Alimenta S.A. vs National Agricultural Co-Operative ... on 9 January, 1986

Equivalent citations: AIR1987SC643, JT1987(1)SC177, 1987(1)SCALE29, (1987)1SCC615, [1987]1SCR957, 1987(1)UJ437(SC), AIR 1987 SUPREME COURT 643, 1987 (1) SCC 615, (1987) 1 JT 117 (SC), 1987 (1) UJ (SC) 437, (1987) 1 ARBI L.R. 78, (1987) 1 SCJ 120, (1987) 1 SUPREME 37, (1987) 1 CURCC 402, (1987) 31 DLT 292

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Bench: Ranganath Misra

JUDGMENT

Murari Mohan Dutt, J.

1. These two appeals by special leaveone preferred by the National Agricultural Co-operative Marketing Federation of India Ltd (for short 'NAFFD') and the other by Alimenta S.A. (for short 'Alimenta'), a Swiss Companyare both directed against the judgment of the Delhi High Court dated December 11, 1981 whereby the application of NAFFD under Section 33 of the Arbitration Act, 1940, has been allowed in part.

2. A contract dated January 12, 1980 was entered into by and between the parties, namely, NAFED and Alimenta for the sale and supply of 5,000/8,000 M.T. of HPS groundnut kernels Jaras. After the usual terms as to quality, quantity, price, etc., the contract provided in Clause 11 thereof as follows:

> Other terms and conditions as per FOSFA-20 contract terms.
>
> The expression 'FOSFA' means the Federation of Oils, Seeds and Fats Association Ltd. Subsequently, another contract dated April 3, 1980 was entered into between the parties in respect of 4,000 metric tonnes of groundnut kernels. Clause 9 of this contract provided as follows:
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> All other terms and conditions for supply not specifically shown and covered hereinabove shall be as per previous contract signed between us for earlier supplies of H.P.S.

3. The FOSFA-20 contract contains an arbitration clause which is as follows:

> ARBITRATION: Any dispute arising cut of this contract, including any question of law arising in connection therewith, shall be referred to arbitration in London (or elsewhere if so agreed) in accordance with the Rules of Arbitration and Appeal of the Federation of Oils, Seeds and Fats Association Limited, in force at the date of this contract and of which both the parties hereto shall be deemed to be cognizant.
>
> Neither party hereto, nor any persons claiming under either of them shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrators, umpire or Board of Appeal (as the case may be) in accordance with the Rules of Arbitration and Appeal of the Federation, and it is hereby expressly agreed and declared that the obtaining of an Award from the arbitrators, umpire, or Board of Appeal (as the case may be), shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute.

4. Disputes and differences arose between the parties. Alimenta alleged that NAFED committed breach of their obligations under both the contracts and sought to commence arbitration proceedings. On the other hand, on March 19, 1981, NAFED filed a petition in the Delhi High Court under Section 33 of the Arbitration Act, 1940 alleging, inter alia, that there was no valid arbitration agreement between the parties. It was contended by NAFED that when it agreed in Clause 11 of the first contract that the parties Would be governed by the terms and conditions of FOSFA-20 contract, it only had in mind such terms and conditions as would govern the relationship between the parties. Further, the fact that there was an arbitration clause in FOSFA-20 contract came as a complete surprise to NAFED. In other words, it was sought to be contended that NAFED was not at all aware of any arbitration clause in FOSFA-20 contract and, accordingly, it could not agree to incorporate any such arbitration clause in the contracts in question. The said petition under Section 33 of the Arbitration Act was opposed by Alimenta.

5. A learned Single Judge of the High Court came to the finding that in view of the fact that NAFED had been nominated as the canalising agent for export of HPS groundnut under the provisions of the Export Control Order by the Central Government, it would not be unjustified to assume that the Senior Manager of NAFED was well aware of the foreign trade in groundnut and the implications of reference to FOSFA-20 contract when he put his signature to the contract in question. The learned Judge could not believe that the Manager of NAFED was not aware of the terms of FOSFA-20 contract. Accordingly, the plea of NAFED that it was not aware of the existence of an arbitration clause in FOSFA-20 contract was overruled. The learned Judge held that the arbitration clause in FOSFA-20 contract was incorporated into the first contract dated January 12, 1980 by virtue of Clause 11 thereof providing "other terms and conditions as per FOSFA-20 contract terms".

6. So far as the second contract dated April 3, 1980 is concerned, it was pointed out by the learned Judge that it did not make any mention of FOSFA-20 contract and all that was stated in Clause 9 thereof was that all other terms and conditions for supply not specifically shown and covered therein should be as per previous contract signed between the parties for similar supply of HPS. The learned

Judge took the view that only those terms and conditions which were referred to or connected with and germane to the supply, had been made applicable from the earlier contract that is to say, the first contract dated January 12, 1980. Further, it was observed that a term about arbitration was not incidental to supply of goods and it was difficult to read from the provisions of Clause 9 of the second contract that the arbitration clause was lifted from there and made a part of the same. Upon the said findings, the learned Judge allowed the petition under Section 33 of the Arbitration Act in so far as it related to the second contract dated April 13, 1980. It was held that no arbitration agreement existed between the parties and, as such, none of them was entitled to seek reference to arbitration with regard to the first contract, and that the same was governed by the arbitration clause as having been incorporated therein from the FOSFA-20 contract. The petition under Section 33 was disallowed so far as the first contract was concerned. Hence, these two appealsone by NAFED against the judgment of the learned Judge disallowing the petition under Section 33 in respect of the first contract and the other by Alimenta in so far as it allowed the petition relating to the second contract.

