M/S Rickmers Verwaltung Gmb H vs The Indian Oil Corporation Ltd on 19 November, 1998

Equivalent citations: AIR 1999 SUPREME COURT 504, 1998 AIR SCW 3672, 1999 (1) ARBI LR 1, 1999 (1) COM LJ 13 SC, 1999 (1) SCC 1, (1999) 1 COMLJ 13, (1999) 2 KER LT 27, 1999 (1) ALL CJ 547, (1999) 1 PUN LR 842, 1998 (6) SCALE 197, 1998 (8) ADSC 481, 1999 (121) PUN LR 842, (1998) 8 JT 85 (SC), 1998 (8) JT 85, (1999) 4 CIVLJ 326, (2000) 2 LANDLR 109, (1999) 1 MAD LJ 62, (1998) 3 SCJ 519, (1998) 31 CORLA 443, (1999) 1 ARBILR 1, (1998) 8 SUPREME 464, (1999) 1 RECCIVR 379, (1998) 6 SCALE 197, (1998) 4 CURCC 101, (1999) 2 CURLJ(CCR) 9, (1998) 76 DLT 587

Author: K.Venkataswami

Bench: K.Venkataswami

PETITIONER:
M/S RICKMERS VERWALTUNG GMB H

Vs.

RESPONDENT:
THE INDIAN OIL CORPORATION LTD.

DATE OF JUDGMENT: 19/11/1998

BENCH:
K.VENKATASWAMI

ACT:

HEADNOTE:

JUDGMENT:

JUDGMENT Dr. A.S.Anand. CJI Leave granted.

This appeal by special leave calls in question the judgment and order of the Delhi High Court dated

Oct. 17, 1996 and arises in the following circumstances. The respondent, Indian Oil Corporation Ltd., entered into an agreement with M/s Tubacero of Mexico for purchase of pipes for its Kandla-Bhatinda Pipeline project on September 16, 1993. According to the terms of the agreement, M/s Tubacero were to deliver the pipes to the respondent at Tampico Port in Mexico. In order to bring the pipes to India, the respondent, a Government Corporation, was required to go through M/s Transchart, a department of the Ministry of Surface Transport, which brokers charter party arrangements with various vessel owners, for the purposes of shipping of pipes from Tampico Port. M/s Transchart invited offers from various ship owners and the appellant was one of the ship owners who made an offer. In order to execute a contract between the parties, respondent No. 1 was to establish a standby letter of credit as per the format to be mutually agreed upon by the parties while the appellant was to furnish a performance bond also in a format to be mutually agreed upon by both the parties. Respondent No. 1 conveyed to the appellant on Nov. 17, 1993 that loading of pipes at Tampico port should commence on December 14, 1993 and be completed by December 21, 1993. The appellant, however, did not proceed in the matter because the format and the language of the standby letter of credit in the form issued by its bankers was not approved by the first respondent. The draft letter of credit proposed by the first respondent was also not approved by the appellant and fresh proposals were exchanged between the parties. As a consequence, the appellant did not carry the pipes, as according to it. the formats of standby letter of credit and performance guarantee were not settled between the parties. The first respondent was, therefore, compelled to arrange for the carriage of first consignment of pipes received from M/s Tubacero at Mexico. Trnaschart by it telex dated December 24, 1993 apprised the appellant about the failure to carry out its obligation, despite repeated requests which had resulted in the Charterers to finalise alternative shipping arrangements. While the matter stood thus, the appellant filed a request for arbitration with the Indian Council of Arbitration on 11.6.1994. On June 28, 1994 the first respondent received a notice from the Indian council of Arbitration intimating it that the appellant had filed an application dated June 16, 1994 invoking Clause 53 of the Agreement of Affreightment (AOA) relating to arbitration and that it had laid a claim of 1,031,668.77 US dollars. The first respondent was directed to deposit a sum of Rs. 83,200/- towards costs of the arbitration on or before July 28, 1994. On receipt of the communication from the Indian Council of Arbitration, the first respondent informed the Indian council of Arbitration (second respondent) that there did not exist any binding contract between the first respondent and the appellant, much less any binding agreement of refer any dispute between the parties to arbitration according to the Rules of the Arbitration of the Indian Council of Arbitration. It was asserted that the agreement dated Nov. 11, 1993 relied upon by the appellant in its statement of claim, as constituting the contract between the parties had not been signed by the first respondent and the document was nothing more than a mere proposal made by the appellant, which was subject to the parties agreeing on the format and language of the standby letter of credit to be provided by the first respondent for the benefit of the appellant and was subject to the parties also agreeing to the format and language of performance guarantee to be established by the appellant in favour of the first respondent. It was maintained that since no agreement could be reached with regard to the contents of the aforesaid two documents, which were fundamental to arrive at a working relationship between the parties, the claim of the appellant regarding the conclusion of the contract between them was not maintainable. The first respondent also questioned the jurisdiction of the Indian Council of Arbitration to decide whether or not an arbitration agreement exists between the parties and asserted that in case the appellant considered that they

