

Hind Construction and Engineering Co. Ltd. Vs. Union of India

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Court : Mumbai

Decided On : Dec-23-1981

Reported in : AIR1982Bom365; (1982)84BOMLR147

Judge : Chandurkar and;Menta, JJ.

Acts : [Arbitration Act, 1940](#) - Sections 2

Appeal No. : Appeal Nos. 273 and 274 of 1976

Appellant : Hind Construction and Engineering Co. Ltd.

Respondent : Union of India

Advocate for Def. : H.H. Advani,;R.L. Dalal,;H.H. Advant and;A.M. Setalvad, Advs.

Advocate for Pet/Ap. : S.S. Ray and;N.R. Khaitan, Advs., i/b., Mutta & Mulla and Craigle Blunt and Caroe

Judgement :

Chandurkar, J.

1. This Judgment will dispose of Appeals Nos, 273 & 274 of 1976. Both these appeals arise out of two judgments delivered by Justice J. In two Award Petitions which were filed by the Appellant Company, hereinafter referred to as the

Contractor for setting aside two Awards, dt. 14th Feb., 1974 arising out of disputes between the Contractor and the Union of India, the Respondent herein, in respect of a contract of construction for the development of the Naval Dockyard at Bombay, for which the tender of the Contractor was accepted by the Government of India. In view of the limited challenge to the two Awards, both in the trial Court as well as in this Court, it is not necessary to set out in detail the events which led to the contract of construction. It is sufficient to state that in connection with the scheme for the development of the Bombay Harbour in or about 1952, the Government of India had entered into an arrangement with a concern known as 'Sir Alexander Gibb and Partners' referred to hereafter as 'AGP Engineers' for the preparation of a detailed design after carrying out the necessary survey and investigation. The contract which was intended to be given to the contractor was intended for the work which was described as follows :-

1. Rock breaking and dredging .
2. Dredging of soft material .
3. Construction of barracks and destroyer wharves standing on vertical cylinders .
4. Boat pond wall .
5. Custom basin wall .
6. Mint storm water culverts and mint reclamation .

The Government of India invited global tenders for this work . The contractor's tender was accepted by the Government in August. 1954 and the contract was formally signed on 2nd sept.1954. works order under Cl. 41 of the contract was issued on 24th Sept. 1954.

2. However, before the completion of the works, the contractor addressed letters, dt. 9th June 1956 and 11th June 1956 to the Government informing the Government of India that the contractor had stopped the work of dredging and rock breaking. Finally on 4th Sept. 1956, after attempts to make some amicable settlement to enable the company to complete the work had failed, the contractor

informed the government that they were taking steps to wind up the organisation and that the plants, machinery, stores etc. Lying at the site would be at the risk and responsibility of Government. Government thereupon forfeited the contract under cl.63 of the Agreement of contract, which we shall shortly reproduce and entered the site on 27th/28th Dec. 1956. On 2nd Feb. 1957 Government finally decided to carry out the finished contract works departmentally.

3. On or about 26th Dec. 1956. The contractor served Notice u/s 80 of the Code of Civil Procedure on the Union of India, but later on invoked cl. 66 of the contract for arbitration. Mr. J.M. Mazumdar, retired judge of the Calcutta High Court was appointed sole Arbitrator. Unfortunately, after entering on the reference he expired before any evidence could be recorded. Thereafter the Union Government appointed Mr. Bishan Narain, retired judge of the Punjab High Court to act as the sole Arbitrator and the Arbitrator entered upon the reference on 15th April 1961. Before the Arbitrator, the company claimed an amount of Rs. 84,47,527/- on various grounds. The Respondent Union of India made a counter-claim against the contractor for Rs. 2,65, 00,000/- In the course of proceedings before the Arbitrator, a question arose as to whether the Arbitrator had jurisdiction to entertain the Respondent's counter-claim aggregating to Rs. 2,65, 00,000/- There upon the Union of India by its letter, dt. 8th Jan. 1962 appointed the Arbitrator as the sole Arbitrator under cl. 66 of the contract to adjudicate upon the claim of the respondent contained in parts A, C and D of the Respondent's pleadings filed before the Arbitrator on 1st June 1961, On 9th Jan. 1962, the Arbitrator entered upon the Reference. On 11th Jan. 1962 both the parties made a joint submission giving their consent 'to the learned Arbitrator opening reference on Jan. 9, 1962 on all matters referred to him by the Secretary, Ministry of Law, Government of India, vide his Instrument dt. Jan. 8 1962, in spite of the fact that the works have not yet been completed'. Prior to that on 9th Oct. 1961, both the parties had already filed a joint application empowering the Arbitrator to adjudicate upon all disputes arising in the case and on the next day, they had also filed a joint application that the Government's-claim for - Rs. 2,65, 00,000/- was covered by reference to arbitration already made by the Law Secretary on 30-3-1961. On 8th Jan. 1962, fresh appointment was, however, made by the Law Secretary as the Arbitrator was of the view that the agreement of parties did not confer any

jurisdiction upon him and he had, therefore, suggested to the council for the Government to reconsider the matter and get a new reference made relating to the Government's counter-claim and thus avoid complications later on.

