
(1961) 03 CAL CK 0033
In the Calcutta High Court
Case No : Special Suit No. 5 of 1958

M.L. Dalmiya and Co.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 22-03-1961

Acts Referred:

Limitation Act, 1908 — Article 115, 120

Citation : AIR 1963 Cal 277

Hon'ble Judges : P.C. Mallick, J

Bench : Single Bench

Advocate : Subimal Roy, A.C. Bhabra and Bachawat, for the Appellant; Arun Mukherjee, for the Respondent

Judgement

P.C. Mallick, J.—A special case has been stated by the arbitrator in the above arbitration proceedings for the opinion of the Court on a question of law. The question of law referred is whether certain claims made by M. L. Dalmiya and Co., the claimant in the above proceedings against the Government is barred by limitation.

2. The contractor's claims arise out of three contracts evidenced by the three tenders all of 1943 and duly accepted by the Government. The terms and conditions are usual as in Government Contracts in standard form. Reference to the terms will have to be made later. The contractor from time to time submitted running bills which were paid after certain deductions and recoveries were made. The running bills were submitted and payments were made in 1943, 1944 and 1946. Though the works under the contracts were actually completed as far back as September 15, 1943, no completion certificate was given to the contractor signifying that the works should be deemed to have been completed. The final bill appears to have been passed by the Government on February 18, 1949, but no intimation was given to the contractor of the passing of the final bill till April 28, 1954, when the Executive Engineer intimated to the contractor by letter of even date the Government's decision in answer to the contractor's claim

submitted on May 9, 1952.

3. In September 1954, the contractor applied for arbitration under the arbitration clause in the different contracts and there was a reference.

4. The contractor's claims may be stated as under:

I. Contract No. AV II/101 of 1943-44 dated 31st July, 1943. These are recoveries made from the contractor's running bill.

Item 1. Recovery of Bamboo rafters amounting to Rs. 4583/5/-.

Item 2. Recovery of cement amounting to Rs. 11,642/8/-.

The contractor's case is that the price of 2101 tons 17 cwts. of cement have been recovered from the running bills under different vouchers of 1943, when in fact only 1869 tons of cement was issued to the contractor. Thus there has been an excess recovery of Rs. 11,642/8/- being the price of 232 tons 17 cwts. of cement not supplied but charged for. The claim on account of bamboo rafters is on the ground that the Government made deductions from the different bills alleging that lesser size bamboo rafters than specified were used in all the buildings having thatched roofs. The contractor by a letter dated January 27, 1945, protested against such deductions. The amount of such deductions come to Rs. 4583/5/-. These are the two items of disputed claim on the running bills under the above contract.

Other claims are amounts disallowed in the final bills on various accounts.

II. Contract No. AV II/100 of 1943-44 dated 31st July, 1943. There are two items of dispute. Of these, one is for Rs. 437/12/- of account of recovery of bamboo rafters from the running bills. The deduction has been made on the same ground as above from the running bills. The other dispute being the difference in the recovery rates of bricks and storage charges. According to the statement of claim this claim has been abandoned and withdrawn by the contractor.

III. Contract No. AV II/7 of 1942-43 dated 30th April 1943. The contractor has claimed payment of Rs. 2840/- in the final bill being the price of 355 gallons of mobil oil supplied at the rate of Rs. 8/- per gallon. There is one claim for refund of Rs. 168/- being the cost of 24 tins of kerosene oil recovered from his third running bill paid on 19-10-43. Another item of claim is for extra works alleged to have been done by the contractor. For this work no measurement appears to have been effected.

5-9. The contracts are in standard form and are subject to certain conditions. These conditions are important and have a bearing on the question of limitation that requires adjudication. The clauses to which reference was made by learned counsel in argument have to be noticed.

