

FOOD CORPORATION OF INDIA

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v.

SURENDRA, DEVENDRA AND MAHENDRA TRANSPORT CO.

FEBRUARY 5, 2003

[M.B. SHAH, ASHOK BHAN AND ARUN KUMAR, JJ.]

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*Arbitration: Agreement—Arbitration clause—Clause excluding certain disputes from purview of arbitration clause—Appointment of Arbitrator—Claims regarding excluded disputes before the arbitrator—Decision thereon—Propriety of—Held, disputes excluded from reference to the arbitrator could not be referred to or decided by the arbitrator—The award made by the arbitrator in respect of excluded items would be in excess of his jurisdiction—Arbitration Act, 1940—Section 20.*

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In agreement, entered into between the appellant and respondent, the arbitration clause (Clause XX) provided for reference of all the disputes to the arbitrator except any matter decision of which was expressly provided for in the contract. Clause XII of the agreement excluded certain items from the purview of clause XX. On the application of the respondent u/s 20 of Arbitration Act, appellant-Corporation, was directed to appoint Arbitrator. After the appointment of the Arbitrator, respondent raised certain claims including the claims regarding transit loss, demurrage and wharfage charges. Appellant-Corporation also raised certain claims. Arbitrator rejected the claim of appellant-Corporation, and allowed the claim of the respondent. Objections against the award of the Arbitrator by the appellant-Corporation were rejected by High Court.

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In appeal to this Court, appellant contended that Arbitrator could not make an award regarding transit loss, demurrage and wharfage, which were specifically excluded from the purview of arbitration clause, and that by doing so, Arbitrator had acted in excess of his jurisdiction.

Partly allowing the appeal, the Court

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HELD: 1. The claim made and given by the arbitrator regarding transit loss, demurrage and wharfage charges could not be made as the same had been specifically excluded under Clause XX read with Clause

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- A** XII of the agreement. The matters which were excluded from the reference to the arbitrator therefore could not be referred to or decided by the arbitrator. Entrance of reference by the arbitrator on disputes which were excluded from reference and the adjudication thereupon would amount to exceeding in the exercise of jurisdiction. Since there was a specific bar to the raising of a claim regarding transit, demurrage and wharfage charges, the award made by the arbitrator in respect thereof would be in excess of the jurisdiction. [844-E, F; 845-D-E]

*Rajasthan State Mines and Minerals Ltd. v. Eastern Engineering Enterprises and Anr.*, [1999] 9 SCC 283, relied on.

- C** CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1577 of 1994.

From the Judgment and Order dated 14.12.1993 of the High Court of Calcutta in Appeal No. 482/91.

- D** Y. Prabhakara Rao and K. Subba Rao for the Appellants.

C.S. Vadiyanathan and P.N. Chatterjee, K.V. Vishwanathan and Rathin Das, for the Respondent.

- E** The Judgment of the Court was delivered by

**BHAN, J.** Food Corporation of India (for short "the Corporation") has filed this appeal against the Division Bench judgment and order of the High Court of Calcutta whereby and where under the High Court has upheld the award made by the arbitrator appointed under the directions of the Court.

- F** *Facts:*

Respondent was appointed as a handling and transport contractor on 14th June, 1979. On 4th January, 1980 respondent addressed a letter to the Managing Director of the Corporation requesting him to refer the disputes which had arisen between the parties for arbitration. Since no arbitrator was appointed to resolve the dispute, he filed an application under Section 20 of the Arbitration Act, 1940 (for short "the Act") in the High Court on the original side, with a prayer to issue a direction to the Managing Director of the Corporation to appoint an arbitrator in terms of the arbitration Clause XX of the agreement entered between the parties. Court by its Order dated 16th June, 1988 issued a direction to the Managing Director of the Corporation to

appoint an arbitrator in terms of Clause XX of the agreement within six weeks from the date of communication of the order. The direction was given in the following terms: A

“Court Order in terms of prayer (a) of the petition. The Managing Director, Food Corporation of India is directed to appoint an arbitrator in terms of Clause 20 of the agreement within six weeks from the date of communication of the order. All disputes in the petition particularly the disputes mentioned in para 24 thereof be referred to the Arbitrator to the appointed by the Managing Director. B

Let it appear marked to be mentioned 8 weeks hence. C

All parties including Managing Director, Food Corporation of India and the proposed Arbitrator to act on a signed copy of the minutes of the Order on the usual undertaking.”

