SUPREME COURT OF INDIA

Larsen & Toubro Ltd.

Vs.

Mohan Lal Harbans Lal Bhayana

C.A.No.7586 of2009

(A.K.Sikri and Surinder Singh Nijjar,JJ.)

25.2.2014

JUDGMENT

A.K.Sikri.J.

1. On an application preferred by the respondent herein under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act), the High Court has appointed/nominated an Arbitrator on behalf of the appellant herein on the ground that in spite of notice by the respondent in this behalf, the appellant had failed to nominate its Arbitrator in terms of Clause 25 of the Agreement entered into between the parties. Since the respondent had already nominated its Arbitrator, further direction is given that the two Arbitrators (one nominated by respondent and one appointed by the Court for the appellant), shall appoint an Umpire in consonance with the said Clause 25. This order is impugned by the appellant primarily on the ground that Clause 25 was modified by three supplementary agreements whereby the entire edifice of the said arbitration clause stood adhered and on a conjoint reading of original Clause 25 with modification effected by the supplementary agreements, there was no question of arbitration between the appellant and the respondent at this stage. To appreciate this contention, one will have to traverse through the relevant clauses of the main contract as well as supplementary agreements. Thus, we would like to state along with the events, as they occurred, in chorology. In fact, as we proceed to unfurl the events with our comments thereon, there and then we shall be getting answer as well to the issue involved.

2. An agreement dated 29.2.1988 was entered into between the Standing Conference of Public Enterprises (SCOPE) and the appellant namely Larsen & Toubro (L&T Ltd.). This agreement was for construction of Twin Tower Office Complex at Laxmi Nagar District Centre, Delhi which was awarded by the SCOPE to the appellant. Original contract value for this work was stipulated at Rs.27.48 Crores. Works comprised of the Civil Works and also subsidiary works, that could be ordered from time to time by SCOPE/Architect. This agreement also permitted the appellant to sub-contract. Accordingly, the appellant entered

into an agreement dated
3.3.1988 with the respondent. While retaining the civil works with itself, the appellant awarded finishing works including brickworks, wood works, flooring, furnishing, aluminum works and other miscellaneous works including waterproofing etc. to the respondent. It was a pass through contract on a back to back basis. The value of sub contract was stated as Rs.12.08 crores. Clause 2 of this agreement dated 3.3.1988 pertains to the payments which were to be made by the appellant to the respondent. As can be seen from the reading of this Clause, as reproduced below, amount under this sub contract was payable to the respondent by the appellant only on receipt of corresponding receipts from SCOPE:

> "Clause 2 - L&T shall pay "MHB" the said contract amount or such other sum as shall become payable only as and when the said payments are received by "L&T" from SCOPE at the time and inhe manner hereinafter specified in the terms and conditions of this Contract."

3. Another important stipulation in this sub contract was Clause 6, as per which the respondent was to perform the work awarded to it to the satisfaction of SCOPE, namely the Principal. It reads as under:

> ^"Clause 6 - All obligations in respect of ancillary works undertaken by MHB shall be performed by MHB itself and will not jeopardize the interest and contract of L&T with SCOPE. Satisfaction of SCOPE, their representatives and Architects shall form the basis of this agreement."

4. Clause 25 of the agreement between the appellant and the respondent provides for arbitration for settlement of disputes. Relevant part of this Clause reads as under:

> "Clause 25 - Except where otherwise provided in the contract, all questions, disputes, certificates excluding "excepted matters" relating to this contract shall be referred to a Sole Arbitrator in case claims are upto and including Rs.10 lakhs to be appointed by the General Manager (Civil), L&T and for claiming over Rs.10 lakhs by panel of 3 Arbitrators of who one will be appointed by General Manager (Civil), L&T the other by BHR and an umpire appointed in advance jointly by the two Arbitrators..No award of the arbitration/umpire shal be binding on L&T unless MHB had furnished complete opportunity to L&T to file a similar claim on SCOPE and only upon L&T receiving any payment from SCOPE under the award which L&T may get in its favour on the subject matter of work."