4. By a further agreement between the parties, dt. 31-3-1964, the Arbitrator was appointed as the sole Arbitrator to adjudicate upon claims made by the Government in Ex. E. of part D of the Government's pleadings filed before the Arbitrator on 1st June 1961. All the three references were consolidated by consent of parties and time for making the Award was extended from time to time and finally till 31st Mar. 1974.

5. On 14th Feb. 1974, the Arbitrator made three Awards. By the first award in the reference made by the letter, dt. 30th Mar. 1961. Which dealt with the claim of the contractor, the Arbitrator found an amount of Rs. 17, 85,146/- due to the contractor from the Government of India. In the second Award made in respect of the counter-claim made by the Government of India, the Arbitrator found a sum of Rs. 30, 27, 300/- due from the contractor to the government of India. In the third award made in the reference dt. 31-3-1964 the Arbitrator found a sum of Rs. 3,27, 881.90 being due from the contractor to the government of India. The sum total of all these three awards was that finally the contractor was liable to pay Rs. 15, 70,035.90 to the Government of India. The first award was challenged by the contractor in award petition No.31 of 1974, which was rejected by the learned single judge and that order is challenged in Appeal No. 273 of 1976. The second award was challenged in award petition No.32 of 1974, which was also rejected and that decision is challenged in Appeal No. 274 of 1976 which deals with the validity of the second Award.

6. Before the learned single judge the second award was challenged on four grounds : firstly, that the learned Arbitrator had misconstrued cl.63 (3) of the conditions of contract; secondly that in the matter pertaining to 'grabbing' the learned Arbitrator wrongly rejected an admission made by a witness for Government and erroneously relied on an admission made by the petitioner's witness; thirdly, that in the matter pertaining to 'soft Dredging', the contractor's

submission on mitigation of damages was wrongly rejected by the learned Arbitrator and fourthly, in assessing the amount spent by the Government in excess of the reasonable amount, by reason of delay in the completion of the works, the learned Arbitrator arrived at conclusions which were inconsistent with his own findings. All these four contentions were rejected by the learned single judge, and we may point out at this stage that when the appeal was argued before us by Mr. Ray, only, the first and the fourth submissions were canvassed.

7. Before we refer to the two submission made, before us by Mr. Ray, it is necessary to reproduce cl. 63 (3) and cl.66 of the contract cl.63 (3) reads as under: -

'If the employer shall enter and expel the contractor under this clause he shall not be liable to pay to the contractor any money on account of the contract until the expiration of the period of maintenance and thereafter until the costs of completion and maintenance, damages for delay in completion (if any) and all other expenses incurred by the Employer have been ascertained and the amount thereof certified by the Engineer. The contractor shall then be entitled to receive only such sum or sums (if any) as the Engineer ,may certify, would have been due to him upon due completion by him after deducting the said amount. But if such amount shall exceed the sum which would have been payable to the contractor on due completion by him then the contractor the amount of such excess and it shall be deemed a debt due by the contractor to the employer and shall be recoverable accordingly'.

C. 66 reads as under :-

'If any dispute or difference of any kind whatever shall arise between the Employer or Engineer on one side and the contractor on the other in connection with or arising out of the contract or the carrying out of the work (whether during the progress of the works or after the completion and whether before or after the determination, abandonment or breach of the contract) the Engineer on behalf of the Employer, will endeavor to reach an agreement on the point in dispute with the contractor and failing such agreement the aggrieved party may require that the dispute should be referred to an arbitrator appointed by the secretary to the

ministry of Law, Government of India, provided always that notwithstanding the disagreement by the contractor any direction given by the Engineer shall be final and binding on the contractor until the completion of the work and shall forth be given effect to by the contractor who shall proceed with the work with all due diligence. All references to the arbitrator shall be deemed to be a submission to arbitration within the meaning of the Arbitration within the meaning of the Arbitration Act 1940 or any statutory enactment or amendment thereof for the time being in force.

Such arbitrator shall have full power to open up, review and revise any decision, opinion, direction, certificate of valuation of the Engineer and neither party shall be limited in the proceedings before such arbitrator to the evidence or agreements put before the Engineer for the purpose of obtaining his decision above referred to. The award of the arbitrator shall be final and binding on the parties. Such reference except as to the withholding by the Engineer of any certificate or the withholding of any portion of the retention money under clause 60 hereof to which the contractor claims to be entailed or as to the exercise of the Engineer's power to give a certificate under clause 63 hereof shall not be opened until after the completion or alleged completion of the works unless the written consent of the Employer and the contractor. Provided always:-

