
(1966) 06 CAL CK 0005
In the Calcutta High Court
Case No : Award Case No. 102 of 1965

Union of India (UOI)

APPELLANT

Vs

Ratilal R. Taunk

RESPONDENT

Date of Decision : 23-06-1966

Acts Referred:

Arbitration Act, 1940 — Section 2, 34
Contract Act, 1872 — Section 15, 2, 20, 21, 28

Citation : (1966) 2 ILR (Cal) 527

Hon'ble Judges : S.K. Datta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.K. Datta, J.—This is an application made by the Union of India for stay u/s 34 of the Arbitration Act of a suit, being suit No. 317 of 1965, filed by one Ratilal R. Taunk, a contractor, claiming that the contract No. 1/CKP/SPL/CRG/62-63 was void from its inception by reason of mutual mistake of fact as to a matter of fact essential to the contract and alternatively, the contract was voidable by reason of misrepresentation made by the Union of India to the Plaintiff and the Plaintiff after knowledge of the same avoided the contract and accordingly claimed compensation of Rs. 10,25, 894.52 P.

2. The Respondent resisted the application for stay on the ground that the claim in this suit falls within the purview of the Arbitration Clause which is widely worded, in the alternative, that the grounds of mistake and misrepresentation have not been made bona fide and in the further alternative, that the question whether the agreement is void for reasons alleged in the plaint should be tried on evidence before an order is made u/s 34 on this application.

3. In the affidavit-in-opposition the Respondent Ratilal R. Taunk has also relied, besides the grounds made in the plaint, on the ground that there is no arbitration agreement subsisting between the parties and/or the same is void.

4. The relevant portion of the Arbitration Clauses is as follows:

62. All disputes or differences of any kind whatever arising out of or in connection with the contract, whether during the progress of the works or after their completion and whether before or after the determination of the contract, shall be referred to by the contractor to the Railway and the Railway shall within a reasonable time after their presentation make and notify decisions thereon in writing. The decisions, directions and certificates with respect to any matters, decision of the Railway, or by the Engineer on behalf of Railway, which matters are referred to hereinafter as excepted matters shall be final and binding upon the contractor and shall not be set aside or be attempted to be set aside on account of any information, omission, delay or error in proceeding in or about the same or on any other reason and shall be without appeal.

63(1). If the contractor be dissatisfied with the decision of the Railway, on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled or if the Railway fails to make decision within a reasonable time, then and in any such case but except in any of the excepted matters referred to in Clause 63 of these conditions the contractor may within ten days of the receipt of the communication of such decision or after the expiry of the reasonable time, as the case may be, demand in writing that such matter in question, dispute or difference be referred to arbitration. Such demand for arbitration shall be delivered to the Railway by the contractor and shall specify the matters which are in question, dispute or difference and only such dispute or difference of which the demand has been made and no other shall be referred to arbitration.

... ..

3(d). It will be no objection that the persons appointed as arbitrator, arbitrators or umpire, are government servants and that in the course of their duties as government servants they have expressed views on all or any of the matters in dispute.

5. Mr. M. Hazra, Learned Counsel for the Respondent contractor, submitted that there is no binding and/or enforceable arbitration agreement.

6. Clause (1) of Condition 63 provides inter alia that "...the contractor may demand in writing that such matter in question, dispute or difference be referred to arbitration".

7. Arbitration agreement has been denned in Clause (a) of Section 2 of the Arbitration Act in these words:

Arbitration agreement means a written agreement to submit present or future difference to arbitration whether the arbitrator is named thereunder or not.

Therefore, when an arbitration agreement gives an option of liberty only to one of the parties to the agreement to submit present or future difference to

arbitration, it is not an arbitration agreement, for the party having the option may or may not take advantage of the arbitration clause. In my opinion, there must be an unqualified or unconditional agreement to submit present or future difference, to arbitration under Clause (a) of Section 2.

8. The word "may" in certain circumstances may mean "must" though, ordinarily, it means that a discretion or liberty is given to a person or to an authority. In this arbitration clause the word "may", in my opinion, has not been used in the sense of "must". Hence, the arbitration clause, on the face of it, is not an agreement to submit present or future differences to arbitration. In this connection reference may be made to the observation of Mukharji, J. reported in *Jyoti Brothers Vs. Shree Durga Mining Co.*, where his Lordship held that when an arbitration clause contains the word "may" it is not a binding, arbitration agreement.