The relevant portion of the Clause XX is as under:

“All disputes and difference arising out of or in any way touching or concerning this agreement whatsoever (except as to any matter the decision of which is expressly provided for in the contract) shall be referred to the sole arbitration of any person appointed by the Managing Director of the Food Corporation of India. It will be no objection to any such appointment that the person appointed is or was an employee of the Corporation that he had to deal with the matters to which the contract related and that in the course of his duties as such employee of the Corporation he had expressed views on all or any of the matter in dispute or difference. The award of such arbitrator shall be final and binding on the parties to this contract. It is a term of this contract that in event of such arbitrator to whom the matter is originally referred being transferred on vacating his office or dying or being unable to act for any reason. Managing Director of the Food Corporation of India at the time of such transfer, vacation of office, death or inability to act shall appoint another person to act as arbitrator. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed as aforesaid should act as arbitrator and if for any reason that is not possible the matter is not to be referred to arbitration at all.” D E F G

Under this clause all disputes and differences arising out of or in any way H

A concerning the agreement whatsoever were to be referred to the sole arbitration of a person appointed by the Managing Director *except as to any matter the decision of which was expressly provided for in the contract*. Clause XII enumerates the items excluded from the purview of clause XX. Relevant sub-clauses (a), (d) and (e) of Clause XII are as under:

B “(a) The contractors shall be liable for all costs, damages, demurrages, wharfage charges and expenses suffered to incurred by the Corporation due to the contractors’ negligence and unworkman like performance of any service under this contract or breach of any terms thereof or their failure to carry out work with a view to avoid incurrence of demurrage etc. and for all damages or losses occasioned to the Corporation or in particular to any property or plant belonging to the Corporation due to any act whether negligent or otherwise of the contractors themselves or their employees. The decision of the Sr. Regional Manager regarding such failure of the contractors and their liability of the losses etc. suffered by Corporation shall be final and binding on the contractors.

D (d) The contractors shall be responsible for the safety of the goods from the time they are loaded on their trucks from Rly. Station/sidings, Depots/Godowns or at other destinations. They shall provide tarpaulin on the decks of the trucks so as to avoid loss of grain etc. through the holes/crevices in the decks of the trucks. They shall deliver at the destination the number of bags and the weight of food grains etc. received by them and loaded on their trucks and shall be liable to make good the value of any loss, shortage or damage in transit. The Regional Manager will be the sole Judge for determining after taking into consideration all the relevant circumstances, the quantum and value of loss and also as regards the liability of the contractors for such loss and the amount to be recovered from them. The decision of the Regional manager in this regard shall be final and binding on the contractors.

E (e) In case of loss, shortage, damage, pilferage, mis-appropriation (including missing of lorry loaded with consignments) to foodgrains/sugar/fertilisers and gunnies during transit, the Regional Manager shall have the right, without prejudice to other rights and remedies under this contract, to impose upon and recover from the contractors an amount not exceeding three times (3 times) the issue rates of the foodgrains/sugar/fertilisers applicable at the time of occurrence of

such pilferage/mis-appropriation and one time (1 time) value of the gunnies. The decision of the Regional Manager in this regard shall be final and binding on the contractors. " A

Respondent raised certain claims on the basis of which the following issues were framed. Corporation also claimed a sum of Rs. 5,62,522.70 p. on account of payment made towards demurrage and wharfage charges. Based on the claim of the contending parties the arbitrator framed the following issues: B

1. Is the claim of the claimant barred by limitation?
2. Is the claimant entitled to a sum of Rs. 6,71,903. 59 paise towards handling and transport bills or to any part thereof? C
3. Is the claimant entitled to get refund of Rs. 67,149.65 paise deducted for transit loss?
4. Is the claimant entitled to refund of Rs. 89,743.34 paise deducted for other purposes? D
5. Is the claimant entitled to refund of Rs. 1,68,500 deducted on account of demurrage and wharfage charges?
6. Is he claimant entitled to Rs. 1,92,873.10 paise towards price of wheat and rice delivered in excess to the respondent?
7. Is the claimant entitled to Rs. 3,21,870/- for running of trucks empty from Howrah siding to Howrah I and Howrah II for empty tare? E
8. Is the FCI entitled to Rs. 5,61,522.70 paise on account of payment made towards demurrage and wharfage charges? F
9. Is the claimant entitled to interest @ 18% per annum from the respective due dates of the bills till payment on the awarded sums?

