
(1973) 08 DEL CK 0012

In the Delhi High Court

Case No : Suit Appeal No. 213A of 1971

M.A. Mistry

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 13-08-1973

Acts Referred:

Citation : (1973) ILR Delhi 916

Hon'ble Judges : T.P.S Chawla, J

Bench : Single Bench

Advocate : M.K. Garg, S.S. Chadha and P.N. Sethi, for the Appellant;

Judgement

T.P.S. Chawla, J.

(1) The sole issue in this is

" WHETHER the disputes (between the Parties) are within the scope of the arbitration agreement ?"

(2) It arises on an application u/s 20 of the Arbitration Act 1940 which was agreed to be. tried on affidavits.

(3) By a contract of 14th January 1970 the petitioner, M. A. Mistry undertook to supply to the Union of India, the respondent two varieties of canned mutton curried in specified quantities. Deliveries were to be completed by 18th March 1970. There is no dispute that the quantities contracted for were supplied within the time agreed, and that the petitioner was paid in full for the same. That is how the matter rested for a while.

(4) Starting with a letter of 27th November 1970, the petitioner received a number of letters till February 1971, from the Assistant Chief Director of Purchase, stating that it had been reported by Q. M. G's Branch (ST7), Army Headquarters, New Delhi that certain quantities of the canned mutton curried supplied by the petitioner had "gone bad and been declared unfit for human consumption within the warranty period". Each of these letters claimed a refund

of the price of the quantities declared unfit. In addition, the petitioner was told that freight and incidental charges incurred by the Government on transport of the condemned quantities would also be recoverable from him. The petitioner in his replies repudiated these demands and disputed that any part of the supplies made by him had at all become unfit for human consumption. That is how the controversy crystallized in the correspondence between the parties. It is unnecessary to refer to the correspondence in further detail. Sometime in March 1971, the petitioner asked for the disputes to be referred to arbitration. No action was taken on this request. Consequently, on 4th May 1971, the petitioner moved this application to obtain an order that the arbitration agreement be filed and that the disputes which had arisen between the parties be referred to arbitration.

(5) Clause 19 of the Special Conditions of Contract contains the arbitration agreement between the parties. It is a lengthy clause and I will refer only to the relevant parts. The first sentence of the first paragraph reads:

"In the event of any question, dispute or difference arising under or out of or in connection with the conditions mentioned in this schedule or in annexure thereto or in General Conditions of Contract governing contracts placed by the Central Purchase Organisation of the Government of India (now under the Department of Supply), Form No. D.G.S.&D.-68 (revised) contained in the pamphlet DGS&D 25-1967 print or touching or concerning the construction meaning, operation or effect thereof or of any matter contained therein or as to the rights and duties or liabilities of the parties hereto respectively or otherwise howsoever in connection with this contract (except as to any matters the decision of which is specially provided for in the conditions mentioned in this schedule or in annexure thereto or in General Conditions of Contract as aforesaid) the same shall be referred to the sole arbitration of any person appointed by the Secretary to the Government of India, Ministry or Department of the Government of India administratively dealing with the contract at the time of such appointment, or if there be no secretary, the administrative head of such Ministry or Department at the time of such appointment "

(6) The rest of this paragraph is not material. In the next three paragraphs it is provided that :

" THIS clause does not apply to any matters the decision of which is specially provided for by any conditions applicable to this contract and it shall not be open to either party to refer any such questions or disputes to arbitration unless a specific reference to Arbitration is jointly signed by the contractor and the purchaser. If no request in writing for such arbitration is made by the contractor within a period of one year from the date of completion of contract all claims of the contractor under the contract shall be deemed to be waived and absolutely barred and the purchaser i.e. President of India shall be discharged and released of all his liabilities under the contract.

(7) The date of completion of the contract shall mean and include :-

(I) the date when the goods are delivered according to the terms of delivery.

(II) in case of warranty clause contracts the date when warranty expires.

(III) in case where the contract is cancelled wholly or partly the date when the letter of cancellation is issued."

(8) It was not disputed before me that the words of the arbitration clause were wide enough to encompass the disputes which had arisen. But, it was contended for the Union that these disputes were expressly excluded from its ambit by the excepting words within brackets in the second paragraph which were more or less repeated in the second paragraph. What is excluded from arbitration is "any matter the decision of which is specially provided for" by any condition of the contract. The only condition on which the respondents rely is what is described as the "standard warranty clause". This clause again is a long one; but, as the entire controversy centres round it, I had better set out at large. It is printed on a separate slip and reads: "STANDARD Warranty Clause

1. The contractor warrants the supplies delivered to be sound, wholesome, and fit for human consumption as Meat Curried, for a period of 12 months from the last day of the stipulated month of delivery if, the supplies are tendered in the month of manufacture and from the last day of the month of tendering if the supplies are tendered with prior permission of the Chief Director of Purchase provided that such permission will be deemed to have been granted in cases where delivery period is 15th day or prior of a month) in a month subsequent to the month of manufacture if any climate and under all conditions of storage and movement in India.