What is contended before us by Mr. Ray is that on an interpretation of Cl. 63 (3) of the contract, on claim can be filed by either before the contractor or the employer either before the Arbitrator or anybody else before the grant of the certificate by the Engineer as envisaged in that clause. It was contended that want of a certificate contemplated by cl.63 (3) will go to the root of the matter and if the contractor is held liable without the certificate of the Engineer, then this would render the matter different in substance from what was stipulated for by the parties. In other words, the contention is that a certificate under Cl. 63 (3) of the contract is a condition-precedent before the Government of India could canvass its counter-claim and no such certificate having been obtained from the Engineers, the counter-claim was liable to be rejected. The learned arbitrator had held that cl.63 (3) did not require the AGP Engineers to issue any certificate for the works done by the Government of India after forfeiture of the contract, and the learned

arbitrator recorded a finding in the alternative that the AGP Engineers were in error in not granting completion certificates as the rock breaking work had been substantially completed. The learned arbitrator held that the firm of AGP is a firm of Engineers and not that of cost Accountants and its duties and powers are described in cl. 2 of the contract, which inter alia provided 'to watch and supervise the works and to test and examine any material to be used or workmanship employed in connection with the works'. According to the learned arbitrator, under the contract, AGP could only ascertain and certify the amount spend and, therefore, this provision was neither a condition precedent not mandatory. The learned Arbitrator further held that 'AGP's failure to issue such a certificate could not possibly deprive the Government from recovering the extra amounts aspect by it in completing the works,' and that it was not fore the AGP to certify reasonableness of such expenses. The learned Arbitrator, therefore, held that it was open to him to ascertain and determine the amount of reasonable expenses incurred by the Government under Cl. 63 (3) of the contract. The Arbitrator pointed out that the reference was made when the Government was in the process of completing the works and the basis of the claim originally made was completion the contract works under cl.63 (3) and the amount specified in the claim consisted of expenses already incurred and estimate of expenses to be incurred; this amount was not ascertained at that time and was only an estimate, but by the time award was made, the expenses were ascertained. The Arbitrator also referred to the joint applications of the parties, dt. 9-10-1961, 10-10-1961 and 12- 1-1962 which clearly expressed 'the parties' intention and position that I should decide all claims relating to both periods'. According to the Arbitrator, any other conclusion would amount to multiplicity of legal proceedings and such a conclusion must be avoided.

8. With regard to Cl.63 (3) of the contract, the learned judge took the view that he was not sitting in appeal over the reasoning and findings of the learned Arbitrator who had taken all the factors into consideration, and even assuming that the court might come to a different conclusion, that by itself was not sufficient to set aside an award. The limitations were strictly prescribed by S. 30 of the Arbitration Act beyond which it was not permissible to travel. According to Mr. Ray, the finding recorded by the learned Arbitrator that the requirement of a certificate under Cl.63

(3) was not a condition precedent was an error apparent on the face of the record and since the arbitrator proceeded on the erroneous view of the matter that certificate was not a condition precedent, the correctness of the finding on the question of law could be gone into. Reliance was placed on the decision of the supreme court in *Thawards pherumal v. Union of India*, : [1955]2SCR48 where the supreme court pointed out that an arbitrator cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. It was held that he is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the court provided his error appears on the face of the award. The exception to this was when the parties choose specifically to refer a question of law as a separate and distinct matter. When the matter was argued before us on behalf of the respondent, the hearing proceeded on the footing that the correctness of the finding given by the learned Arbitrator as to whether a certificate under C.63 (3) was a condition precedent to be satisfied by the Government of India before the counter-claim was made, could be looked into u/s. 30 of the Arbitration Act. We need not, therefore, go into the contention whether the correctness of the finding could be validly looked into or not. The contention advanced before us on behalf of the appellant is based on certain decisions which are referred to in Ch,7, S. 3 in Hudson's Building and Engineering contracts, Tenth Edition under the heading 'whether certificate, satisfaction or Approval a condition precedent to Builder's Right to sue'.

9 Now before we go to these authorities, it is necessary to refer to the relevant terms of the contract. Cl.63 of the contract empowers the Government of India, under certain circumstances, to enter upon the site and the works and expel the contractor therefrom without thereby avoiding the contract or releasing the contractor from any of his obligations or liabilities under the contract or affecting the rights and powers conferred on the Employer (the Government of India) or the Engineer (AGP) by the contract and the Government of India could complete the works or employ and other contractor to complete the works and the employer or such other contractor could use for such completion so much of the constructional and Dreading plant, temporary works equipment , transport and materials on the site as the Employer or the contractor may think proper. This clause refers to the

