M/S. Ambica Construction vs Union Of India on 20 November, 2006

Equivalent citations: AIRONLINE 2006 SC 210

Author: Altamas Kabir

Bench: Ar. Lakshmanan, Altamas Kabir

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           CASE NO.:
Appeal (civil)  5093 of 2006

PETITIONER:
M/s. Ambica Construction

RESPONDENT:
Union of India

DATE OF JUDGMENT: 20/11/2006

BENCH:
Dr. AR. Lakshmanan & Altamas Kabir

JUDGMENT:
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J U D G M E N T (Arising out of SLP) No.2753/2005) WITH CIVIL APPEAL NO. 5097 OF 2006 (Arising out of SLP) No.19237 of 2005) M/s.Ambica Construction ... Appellant Versus Union of India ... Respondent ALTAMAS KABIR, J.

Delay condoned in S.L.P.(c) No.19237/2005.

Leave granted in both the Special Leave Petitions which have been taken up together for disposal, since SLP (c) No.19237 of 2005 is directed against the main judgment and Order dated 16th March, 2004, passed by the Calcutta High Court allowing the appeal of the Union of India and SLP (C) No.2753 of 2005 arises out of the order dated 23rd September, 2004 passed by the said High Court on a Review Petition in respect of the main judgment.

Pursuant to a Tender Notice, issued by the respondent for certain new works, additions, alterations, repair and maintenance works in the Mancheswar Complex, the appellant submitted its tender on 2nd September, 1992. The appellant's tender was duly accepted by a letter dated 14th September, 1992 with the stipulation that the work was to be completed in all respects by 30th June, 1993. It was also indicated that the work orders were to be issued within 7 days from the date of receipt of the acceptance letter. A formal contract was executed between the parties on 4th March, 1993 and the said agreement provided that the General Conditions of Contract and Standard Specifications of the South Eastern Railways shall be applicable to the contract. Clause 63 of the General Conditions

of Contract provides for settlement of disputes by Arbitration.

As would appear from the materials on record, the appellant herein was unable to complete the work within the stipulated time frame and accordingly it applied for extension of time by three months upto 30th September, 1993. It is the appellant's case that since it was not informed about the decision on the said application, the appellant suffered huge losses on account of idle labour and surplus staff. It appears that ultimately the appellant's request was turned down and certain deductions were made from the Running Bills submitted by the appellant and in fact payment was not even made for the works already done by the appellant. According to the appellant, the respondent refused to refund even the appellant's security deposit unless the appellant submitted a No-Claim Certificate in terms of Clause 43(2) of the General Conditions of Contract. Having no other alternative and having incurred huge losses on account of idle labour and surplus staff and the establishment expenses, the appellant submitted a No Claim Certificate in order to at least get refund of its security deposit.

By a letter dated 17th January, 1996, the appellant called upon the respondent to make payment of a sum of Rs.8,73,168/- and Rs.1,31,642/- which, according to the appellant, was due from the respondent to the appellant under the contract, failing which the respondent was requested to appoint an Arbitrator for adjudication of the disputes which had arisen between the parties. In view of the failure of the respondent either to pay the dues, as demanded, or to appoint an Arbitrator, the appellant filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter called "the 1996 Act") before the Calcutta High Court for reference of its claims in terms of its letter dated 17th January, 1996 to arbitration and for appointment of an Arbitrator. No reply was filed by the respondent to the said application but during the pendency thereof, the respondent refunded to the appellant, the security deposit of Rs.79,000/-. The same was received by the appellant under protest.

As no objection was taken by the respondent to the appellant's application under Section 11 of the 1996 Act or with regard to the submission of the No Claim Certificate by the appellant at the time of receiving the security deposit, the learned Single Judge of the Calcutta High Court, by his order dated 20th February, 1998, directed the matter to be placed before Hon'ble the Chief Justice for naming an Arbitrator for adjudication of the disputes. On 12th March, 1998, the Chief Justice appointed one Shri Subrata Bagchi as Sole Arbitrator to go into the disputes between the parties. The Arbitrator came to a finding that the No Claim Certificate had been signed by the appellant under duress and coercion but disallowed the various claims of the appellant amounting to Rs.10 lakhs. However, the Arbitrator awarded a sum of Rs.1,03,000/- as costs to the appellant.

