Gannon Dunkerley And Co. Ltd.

Vs

Union of India (from patna)

Civil Appeal Nos. 2584 and 2585 of 1966

(J.C. Shah, K.S. Hegde JJ)

28.10.1969

JUDGMENT

SHAH, J. -

1. The Government of India invited tenders for "reinforced concerets work relating to the foundation and super-structure of the Fertilizer Factory building at Sindri" in the State of Bihar. The tender submitted by the appellant Company was accepted on November 22, 1947 and a formal contract in that behalf was executed on November 26, 1948. By Clause 12 of the contract, in so far as it is relevant, it was provided :

> "The Engineer-in-charge shall have power to make any alterations in, omissions from, additions to, or substitutions for, the original specifications, drawings, designs and instructions, X X X, and the contractor shall be bound to carry out the work in accordance with any instructions which may be given to him X X X : 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, and at the same rates as are specified in that tender for the main work. X X X And if the altered, additional or substituted work includes any class of work, for which no rate is specified in this contract, then such class of work shall be carried out at the rates entered in the current schedule of rates of the Hazaribagh P.W.D. district which was in force at the time of the acceptance of the contract minus/plus the percentage which the total tendered amount bears to the estimated cost of the entire work put to tender, and if the altered, additional or substituted work is not entered in the said schedule of rates, then the contractor shall within seven days of the date of his receipt of the 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, and if the Engineer-in charge does not agree to this rate he shall, by notice in writing, be at liberty to cancel his order to carry out such class of work, X X X provided X X that if the contractor shall commence work or incur any expenditure in regard thereto before the rates shall have been determined X X X then X X he shall only be entitled to be paid in respect of the work carried out or expenditure incurred X X X according to such 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 shall be final."

Clause 25 of the agreement provided, in so far as it is relevent :

"Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings, and instructions, 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, instructions, orders, or these conditions, or otherwise concerning the works, 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 a Superintending Engineer x x x to be nominated by the Chief Engineer for arbitration in the manner provided by law relating to arbitration X X X X."

2. The Sindri Factory Buildings were to be constructed under the advice and guidance of M/s. Chemical Construction Corporation of New York. That Firm made delay in supplying the drawings and specifications which involved work of a complicated nature not included in the original contract. Time for completion of the work was on that account extended till February 26, 1950.

3. On September 20, 1950 the appellant Company made a demand for payment of an enhanced rate of 42 1/2% over the basic rates stipulated under the original contract. This claim was made on five grounds :

1. that there was a "substantial deviation" in the nature of work of which the detailed work drawings were supplied to the appellant Company after the date of the contract. The work involved was of a complex nature requiring highly skilled labour, and that additional labour and materials not covered by the contract rates were required;

2. that there was "great increase in the price of materials and labour on account of undue prolongation of the period of work";

3. that there was increase in the cost of transportation on account of rise in the price of petrol and increase in railway freight;

4. that the Government of India entered into other contracts incidental to the construction of the Sindri Factory at substantially higher rates which directly affected the cost of labour and materials of the appellant Company who had to compete with the other contractors;

5. that additional work ordered to be done involved in many instances quantity of work several times the work set out in the contract.

4. By his letter dated September 13, 1950, the Additional Chief Engineer rejected the claim. In September 1954 the disputes relating to the claim for rise in cost of material and labonr due to delay in supplying detailed work drawings, the claim arising from rise in price of petrol and for increase in the cost of material and labour due to other contractors working on the site, were referred to arbitration, but not the claims for revision of rates due to complex nature of the work and increase in the quantity of work. The arbitrator rejected the claims of the Company in respect of the matters which were referred.