power of forfeiture and one of the circumstances in which this power of forfeiture can be exercised is that the contractor has abandoned the contract. We are not concerned with the other grounds of forfeiture, under CL. 63 (1), therefore, it is open to the Employer (Government of India) to complete the works after entering upon the site and the works. Under Cl.63 (2) the Engineer has to determine either exparte or by after reference to the parties or after such investigation or inquires as he may think fit to make or institute and certify what amount had at the time of such entry and expulsion been reasonably earned by or would reasonably accrue to the contractor in respect of work then actually done by him under the contract and what was the value of any unused or partially used materials, any unused or partially used materials, any plant and temporary works equipment or transport on the site. Then we come to Cl. 63 (3) , Cl .63 (3) is headed 'payment after forfeiture'. It is expressly provided in that clause that the employer shall not be liable to pay to the contractor any money on account of the contract in the case of forfeiture until the expiration of the period of maintenance and thereafter until the costs of completion and maintenance, damages for delay in completion (if any) and all other expenses incurred by the employer have been ascertained and the amount thereof certified by the Engineer. Cl.63 (3) also provides for the quantum which the contractor is entitled to get, The contractor will be entitled to get,. The contractor will be entitled to get only such amount as the engineer may certify would have been due to him upon due completion by him after deducting the said amount, i.e, the amount which the contractor would be entitled to receive will be the difference between the amount which he would have earned if he had duly completed the contracted and the expenses incurred by the employer on account of costs of completion and maintenance as well as after taking into account the damages for delay in completion. The period of maintenance in the instant case was 12 months calculated from the date of completion of the works certified by the Engineer in accordance with Cl.48 Cl.48 refers to the certificate of completion of works. Cl.47 refers to the Liquidated Damages for Delay under which if the contractor failed to complete the works within the time prescribed, he was to pay to the Employer the sum stated in the Tender as liquidated damages for such default the amount specified in the instant case being Rs. 7,200/- per week - and the employer had the right without prejudice to any other method of recovery, to

deduct the amount of such damages from any moneys in his hands due or which may become due to the contractor. Cl.63 (3) further provides that if the amount of costs of completion and maintenance damages for delay in completion and maintenance, damages for delay in completion (if any) and all other expenses incurred by the employer exceeded the sum which would have been payable to the contractor on due completion by him, then the contractor shall upon demand pay to the employer the amount of such excess and it shall be deemed a debt due by the contractor to the employer and shall be recoverable accordingly.

10. The counter-claim of the union of India made before the Arbitrator was under this later clauses of Cl. 63 (3) and the question is whether a certificate of the Engineers was a pre-notation before this claim could be entertained or granted. Now, according to cl. 66, if there was any dispute or difference of any kind whatever between the employer or Engineer on one side and the contractor on the other, in connection with or arising out of the contract, primarily it was the Engineer who had to endeavor to reach an agreement on the point in dispute, and failing such agreement the aggrieved party had the right to require that the dispute should be referred to an Arbitrator appointed by the secretary to the ministry of Law, Government of India. The powers of the Arbitrator are given in the second paragraph of Cl. 66 and it show that the Arbitrator had the power to open up, review and revise any decision, direction, certificate or valuation of the Engineer and neither party was limited in the proceedings before such Arbitrator to the evidence or agreements put before the Engineer for the purpose of obtaining his decision on the dispute, Normally, under Cl.66 a reference is not to be opened until after the completion or alleged completion of the works, except in respect of three matters viz.

- (1) Withholding by the engineer of any certificate;
- (2) Withholding of any portion of the renting money under clause 60 to which the contractor claims to be entitled; and
- (3) As to the exercise of the Engineer's powers to give a certificate under Cl. 63.

However, it is provided in Cl.66 that in respect of other matters, the reference can be opened with the written consent of the Employer and the contractor, The effect of clause 66 is that in respect of the three matters referred to above, the reference could be opened before the completion or alleged completion of the works. It is obvious , therefore, that when clause 66 specifically provides that the references as to the Engineer's power to give a certificate under Cl.63 can be opened before the completion of the works, the reference cannot be to anything else except clause 63 (2) which refers to the valuation at the date of forfeiture. That clause specifically requires the Engineer to certify what amount (if any) at the time of entry of the Employer and the emulsion of the contractor. The contractor had reasonably earned on the date of forfeiture. Such a reference alone could be opened prior to the completion. Reference in respect of all other disputes had to be postponed after the completion or alleged completion of the works, unless the parties agreed in writing to have the references opened.

11. Now, it is no doubt true that clause 63 (3) refers to the Engineer ascertaining the costs of completion and maintenance, damages for delay in completion and all other expenses incurred by the employer and this amount will be certified by the Engineer. The occasion to certify this amount can arise only after the completion of the contract. As a matter of fact, the right of the contractor to claim any moneys in terms of clauses 63 (3) can arise only after the completion of the works. No claim for any amount due or alleged to be due from the Employer to the contractor could have been made under clause 63 (3) before the completion of the contract. Thus, clause 63 (3) comes into operation only after the completion of the work contract. Now, admittedly in the instant case, both the parties have gone to the Arbitrator before the completion of the contract. Indeed, originally the first arbitration proceeding was taken by the contractor after they had served a notice under section 80 of the Civil p.C. Admittedly, at that time, the contract was not complete and it is not in dispute that the contractor took recourse to the procedure for arbitration under Cl. 66 prior to the completion of the contract, Now if the parties have, by consent, gone to arbitration in respect of their disputes prior to the completion of the contract itself and prior to the time when the said Cl. 63 (3) could really become effective. It is difficult to see how any certificate as contemplated by clause 63 (3) could be treated as a condition precedent which had to be satisfied

by the Government of India before making their counter-claim. Mere reference to Cl. 63 (3) by the Arbitrator that the claim was under Cl.63 (3) would not necessarily imply that all the conditions under Cl.63 (3) obviously it was intended to convey that the rights and liabilities of the parties had to be determined on the basis that the contractor would be entitled to claim the difference between such amount as he would have earned if the contract. Was completed and the costs of completion and maintenance, damages for delay and the other expenses incurred by the union of India. This was the mode of determining the quantum of liability of the parties against each other and that was why a reference to clause 63 (3) was required to be made by the Arbitrator. The Arbitrator was, therefore, clearly right when he took the view that no certificate under clause 63 (3) was required to be issued. Indeed when the parties by consent have gone to arbitration long before the completion of the works and when the certificate contemplated by clause 63 (3) was a certificate after completion, it is difficult to see how the certificate could be required as a condition precedent on the facts of the case.