2. In the event of the supplies or a part thereof having been declared during the period of warranty as being unsound, unwholesome or unfit for human consumption as Meat Curried by the Director of Supplies & Transport, Q.M.G's Branch, Army Headquarters, New Delhi or any Officer acting on his behalf (whose opinion as to whether or not the particular consignment is sound wholesome, or fit for human consumption as Meat Curried will be final), the purchaser will have the right to dispose of the condemned stock in any way he considers necessary after giving due notice to the contractor and also, at his discretion, either to allow the contractor to replace the condemned stock within a specified period or to recover from the contractor the contract price thereof together with all incidental and freight charges incurred from the place of delivery to the place where the supplies were ultimately condemned. The opinion of the Chief Director of Purchase or Officer acting on his behalf in regard to these charges will be final.

3. The declaration by the Chief Director of Purchase or any officer acting on his behalf communicated to the contractor in writing that a particular consignment has been condemned will be taken by the contractor as the conclusive evidence of the proper condemnation of that consignment provided that such comment is

issued by the Chief Director of Purchase within 45 days of the expiry of the warranty period. Nothing herein contained shall prejudice any other right of the purchaser in that behalf under this contract or otherwise."

(9) Does this warranty clause provide for the "decision" of disputes of the kind in which the parties are now immersed ? Before I get to that, I must notice a contention sought to be raised on behalf of the petitioner that the warranty clause was no part of the contract because, it was alleged, the printed slip bearing the clause was not contained in the tender documents. No trace of such a plea is to be found in any pleading or affidavit filed by the petitioner. On the contrary the rejoinder seems to proceed on the assumption that there was such a clause included in the contract. Nor was any issue sought, as ought to have been, if the point was intended to be agitated. Evidence might then have been necessary to resolve the question of fact. The petitioner is barred from raising the point now. However, I am otherwise satisfied that the warranty clause was one of the terms of the contract. Paragraph 4 of the Acceptance of Tender specifically states:

"WARRANTY:-The warranty period shall be 12 months as per para 19 of A.S.C. Specification No. 115-B for Canned Mutton Curried."

(10) There is no doubt that the A.S.C. Specification No. 115-B referred to was a part of the contract. This document has been endorsed ."admitted" by counsel for the petitioner. Paragraph 19 of the Specific -corporation is again entitled "Warranty" and provides :

" THIS shall be in accordance with the standard warranty clause (Appendix "J"). The warranty shall be 12 months."

(11) This provision is perfectly clear. It fixes the warranty period at 12 months, and intimates that the terms will be in accordance with a standard clause which presumably was attached or meant to be attached as an Appendix "J". In my opinion, it really makes no difference whether it was attached or not. For, having accepted paragraph 19 of A.S.C. Specification 115-B, the petitioner must be deemed to be aware of the terms of the standard warranty clause. If he was not he would have asked for it. It is too late now for him to plead he did not know. Supposing that the print of the standard warranty clause was not given to the petitioner with the contract documents, it is incorporated therein by reference and hence the petitioner is bound by it.

(12) With this finding, I revert to the main point. The controversy between the parties raises two questions : (i) whether any of the goods supplied by the petitioner were unfit for human consumption during the warranty period ? and (ii) if so, what quantity, and for what amount is the petitioner liable to the Union ? The Union contends these are questions for the "decision" of which the warranty clause makes special provision. That depends on the meaning to be given to the word "decision" in the arbitration clause. From the context in which the word occurs in that clause, it would seem that the decision contemplated is

in respect of "any question, dispute or difference". Those are the "events" which activate the clause : so, also the exception. If the exception were not made, the matter which is the subject of the exception would be capable of reference to the arbitrator. His decision would not be required if there were no dispute. Reference of a non-dispute to the arbitrator is inconceivable. The mind fails to grasp such an idea. Reasoning backwards it would follow that the "decision" envisaged by the exception is also in respect of a dispute. A decision given when no controversy exists may be a "decision" in the wide sense, but is not within the meaning of the exception.

