

# RAJASTHAN HIGH COURT

Builder and Associates

Vs.

RIICO

C.M.A.A. No. 26 of 2002  
(Mrs. Gyan Sudha Misra, J.)

09.10.2003

## ORDER

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

1. A contract for construction of Community Centre. Bank Building/Post Office at Housing Colony, Kota, was awarded to the applicant-M/s. Builder & Associates, (a Proprietorship firm for undertaking construction work) by the non-appellant-Senior Regional Manager, Rajasthan State Industrial Development and Investment Corporation (for short "RIICO"), Kota vide order No. 763 dated 22-5-1996. An agreement for this purpose was executed between the parties wherein Clause-79 lays down as follows:-

"79. (i) should the contractor consider that he is entitled to any extra payment or compensation or any claim whatsoever in respect of the works he shall give notice in writing to the Engineer, furnishing detailed particulars of all such claims for extra payment and or compensation, within 10 days from the ordering of the work or happening of any event upon which the contractor passes such claims. Failure on the part of the contractor to put forward any claim with the necessary particulars within the period as aforesaid, shall be a complete waiver of such claims."

2. The applicant has raised a claim of approximately Rs. 11,50,000/- for executing certain extra work as per his case and according to his averment he is entitled for this payment for which he had raised a claim before the non- applicant which was not looked into or examined by the non-applicant. The applicant therefore in view of Clause-79 sent a notice to the non-applicant- RIICO on 6th September, 2000 as

contained in Annexure-2 giving out specific details regarding execution of the extra work for which the payment was claimed but the same was not responded to by the non-applicant. This notice in fact was sent in view of Clause-80 of the agreement executed between the parties wherein the mode and manner for appointment of an arbitrator has been elaborately recorded for adjudication of all questions and disputes in regard to the work order giving rise to the dispute *inter alia* relating to specifications, designs, drawings and instructions. The applicant's grievance is that in spite of his notice, the non-applicant failed to take any steps for appointment of an arbitrator to decide this dispute and hence he was compelled to file this application for appointment of an arbitrator under Section 11 of the Indian Arbitration Act, 1996.

3. Initially, the counsel for the non-applicant resisted the claim for referring the dispute to the arbitrator on two counts-it was submitted by Shri A. K. Sharma that the notice for appointment of an arbitrator was time barred as this notice in view of Clause-79 read with Clause-80 of the Contract had to be issued within ten days of completion of the work and that notice having been given after a long lapse of time, the case for appointment of an arbitrator is not made out. It was argued, that in view of the clause, it is a case of waiver and no claim at the instance of the petitioner-contractor is fit to be sustained. However, this argument was rejected out-right in view of the authority of the Supreme Court delivered in the case of *State of Orissa v. Gokulnanda Jena reported in* <sup>1</sup> wherein the learned Judges of the Apex Court have recorded that if all questions are left to be decided by the arbitrator the same being an alternative remedy for adjudication of the dispute, the question of limitation also can well be adjudicated by the arbitrator himself who is appointed in the matter. Hence the objection of the non-applicant's advocate was not fit to be entertained in order to consider whether the claim of the applicant and his plea for appointment of an arbitrator could be rejected only on the ground of lapse of time. Ultimately, the only course left open for the parties was to refer the matter to the arbitrator as given out in Clause 80 of the contract itself which gives out several options to the contesting parties for appointment of a sole arbitrator, two arbitrators along with an umpire. However, the second option viz. the appointment of two arbitrators along with an umpire is obviously an alternative option for the contesting parties and the initial choice is to appoint the sole arbitrator to be mutually agreed upon between the contractor and the competent authority of RIICO. Fortunately, a consensus has reached between the applicant and the non-applicant for appointment of a sole arbitrator out of six names which have been suggested by the counsel for the RIICO and one of the names is of Shri B. R. Johar who is a retired Chief Engineer of the

Public Works Department (for short PWD).

4. Since the contractual agreement itself lays down that a sole arbitrator who is mutually agreed upon can be appointed for deciding all claims of Rs. 50,000/- and above and Sri BR Johar has been agreed upon to function as sole arbitrator to decide the dispute between the applicant and the non-applicant herein, Shri Johar is appointed as an arbitrator to adjudicate the disputes of the contesting parties after hearing their respective claims and contest to the claim in respect of the claim of the applicant emerging out of order No. 763 dated 22-5-96 which was granted to the applicant-Construction Company and the question of limitation as to whether the claim is fit to be accepted or not also can be decided by the arbitrator himself, in view of this Supreme Court judgment and order referred to hereinbefore. It goes without saying that the claim shall be decided after granting full opportunity to the contesting parties after which the award shall be passed by the arbitrator in full and final statement of the claim between the parties.

5. It is however further made clear that this Court has merely appointed an arbitrator for settlement of the dispute which arises between the parties and hence any observation or remark which is incorporated in this order may be treated as purely incidental having to bearing on the claims of the parties.

6. This application accordingly stands allowed and disposed of.

Application allowed.

Cases Referred.

1. 2003 (6) SCC 465: (AIR 2003 SC 4207)