12. Even otherwise the question as to whether a certificate, which is normally contemplated by such contracts, has to be obtained as a condition precedent before the claim is made, will have primarily to be decided on the basis of the intention of the parties to be deduced from the contract, and as pointed out by Hudson at page 404 'there is no magic in the existence of a contractual provision as to a certificate'. We have not been shown any provision in the contract which indicates that the parties ever intended that any certificate is to be treated as conclusive by the parties under the contract. In Halsbury's Laws of England, Fourth Edition, paragraph 1194, it is observed as follows :-

'Contracts for works of construction frequently provide that the contractor should carry out and complete the works to the satisfaction or approval of the architect or engineer. In such a case, such approval may, on the proper construction of the contract, be a condition precedent to the contractor's right to payment. This question of construction may turn on considerations similar to those which determine whether the issue of a certificate is a condition precedent, but the mere fact that the architect or engineer is required to express his approval in a certificate is not decisive. The main test seems to be whether the decision of the architect or

engineer in granting or withholding approval was intended by the parties to be final'.

13. Now, certificates which are normally contemplated by such contracts are either progress or interim certificates or final certificates or some other certificates. Progress or interim certificates are issued from time to time during the course of the work, certifying that, in the opinion of the Architect, work has been carried out and in some cases materials supplied is of a certain value. A final certificate may certify the amount finally payable to the contractor under the contract or the satisfaction of the contract or both. Upon these matters the Architect's decision embodied in his certificate is often binding and conclusive on the parties. The other certificates may empower the Architect to certify various matters. Such as the happening of an event which entitles the employer to exercise a right of forfeiture or to record an extension of time given by the Architect to the contractor. The Architect's decision may be binding and conclusive upon these matters. (See Building contracts by Keating, fourth edition, pages 76, and 77). We are not concerned in this case with the certificate of approval which is normally given by the Engineer to the contractor. As a matter of fact, it does not appear that when the arbitration proceedings commenced, the certificate required under clause 63 (2) of the contract was obtained even by the contractor.

14. In the present case, there is no specific provision with regard to the finality of any certificate given by the Engineer. The power of the Arbitrator under clause 63 is so wide that he has been given the power to reopen or review any decision of the Engineer and. Therefore when the matter is taken to the Arbitrator, the merits of the claim have to be gone into completely and fully by the Arbitrator. Even assuming that there was any requirement of the certificate, which indeed we do not find on the contract, as being condition precedent, it is necessary to refer to the law with regard to the powers and jurisdiction of the Arbitrator in such cases. On the question as to the effect of the arbitration clauses on the certificate clause, where a building contract contains a clause by which the determination or certificate of the Architect is made final and conclusive between the parties, or is made a condition precedent to any right of the contractor to payment and the contract also contains a clause by which all disputes are to be referred to

arbitration, the law is stated thus by Halsbury in paragraph 1298:-

'where the arbitration clause excludes certain matters in express terms and leaves them to the sole discretion of the architect. No arbitration can arise in respect of these matters except by agreement, and. In the absence of an allegation of fraud, neither the court nor the arbitrator has jurisdiction to review the determination of the architect as to those matters.

On the other hand, where there is no express restriction of the scope of the arbitration clause, the jurisdiction of the arbitrator does not apparently extend to review the correctness of measurements and valuations where they are made conclusive between the parties, or conditions precedent to a right to payment . Where , however , the architect has a power to issue a certificate which is neither made conclusive between the parties , nor is a condition precedent to payment , such a certificate would be subject to an arbitration clause in the contract.'

Also in paragraph 1215, the learned Author has observed as follows:-

' A clause giving an arbitrator power to open up, review and revise the certificate, opinion or decision of the certified and to determine all disputes and matters submitted to him as if no such certificate , decision or opinion had been given will certainly be wide enough' .

15. After a review of several decisions, to some of which we shall refer , Hudson has called the principles as follows at page 446 :-

' (a) An arbitration clause in general terms a fortiori if it empowers the arbitrator to open up , review and revise any opinion or certificate , or specifically mentions disputes arising on the withholding of a certificate , will , in the absence of any provision to the contrary , empower the arbitrator to disregard a certificate or the absence of one .

(b) Once an arbitrator has held to have jurisdiction to hear the merits of a claim, any purely technical or procedural difficulties in the way of giving full practical effect to his decision arising out of the wording of the contract in relation to the certified and the parties are likely to be disregarded , the implication being that all

necessary powers have been conferred on the arbitrator to enable him to give full effect to his decision'.

