R.N. Ganekar & Co. vs Hindustan Wires Ltd. on 29 November, 1973

Equivalent citations: AIR1974SC303, (1974)1SCC309, 1974(6)UJ30(SC), AIR 1974 SUPREME COURT 303, 1974 (1) SCC 309 1975 (1) SCJ 33, 1975 (1) SCJ 33

Bench: D.G. Palekar, R.S. Sarkaria, V.R.Krishna Iyer

JUDGMENT

Palekar J.

1. This appeal by special leave arises out of an Order dated June 28, 1971 passed by the learned single Judge of the High Court of Calcutta in Matter No. 61 of 1970 (in the ordinary original civil jurisdiction) on an application made by the respondents under Section 33 of the Arbitration Act, 1940.

2. The facts are quite simple. The appellants are Engineers and Contractors with their Head Office in Bombay. They have a factory for the manufacture of prestressed and pre-cast products near Delhi. In December, 1968 the appellants received an order for 20,000 prestressed concrete poles from the Haryana State Electricity Board to be supplied in a period of approximately two years. One of the components of the poles is prestressed concrete wire made of steel. The appellant required about 400 metric tons of the said wire meeting the order. The respondents, who are from Calcutta, are manufacturers of such wires. Their representative in Bombay one Mr. I.M. Uppal learnt that the appellants were in need of wires and so on behalf of the respondents he contacted the appellants at Bombay. Negotiations were carried on by Mr. Uppal on behalf of the respondents and after obtaining confirmation from his Head Office at Calcutta Mr. Uppal informed the appellants that the respondents were agreeable to the terms discussed. Thereafter the appellants, by way of confirmation of the terms of the contract agreed upon, wrote a letter to the respondents on 7-5-1969 as per Annexure B. This letter so far as it is relevant is as follows:

> In continuation of the discussions, we hereby confirmed that:-
>
> We agree to purchase and you have agreed to sell over the next 18/24 months 400 tons of 4 mm and/or 5 mm dia. p.c. wire on the following terms and conditions-
>
> It is not necessary to extract all the terms and conditions here except the one with regard to price. It is as follows :
>
> The above quantity to be supplied at the firm price of Rs. 2450/- (Rupees two thousand four hundred fifty only) per Mt. For Faridabad inclusive of CST., 'C' form shall be issued by us after receipt of invoice.

> A special discount of Rs. 50/- per M.T. in the price was also allowed for which it was agreed that a credit note would be issued by the respondents along with the invoice and the bill was to be drawn on the bankers only for the net amount.

3. After recording the terms and conditions, the letter closed with these words :

> Please confirm the acceptance of the above order and despatch one wagon load as already requested personally.

4. After the receipt of the above letter the respondents sent a telegram dated May 10, 1969 informing the appellants that they can despatch one wagon load of 4 mm wire ex-stock and that they would be in a. position to send 5 mm wire only after two weeks since the same had to be manufactured. The appellants wrote back on May 13, 1969 telling the respondents that 4 mm wires were of no use for the present and they require only 5 mm wires urgently, for, otherwise, their work of manufacturing poles would be held up. So the appellants requested the respondents to arrange for delivery at once of at least one wagon load of 5 mm wires.

5. On may 16, 1969 the respondents wrote a letter to the appellants as per Annexure 'F'. They referred to the appellants' letter dated 7-5-1969 and also to the letter dated 13-5-1969 and stated "kindly note that manufacture of 5 mm wires has already been under taken and we expect to despatch the same within two weeks." Along with the letter Annexure 'F' the respondents sent to the appellants a copy of what is known as the works order also dated 16-5-1969. That is an order to the respondents' works unit to supply the agreed quantity of goods. This works order which is Annexure 'C' shows that the manufacturing unit of the respondents had been directed to supply 400 metric tons of wire of 5 mm gauge. Out of this quantity 20 metric tons had to be despatched immediately and for the rest it was stated that despatch instructions would be issued from time to time. The rate st which the supply was to be made was also mentioned as "Rs. 2450/- inclusive of CST at 3%. Less quantity discount of Rs. 50/- per metric ton." There was the following note under the works order, "All concerned are requested to check this works order thoroughly and in case of any discrepancies to report the same at once to the company. This works order is being issued subject to the terms and conditions of business printed overleaf and form an integral part of this contract. These terms and conditions apply to all customers including Government departments of what is written in customers' order, indent or A/T etc." Terms and conditions of business attached to the works order contain the following clause about arbitration :

