
(1987) 09 DEL CK 0016
In the Delhi High Court
Case No : Suit No. 274A of 1978

Union of India

APPELLANT

Vs

Raman Iron Foundry and Steel Rolling Mills and Another

RESPONDENT

Date of Decision : 15-09-1987

Acts Referred:

Citation : AIR 1988 Delhi 368 : (1987) 2 ARBLR 250 : (1988) 34 DLT 31

Hon'ble Judges : B.N. Kirpal, J

Bench : Single Bench

Advocate : Kadambini, O.P. Popli and C.R. Iyer, for the Appellant;

Judgement

B.N. Kirpal, J.

(1) The challenge in this suit is to the award of the Arbitrator/dated 31st December 1977 on a dispute having been referred to him.

(2) Briefly stated the facts are that in pursuance of an invitation to tender the respondent No. 1/objector gave an offer for the supply of C.I. Brake Blocks. This offer included a price variation clause which, inter alia, provided that the price offered would be subject to various in case of increase in price of the raw material being used.

(3) The petitioner/Union of India accepted the afterlife its acceptance of tender dated 30th June 1975, by an advance acceptance of tender. Subsequently, a formal acceptance of tender was issued dated 7th August 1975 in which clause 7 read as follows : "Conditions of Contract :- As contained in form No. DGS&D-68 (Revised) including excluding clause 24 thereof as amended to date will apply to this contract." (Italics added).

(4) According to respondent No. 1 the acceptance of tender was not unqualified because no variation clause had been incorporated therein as had been suggested by the said respondent. Thereupon, a letter was issued amending the acceptance of tender and incorporating therein a price variation clause.

(5) , appears that the contracted goods were not supplied by the respondent. On 5th September 1975 the Union of India cancelled the contract at the risk and cost of the respondent/

(6) THE/RESPONDENT sent a notice u/s 80 CPC dated 10th November 1976 in which it was submitted that there was no concluded contract which had been arrived at between the parties and that the cancellation of the contract was illegal. On 28th December 1976 the Union of India informed the respondent through a letter that the latter was Liable to pay damages to the tune of Rs. 1,73,743.00 on account of risk purchase having been undertaken by the petitioner.

(7) When the amount claimed as damages was not paid, the purchaser wrote to the Dgs & D to appoint an Arbitrator Vide order dated 15th April 1977 the then Director General of Supplies and Disposals referred the dispute to the sole arbitration of Dr. Bakshish Singh, respondent No. 2.

(8) After the Arbitrator entered upon the reference the respondent entered appearance. On 9th September 1977 application was filed before the Arbitrator to the effect that there was no valid contract between the parties and that the reference to arbitration was vague and void ab initio. A request was made to adjourn the proceedings to allow the respondent to file a civil suit and obtain a stay order.

(9) On 17th November 1977, suit No. 1121/77 was filed by the respondent inter alia, challenging the contract and the impugned demand of the Union of India. A proper was also made for an injunction against the Union of India not to act in any manner to the prejudice of the respondent.

(10) On 16th December 1977 the respondent moved an application u/s 35 of the Arbitration Act before the Arbitrator in which it was stated that a civil suit had been filed in this Court and that the said suit wholly and substantially covers the subject matter which is pending for arbitrations The Arbitrator was accordingly requested not to proceed with the matter.

(11) On 30th December 1977 no one appeared on behalf of the respondent before the Arbitrator. The application u/s 35 which had been filed was rejected by observing that the nature of both the proceedings was different. Thereupon the award was made on 31st December 1977 awarding a sum of Rs. 98,000.00 in favor of the Union of India

(12) The Union of India then moved a petition under Sections 14 and 17 of the Arbitration Act in this Court being Suit No. 274-A/78. Notice was issued to the Arbitrator, who filed the award and proceedings in Court. Thereafter notice was issued to the parties and the respondent has filed objections under Sections 19, 30 and 33 of the Arbitration Act. The main contentions of the respondent were that there was no valid and binding arbitration agreement between the parties and further that the arbitration proceedings were vitiated in view of the

provisions of Section 35 of the Arbitration Act. The Union of India, on the other hand, contended that there was a valid arbitration agreement and a valid and binding contract had come into existence. It was further contended by the Union of India that the provisions of Section 35 of the Arbitration Act were not attracted to the present case. It was also the submission of the petitioner that the respondent had participated in the arbitration proceedings and, Therefore, could not challenge the validity of the reference.

(13) On the pleadings of the parties, the following four issues were framed :- (1) Whether there exists a binding agreement between the parties to refer the matter to arbitration ? (2) Whether the respondents can question the validity of the reference in view of their participation in the arbitration proceedings before the arbitrator ? (3) Whether the arbitration proceedings were rendered void in view of a pending suit between the parties for recovery of damages ? (4) Relief. Evidence by way of affidavit was filed. I now deal with the issues separately. Issue No. 1.

(14) The principal contention of the counsel for the respondent is that clause 7 of the acceptance of tender, which has been quoted hereinabove, was vague. It contended that according to the principles of incorporation it is necessary that the clause which has to be incorporated should be constructively construed. Reference is made to *Dwarkadas and Co. Vs. Daluram Goganmull*, .