Both these propositions are founded , inter alia , on Brodie v. Cardiff Corporation (1919) AC 337 , Neale v. Richardson (1938) 1 All ER 753 and Prestige v. Brettell (1938) 4 All ER 346. On the basis of the proposition (a), Mr. Advani appearing on behalf of the Respondent has urged that the proposition clearly laid down that the absence of a certificate does not prevent the arbitrator to deal with the disputes between the parties. Mr. Ray , however , has contended that when reference in proposition in (a) is made to the absence of a certificate , it must be construed to mean that the certificate was not produced or could not be obtained because the Engineer wrongly declined to issue the certificate when asked for .

16. Now, it is no doubt true that in the case of Brodie v. Corporation of Cardiff and Neale v. Richardson , cited (supra) , the Engineer had declined to issue the necessary certificate . In Brodie's case the contract was to construct a reservoir for a Municipal Corporation at a fixed price in accordance with the specification , and the work had to be done to the satisfaction of the Corporation Engineer , with such additions , alterations and variations as from time to time be directed by the Corporation or the Engineer as provided by the specification . The contract provided that the corporation would not be liable for payment of any charge for additions , alterations or deviations unless instructions for them were given in writing by the Engineer . The contract provided that in any case dispute should arise , either during the progress of the works or after the determination of the contract , or as to any matter or thing arising thereunder , or as to any objection by the contractor to any certificate, finding , decision, requisition or opinion of the Engineer , such dispute was to be referred to the arbitration and final decision of a single arbitrator , and either party might demand an immediate determination of the dispute. In respect of certain works which the contractor contended were extras , for which he was entitled to be paid in addition to the contract price, the Engineer refused to give written orders on the ground that the works were in accordance with the contract and were not extras . The matter was referred to arbitration . The Arbitrator found that the requirements were not in accordance with the contract , that the Engineer improperly refused to give orders in writing for the

same as extras and that in deciding against the claim of the contractor the Engineer did not act fairly or impartially , but had no dishonest motive and, therefore, awarded certain sums to be paid to the contractor . The House of Lords held that upon these findings the Arbitrator had power to award that the items in question should be paid for as extras , notwithstanding the absence of any orders in writing by the Engineer . The question which was posed in that case for decision was ' whether the claim for payment is barred for want of a certificate in writing' . The contention that the Cardiff Corporation was entitled to defeat the contractor by pleading that there was no order in writing was rejected by the House of Lords with these words :-

' When the arbitration was held it appeared that the Engineer was in the wrong , and the award finds that the claims ought to have been allowed as extras. On the arrangement for arbitration at the end the contractor executed these extra works, and it is now strenuously contended on behalf of the corporation that although the award is in favour of the contractor, and shows that an order in writing should have been given, the corporation are entitled to defeat the contractor by pleading that there is no order in writing, in my opinion this contention is unfounded. The dispute was whether the item was an extra for which an order in writing should be given, and when the parties agreed that the work should be done and that the question should stand over for arbitration, the effect of the contract is that the finding of the arbitrator is to take the place of the order in writing which ought to have been given, Otherwise, the postponed arbitration would be entirely useless.' (P. 351)

17. The decision in Brodie's case 1919 AC 337 was followed in Neals v. Richardson (1938) 1 All eR 753. That was also a case where under the contract to build a house for the defendant, the plaintiff was to be paid by instalments when a certificate was given by the architect and in case of disputes, the architect was to act as arbitrator. A dispute arose and the arbitrator nominated a person other than himself to act as arbitrator and when it was pointed out to him that the contract provided that he himself should be the arbitrator, he refused to arbitrate or to issue a certificate with regard to the final installment. The plaintiff thereupon sued the defendant for the balance alleged to be due according to him. The defendant took no steps to appoint a new arbitrator or stay the suit, Before the Country Court

Judge It was argued for the defendant that under the contract obtaining a certificate was a condition precedent to payment, The Country Court Judge held that the arbitrator has failed to carry out his duties and a decree was passes. The defendant appealed. The Court of Appeal took the view that the arbitration clause in the contract provided that in all cases of dispute arising out of the contract, the decision of the architect shall be binding on the parties, and held that the arbitration clause was sufficiently wide to empower the Architect as Arbitrator to determine whether a certificate should have been given and since he had refused to act and the defendant had taken no steps to have a new Arbitrator appointed, the Court could assume the powers which the Arbitrator would have and determine whether a certificate should have been given. Referring to Brodie's case, it was observed in the judgment of Slesser L. J., as follows:-

'Here, the question being as to whether or not the final certificate ought to be given, a dispute arose on which, under clause 8, I think the arbitrator had power to determine that the certificate ought to have been given, and, if he had, the legal effect would have been, as their Lordships assumed in Brodie's case, as if it had been so given.

