

(2010) 05 DEL CK 0291
In the Delhi High Court
Case No : FAO (OS) No. 480 of 2008

Prime Industries Ltd.

APPELLANT

Vs

Seil Ltd. and Another

RESPONDENT

Date of Decision : 21-05-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 13(2), 16, 2(1), 34
Council of Arbitration Rules — Rule 20, 21, 22
General Clauses Act, 1897 — Section 13(2)

Citation : (2010) 05 DEL CK 0291

Hon'ble Judges : Valmiki J Mehta, J; Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : Manish Singhavi, Vinay Kumar Sharma and Bhagwan Swarup Shukla, for the Appellant; D.K. Malhotra and Rajesh Malhotra, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—The plea of the appellant to seek adjudication of disputes before a Single Arbitrator in accordance with the arbitration clause rather than a panel of arbitrators as per rules of Indian Council of Arbitration ("ICA" for short) has given rise to the present appeal from the impugned judgment of the learned Single Judge dated 23.10.2008. The learned Single Judge on the interpretation of the arbitration clause came to a conclusion that the arbitration has to be by a panel of three arbitrators and thus allowed the preliminary objection of the respondents that the composition of arbitration tribunal was not in accordance with the agreement between the parties. The award passed by the Single Arbitrator thus stood negated on this preliminary objection.

2. The facts of the case are that the respondents entered into an agreement with the petitioner on 10.06.1994 in respect of its manufactured products of Vanaspati and Vegetable oils. Respondent No. 2, a unit of respondent No. 1, wanted to source the supplies of Vanaspati and vegetables products of the petitioner for marketing the same under their own established brand names. The

agreement styled as MOU was valid for 2 years with a stipulation of renewal for a further period through consent of parties and could be terminated by either party giving notice in writing. It is under this MOU that the respondents placed orders on the petitioner to the extent of 1562.975 metric tons till March, 1995 whereafter no further orders were placed.

3. The grievance made by the petitioner was that the respondents failed to lift the minimum quantity required to be lifted or purchased in respect of two years - 5,000 metric tons in the first year and 6,000 metric tons in the second year. The MOU contained an arbitration clause, which reads as under:

18. Arbitration All disputes between the parties hereto arising out of this agreement shall be referred to an arbitrator appointed by Indian Council of Arbitration, New Delhi and the provisions of the Indian Arbitration Act for the time being in force shall be applicable to such reference. Such reference will be decided as per rules of Indian Council of Arbitration. The award decision so given shall be final and binding upon the parties.

4. The petitioner filed an application being AA No. 120/1996 u/s 11(6) of the Arbitration and Conciliation Act, 1996 ("the said Act" for short) for appointment of an arbitrator and that application came to be disposed of by an order dated 02.07.1999 recording the consent on behalf of the parties that an arbitrator can be appointed in terms of the aforesaid Article 18 of the MOU dated 10.06.1994. The consent of parties was also recorded that the arbitrator would be entitled to decide the question of existence of arbitration agreement or otherwise in terms of Section 16 of the said Act. The matter was referred to ICA for appointment of arbitrator.

5. In view of the aforesaid order, the petitioner addressed a letter to the ICA on 10.11.1999. The ICA in turn vide letter dated 06.01.2000, addressed to the respondent No. 1, referred to the fact that the claim amount of Rs. 6,81,12,565/- under the rules of ICA had to be determined by an arbitral tribunal of three arbitrators unless the parties to the dispute agree to refer the disputes to a sole arbitrator {Rule 21(b)}. However, on 18.01.2000, counsel for the petitioner took a position that Clause 18 of the MOU referred to reference of disputes to "an arbitrator" and thus only a sole arbitrator was required to be appointed. It is at that stage that ICA on 30.01.2000 took a stand that the disputes could be decided by a sole arbitrator and appointed Justice K.N.Singh, Retired Chief Justice of India as the sole arbitrator. The respondents once again moved an application before the arbitrator claiming that the constitution of the arbitral tribunal of a sole arbitrator was contrary to Rule 21(b) of ICA Rules and also contrary to Clause 18, being the arbitration clause of the MOU and thus sought appropriate orders u/s 13(2) of the said Act. This application was, however, rejected by the arbitrator on 06.12.2000. The arbitrator came to the conclusion that Clause 18 of the MOU no doubt referred to the rules of ICA for purposes of a decision to be arrived at by the arbitrator but that would not affect the agreement of the parties to appoint a sole arbitrator under the first part of

