Before M. M. Kumar & A. N. Jindal, JJ.

S. K. JAIN,—*Petitioner*

versus

STATE OF HARYANA AND ANOTHER,—*Respondent*

CWP No. 12719 of 2007

17th August, 2007

Constitution of India, 1950—Art. 226—Arbitration and Conciliation Act, 1996—Ss. 31(8) & 38—State allotting work of construction to a contractor—Agreement—Dispute between parties—Referred to Arbitral Tribunal—Petitioner filing claim—Sub-Cl. (7) of Cl 25-A of agreement imposes condition of security deposit for referring dispute to arbitration—Tribunal directing petitioner to deposit 7% of total amount claimed—Whether such clause is violative of provisions of 1996 Act—Held, no—Agreement between parties by free will is binding upon them unless it is shown to be against law—Petition dismissed.

Held, that a perusal of sub-clause (7) of Clause 25-A of the agreement shows that a contractor if invokes the arbitration clause is required to furnish security to the satisfaction of the Executive Engineer-in-Charge of the work. The security deposit has to be determined in accordance with the details given in the provision itself and the petitioner has to deposit 7% of the amount claimed. It is, thus, absolutely clear that clause by no stretch of imagination is confined to payment of the amount of cost.

(Para 7)

Further held, that a perusal of sub-section (8) of Section 31 of the Arbitration and Conciliation Act, 1996 brings out that the provision is to operate in the absence of agreement with regard to cost. By no canon of construction sub-clause (7) of clause 25-A of the agreement could be termed as a clause providing for deposit of cost. It is different matter if the aforementioned clause of the agreement has provided for adjustment of cost from the security amount which is required to be deposited under that

clause. Therefore, in the absence of any clause in the agreement providing for exorbitant cost, the question of determining the validity of the clause under sub-section (8) of Section 31 read with Section 38 of the Act would not arise.

(Para 8)

Puneet Bali, Advocate, *for the petitioner.*

JUDGMENT

M. M. KUMAR, J.

(1) This petition filed under Article 226 of the Constitution prays for quashing Memo No. 428, dated 10th January, 2007 (Annexure P-11), directing the petitioner to deposit an amount of Rs. 1,81,14, 845 which is 7% of the total amount claimed by the petitioner before the Arbitral Tribunal (hereinafter referred to as 'the Tribunal').

(2) The petitioner is a contractor, who was allotted work of constructing Haryana Government office building in Sector 17, Chandigarh. On 4th March, 1992, an agreement was entered into between the parties, which incorporated sub-clause (7) of clause 25-A providing for arbitration in case of any dispute. Some differences between the parties regarding payment in respect of allotted work have arisen, which resulted in referring the dispute to the three members Arbitral Tribunal. The petitioner filed his claim before the Tribunal. The respondent State filed its objection to the claim by principally submitting that the contractor has to comply with the mandatory requirements of sub-clause (7) of clause 25-A of the agreement, dated 4th March, 1992, which obliged the petitioner to deposit 7% of the total claim made. The amount so calculated comes to Rs. 1,81,14,845. The Tribunal sustained the objection and after placing reliance on a judgment of Hon'ble the Supreme Court in the case of **Municipal Corporation, Jabalpur** *versus* **M/s Rejesh Construction Company, (1),** has opined as follows :—

> "In view of the decision of the Supreme Court, referred to above, as suggested on behalf of the respondent, the claimant is directed to deposit Rs. 1,81,14,815 i.e. 7% of the amount claimed in

(1) J.T. 2007 (5) S.C. 450

the statement of claim with the respondent and further arbitration proceedings would proceed only thereafter. The claimant was to comply with the above condition in agreement before steps could be taken to start arbitration proceedings. Hence, at this stage Arbitrators cannot assume jurisdiction to proceed with the arbitration. While allowing objection petition failed under Section 16 of the Arbitration and Conciliation Act, it is so ordered as above, accordingly."

