

C. Lyall and Co. Vs. Union of India

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Court : Delhi

Decided On : Nov-08-1988

Reported in : ILR1988Delhi352

Judge : Y.K. Sabharwal, J.

Acts : [Arbitration Act, 1940](#) - Sections 30

Appeal No. : Interim Application No. 1045 of 1981 and Suit No. 76-A of 1971

Appellant : C. Lyall and Co.

Respondent : Union of India

Advocate for Pet/Ap. : Vipin Sanghi, Adv

Judgement :

Y. K. Sabharwal, J.

(1) The petitioner (for short 'contractor') executed the work of strengthening of existing runway and construction of Taxi track and Apron at Bakshi-ka-Talab (Lucknow) pursuant to agreement No. 2/EE of 1962-63. As some disputes arose out of the said contract Mr. N. K. Aggarwal, respondent No. 2 was appointed as an arbitrator. The arbitrator made and published his award on 2nd February, 1971 awarding a sum of Rs. 7,12,459.97 to the contractor. The award and proceedings were filed in this Court and respondent No. 1 has filed objections challenging the

award in respect of claims No. 2(i) to (v), 11(a) and (b) and 15 to the extent of Rs. 5,78,624.96 particulars whereof are as under:

Claim No. No. 2(i) No. 2(ii), (iii), (iv) & (v) No. 11 (a) No. 11 (b) No. 15. The amount awarded. Rs. 1,22,626.00 Rs. 21,650.00 Rs. 11,500.00 Rs. 2,32,935.00 Rs. 1,89,913.00 Total: Rs. 5,78,624.96'

(2) On pleadings of the parties, following issues were framed.

1. Whether the objections are within time? If not, is the objector entitled to condensation of delay?

2. Whether there are no disputes or differences between the parties?

3. Had the arbitrator no jurisdiction in the matter?

4. Is the award liable to be set aside for reasons given in the objection petition. If so, with what effect?

5. Is the petitioner debarred from claiming the amounts in dispute?

6. Relief.

(3) I have heard learned counsel for the respondent/objector in support of the objections. None appeared for the contractor. My findings on issues are as under :

FINDINGS:

(4) Issue NO. 1: Issue No. 1 stands answered in favor of the objector by judgment of Division Bench in Fao (OS)-14 of 1973 dated 13th November, 1980 holding that the objectors are entitled to delay being condoned. Issue No. 1 is decided accordingly.

(5) Issues NO. 2 to 5: Issues No. 2 to 5 can be conveniently taken up together. The substance of the objection to the award is that disputes in regard to claims No. 2(i) to (v), 11 (a), 11 (b) and 15 cannot be arbitrated upon under clause 25 of the agreement containing arbitration clause as these disputes are covered by clause 12 which itself provides the machinery for decision of disputes falling under

the said clause whereunder decision of the Superintending Engineer is final. Learned counsel for the objector submits that award in respect of these claims is liable to be set aside as the arbitrator has exercised jurisdiction in respect of the matters outside the reference and that disputes and differences, if any, pertaining to the said claims -fall in the category of 'Excepted matters' and could not be referred to arbitration as the decision of the Superintending Engineer there upon is final. It is submitted that arbitrator exceeded his jurisdiction in proceeding to give his award in respect of the said claims. As the bone of contention depends upon the interpretation of arbitration clause No. 25, it would be appropriate to produce the said clause which reads as under:

EXCEPT where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs drawings and instruction hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instruction, 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 appointed by the Additional Chief Engineer, Central Public Works Department, in charge of the work at the time of dispute or if there be no Additional Chief Engineer, the administrative head of the said Central Public Works Department at the time of such appointment. It will be no objection to any such appointment that the arbitrators 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 views on all or any of the matters in dispute or difference. The Arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, such Additional Chief Engineer or administrative head as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by such Additional Chief Engineer or administrative head of the Central Public Works Department as

aforesaid should act as arbitrator and, if for any reason, that is not possible, the matter is not to be referred to arbitration at all.

(6) The submission of learned counsel is that clause 12 of the agreement provides for complete machinery for decision of disputes in regard to matters relating to rates for the altered, additional or substituted works etc. and in the event of a dispute the decision of the Superintending Engineer of the Circle is final under the said clause. Clause 12 reads as under:-

'THE Engineer shall have power to make any alterations in, omissions from, additions to, or substitution for, 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-Charge, and such alterations. omissions, additions or substitution shall not invalidate the contract, and any altered, additional or substituted 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. The time for completion of the work shall be extended in the proportion that the altered, additional or substituted work bears to the original contract work and the certificate of the Engineer-in-Charge shall be conclusive as to such proportion. The rates for the altered, additional or substituted work shall be worked out in accordance with the following provisions in their respective order :-

1.If the rates for the additional altered or substituted work are specified in the contract for the work, the contractor is bound to carry out the additional. altered or substituted work at the same rates as are specified in the contract for the work.