In the present case, it is clear on the facts that the arbitrator under the contract has refused to arbitrate, and the question of the builder's right to remuneration, in the absence of a final certificate, has failed to be determined. Following Brodie's case, an arbitration resulting in favour of the builder for a sum there determined would have enabled him to use for his payment as if a final certificate for that amount has been granted and not wrongfully refused.' (Pp. 757 - 758)

Now, it is not doubt true, as contended by Mr. Ray, that Neale v. Richardson was also a case where the Architect had declined to issue a certificate and the Court, therefore proceeded to determine the right of the builder on the basis of the claim to which he would have been entitled if a final certificate for that amount had been granted by the Architect.

18. Though the two decisions in Brodie's case 1910 AC 337 and Neale v. Richardson (1938) 4 1 All ER 753, arose out of the refusal of the architect, it is instructive to see how these decisions have been construed by the Court of

Appeal in *Prestige & Co. Ltd. V. Brettell* (1938) 4 All ER 349, That was also a case where the architect had refused to issue a certificate to the builders on the ground that he had received a complaint from the building owner with reference to the work. The architect asked the builders to get in touch with the owner. Upon this the builders alleged that a dispute had arisen and claimed that the matter should be referred to an arbitrator under the arbitration clause in the contract. The arbitrator took the view that he was entitled to consider not only the withholding of the certificate, but also the manner in which the work had been done, The Court of Appeal took the view that in view of the decision in *Brodie v Cardiff Corporation*, the arbitrator had power not only to decide as to the issue for a certificate, but also to make an award of the sum due, having regard to the manner in which the work had been done. Slesser L. J., who was a party to the decision in *Neale v. Richardson*, was one of the learned Judges who decided *Prestige & Co's* case. Slesser. L. J., referred to the judgment of Bankes, L. J., in *Brodie v. Cardiff Corporation* in the Court of Appeal and reproduced the following paragraph from Bankes, L.J., judgment:-

'The dispute between the parties which arises under these circumstances appears to me to be a dispute not merely as to whether the engineer was right or wrong in refusing to treat the work as an extra and to give a written order for it, but the dispute includes the question of what the contractor is entitled to be paid for the work so done, assuming that the engineer ought to have given a written order for it.'

Dealing with the scope of the arbitration in the case of a dispute which arose out of the refusal of the arbitrator to issue the necessary certificate, Slesser. L. J., observed as follows, referring to the above-quoted observations of Bankes, L. J.,

'There, as I read Bankes L. J., you have a situation very similar to the one in this case. That is to say, on a very strict and technical interpretation of the reference, it might be said, as was there said, that all that was being asked was whether the failure or refusal to issue the certificate was well founded. Alternatively, it might be said that it was reasonable to imply that the reference included the question whether the full amount for which such certificate might have been issued, or some

lesser sum which the arbitrator thought the contractors were entitled to, should be paid' Now, it may be pointed out that the arbitration clause in Prestige & Co.'s case was very similar to the arbitration clause in the present case. The operative part of Cl. 26, which deals with the powers of the Arbitrator, was as follows;_

'The arbitrator shall have power to open up, review and revise any certificate save in regard to the said matters expressly excepted above, and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid, in the same manner as if not such certificate had been given.' It was while considering such a clause that the Court of Appeal held in Prestige & Co.'s case that the dispute referred to the arbitrator could not be considered as being restricted merely to the issuance or non-issuance of the certificate and that the claim on merits was also referred. Certain observations in the judgment of Greer L. J., are worth noting, Greer L.J., while reading the contract as meaning that as a condition precedent to liability to pay anything from time to time during the progress of the work, there must be, first, a certificate of the architect and that without that certificate, there was no legal liability established by the contract to pay any sum whatsoever observed that he was precluded by authority from giving effect to the view which he would otherwise have taken, but for the authorities. He also observed that he was never was in that case any reference to the arbitrator to decide whether or not there was an amount due from the building owner to the building contractor, Greer L. J., then observed as follows:- 'I cannot read these as being other than decisions that there may be occasions on which the Court may say that, notwithstanding the failure of the claimant to establish that conditions precedent to liability have happened, the Court has power to make an order, in the absence of the performance of these conditions, for payment of money which by the contract, is made dependent upon those conditions.. It is because I am impressed with the effect of the two authorities which the effect of the two authorities which have been cited that I am able to agree with the view which has been expressed by my brethren. I cannot read either Brodie v. Cardiff Corporation or Neale v. Richardson Except as expressing the view that, in the opinion of the House of Lords in Brodie's case and in the opinion of this Court in Neale v. Richardson, an arbitrator to whom a matter is remitted in the form in which it was in this case has the power to dispense with

the conditions precedent, and to order that, notwithstanding the non-performance of those conditions precedent, a liability may be established on which money may be ordered to be paid.'

