Supreme Court of India
Karnataka Power Trans. Cor. Ltd & ... vs M/S Deepak Cables (India) Ltd on 7 April, 1947
Author: D Misra
Bench: Anil R. Dave, Dipak Misra

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4424 OF 2014
(Arising out of S.L.P. (C) No. 20558 of 2013

Karnataka Power Transmission
Corporation Limited and another ... Appellants

Versus

M/s. Deepak Cables (India) Ltd. ...Respondent

With

CIVIL APPEAL NO. 4425 OF 2014
(Arising out of S.L.P. (C) No. 29008 of 2013)

With

CIVIL APPEAL NO. 4426 OF 2014
(Arising out of S.L.P. (C) No. 29009 of 2013)

With

CIVIL APPEAL NO. 4427 OF 2014
(Arising out of S.L.P. (C) No. 29010 of 2013)

With

CIVIL APPEAL NO. 4428 OF 2014
(Arising out of S.L.P. (C) No. 29011 of 2013)

With

CIVIL APPEAL NO. 4429 OF 2014
(Arising out of S.L.P. (C) No. 29012 of 2013)

With

CIVIL APPEAL NO. 4430 OF 2014
(Arising out of S.L.P. (C) No. 29013 of 2013)

With

CIVIL APPEAL NO. 4431 OF 2014
(Arising out of S.L.P. (C) No. 29014 of 2013)

J U D G M E N T

Dipak Misra, J.

Leave granted in all the special leave petitions.

2. The controversy involved in these appeals, preferred by special leave, being similar, they were heard together and are disposed of by a common judgment. For the sake of convenience, we shall state the facts from Civil Appeal arising out of Special Leave Petition 29011 of 2013.

3. The appellant No. 1 is a company wholly owned by the Government of Karnataka and, being a State transmission utility, is a deemed licencee in the State. It invited tenders for establishing 2x8 MVA, 66/11 Sub-stations at Tavarekere in Channagiri Taluk, Davanagere District, which included the supply materials, erection and civil works on partial turnkey basis. The respondent-company participated in the bid and it was successful in the tender and, accordingly, a letter of intent was sent to it. After taking recourse to certain procedural aspects, a contract was entered into between the appellant- company and the respondent. During the performance of the contract, the respondent raised a claim before the engineer as per clause 48 of the general conditions of the contract and called upon the engineer to settle certain disputes arising in connection with the contract. As the concerned engineer did not do anything within the prescribed period of thirty days as provided under clause 48.2, the respondent filed CMP No. 62 of 2011 under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996 (for brevity "the Act") before the High Court of Karnataka at Bangalore for appointment of an arbitrator.

4. The said application was resisted by the present appellants on the singular ground that clause 48 does not provide for arbitration and the same, under no circumstances, could be construed as an arbitration clause. To substantiate the said submission, reliance was placed on clause 4.1 of the agreement. It was put forth that as there is no arbitration clause, no arbitrator could be appointed. The designated Judge of the Chief Justice placed reliance on the proceedings in W.P. No. 28710/09 (M/s. Subhash Projects & Marketing Limited v. Karnataka Power Transmission Corporation Limited) disposed of on 10.6.2010 wherein the appellant-company, being a State owned Corporation, had not disputed clause 48.2 as an arbitration clause and, on that foundation, opined that it was precluded from denying the same in the case under consideration. The learned designated Judge interpreted clauses 48 and 4.1 of the agreement and came to hold that a plain reading of clause 48 would indicate that it partakes the character of an arbitration clause and, accordingly, appointed a sole arbitrator to adjudicate the matters in dispute.

5. We have heard Mr. K.V. Vishvanathan, learned senior counsel appearing for the appellants, and Mr. Dushyant Dave and Mr. Shyam Divan, learned senior counsel appearing for the respondents.

6. Mr. Vishvanathan, learned senior counsel appearing for the appellants, assailing the impugned order, has submitted that clause 48 of the agreement cannot be remotely construed as an arbitration clause and hence, the designated Judge could not have invoked the power under Section 11(5) & (6) of the Act for appointment of an arbitrator. It is urged by him that an order passed in a writ petition, which was instituted in a different context, could not have been placed reliance upon for construing the said clause as an arbitration clause. It is submitted by him that in the absence of an express intention for referring the matter to an arbitrator, it cannot be so inferred from such a clause and, more so, when there is a specific clause, i.e., clause 4 in the agreement which provides for settlement of disputes that stipulates that all the references and disputes arising out of the agreement or touching the subject-matter of the agreement shall be decided by a competent court at Bangalore. To bolster his contentions, he has commended us to the decisions rendered in M.K. Shah Engineers & Contractors v. State of M.P.[1], Wellington Associates Ltd. v. Kirit Mehta[2] and Jagdish Chander v. Ramesh Chander and others[3].

