A M/S. BUILD INDIA CONSTRUCTION SYSTEM

v.

UNION OF INDIA

MAY 7, 2002

B [R.C. LAHOTI AND B.N. AGRAWAL, JJ.]

Arbitration—Parties entering into contract in 1985—Arbitration clause providing for reference of dispute to arbitrator but not for reasoned award—Subsequent amendment in 1986 in the general conditions of contract that if value of claim exceeds Rs. 1 lakh arbitrator to give reasoned award—Dispute leading to cancellation of contract—Reference to arbitrator—Award—Held, amendment of 1986 does not apply to general conditions of contract as applicable to parties—Hence, arbitration clause should not be read as amended—Arbitrator not oblige to give reasoned award—Terms of contract between the parties could not be varied except by mutual agreement—Further amendment to general conditions, coming into effect after the date of amendment, cannot have any relevance for interpreting arbitration clause much before the date of amendment coming into effect.

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Practice and procedure—Plea not raised in objection petition, cannot be urged at appellate stage.

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Appellant entered into a contract with the respondent-Government for construction work in 1985. Contract contained an arbitration clause by which disputes could be referred to an arbitrator. However, arbitration clause did not provide for a reasoned award or a speaking award by the arbitrator. Subsequently in 1986 Government amended the general conditions of the contract providing that if the value of the claim exceeds Rs. 1 lakh, arbitrator shall pass reasoned award. This amendment was effective on 30th day after the date of amendment. Disputes arose between the parties leading to cancellation of contract by the respondents. Disputes were referred to an arbitrator in accordance with the arbitration agreement. Arbitrator passed an award without giving reasons. Single Judge of High Court made award rule of the Court. However, Division Bench directed the award to be set aside and remitted back the award to the arbitrator for proceeding afresh and making a reasoned award.

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The question that arose in appeal before this Court was whether the amendment of 1986 applies to the general conditions of contract as applicable to the parties, and therefore, the arbitration clause should have been read as amended casting an obligation on the arbitrator to give a reasoned award. A

In appeal before this Court, appellant submitted that the amendment of 1986 applies only to the contracts entered into on and after that date and in any case the respondent could not have amended the general conditions of contract all by themselves and without the consent of the appellant and, therefore, the arbitration clause governing the parties was the one as contained in the general conditions of contract which existed and were applicable on the date on which the contract was entered into between the parties. B C

Respondent submitted that the acceptance letter signed by the appellant should be read and interpreted as the appellant having authorized the respondent to amend the general conditions of contract and also as the appellant having agreed to bind itself by the general conditions of contract as modified from time to time and, therefore, the parties and the arbitrator should all be held bound by the amendment of 1986 and any award given in breach of the arbitration clause as amended should be held as void. D

Allowing the appeal, the Court

HELD: 1. The letter of acceptance signed by the appellant cannot be so read as to spell out the appellant having conferred any authority on the respondent to modify or alter the terms of the contract except by mutual agreement and to bind itself by such variations. The arbitration clause is contained in the contract entered into between the parties. Its terms could not have varied except by mutual agreement. Moreover the amendment itself provides for its coming into effect on 30th day after the date of the amendment. That amendment clearly cannot have any relevance for interpreting the arbitration clause contained in the contract entered into between the parties much before the date of amendment coming into effect. [872-F-H; 873-A] E F

2. The reference to arbitrator does not suggest an obligation having been cast on the arbitrator to give reasons for the award. Such a plea urged in this Court, was not taken by the respondent before the arbitrator. Even in the objections filed, the validity of the award has not been specifically questioned on the ground of its having been given in breach of any obligation of arbitrator to give reasons. The judgment of the Single Judge does not show such a plea G H

having been urged before him. In the objection petition there is a vague and general plea raised that rejecting the claims forming subject matter of cross objection and allowing the claims of the appellant without assigning any reason was bad. Such an omnibus and general plea cannot be read as submitting that the amendment applied to the contract between the parties and that in view of the amended arbitration clause the unreasoned award was bad. It appears that the plea was for the first time raised at the appellate stage before the Division Bench. Unwittingly, the Division Bench fell into the error of entertaining such a plea and disposing of the appeal by upholding the same though the plea was not even available to the respondents to be raised at that stage. [873-B-E]