9. There is, however, another aspect of the matter.

10. The arbitration clause gives a liberty to one of the parties, that is the contractor, to refer the difference to arbitration. He is, however, not bound to refer it. In case, however, the contractor chooses to refer the dispute to arbitration in terms of the clause then the word "may" loses its significance and assumes the character of "shall" or "must".

11. In this connection reference may be made with advantage to the case of *Kedarnath Atmaram v. Kesoram Cotton Mills Ltd.* ILR (1950) Cal. 556 (558), where it was expressly observed that

once the option is exercised it is final and binding on both parties and the arbitration tribunal is the forum to which the parties must be relegated.

In this case the contractor not only refrained from taking advantage of the liberty given to him under the clause but has filed a suit. Hence, there is no binding arbitration agreement between the parties.

12. It was suggested on behalf of the Union of India that if the contractor does not take recourse to arbitration in terms of this clause, the Petitioner can force him to do so by making an application u/s 34 and obtaining an order thereunder. In my opinion, the Court cannot make an order of stay for there is no binding arbitration agreement between the parties until the contractor chooses to take advantage of it. Hence, I have no hesitation in holding in this matter that there is no binding arbitration agreement and consequently, the Union of India cannot successfully claim a stay of the suit.

13. There are several other points which may be shortly discussed without expressing firm views on the matters.

14. Mr. Hazra further submitted that even assuming that the contractor takes recourse to arbitration under such an arbitration agreement, it is void for there is want of mutuality which, in other words, means that it is unilateral and not

bilateral. It has to be assumed in order to appreciate this point as to mutuality that one of the parties is bound to refer the difference to arbitration, whereas the other party is not at all bound by the arbitration clause to refer any difference to arbitration.

15. The simplest contract sets out the right of one party and the obligation of the other party to the contract. Hence, either party may raise differences in respect of the only right or of the only obligation or in respect of both and consequently either party may refer the same to arbitration.

16. The word "difference" if read with the preceding words "a written agreement to submit" and the subsequent words "to arbitration" necessarily implies that either party to the contract is competent to refer the differences in respect of the only right or the only obligation or of both.

17. There is no room for vertical vivisection of the difference in respect of the same right or obligation or of both.

18. This conclusion is equally applicable to a contract containing diverse rights and obligations and an arbitration agreement in terms of its definition.

19. This view receives support from an observation of Lord justice Davies made in the recent case of *Baron v. Sunderland Corporation* (1966) 1 All. E.R. 349, where his Lordship observed inter alia that

In other words, the clause must give bilateral rights of reference.

In order to controvert this proposition the cases of *Woodall v. Pearl Assurance Company* (1919) 1 K.B. 593, *Mulchand Sobhraj v. Radhakishin Perumal* AIR 1926 Sin. 27, *Chettoomal v. Shankardas* AIR 1929 Sin. 83 were referred to before me. This arbitration clause in *Woodall's* case (1919) 1 K.B. 593 is an admixture of an option clause and a clause in the nature of *Scott v. Avery* 5 H.L.C. 811 corresponding to exception 1 of Section 28 of the Contract Act. There, in *Woodall's* case (1919) 1 K.B. 593 it was decided that the arbitration clause as a whole was a condition precedent to the recovery of any claim under the Insurance policy. The question of validity of the option clause in the arbitration agreement was not however directly raised or determined in that case. The case of *Mulchand Sobhraj v. Radhakishin Perumal* AIR 1926 Sin. 27 proceeded on the basis of *Woodall's* case (1919) 1 K.B. 593. Hence, it is not helpful. The second Sind case of *Chettoomal v. Shankardas* AIR 1929 Sin. 83 proceeded on the basis of *Woodall's* case (1919) 1 K.B. 593, the non-applicability of the doctrine of mutuality in a suit for specific performance and that Section 2 of the Contract Act cannot be invoked as a clause importing the doctrine of mutuality into the law of contract in India. In my opinion *Woodall's* case is not relevant on the point. In my opinion, it is more or less immaterial whether the doctrine of mutuality has application in a suit for specific performance or not in construing an arbitration agreement. In my opinion, Section 2 of the Contract Act which is material for the construction of an arbitration Act imports mutuality for it connotes reciprocal

promises. Hence, this case again is not decisive. Moreover, it has been held in *Debendranath v. Lalit Krishna* > (1958) 42 C.W.N. 1090 that

a contract to be specifically enforceable must be mutual which means that at the time of the contract it must be enforceable by either of the parties against the other.

