

CR No.4556 of 2014 -1-

IN THE COURT OF PUNJAB AND HARYANA HIGH COURT AT CHANDIGARH

CR No.4556 of 2014

Date of Decision: 26.02.2015

Union of India

...Petitioners

Vs.

M/s Kay Kube Ko

..Respondents

CR No.7644 of 2014

M/s Kay Kube Ko

..Petitioner

Vs.

Union of India

A N D

CR No.7723 of 2014

M/s Kay Kube Ko

..Petitioner

Vs.

Union of India

..Respondent.

CORAM: HON'BLE MR.JUSTICE RAKESH KUMAR JAIN

Present: Mr. A.K.Bansal, Advocate for the petitioner.

Mr. D.K.Singal, Advocate for the respondent.

RAKESH KUMAR JAIN, J. (ORAL)

This order shall dispose of three revision petitions bearing

Nos.4556, 7644 and 7723 of 2014 because similar issue is involved therein.

However, for the sake of convenience, the facts are being extracted from CR No.4556 of 2014 titled as Union of India Vs. M/s Kay Kube Ko.

In short, the petitioner/Union of India through its Executive Engineer, entered into an agreement No.37/EE/CCD/1989-1998 with the respondent for the construction of residential quarter for defence audit in Sector 32-A, Chandigarh Sub Head Type-I/9 nos.(T/s) and Type-II/24 (T/S) numbers including water supply, sanitary installation, drainage etc. The construction work was commenced from 22.9.1989 and was to be completed by 21.7.1990 but the respondent/Contractor failed to complete the job within the stipulated time, allegedly despite issuing slow progress notices dated 16.3.1992 and 3.4.1992. According to the petitioner, respondent was liable to pay the compensation for his failure to complete the job within the stipulated time as per Clause 2 of the agreement which empowers Superintending Engineer to levy compensation as per the rate prescribed in the Contract Agreement and his decision for levy of compensation has been held to be final and binding. According to the petitioner, levy of compensation under Clause 2 in the contract agreement is an excepted matter and is not a subject of the arbitration. Before levy of compensation, Superintending Engineer issued show cause notice dated 10.6.1993 under registered post, proposing the levy of compensation under Clause 2 of the contract agreement, affording him an opportunity to represent against the said proposal. The respondent filed reply to the show cause notice on 30.6.1993. The Superintending Engineer, after examining the matter and considering the reply, exercising his powers under clause 2 of the

Agreement held the respondent liable to pay a sum of ₹2,09,946/- by way of compensation for not completing the work as per time Schedule provided in Clause 2 of the Agreement, at the rate of 10% on the estimated cost of the work shown in the agreement and accordingly passed the order dated 26.8.1993. Since the respondent raised certain disputes and the petitioner also raised its demand, under Clause 25 of the agreement, the matter was referred to the sole Arbitrator Sh.P.K.Kohli, New Delhi to adjudicate upon the dispute between the parties in which the petitioner highlighted the claim of levy of compensation under Clause 2 of the Agreement but, the same was withdrawn from the proceedings of the Arbitrator vide letter dated 15.10.2007 and suit for recovery was filed. The respondent thereafter filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') to refer the matter for arbitration which was allowed by order dated 23.12.2013 which is under challenge in the revision petition.

It would be pertinent to mention that there were four cases of the similar nature in which application under Section 8 was filed by the contractor. The application was allowed in two cases whereas in two other cases it was declined. The revision petition from which the facts have been extracted i.e. **Union of India Vs. M/s Kay Kube Ko** is only in one case.

Counsel for the petitioner has submitted that he is not aware about the other two cases but in any case at present there are three revision petitions before this Court out of which two revision petitions have been filed by the Contractor against the order passed by the Civil Court dismissing their application filed under Section 8.

During the course of hearing, counsel for the petitioner has

admitted that the dispute is with regard to clause 2 of the Agreement No.37-EE/CCD/1989-1998 to the extent as to whether Arbitrator has the jurisdiction to decide about the liquidated damages or not. He has fairly conceded that the Arbitrator has the jurisdiction to decide about the delay, risk and cost under clause 3 of the said Agreement.

Counsel for the respondent has submitted that the case is covered by the decision of the Supreme Court in the case of ***J.G.Engineers Pvt. Ltd. Vs. Union of India and another 2011 AIR SC (Civil) 1349*** in which litigation was with the same department by a contractor and the same Clauses 2 and 3 of the agreement were interpreted. It was held by the Supreme Court that award of liquidated damages in Clause 2 is not an excepted matter and is arbitrable.

On the other hand, counsel for the petitioner has argued that as per the findings in para 17 of the said judgment in ***J.G.Engineers Pvt. Ltd. (supra)***, the liquidated damages cannot be awarded by the Arbitrator and it can be granted only by the Court.

After hearing learned counsel for the parties and after examining the record, I am of the considered opinion that there is no dispute about the fact that same clause, namely, Clauses 2 and 3 of a similar contract of the same department of the petitioner was before the Apex Court in the case of ***J.G. Engineers (supra)*** in which it has been held that the question as to whether the contractor was responsible or the Union of India for the delay in execution of work is arbitrable. At the same time, it was also held that the Arbitrator had examined the said issue and recorded a finding that respondent-Union of India was responsible for the delay in execution of

the work, contractor was not responsible and the termination of contract was illegal, therefore, respondents were not entitled to claim extra cost for the work executed through an alternative Agency. If the matter is referred to the Arbitrator and he comes to a conclusion that the Contractor was not responsible for the delay in execution of the work and the said delay is by the respondent-Union of India, then definitely Union of India shall not be entitled to recover the liquidated damages. In those circumstances, the question which has to be decided by the Arbitrator is with regard to clause 3 and if it comes to the conclusion that contractor is not liable for the delay in execution of work and as a result thereof, Union of India had to get the work done through an alternative agency then the question of levying of liquidated damages would not arise and if it is held otherwise, it would be decided by him as to what liquidated damages should be paid by the Contractor.

In view of the above, the present revision petition from which the facts have been taken i.e. CR No.4556 of 2014, is found to be without any merit and the same is hereby dismissed and the revision petitions filed by the respondents i.e. CR Nos.7644 and 7723 of 2014 are hereby allowed. Thus, the matter would now be decided by the Arbitrator, who would be appointed as per the Arbitration Clause.

(RAKESH KUMAR JAIN)
JUDGE

26.2.2015
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