Clause 18. The arbitration clause was thus segregated into two parts - the first part relating to appointment of a sole arbitrator and conferring authority on ICA for that appointment and the second part relating to the procedure and other matters in deciding the reference as per rules framed by the ICA. The conclusion thus reached was that if the agreement had stated that the disputes shall be settled by arbitration in accordance with rules of ICA then Rules 20 and 22 (b) would be applicable but the language of Clause 18 of MOU was to the contrary where reference had to be made to a sole arbitrator to be appointed by the ICA and there was a further agreement that the provisions of the Act and the rules of ICA would apply in deciding the reference.

6. The arbitrator after deciding the aforesaid application proceeded to adjudicate the disputes on merits and passed an award dated 30.07.2005 holding that the petitioner was entitled to Rs. 1,13,68,273/- as damages with interest from the date of filing of the claim till the date of award at the rate of 6 per cent per annum as also future interest and costs. This award was challenged by the respondents by filing an application u/s 34 of the said Act. One of the grievances raised was that since the constitution of the arbitral tribunal was not according to the agreement between the parties, the award was liable to be set aside by virtue of Section 34(2)(a)(v) of the said Act. The basic plea advanced was that since the claim of the petitioner was more than 50 lakhs, a panel of three arbitrators was envisaged under Rule 21(b) of the ICA Rules. Rule 21 reads as under:

Rule 21: The number of arbitrators to hear a dispute shall be determined as under:

a) Where the claim does not exceed Rs. 50 lakhs and where the arbitration agreement does not specify three or more arbitrators, the reference shall be deemed to be to a sole arbitrator, unless the parties to the dispute agree to refer the dispute to three arbitrators within thirty days from the date of notification of request for arbitration.

b) Where the claim exceeds Rs. 50 lakhs the dispute will be heard and determined by three arbitrators, unless the parties to the dispute agree to refer the dispute to a sole arbitrator within thirty days from the date of the notification of the request for arbitration.

c) Where there arbitrators have to be appointed as per the above Sub-rule and any of the parties to the dispute fails to make the necessary deposit towards the cost and expenses of arbitration, instead of three arbitrators, the Registrar may appoint a sole arbitrator, irrespective of the value of the claim.

7. Learned Single Judge in terms of the impugned order dated 23.10.2008 found favour with the arguments advanced on behalf of the respondents. The substratum of the plea is that the reference to "an arbitrator" has to be understood as the dispute resolving mechanism rather than a conscious agreement of parties to refer the disputes to a sole arbitrator and while

interpreting an Act or Regulation, a term in singular would include plural and vice versa in view of Section 13(2) of the General Clauses Act, 1897. A judgment which has been strongly relied upon is C.M.C. Ltd. Vs. Unit Trust of India and Others, . The arbitration clause in that case stated that the dispute shall be settled by arbitration, each party to appoint an arbitrator and the arbitrators appointed had to in turn appoint an umpire. The decision of the umpire in case of disagreement between the arbitrators appointed by the parties would be final and the arbitration proceedings were to be conducted in accordance with the rules prescribed by ICA. In those facts it was held that the parties retain the power of to appoint an arbitrator and were free to adopt the procedure for the same and the arbitration would be governed by ICA Rules. On the other hand, learned Counsel for the petitioner predicates his plea on the right of the parties to choose the forum of arbitration of a single arbitrator alone and such agreement of parties ought to prevail. The expression "an arbitrator" is thus sought to be given the meaning which is explicit in the expression and not merely an intention to get the disputes resolved through the process of arbitration. A further fact pleaded is that Clause 21(b) of the ICA Rules itself envisages the eventuality of a single arbitrator in case of agreement between the two parties and thus arbitration of a single arbitrator is not alien to the ICA Rules more specifically Rule 21(b).