had entered into a binding agreement between the parties, they could take steps to obtain a reference through a competent court. Notwithstanding the stand of the first respondent, the Indian Council of Arbitration on January 3, 1995, intimated to the parties that it had appointed Mr. M.K.Chawla a retired Judge of the Delhi High Court as an Arbitrator. It was also stated in the communication that appellant had nominated Rear Admiral (Dr.) O.P.Sharma as their nominee as arbitrator. The first respondent was requested to file its statement of defence by January 15, 1995, which date was subsequently extended. The direction to deposit a sum of Rs. 83,000/- towards cost of expenses of the arbitration was reiterated. The first respondent, aggrieved by the communication from the Indian Council of Arbitration dated January 3, 1995, filed a petition under Section 33 of the Indian Arbitration Act, 1940, seeking a declaration from the court that there did not exist any concluded arbitration agreement between the parties and the reference of the dispute in question to the Arbitration by the appellant was unwarranted and not maintainable. The application was resisted by the appellant, who maintained that a valid and subsisting agreement between the parties had come into existence and that the claim of the appellant was required to be adjudicated by the arbitrators in terms of Clause 53 of the "agreement". On the pleadings of the parties, a learned single Judge of the Delhi High Court framed the following issues :

"1.Whether there is a valid and subsisting agreement between the parties ?

2.Relief."

During the pendency of the application the learned single Judge stayed further proceedings before the Arbitrator appointed by the Indian Council of Arbitration. Parties were directed to file evidence by way of affidavits in the court. documentary evidence and affidavit were consequently filed in the court.

The case put up before the learned single Judge on behalf of the appellant was that though no agreement (as drawn up on 11.11.1993) was formally signed between the parties, yet the contemporaneous correspondence exchanged between them went to show that a binding contract did come into existence between the parties and since Clause 53 of the "agreement" dated 11.11.1993 provided that all disputes under the Charter Party were to be settled in India in accordance with the provisions of the Indian Arbitration Act, 1940 read with the Maritime Arbitration Rules of the Indian Council of Arbitration, their plea to get the dispute settled by arbitration was well founded. According to respondent No. 1, Indian Oil corporation Ltd., on the other hand, no arbitration agreement had been executed between the parties and that the contemporaneous correspondence exchanged between the parties had also not brought about any enforceable contract between them because the fundamental conditions of the terms of the bargain were neither agreed upon nor fulfilled by the parties.

After referring to various documents and correspondence exchanged between the parties, the learned single Judge on October 17,1996, vide the order impugned herein, held that on concluded, enforceable and binding contract came into existence between the parties and as such Clause 53 of the Charter Party "agreement" relating to arbitration had no existence in the eye of law. Issue No. I was, accordingly, decided in favour of respondent No. 1 and the petition filed under Section 33 of the

Arbitration Act by respondent No.1 was allowed on October 17,1996. The learned single Judge restrained the appellant from proceeding with the arbitration. Hence this appeal. We have heard learned counsel for the parties and perused the record.