Claim made by the Corporation for the sum of Rs. 5,62,522.70 p. was rejected. The sole arbitrator by a speaking and detailed order gave the award in the following terms: G

"HELD that the claimant is entitled to a sum of Rs. 4,87,318.54 paise (Four lakhs fifty seven thousand and three hundred eighteen rupees and paise fifty four) only from the respondent on account of handling H

A and transport bills, and refund of Rs. 67,149.65 paise (Sixty seven thousand one hundred forty nine rupees and paise sixty five) only deducted by the respondent from the claimant's pending bills towards transit loss and refund of Rs. 1,68,500/- (One lakh sixty eight thousand five hundred rupees) only deducted by the respondent from the claimant's pending bills on account of demurrage and wharfage charges. The claimant will be entitled to claim interest before the Hon'ble Court on the sum awarded from the date of publication of the award till such time as the Hon'ble Court will deem fit and proper."

C Corporation being aggrieved filed objections against the award before the High Court which were rejected. Contention of the Corporation that the arbitrator could not make an award regarding item which was specifically excluded from the purview of arbitration Clause XX and that by doing so the arbitrator had acted in excess of his jurisdiction to that extent was rejected. Other contentions raised by the Corporation were also rejected.

D Aggrieved against the order of the High Court the present appeal has been filed. Counsel appearing for the Corporation relying upon the judgment of this Court in *Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises and Anr.*, [1999] 9 SCC 283, contended that the arbitrator acted in excess of his jurisdiction in entering upon a dispute and making an award of a claim which was not permitted to be referred to the arbitrator under the contract. According to him, the claim made and given by the arbitrator under issue Nos. 3 and 5 regarding transit loss and demurrage and wharfage charges could not be made as the same had been specifically excluded under Clause XX read with Clause XII of the agreement. We find substance in this submission. Arbitration Clause XX provided that all disputes and differences arising out of or in any way touching or concerning the agreement whatsoever could be referred to the sole arbitration of a person appointed by the Managing Director except "as to any matter the decision of which is expressly provided for in the contract". Clause XII of the agreement provided that the contractor would be liable for all costs, damages, demurrages, wharfage charges and expenses etc. or transit loss suffered by the Corporation and the Sr. Regional Manager shall be the sole authority to determine the said failures on the part of the contractors or the loss caused thereby, thus excluding the reference to the arbitrator for the decision of these disputes. This Court in *Rajasthan State Mines & Minerals Ltd.* case (supra) has held:

H "(f) To find out whether the arbitrator has travelled beyond his

jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. The arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award. A

(g) In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction." B C

High Court issued a direction by order dated 16th June, 1988 referring the disputes for arbitration in terms of Clause XX. The matters which were excluded from the reference to the arbitrator therefore could not be referred to or decided by the arbitrator. Entrance of reference by the arbitrator on disputes which were excluded from reference and the adjudication thereupon would amount to exceeding in the exercise of the jurisdiction as held by this Court in *Rajasthan State Mines & Minerals Ltd.* 'case (supra). Since there was a specific bar to the raising of a claim regarding transit, demurrage and wharfage charges, the award made by the arbitrator in respect thereof would be in excess of the jurisdiction. D E

Accordingly, the appeal is partly allowed. Order of the High Court confirming the award regarding the aforesaid two amounts as well, is set aside. Award of the arbitrator on issues 3 and 5 relating to the refund of Rs. 67,149.65 paise towards the transit loss and the refund of Rs. 1,68,500 towards demurrage and wharfage charges is set aside. Corporation would not be liable to pay these amounts. There is no infirmity in the award regarding other claims made by the respondents. There shall be no order as to costs. F

K.K.T.

Appeal partly allowed.