Union Of India (Uoi) vs Salween Timber Construction (India) ... on 25 September, 1968

Equivalent citations: AIR1969SC488, [1969]2SCR224

Bench: J.C. Shah, A.N. Grover

JUDGMENT

Ramaswami, J.

1. This appeal is brought by special leave against the judgment of the Punjab High Court in Civil Revision No. 438-D of 1964 by which the revision petition of the appellant against the order of Shri D. R. Khanna, Subordinate Judge, 1st Class, Delhi dated 20th April, 1964 in Suit No. 128 of 1963 was dismissed in limine. Suit No. 128 of 1963 was an application by the Union of India under sections 5, 12(2), 31(3), 32 and 33 of the Arbitration Act, 1940 for obtaining a declaration that the reference of the claim of the respondent firm in respect of excess quantity of timber alleged to have been delivered and certain other matters was not covered by the arbitration agreement and for leave to revoke the authority of the Arbitrators and the Umpire. The petition was rejected by the Subordinate Judge by his order dated 20th April, 1964.

2. By a savingram dated 21st December, 1953 the Union of India (hereinafter called the appellant) entered into a contract of purchase of 1.01.750 cubic feet of teak logs at Rs. 9/12/- cer c.ft. to be delivered F.O.R. Halisahaar and Lillooah. both in West Bengal near Calcutta. The consignee was the District Controller of Stores, Eastern Railway. The formal acceptance of tender confirming the savingram and containing the other terms of the contract was issued on 13th January, 1954. Besides the quantity of teak logs originally contracted to be supplied, the respondent firm subsequently supplied a quantity of 1676.95 c.ft. Burma teak squares at the same rate and the contract was accordingly amended on 13th December, 1957. It was provided in Clause 17(c) of the acceptance of tender that the respondent firm was to offer the timber for inspection at its own premises at Halisahaar and Lillooah. Although the delivery time was extended from time to time, upto 26th January, 1958. the respondent firm supplied only 77.211.89 cubic feet of timber and the contract in respect of the unsupplied quantity was cancelled on 20th June, 1958 and that the supplied quantify was repurchased by Government from third party at a loss of Rs. 1,54,541.36 on 23rd July, 1958. Including this item the appellant made a claim of Rs. 3.50 085.90 against the respondent firm out of which it recounted Rs 1.79.366 from the sums due to the respondent firm leaving a balance of Rs. 1 70.719.99. The contract in question is governed by the arbitration agreement contained in clause 21 of the form W.S.B. 133 which states as follows :--

"Arbitration :

> In the event of any question or dispute arising under these conditions or any special conditions of contract or in connection with this contract (except as to any matters the decision of which is specially provided for by these conditions) the same shall be referred to the award of an arbitrator to be nominated by the Purchaser and an arbitrator to be nominated by the Con tractor, or in case of the said arbitrators not agreeing then to the award of an Umpire to be appointed by the arbitrators in writing before proceeding on the reference and the decision of the arbitrators, or in the event of their not agreeing, of the Umpire appointed by them, shall be final and conclusive and the provisions of the Indian Arbitration Act, 1940, and of the Rules there under and any Statutory modification thereof shall be deemed to apply to and be incorporated in this contract.
>
> Upon every and any such reference, the assessment of the costs incidental to the reference and award respectively shall be in the discretion of the arbitrators or in the event of their not agreeing of the Umpire appoint ed by them."

3. In pursuance of the arbitration clause the respondent firm appointed one Mr. T. R. Sharma as its arbitrator and the appellant appointed Mr. R. R. Desai, Deputy Legal Adviser, Ministry of Law. Government of India as its nominee. Mr. P. S. Bindra, a retired District Judge was appointed as the Umpire by order of the Sub-Judge dated 2-8-1961. Both the parties filed their respective claims before the arbitrators. The respondent firm claimed a sum of Rs. 73,50,000 while the appellant contended that the E respondent committed breach of the contract by not supplying the stipulated quantity of timber under the contract and as such claimed damages to the extent of Rs. 3,00,000. The case of the respondent firm was that in order to cover up possible rejection, a quantity of timber much in excess of the contracted quantity was despatched to the consignees and the excess Quantity measuring 3,400 tons i.e. 1,70.000 cubic feet was still lying with the Lillooah consignee and 1,500 tons i.e. 75,000 cubic feet with the Halisahaar consignee and had not been returned despite repeated requests. The respondent firm claimed return of this quantity of timber and compensation for its deterioration. It was alternatively contended that in case the Government failed to return the whole or part of the excess timber, then payment for that quantity at the market rate should be made. The appellant in its reply denied the allegation relating to the delivery and retention of excess quantity. It was specifically denied that 4,900 tons or any quantity was due to be returned to the respondent firm or that it was entitled to recover Rs. 73,50,000 or any amount as claimed. It was contended that in terms of the contract the respondent firm H was to offer inspection of the store at its own premises at Lillooah and Halisahaar but instead done so. the respondent firm started to despatch the logs to the DCO's Lillooah and Halisahaar to be A inspected at the consignees' premises. This was done for its own convenience and at its own risk. The inspected stores were retained by the consignee while the rejected stores were to be removed by the respondent firm from the consignee's premises at their own expense. It was submitted that the dispute raised by the respondent firm was outside the scope of the arbitration agreement and that the arbitrators had no jurisdiction to entertain such a claim. After hearing the parties, the Subordinate Judge rejected the application of the appellant by his order dated 20th July, 1964.