7. Mr. Dushyant Dave and Mr. Shyam Divan, learned senior counsel appearing for the respondents in all the appeals, in oppugnation, have submitted that when clause 48 is read as a whole, it is clear as crystal that the intention of the parties is to get the matter referred to an arbitrator and clause 4.1 only determines the place of territorial jurisdiction and has nothing to do with any stipulation for arbitration. It has been strenuously urged that clause 48 has to be interpreted on the touchstone of the language employed in Section 7 of the Act and when it is scrutinized on that anvil, there remains no trace of doubt that clause 48 has all the attributes and characteristics of an arbitration agreement. Learned senior counsel have placed reliance on Smt. Rukmanibai Gupta v. Collector, Jabalpur and others[4] and Punjab State and others v. Dina Nath[5].

8. Before we advert to the rival submissions advanced at the Bar, we think it appropriate to refer to Section 7 of the Act and what it conveys and, thereafter, refer to few authorities to understand what constitutes an arbitration clause in an agreement entered into between two parties. Section 7 of the Act reads as follows: “7. Arbitration agreement. – (1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

3) An arbitration agreement shall be in writing.

4) An arbitration agreement is in writing if it is contained in –

a) a document signed by the parties;

b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

c) an exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

9. From the aforesaid provision, it is graphically clear that unless an arbitration agreement stipulates that the parties agree to submit all or certain disputes which have arisen or which may arise in respect of defined legal relationship, whether contractual or not, there cannot be a reference to an arbitrator. To elaborate, it conveys that there has to be intention, expressing the consensual acceptance to refer the disputes to an arbitrator. In the absence of an arbitration clause in an agreement, as defined in sub-section (4) of Section 7, the dispute/disputes arising between the parties cannot be referred to the arbitral tribunal for adjudication of the dispute.

10. In Smt. Rukmanibai Gupta (supra), while considering Clause 15 of the agreement therein, a two-Judge Bench opined that the clause spelt out an arbitration agreement between the parties. The said clause was as follows:-

"Whenever any doubt, difference or dispute shall hereafter arise touching the construction of these presents or anything herein contained or any matter or things connected with the said lands or the working or non-working thereof or the amount or payment of any rent or royalty reserved or made payable hereunder in the matter in difference shall be decided by the lessor whose decision shall be final." The learned Judges, to appreciate the tenor and purport of the said clause, referred to Section 2(a) of the 1940 Act and reproduced a passage from Russell on Arbitration, 19th Edn., P. 59 which reads as follows: -

> "If it appears from the terms of the agreement by which a matter is submitted to a person's decision that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry and hear the respective cases of the parties and decide upon evidence laid before him, then the case is one of an arbitration"

11. The Court also referred to Chief Conservator of Forest v. Rattan Singh[6] and ruled that:

"In the clause under discussion there is a provision for referring the disputes to the lessor and the decision of the lessor is made final. On its true construction it spells out an arbitration agreement."

12. At this juncture, it is apposite to refer to a three-Judge Bench decision in State of U.P. v. Tipper Chand[7] where the Court was interpreting Clause 22 in the agreement which was under consideration so as to find out whether the stipulations therein spelt out an arbitration clause. The clause involved in the said case read as follows:-

"Except where otherwise specified in the contract the decision of the Superintending Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions

relating to the meaning of the specifications, design, drawing and instructions hereinbefore mentioned. The decision of such Engineer as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or things whatsoever, in any way arising out of or relating to the contract, designs, drawing specifications, estimates, instructions, orders, or these conditions, or otherwise concerning the works, or the execution or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment of the contract by the contractor, shall also be final, conclusive and binding on the contractor." Interpreting the said clause, the Court opined thus:- "Admittedly the clause does not contain any express arbitration agreement. Nor can such an agreement be spelled out from its terms by implication, there being no mention in it of any dispute, much less of a reference thereof. On the other hand, the purpose of the clause clearly appears to be to vest the Superintending Engineer with supervision of the execution of the work and administrative control over if from time to time."