10. Clause 1 provides for furnishing of security deposit. The tenders are accepted subject to furnishing of security deposit. The clause provides that all claims of

the Government for compensation is liable to be realised from the security deposit. Clause 2 provides that the contractor will be liable to pay compensation for delay in execution of works. Clause 3 sets out the circumstances under which the whole of the security deposit may be forfeited. Under Clause 6 the contractor is to be furnished with a certificate after completion of works. No such certificate shall be given nor the works shall be considered to be complete till removal of scaffolding and clearing of materials is effected by the contractor and actual measurement by the Engineer-in-charge is complete. In default of the contractor removing the scaffolding and surplus materials etc., as aforesaid, the Engineer-in-charge will do it at the contractor's expense. Clause 7 provides for the payment of running bills for works done on the basis of intermediate certificate issued by the Engineer-in-charge. Such intermediate payments shall be regarded as payments by way of advance against the final payment and not as payments for work actually done and completed, and shall not preclude the requiring of bad, unsound and imperfect or unskilful work to be removed and taken away and reconstructed or re-erected or be considered as an admission of the due performance of the contract or any part thereof in any respect or the accruing of any claim nor shall it conclude determine or affect in any way the power of the Engineer-in-charge under these conditions or any of them as to the final settlement and adjustment of the accounts or otherwise or in any other way vary or affect the contract. The final bill shall be submitted by the contractor within one month of the date fixed for completion of the work otherwise the Engineer-in-charge's certificate of the measurement and of the total amount payable for the work accordingly shall be final and binding on all parties. Clause 10 provides for stores being supplied by the Government which shall be used by the contractor for the purpose of the contract only. The value of the materials so supplied may be set off or deducted from any sum due to the contractor or from his security deposit. Clause 14: The contractor will be liable to pay compensation for bad workmanship on his failure to rectify the same.

11. Clause 17: The contractor is liable for damages done or imperfections for three months after the certificate. The damages can be recovered from the security deposit or the sale proceeds thereof. The security deposit of the contractor shall not be refunded before the expiry of three months (six months in the case of road work) after the issue of the certificate final or otherwise of completion of work. Clause 18A: If the Government is compelled to pay compensation to a workman employed by the contractor, the Government will be entitled to recover it from the contractor by deducting from the security deposit or from any sum due by the Government to the contractor.

12. The claim in the instant case arises out of and is based on contracts subsisting between the parties on the three acceptance of Tenders noted above. Article 115 of the Limitation Act governs every claim for compensation for breach of contract not in writing registered and not specially provided for in the Limitation Act. The claim of the contractor in the instant case is to recover a specified sum of money on three contracts not registered and is therefore a claim

for compensation for breach of contract within the meaning of Article 115 of the Indian Limitation Act. (See *Nobokumar v. Siroo Mullick* ILR 6 Cal 94; *Husain Ali Khan v. Hafiz Ali Khan* ILR 3 All 600 (FB); *Mahomed Ghasita v. Sirajuddin* AIR 1922 Lah 198 (FB)). In my judgment Article 115 of the Limitation Act and not Article 120 will govern the instant case.

13. The next point for consideration is the starting point of limitation in the case of contracts having peculiarities as noted above. This is the most important point that is to be decided in this case. The starting point of limitation under Article 115 is the date of breach which constitutes the cause of action for the claim. For the purpose of determining the starting point of limitation, it would be convenient to classify the claims into following categories:

I. Deductions made from running bills.

(a) on account of price of goods not supplied at all.

(b) on the ground that the size of the bamboo supplied by the contractor is less than billed for.

II. Claims made in the final bill on different accounts.

III. Claims made on account of "extra works" done.

14. Let us first consider the claims on account of deductions or recoveries made from the running bills on account of price of goods not supplied at all. It is contended by Mr. Arun Mukherjee, learned counsel appearing for the Union of India, that the starting point of limitation is from the date of such recoveries and as such the claims of the contractor in respect to such illegal recoveries from the running bills in the instant case are time-barred. The recoveries were made in 1943, 1944 and 1946. If in law time begins to run from the date of such illegal recoveries from the running bills, then clearly the claims are time-barred. Mr. Subimal Roy, learned counsel appearing for the contractor, however, contended that having regard to the terms and conditions of the instant contract, the dates on which deductions have been made in the running bills cannot be considered to be the dates from which time will run. His argument is that the interim payments on intermediate certificates of works done and embodied in the running bills are payments by way of advances. These payments do not conclude, determine or affect in any way the power of the Engineer-in-charge to effect a final settlement and adjustment of accounts. Further, it is clearly provided that the price of stores supplied by the Government may be set off or deducted from any sum due or to become due to the contractor or may be recovered out of the security deposit even. Again, the surplus stores are liable to be returned to the Government. Mr. Subimal Roy, therefore, submitted that having regard to all these clauses, it must be held that the deductions made in the running bills along with the other items in the running bills are liable to be reopened and reconsidered at the time of the final payment. The starting point of limitation, therefore, would not be from the dates of the respective deductions in the running bills. There is no finality in the