5. The position which prevailed up to this stage was that for the works undertaken by the respondent, it could receive the payments only when such payments were made by SCOPE to the appellant. Further, all questions and disputes between the appellant and the respondent were to be referred to a sole arbitrator where the claim was up to Rs.10 lakhs and three arbitrators for claims beyond 10 lakhs. The arbitrator(s) was not supposed to deal with "excepted matters", so stated in the certificates. However, even if the award of the

arbitrator/umpire was in favour of the respondent, respondent could not receive payment under the said award unless such a payment was received by the appellant from SCOPE under the award. In that event, the respondent was to provide an opportunity to the appellant to raise those claims with SCOPE. On receiving the payments from SCOPE either under the arbitration award between SCOPE and the appellant or otherwise, the appellant was supposed to honour the award passed in favour of the respondent. In essence, the parties understood that as the Principal/Employer was SCOPE, for whom the work was to be performed by virtue of main agreement dated 29.2.1988 entered into between parties and the sub contract between the appellant and respondent was on back to back basis, any work done by the respondent was for the benefit of SCOPE and ultimately liability for honoring the claims of the respondents was that of SCOPE and the appellant was not supposed to make any payment from its coffers.

6. The parties even acted on the basis of aforesaid understanding initially. There were certain claims of the respondent and the appellant in turn raised those claims with SCOPE. A settlement was reached between the appellant and SCOPE with respect to those claims whereby the appellant was given a sum of Rs.2.15 crores by SCOPE. The appellant and the respondent entered into an agreement dated 31.1.1990 for apportioning the aforesaid amount, whereby a sum of RS.77.40 lacs was paid to the respondent towards full and final settlement of claims/ price escalation on works due to hindrance caused in execution of work and to complete the balance work. At the same time, another important understanding was also reached between the parties. While making this apportionment, the modalities of settling the disputes between the parties through arbitrator also underwent a significant change. This is clear from Clause (viii) of the first supplementary agreement which reads as under:

> "The Agreement provides that all disputes between the parties shall be settled through arbitration. It is now expressly agreed that any dispute or difference which MHB might have with L&T under the agreement or SCOPE might have with L&T under the main contract between then relating to the part of work that is to be executed by MHB, shall be deemed disputes jointly between MHB and L&T and SCOPE under the main contract and L&T will refer all such disputes to SCOPE for settlement by negotiation. If SCOPE does not settle the same by negotiation, then L&T will refer the said disputes for arbitration with SCOPE a/on with any other disputes which L&T might have with SCOPE in terms of the arbitration clause provided in the main contract. MHB shall in such an event, help prepare claims and statement of case relating to their scope of work and render all assistance and cooperation as may be required in successfully pursuing arbitration. MHB shall bear proportionately cost of arbitration relating to their scope of work. The award of the arbitration on all such matters in dispute claims and counter claims relating to the MHB's scope of works shall be binding on both MHB and L&T and all such disputes between MHB and L&T shall be deemed to have been settled accordingly and shall not be referable to arbitration again between MHB and L&T under the agreement."

7. This clause acknowledges the fact that for the work done by the respondent under the

sub contract, there could be two kinds of situations. There could be a situation where there would be disputes and differences between the appellant and the respondent for the works done by the respondent. This could be regarding the workmanship or the amounts payable for the work done etc. There could also be a situation where SCOPE is not satisfied with the workmanship or may raise dispute about the quantum of bills etc. resulting into denial of payment or short payment to the appellant for the work undertaken by the respondent under the sub contract. The Clause (viii) in the first supplementary agreement provided that such disputes will be deemed to have been raised jointly between the respondent and appellant on the one side and SCOPE on the other side. For this reason, this Clause further provided that appellant was to refer such disputes to SCOPE for settlement by negotiation failing which arbitration (as per mechanism provided in the Clause between the appellant and SCOPE). In order to lodge these claims suitably and properly, the respondent was supposed to assist and cooperate the appellant. Such an assistance was expected in successfully pursuing arbitration as well. Reason for such a collaborative effort, with synergy between the two parties synergize, was too obvious. Since the respondent has undertaken the work, its inputs could immensely help the appellant in prosecuting the claims efficaciously and potently. Further, by participating the respondent would have satisfaction that its interest is appropriately taken care of. It was even supposed to bear proportionate cost of arbitration. It was, thus, clear intention that the claims of the respondent were to be taken up by the appellant and raise with SCOPE and in the event SCOPE disputing those claims, get those claims adjudicated through arbitration. In that sense, both the appellant and respondent were on one side as co-claimants. However, since the respondent is not a party to the main agreement dated 29.9.1988 which is entered into between the appellant and SCOPE, the respondent was supposed to give the assistance and cooperate in the manner provided in this Clause. It is for this reason that this Clause unambiguously further provided that in view of the arbitration between the appellant and SCOPE, pertaining to the claims of the respondent as well, even if the disputes between the appellant and the respondent were deemed to have been settled and were not referable to arbitration again between these two parties.

