

# RAJASTHAN HIGH COURT

Nitin Kumar Agrawal

Vs.

State of Rajasthan

Civil Misc. Arbin. Appln. No. 82 of 2002

(Mrs. Gyan Sudha Misra, J.)

24.07.2003

## ORDER

**Mrs. Gyan Sudha Misra, J.**

1. This is an application for appointment of an arbitrator for adjudication of the dispute between the applicant M/s. Nitin Kumar Agarwal and the non-applicant-Public Works Department which arose on account of a construction of Air Strip at *Kishangarh District Ajmer* which had been undertaken by the applicant. The applicant after completion of the project raised his claim for payment which give rise to a dispute between the parties and hence the applicant filed an application on 14th October, 2002 before the non-applicant Public Works Department for referring the matter to the Standing Committee for settlement of disputes as per Clause 23 of the Agreement of Contract and it would be relevant to quote Clause 23 of the agreement in order to appreciate the controversy involved herein, which states as follows :

"If any question, difference or objection, whatsoever arises in any way, in connection with or arising out of this instrument, or the meaning of operation of any part thereof, or the rights, duties or liabilities of either party then, save in so far, as the decision of any such matter, as hereinbefore provided for, and been so decided, every such matter constituting a total claim of Rs. 50,000/- or above, whether its decision has been otherwise provided for and whether it has been finally decided accordingly, or whether the contract should be terminated, or has been rightly terminated, and as regards the rights or obligations of the parties, as the result of such termination, shall be referred for decision to the empowered Standing Committee, which would consist of the followings :-

(i) Administrative Secretary concerned.

- (ii) Finance Secretary or his nominee not below the rank of Deputy Secretary.
- (iii) Law Secretary or his nominee not below the rank of Joint Legal Remembrancer
- (iv) Chief Engineer-cum-Additional Secretary of the concerned department.
- (v) Chief Engineer concerned (Member Secretary)

The Engineer-in-charge, on receipt of application along with non-refundable prescribed fee, (the fee would be two per cent of the amount in dispute, not exceeding Rs. one lac) from the Contractor, shall refer the disputes to the Committee, within a period of one month from the date of receipt of application."

2. In view of this Clause the applicant filed an application on 14th October, 2002 for referring the dispute to the Settlement Committee consisting of the aforesaid members of the Standing Committee. The applicant's grievance is that although he filed the application on 14th October, 2002 the matter was not referred to the Settlement Committee and hence he was compelled to file this application for appointment of an arbitrator.

3. A show cause notice was issued on the aforesaid averments in response to which the counsel for the non-applicant-Public Works Department Sri SP Sharma explained the position and submitted that Clause 23 of the Agreement quoted herein-before clearly lays down that in case of dispute arising between the parties, the matter has to be referred to the Standing Committee within a period of one month from the date of receipt of application and that has exactly been complied by the non-applicant PWD as the Chief Engineer of the PWD at Ajmer by letter dated 11-11-2002 as contained in Annexure R/2 had written to the Chief Engineer that in view of Clause 23 of the Agreement and in view of the application of the applicant-contractor the files are submitted to the Settlement Committee for adjudication of the dispute between the parties. Thereafter, in pursuance of this letter it was communicated to the applicant-contractor by the Chief Engineer by his letter dated 30-11-2002 as contained in Annexure-R/4 to the following effect. "We have taken cognizance of order/application and accordingly action is being taken." This communication clearly indicated in the subject column that cognizance was taken with reference to the application dated 3-11-2002 regarding contract Agreement No. 110/2000-2001 in connection with the construction of Air Strip at *Kishangarh* Famine Relief Work Samwat 2056. A copy of

this letter was sent to the Executive Engineer, PWD District Division Ajmer for submitting the case as procedure laid down for settlement of dispute by the Standing Committee including comments of Superintending Engineer & Additional Chief Engineer immediately. This is specifically indicated in the letter dated 30-11-2002 which was sent to the applicant. In view of this letter it was submitted that the dispute having been referred to the Settlement Committee as per Clause 23 of the Agreement, the applicant was under an obligation to appear before the Standing Committee for settlement of the dispute.