20. The Union of India also placed strong reliance on two Bench cases of this Court. One of them is *Brindaban Chandra Dutta and Company v. Bisheshar Lal* ILR (1937) Cal. 606, where R.C. Mitter, J. observed:

In my opinion, the test is whether both parties are bound by that clause and not whether a right has been expressly given to the opposite party to initiate arbitration proceedings.

In the case of *Kedarnath Atmaram v. Kesoram Cotton Mills Ltd.* Supra, more or less, the same view was expressed. In my opinion, however, in both these cases the question of option or liberty was before the Court and the question of mutuality did not directly arise and consequently, in my opinion, there is room for further consideration of the matter. It is not necessary for me in this matter to express any firm view, but it is sufficient to state that it involves a difficult question of law.

21. Mr. Hazra further submitted that the arbitration agreement is indefinite and void for there is no means of distinguishing between excepted matters and matters which are not excepted matters.

22. Clause 62 is a condition precedent to arbitration.

23. Clause 62 refers to two kinds of decisions by the Railway. In the case of one class, the contractor may demand arbitration under Clause 63. In the case of another class called "excepted matters" the decisions made by the Railway or its engineer is final and it is not open to the contractor to take advantage of arbitration under condition 63. Hence, it is necessary to distinguish these two classes of decisions,

24. Clause 62 refers to "hereinafter referred to as excepted matters referred to in Clause 63". Clause 63 states "except in any of the excepted matters referred to in Clause 63 of these conditions". There is no enumeration of excepted matters in Clause 63. Those words in Clauses 62 and 63 do not make any sense and leave no room of division between two classes of decisions. It may be said that in Clause 63 "Clause 63" is a mistake for Clause 62. Assuming that it is so, it is not consistent with Clause 62, for it says "hereinafter referred to as excepted matter". Hence, again, it makes no sense. It may only make a sense if the word "hereinafter" in Clause 62 is read as "hereinbefore". Whether such violent changes in both the clauses should be permitted or not as a matter of construction is again a matter not free from difficulty. In connection with this contention reference was made to *Re: Arbn. Seth Kerorimal Adwani Vs. Union of India (UOI)*,

25. Fourthly a point which struck at the time when I was considering this matter before delivering the judgment it is this. Condition 63 may be an arbitration agreement where decisions have been made in terms of Clause 62 by the Railway. Arbitration presupposes differences. The object of arbitration is to resolve them. In this case, however, a machinery has been provided in Clause 62 to resolve all questions, disputes and differences between the parties. The Railway is vested with the power to make decisions on such disputed questions and differences. Hence, when decisions are made by the Railway engineer, in my opinion, there cannot be any question of any subsisting dispute, difference or question between the contractor and the Union of India. There is nothing to resolve. There may be question of appeal or review of the order of the Railway. That this is the position is also indicated by the opening words of Clause 63 which says "if the contractor be dissatisfied with the decision of the Railway". In my opinion, dissatisfaction with a decision is not a dispute or difference or a question to be resolved. The draftsman again found difficulty, as will appear from the clause itself. He does not directly mention question, dispute or difference be referred to arbitration but introduces there a phrase "such matter" before these words, for he evidently felt that it is inconsistent with the position of a decision and a consequent dissatisfaction. It may be said that difference arose when the Railway gave the decision and the contractor refused to abide by it. In my opinion, this would be making an undue extension of the meaning of the word "decision" which has resolved the differences. It is not again necessary for me to express firm view on the matter, but it is sufficient to say that it involves a question of difficulty which goes to the root of the arbitration agreement.

26. Mr. Hazra, lastly, submitted that Clause 3(d) of condition 63 is contrary to the principle of natural justice and consequently it is void. It is so intermixed with the other Clauses in 62 and in particular 63, that it cannot be separated and hence the whole arbitration agreement is void.

27. The relative clause in Sub-clause (d) of Clause 3 of condition 63 is reiterated for convenience and is as follows:

It will be no objection that the persons appointed as arbitrator, arbitrators or umpire, are the Government servants and that in the course of their duties as Government servants they have expressed views on a or any of the matters in dispute.

There are cases where it has been observed that if the parties with full knowledge agree to refer the matter to arbitrators who may be biased, then the aggrieved party cannot make a point of it at a later stage. This will appear from *Russel on Arbitration*, 15th ed. p. 102. In a recent case *The Andhra Pradesh State Road Transport Corporation, Hyderabad and Another Vs. Sri Satyanarayana Transports (Private) Ltd., Guntur and Others*, the Supreme Court has considered the matter. There Gajendragadkar, C.J. has made observations, inter alia, to the following effect:

It is an elementary rule of justice that a person who tries a cause should be able to deal before him objectively, fairly and impartially.... The use of the word bias should be confined to its sphere. It's proper significance is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or bias towards one or the other in dispute.