(13) Other clauses in the contract in which the word occurs suggest the same conclusion. Clause 7 in the Invitation to Tender is entitled the "Book Examination Clause". It obligates the contractor to produce documents and furnish information relevant for verifying or ascertaining the cost of execution of the contract. The "decision" of an authorised Government Officer on the question of relevancy of the document or information is made final and binding on the parties. It is plain that the occasion for a "decision" could not arise unless relevancy were in dispute. Again, clause 22 (i) of the Special Conditions enjoins upon the contractor not to resort to corrupt practices. If, nevertheless, he does, the contract or any other contract made with the contractor may be cancelled. In that event the amount of any loss arising from such cancellation is recoverable from the contractor. Sub-clause (ii) provides that any "dispute or difference" pertaining to these matters shall be "decided" by a specified Secretary or his nominee whose decision shall be final and binding on the contractor. Here also "decided" is used in the environment of disputes. This internal evidence within the contract supports the conclusion at which I have arrived. Nothing was shown to me which might militate against it.

(14) The only case cited on this point accords with this view. In an unreported decision in suit No. 273 of 1968 entitled R. B. Seth Ram Rattan v. State of Madhya Pradesh, decided on 13th December, 1971 Mr. Justice Prakash Narain held that the word "decision" in an arbitration clause in a contract carried the meaning that disputes should be adjudicated upon in a judicial or quasi judicial manner and not that an administrative order should be made. That is a near case, for the word is employed in a similar context. Therefore, as a matter of construction, I hold, that "decision" in the words of exception in the arbitration clause is used in the sense I have stated, and the question is whether the warranty clause provides for a decision in that sense.

(15) Now, the words of the warranty present a vivid contrast. "Paragraph 2 uses the words "declared" and "opinion"; paragraph 3 "declaration" and "comment". Although the declaration, opinion or comment is made "final" or "conclusive evidence" against the contractor, there is no dispute which is decided. No word or phrase in the warranty even hints that the power it gives is to be exercised after disputes have arisen. This is no matter of surprise for the very purpose of such clauses is to "prevent differences from arising, not to settle them when they

have arisen": see *In Re: Carus-Wilson And Greene* 1887 (18) Q.B.D. 7; Hudson's Building and Engineering Contracts 9th edition page 317 et. seq.; Halsbury's Laws of England (3rd edition) Vol. 2 page 5 para 9 and Vol. 3 page 522 para 1039 ; (3). From that the inference flows that the warranty does not provide for a "decision" within the meaning of the arbitration clause. Had the draftsman intended such a "decision" he would have used a different formula of words, examples of which I have given from the other clauses of the contract. This conclusion is really enough to decide the petition and to hold that the disputes between the parties are not excepted from arbitration. But that would leave some loose ends which would need to be tied.

(16) For, what then, it could legitimately be asked, is the function, meaning and effect of the warranty clause ? It was contended for the petitioner that no "declaration" or "comment" had in fact been made or issued, or if it had, not by the appropriate officer; and that, in any case, it was not done within the required time nor after giving the petitioner an opportunity to be heard. There was considerable argument on these matters and with some effort I have been able, I think, to comprehend what the warranty implies. Ought I to decide these questions ? If it be correct, as I have held, that the disputes which exist are not ousted from arbitration, then the interpretation of this clause and the questions revolving round it properly fall within the Jurisdiction of the arbitrator. His jurisdiction, the arbitration clause says, extends to "the construction, meaning, operation or effect" of the terms of the contract. I would, Therefore, exceed jurisdiction if I attempted to expound the warranty clause, and anything I might say would be likely to unduly inhibit him. To the extent it was necessary for deciding the issue it has not been entirely possible to avoid dealing with this clause. That is permissible for determining questions as to the ambit of the submission: see Halsbury's Laws of England, 3rd edition, page 519 para 1033. To go further would not be right.

(17) Counsel for the petitioner cited *Heavy Electricals (India) Ltd. Bhopal v. Pannalal Devchand Malviya*, 1973 M.P. 7 to show that I ought to decide the questions which he sought to raise regarding the warranty clause. In that case the arbitration clause provided for reference of "All disputes" to arbitration "other than those for which the decision" of certain persons was "by the contract expressed to be final and conclusive or binding". Another clause stated the manner in which rates for deviated or new items were to be fixed, and then said that "all disputes" regarding the settlement of these rates would be referred to specified officers "whose decision shall be final and conclusive". A dispute arose in respect of alleged deviations and the rates to be allowed therefore. The court held that it could not be referred to arbitration as it was excepted from the arbitration clause. This is unexceptionable because the other clause provided for a "decision" within the meaning of the excepting words in the arbitration clause. Thus far there is nothing inconsistent with the view I take. However, the judgment goes on to hold that the decision given by the appropriate officer acting under the clause relating to deviated or new items was open to scrutiny by

the court for ascertaining whether it had been arrived at judicially or not. With this part of the decision, with respect, I am unable to agree.