interim payments and all disputes relating to the running bills and every item therein are liable to be raised at the time of final adjustment of claim made in the final bill.

15. It is important to note that these intermediate payments on running bills are not "ex gratia" payments, but payments which the Government is bound to make and the contractor has the right to receive, in terms of Clause (7) of the contract. If a certificate is given by the Engineer-in-charge of completion of a part of works and running bill is submitted by the contractor on the basis of such intermediate certificate, then the amount becomes due and payable and the Government is bound under Clause (7) to pay the running bill, even though the certificate and the payment made thereunder might be reopened at the time of adjustment of the final bill. The non-payment of a running bill on the basis of an intermediate certificate will amount in law to a breach of contract on the part of the Government, giving rise to a cause of action to the contractor to recover the same in appropriate proceedings. The contractor has got another right to be paid after the final bill is made on the completion of works. If any payment is made on a running bill, such sum will be deducted from the final bill as being an advance payment on account of the final bill. If one or more of the running bills submitted by the contractor has or have not been paid and the cause of action for the realisation of the same has become time-barred due to the passage of time, nevertheless, the contractor will be entitled to recover the same as a part of the final bill. Failure to pay the final bill constitutes a new cause of action and the starting point of limitation (or payment will arise from the date of default in the payment of the final bill. Thus, it is clear that even if the cause of action to enforce payment of intermediate or running bills is barred by lapse of time, the payment of the same can, nevertheless, be enforced as a part of the payment of the final bill. The cause of action for the recovery of the intermediate bill and of the final bill are different and the starting points of limitation are on different dates. Every item of claim for works done or materials supplied by the contractor must appear both in the running bills and in the final bill. If one item of claims is not allowed in the running bill, it may not be recovered after the statutory period as a part of the running bill. The claim for the same amount in the final bill will however not be defeated on the ground that it was included in the running bill and has now become time-barred. I am not considering now the merits of the claim. The claim might not be upheld on a construction of the terms and conditions of the contract or on facts or otherwise. All that I am saying is that the claim, if made in the final bill, cannot be defeated on the ground that it was included in a previous running bill which is now time-barred.

16. But when deduction is made from the running bill of the price of materials not supplied at all, the question becomes different. It is not now a question of contractor's claim for works done and materials supplied for which an intermediate certificate is provided in the contract, giving cause of action to the contractor to get intermediate payment under the contract. But it is a claim of the Government for payment of goods, which under the contract the Government

is entitled to set off from any amount due and payable to the contractor. This has nothing to do with the quantum of work done by the contractor or materials supplied by the contractor every month for which under the contract the contractor is entitled to receive intermediate payments on intermediate certificate furnished by the Engineer-in-charge. The important point to note is that it is not a contractor's claim for works done and materials supplied, but a claim of the Government. The Government is given the right under the contract to recover this amount from any amount due and payable to the contractor, whether under the running or final bill or even from the security deposit (vide Clause 10 of the terms and conditions). It is not necessary for me to decide in this case at what point of time the set off can be made when Government stores were actually supplied to the contractor. Is it at the time when the stores were actually supplied or is it after the completion of the works when the contractor is required to return back the surplus stores? In such cases, the conditions as to refund of the surplus may have a bearing in determining the point of limitation. In the instant case, however, the contractor claims that the stores have not been supplied at all. In a case where the stores have not been supplied at all and the Government has, nevertheless, made a deduction from the contractor's running bill, a breach is committed by the Government in making a wrongful claim and illegal set off immediately giving rise to a cause of action to the contractor to get the sum so deducted. Whether the running bill for the works done by the contractor is by way of advance or whether the items not allowed in the intermediate certificate can, nevertheless, be included in the final bill, is an irrelevant consideration, so far as this point is concerned. The contractor's cause of action arises when deduction is made of a wrongful claim by way of set off of any amount due and payable to the contractor under the contract. That is the date of the breach and time begins to run from that point of time. It follows that while the claim of the contractor for recovery of the price of cement is barred by limitation, the claim on account of bamboo rafter is not barred if the claim of the contractor on account of the final bill is not barred by limitation yet.

