
(1983) 01 DEL CK 0017
In the Delhi High Court
Case No : C.R. No. 469 of 1982

Union of India

APPELLANT

Vs

M/s. Batliboi and Co. Ltd.

RESPONDENT

Date of Decision : 13-01-1983

Acts Referred:

Citation : AIR 1984 Delhi 172

Hon'ble Judges : Yogeshwar Dayal, J

Bench : Single Bench

Advocate : R.K. Anand, for the Appellant; D.K. Sayal, for the Respondent

Judgement

Yogeshwar Dayal, J.—This is a petition for revision on behalf of Union of India against an order of learned Additional District Judge, Delhi, dated 20th October, 1981 dismissing an application for leave to defend filed by the petitioner and decreeing the suit filed by the plaintiff-respondent. M/s. Batliboi & Co. Ltd., under Order 37 of the C.P.C. for recovery of Rs. 84,862-45 ps.

2. The plaintiff-respondent filed the aforesaid suit for recovery of the aforesaid amount inter alia on the allegations that the petitioner through the Director General of Supplies and Disposals, New Delhi, placed an order dated 12-6-1978 upon the respondent Company for the purchase of goods as mentioned in the aforesaid order. In terms of that order the respondent Company supplied the goods which were accepted by the petitioner. Accordingly, there is no dispute between the parties with regard to the supply of goods. The respondent Company further alleged that as per terms and conditions, the respondent submitted bill dated 9-10-1979 representing 95% of the goods sold amounting to Rs. 72,999.39 but the defendant-petitioner had failed to pay the amount and thereafter the plaintiff served a notice u/s 80 of the C.P.C. on the defendant-petitioner and also claimed interest with effect from 9-10-1979 and thus claimed the aforesaid amount.

3. The defendant-Union of India being served with the summons in the

prescribed form filed the application for leave to defend. Apart from various other pleas, the defendant-petitioner herein took a plea that as per Clause 26 of the schedule to tender, the defendant was within its right to withhold the amount of Rs. 72,999-39 against the expenses incurred by the Union of India in carrying out modifications and repairs of the machines supplied by the plaintiff in compliance of another acceptance of tender dated 6-12-1974. The said contract was governed by arbitration clause and the dispute arising out of the said contract had to be referred to arbitration and the Union of India is referring the same to arbitration. The claim of interest was also denied.

4. The defendant-Union of India also taken the plea that the suit under O. 37 of the CPC is not maintainable. The learned trial Court held that the suit under Order 37 of the CPC is maintainable and that the plaintiff company was entitled to interest in view of the alleged notice served by the plaintiff on the defendant-Union of India.

5. On the plea of the defendant-Union of India that it had the right to withhold amount, the learned trial Court took the view that this ground is not open to the defendant as the claim of the defendant is a disputed amount and it has still to be referred to the arbitrator and unless and until the arbitrator gives the award, the defendant-Union of India cannot be said to be entitled to withhold that amount and accordingly held that it is no defence and consequently dismissed the application for leave to defend and decreed the suit.

6. Union of India being aggrieved has come up in revision. It is submitted that amended Clauses 18 and 18-A of the General Conditions of Contract contained in the standard Form of Contract No. D.G.S. & D-68 were introduced after the decision of the Supreme Court in the case of Union of India (UOI) Vs. Raman Iron Foundry, and now a right has been given expressly to the purchaser (Union of India) to have a lien over the admitted claim of the contractor so long as claims under other contracts of the purchaser are pending finalisation or adjudication. It is submitted that the Clauses 18 and 18-A of the aforesaid General Conditions of Contract were amended and the contract in dispute contains such amended clauses and parties are no longer governed by the decision of the Supreme Court in the aforesaid case of Raman Iron Foundry.

7. Mr. R.K. Anand, learned counsel for the petitioner-Union of India, has brought to my notice the amended Clauses 18 and 18-A of the aforesaid General Conditions of Contract which are reproduced hereunder:

Clause 18

WITHHOLDING AND LIEN IN RESPECT OF SUMS CLAIMED

Whenever any claim or claims for payment of a sum of money arises out of or under the contract against the contractor, the purchaser shall be entitled to withhold and also have a lien to retain such sum or sums in whole or in part from the security, if any, deposited by the contractor and for the purpose aforesaid,

the purchaser shall be entitled to withhold the said cash security deposit or the security, if any, furnished as the case may be and also have a lien over the same pending finalisation adjudication of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the contractor, the purchaser shall be entitled to withhold and have a lien to retain to the extent of Such claimed amount or amounts referred to supra, from any sum or sums found payable or which at any time thereafter may become payable to the contractor under the same contract or any other contract with the purchaser or the Government or any person contracting through the Secretary pending finalisation or adjudication of any such claim.

