

P.N. Garg, Engineering and Contractors Vs. State of U.P. and ors.

P.N. Garg, Engineering and Contractors Vs. State of U.P. and ors.

SooperKanoon Citation : sooperkanoon.com/482186

Court : Allahabad

Decided On : Apr-27-2007

Reported in : AIR2007All154; 2007(4)ARBLR50(All)

Judge : H.L. Gokhale, C.J.

Appellant : P.N. Garg, Engineering and Contractors

Respondent : State of U.P. and ors.

Advocate for Pet/Ap. : Mr. K.K. Dubey, Mr. Dubey

Disposition : Petition allowed

Judgement :

ORDER

H.L. Gokhale, C.J.

1. Heard Mr. K.K. Dubey, learned Counsel for the petitioner and Sri. C. S. Singh, learned Additional Chief Standing Counsel, appearing for the respondents/ State of U.P.
2. This arbitration petition seeks appointment of an Arbitrator to decide the claim of the petitioner/contractor.
3. The short facts leading to this appeal are : Sometimes in the year 2002, the petitioner/Company was appointed as a Contractor for part of the work under the

Prime Minister Gramin Sadak Yojana on 24-4-2002. The contracted work was to be completed by 23-1-2003. The petitioner could complete only 25% of the work during that time. He applied for extension on 7-4-2003. His case was that the proper designs were not supplied by the respondents and that it was an area where he was working is affected with dacoits. The respondents started deduction of Rs. 10,000/- per day for not completing the work and ultimately the contract was rescinded on 23-5-2003.

4. The petitioner served a notice on 23-7-2004, raising a claim of about Rs. 55 lacs. This consisted of loss of security unlawfully forfeited, cost of levelling pillars provided but not paid for, idling of labour and machinery, unlawful deduction, loss of profit @ 10% on balance cost of work and also the cost of arbitration, which would become necessary. The respondents did not entertain that request and, therefore, this arbitration petition has been filed for appointment of an Arbitrator by invoking Section 11 of the Arbitration and Conciliation Act, 1996.

5. It so happened that the matter was taken up by the predecessor Chief Justice, who appointed a practicing Advocate of this Court, as an Arbitrator and it appears from the order that the order did not contain any reasons. That order was challenged by the respondents before the Apex Court and the Apex Court, vide its order passed on 12.1.2007 in Civil Appeal No. 184 of 2007, set aside the order and remitted the matter for passing of orders in terms of the agreement after hearing the parties.

6. Mr. Dubey, learned Counsel for the petitioner has drawn my attention to Clause 32(c) of the general conditions of contract/ agreement signed by the parties. This clause reads as follows:

32(c). Except be (sic) where otherwise provided in the contract all questions and disputes relating to the meaning of the specification designs, drawing and instruction hereinbefore mentioned and to the quality of workmanship or materials used on the work or as to any other question, claim, right or rates for extra items sanctioned and decided or not by the competent authority under the condition, of this contract matter or thing what so ever in any way arising out of or relating to the contract, design, drawing specifications, estimates, instructions order on these

conditions or otherwise concerning the work or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person or persons appointed by the Chief Engineer, Public Works Department U.P. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant that he had to deal with the matters to which the contract relates and that in the course of his duties as Government servant he had expressed view on all or any of the matters in dispute or difference. The arbitrator to whom the matter is originally or subsequently referred being incapacitated to act the Chief Engineer shall appoint another person to act arbitrator in accordance with the term of contract. It is also a term of this contract that no person other than person appointed by the Chief Engineer of U.P., P.W.D. as aforesaid shall, if for any reason that is not possible the matter is to be referred to the arbitrator(s) may from time to time with consent of the parties enlarge the time for making and publishing the award. Subject as aforesaid the provision of the ' Arbitration Act, 1940 or any statutory modification or re-enactment thereof and: the rules made thereunder and for the time being enforce shall apply to the arbitration proceedings, under this clause. The sole arbitrator or arbitrators to be appointed by the Chief Engineer shall be of the status given below:

1. For claims of amount in dispute of not over Rs. 5,000/- in the case of work order and in case of contract accepted by an Assistant Engineer/District Engineer/Sub Divisional Officer/Executive Engineer.

An Executive Engineer of U.P.P.W.D.,

2. For claims of amount in dispute of over Rs. 5,000/- but not over Rs. one lakh.

Superintending Engineer, U.P.P.W.D.

