

SUPREME COURT OF INDIA

Executive Engineer, R.E.O.

Vs.

Suresh Chandra Panda (Dead)

(S V Manohar and R Lahoti JJ.)

12.01.1999

ORDER

SUJATA V. MANOHAR, J.

I. The only contention which has been raised in this appeal relates to Claims 2, 3 and 6 decided by the arbitrator in arbitration under Clause 23 of the agreement between the parties. According to the Appellants, these claims are covered by Clause 11 of the agreement and are not arbitrable. The agreement between the parties pertained to construction of a stepped fall of a channel of Arikul MI Project in the District of Mayurbhanj. Relevant parts of Clauses 11 and 23 of the agreement provide 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-Charge, 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.

23. Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before 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, drawing, specifications, estimates, instructions, orders or 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 a Superintending Engineer of the State Public Works Department unconnected with the work at any stage nominated by the Chief Engineer concerned. If there be no such Superintending Engineer, it should be referred to the sole arbitration of Chief Engineer concerned. It will be no objection to any such appointment that the arbitrator so appointed is a government servant. The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to this Contract.

2. The disputes which arose between the parties were referred to arbitration. The arbitrator gave his award on 25-6-1980. A decree in terms of this award was passed by the Court after rejecting the objections raised by the Appellants. This decision has been confirmed by the High Court in appeal.

3. The present appeal of the Appellant is confined to three claims which have been allowed by the arbitrator, namely, Claims 2, 3 and 6 raised by the contractor-Respondent. The Appellant throughout contended that these three claims were covered by the finality clause being Clause 11 of the contract and hence were not arbitrable under Clause 23 of the contract. This contention has been negated by the Sub-Judge as well as by the High Court relying upon a decision of the High Court of Orissa at Cuttack in *State of Orissa v. G.C. Kanungo* (1979) SCC 48 Cut LT 505.

4. Under Clause 11 of the contract, there is an elaborate provision dealing with the power of the Engineer-in Charge to make any alterations or additions to the original specifications, drawings, designs and instructions. It, inter alia, provides that if for such alterations or additions no rate is specified in the contract, then the rates which are entered in the sanctioned schedule of rates of the locality during the period when the work is being carried out, would be paid. However, if this class of work, not provided for in the sanctioned schedule of rates then the contractor has the right, in the manner specified in that clause, to inform the Engineer-in-Charge of the rate at which he intends to carry out that work. If the Engineer-in-Charge does not agree to this rate he is given the liberty to cancel his order and arrange to carry out such class of work in such manner as he may consider advisable. The clause further provides that if the contractor commences such additional work or incurs any expenditure in respect of it before the rate are determined as specified in that clause, then the rate or rates shall be as fixed by the Engineer-in-Charge. In the event of a dispute, the decision of the Superintendent Engineer of the circle will be final. Under Clause 23, except as otherwise provided in the contract, all disputes are arbitrable as set out in that clause. The finality of rates, therefore, under Clause 11 is a provision to the contrary in the contract which is excluded from Clause 23.

6. This Court in the case of *Prabartak Commercial Corporation Ltd. v. Chief Administrator Dandakaranya Project* considered the interrelationship between two similar clauses in a construction contract. The Court was considering an appeal from the Madhya Pradesh High Court. The two clauses which this Court was required to consider are set out in the decision of the Madhya Pradesh

High Court which is reported in Chief Administrator, Dandakaranya Project v. Prabartak Commercial Corporation Ltd. 1975 AIR MP 152. In that case also, Clause 14 which was the arbitration clause contained the following words "except as otherwise provided in the contract" all disputes would be referred to arbitration as set out therein. Clause 13-A of the same agreement was similar to Clause 11 in the present case. The Engineer-in-Chief was to determine the rate for any additional work. The decision of the Superintending Engineer was final in the event of a dispute.

7. This Court upheld the decision of the Madhya Pradesh High Court to the effect that when an arbitration clause specifically excluded from its purview disputes which were covered by Clause 13-A, these disputes would not be within the ambit of the arbitration clause. The awards, therefore, in that case were without jurisdiction and were void. The ratio of this case applies directly to the present case also. The arbitration award, therefore, insofar as it decides Claims 2, 3 and 6 is set aside. The appeal is accordingly allowed and the impugned award and decree is modified to the above extent.