It is an admitted case of the parties that a Charter Party Agreement was drawn up on November 11, 1993. It is, however, not disputed that the said agreement was not signed by the parties. Mr. R.F.Nariman, learned senior advocate appearing for the appellant submitted that even though the agreement dated November 11, 1993 had not been signed by the parties but the parties had acted upon it treating it to be a binding contract. Argued Mr. Nariman that the agreement was operative and binding even without the parties having agreed to the format and terms of the standby letter of credit and the performance guarantee, because the appellant had after receipt of the letter of credit from respondent No.1 sent to him a communication dated December 6, 1993 intimating that the draft of letter of credit was basically acceptable except for some minor details. Similarly, it had been eonveyed that the draft performance bank guarantee received by it from respondent No.1 had been forwarded to the bankers for their acceptance. Learned counsel pointed out that on December 16,1993, Transchart had faxed a fresh draft of standby letter of credit to the appellant and in the communication attached thereto, it was indicated that the draft letter of credit would be acted upon by respondent No.1 On this basis, Mr. Nariman submitted that a binding agreement had come into existence, through correspondence, and the non-signing of the charter party agreement dated November 11,1993 by respondent No.1 was of no consequence. Mr. Nariman asserted that Clause 48 of the agreement did not speak of any agreement regarding the terms of letter of credit to be forwarded by State Bank of India or regarding the format and language of the performance guarantee to be established by the appellant in favour of the first respondent, and therefore, even in the absence of an agreement about the format of the letter of credit and of the performance guarantee, Clause 48 of the agreement was attracted and recourse to arbitration was justified. Learned counsel for the respondent in reply submitted that perusal of the correspondence exchanged between the parties established that there was no meeting of mind between the parties and no agreement could also be spelt out from the correspondence exchanged between the parties. Learned counsel submitted, by reference to the documents on the record, that the correspondence exchanged between the parties, including various fax messages, exposed that the appellant was not ready to nominate the vessel to carry the cargo, without agreeing on the terms of the letter of credit and the performance guarantee and that there was no letter or fax exchanged between the parties which could in any manner indicate that any agreement had been arrived at between the parties with regard to the terms of the standby letter of credit and the performance guarantee. Since, the appellant itself attached primary importance to the furnishing of letter of credit by the first respondent before it could carry the cargo submitted the learned counsel, the "draft" Charter Party agreement dated November 11,1993 even if it had in fact been executed between the parties, could not become enforceable because the terms of letter of credit and performance guarantee had not been agreed to between the parties.

It would at this stage be relevant to extract sub-clause (a) of Clause 48 to the Charter Party. It reads thus:-

> "4(a) Freight is payable :-

> IOC will open a standby irrevocable Letter of Credit for freight amount of each shipment for the cargo in transit. Standby Letter of Credit will be issued by SBI India on SBI Germany. Freight payment will be made through Bank Transfer at Hamburg Germany under which 50 percent less 3.75 percent commission is payable within 7 working days against presentation of copy Bill of Landing and owners invoice in triplicate. 40 percent within 7 working days of saft arrival of vessel at disport and on presentation of owners invoice in triplicate and 10 percent within 30 days of completion of discharge and on presentation of owners invoice in triplicate".

A bare reading of Clause 48 (supra) shows that respondent No.1 was to open a standby irrevocable letter of credit for freight amount of each shipment of the cargo in transit. The standby letter of credit was required to be issued by the State Bank of India on the State Bank of Germany. Indeed this clause by itself does not show whether the condition of establishing a standby irrevocable letter of credit or the furnishing of performance guarantee were conditions precedent to the conclusion of contract but there is enough material on the record to show that they were meant to be condition precedent. In this connection a reference may be made to the fax communication dated 4.11.1993 from the appellant (much before the alleged agreement of November 11,1993) which reads thus :-

> "frt-payment : 100 pct secured by bank gtee in favour of Line account at hamburg under which 50 pct less 3.75 pct commission is payable within seven working days against presentation of original bladings and Lines invoice in triplicate. $0 pct within 35 days of date of bill of lading 10 pct within 60 days of date of bill of lading.
>
> (in order to avoid any dispute and documents to be furnished we have to relate to one firm document which is bill of lading and one firm date which is date of bill of lading).
>
> Line to provide charters with performance gtee equivalent to 5 pct of freight bases on appr. 10,000 mt per shipment equivalent to usd 50,000 firm valid till 40 pct payment is released.
>
> Formate of bank gtee and performance bond gtee to mutually agreed. Specification of cargo noted however quantity now abt. 50,000 mt only. In case of 7 shipments quantity per shipment 7,000 mt only. Kdly advise as cargo quantity major factor for freight calculation. Pls Advise urgently till office opening tom. Morning here. Will reply on c/p-terms tom. Afternoon."

and the fax message sent by respondent No.1. on 10.11.1993:

> "tradex newdelhi 10.11.1993 attn: mr wersich line pipes-tampico/kandla received following from chrts:
>
> 1.period - to be changed to dec 1993 to july 1994 (however everything else reg qtty / lots remains same)

2.in place of bank gtee -

"ioc will open a standby irrevocable 1/c for freight amount of one shipment for the cargo in transit. Standby l/c will be issued by sbi india on sbi germany. Freight payment will be made through bank transfer at hamburg germany under which 50% less 3.75% commission is payable within 7 working days against presentation of b/1 and owners invoice in triplicate. 40 pct within 7 working days of safe arrival of vsl at disport and 10 pct within 30 days of completion of discharge.

