
(1982) 07 CAL CK 0042
In the Calcutta High Court
Case No : A.F.O.O. No. 544 of 1977

Atin Bose

APPELLANT

Vs

Heavy Engineering Corporation Ltd.

RESPONDENT

Date of Decision : 14-07-1982

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : AIR 1983 Cal 376

Hon'ble Judges : Ramendra Mohan Datta, J;C.K. Banerji, J

Bench : Division Bench

Advocate : P.K. Mallick and Pradip Dutta, for the Appellant; Rajat Ghose, for the Respondent

Final Decision : Allowed

Judgement

Ramendra Mohan Datta, J.—This appeal arises from the judgment and order of Sabyasachi Mukharji, J., dated 29th September, 1977 ; (AIR 1976 NOC 200) in an application u/s 34, Arbitration Act, 1940. The learned Judge by his order has stayed the suit of the plaintiff Atin Bose, the appellant herein, filed by Mm on or about the 20th June 1977.

2. The claim arose out of a contract dated 25th September, 1974 between Heavy Engineering Corporation Ltd, and Messrs. K. Lall & Co. a proprietary concern of the plaintiff Atin Bose. The contractor Atin Bose was to be paid by the respondent Corporation for providing escorts at the rate shown in the schedule of rates of the work as per terms and conditions of the contract. The said schedule including the notes thereof was to form an integral part of the said contract. Both the parties agreed that the terms and conditions as provided in the special conditions of contract and in general conditions of contract, would be applicable and would be binding on them, Of the special conditions which were provided therein, a condition read as follows:--

"Where the special conditions differ from the general conditions, those special

conditions shall override the latter.

All materials shall be considered in the possession, care and custody of the contractor and at the risk and responsibility of the contractor from the moment these have been delivered to and accepted in writing by the escorts until such time materials have been carried to and received in the conditions as delivered to the escort by an authorised officer of the Corporation at the destination."

It would appear that the question of deduction by the Corporation would come in under such special conditions.

3. The said contract provided a clause under the general conditions of contract and the same read as follows:--

"In the event of any dispute or difference between the parties in respect of rights and obligations of the parties as to the true intent and meanings of these presents and many articles of condition thereto, such dispute and differences of opinion shall be referred to the sole arbitrator nominated by the Managing Director of Heavy Engineering Corporation Limited, and his decision shall be final, conclusive and binding on the parties."

It is the above clause on the basis whereof the petitioner for stay, the respondent-Corporation herein, contends that the suit was rightly stayed inasmuch as the disputes, which are the subject-matters of this suit, are covered by the above arbitration clause.

4. On behalf of the plaintiff appellant, however, it is contended that the said clause is vague, uncertain, indefinite, ambiguous and does not in law or in fact amount to a valid arbitration agreement or clause and the parties are not bound by such clause. On behalf of the appellant it is contended that the claim of the appellant in any event, as stated in the said suit, is not covered by the -said clause and the disputes mentioned in the said suit could not be referred to arbitration by the said clause which is being relied on as the arbitration clause by and on behalf of the respondent Corporation.

5. There is another point which has also been agitated both before the court below and before us and that is that the respondent-Corporation was not ready and willing to go to arbitration or to do all things necessary for the proper conduct of the arbitration. That contention was made on the basis of various letters which remained unreplied by the Corporation with the result that the plaintiff had to file the suit after the plaintiffs money claim was not paid by and on behalf of the respondent-Corporation.

6. Regarding the above arbitration clause on the basis whereof the learned Judge of the court below has stayed the suit it would appear that the learned Judge was of the view that the expression "many" must be a typographical mistake and the correct word should have been "any" and the learned Judge has read the clause accordingly, with the word "any". It is, however, to be noted that the word next after that has been used in plural but the learned Judge has not thought it fit to

correct the same. In any event, the learned Judge has read it as "any articles" instead of "many articles". Then again, it further appears that the learned Judge found difficulty in reconciling the expression "and many articles of condition thereto" with the rest of the said clause and after trying to give a meaning thereto ultimately read the said arbitration clause without the said expression and by omitting the same altogether.

7. In my opinion, the arbitration clause has to be read and understood as a whole in the manner it has been agreed to by and between the parties and the Court while correcting some part of it as typographical mistake in effect gave it a different shape and meaning which was not contemplated by the parties when they entered into the said agreement, it is an agreement entered into by and between the parties and on the basis thereof the parties have intended that their disputes are to be resolved. Accordingly, a strict construction has to be put on such clause where-under their disputes are to be resolved. That being so, in my opinion, by reading the said agreement without the said expression therein, namely, "and many articles of condition there-to", the learned Judge went wrong in coming to his finding. If the Court would find that such an expression if allowed to stand, would go to affect the meaning of the arbitration clause rendering it vague and meaningless, the court would leave it at that without trying to dissect and discard it and thereby giving a meaning to it.