> 14. Any dispute arising out of or in any way relating to any contract made with you shall be referred to the arbitration of the Tribunal of Arbitration of the Indian Chamber of Commerce, Calcutta, in accordance with the provisions of the arbitration act, 1940 and the rules of the chamber. And in any action or other proceedings at law available upon in any such contract and not precluded by the foregoing provision for arbitration, the parties submit in all respects to the jurisdiction of the High Court at Calcutta in West Bengal.

The appellants accepted the position as disclosed in the respondents letter dated 16-5-1969 and the works order of that date. In fact as envisaged in the works order the appellants received two consignments of wires one despatched on 17-6-1969 and the other despatched on 21-6-1969.

6. Further deliveries, however, were not made on time as disputes arose regarding the price. By their letter dated 4-9-1969 the respondents demanded a rise in price from Rs. 2450/- per M.T. to Rs. 2680/- per M.T. Then by their letter dated 31-10-1969 the respondents asked for further enhanced price of Rs. 2750/-: By the letter dated 9-1-1970 they demanded a still further increase of Rs. 75/- pes M.T. The appellants being pressed by their own contract with the Haryana Electricity Board accepted the supply of the quantities at the said enhanced rates, expressly, without prejudice to their legal rights under the contract. The respondents were not happy that the appellants should fail to accept formally in writing the respondents right to enhance the price and, hence on January 28, 1970 respondents informed the appellants that since the appellants were raising objection to the price rise the respondents were treating the contract to the extent of the balance of the quantity agreed to be sold as cancelled. By this time it appears that out of 400 tons agreed to be sold the respondents had sold and delivered in all about 88 tons.

7. After the above letter of the respondents, the appellants on 18-2-1970 referred the dispute to the arbitration of the Indian Chamber of commerce under the arbitration clause already referred to. The appellants also filed their statement of claim before the Tribunal of arbitration on 10-3-1970. Notice was issued to the respondents to file their reply on 8-4-1970. But the respondents took extensions of time till 19-6-1970. On 20-5-1970 the respondents filed the application out of which the present appeal arises on the original side of the High Court claiming (i) that no contract as alleged by appellants was concluded between the parties; (ii) that consequently there was no arbitration agreement between the parties; (iii) an injunction restraining the appellants from proceeding with the reference and (iv) a declaration that there was a concluded contract including the arbitration clause between the parties not in terms of the price alleged by the appellants but subject to variation as notified to the appellants by letter dated 16-5-1969.

8. The appellants contended that the respondents' application was not competent as even according to them there was a concluded contract with an arbitration clause. The dispute was confined only to the price. The appellants alleged that the respondents had agreed to the firm price of Rs. 2450/- per M.T., while the respondents claimed that it was subject to variation. That was a matter which was entirely within the jurisdiction of the arbitrators and, therefore, the court had no jurisdiction under Section 33 of the Arbitration Act to grant the reliefs claimed.

9. The learned single Judge held that there was no concluded contract at all. Therefore, the arbitration clause which was an integral part of the contract never came into existence. The learned single Judge was further of the view that the price variation clause referred to by the respondents had never been agreed between the parties and hence there was no concluded contract even as alleged by the respondents. In these circumstances, therefore, he granted a perpetual injunction restraining the appellants from proceeding with the arbitration reference.

10. It is contended by the appellants that the learned Judge was in error in finding that there was no concluded contract at all between the parties. It was submitted that both the parties alleged that there was a concluded contract with a valid clause for arbitration, and the only point of dispute between the parties was whether the respondents was entitled to the price rise as claimed by them. That was a matter entirely within the jurisdiction of the arbitrator and hence the learned Judge was in error in dealing with the matter as if there was no concluded contract.