18-A. The above quoted observations from *Prestige and Co's case* (1938) 4 All ER 345, will, therefore show that where the dispute with regard to the claims of the parties is expressly referred to the arbitrator, then the Arbitrator has the power to dispense with the condition precedent and that non-performance of the condition precedent does not prevent him from determining the claim of the parties on merits. In the light of these observations, the joint submission made by the two parties to the Arbitrator, dated 11th Jan., 1962, becomes extremely relevant. We have already referred to this joint submission by which the parties gave their consent to the opening or reference on Jan., 9, 1962 on all matters referred to him by the Secretary, Ministry of Law. Government of India, vide his Instrument dated Jan., 8, 1962.' The order issued by the Law Secretary on 8th Jan., 1962' is on record and it expressly refers to the claim both as a set-off as well as substantive claim made by the Government of India against the Company in the reference pending before the Arbitrator, and it refers to the consent given by the Contractor 'to the said Shri Bishan Narain opening reference on the claims of the Union of India as contained in its Statement dated the 1st day of June, 1961, in the said reference and adjudicate upon the same both as and substantive claim and as set off against the claims of the Company as contained in its Statement dated the 26th day of April 1961 in the said reference, by this instrument the Secretary to the Ministry of Law Govt, of India, specifically appointed the arbitrator 'for the purpose of reference of the dispute arising out of the claims made by the Union of India as set out in Parts A. C and D of the said Statement filed by the Union of India, dated 1st day of June, 1951,' In view of the Terms of the Reference, therefore, and in view of the Statement of Law in *Prestige and Company's case* it does not appear that there was any legal impediment in the way of the Arbitrator to deal with the claim.

19. Mr. Ray has invited our attention to the decision of the House of Lords in *East Ham Corporation v. Bernard Sunley & Sons Ltd.* 1966 AC 405. The question in that case was to what extent the certificate is conclusive even where the Arbitrator

has the power under the contract to open up, review or revise any certificate. Under the contract for the creation of a school for a local authority, Cl. 24 (f) which dealt with the final certificate to be issued by the Architect, read as follows:-

'.....(f) Upon expiration of the defects liability period (six months from the practical completion of the work) the architect shall issue a final certificate and such final certificate save as regards all defects and insufficiencies in the works or materials which a reasonable examination would not have disclosed, shall be conclusive evidence as to the sufficiency of the works and materials.'

Then clause 27, after providing for arbitration in cases of dispute, stated :-

' the arbitrator shall have power to open up, review or revise any certificate in the same manner as if no such certificate ... had been given.' After the completion of the work and some two years after the architect had given his final certificate, stone panels fixed to the exterior walls fell off owing to defective fixing by the local authority who sought to recover the cost from the contractors in an arbitration pursuant to clause 27 of the contract. The question before the House of Lords was (a) whether the arbitrator had power to reopen the architect's final certificate and (b) if so and liability were established, at what date damages were established, at what date damages were to be assessed. The House of Lords held that clause 24 (g) showed that the final certificate was to be conclusive evidence that the works and materials were in accordance with the contract and, therefore, the architect's final certificate was placed in a special position for a special purpose and, therefore, the wide general words of clause 27 could not be read literally because so to do would deprive clause 24 (f) and (g) of any effect or operation, it was further held that in order to give effect to both clauses, clause 24 must be read as being subject to CL. 24 (1) and (g) and accordingly the final certificate of the architect was conclusive and could not be reopened by the arbitrator save in the exceptional circumstances therein stated.

20. Now, it is difficult for us to see how this case can be of any assistance to the appellant. We have already pointed out that there is no clause which gives finality to any certificate of the Engineers in the contract and the law laid down by the

House of Lords that clause was widely worded, the Arbitrator could not reopen matters in respect of which the certificate was made final, was not relevant for the purpose of the case before us. As a matter of fact, if the converse proposition is spelt out, the position would be that in a case where finality to any certificate is not specifically attached under the contract, the wide power given to the Arbitrator to open up, review or revise any certificate would enable him to consider the entire dispute referred to him and further, in view of the earlier decisions, the absence of any certificate under the contract would not possible to accept the argument of Mr. Ray that when in proposition (a) laid down in Hudson at P. 446 reference to the absence of a certificate was made, that contemplated only a case where the certificate was asked for and declined.

21. We must mention that in support of his contention that a certificate by the Engineer must be treated as a condition precedent, the learned Counsel for the appellant had referred to certain decisions which are clearly distinguishable, They were all decisions where the question was whether, unless there was a certificate in favour of the contractor, the contractor would be entitled to the payment or not,. The earliest in point of time was the decision in Morgan v. Birnie. (1833) 9 Bind 672. That was a case in which an action was brought on a builder's contract under which the defendant was to pay for building upon receiving the architect's certificate that the work was done to his satisfaction. The architect checked the builder's charges and sent them to the defendant. It was held that the certificate did not amount to a certificate of satisfaction as contemplated by the contract so as to enable the builder to sue the defendant, although the defendant had not objected to pay on the ground that no sufficient certificate had been rendered.

22. The second case is Scott v. Corporation of Liverpool (1958) 44 ER 1297, Other cases are Clarke v. Walson (1865) 18 CB 278, Eaglesham v. McMaster (1920) 2 KB 169 and Dunlop v. Hendall. (1957) 1 WLR 1102. In the view which we have taken about the scope of the clause of arbitration and the absence of any clause making any certificate issued by the Engineer conclusive, we do not think it necessary to discuss in detail these authorities.

23-27. XX XX XX XX

28. Appeal dismissed.

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