(3) We have heard Mr. Puneet Bali, learned counsel for the petitioner at a considerable length. He has argued that the Arbitration and Conciliation Act, 1996 (for brevity, 'the Act') does not permit the parties to contract out of the provisions of that Act and in that regard he has placed reliance on paragraphs 72, 73 and 74 of the judgment of Hon'ble the Supreme Court in the case of **Centrotrade Minerals & Metals Inc.** *versus* **Hindustan Copper Ltd., (2).** According to learned counsel, the arbitration agreement of the parties, therefore, has to be consistent with the provisions of the Act. In order to butterss his stand, learned counsel has argued that Section 31(8) read with Section 38 of the Act postulates the cost which could be deposited by the petitioner and the same has to be reasonable. Learned counsel has submitted that the cost cannot be more than Rs. 20 lacs whereas the petitioner has been asked to deposit the amount of Rs. 1,81,14,845, which is 7% of the total amount claimed. He has maintained that insertion of sub-clasue (7) of clause 25-A would be wholly arbitrary, unreasonable and capricious and, therefore, it is liable to be declared violative of Section 31(8) and Section 38 of the Act.

(4) We have thoughfully considered the submissions made by learned counsel and are of the view that there is no merit in this petition. It is well settled that once an agreement has been entered into by free will of the parties then it is binding on them unless it is shown to be against law. It was in 1861 when Sir Henry Maine in his famous work 'Ancient Law' had evolved a comparative conclusion that the movement of progressive societies "has hitherto been from status to contract". This association of progress with the 'contract' continually displacing 'status' made the individual as the unit of society of which all civil laws take account. In other words, contract, and not those forms of reciprocity in rights and duties which have their origin

(2) J.T. 2006 (5) S.C. 507

in 'status', became the judicial foundation of the relationship between one person and another. "Starting, as from one terminus of history", said Maine, "We seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals." On the subject of Negro Servitude, for instance, Maine showed how the status of slave came to be superseded by the contractual relation of the servant to his master. It was considered virtually certain that the science of Political Economy would fail to correspond with the facts of life if it were not true that Imperative Law had abandoned the largest part of the field which it once occupied, and had left men to settle rules of conduct for themselves with a liberty never allowed to them till then. The law, thus, came to permit individuals unprecedented freedom of contract. Similar view has been echoed by a Division Bench of Bombay High Court in the case of **Lakhaji Dollaji & Co.** *versus* **Boorugu, (3).** Speaking for the Bench Beaumont C.J. observed that it would be "a startling thing to say that person *sui juris* are not at liberty to enter into such a contract of bailment as they may think fit". In the case of **Central Bank of India** *versus* **The Hartford Fire Insurance Co. Ltd., (4),** the concept of freedom of contract has been reflected in para 5, which reads as under :—

> "(5).....Now it is commonplace that it is the court's duty to give effect to the bargain of his parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however it may dislike the result....."

(5) The aforementioned view has been followed and accepted by a Constitution Bench in the case of **General Assurance Society Ltd.** *versus* **Chandmull Jain, (5).** Hon'ble Mr. Justice M. Hidayatullah, speaking for the Bench has, in para 11, observed as under :—

> ".....In interpreting documents relating to a contract of insurance, the duty of the Court is to interpret the words in which the contract is expressed by the parties, because it is not for the

(3) AIR 1939 Bombay 101
(4) AIR 1965 S.C. 1288
(5) AIR 1966 S.C. 1644

court to make a new contract, however reasonable, if the parties have not made it themselves. Looking at the proposal, the letter of acceptance and the cover notes, it is clear that a contract of insurance under the standard policy for fire and extended to cover flood, cyclone etc. had come into being."

(6) In this backdrop we may appreciate the submissions made by the learned counsel for the petitioner. It is considered necessary to first read sub-clause (7) of clause 25-A of the agreement, which is reproduced hereunder :

"(7) It is also a term of this contract agreement that where the party invoking arbitration is the contractor, no reference for arbitration shall be maintainable unless the contractor furnishes to the satisfaction of the executive Engineer-in-charge of the work, a security deposit of a sum determined according to details given below and the sum so deposited shall, on the termination of the arbitration proceedings be adjusted against the cost, if any, awarded by the arbitrator against the claimant party and the balance remaining after such adjustment in the absence of any such cost being awarded, the whole of the sum will be refunded to him within one month from the date of the award :—

	Amount of claim	**Rate of security deposit**
(i)	For claims below Rs. 10,000	2% of amount claimed
(ii)	For claims of Rs. 10,000 and above and below Rs. 1,00,000 and	5% of amount claimed
(iii)	For claims of Rs. 1,00,000 and above	7% of amount claimed

The stamp fee due on the award shall be payable by the party as desired by the arbitrator and in the event of such party's default the stamp fee shall be recoverable from any other sum due to such party under this or any other contract."