17. Coming now to the claim of the contractor made in the final bill and rejected by the Government, it is to be noted that in the instant case no certificate of completion has been given to the contractor signifying that the works must be deemed to have been completed. The final bill appears to have been passed on February 18, 1949 and the final bill does not contain the contractors signature. It is prepared by the Government and passed by the Government without any reference to the contractor. The contractor submitted his claim on May 9, 1952 and only on April 28, 1954 the contractor was informed that his bill for works done has been passed on February 18, 1949. By implication all claim in the contractor's bill of May 9, 1952, in excess of what is sanctioned by the Government in the bill dated February 18 1949, must be deemed to have been rejected. On these facts, the question to be considered is--from what date limitation began to run. Is it from February 18, 1949, or May 9, 1952 or April 28, 1954?

18. Clause (7) of the contract provides that the final bill shall be submitted by the contractor within one month of the date fixed for completion of works, otherwise the Engineer-in-charge's certificate of measurement and of the total amount payable for the works accordingly shall be final and binding on all parties. Clause (6) provides that a final certificate of completion of works shall be furnished to the contractor. Government will be entitled to withhold certificate till the contractor removes certain materials and scaffolding and does some cleaning up operation. In default of the contractor's removing the materials and doing the clearing up operation, the Government will be entitled to do it itself and the contractor is liable to pay the expenses incurred by the Government. It follows that in cases where the contractor fails to remove materials and scaffolding etc. and to do clearing up operation, the penalty is that the contractor will not be entitled to a certificate of completion and without such certificate the contractor is not entitled to submit his bill for payment. In such cases, I apprehend, it is the duty of the Government, after doing the work departmentally, to give the contractor a certificate of completion. Till such certificate is given, the contractor cannot submit his bill and get payment and the cause of action for payment, in terms of the contract, does not arise. Looked at from this point of view, in the matter of presentation and determination of the contractor's claim, there are reciprocal obligations on either party. In such cases where there are reciprocal obligations for submitting or scrutinising of bills before payment can be received, the cause of action for payment does not arise on the completion of works and time cannot run till the cause of action accrues. (See *District Board Vs. Baijnath Prasad*,). Till the certificate of completion is given to the contractor, no claim for payment can be made by the contractor, even after the completion of works. In the instant case, no such certificate having been given, no claim could be made on the basis of the final bill and the question of time running against the contractor's claim for final bill cannot, therefore, arise on that basis. The Government, however, prepared a final bill in 1949, which indicated what claim the Government is prepared to recognise and pay. This final bill has been prepared by the Government without reference to the contractor. If the final bill does not include all sums payable to the contractor under the contract, the Government would be guilty of breach of contract when the Government intimates to the contractor the amounts allowed in the final bill. Till intimation to the contractor of the Government's decision, there is no breach. In the instant case, the Government did not intimate its decision till April 28, 1954 and time cannot, therefore, run before that date. Reference of the dispute to arbitration having been made shortly thereafter, well within 3 years from that date, the amount claimed in the final bill is well within time and is not barred by limitation.

19. There is a claim for extra works, which is alleged to be outside the contract. Even though it is outside the contract, the contractor may, nevertheless, be entitled to be paid for the works done and materials supplied, on the basis of quantum meruit. The time in such event runs from the date of the works done when the claim for payment arises. If, however, it is held that the claim for extra

works can be included in the final bill to be submitted under the contract, the claim would not be time-barred, as indicated above. Otherwise, I apprehend, it will.

20. The records along with this opinion are directed to be sent back to the arbitrator forthwith. Costs costs in the arbitration proceedings.