II.If the rates for the additional, altered or substituted work are not specifically provided in the contract for the work the rate will be derived from the rates for similar class of work as are specified in the contract for the work.

III. If the rates for the altered, additional or substituted work cannot be determined in the manner specified in sub-clause (1) and (II) above, then be contractor shall

within 7 days of the date of receipt of order to carry out the work, inform the engineer-in-charge of the rate which it is his intention to charge for such class of work, supported by analysis of the rate or rates claimed, and the engineer-in-charge shall determine the rate or rates on the basis of prevailing market rates and pay the contractor accordingly.

(7) However, the engineer-in-charge by notice in writing, will be at liberty to cancel his order to carry it out in such manner as he may consider advisable, but, under no circumstances, the contract shall suspend the work on the plea of no settlement of rates of items falling under the clause. In the event of a dispute the decision of the Superintending Engineer of the Circle shall be final.'

Firstly i will take up award in respect of claims No. 2(i) to (v), 11 (a) and 11 (b). Under clause 2(i) to (v) the contractor challenged the reduction made by the objector in rates in various items and claimed refund and also challenged certain deductions made due to the rough surface in runway, inadequate rolling, joints not filled with mortar in French drain and due to inadequate curing on the masonry work. The objectors/Union of India justified the reductions and deductions made by it. The amount awarded is as under :-

Claims Award '2 (1). The claimants submit The claim is partly justified. that recovery of Rs. 1,39,066.38 An amount of Rs. 122.626 on account of alleged oversized (Rs. one hundred & twenty ballast is not acceptable and the two thousand and six amount recoverable on this hundred and twenty-six) be account is only Rs. 183.82. Re. refunded to the claimants. fund of the amount recovered in excess is claimed. 2. (II), (III), (IV) & (V). The The claims are partly justified claimants submit that recovery An amount of Rs. 21,650 for so-called brought finish of (Rs. Twenty-one thousand & concrete, inadequate during etc. six hundred and fifty) be is not justified and refund of the refunded to the claimants.' amount of Rs. 38,392.06 recovered on this ground is claimed.

(8) It does not appear from the aforesaid that claims 2(1) to (V) relate to extra items of work as contended on behalf of the objector. It cannot be said from the reading of the aforesaid claims that they fall under clause 12 of the agreement. Even in their counter statement, no objection was taken by the objector that these

claims fall under clause 12 and are not arbitraable, although such an objection was taken in regard to claim No. 15. It is not possible to accept the contention of the objector that the petitioner is debarred from claiming the amounts in respect of these claims or that the arbitrator had no jurisdiction to decide these claims. There is no error apparent on the face of the award nor is there any misconduct justifying setting aside of the award in regard to these claims. The next challenge is to award in respect of claims No. 11 (a) and 11(b). The claim and the award in respect of these claims read as under :

Claims Award 11 (a) It is stated that a quantity of 574,728 c.ft. earth-work was executed under agreement item (Rs. eleven thousand and No. 1 or 2 which carries a rate five hundred) to be paid to the claimants at Rs.70 per % of ft., and it is claimed in addition to not just to treat it as extra item amounts already paid to of work as no such orders were given. Payment made at Rs. 40.15 is, therefore, not acceptable and payment of the balance amount Rs. 17,156 is claimed. **11(b)** It is stated that a total quantity of 1.50.000 e. ft. of concrete was done for (Rupees two hundred and which the correct rate payable is thirty-two thousand and nine Rs. 595.73 % c. ft., but payment has been made for 16.397 paise ninety-six only) to be paid c.ft. at Rs. 547.07 % c.ft. and no payment has been made for the respondents in addition to the balance quantity. Thus, an additional payment of Rs. 813,370 is claimed. This claim includes claim for refund of Rs. 14,639 recovered on account of rejection of a slab.

(9) Perusal of the statement of claim in regard to aforesaid two items shows that there was dispute between the parties as to whether work in respect of these claims was an extra item or not. The case of the contractor was that earth-work paid under item No. 48/37 which was alleged to be an extra item. was not an extra item as it was covered by items 1 or 2 of the agreement. On the other hand, the Union of India was claiming it to be an extra item. Undoubtedly if it was not an extra item, it could be arbitrated upon. It is not for this Court to sit over the judgment of the arbitrator as a Court of appeal.

(10) In M/s Bindra Builders vs. Delhi Development Authority Air 195 Delhi-370(1), the facts were that a claim could be arbitrated upon if it was a case of substitution and if it was one of 'reduction', the arbitrator was to be bound by the decision of the Chief Project Engineer. A learned Single Judge left it for the arbitrator to decide and said that 'if he and that the case was of substitution, he would naturally adjudicate upon the same. If, however, he comes to the view that the case is one of reduction, then to that extent he will be bound by the decision of the Chief Project Engineer in terms of clause 25 B.'