Benode Behary Roy v. *The General Assurance Society Ltd.,* **AIR (1950) Calcutta 232 and** *Food Corporation of India.* **v.** *Jagadish Chandra Saha,* **[1995] Suppl. 4 SCC 521, referred to.**

Lombard Tricity Finance Ltd. **v.** *Paton,* **(1989) 1 All ER 919, referred to.**

Anson's Law of Contract (27th Edition, 1998, at p. 494 and Treital's Law of Contract (10th Edition, 1999. at p.55), referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3364 of 2002.

From the Judgment and Order dated 9.10.2000 of the Mumbai High Court in A. No. 805 of 2000.

Rakesh Singh and Arun K. Sinha for the Appellant.

Prateek Jalan, R.N. Poddar and B.V. Balaram Das for the Respondent.

The Judgment of the Court was delivered by

R.C. LAHOTI, J. Leave granted.

In response to a Notice Inviting Tenders (NIT) issued by the respondent on 12.9.1984, the appellant submitted the tender based on the tender document issued by the respondents. The tender submitted by the appellant was accepted. On 22.2.1985, the appellant signed a letter to the following effect:-

"CA No (GE) B-10 of 8586 Serial Page No. 23

(General Conditions of Contract—IAFW-2249) 1976(Print)

Lump Sum Contract For IAFW-2159

Term Contract for Artificers Work (IAFW-1821)

Measurement Contract-IAFW-1779 and 1779A

1. A copy of GENERAL CONDITIONS OF CONTRACTS (IAFW-2249 1976 Print) with Errata No.1 to 27 and Amendment No.1 to 27 has been supplied to me/us and is in my/our possession. I/We have read and understood the provisions contained in the aforesaid GENERAL CONDITIONS OF CONTRACTS before submission of this tender and I/We agree that I/We shall abide by the terms and conditions thereof, as modified, if any elsewhere in these tender documents.

2. It is hereby further agreed and declared by me/us, that the GENERAL CONDITIONS OF CONTRACTS-IAFW-2249 (1976 PRINT) including Conditions 70 there pertaining to settlement of disputes by arbitration containing 30 pages (Serial Page Number 1 to 30) with Errata Numbers 1 to 27 and amendment Numbers 1 to 27 form Part of these Tender documents.

Sd/- Sd/-

Singature of Contractor Accepting Officer

Dated:....."

The respondent accepted the tender and a contract was entered into between the parties on 29.5.1985. It is not in dispute that the contract contains an arbitration clause requiring all disputes, between the parties to the contract (other than those for which the decision of the CWE or any other person is by the contract expressed to be final and binding) shall, after written notice by either party to the contract to the other of them, be referred to the sole arbitration of an Engineer Officer to be appointed by the authority mentioned in the tender documents. There are other recitals contained in the arbitration clause which are not relevant for our purpose. What is relevant to mention is that the clause does not provide for a reasoned award or a speaking award being given by the arbitrator. There is nothing in the arbitration clause spelling out an obligation on the part of the arbitrator clause spelling out an obligation on the part of the arbitrator to give reasons for the findings arrived at by him.

On 4.9.1986, the Government of India, Ministry of Defence, New Delhi sanctioned an amendment in the general conditions of the contract which

reads as under:-

"Amendment No.	Page No.	Particulars
48 1978 Print	24	Condition 70 Sub para 9. Add the following at the end of the sub paras; "If the value of the claims or counter claims in an arbitration reference exceeds Rs. 1 lakh the arbitration shall give reasons for the award. 2. Sanction of the Government is also accorded for incorporation of the above mentioned amendment at the appropriate place in the earlier prints of IAFW 2249. 3. This amendment shall come into effect from 3.10.1986."