Both parties were aggrieved by the aforesaid Award and filed separate applications for setting aside the same. Ultimately, by consent of parties, the learned Single Judge of the Calcutta High Court by his order dated 31st January, 2000 set aside the Award made by Shri Subrata Bagchi and by consent appointed Shri G.C Law, Counsel appearing for the Union of India in the case, as Sole Arbitrator. On 25th May, 2001, Shri Law published his Award allowing the claims made by the appellant. The said Award was challenged by the respondent herein- Union of India under Section 34 of the 1996 Act, being A.P. No.193 of 2001, before the learned Single Judge of the Calcutta High Court. On behalf of

the Union of India it was urged that the Arbitrator had not considered the General Conditions of Contract and in particular Rules 43(2) and 16(2) thereof. The learned Single Judge appears to have been of the view that by participating in the proceedings under Section 11 of the 1996 Act and no objection having been made to the appointment of an Arbitrator despite the submission of a No Claim Certificate by the appellant, the Award did not warrant any interference. According to the learned Single Judge the matters had been adjudicated upon by the Arbitrator and since the court was not sitting in appeal over the Award, it could not enter into the reasonableness of the reasons given by the Arbitrator. The learned Single Judge dismissed the application for setting aside the Award with the aforesaid observations. The matter was taken in appeal by the Union of India in APO No.212 of 2004 under Section 37 of the 1996 Act. Taking note of the No Claim Certificate, submitted by the appellant, in the light of Clause 43(2) of the General Conditions of Contract, the Division Bench came to a finding that apart from a mere statement, there was no proof of the allegation that the appellant herein had been compelled to sign such a certificate under coercion or duress. The Division Bench observed that no such finding had been arrived at by the Arbitrator. On such finding, the Division Bench allowed the appeal and also the application under Section 34 of the 1996 Act. Consequently, the impugned order of the learned Single Judge and the Award passed by the learned Arbitrator were both set aside.

As indicated hereinbefore, SLP (C) No.19237 of 2005 is directed against the said judgment and order of the Division Bench of the Calcutta High Court.

The Union of India filed a Review Petition, being GA No.1265 of 2005, for review of the aforesaid judgment dated 16th March, 2004 but the same was also dismissed on 23rd September, 2004. SLP (C) No.2753 of 2005 is directed against the order passed on the Review Petition.

Appearing in support of the two appeals, Mr.Raj Kumar Mehta, Advocate, urged that the Division Bench of the Calcutta High Court had been persuaded to allow the appeal filed by the Union of India on the sole ground that by furnishing the No Claim Certificate the appellant herein was no longer entitled to raise any claim having regard to Clause 43(2) of the General Conditions of Contract. Mr.Mehta also submitted that the Division Bench had wrongly held that there was no proof in support of the allegations that such No Objection Certificate had been furnished by the appellant under coercion and duress. It was urged that there were sufficient materials on record to indicate that the authorities of the respondent were bent upon denying the appellant its just dues, and, on the other hand, they had deducted certain amounts which were due and payable on account of Running Bills submitted by the appellant. It was also submitted that a case had been made out before the learned Arbitrator as also the learned Single Judge that the appellant had been compelled by circumstances to submit the No Objection Certificate without which no payment even of lawful dues are made by the Railways. It was sought to be urged that it is common practice for discharge receipts to be given before any payment is made and the appellant had, under compelling circumstances, merely followed such practice in order to recover even its security deposit which was not being paid to it.