(18) It seems to have been conceded before the court that the decision as to deviations would be open to judicial scrutiny when the matter "reaches the court of law" and it is assumed that "About that, there can be no doubt" (see para 6). Consequently, the court adopted a "middle course which would meet the ends of justice" and directed the trial court to inquire into that question before the remaining disputes were referred to arbitration (see para 9). Apparently it was not argued in that case that if there was a dispute between the parties whether the decision as to deviations was given judicially or not, this too was a dispute covered by the all embracing phrase "All disputes" in the arbitration clause, and not excepted from it. Such a dispute would be within the jurisdiction of the arbitrator.

(19) None of the cases referred to in that judgment warrants the conclusion at which it arrives. The warranty clause here, as also the clause dealing with rates for deviated or new items in the Heavy Electricals" case, are comparable to clauses in building and engineering contracts providing for certifiers. The interaction of such clauses with arbitration clauses is examined in great deal, with a wealth of illustrations based on decided cases, in chapter 7 section 4 of Hudson's treatise to which I have already referred. One conclusion which emerges is that a certifier may either be required to perform an administrative or a judicial function. It all turns on the nature of the contractual provision which must be carefully scrutinised. Various passages on pages 520 to 523 in volume 3 of Halsbury's Laws of England (3rd edition) are to the like effect. If and when a certifier is required to act judicially but does not, his decision may be impugned. Notwithstanding the width of some observations in *South India Railway Co. Ltd. v. S. M. Bhashyam Naida and others*, 1935 Mad 356, that is all that that case decides. It is important to notice that there was no arbitration clause there and the matter came before the court on appeal in a suit. The only question into which the court inquired was whether the Chief Engineer whose decision was to be final had acted judicially or not. Whether it would still have done so if there had been an arbitration clause is not a point which arose or was considered in that case. It cannot, Therefore, support the conclusion reached by the court of Madhya Pradesh. In *Hickman & Co. v. Roberts and Others* (1913) A.C. 229 there were clauses in a building contract to the effect that payment was to be made on certificates given by the architect, whose decision on all matters in relation to the work was to be final. He wrongfully delayed issuing certificates under the influence of the building owners. An action brought by the contractor for the final balance alleged to be due was sought to be defeated on the ground that a certificate by the architect was a condition precedent to the bringing of the action. The court held that the building owners were precluded in the circumstances from setting that up as a defense. No question of arbitration was involved. Clearly this case has no bearing on the point. Nor does *Bristol Corporation v. John Am & Co.* (1913) A.C. 241 in which stay of an action was

refused despite an arbitration clause because the engineer arbitrator was likely to be a witness in respect of some matters in dispute and so not proper to be an arbitrator.

(20) On principle also the view taken in the Heavy Electricals" case does not seem to be sound. Suppose, in the case before me, there had been no arbitration clause and the Union had brought a suit for recovery of the price of the goods alleged to -have "gone bad". It could still have relied on the warranty clause. In that event it would be for the court to interpret and give effect to it. The case would then equate with South India Railway Co. Ltd. v. S. M. Bhashyam Naida and others 1935 Mad 356. By the arbitration clause the very same jurisdiction which the court would otherwise have had shifts to the arbitrator, including the jurisdiction to interpret and apply the warranty clause. An illustration can be found in Gannon Dunkerley and Co. v. Union Carbide (India) Ltd. 1962 Cal 360. There the contract made the architect's certificate a condition precedent to any right of the contractor to receive payment. The certificate was to be final. Yet, it was held, that a dispute whether a certificate was improperly refused and a claim for payment for work done which had not been met were within the arbitration clause. Probably, if I may say so with respect, the fallacy in the Heavy Electricals" case is the assumption that the decision as to deviations was bound to come for scrutiny before the court at some stage or other. If the arbitrator had been held competent to scrutinise the validity, without encroaching upon the finality, of the decision under the deviations clause, and to give effect to it, it would in the process merge in his award. Only the award would come for scrutiny before the court; and the court would not then be able to reach the decision given under the deviations clause except, if at all, on grounds justifying setting aside of the award.

(21) For these reasons I refrain from deciding questions sought to be raised regarding the warranty clause, and am content to hold that the disputes which have arisen between the parties are not excepted from the arbitration clause.

(22) Accordingly, the petition succeeds. Let the arbitration agreement be filed within 3 weeks. The disputes which have arisen between the parties will stand referred to an arbitrator to be appointed in accordance with the arbitration clause. In accordance therewith, the appropriate officer will appoint an arbitrator within one month from today. The arbitrator will make his award within four months of the date on which he enters upon the reference. There will be no order as to costs.