In my opinion, there is considerable room for the contention that such a clause in the arbitration agreement is opposed to principles of natural justice and is accordingly void. In this case it is not necessary for me to express a firm view on the matter, but this point will, in my opinion, raise difficult questions of law.

28. The next set of questions relate to the contract itself.

29. In view of the allegations in the plaint that the contract was void because of a mutual mistake of fact essential to the contract and alternatively, it was void because the Union made misrepresentation to the contractor and the contractor has avoided it, the question for consideration is, firstly, whether the suit falls within the purview of the arbitration clause and secondly, even if it does, whether the question of validity should be decided in this application by taking recourse to trial on evidence, for, it is a common case that no definite decision can be arrived at on the affidavits before me.

30. The more important averment of the plaint is that the negotiated rate submitted by the contractor was on the basis of a plan given to him which indicates what part requires no blasting, what part requires partial blasting and what part requires blasting mostly. The contractor after a considerable amount of work had been executed, that is, 125 lakhs cft. out of 1,80,000,000 cft., found that the earth-work to be executed by them which required blasting was not 22 per cent and 8 per cent as appearing from the drawings and specifications but was about 50 per cent of each kind. The Plaintiff states that in the foresaid facts and circumstances the said classification of soil of 22 per cent requiring blasting and 78 per cent requiring no blasting formed the basis and foundation of the said contract, that both parties were in a common mistake as to a matter of fact essential to the agreement and that the said contract was void ab initio. On or about November 23, 1963 the Plaintiff asserted and/or declared the said contract to be void at its inception and demanded payment of compensation and refund of security deposit; but the Defendants wrongfully denied the contentions and claims of the Plaintiff. In the alternative, it was said that "the said, through rates were entered and the said contract was induced by a representation by the Defendant to the Plaintiff in the said drawings and specifications". The contractor thereafter found that the representations were not correct and that he could not have found them with ordinary diligence, because the work extended upto a depth of 50 ft. below the surface. Thereupon the Plaintiff duly avoided the same

and demanded compensation and refund of security deposit. The said contract thereupon became void.

31. The question whether a suit falls within an arbitration clause in a contract depends on (a) what is the dispute and (b) what disputes the arbitration clause cover - *Heyman v. Darwin Ltd.* (1942) A.C. 356, as per Viscount Simon. Therefore, it is necessary to consider the amplitude of the arbitration clause. The amplitude of a somewhat similar arbitration clause was considered in the case of *Dhanrajamal Gobindram Vs. Shamji Kalidas and Co.*, where Hidayetulla J. observed:

In our opinion the words of the bye-law arising out of or in relation to contracts are sufficiently wide to comprehend matters, which can legitimately arise u/s 20. The argument is that when a party questions the very existence of a contract no dispute can be said to arise out of it. We think that this is not correct and even if it were, the further words "in relation to" are sufficiently wide to comprehend even such a case. In our opinion the argument must fail.

32. In *Union of India (UOI) Vs. Birla Cotton Spinning and Weaving Mills Ltd.*, their Lordships of the Supreme Court quoted with approval a passage from *Heyman v. Darwin Ltd.* (1942) A.C. 356 as per Viscount Simon, L.G. which includes this portion:

An arbitration clause is a written submission, agreed to by the parties to the contract, and like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission.

Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void. But in a situation where the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them whether there has been a breach by one side or the other, or whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen "in respect of", or "with regard to" or under the contract and an arbitration clause which uses these or similar expressions should be construed accordingly.

33. Hence, if the latest view of the Supreme Court, in consonance with the observation of Viscount Simon, is taken into account it seems to me that, in any event, the case that the contract was void by reason of mutual mistake does not fall within the ambit of the arbitration clause in this case. If it does fall within the ambit of arbitration clause then even if it is false and vexatious, the Court cannot stay such a suit. This was held in *Shree Bajrang Jute Mills Ltd. Vs. Fulchand*

Kanhaiyalal Co. and Another, following several English decisions and the observation of the Supreme Court, inter alia, in *Gaya Electric Supply Co. Ltd. Vs. The State of Bihar*,

34. There is, however, lesser room for the contention that the case of avoidance of the contract by reason of misrepresentation falls outside the scope of the arbitration clause for avoidance of the contract took place subsequent to the contract. In case it is assumed that such a plea falls within the purview of the arbitration clause, then, in my opinion, since one of the principal points is that the contract is void for mutual mistake and the other is also a point which arises more or less out of the same facts, the suit in my opinion, should not be stayed partially.