Disputes arose between the parties leading to cancellation of contract by the respondent on 3.11.1987 and again on 4.4.1990. On 31.5.1991, the respondents appointed a Senior Engineer Officer as the sole arbitrator in accordance with the arbitration agreement. On 28.9.1995, the arbitrator published his award allowing the appellant's claim to the extent of Rs. 80,000 only and rejecting the respondents' counter claim. The award was made a rule of the court by the learned Single Judge of the High Court. In an appeal preferred by the respondents, the decree passed by the learned Single Judge has been set aside by the Division Bench of the High Court which has also directed the award to be set aside and remitted back to the arbitrator for proceeding afresh and making a reasoned award. For doing so the Division Bench has relied on the amendment dated 4th September, 1986 and held it to be applicable to the contract between the parties. Feeling aggrieved by the judgment of Division Bench, the appellant has preferred this appeal by special leave.

The singular question arising for decision in this appeal is whether the amendment dated 4.9.1986 applies to the general conditions of contract as applicable to the parties, and therefore, the arbitration clause should have been read as amended casting an obligation on the arbitrator to give a reasoned award.

Shri Rakesh Singh, learned counsel for the appellant, has submitted that

the amendment date 4.9.1986 applies only to the contracts entered into on and after that date and in any case the respondents could not have amended the general conditions of contract all by themselves and without the consent of the appellant and, therefore, the arbitration clause governing the parties was the one as contained in the general conditions of contract which existed and were applicable on 29.5.1985, the date on which the contract was entered into between the parties. Shri Prateek Jalan, learned counsel for the respondents, has, however, submitted that the acceptance letter signed by the appellant on 22.2.1985 should be read and interpreted as the appellant having authorized the respondents to amend the general conditions of contract and also as the appellant having agreed to bind itself by the general conditions of contract as modified from time to time and, therefore, the parties and the arbitrator should all be held bound by the amendment dated 4.9.1986 and any award given in breach of the arbitration clause as amended should be held as void.

A plain reading of the acceptance letter dated 22.2.1985 signed by the appellant clearly suggests a copy of general conditions of contract with (i) errata numbers 1 to 27, and (ii) amendment numbers 1 to 27 having been supplied by the respondents to the appellants and having been read and understood by the appellant followed by appellant's agreement to abide by the terms and conditions thereof. The expression 'as modfied', qualifies the terms and conditions contained in the general conditions of contract as on and till that day. There is nothing contained in the acceptance letter, either expressly or by necessary implication, to spell out the appellant having authorized the respondents to carry out modifications in the terms and conditions of the contract otherwise than by mutual agreement and to hold the appellant bound by such modifications though not consented to by him and though not even brought to his knowledge.

The learned counsel for the respondents has placed forceful reliance on a single bench decision of Calcutta High Court in *Benode Behary Roy* v. *The General Assurance Society Ltd.,* AIR (1950) Calcutta 232, as also on a few other authorities. *Benode Behary Roy's* case (supra) related to a service dispute. The plaintiff took up an employment with the respondent company the bye-laws whereof provided for the release of gratuity on retirement. Subsequently the company amended the bye-laws and provision for gratuity was deleted. The plaintiff laid a claim for gratuity submitting that on the date of plaintiff's entering into contract of employment with the company there was a provision for gratuity and the bye-laws could not have been amended without the consent of the plaintiff so as to take away his right to gratuity.

A The learned single Judge held that the letter of appointment did not make gratuity an express term in the contract of service and the claim for gratuity could only be based on the bye-laws. The bye-laws contained an express provision that they could be altered or added to at any time by the Board of Directors. The contract did not give the plaintiff any vested right, in fact or in law, to the gratuity. Right to claim gratuity depended not on the contract B but on the bye-laws and such right could arise only "on retirement". In this background the learned single Judge of Calcutta High Court laid down the principle that there is nothing repugnant to the law of contract to have as one of the express terms of the contract itself that it will be alterable at the instance of one party alone. If one contracting party gives to the other C contracting party the right to alter the terms of the contract between them the Court ought to uphold the sancity of a contract. But then it is necessary for the Courts to examine with care the terms and true construction of such contract; else there is the risk or danger of misdirected righteousness in the name of sanctity of contract.