8. On reading Clause 25 in the original agreement pertaining to the process of arbitration along with the modified mechanism agreed to between the parties in the aforesaid first supplementary agreement, the parties for making the change is clearly discernable. As per the original clause, the disputes between the appellant and the respondent were to be referred to the arbitral tribunal. After the rendition of award by the arbitral tribunal, money was still not payable under the award to the respondent. Instead, in order to recover those moneys from SCOPE, it was for the appellant to file a similar claim on SCOPE and on receiving the payment from SCOPE under the award, the appellant was to give the money to the respondent as per the award between the appellant and the respondent. It amounted to indulging in double exercise, viz. (1) an arbitration between the parties herein and thereafter another arbitration relating to subject matter between the appellant and SCOPE. (2) In order to rationalize and eliminate the dual exercise, the parties agreed that instead of resorting to arbitration between themselves, both would join together and prefer those claims with SCOPE. This modified process of arbitration, as envisaged in the first supplementary agreement, was much more rationale which appealed to reason.

9. The next event which took place cemented the aforesaid mechanism between the parties. It appears that there were further claims of the respondent which were raised by the appellant with SCOPE. SCOPE agreed to make payments and to apportion those payments between the appellant and the respondent, these two parties entered into another supplementary agreement dated 8.12.1993. The recital to this agreement is of paramount importance for our purposes. It records:

> "L&T has, therefore, invoked the arbitration clause under L&T's contract with SCOPE and referred all the claims including those relating to MHB on 29.5.1992 to arbitration, which is now pending."

10. The parties acted as per modified understanding. It was further agreed whatever claims are received by the appellant from the SCOPE, they shall be shared between the appellant and respondent in the ratio of 67:33. The understanding between the parties that for any claims of the respondent, both the parties were to join together and raise claims against SCOPE was reinforced by Clause 6 in the said agreement which again provided an underlined message that in so far as the appellant and the respondent are concerned, they shall not resort to any arbitration between themselves on this account. For better appreciation, we reproduce Clause 6 herein below, of the second supplementary agreement, dated 8.12.1993:

> "That L&T and MHB shall not undertake any other arbitration as between them in respect of the claims referred to pending arbitration, except to share the proceeds or liabilities as stated above by way of accord and satisfaction."

11. In the aforesaid arbitration, two Member Arbitral Tribunal awarded a sum of Rs.15.02 crores approximately (which was subsequently reduced to Rs.13.23 crores by mutual negotiation) and as per the second supplementary agreement, that amount was shared between the appellant and the respondent whereby appellant paid a sum of Rs.4.58 crores to the respondent. So much so, when the amount of Rs.15.02 crores, as awarded by the Arbitral Tribunal against SCOPE and in favour of the appellant was reduced to 13.23 crores, this arrangement was endoresed by the respondent as well by entering into third supplementary agreement dated 6.2.1995. The significance of this agreement, for the purpose
of present case, is Clauses 5 and 16 thereof. Therefore, we reproduce hereinunder both these Clauses:

> "Clause 5 - Any claim arising after the date covered by the said award, shall as far as possible settled mutually by negotiation. It is mutually agreed by the parties that any such disputes, shall be identified but shall not be referred to arbitration on the owner (SCOPE herein) until the completion of the project. This would facilitate concentration of the concerted efforts of the parties for timely completion of the project. The reference of disputes, if any, to arbitration after completion of the project shall be in accordance with the terms of first supplementary agreement dated

31.01.1990. Any further arbitration if referred to the owner after completion of the work, the Award arising out of this arbitration shall be share in promotion of the claims referred to the works of each of the parties herein. Clause 16 - The parties further agrees amend and modify clause 25 of the General Conditions of Contract dated 3.3.1988 which deals with settlement of Disputes by Arbitration to the limited extent that in the event of any fresh reference of disputes to arbitration, the Arbitrator or arbitrators as the case may be shall be bound to give speaking award. This Clause 25 is subject to the terms of the first supplementary agreement dated 31.01.1990 which modified the agreement dated 03.03.1988."