35. In *Chandanmull Jhaleria and Others Vs. Clive Mills Co. Ltd. and Others*, the appeal Court held that the Court may in its discretion decide the question of validity or existence of a contract in an application u/s 34, whatever may be the nature of that question. This was evidently approved in the case of *Anderson Wright Ltd. Vs. Moran and Company*, In *Birla Cotton Spinning and Weaving Mills Ltd. Supra*, this case of *Chandanmull Jhaleria* was explained in these words:

The decision of the Calcutta High Court in *Chandmull Jhaleria v. Clive Mills Company Ltd.*, on which also reliance was placed does not assist the Union. In that case the Court decided that an arbitration clause in a contract, by which the parties thereto agree to refer their disputes to arbitration may be wide enough to include a dispute whether the contract itself has or has not been frustrated; but in the present case we are not concerned about any dispute relating to frustration of the contract.

36. In my opinion, this recent case has put a limitation on the effect and scope of the decision in *Chandanmull Jhaleria and Others Vs. Clive Mills Co. Ltd. and Others*, and has brought it in accord with the observations of Viscount Simon in *Heyman v. Darwin Supra* which has been quoted with approval in *Union of India v. Birla Cotton Spinning and Weaving Mills Ltd. Supra*.

37. Hence, in my opinion, there is slender room for trying the questions as to the existence or validity of the arbitration agreement on evidence in an application u/s 34 of the Arbitration Act.

38. Be that as it may, in my opinion, assuming this case again falls within the fold of *Chandanmull Jhaleria v. Clive Mills Company Ltd. Supra* as widely understood until, in my opinion, its limitation has been put in by the Supreme Court in the above case of *Union of India v. Birla Cotton Spinning and Weaving Mills Ltd. Supra* reads the correct position in law, even then this is a matter of discretion of the Court.

39. In my opinion, in this matter the Court should not exercise its discretion to try the questions as to the existence or validity of the arbitration agreement on evidence for the reasons given hereinafter. There is, according to me, no

subsisting arbitration agreement because there is only an option to go to arbitration and that option has not been exercised by the contractor.

40. There are, furthermore according to me, four difficult questions of law which go to the root of the arbitration agreement itself.

41. The Railway has a large claim, according to it, against the Applicant for which the only remedy is a suit. This suit, if filed, will include a large area of controversy which have been covered by the Applicant here. Therefore, it is preferable that they, in the circumstances, should be tried in one forum which is common to both.

42. The claims in the suit cannot be said, on the materials before me, to be without foundation but raises serious questions of facts and law. The case of mutual mistake or misrepresentation is founded on the plan for, according to the Petitioner, the through rates were quoted on the basis of the plan. The Union of India in course of the correspondence asserted that the plan was not supplied to the contractor and did not form part of the tender document. It is now clear that there is sufficient prima facie materials to indicate that the plan was supplied by the Union of India to the contractor. There is also sufficient prima facie materials appearing even from the terms of the contract to indicate that the plan was a part of the tender documents. There is also this almost admitted position that the Union acted on the basis of this plan, to decide whether the rate tendered is proper or not. There is also this evidence before me that in fact the excavation work was not of the kind mentioned in the plan, but the proportion which required blasting was much higher, it was of 50 : 50 instead of about 22 : 78, This, I was told, means an additional claim of about Rs. 15,00,000. There is also foundation for the case of misrepresentation on the basis of the plan supplied by Respondent to the Petitioner. It was urged that the plan was prepared for the purpose of the Union on the basis of the informations received. Therefore, they want to suggest that it is useless. In my opinion, whether that was done or not, again is a controversial question. The fact remains they relied on the plan and the fact that the plan was apparently supplied to the contractor. It was further urged that the Union has under the terms contracted out of the liability. In my opinion, when there is a mutual mistake, on avoidance of the contract on the ground of misrepresentations, it is a question of law whether the Union is competent to contract out in view of the provisions u/s 21 of the Contract Act or Section 15 of the Contract Act which deals with misrepresentation.

43. It must be recorded that as a matter of abundant caution that the observation made by me in the foregoing three paragraphs are only prima facie observations and should not be taken as if I have considered the matter fully and expressed my final views on these aspects of the matter.

44. Therefore, in the result, application for stay made by the Union should be rejected and I hereby reject it. The application is dismissed with costs. The interim stay is vacated. Certified for two counsel.