

(2009) 09 GUJ CK 0025

In the Gujarat High Court

Case No : Letters Patent Appeal No. 6 of 1997 in Spl. Civil Application No. 821 of 1995 and Civil Application No. 9197 of 2009

State of Gujarat and Another

APPELLANT

Vs

Narmada Cement Co. Ltd.

RESPONDENT

Date of Decision : 16-09-2009

Acts Referred:

Contract Act, 1872 — Clause 18

Citation : (2010) 1 GLH 133 : (2010) 51 GLR 553

Hon'ble Judges : K.S. Radhakrishnan, C.J.; Akil Kureshi, J

Bench : Division Bench

Advocate : Monali Bhatt, A.G.P. Nos. 1 and 2, for the Appellant; Manish R. Bhatt and Mauna M. Bhatt, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Radhakrishnan, C.J.—The question that has come up for our consideration in this case is whether Clause 26 of the Tender Agreement No. D-3 of 1990-1991 would enable the State Government to appropriate any sum of money due and payable to the contractor by way of set off against any claim of the Government arising out of any other contracts with that contractor.

2. Petitioner-Company is engaged in the manufacture of cement. Respondent No. 2-Executive Engineer, Irrigation Mechanical Division No. 3 invited tender for the supply of ordinary portland cement and possolone portland cement to the extent of 1,00,000 M.T. as per tender notice No. 4 of 1990-1991. In response to the tender notice, petitioner submitted its tender which was accepted and an agreement in Form-D was entered into between the petitioner and the respondent No. 2. Petitioner supplied 40,621-75 M.T. cement under the contract costing Rs. 6,76,27,702-31, against which, the respondent made payment of Rs. 6,52,38,900-80. Amount of Rs. 23,88,801-49 was due and payable to the contractor, but was withheld by the respondent No. 2 alleging that the said amount had to be adjusted towards other claims against the contractor.

Aggrieved by the same, petitioner has approached this Court.

3. Learned Single Judge, on facts as well as on law, come to the conclusion that Clause 26 of the Tender Conditions would not empower the respondent authority to withhold and set off those accounts in respect of other claims pertaining to the other contracts. Direction was given to the respondent-Authority to release amount of Rs. 18,68,508-56 with interest at the rate of 18%. Aggrieved by the order, the State has preferred this Letters Patent Appeal.

4. Learned Assistant Government Pleader Ms. Monali Bhatt appearing for the appellant has submitted that the learned single Judge has committed an error in interpreting Clause 26 of the Tender agreement. Learned A.G.P. submitted that heading of Clause 26 says "set-off of money" and "not set off of money due and payable". Learned A.G.P. submitted that such a Clause has been incorporated in public interest, so that there will be certainty in satisfying the claim of the State. She drew a parallel referring to Clause 18 of the Standard Contract pertaining to the Central Government Works. Reference was also made to the judgments of the Apex Court in the case of Union of India (UOI) Vs. Raman Iron Foundry, and H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others, and submitted that the principle laid down by the Apex Court in above-mentioned decisions while interpreting Clause 18 would apply to Clause 26 of the Tender Conditions.

5. Learned Senior Counsel Mr. Manish R. Bhatt appearing for the respondent-Company submitted that there is no illegality in the view expressed by the learned Single Judge and referred to the judgment of the Apex Court in the case of Lakshmichand and Balchand Vs. State of Andhra Pradesh, Learned Senior Counsel further submitted that if Clause 26 is interpreted as stated by the learned A.G.P., then the entire defence taken by the Company in Special Suit No. 351 of 1992 filed by the State before the learned Civil Judge (S.D.), Surat would be thrown to the winds. Learned Counsel submitted that the petitioner is seriously disputing various claims raised by the State Government in respect of other contracts. Learned Counsel also submitted that principle laid down by the Apex Court in the decision referred to by the learned A.G.P. are in support of the petitioner.

6. Learned Single Judge in Para 6 of the judgment compared Clause 18 of the Standard Contract and Clause 26 of the Tender Conditions. Clause 18 of the Standard Contract has been interpreted by the Apex Court in the case of Union of India v. Air Foam Industries (P.) Ltd. (supra) interpreting the words "any claim for the payment of a sum of money" of Clause 18 of the Contract, the Apex Court held that the above words occurring in Clause 18 of the Contract must be read not in isolation, but in the context of the whole clause, for the intention of the parties is to be gathered not from one part of the clause or the other but from the clause taken as a whole. Apex Court held if so read, Clause 18 does no more than merely provide an additional mode of recovery to the purchaser, and the purchaser is entitled to exercise the right conferred under that clause only where

there is a claim for a sum which is presently due and payable by the contractor. Above-referred decision came up for consideration before the three Judges' Bench of the Apex Court in the case of H.M. Kamaluddin Ansari & Co. v. Union of India and Ors., (supra), wherein the Court impliedly over-ruled reasoning of the judgment in Union of India v. Air Foam Industries (P.) Ltd. (supra), but all the same, while interpreting Clause 18, the Apex Court took the view that clause gives wide powers to the Union of India to recover the amount claimed by appropriating any sum then due or which at any time thereafter may become due to the contractor under other contracts. When we look at Clause 26 of the tender condition in the instant case, it altogether stands on different footing. Question of appropriation of amount in respect of any other contract arises only when the claim of the State Government is crystallised. Otherwise, any objection raised by the contractor against other claims of the State Government in respect of other contracts would be effectively frustrated. In the instant case, the State Government has preferred a civil suit in which the contractor has taken various defences. All those defences would be set at naught and a possible judgment in favour of the contractor would be rendered otiose if interpretation of the State Government is accepted on Clause 26.

7. We are of the view that only in cases where the claim is crystallised, the State Government can set off and adjust those amounts from the money due and payable in respect of the other contract. So far as the facts of the present case, we are of the view that the judgment rendered by the Apex Court in the case of Lakshmickand & Balchand (supra) would squarely apply. Interpreting Clause 71 of the Contract, the Apex Court held as under:

In regard to the claim to adjustment on the second count, the position is more controversial. The claim is founded in the doctrine of equitable set-off, but we do not find evidence before us to bring the case within the operation of the doctrine. It is not a case where cross demands rise out of the same transaction or the demands are so connected in their nature and circumstances that they can be looked upon as part of one transaction. Nor can assistance be derived from Clause 71. The benefit of that provision can be claimed only if the amount sought to be retained is an ascertained sum, an amount which can be readily adjusted against the amount payable under the other contract. Here, the amount sought to be adjusted has yet to be determined as a liability against the contractor. It has been disputed by the appellant. Accordingly, Clause 71 cannot be invoked.
xxx xxx

In our view, Clause 26 would come to the rescue of the State Government only if the amount is adjusted towards a claim which is crystallised, not otherwise. We, therefore, fully endorse the view of the learned Single Judge on the interpretation of Clause 26.

8. Under the circumstances, Letters Patent Appeal lacks merits and the same is dismissed.