Mr.Mehta also urged that wrong reliance had been placed by the Division Bench on the decision of this Court in the case of P.K. Ramaiah and Co. vs. Chairman & MD, National Thermal Power Corpn.,

[1994 Supp (3) SCC 126]. According to Mr.Mehta the Division Bench should have, on the other hand, taken into consideration the age old maxim Necessitas non habet legem which means that necessity knows no law. According to Mr.Mehta it was out of necessity, namely, to recover its security deposit, that a No Claim Certificate had been submitted by the appellant and the same ought not to be held as a bar against the appellant for raising claims in respect of its lawful duties.

In support of the aforesaid submissions, Mr.Mehta referred to and relied upon the decision of this Court in Chairman and MD, NTPC Ltd. vs. Reshmi Constructions, Builders & Contractors [2004 (2) SCC 663] wherein the aforesaid maxim had been explained and applied to a similar situation where a question had arisen for decision as to whether an arbitration clause in a contract agreement continues to survive despite the purported satisfaction thereof. This Court while adverting to various decisions on the subject, including the decision in P.K. Ramaiah's case (supra), came to the conclusion that notwithstanding the submission of a No Demand Certificate, the arbitration agreement continued to subsist because of the several reasons indicated in the judgment. Having regard to the views expressed in the aforesaid judgment, Mr.Mehta submitted that the Division Bench of the Calcutta High Court had erred in relying solely on Clause 43(2) of the General Conditions of Contract and the No Claim Certificate submitted by the appellant in arriving at a conclusion that no further dispute existed for determination in arbitration and the judgment and orders under appeal were liable to be set aside.

Mr.Doabia, learned Senior Advocate, appearing for the Union of India, supported the judgment of the Division Bench of the Calcutta High Court with particular reference to Clause 43(2) of the General Conditions of Contract. He reiterated the findings of the Division Bench to the effect that having submitted a No Claims Certificate, the appellant was precluded from raising any further claims and the learned Arbitrator had committed a gross error in allowing such claim notwithstanding the prohibition contained in the said clause. Since we are called upon to consider the efficacy of Clause 43(2) of the General Conditions of Contract with reference to the subject matter of the present appeals, the same is set out hereinbelow:

> "43(2) Signing of "No claim" Certificate. The Contractor shall not be entitled to make any claim whatsoever against the Railways under or by virtue of or arising out of this contract, nor shall the Railways entertain or consider any such claim, if made by the contractor, after he shall have signed a "No Claim" certificate in favour of the Railways, in such form as shall be required by the Railways, after the works are finally measured up. The contractor shall be debarred from disputing the correctness of the items covered by "No Claim Certificate" or demanding a reference to arbitration in respect thereof."

A glance at the said clause will immediately indicate that a No Claim Certificate is required to be submitted by a contractor once the works are finally measured up. In the instant case the work was yet to be completed and there is nothing to indicate that the works, as undertaken by the contractor, had been finally measured and on the basis of the same a No Objection Certificate had been issued by the appellant. On the other hand, even the first Arbitrator, who had been appointed, had come to a finding that No Claim Certificate had been given under coercion and duress. It is the Division

Bench of the Calcutta High Court which, for the first time, came to a conclusion that such No Claim Certificate had not been submitted under coercion and duress. From the submissions made on behalf of the respective parties and in particular from the submissions made on behalf of the appellant, it is apparent that unless a discharge certificate is given in advance, payment of bills are generally delayed. Although, Clause 43(2) has been included in the General Conditions of Contract, the same is meant to be a safeguard as against frivolous claims after final measurement. Having regard to the decision in the case of Reshmi Constructions's (supra), it can no longer be said that such a clause in the contract would be an absolute bar to a contractor raising claims which are genuine, even after the submission of such No Claim Certificate.

We are convinced from the materials on record that in the instant case the appellant also has a genuine claim which was considered in great detail by the Arbitrator who was none other than the counsel of the respondent-Railways. In such circumstances we are inclined to hold that notwithstanding Clause 43(2) of the General Conditions of Contract and the submission of a No Claim Certificate by the appellant, the appellant was entitled to claim a reference under the contract and the Division Bench of the Calcutta High Court was wrong in holding otherwise.

The appeals are accordingly allowed. The impugned judgments in the two appeals are both set aside. There will, however, be no order as to costs.