8. In the next place, even if we read the entire arbitration clause as a whole then also the meaning that has been given or attributed to it by the learned Judge as to the expression, "in respect of rights and obligations of the parties as to the true intent and meaning of these presents", does not appear to convey the sense in which it has been read. In my opinion, even if the said clause is read in the corrected way and in isolation of the expression as mentioned hereinabove, then also the same cannot be connected with or related to the facts involved in the disputes; but all that can be conveyed is that the said clause has been agreed to by and between the parties only for the purpose of the interpretation of the various clauses or conditions in the entire contract itself.

9. In support of my above view it should be noted that the parties have mentioned certain expressions in the arbitration clause which are quite apposite for consideration and cannot be ignored. The expression "in respect of rights and obligations of the parties as to the true intent and meaning of these presents" must undoubtedly refer to the conditions of the contract and the true intent and meaning thereof if they are to be declared, could be so referred to before the arbitrator. I should particularly mention about the expression "these presents", which must necessarily refer to the various conditions of the contract only and not to any factual aspect of the dispute which might arise between the parties. The expression "such dispute and differences of opinion shall be referred to the sole arbitrator" further enforces the view that we have taken that the opinion in respect whereof differences have arisen should only relate to the interpretation of the various conditions of the contract and could not be referable to the factual

disputes which might arise by and between the parties. We have no doubt in our mind that the parties intended that the scope of the arbitration clause would be a very restricted one and cannot be widened so as to bring within it the other factual disputes that might arise out of the contract.

10. In my view the only rational meaning that can be given to the said arbitration clause is that if there is any dispute or difference between the parties in respect of their respective rights and obligations with regard to the true intent and meaning of the said contract as a whole and in respect of the various or any of the terms or conditions or clauses of the said contract and if the dispute or difference of opinion of the parties with regard thereto would subsist then only such dispute and difference of opinion alone would be referred to arbitration in the manner as provided in the said arbitration clause.

11. Any attempt to give any other meaning to the said arbitration clause would lead to ambiguity and vagueness of the same and to redundancy or surplusage of portions thereof. This is the only way we could read this clause which has been relied on by the respondent-Corporation as the arbitration clause for the purpose of staying the legal proceedings commenced by the plaintiff-appellant. As already observed, the learned Judge has given a meaning to this clause but such meaning has been given by omitting some part thereof and without considering the meaning and scope of the expression "these presents",

12. Before Mukharji, J. it was sought to be argued on behalf of the respondent-Corporation that the expression "any dispute" was disjunctive and separate in respect of the rights and obligations of the parties as to true intent and meaning of "these presents". It was argued that the expression "any dispute" was independent of and separate from the other category of difference as is provided in the clause and which is confined to the true intent and meaning of these presents. The learned Judge, however, did not accept such contention. The learned Judge was of the view that the expression "any dispute or difference" must be limited to the difference and dispute in respect of the rights and obligations of the parties as to the true intent and meaning of "these presents". According to the learned Judge both the dispute and difference must be as to the true intent and meaning of the expression "these presents." The learned Judge however after going into the facts of this case has expressed his opinion in the following words:--

"In the plaint, as I have mentioned hereinbefore, the plaintiff has claimed moneys for works done under the contract and on the basis that under the contract the plaintiff is entitled to the said money for the work done under the contract. There is also further claim of the plaintiff that there have been certain deductions from the bills of the plaintiff which deductions cannot be justified. Therefore, the claim, to money and the right to receive the amount deducted involve the determination of the rights of the parties in accordance with the true intent and meaning of the contract. The plaintiff has claimed firstly the money under the contract. Secondly, the plaintiff has claimed that the defendant has no

right to deduct any amount from the bills. The defendant, on the other hand, has not paid the money and has deducted the amount. Therefore, the defendant must be taken to have disputed the right of the plaintiff on these two scores. If that is the position then the right or the claim of the defendant vis a vis the plaintiff must be based on the rights and obligations of the parties as to the true intent and meaning of the contract. Such disputes, therefore, in my mind, even on a strict view of the arbitration clause, are covered by the arbitration clause. I am, therefore, unable to accept this submission on behalf of the respondent that the arbitration clause was vague and as such voidable and not enforceable."

It would clearly appear from the above that the learned Judge has only applied a part of the arbitration clause to the facts, of the case as are involved in the plaint, secondly, having held that the expression "any dispute or difference" must be limited to the difference or dispute in respect of the rights and obligations of the parties as to true intent and meaning of "these presents" it is difficult to appreciate how the learned Judge could apply such disputes and differences only to the rights of the parties as to the true intent and meaning of the contract. The learned Judge, however, has observed that the amount deducted involved the determination of the rights of the parties in accordance with the true intent and meaning of the contract although the expression used in the arbitration clause is not "in accordance with" but "as to the true intent and meaning of these presents". That would undoubtedly make a difference in interpreting the said arbitration clause. In dealing with the aforesaid clause the learned Judge, however, has not laid any stress on the words "these presents". If that expression viz., "these presents" would be taken into account then the same would undoubtedly refer to the various conditions and clauses in the contract and obviously would relate to the interpretation thereof.