11. Section 33 of the Arbitration Act is as follows :

> Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits.
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> It is clear from the provision that the court had jurisdiction under this section (i) when it is desired to challenge the existence of an arbitration agreement; (ii) when it is desired to challenge the validity of that agreement and (iii) when it is desired to have the effect of the arbitration agreement determined. In all these cases it is the arbitration agreement only which is the subject matter for consideration before the court. Indeed if an arbitration agreement forms one of the clauses in a contract and that contract is for some reason invalid in law or non-existent in law, it would automatically follow that the arbitration agreement also was invalid or non-existent in the eye of the law. But when it is not the case that the arbitration agreement has become non-existent or invalid for that reason, the court under Section 33 is merely concerned with the three questions relating to the arbitration agreement only. As pointed out by this Court in Shiva Jute Balling Limited v. Hindley and Co. Ltd. 1960 SCR 569 at page 576. "An arbitration agreement may come into existence in one of two ways; it may either arise out of an agreement which contains nothing else besides the arbitration agreement, or it may arise out of a term contained in a contract which deals with various other matters relating to the contract, which is the present case. Where one is dealing with an arbitration agreement of the second kind, Section 33 is concerned only with the term relating to arbitration in the contract and not with the other terms of the contract which do not arise for consideration on an application under that section."

12. In the present case the learned Judge has come to the conclusion that there was no concluded contract at all for the sale and delivery of 400 metric tons of wire and hence there could not be in existence any arbitration agreement. It appears to us that this finding is not only contrary to the pleadings of the parties but also to the facts of the case. The respondents in their petition had clearly admitted that there was a contract for the sale of 400 metric tons of steel wire. They had accepted the contents of the appellants letter dated 7-5-1969 and had offered by their telegram of 10-5-1969 to send one wagon load of 4 mm wires immediately in pursuance of the contract. In fact on 16-5-1969 they took steps to execute the contract and in the works Order of that date repeated the terms as regards the price agreed to and recorded in the letter written by the appellants on May 7,

1969. And what is more this works order makes no reference to any possible variation of the price in future. It is the case of the respondents that along with the letter of May 16, 1969 Annexure 'F' and the copy of the works order Annexure 'C', the respondents had also sent another letter of the same date in which the respondents had informed the appellants that they were liable to pay a higher price under certain circumstances. The letter is at Annexure 'C' and its relevant portion is as follows :

> Kindly note that the price quoted by us is based on the prevailing cost of raw materials, duties, levies, taxes etc. Should there be any increase in the cost of main subsidiary of secondary raw materials and/or increase of duties levies, excise, taxes or fresh levies effected by the Central or State Governments or Custom or Excise authorities or any other factors the price shall be correspondingly increased. The above price will hold good for a period of one year and the same may be revised after that period.

The appellant denied that they had received any such letter along with Exts. 'F' and 'C' of the same date though such a letter dated May 16, 1969 was received sometime later. Thus there is a controversy about it. But it is not necessary for us to enter into the controversy. It was the appellants' case that there was a concluded contract for the supply of 400 Metric tons of steel wire at a certain firm price & this was not only confirmed by the respondents in Annexures 'F' and 'C' dt. 16th May, 1969 but also by delivery of two truck loads of goods thereafter. Even later, some more tons of steel wire were delivered in pursuance of this original contract although the appellants were required to pay a higher price owing to the respondents' refusal to make the deliveries at the price originally fixed. Even in January, 1970 when the respondents refused to make any further supply it was not because there was no contract between them but because, the appellants, though requested for a long time to formally confirm in writing the price variation clause referred to above, had not done so. The respondents letter dated January 28, 1970 puts the whole controversy beyond the pale of doubt. The relevant portions of that letter are as follows :

> Your order was subject to the terms and conditions as per our letter No. W/8/11 dated 16th May 1969, according to which the prices of wire were subject to price variation....
>
> As and when we have informed you regarding the increase in price on account of above said condition you have not accepted the increase and every time you raised objections and given clearance partially for some quantities. To keep business relationship with you we had all the times kept your requests even though you have given your confirmation for partial quantity although under no circumstances, we were obliged to accept the same and could treat your order as cancelled, in the absence of confirmation regarding increase in the price....