8. The findings of the learned Single Judge are based on a reading of Rule 21(b) of the ICA Rules which provide for an arbitral panel of three arbitrators in case the claim exceeds Rs. 50 lakhs. Undisputedly, the claim in the present case exceeded Rs. 50 lakhs. There is no agreement between the parties to refer the disputes to a sole arbitrator as per latter part of Clause 21(b) of the ICA Rules. Learned Single Judge has relied upon the observations made by the Supreme Court in The Iron and Steel Company Limited Vs. Tiwari Road Lines, which underline the importance of courts respecting the mandate of the parties as contained in their agreement. This observations has been read along with the view taken in Basavarajappa v. Gurubasamma and Ors. 2005 (12) SCC 290 that a term expressed in singular would include plural and vice versa by applying Section 13(2) of the General Clauses Act. The learned Single Judge was of the view that the widely used expression "sole arbitrator" or such like expressions had not been used.

9. Another judgment strongly relied upon by learned Counsel for the respondents, as also forming basis of the impugned judgment, is that of Orissa High Court in Gayatri Projects Ltd. v. State of Orissa Through the Executive Engineer, Heads Works Division, At/P.O.Samal, Dist. Angul 2004 (2) Arb.L.R. 394. The said judgment dealt with Orissa Arbitration Tribunal Rules, 1979 and constitution of Tribunal consisting of three members under those rules. It was held that the same was not in any manner repugnant to the provisions of the said Act which came into force subsequently. The agreement between the parties contemplated that if either of the parties to the agreement was aggrieved by the decision of the adjudicator, it was open to the said party to refer the dispute to

"an arbitrator" and the procedure followed by the Orissa Arbitration Tribunal shall be followed in such a case. Orissa had only one Arbitration Tribunal constituted under the provisions of said Rules and therefore it was held that the parties in that case had agreed to refer the disputes to the Arbitration Tribunal which existed. The expression "an arbitrator" was held to include the Arbitration Tribunal constituted by the Government under the provisions of the said Rules. Learned Single Judge has agreed with this view of the Orissa High Court.

10. We are unable to persuade ourselves to agree with the view taken by the learned Single Judge. It is trite to say that the will of the parties as reflected in the agreement must prevail in case of constitution of an Arbitration Tribunal. Thus each arbitration clause would have to be given a meaning as per its phraseology. If the arbitration Clause 18 of the MOU is examined in that context, we are of the considered view, that there are three parts to the arbitration clause. The first part deals with reference of disputes between the parties to the agreement to be referred to "an arbitrator" appointed by ICA, New Delhi. The second part stipulates that the provisions of the said Act would be applicable to such a reference. The third part provides that a reference would be decided as per rules of ICA. We find that that expression "an arbitrator" must be given its full effect and the said phrase would not have been used but for the intent to appoint a sole arbitrator. The parties are limited companies and are duly advised by legal counsels who would have taken care to use the appropriate word/phraseology. The first part does not say that the disputes should be referred to the arbitration of arbitrators appointed in accordance with Rules of ICA. If such a phraseology would have been used then only the question of Rules 21(b) of the ICA mandating a panel of three arbitrators would apply in the present case. The view taken by the learned arbitrator in deciding the application 06.12.2000 is thus correct. We also note that the petitioner had approached the Court by filing an application u/s 11(6) of the said Act for appointment of an arbitrator. The order passed on that application on 02.07.1999 also shows the same intent. The order reads as under:

Learned Counsel for the parties agree for appointment in terms of Article 18 of the Memorandum of Agreement dated 10.06.1994. All disputes between the parties may be referred for arbitration and the rules of Indian Council of Arbitration by the Arbitrator appointed by Indian Council of Arbitration. It is agreed to by the learned Counsel for the parties that Arbitrator shall be entitled to decide the question of existence of the arbitration agreement of otherwise in terms of Section 16 of the Act as well as all other objections, claims and counter claim which may be raised by the parties. The matter of accordingly referred to the Indian Council of Arbitration for appointment of Arbitrator.

11. The aforesaid shows the use of the expression "the arbitrator" and the expression "arbitrator". This order was passed by consent of parties. Thus, the intent even at that stage was to have the appointment of a single arbitrator.