(11) Learned Judge observed that 'the case was not one of the determining the jurisdiction of the arbitrator, but that of interpreting the terms & conditions of the contract in the context of the facts ascertained.' In case in hand it cannot be said that claims 11 (a) and (b) are extra items covered by clause 12 and in any case, it cannot be said that there is any error apparent on the face of the award or there is any misconduct justifying setting aside of the award in respect of these items. The arbitrator did not treat it as extra items of work. It is also not apparent from the award that the contractor was stopped from claiming the amount under these items. The objection to this part of the award also fails.

(12) This takes me to the last item of challenge, namely, claim No. 15 which reads as under :

Claim Award 15. The claimants submit that The claim is partly justified. for certain extra items of work. An amount of Rs. 189,913 payment has been made at less (Rs. one hundred and eighty rates and for certain items, no mini thousand and nine payment has been made as per hundred and thirteen) be details given in the statement 'C', paid to the claimants by the part I & li of the statement of respondents in addition to quantities, etc. filed by the clay payments already made. claimants. An additional amount of Rs. 981,411.10 is claimed for full quantity at correct rate?.

(13) The claim petition filed before the arbitrator also shows that claim under this item was under clause 12 of the agreement. It has been stated in the statement of claim that, 'the rates of the extra items have not been determined as per the terms of the contract as under the terms of the contract clause 12 of the agreement we

had to inform the rate of the extra items within 7 days of the receipt of the order to carry out the work and we did accordingly in our various letters which are mentioned below along with the analysis, so these rates are not acceptable to us and should be revised as demanded in our letter as referred below in each item.'

(14) Clause 12 expressly states that the decision of the Superintending Engineer with regard to the aforesaid matters, in the event of a dispute, shall be final. Clause 25 containing arbitration clause starts with the words 'except where otherwise provided in the contract'. The machinery to determine disputes having been expressly provided for under clause 12 excludes the operation of the arbitration clause in relation to disputes covered under clause 12. Specific objection was taken by the objector/ Union of India before the arbitrator that the rate for extra items have been derived strictly in accordance with the provisions contained in clause 12 of the agreement and as per clause 12 of the agreement if any dispute arises regarding the rates for any altered, additional or substituted item of work the decisions of the Superintending Engineer for rates is final, and hence this dispute is beyond the purview of the arbitration. On such an objection being taken the arbitrator determined the disputes subject, however, to the plea of want of jurisdiction of the arbitrator raised by the respondents in the counter statement of facts and it has been so specifically recorded in the recital of the award. Clauses similar to clause Nos: 12 and 15 came up for consideration before a Division Bench of Madhya Pradesh in re : The Chief Administrator, Dandakaranya Project, Koraput, Orissa and another vs . M/s. Prabartak Commercial Corporation-Ltd. : AIR 1975 MP152 , The Division Bench on the construction of the said clauses came to the conclusion that the matters left to the decision of the Superintending Engineer were not subject to review despite the arbitration clause and observed :

ON the proper construction of the contract, the matters left to the decision of the Superintending Engineer under Clause 13A, were not subject to review, despite the arbitration clause. Clause 14.' The matters left by the contract to the decision or determination of the Superintending Engineer were expressly excepted from the arbitration clause. The reference of the alleged dispute, when there was none, to the arbitrator under Section 20 of the Arbitration Act, was, therefore, clearly

invalid. Consequently, the entire proceedings before the arbitrator, including the resultant awards and the preliminary decree based thereon, were null and void.

(15) Clause 12 is similar to clause 13A and clause 15 is similar to clause 14 which came up for consideration before the Madhya Pradesh High Court. I am in complete agreement with the view expressed in M/s. Prabartak Commercial Corporation Ltd. case (supra). This case was also cited with the approval in a Division Bench judgment of this Court in case of M/s. Jagan Nath Phool Chand vs. Union of India and others (1981) 30 Del L T 280 holding that the jurisdiction of an arbitrator to hear and decide the disputes springs from and circumscribed by the agreement of arbitration itself and he cannot assume jurisdiction which does not vest in him, there under. It is clear that the dilutes in respect of claim No. 15 could be arbitrated upon in view of combined reading of clauses 12 and 15 and as such are outside the jurisdiction of the arbitrator. In view of above, my answer to issues No. 2 to 5 is as under :

(16) Issue NO. 2 : Disputes or differences in respect of claim No. 15 are not covered by arbitration clause.

(17) Issue No. 3 : The arbitrator had jurisdiction to decide all claims except claim No. 15.

(18) Issue No. 4 :The award is liable to be set aside only in regard to claim No. 15.

(19) A Issue No. 5 The contractor is not debarred there claiming the amount in dispute except the amount under claim No. 15.

(20) Issue No. 6 : Relief : For the reasons above mentioned, award dated 2nd February, 1971 in respect of claim No. 15 amounting to Rs. 1,89,913 is set aside. The award in respect of all other claims is made a rule of the Court and decree is passed in terms thereof. Parties are left to bear their own costs.