4. It is necessary at this stage to quote the relevant clauses of the contract. Clause 13(1) provides:

"Inspection and Rejection : Facilities for Test and Examination:--The Contractor shall afford at his own expense the Inspector all reasonable accommodation and facilities for satisfying himself that the stores are being or have been manufactured in accordance with the particulars and for this purpose the Inspector shall have full and free access at any time during the con tract to the Contractor's work and may require the Contractor to make arrangements for anything to be inspected at his premises or at any other place and the Contractor shall reserve a similar right as regards any sub-contract he may make.

The Contractor shall pay all costs connected with such tests and provide, without extra charge, all materials, tools, labour and assistance of every kind which the Inspector may consider necessary for any test and examination other than special or independent tests which he shall require to be made on the contractor's premises, and shall pay all the costs attendant thereon, failing these facilities (in regard to which the Inspector will be the sole judge) at his own premises for making the tests, the Contractor shall bear the cost of carrying out such tests elsewhere".

Clause 13(4) reads as follows :--

"Inspection and rejection: The whole of a consignment may be rejected, if, on inspection, a portion upto 4 per cent of the consignment (at the sole discretion of the Inspector) is found to be unsatisfactory."

Clause 13(5) states :

"Rejection: If any stores are rejected as aforesaid then, without prejudice to the foregoing provisions, the Secretary, Department of Supply shall be at liberty to :--

(a) allow the contractor to resubmit stores in replacement of those rejected within a time specified by the Secretary, Department of Sup ply, the contractor bearing the cost of freight in such replacement without being entitled to any extra payment, or

(b) buy the quantity of the stores rejected or others of a similar nature elsewhere at the risk and cost of the contractor without affecting the contractor's liability as regards supply of any further consignment due under the contract, or

(c) terminate the contract and recover from the con-

tractor the loss the purchaser thereby incurs".

5. On behalf of the appellant Dr. Seyid Mohammad presented the argument that the dispute regarding the respondent's claim in respect of the excess quantity of timber measuring 4,900 tons said to have been tendered but not inspected was not a dispute 'arising under the contract" or 'in connection with the contract' and hence the arbitrators had no jurisdiction to adjudicate upon that

claim. It was stated that the terms of contract did not require the respondent firm to tender for inspection any quantity in excess of the contacted quantity of timber and The alleged placing of unlimited stocks of timber at the disposal of the Government officials far in excess of the quantity ordered was beyond the scope of the con- tract. It was argued that the claim should be treated as a claim relating to a transaction of involuntary bailment and not to anything done in the performance, implementation or execution of the contract. It was said that the claim for return of these goods and damages for deterioration or in the alternative for their market value was a claim in detinue and the dispute was not hence a dispute "arising out of the contact" or 'in connection with the contract' but was a dispute relating to a tort of wrongful detention. We do not think that there is any justification for the argument put forward on behalf of the appellant. In our opinion, the claim made by the respondent firm was a claim arising out of the contract. The test for determining the Question is whether recourse to the contract by which both the parties are bound is necessary for the purpose of determining whether the claim of the respondent firm is justified or otherwise. If it is necessary to take recourse to the terms of the contract for the purpose of deciding the matter in dispute, it must be held that the matter is within the scope of the arbitration clause and the arbitrators have jurisdiction to decide this case. In Hevman & Anr. v. Darwins Ltd., (1942) A.C. 356 at 365 the law on the point is very clearly stated in the following passage:

> "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 con tract 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 regard ed 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".