It is an agreed term of the contract that the sum of money or monies so withheld or retained under the lien referred to above, by the purchaser will be kept, withheld or retained as such by the purchaser till the claim arising out of or under the contract is determined by the arbitrator (if the contract is governed by the arbitration clause), or by the competent Court as prescribed under clause 20 hereinafter provided, as the case may be, and that the contractor will have no claim for interest or damages whatsoever on any account in respect or such withholding or retention under the lien referred to supra and duly notified as such to the contractor. For the purpose of this clause, where the contractor is a partnership firm or a limited company, the purchaser shall be entitled to withhold and also have a lien to retain towards such claimed amount or amounts in whole or in part from any sum found payable to any partner/limited company, as the case may be, whether in his individual capacity or otherwise, (emphasis added)

18A-- LIEN IN RESPECT OF CLAIMS IN OTHER CONTRACTS

Any sum of money due and payable to the contractor (including the security deposit returnable to him) under the contract may be withheld or retained by way of lien by the purchaser or Government or any other person or persons contracting through the secretary against any claim of the purchaser or Government or such other person or persons in respect payment of a sum of money arising out of or under any other contract made by the contractor with the purchaser or Government or with such other person or persons.

It is an agreed term of the contract that the sum of money so withheld or retained under this clause by the purchaser or Government will be kept withheld or retained as such by the purchaser or Government or till his claim arising out of/in the same contract or any other contract is either mutually settled or determined by the arbitrator, if the contract is governed by arbitration clause or by the competent Court under clause 20 hereinafter provided as the case may be, and that the contractor shall have no claim for interest or damages whatsoever in this account or on any other ground in respect of any sum of money withheld or retained under this clause and duly notified as such to the contractor. (emphasis added)

8. The Supreme Court while deciding the aforesaid case of Union of India (UOI)

Vs. Raman Iron Foundry, dealt with un amended cls. 18 and 18-A of the General Conditions of the aforesaid Contract which read as under :--

18. Recovery of Sums Due

Whenever any claim for the payment of a sum of money arises out of or under the contract against the contractor, the purchaser shall be entitled to recover such sum by appropriating in whole or in part, the security, if any, deposited by the contractor, and for the purpose aforesaid, shall be entitled to sell and/or realise securities forming the whole or part of any such security deposit. In the event of the security being insufficient, the balance and if no security has been taken from the contractor, the entire sum recoverable shall be recovered by appropriating any sum then due or which at any time thereafter may become due to the contractor under the contract or any other contract with the purchaser or the Government or any person contracting through the Secretary, if such sum even be not sufficient to cover the full amount recoverable, the contractor shall on demand pay to the purchaser the balance remaining due.

For the purpose of this clause, where the contractor is a partnership firm, the purchaser shall be entitled to recover such amount by appropriating in whole or in part any sum due to any partner of the firm whether in his individual capacity or otherwise.

18-A. Set Off.

Any sum of money due and payable to the contractor (including security deposit returnable to him) under the contract may be appropriated by the purchaser or Government or any other person or persons contracting through the Secretary and set-off against any claim of the purchaser or Government or such other person or persons for the payment of a sum of money arising out of or under any other contract made by the contractor with the purchaser or Government or such other person or persons.

9. The Supreme Court while deciding the aforesaid case of Raman Iron Foundry (AIR 1974 SC 1365) (supra) interpreted the meaning of the word "any claim" in the light of the right to appropriation given to the purchaser in the clause which was there at that time and took the view that the true construction of clause 18 before amendment was that the expression any claim for the payment of a sum of money occurring therein" meant an adjudicated claim i.e. the claim which had been found by an adjudicating body either Court or arbitrator and not a mere claim for liquidated or unliquidated damages which has not been adjudicated upon. The Supreme Court observed that it refers to a claim which was recoverable in present time and not a claim recoverable by adjudication in future. Bhagwati, J. speaking for the Supreme Court at page 1271 of the aforesaid report observed as under:--

.....It is important to note that clause 18 does not create a lien on other sums due to the contractor or give to the purchaser a right to retain such sums

until his claim against the contractor is satisfied. If merely a right of lien or retention were given to secure payment of a claim, then even if the claim were for a sum not presently due and payable, the provision perhaps would not have been so startling or unusual.

10. After the aforesaid decision and in the light of the aforesaid observations it appears that the form was amended.

11. It appears prima facie from the amended clauses 18 and 18-A that now an express right of lien or retention has been given to the purchaser even to secure a bare claim for money when it is being finalised or adjudicated.

12. Mr. D.K. Sayal, learned counsel for the respondent, submitted that the Supreme Court in the aforesaid case of Union of India (UOI) Vs. Raman Iron Foundry, has given interpretation to the expression "any claim for the payment of sum of money" and has held that this expression mean a sum of money which has been adjudicated upon in favour of party and not a mere claim which has not been adjudicated upon.

13. I am afraid this reasoning cannot be accepted in view of the express wording of the amended clauses 18 and 18-A.

14. The judgment of the Supreme Court was based on the reading of the entire clause 18 and not merely the expression "any claim for the payment of sum of money".

15. In this view of the matter it could not be said that no triable issue arises in the present case.

16. It appears to me that the amended clauses 18 and 18-A of General Conditions of Contract were not brought to the notice of learned trial Court as there is no discussion of the amended clauses in the judgment.

17. I would accordingly set aside the impugned judgment and grant the defendant-petitioner leave to contest the suit.

18. Parties are directed to appear before the trial Court on 1st March, 1983. Costs of the present proceedings will abide the result of the suit.