5. Thereafter the appellant Company filed a suit on August 9, 1956, against the Union of India, for a decree for Rs. 3,62, 674/9/6 being the amount claimed at the rate of 42 1/2%, above the contract rate, in the alternative, a decree for Rs. 2,44,000/- being the amount claimed at the rate of 28.1 % above the contract rate as recommended by the Executive Engineer, and in the further alternative, a

decree for Rs. 1,36,222/- at the rate of 18.17 % above the contract rate as certified by the Superintending Engineer. The Union of India contended, inter alia, that the claim was barred by the law of limitation.

6. The Trial Court held that the claim was not barred by the law of limitation and decreed the claim for Rs. 1,36,222/- as certified by the Superintending Engineer. Against the decree passed by the Trial Court the appellant Company as well as the Union of India appealed to the High Court.

7. Before the High Court, in support of the appeal only the plea of limitation was pressed on behalf of the Union of India. In the view of the High Court the claim was governed either by Article 56 or by Article 115 of the First Schedule to the Limitation Act, 1908, and the suit not having been filed within three years of the date on which the work was done and in any event of, the date on which the claim was rejected was barred. The appellant Company has appealed to this Court with certificate.

8. The appellant Company had undertaken under the terms of the contract to do specific construction work at "basic rates". The Engineer-in-charge was by the terms of Clause 12 of the agreement competent to give instructions for work not covered by the terms of the contract, and it was provided that remuneration shall be paid at the rate fixed by the Engineer-in-charge for such additional work, and in case of dispute the decision of the Superintending Engineer shall be final. It is common ground that the claim made by the appellant Company was not covered by the arbitration agreement, and on that account it was not referred to the arbitrator. The claim in suit related to the revision of rates due to the complex nature of the work and due to increase in the quantity of work and also grant of contracts to other competing parties at substantially higher rates and other related matters.

9. Article 56 of the First Schedule to the Indian Limitation Act, 1908, prescribes a period of three years for a suit for the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment, and the period of limitation commences to run from the date when the work is done. A suit is governed by Article 56 if it arises out of a contract to pay the price, of work done at the request of the defendant. The claim in the present case is for payment at an additional rate over the stipulated rate in view of change in circumstances, and not for price of work done by the appellant Company. It is true that additional work was done at the request of the Engineer-in-charge, but the claim in suit was not for the price of work done but for enhanced rates in view of altered circumstances.

10. Article 115 of the First Schedule to the Limitation Act is a residuary article dealing with the claim for compensation for the breach of any contract, express or implied, not in writing registered and not specially provided for, in the First Schedule. The period of limitation in such cases is three years and it commences to run when the contract is broken, or where there are successive breaches when the breach in respect of which the suit is instituted occurs, or where the breach is continuing when it ceases. The suit filed by the appellant Company is not a suit for compensation for breach of contract express or implied; it is a suit for enhanced rate because of change of circumstances and in respect of work not covered by the contract. The additional work directed by the Engineer-in-charge when carried out may be deemed to be done under the terms of the contract; but the claim for enhanced rates does not arise out of the contract, it is in any case not a claim for compensation for breach of contract.

11. The claim is therefore, not covered by any specific article under the First Schedule, and must

fall within the terms of Article 120. The Solicitor-General appearing on behalf of the Union of India contended that even if the claim falls within the terms of Article 120 of the Limitation Act, it was barred, for, the appellant Company had in the suit made a claim for work done more than six years before the institution of the suit. Counsel submitted that under Article 120 the period of limitation commences to run from the date on which the defendant obtains the benefit of the work done by the plaintiff. But under Article 120 of the Limitation Act the period of six years for suits for which no period of limitation is provided elsewhere in the Schedule commences to run when the right to sue accrues. In our judgment, there is no right to sue until there is an accrual of the right asserted in the suit, and its infringement, or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted : Bolo v. Kokan and Other (LR 57 IA 325 at p. 331).

12. The appeals are allowed and the decree passed by the Trial Court is restored with costs in the High Court and in this Court. One hearing fee. The appellant will be entitled to interest on the amount decreed at the rate of 6 % per annum from the date of the suit till payment.

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