6. In Stebbing v. Liverpool & London and Globe Insurance Company Ltd., [1917] 2 K.B. 433 the policy of insurance contained a clause referring to the decision of an arbitrator "all differences arising out of this policy". It also contained a recital that the assured had made a proposal and declaration as the basis of the contract, and a clause to the effect that compliance with the conditions indorsed upon the policy should be a condition precedent to any liability on the part of the insurers. One of the conditions provided that if any false declaration should be made or used in support of a claim all benefit under the policy should be forfeited. In answer to a claim by the assured, the insurers alleged that statements in the proposal and declaration were false. When the matter came before the arbitrator, the assured objected that this was not a difference in the

arbitration and that the arbitrator had no power to determine whether the answers were true or not, or to determine any matters which called in question the validity of the policy. In holding that the arbitrator had jurisdiction to decide the matter, Viscount Reading, C.J. observed :

> "If the company were seeking to avoid the contract in the true sense they would have to rely upon some matter outside the contract, such as a misrepresentation of some material fact, inducing the contract, of which A force and effect are not declared by the contract itself. In that case the materiality of the fact and its effect in inducing the contract would have to be tried. In the present case the company are claiming the benefit of a clause in the contract when they say that the parties have agreed that the statements in question are material and that they induced the contract. If they succeed in escaping liability that is by reason of one of the clauses in the policy. In resisting the claim they are not avoiding the policy but relying on its terms. In my opinion, therefore, the question whether or not the statement is true is a question arising out of the policy".

7. The principle has been reiterated by this Court in Ruby General Insurance Co. Ltd. v. Pearey Lal Kumar & Anr., [1952] S.C.R. 501 In that case the appellant company insured a car belonging to respondent No. 1 and issued the policy which contained, inter alia, the following terms :--

> "All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed by the parties.... If the company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration then the claim shall have been deemed to have been abandoned and shall not be recoverable".

8. The car was lost and company through its Branch Manager disclaimed liability on three different dates. The insured did not take any action in regard to the appointment of an arbitrator until more than twelve months after the last disclaimer by the company. The case of the company was that the insured must be deemed to have abandoned his claim by virtue of the contract of insurance policy while the respondent averred that there was never any valid disclaimer by the company of its liability as the Branch Manager had no authority to disclaim the liability and it could have been disclaimed only by the resolution of the company. The company made an application under Section 33 of the Indian Arbitration Act praying for a declaration that the reference to arbitration was illegal and the award if made by the arbitrator would not bind the company. It was contended on its behalf that the arbitration clause had ceased to be operative and the question as to the existence and validity of the arbitration agreement was triable by the court under Section 33 of the Arbitration Act and not by the arbitrator. The argument was rejected by this Court. It was held that the point on which the parties were in dispute was a difference arising out of the policy, because recourse to the contract by which both the parties were bound was necessary for the purpose of determining the matter in dispute between them. As there was no contention raised by either of the parties that there was no contract entered into at all or that it was void ab initio the arbitrator had jurisdiction to decide the matter referred to him. In our opinion, the principle applies to the present case and it follows that the dispute between the parties falls within the scope of the arbitration clause.

9. On behalf of the appellant reliance was placed upon the decision of Court of Appeal in Piercy v. Young, 14 Ch. D. 200 in which it was held that the clause "that any differences or disputes that may arise between the partners shall be settled by an arbitrator" does not include a dispute whether the partnership has been terminated, or whether certain shares have been paid on account to the partnership or to one partner alone. In our opinion, the principle does not apply in the present case where the question presented for determination is quite different. Counsel for the appellant also referred to Turnock v. Sartoris, 43 Ch. D. 150. In that case the lessor was under a covenant to supply his lessee with a specific quantity of water. The lease contained a comprehensive arbitration clause. Dispute having arisen as to the supply of water, an agreement was subsequently entered into, binding the lessor to take certain steps to secure the supply and varying the rights of the parties in respect of the supply. The lessee brought an action alleging that the steps agreed upon had not been taken and that he had not been fully supplied with water and asking for an action of the damages to be taken. The lessor moved to have the action stayed. It was held that the disputed matters arose partly under the agreement and were outside the arbitration clause in the lease and that even if all the matters for which damages were claimed could be brought within the arbitration clause it would not be proper to refer them to an arbitration who would not have the authority to construe the agreement to determine its effect upon the lease. It is manifest that the decision has no bearing upon the question presented for determination in the present case.

10. For the reasons already expressed, we hold that the claim of the respondent firm was within the scope of the arbitration clause and the application made by the appellant in Suit No. 128 of 1963 was rightly dismissed by the Subordinate Judge. Accordingly, the appeal fails and is dismissed with costs.