13. In our view reading the entire clause as a whole one cannot but find it difficult to find any clear meaning as to the applicability of the arbitration clause in respect of the disputes that have been raised in the plaint. It cannot but be read as a vague clause and as such, voidable and not an enforceable arbitration clause. In any event, even assuming that the arbitration clause can be read without attaching any meaning to the expression "and many article of conditions thereto", even then the rest of the arbitration clause must be read as limited to the interpretation of the clauses contained in the contract and. accordingly, the expression "such disputes and differences of opinion" has; been used in connection therewith. In our opinion, the disputes, which are the subject-matter of the legal proceedings being the plaint hereof cannot be covered by the said arbitration clause contained in the said contract.

14. There is another point, as indicated hereinabove, which was urged before the learned Judge regarding the readiness and willingness of the respondent-Corporation to go to arbitration. Mr. Mullick contends that the facts and circumstances of this case are such that the court should consider that the Corporation was never ready and willing to go to arbitration at the

commencement of the legal proceedings, Mr. Mullick has referred to the various correspondence which have been annexed to the affidavits filed herein and it is brought to our notice that no reply in connection therewith was sent on behalf of the respondent-Corporation. Accordingly, Mr. Mullick wants us to hold that the respondent-Corporation was never ready and willing to go to arbitration at the relevant point of time. Mr. Mullick has referred to the Supreme Court decision in the case of Food Corporation of India Vs. Thakur Shipping Co. and Others, where the Supreme Court at p. 471 observed :

"Where a party to an arbitration agreement chooses to maintain silence in the face of repeated requests by the other party to take steps for arbitration, the case is not one of "mere inaction". Failing to act when a party is called upon to do so is a positive gesture signifying unwillingness or want of readiness to go to arbitration."

15. It is true that there were two sets of disputes which were involved in the same appeal before the Supreme Court, and in respect of one only, arbitration was demanded specifically but not in respect of the other for which only monetary claim was demanded but the Supreme Court in that case treated both of them at par inasmuch as the Supreme Court did not think fit to disturb the finding of the court below which treated them practically at par. But the Supreme Court in the above case made a clear distinction as to cases where arbitration has been specifically asked for and not replied to, in which case, it was observed that it would not be a case of mere inaction and in respect of the cases where arbitration has not been specifically asked for it would amount to a mere inaction on the part of the other party. In the latter case it cannot be concluded that under such circumstances such party was not ready and willing to go to arbitration. The matter is quite simple--the party concerned might think that as and when an arbitration proceeding would be taken recourse to as agreed to between the parties, he would take part in such proceeding and defend himself therein. The principle has been laid down by the Supreme Court in very clear language that it is only when an arbitration is prayed for but the party remains silent even after such asking, then the same would not be a case of mere inaction. It signifies, therefore, that the demand for money if not replied to would be a case of mere inaction and would not be considered as want of readiness and willingness on the part of the applicant for stay.

16. In the case of The Food Corporation of India Vs. Srish Chandra Guha, a similar, question came up before me sitting singly, before the Supreme Court decision was published, and I had occasion to go into the question while relying on several decisions both Indian and English. There it was argued before me that readiness and willingness u/s 34 must be proved to have existed even prior to the date of the commencement of the legal proceedings. In that case I held that such an argument could not be accepted inasmuch as no such intention could be gathered from the language used in the said section. There I held that for the purpose of proving that he was ready and willing to go to arbitration at the date

of the commencement of the legal proceeding in the absence of any contrary intention appearing in any of the documents or in the pleadings the Court could rely on the affidavit evidence if the Court was satisfied about the same and could use its discretion in granting or refusing stay. A contrary view was taken by a single Bench of the Madras High Court in the case of N.C. Padmanabhan and Others Vs. S. Srinivasan, , but for the view that I took, I differed from the said judgment and decision on this point.

17. Under the circumstances, it could not be contended in this case that the applicant for stay was not ready and willing to go to arbitration inasmuch as at the first opportunity after the intimation was given that the legal proceedings have been commenced herein, the respondent-Corporation took steps, and applied before this Court in the manner as provided u/s 34, Arbitration Act, 1940. That being so, the first point succeeds but the second point fails.

18. The result, therefore, is that the appeal is bound to be and is hereby allowed. The order of the court below is set aside and the suit must proceed accordingly.

19. The appellant is accordingly entitled to the costs of this appeal as also the costs of the court below.

20. Mr. Ghose appearing on behalf of the respondent-Corporation prays for a certificate of fitness for appeal to the Supreme Court. In our view, no such certificate should be granted inasmuch as there is no question of law involved, not to speak of any substantial question of law of general importance which need be decided by the Supreme Court. In that view of the matter, the prayer is rejected.

21. Mr. Ghose asks for stay of the operation of the order for four weeks. In our view, such a prayer cannot be acceded to and the same is rejected.

C.K. Banerjee J.

21. I agree.