(7) A perusal of the aforesaid clause shows that a contractor if invokes the arbitration clause is required to furnish security to the satisfaction of the Executive Engineer-In-charge of the work. The security deposit has to be determined in accordance with the details given in the provision itself and the petitioner has to deposit 7% of the amount claimed. It is, thus, absolutely clear that clause by no stretch of imagination is confined to payment of the amount of cost. It is a different matter if the clause contemplates adjustment of the amount paid as security towards costs. It is, in these facts and circumstances, we are required to examine sub-clause (7) of clause 25-A of the agreement (*supra*) in the light of the provisions of sub-section (8) of Section 31 and 38 of the Act. Sub-section (8) of Section 31 and Section 38 are extracted below for a ready reference :—

"31. From and contents of arbitral award :—

(1) to (7) xx xx xx xx

(8) Unless otherwise agreed by the parties,—

(a) the costs of an arbitration shall be fixed by the arbitral tribunal ;

(b) the arbitral tribunal shall specify—

(i) the party entitled to costs,

(ii) the party who shall pay the costs,

(iii) the amount of costs or method of determining that amount, and

(iv) the manner in which the costs shall be paid.

Explanation.—For the purpose of clause (a), "costs" means reasonable costs relating to—

(i) the fees and expenses of the arbitrator and witnesses,

(ii) legal fees and expenses,

(iii) any administration fees of the institution supervising the arbitration, and

(iv) any other expenses incurred in connection with the arbitral proceed-ings and the arbitral award."

x x x x x x x

"**38. Deposits.**—(1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it :

Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter claim.

(2) xxx xxx xxx xxx

(3) xxx xxx xxx xxx"

(8) A perusal of sub-section (8) of section 31 brings out that the provision is to operate in the absence of agreement with regard to cost. By no canon of construction sub-clause (7) of clause 25-A of the agreement (*supra*) could be termed as a clause providing for deposit of cost. It is a different matter if the aforementioned clause of the agreement has provided for adjustment of cost from the security amount which is required to be deposited under that clause. Therefore, in the absence of any clause in the agreement providing for exorbitant cost, the question of determining the validity of the clause under sub-section (8) of section 31 read with Section 38 of the Act would not arise.

(9) Moreover, their Lordships of Hon'ble the Supreme Court in M/s Rajesh Construction Company (*supra*) upheld a similar clause by observing as follows :

"20. Clause 29 specifically stipulates, as indicated herein earlier, that if any dispute arises between the parties, the party seeking invocation of the arbitration clause, shall first approach the Chief Engineer and on his failure to arbitrate the dispute, the party aggrieved may file an appeal to MPL Com, failing which, the Corporation shall constitute an Arbitration Board to resolve the disputes in the manner indicated in Clause 29. However, before doing so, the party invoking arbitration clause is required to furnish security of a sum to be determined by the Corporation.

21. In this case, admittedly, the security has not been furnished by the respondent to the Corporation. We, in fact, asked Mr. Sharma, appearing on behalf of the respondent to ascertain on the date of the hearing of the appeal, whether the security deposit was made or not. On instruction, Mr. Sharma informed us that such security has not yet been deposited. Such being the position even today, we hold that the obligation of the Corporation to constitute an Arbitration Board to resolve disputes between the parties could not arise because of failure of the respondent to furnish security as envisaged in Clause 29(d) of the contract. Therefore, we are of the opinion, that on account of non-furnishing of security by the respondent, the question of constituting an Arbitration Board by the Corporation could not arise at all. Accordingly, we hold that the High Court was not justified in appointing a retired Chief Justice of a High Court as Arbitrator by the impugned order."

(10) This issue has earlier been considered by a Division Bench of this Court in the case of **National Building Construction Corporation Limited and another** *versus* **State of Haryana and another (C.W.P. No. 19065 of 2006, decided on 9th January, 2007)** which comprised one of us (M. M. Kumar J.). There the validity of a similar clause was also upheld. The Division Bench dealing with a similar clause has held that there is a laudable object underlying insertion of such clauses in standard form contract becasue it discourages filing of frivolous claims by contractor.

(11) In view of the above, the petition is wholly misconceived and the same is hereby dismissed.

R.N.R.

10177/HC—Govt. Press, U.T., Chd.