12. We find reliance on *Gayatri Projects Ltd. v. State of Orissa* through the

Executive Engineer, Heads Works Division, At/P.O. Samal, Dist. Angul's case (supra) as misplaced as the facts of that case were quite different. It has been repeatedly observed by the Supreme Court that a judgment is based on facts and is not to be read like a statute. It has been observed by a Constitution Bench of the Supreme Court in *Padmasundara Rao and Others Vs. State of Tamil Nadu and Others*, as under:

9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *British Railways Board v. Herrington*. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.

13. The facts of that case show that there was already an existing tribunal of three arbitrators under the Orissa Arbitration Tribunal Rules, 1979 and the question was whether the reference of disputes to the arbitration tribunal was to that particular tribunal. Since the arbitration was under those rules and there was only one pre-appointed tribunal of three arbitrators, it was naturally held in that context that the reference to "an arbitrator" under those rules should mean a reference to that arbitration tribunal. The facts of the present case are quite different.

14. The judgment in *CMC Ltd. v. Unit Trust of India's* case (supra) does not really support the respondents as the arbitration clause in that case was quite different contemplating appointment of arbitrators. In fact, the ratio of the said judgment is that the parties should be free to adopt the procedure for appointment of arbitrator. There is no question of the singular including plural here as the intent of the parties is clear to appoint a sole arbitrator even if the expression "sole arbitrator" has not been used. The expression "an arbitrator" is as good an expression as "sole arbitrator".

15. Our attention has also been drawn by learned Counsel for the petitioner to a recent judgment in *Comed Chemicals Ltd. Vs. C.N. Ramchand*, . The arbitration clause which was found to be applicable to the agreement between the parties was under:

12. If there be any dispute pertaining to meaning of this MoU or of any nature, will be solved and decided by appointing an independent arbitrator acceptable to all the parties and if not solved by him can be referred to court of law and for which the jurisdiction will be Vadodara.

16. The expression "an arbitrator" is elucidated in para 34 of the judgment as under:

34. For the foregoing reasons, in my opinion, the application filed by the

Company must be allowed by holding that the case is covered by Clause (f) of Sub-section (1) of Section 2 of the Act. It is a case of international commercial arbitration and is covered by Clause 12 of the MoU. Since there is a dispute between the parties, it has to be decided by an arbitrator. The clause extracted hereinabove provides for an arbitrator i.e. sole arbitrator and hence only one arbitrator should be appointed. I, therefore, appoint Mr. Madhukar Fanse, retired Judge, City Civil Court, Ahmedabad as the sole arbitrator to decide the dispute between the parties.

17. The aforesaid thus leaves no manner of doubt that the expression "an arbitrator" implies a sole arbitrator and thus our view finds support from the aforesaid judgment.

18. Learned Counsel for the petitioner has also rightly drawn strength from the commentary on The Law and Practice of Arbitration and Conciliation Second Edition by O.P. Malhotra and Indu Malhotra where the aspect of appointment of sole arbitrator has been dealt with in para 10-07 at pages 464-466. The arbitration of a sole arbitrator has been observed to be more expeditious and in a domestic arbitration in common law countries a sole arbitrator is the norm because a tribunal of three or more arbitrators adds substantially to the costs of litigation and is apt to delay the proceedings. It has been observed in the commentary as under:

The sole arbitrator is a complete tribunal. In the absence of a contrary intention of the parties, an arbitration agreement is deemed to provide that reference shall be to a single arbitrator (sole arbitrator).

19. If the present case is examined in the conspectus of what we have discussed aforesaid, we are clearly of the view that the intent of the parties as contained in Clause 18 of the MOU was to have an arbitration through a sole arbitrator to be appointed by the ICA. The fact that the arbitration is to be governed by the procedure and rules of ICA would make no difference to this appointment of the sole arbitrator.

20. The result of the aforesaid is that the appeal is allowed, the impugned order dated 23.10.2008 of the learned Single Judge is set aside and the matter is remanded back to the learned Single Judge to decide the objections of the appellant and respondents on merits in accordance with law being OMP No. 468/2006 and OMP No. 419/2005. The petitioner shall also be entitled to costs quantified at Rs. 15,000/-.