7. We may at first deal with the appeal preferred by the appellant NAFED relating to the first contract. The question is whether by Clause 11 in the first contract, the arbitration clause in FOSFA-20 contract can be said to have been incorporated into the contract. It is now well established that the arbitration clause of an earlier contract can, by reference, be incorporated into a later contract provided, however, it is not repugnant to or inconsistent with the terms of the contract in which it is incorporated. Mr. G. Ramaswamy, learned Additional Solicitor General appearing on behalf of the appellant, has strenuously urged that the High Court was wrong in holding that the arbitration clause in the FOSFA-20 contract was incorporated into the first contract by virtue of the incorporation clause. He has drawn our attention to the second illustration at page 46 of Russell on Arbitration, Twentieth Edition. The illustration refers to the decision of Lord Esher M.R. in Hamilton & Co. v. Mackie & Sons [1889] 5 TLR 677 (C.A.). We have looked into that decision as much reliance has been placed thereon on behalf of NAFED. In that case a bill of lading contained the words "all other terms and conditions as per charter-party", The charterparty contained an arbitration clause. It was contended on behalf of the ship-owners that the arbitration clause in the charterparty was incorporated into the bill of lading. In overruling the said contention Lord Esher M.R. Observed:

> Where there was in a bill of lading such a condition as this, 'all other conditions as per charterparty', it had been decided that the conditions of the charterparty must be read verbatim into the bill of lading as though they were there printed in extenso. Then if it was found that any of the conditions of the charterparty on being so read were inconsistent with the bill of lading they were insensible, and must be disregarded. The bill of lading referred to the charterparty, and therefore, when the condition was read in, 'All disputes under this charter shall be referred to arbitration,' it was clear that that condition did not refer to disputes arising under the bill of lading, but to disputes arising under the charterparty. The condition therefore was insensible, and had no application to the present dispute, which arose under the bill of lading.

8. According to Lord Esher M.R., the arbitration clause in charterparty "all disputes under this charter shall be referred to arbitration", if incorporated into the bill of lading would be quite insensible because of the words "under this charter". The arbitration clause was, therefore, meant only for the charterparty and not for the bill of lading.

9. In a Full Bench decision of the Calcutta High Court in Dwarkadas & Co. v. Daluram Gaganmull AIR 1951 Cal 10 F.B., the said observation of Lord Esher M.R. was considered by Harries, CJ. The learned Chief Justice also took the view that if the arbitration clause in the charterparty was imported into the bill of lading it would be quite meaningless because no dispute under the charter could arise in the contract evidenced by the bill of lading. According to the learned Chief Justice, if the words of the arbitration clause in the charterparty had read "all disputes under this contract shall be referred to arbitration", then if that term was transported into the bill of lading, it would be a perfectly sensible and reasonable term, for, once it had imported the phrase "all disputes under this contract", it would refer to all disputes arising under the bill of lading. There would, therefore, be nothing inconsistent between such a term and the terms of the bill of lading and that being so, cases similar to the case of Hamilton & Co. v. Mackie & Sons (supra) would have no application to the case. This view was also taken by the other learned Judges of the Full Bench.

10. In our opinion, Harries, CJ, had taken a very reasonable and sensible view. It is true, as pointed out by Lord Esher M.R., that the expression "all disputes under this charter", if incorporated into the bill of lading, would be quite insensible. But if, the clause had been "any dispute under this contract", then after incorporation into the bill of lading the words "this contract" would only mean the bill of lading into which it had been incorporated. In the instant case, as has been already noticed, the arbitration clause in the FOSFA-20 contract provides "any dispute arising out of this contract" and, as such, there is no difficulty in the incorporation of the arbitration clause into the first contract, for, the words "this contract" would mean the first contract into which it has been incorporated. Such incorporation would be quite intelligible and not inconsistent with the terms of the first contract. There is, therefore, no substance in the contention made on behalf of the appellant on the basis of the decision in Hamilton & Co. v. Mackie & Sons, (supra).