3.the ship name/details should be intimated immediately. End plse confirm your acceptance to above per return."

The return fax message from the appellant dated 10.11.1993 reads:

"refyr msg of just now :

1.accepted

2.ioc will open a standby irrevocable 1/c in regard to the freight amount for the shipments. Funds under 1/c for each lot to be available by latest 15th of each month before nomination of the vessel by line. Standby 1/c will br issued by sbi india on sbi germany, sbi Germany to be authorised to reimburse themselves. In case any freight amount is not being received by line as per c/p and mentioned below, the amount shall be released on first written demand under standby 1/c freight payment will be made through bank transfer at hamburg germany:

a.50% less 3.75% commission is payable within 7 days on prersaa, 29,90: 2 nos. copy bill of lading Lina's invoice in triplicate b.40% is payable within 7 days on presentation of : arrival notice from master (telegram/telex/telefex) c.10% is payable within 30 days on presentation of : discharge notice from master (telegram/telex/telefex)

3.require urgently all detls of Ist lot (see Y' days telex) before, we cannot niminate the vessel. Entd comments:

in case point 2 not clear, kdly call in order to discuss the possibilities over phone. Tks. Lifting extended to 12.30 hrs german time tomorrow.

Looking forward to hearing from you."

This correspondence unmistakably shows that at no point fo time, till the charter party agreement was drafted on 11th Nov. 1993 did the parties agree to proceed further without agreeing upon the format of the letter of credit and performance guarantee.

Reference here may also be made to the fax message dated December 16, 1993, by which a fresh draft of standby letter of credit was sent by Transchart to the appellant. In that fax message it was indicated that the draft letter of credit would be acted upon by the appellant. The response of the appellant's agent, Line International of the same date, however, shows that it was categorically asserted by it that the draft letter of credit was not workable and therefore, was not acceptable. Line International had faxed draft of a fresh standby letter of credit. Subsequently, another draft of standby letter of credit was also faxed by Line International but since there was no agreement regarding the acceptance of the draft, the appellant did not nominate any vessel for carrying the cargo which was required to be loaded from December 14, 1993 to December 21, 1993. Line International had consistently maintained in their various fax messages, that the offer made by the appellant was subject, inter alia, to the acceptance of the draft letter of credit. The stand of the appellant was thus categorical that without any agreement on the terms of the letter of credit, it was not ready to nominate the vessel to carry the cargo. The appellant was, thus, for all intent and purposes treating the furnishing of the letter of credit as a condition precedent for carrying the cargo. At no point of time did the appellant accept the terms of the letter of credit furnished by respondent No.1. The submission of Mr. Nariman that an agreement, even if not signed by the parties, can be spelt out from correspondence exchanged between the parties admits of no doubt. In fact, various judgments cited by him at the bar unmistakably support this assertion. The question, however, is can any agreement be spelt out from the correspondence between the parties in the instant case ? In this connection the cardinal principle to remember is that it is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the Court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence it can unequivocally and clearly emerge that the parties were ad idem from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement, upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence.

From a careful perusal of the entire correspondence on the record, we are of the opinion that no concluded bargain had been reached between the parties as the terms of the standby letter of credit and performance guarantee were not accepted by the respective parties. In the absence of acceptance of the standby letter of credit and performance guarantee by the parties, no enforceable agreement could be said to have come into existence. The correspondence exchanged between the parties shows that there is nothing expressly agreed between the parties shows that there is nothing

expressly agreed between them and no concluded enforceable and binding agreement come into existence between them. Apart from the correspondence relied upon by the learned single Judge of the High Court, the fax messages exchanged between the parties, referred to above go to show that the parties were only negotiating and had not arrived at any agreement. There is a vast difference between negotiating a bargain and entering into a binding contract. After negotiation of bargain in the present case, the stage never reached when the negotiations were completed giving rise to a binding contract. The learned single Judge of the High Court was, therefore, perfectly justified in holding that Clause 53 of the Charter Party relating to Arbitration had no existence in the eye of law, because no concluded and binding contract ever came into existence between the parties. The finding recorded by the learned single Judge is based on a proper appreciation of evidence on the record and a correct application of the legal principles. We find no merit in this appeal. It fails and is dismissed with costs.