12. Following aspects emerge from the reading of these two Clauses:

"(a) The parties herein agreed to settle the claims between themselves through negotiations, in the first instance.

(b) Even if there were disputes between the appellant and the respondent they were only to be identified but could not be referred to arbitration with SCOPE until completion of the project.

(c) Even on the completion of the project, the mechanism of raising the disputes had to remain the same as was agreed to earlier in the first supplementary agreement dated 31.1.1990 viz. appellant had to raise the claims with SCOPE in cooperation with the respondent and there was not to be any inter-se arbitration between these parties.

(d) Clause 25 as contained in the original agreement dated 3.3.1988 between the appellant and the respondent pertaining to the arbitration was specifically made subject to the logistic provided in the first supplementary agreement
dated 31.1.1990 making it abundantly clear that Clause 25 stood modified by the supplementary agreement."

13. Some further claims, out of the aforesaid contract arose and the appellant submitted those claims to SCOPE in October, 2000 which were up to date in November 2000. These were made jointly by these parties on SCOPE in August 2001. They were up dated again in December 2002 and January 2003 in concert with each other.

14. Now the stage came which led to present proceedings. While the things stood at the aforesaid level, the respondent decided to close the contract sometime in the year 2002. We are not required to go into the nitty gritty of this event viz. as to whether the respondent abandoned the site or it had completed the project. Suffice it is to note that the respondent raised many claims with the appellant and also served legal notice dated 31.1.2004 in this behalf. It nominated its arbitrator and called upon the respondent to appoint its arbitrator for settling the disputes between them. The appellant replied by denying the contents of the legal notice. This denial of the appellant prompted the respondent to file the application under

Section 11 of the Act seeking a direction to the appellant to appoint its arbitrator. The exact prayer made in this application was as under:

> "(a) Appoint an Arbitrator on behalf of the Respondent in terms of Clause 25 of the Contract Agreement dated 3rd of March 1988 between the parties as modified by Supplementary Agreement dated 31st January 1990 and 6th February 1995.
> (b) Direct the Arbitrators appointed by the applicant and that appoint on behalf of the respondent to appoint an umpire in terms of Clause 25 of the Contract Agreement dated 3 rd March, 1988."

15. It is in this application, as mentioned above, impugned orders are passed by the High Court holding that Clause 25 still survived and the arbitral tribunal can be constituted for adjudication of the disputes between the appellant and the respondent. The High Court has further held that though the respondent had nominated its arbitrator, since the appellant had failed to do so in spite of notice, the appellant lost its right to nominate its own arbitrator. For this reason, it is the High Court which has appointed/nominated an arbitrator for the appellant with direction that two arbitrators may appoint presiding arbitrator.

16. While narrating the aforesaid events, we have also commented on the effects of the three supplementary agreements and impact thereof on Clause 25. It is too obvious, from the reading of the relevant clause in the supplementary agreements, that there could not have been any arbitration between the appellant and respondent, at this stage. Clause 25 of the original agreement has undergone material change. The modalities of raising arbitration are completely novated. As per the modified understanding between the parties, which is so eloquently recorded in writing, in the first instance, the claims of the respondent are to be taken up by the appellant with SCOPE. For pressing those claims and in order to ensure their proper adjudication, the respondent is supposed to assist and cooperate with the appellant in pursuing the arbitration. In that sense, at this stage, the appellant and respondent are on one side who have to put up a joint fight with SCOPE. It is only after the award is rendered in the arbitration between the appellant and SCOPE and something remains, which may qualify as a dispute between the appellant and the respondent, that there can be an arbitration in respect of those disputes between these two parties. We are, therefore, of the opinion that the High Court is not correct in holding that Clause 25 of the original agreement in unamended form holds the field. In fact, even the respondent knew fully well that said clause had been drastically altered by supplementary agreements. It is for this reason that in the prayer (a) of the application under Section 11 of the Act filed by the respondent, it has itself acknowledged this change by mentioning that arbitrator be appointed in terms of Clause 25 of the contract agreement dated 3rd March 1988 "as modified by supplementary agreements dated 31st January 1990 and 6th February 1995". What, however, is lost sight of by the respondent in the process, is that the modification in Clause 25 did not permit the respondent to move this kind of application for appointment of arbitrator between the parties, at that stage.