D The abovesaid analysis of *Benode Behary Roy's* case (supra) clearly points out that reliance thereon by learned counsel for the respondents is entirely misconceived so far as the facts of the present case are concerned. Shri Jalan also invited our attention to a few passages from Anson's Law of Contract (27th Edition, 1998, at p. 494), Treital Law of Contract (10th Edition, E 1999, at p.55) and speech of Staughton LJ in Court of Appeal in *Lombard Tricity Finance Ltd.* v. *Paton,* (1989) 1 All ER 919, taking the view that a contract may also give one of the parties the power unilaterally to vary the obligations and if such power can be spelled out from the terms of the contract and is held to be lawful then a unilateral variation of obligation by one party shall be binding on the other party to the contract. On principle, F there may not be a dispute with the legal proposition so forcefully advanced by the learned counsel. However, the question is of its applicability to the case at hand. As we have already pointed out, the letter of acceptance dated 22.2.1985 cannot be so read as to spell out the appellant having conferred any authority on the respondents to modify or alter the terms of the contract except by mutual agreement and to bind itself by such variations. The G arbitration clause is contained in the contract entered into between the parties. Its terms could not have been varied except by mutual agreement. Moreover the amendment dated 4.9.1986 itself provides for its coming into effect from 3.10.1986, i.e. on 30th day after the date of the amendment. That amendment clearly cannot have any relevance for interpreting the arbitration clause H contained in the contract entered into between the parties much before the

date of amendment coming into effect. A

There are several other factors which preclude the respondents from urging such a plea. The reference to arbitrator does not suggest an obligation having been cast on the arbitrator to give reasons for the award. Such a plea, as has been urged in this Court, was not taken by the respondents before the arbitrator. Even in the objections filed in the court, the validity of the B award has not been specifically questioned on the ground of its having been given in breach of any obligation of arbitrator to give reasons as spelled out by the arbitration clause. The judgment of the learned single Judge does not show such a plea having been urged before him. In the objection petition there is a vague and general plea raised that rejecting the claims forming C subject matter of cross objection and allowing the claim of the appellant without assigning any reason was bad. Such an omnibus and general plea cannot be read as submitting that the amendment dated 4.9.1986 applied to the contract between the parties and that in view of the amended arbitration clause the unreasoned award was bad. It appears that the plea was for the first time raised at the appellate stage before the Division Bench of the High D Court. Unwittingly the Division Bench fell into the error of entertaining such a plea and disposing of the appeal by upholding the same though the plea was not even available to the respondents to be raised at that stage.

At the end, the learned counsel for the respondents made an alternative E submission that assuming the ground which prevailed with the Division Bench for setting aside the award does not appeal to this court, then the matter should be sent back to the Division Bench for dealing with such other objections to the validity of the award as may be available to the respondents. Reliance was placed on *Food Corporation of India* v. *Jagdish Chandra Saha,* [1995] Suppl. 4 SCC 521. In the facts and circumstances of this case, F we are not inclined to accept that submission. The Judgment of the Division Bench does not show any plea, other than the one on which the decision of the Division Bench is based, having been taken before the Division Bench yet not having been dealt with by the Division Bench as unnecessary in view of its opinion formed on one of the pleas raised by the appellants. The learned G single Judge has noted in his judgment—"the entire arguments of the learned counsel were on the facts of the case. He has not pointed out any legal flaw or error in the award of the arbitrator. Thus, there is no substance in the objection raised". We do not also find any other plea deserving consideration having been taken up either in the objection petition before the learned single Judge or before the Division Bench which may call for a remand by this Court H

A for further hearing.

For the foregoing reasons, the appeal is allowed. The judgment of the Division Bench is set aside and the decision dated 20th October, 1999 by the learned single Judge is restored.

B N.J. Appeal allowed.