11. It is next contended by the learned Additional Solicitor General that the arbitration clause in FOSFA-20 contract not being germane to the subject-matter of the first contract, it cannot be said to have been incorporated therein. It is pointed by him that the FOSFA-20 contract is a CIF contract relating to cost, insurance and freight, while the first contract is a f.o.b. contract. It is, accordingly, submitted by the learned Counsel that the arbitration clause is not germane to the subject-matter of the first contract. In support of his contention he has placed much reliance upon the decision of the Court of Appeal in the case of The Annefield [1971] 1 All.E.R. 394. In that case the question was whether the arbitration clause in the charterparty was incorporated into the bill of lading by virtue of the incorporation clause Clause 39, which was the arbitration clause, contained the words "All disputes from time to time arising out of this contract". In considering the question Lord Denning M.R., referred to the decision in The Njegos [935] All.E.R. Rep. 863, where in the course of the discussion, it transpired that these clauses in the charterparty and bill of lading had been in existence since 1914 and, it had always been held that the arbitration clause was not incorporated in the bill of lading. On behalf of the shipowners in that case it was argued that if the arbitration Clause

39 was incorporated into the bill of lading, the expression "this contract" in Clause 39 would then be the contract evidenced by the bill of lading. In other words, the arbitration clause must be read in its bill of lading context. This contention was made on the basis of the observation made by Lord Esher M.R., as extracted above. The contention also finds support from the observation of Harries, CJ, in Dwarka Das's case (supra). Lord Denning M.R. took the view that a clause which is directly germane to the subject-matter of the bill of lading, that is, to the shipment, carriage and delivery of goods, could and should be incorporated into the bill of lading contract, even though it might involve a degree of manipulation of the words in order to fit exactly the bill of lading. But, if the clause was one which was not thus directly germane, it should not be incorporated into the bill of lading contract unless it was done explicitly in clear words either in the bill of lading or in the charterparty. It was, however, held by Lord Denning M.R. that an arbitration clause was not directly germane to the shipment, carriage and delivery of goods. So, it was not incorporated by general words in the bill of lading.

12. Relying upon the decision in The Annefield, it is submitted on behalf of the appellant that the arbitration clause in FOSFA-20 contract is not germane to the subject-matter of the first contract and, accordingly, it was not incorporated into the first contract. We are unable to accept the contention. It has already been noticed earlier that there has been a long continued practice in England that the arbitration clause is not incorporated into the bill of lading by general words, unless it is explicitly done in clear words either in the bill of lading or in the charterparty. In the instant case, we are not, however, concerned with a charterparty and a bill of lading contract. Even assuming that the subject-matters of FOSFA-20 contract and the f.o.b. contract are different, we do not think that any question as to the germaneness of the arbitration clause to the subject-matter would be relevant. It has been found by the learned Judge of the High Court that the Manager of NAFED, who had signed the first contract, was aware of the terms of the FOSFA-20 contract including the arbitration clause contained therein. It is, therefore, manifestly clear that by the incorporation of Clause 11 in the first contract, the appellant intended to incorporate into it the arbitration clause of FOSFA-20 contract. Thus where, as in the instant case, the parties are aware of the arbitration clause of an earlier contract, the subject-matter of which is different from the contract which is being entered into by them, incorporates the terms of the earlier contract by reference by using general words, we do not think there would be any bar to such incorporation merely because the subject-matters of the two contracts are different, unless, however, the incorporation of the arbitration clause will be insensible or unintelligible, as was in Hamilton & Co. v. Mackie & Sons, (supra). In the instant case, the arbitration clause in FOSFA-20 contract will fit in the first contract. In other words, it will not be either insensible or unintelligible. In our opinion, therefore, the High Court was right in holding that the arbitration clause in FOSFA-20 contract was incorporated into the first contract.

13. In the other appeal which has been preferred by Alimenta, it has been held by the High Court that there has been no incorporation of the arbitration clause into the second contract. In the second contract, Clause 9 provides "all other terms and conditions for supply not specifically shown and covered hereinabove shall be as per previous contract signed between us for earlier supplies of HPS". There is a good deal of difference between Clause 9 of this contract and Clause 11 of the first contract. Clause 11 has been couched in general words, but Clause 9 refers to all other terms and

conditions for supply. The High Court has taken the view that by Clause 9 the terms and conditions of the first contract which had bearing on the supply of HPS were incorporated into the second contract, and the term about arbitration not being incidental to supply of goods, could not be held to have been lifted as well from the first contract into the second one.

14. It is, however, contended on behalf of the appellant that the High Court was wrong in its view that a term about arbitration is not a term of supply of goods. We do not think that the contention is sound. It has been rightly pointed out by the High Court that the normal incidents of terms and conditions of supply are those which are connected with supply, such as, its mode and process, time factor, inspection and approval, if any, reliability for transit, incidental expenses etc. We are unable to accept the contention of the appellant that an arbitration clause is a term of supply. There is no proposition of law that when a contract is entered into for supply of goods, the arbitration clause must form part of such a contract. The parties may choose some other method for the purpose of resolving any dispute that may arise between them. But in such a contract the incidents of supply generally form part of the terms and conditions of the contract. The first contract includes the terms and conditions of supply and as Clause 9 refers to these terms and conditions of supply, it is difficult to hold that the arbitration clause is also referred to and, as such, incorporated into the second contract. When the incorporation clause refers to certain particular terms and conditions, only those terms and conditions are incorporated and not the arbitration clause. In the present case, Clause 9 specifically refers to the terms and conditions of supply of the first contract and, accordingly, only those terms and conditions are incorporated into the second contract and not the arbitration clause. The High Court has taken the correct view in respect of the second contract also.

15. In the result, the judgment of the High Court is affirmed and both these appeals are dismissed. There will, however, be no orders as to costs.