3. For claims of amount in dispute aggregating to more than Rs. one lakh but not more than Rs. 3 lakhs.

Dy. Chief Engineer or Additional Chief Engineer, U.P. Government

4. For claims of amount in dispute aggregating to more than Rs. 3 lakhs.

Two Arbitrators one of the rank of Dy. Chief Engineer, U.P.P.W.D./or Addl. Chief Engineer and other Officer of Judicial service appointed by U.P. Government.

All disputes between the parties to the contract arising out of and relating to the construction shall after written notice by either party to the contract to the other party, be referred to arbitration as above. Unless the parties otherwise agree such reference shall not take place until after the completion, alleged completion or abandonment of the work or the determination of the contract. The venue of arbitration shall be such a place or places as may be fixed by an arbitrator(s) in his/their sole discretions any suit or an application for the enforcement of this arbitration clause shall be filed in competent Court at Lucknow and no other Court of any other district of Uttar Pradesh or outside Uttar Pradesh shall have any jurisdiction in the matter. The award of the arbitrator shall be final, conclusive and binding on both the parties to the contract.

7. Mr. C.S. Singh, learned Additional Chief Standing Counsel, appearing for the respondents submitted that such clauses are not read as amounting to provide for Arbitrator. He relied upon two judgments of the Apex Court in this behalf. Firstly, in the case of Executive Engineer, R.E.O. v. Suresh Chandra Panda (dead) through LR's, reported at : (1999)9SCC92 . That was a case where certain disputes were specifically excluded from the purview of arbitration. Therefore, the Apex Court held that such a clause would not be considered as providing for Arbitrator, although a finality was given to the decision of the Superintending Engineer concerned. The relevant clause in that matter reads as follows:

II. The Engineer-in-Chief shall have power to make any alterations or addition to the original specifications, drawings, designs and instructions that may appear to him to be necessary or advisable during the progress of the work, and the contractor shall be bound to carry out the work, in accordance with any instructions which may be given to him in writing signed by the Engineer-in-Chief, and such alteration shall not invalidate the contract and any additional work which the contractor may be directed to do in the manner above specified as part of the work, shall be carried out by the contractor on the same conditions in all respects on which he agreed to do the main work, and at the same rates as are specified in

the tender for the main work.

Provided always that if the contractor shall commence work, incur any expenditure in regard thereof before the rates shall have been determined as lastly herein before mentioned, then and in such case, he shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the date of the determination of the rate as aforesaid according to such rate or rates as shall be fixed by the Engineer-in-Charge. In the event of a dispute, the decision of the Superintending Engineer of the circle will be final.

8. Similar is the judgment in the case of State of Rajasthan etc. etc. v. Nav Bharat Construction Co. reported at : AIR 2005 SC2795 . The judgment in the case of Executive Engineer, R.E.O. v. Suresh Chandra Panda (supra) has been referred with approval in paragraph 6 of that judgment. The Apex Court in terms held in paragraph 12 that the concerned clause was undoubtedly not an arbitration clause. Suffice it to say that the clause concerning in this matter was almost similar to one of Suresh Chandra Panda's case (supra). It is also material to note that in either of the two cases term 'arbitration' was not used.

9. Clause 32 (c) of the general conditions of contract in the present case is quite wide clause. It covers amongst other things whatsoever in any way arising but of or relating to the contract, design, drawing specifications, estimates, instructions order on these conditions or otherwise concerning the work or the execution or failure to execute the work whether arising during the progress of the work or after completion or abandonment thereof. All these disputes have to be referred to the sole Arbitrator of the person or persons appointed by the Chief Engineer, Public Works Department, U.P. This being the position, the clause in any case is different from the matters decided by the Apex Court.

10. Sub-clause (4) of Clause 32(c) of this general conditions of contract provides that where the claim is for an amount of more than Rs. 3 lacs, two Arbitrators are to be appointed, one who is of the rank of the Deputy Chief Engineer, U.P. Public Works Department/or Additional Chief Engineer and the other has to be an Officer of judicial service appointed by the U.P. Government.

11. Both the learned Counsel leave it to the Court to appoint appropriate persons as Arbitrators. They have suggested the name of one Sri. Sunil Chandra Srivastava, a retired District Judge of Uttar Pradesh, presently settled in Allahabad and the learned Additional Chief Standing Counsel has suggested the name of one Sri. Jagdish Prasad, Chief Engineer, Public Works Department.

12. I hereby appoint both of them as joint Arbitrators to go into the disputes raised between the parties and to decide the same.

13. Accordingly, the arbitration petition is allowed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com