the appellant to raise that objection. [25-E-G]

M/s. P.K. Ramaiah & Co. v. Chairman & Managing Director, National Thermal Power Corpn., [1994] Supp. 3 SCC 126 and Nathani Steels Ltd. v. Associated Constructions, [1995] Supp. 3 SCC 324, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5937 of 2000.

From the Judgment and Order dated 28.1.99 of the Calcutta High Court in G.A. No. 42/99 in A.P.O.T. No. 10/99 in A.C. No. 52 of 1997.

A. Subba Rao, B. Krishna Prasad and K. Swami for the Appellant.

L. Nageswara Rao, Abhijit Sengupta, Ms. Madhurima Tatia and D. Bharat Kumar for the Respondent.

The Judgment of the Court was delivered by

PATTANAİK, J. Leave Granted.

This appeal by the Union of India is directed against the judgment dated 28th of January, 1999 of the Division Bench of Calcutta High Court, dismissing the appeal of the Union of India, arising out of an arbitration proceeding. The undisputed facts are that the respondent had entered into an agreement with the appellant for construction of Annex Building to the Telephone Bhawan at Calcutta. The agreement between the parties contained an arbitration clause therein. After the completion of work the final bill was drawn and was sent to the respondent and he agreed to accept the final bill and in fact did receive the money under the final bill without any objection. But thereafter, he wrote a letter to the concerned Chief Engineer, indicating several items of claim and additional works which the respondent had executed pursuant to the directions of the appropriate authority and the said work had not been included in the final bill. He, therefore, requested the Chief Engineer, the authority under Clause 25 of the agreement to appoint an arbitrator and pursuant to the said request, the Chief Engineer by his letter dated 25.11.1993 did appoint an arbitrator. Subsequently, the appointed arbitrator was changed.

- A Pursuant to an order of the High Court and before the arbitrator, the respondent filed his claim on different heads. The Union of India-appellant herein, filed his objection as well as filed a counter claim before the arbitrator. The learned Arbitrator ultimately passed an award and that award was filed before the High Court, for being made a rule of Court under Section 14 of the Arbitration Act, 1940. The Union of India filed an objection under Sections 30 and 33 for setting aside the award. The learned Single Judge considered the objections filed by the Union of India and rejecting the same, made the award a rule of Court. Against the aforesaid order of the learned Single Judge, an appeal was carried to the Division Bench under Section 39 of the Arbitration Act. The Division Bench having dismissed the Union's appeal by the impugned order,
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- C the present appeal has been preferred by the Union of India. From the judgment of the learned Single Judge, rejecting the objections of the Union of India as well as the impugned judgment of the Division Bench, it appears that the Union of India had urged the sole point of limitation and the same had been negated by the courts below and in our view rightly.
- D Mr. A. Subha Rao, the learned counsel for the Union of India however raised the question that the final bill having been accepted by the respondent-contractor, without any objection, there did not subsist any arbitrable dispute to be referred to arbitration, invoking Clause 25 of the agreement and, therefore, the impugned award has to be set aside. In support of this contention,
- E reliance has been placed on two decisions of this Court—*M/s. P.K. Ramaiah and Company v. Chairman & Managing Director, National Thermal Power Corpn.*, [1994] Supp. 3 SCC 126 as well as the three Judge Bench decision of this Court in *Nathani Steel Ltd. v. Associated Constructions*, [1995] Supp. 3 SCC 324.
- F Mr. L. Nageswara Rao, appearing for the respondent-claimant on the other hand contended that objection had not specifically been taken in the objection, that was filed under Sections 30 and 33 of the Arbitration Act, and therefore, the Union Government should not be permitted to take up this plea in this forum. He further contended that pursuant to the request made by the Contractor, the Chief Engineer himself having appointed an arbitrator on the
- G ground that dispute subsists for arbitration and in the arbitration proceeding, the Union Government having fully participated and further, subsequent to the award, a rectification application having been filed by the Union Government and in that application also, only challenge being made on the quantum and not on the ground of absence of arbitrable disputes, it would
- H not be appropriate for this Court to allow the Union Government to take this

plea at this belated stage. He also contended that the two decisions referred to by the Union Government are prior to the appointment of the arbitrator and none of these decisions are applicable to the case in hand, where an award has been passed by the appointed arbitrator after due participation of Union Government in the arbitration proceedings.

Having considered the rival submissions at the Bar and on careful scrutiny of the objections filed by the Union Government under Sections 30 and 33 of the Arbitration Act, though we find sufficient force in the contention of Mr. Nageswara Rao, but the existence of a dispute being the condition precedent for appointment of an arbitrator under Clause 25 and in view of the two decisions of this Court and that the respondent-claimant did receive the final bill without any protest, we are not persuaded to outright reject the contention of Mr. Subba Rao, appearing for the Union Government. It transpires from the award itself that only as against claim item No. 2, the Union of India had pleaded that the said claim cannot be entertained in view of the receipt of the final bill by the contractor without any protest, though the arbitrator had rejected the said plea of the Union of India. It is no doubt true as contended by Mr. Nageswara Rao that neither the judgment of the learned Single Judge nor the judgment of the Division Bench, which is under challenge in this appeal before this Court did indicate the fact that the Union of India had raised this contention before the aforesaid two forums below but notwithstanding the same when the existence of an arbitrable dispute is the condition precedent for exercise of power for appointment of an arbitrator under Clause 25 and since the final bill that was prepared by the appropriate authority was accepted by the respondent without any protest as is apparent from the letter of the claimant-contractor and the question had been raised before the arbitrator in respect of the claim item No.2 by the Union of India, we think it appropriate to hold that so far as claim item No. 2 is concerned, the same could not have been a matter of reference of an arbitrable dispute and as such, the award of the arbitrator to that extent must be set aside. So far as the other claim items are concerned, the Union of India not having taken any objection to the same on the aforesaid score and that even the objection filed under Sections 30 and 33 of the Arbitration Act not being specific on that issue, we do not think it appropriate to allow the Union Government to raise that objection, so far as the other items of claim are concerned. Accordingly, the impugned award in respect of claim item No. 2 is set aside and the rest of the award amount, stand affirmed. The appeal is allowed in part.

B.S.

Appeal partly allowed.