4. It appears that for the reasons best known to the applicant, he avoided to appear before the Standing Committee and thought it proper to file this application for appointment of an arbitrator which has to be listed in light of the agreement between the parties.

5. The counsel for the applicant endeavored hard to impress upon this Court that the reference of the dispute to the Standing Committee was beyond the prescribed period of one month as laid down under clause 23 of the Agreement as the applicant was communicated about this only after expiry of a period of one month on 30th November, 2002. According to the applicant the non-applicant-PWD having not referred the dispute within the prescribed period of one month offered a legal plank of the applicant to file an application for appointment of an arbitrator by passing the procedure of settlement of the dispute by the Settlement Committee. The counsel for the applicant further relied upon an authority of the Division Bench delivered in the case of *State of Rajasthan v. M/s. Goodwill Construction & Company (Defect)* <sup>1</sup> wherein it has been held that clause 23 of the Agreement between the PWD and the contractor can be treated as a Clause for arbitration agreement. While there is no quarrel about this proposition as to whether this could have been treated as a clause for arbitration or not, that stage in fact has not reached in this case for the specific provision in this clause is to refer the dispute to the Standing Committee and only if this dispute had not been referred within the time frame or the time limit of one month, the dispute can be referred to the arbitrator as per the interpretation attributed to clause 23 of the aforesaid judgment of the Division Bench.

6. Under the facts and circumstances of this particular case it is difficult to hold that the matter was not referred to the Standing Committee since the non-applicant-PWD by letter dated 11-11-2002 as contained in Annexure-R/2 to the following effect:

"Hence, the related case along with original contract agreement copy,

application of the contractor Photostat copy of claim and Draft (original) are being annexed and sent for adjudication of Standing Committee is being submitted herewith for the purpose."

7. This was in pursuance of the application filed by the applicant for referring the dispute to the Settlement Committee by letter dated 14-10-2002 and all steps for referring the dispute to the Standing Committee were taken on 11-11-2002. The counsel for the applicant, however, attempted to derive advantage out of the delay of few days in receiving the intimation of reference of dispute before the Settlement Committee after expiry of one month in order to contend that the reference was not done within the period of one month. But this technical argument has absolutely no substance in my view as Clause 23 of the Agreement clearly lays down that appropriate action for reference of dispute has to be taken within the period of one month and it does not envisage that communication to the applicant has also to be made within the same period. In the instant case it was communicated to the Chief Engineer that the dispute has been referred and copies to all the concerned authorities were sent informing that the matter has been referred to the Settlement Committee. Thus, the action of initiation of dispute to the Standing Committee as per Clause 23 clearly stands complied in my opinion and communication of the same was merely a consequence of this action and thereafter if this information was communicated only after 2 or 3 days to the applicant, it was expected of him to appear before the Committee and contest the matter if he *bona fide* wanted the matter to be settled by the Settlement Committee. The applicant, for reasons best known to him, failed to appear before the Committee although the matter was adjourned several times. It is thus obvious that the applicant-Contractor was eager that the matter may be referred to the arbitrator and it may not be referred to the Standing Committee. But in view of Clause 23 of the Agreement, it is difficult to skip over this procedure, so that the dispute could straightway be referred to the arbitrator. The question of appointment of an arbitrator would have arisen only if the non-applicant-PWD had been sitting idle over the matter for more than a period of one month which is not the position in the instant case and hence the plea raised on behalf of the applicant that the matter having not been referred within a period of one month to the Settlement Committee, it was fit to be referred to the arbitrator, cannot be accepted as a correct argument.

8. The application for appointment of an arbitrator therefore, stands rejected. The applicant therefore, will be under a legal obligation to appear before the Settlement Committee for adjudication of the dispute. It is expected of the members of the

Settlement Committee to adjudicate the matter fairly and arrive at a just settlement of the dispute without being influenced in any manner and without any prejudice against the applicant merely because he had moved this Court. The Settlement Committee is also expected to decide the dispute expeditiously preferably within a period of three months.

Application rejected.

Cases Referred.

1. (DBCWP No. 464/03)