(15) It is not disputed that the terms and conditions of the contract are contained in the acceptance of tender which has been issued by the petitioner. The arbitration agreement is contained in clause 24 of the DGS&D Form 68 (Revised). In their reply, the respondents have referred to DGS&D Form 100. It is however, not clear as to what is the significance of the reference. Possibly, it refers to whether the contractor would agree to sole arbitration and this agreement is required to be communicated at the time of submission of the tender. In the acceptance of tender, however, what was mentioned in this particular case was that the contract would be governed by the DGS&D Form No. 68 "including/excluding Clause 24". It is not clear from this clause 7 of the acceptance of tender whether the condition of contract is inclusive or exclusive of clause 24 of the DGS&D Form No. 68 (Revised). To put it differently, it is not certain whether the conditions of contract includes or excludes the arbitration clause. An arbitration agreement has to be certain and not ambiguous because an arbitration agreement excludes the normal forum for adjudication of disputes, namely, the civil courts. The ouster of the civil courts' jurisdiction must be clear and unambiguous. This can be inferred if there is a valid and binding arbitration agreement between the parties. In the present case, assuming the contract itself as being valid, the acceptance 35 of tender does not indicate that there has been a definite exclusion of the civil courts and the inclusion of an arbitration agreement. The clause No. 7 of the acceptance of tender is extremely vague. The invitation to tender was in DGS&D Form No. 100. The respondent apparently filled its tender in accordance with the said terms. The implication of this is that

the respondent agreed that there should be an arbitration clause as DGS&D Form No. 100 referred to an arbitration clause. The tender of the respondent however, was an offer which had yet to be accepted by the petitioner. The acceptance of the petitioner was conveyed by the acceptance of tender dated 7th August 1975. The term with regard to arbitration, which must be regarded as having been included in the offer of the respondent was not accepted in any unequivocal terms. If in the acceptance of tender there had been no Clause 7 or if the word "excluding" had been scored out, then it could have been said that the offer of the respondent that the disputes be settled by arbitration had been accepted by the petitioner. In the present case, however, the acceptance of the offer of the respondent was, as already indicated above, ambiguous uncertain. Under these circumstances, it must follow that there was no existing binding agreement between the parties to refer the disputes to arbitration. Issue No. 1 is, Therefore, decided in favor of the respondent no. 1/ objector.

(16) It was sought to be contended by counsel for the petitioner that in Clause 7 of the acceptance of tender the word used is "including". This argument is being raised before me for the first time. Neither in the reply nor in the written arguments which have been filed, is it the case of the petitioner that the word "excluding" occurring in the acceptance of tender clause 7 was scored off. May be that in the copies in the files of the petitioner the word "excluding" may have been scored off, but that is of no importance is the words occurring in clause 7 of the acceptance of tender as conveyed to the contractor. The mere fact that in the invitation to tender and in the offer made by the respondent there was an arbitration clause it does not become a final and binding term of the contract unless in the acceptance of tender there is an unequivocal acceptance of the arbitration clause. That unequivocal acceptance is missing in the present case because of the ambiguous language of the clause 7 of the acceptance of tender. Issue No. 2.

(17) This issue arises on the assumption that even though there was no valid arbitration proceedings, nevertheless, the respondent took part in the proceedings and, Therefore, cannot be permitted to question the validity of the same. It is not necessary for me to go into the legal aspect involved in this issue, because on facts it is not correct to contend that the respondent participated in the arbitration proceedings without any objection. It is not in dispute that by a letter dated 9th September 1977 the respondent did write to the Arbitrator challenging the existence of an arbitration agreement. Of course, in the letter the request made was for an adjournment in order to enable the respondent to get an appropriate order from a civil court. Nevertheless, the Arbitrator was informed that, according to the respondent there was no valid and binding arbitration agreement between the parties. On 30th December 1977 no one appeared before the Arbitrator on behalf of respondent. By that date, in fact an application u/s 35 of the Arbitration Act had been filed. The proceedings on merits in fact took place, ex-parte, on 30th December 1977 when the respondent had refrained from 36 participating. In view of the fact that the respondent had challenged the

existence of a valid contract and the arbitration agreement, and as the respondent had not participated in the arbitration proceedings after 9th September 1977, respondent to my mind, can question the validity of the reference. Issue No. 2 is decided in favor of the respondent. Issue No. 3

(18) According to Section 35 of the Arbitration Act, no award is rendered invalid by reason only of the commencement of the legal proceedings upon the subject matter of the reference. The exception, however, is that when legal proceedings upon the whole of the subject matter of the reference has been commenced between the parties and notice thereof is given to the Arbitrator, then further proceedings are invalid unless they are stayed by an order u/s 34 of the Arbitration Act. In the instant case, the contention of the petitioner is that, and this has been observed by the Arbitrator in his order dated 30th December 1977, that the subject matter of the suit filed by the respondent and of the arbitration proceedings is not similar. I am unable to agree with this submission. It may be that the relief which is asked for was dissimilar, but the subject matter of the suit and the reference was similar. In the reference made to arbitration there was a demand for damages on account of risk purchase which had been done at the cost of the respondent. This demand itself had been challenged by the respondent in a suit for injunction which had been filed in this Court. In the said suit it had been contended that there was no valid arbitration agreement and that the impugned demand raised by the Union of India vide its letter dated 28th December 1976, and which was also the subject matter of adjudication before the Arbitrator, was illegal. To my mind the subject matter of the dispute which had been referred to arbitration was covered by the suit. Admittedly, the notice of the suit had been given to the Arbitrator and the Arbitrator still proceeded to deal with the reference by holding that the subject matter was not the same. This conclusion of the Arbitrator, to my mind, was incorrect. When the Arbitrator had notice of the filing of the suit where the subject matter was the same, he ought to have stayed further proceedings. This he did not do so. The provisions of Section 35 of the Arbitration Act were, Therefore, clearly attracted and the proceedings which took place after 30th December 1977 before the Arbitrator, including the passing of the award, are clearly invalid. Issue No. 3 is decided in favor of the respondent. Relief

(19) In view of my findings given hereinabove relating to different issues, the award dated 31st December 1977 of respondent No. 2 is set aside.

(20) The parties to bear their own costs.