17. Fully realizing the sequittor of the modified clause, Ms. Priya Kumar, learned Advocate appearing for the respondent tried to paint a different story alleging

non-cooperation of the appellant. She was vociferous in her submission in depicting blameworthy conduct of the appellant in not raising the claims preferred by the respondent, with SCOPE and submitted that such a conduct of the appellant was reprehensible which could not make the respondent wait for indefinite period. She highlighted the fact that though the works were completed in the year 2002, when even the constructed complex was inaugurated and the respondent had preferred the claims with the appellant with request to take up those claims with SCOPE way back in October, 2002. But nothing has moved forward. She further submitted that till date even the arbitral tribunal has not been constituted and the respondent can not be made to suffer by waiting endlessly.

18. This argument may be convincing in so far as equities are concerned. However, merely thereby the legal position which is contractually defined between the parties by way of written agreements does not alter. It would be necessary to record here that when the High Court had passed the impugned orders, the claim had not been made with SCOPE. That may be one of the reasons for the High Court to pass the impugned order. However, the said position has undergone substantial change thereafter. Even after the filing of the Special Leave Petition against the impugned order and grant of leave in the matter, in November 2009, there have been joint meetings of the appellant and the respondent with the officials of SCOPE. Few such meetings took place in April 2012. Pursuant to those meetings, SCOPE had called upon the appellant to complete the residual work rectification so that SCOPE was in a position to settle the final bills, Thereafter in June 2012, after detailed discussion on various issues concerning the project, SCOPE asked the appellant to submit revised final bill. Accordingly, bill dated 16th June, 2012 was prepared by the appellant in consultation with the representatives of the respondent and submitted to SCOPE.

19. After the submission of the revised final bill, SCOPE has been in the process of scrutinizing the same including the claims. In this regard, several round of meetings held with SCOPE. Many of these meetings with SCOPE which were held after the submission of the revised final bill were attended by the representative of the respondent along with the appellant. In December 2013, again SCOPE called upon the appellant to hold a meeting to discuss on the pending issues.
Meanwhile the appellant L&T has been continuing to extend the Bank Guarantee which was submitted to SCOPE.

20. In such a scenario, when the final bill is almost at the stage of finalization the only aspect that can be taken care of at this stage is to hasten the process of arbitration, in case after the passing of the final bill by SCOPE, some claims of the respondent still survive.

21. Accordingly while allowing this appeal and setting aside the order of the High Court, we would like to give the following directions, in order to balance the equities:

> "(1) It shall be ensured by the appellant that final bill is settled by SCOPE within two months from the date of receiving the copy of this order. For this purpose, this order

shall be brought to the notice of SCOPE as well so that SCOPE acts swiftly for settling the bill.

(2) In case there are certain claims of the respondent which are not agreed to while passing the final bill and disputes remain, those will be taken up by the appellant with SCOPE immediately thereafter by invoking arbitration between the appellant and SCOPE as per the arbitration agreement between the appellant and SCOPE. In raising such disputes the appellant and the respondent shall act in unison as per the understanding arrived at between them vide supplementary agreements. In that event, arbitral tribunal shall be constituted within 2 months thereof.

(3) In case the appellant is satisfied with the final bill and chooses not to raise the claims with SCOPE but the respondent feels that their claims are legitimate then it would be treated as dispute between the appellant and the respondent. In that event, arbitral tribunal shall be constituted as per Clause 25 of the agreement dated 3.3.1998 between the parties within a period of two months of that event.

(4) In either of the aforesaid arbitrations, the arbitral tribunal shall endeavour to render its award within six months from the date of the constitution of the arbitral tribunal. "

22. The appeal is allowed and disposed of in the aforesaid terms.