Even the last confirmation which you gave vide letter No. DLW/553/69 dated 22-11-1969 was only for 2 wagons and naturally we have taken it as granted that you are not interested in the balance quantity against your order. However, even vide your letter No. DLW/653/69 dated 30-12-1969, you had confirmed the increase in price only in respect of 3 wagons. This clearly shows that at no stage you had been interested in confirming the increase in price as per price variation clause, inspite of the fact that the price variation clause was accepted by you.

We regret at this stage it is not feasible for us to supply the balance quantity of your order and till writing of this letter, you have not confirmed the increase in price which we have asked for from time to time as per price variation clause and as such we are treating the balance quantity of your order as cancelled.

The word 'order' in the above letter clearly refers to the original agreement for the supply of 400 metric tons of steel wire. The letter charges the appellants that they had accepted the price variation clause and still for some reason or the other they were not confirming in writing the acceptance of the increase in price as per the price variation clause. Therefore, the respondents thought that they were entitled to "treat the balance quantity of your order as cancelled" i.e. to say that the respondents were relieved of the necessity of supplying the balance quantity of steel wire under the original contract. It is evident that the respondents accepted the main contract for the supply of 400 tons of steel wire as recorded in the letter of the appellants dated 7-5-1969, but put forward the plea that the original price of Rs. 2450/- fixed between the parties as the firm price was subject to the price variation clause mentioned in Annexure 'C' dated May 16, 1969 and which, the respondents alleged in their petition, had been accepted by the appellants on or about May 22, 1969. See para 6 of the respondents' petition in the High Court. In other words, it was common ground that there was a completed contract for the sale and delivery of 400 metric tons of steel wire, but whereas the appellants said that the price per ton was Rs. 2450/- the respondents countered that price was subject to variation. The respondents had refused to deliver the remaining portion of goods under the contract only because the appellants, though they had orally agreed to accept the price variation clause, had not formally accepted that clause in writing. The respondents' petition in High Court shows at every step that there was a concluded contract and in fact they wanted a declaration from the court in the following terms :

that the court may be pleased to determine that a contract was concluded between your petitioner and the respondent on the terms and conditions mentioned in the correspondence consisting of the letter dated May 7, 1969 written by the respondent to your petitioner, telegram dated May 10, 1969 from your petitioner to the respondent, letter dated May 13, 1969 from the respondent to your petitioner and the two letters both dated May 16, 1969 and copy of works order dated May 16, 1969 written by your petitioner to the respondent and accepted by and between the petitioner and respondent and that an arbitration agreement exists between your

petitioner and the respondent on the basis of such contract having been concluded between the parties in terms of Clause 14 of the said works order.

This clearly goes to show that there was really no difference as to the subject matter of the contract between the parties except that while the respondents alleged that the appellants had agreed to the price variation clause the appellants alleged that they had not. Apart from this there was no dispute between the parties whatsoever with regard to the terms of the contract. Both parties agreed that in accordance with the works order there was an arbitration clause and this arbitration clause was binding on both. In these circumstances, it is difficult to see how the respondents were entitled to approach the court under Section 33 of the Arbitration Act. There is no challenge to the existence or validity of the arbitration agreement, nor was the application made with a desire to have the effect of the arbitration agreement determined. The learned Judge, with respect, was in error in thinking that the respondents' petition was competent under Section 33 of the Arbitration Act, 1940.

13. In the result the order passed by the High Court is set aside. The arbitrators may now proceed with the arbitration in the course of which it is open to them to consider whether the price per ton fixed in the letter dated 7.5.1969 was to rule the contract or was subject to variation as stated in Annexure 'G' dated 16.5.1969 alleged to have been written by the respondents. The appellants shall get their costs from the respondents.