13. In that context, the three-Judge Bench approved the decisions of the High Courts in Governor-General v. Simla Banking and Industrial Company Ltd.[8], Dewan Chand v. State of Jammu and Kashmir[9] and Ram Lal v. Punjab State[10] wherein the clauses were different. In that context, it was opined that the High Courts had rightly interpreted the clause providing for arbitration. We think it apt to reproduce the delineation by the learned Judges:-

"In the Jammu and Kashmir case the relevant clause was couched in these terms:

> "For any dispute between the contractor and the Department the decision of the Chief Engineer PWD Jammu and Kashmir, will be final and binding upon the contractor." The language of this clause is materially different from the clause in the present case and in our opinion was correctly interpreted as amounting to an arbitration agreement. In this connection the use of the words "any dispute between the contractor and the Department" are significant. The same is true of the clause in Ram Lal case which ran thus:
>
> "In matter of dispute the case shall be referred to the Superintending Engineer of the Circle, whose order shall be final." We need hardly say that this clause refers not only to a dispute between the parties to the contract but also specifically mentions a reference to the Superintending Engineer and must therefore be held to have been rightly interpreted as an arbitration agreement."
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> 14. At this stage, it is useful to refer to a three-Judge Bench decision in State of Orissa and another etc. v. Sri Damodar Das[11] wherein the Court posed the question whether there was an agreement for the resolution of disputes as enshrined under Clause 25 of the agreement.

The said clause read as follows:-

"25. Decision of Public Health Engineer to be final. — Except where otherwise specified in this contract, the decision of the Public Health Engineer for the time being shall be final, conclusive and

binding on all parties to the contract upon all questions relating to the meaning of the specifications; drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work, or as to any other question, claim, right, matter or thing, whatsoever in any way arising out of, or relating to, the contract, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or the sooner determination thereof of the contract." The three-Judge Bench referred to the principles stated in Tipper Chand (supra) and observed as follows:-

> "We are in respectful agreement with the above ratio. It is obvious that for resolution of any dispute or difference arising between two parties to a contract, the agreement must provide expressly or by necessary implication, a reference to an arbitrator named therein or otherwise of any dispute or difference and in its absence it is difficult to spell out existence of such an agreement for reference to an arbitration to resolve the dispute or difference contracted between the parties. The ratio in Smt. Rukmanibai Gupta v. Collector does not assist the respondent."

15. In K.K. Modi v. K.N. Modi and others[12], a two-Judge Bench was interpreting Clause 9 of the agreement which read as follows:- "Implementation will be done in consultation with the financial institutions. For all disputes, clarification etc. in respect of implementation of this agreement, the same shall be referred to the Chairman, IFCI or his nominees whose decisions will be final and binding on both the groups." The court referred to a passage from Russell on Arbitration, 21st Edn., at p. 37, para 2-014 and the decisions in Rukmanibai Gupta (supra) and M. Dayanand Reddy v. A.P. Industrial Infrastructure Corporation Limited And Others[13] and came to hold that the said clause was not an arbitration clause and hence, the proceedings before the Chairman, IFCI could not have been treated as arbitration proceedings. It was so held on the following ground:-

> "Undoubtedly, in the course of correspondence exchanged by various members of Groups A and B with the Chairman, IFCI, some of the members have used the words "arbitration" in connection with clause 9. That by itself, however, is not conclusive. The intention of the parties was not to have any judicial determination on the basis of evidence led before the Chairman, IFCI. Nor was the Chairman, IFCI required to base his decision only on the material placed before him by the parties and their submissions. He was free to make his own inquiries. He had to apply his own mind and use his own expertise for the purpose. He was free to take the help of other experts. He was required to decide the question of valuation and the division of assets as an expert and not as an arbitrator. He has been authorised to nominate another in his place. But the contract indicates that he has to nominate an expert. The fact that submissions were made before the Chairman, IFCI, would not turn the decision-making process into an arbitration."

16. In Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd., Kanpur[14], clauses 23 and 24 of the agreement were projected to make the foundation of an arbitration clause. That read as follows:- "Decision of the Executive Engineer of the UPSIC to be final on certain matters.

23. Except where otherwise specified in the contract, the decision of the Executive Engineer shall be final, conclusive and binding on both the parties to the contract on all questions relating to the meaning, the specification, design, drawings and instructions hereinbefore mentioned, and as to the quality of workmanship or materials used on the work or as to any other question whatsoever in any way arising out of or relating to the designs, drawings, specifications, estimates, instructions, orders or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work, or after the completion thereof or abandonment of the contract by the contractor shall be final and conclusive and binding on the contractor.

Decision of the MD of the UPSIC on all other matters shall be final

24. Except as provided in clause 23 hereof, the decision of the Managing Director of the UPSIC shall be final, conclusive and binding on both the parties to the contract upon all questions relating to any claim, right, matter or thing in any way arising out of or relating to the contract or these conditions or concerning abandonment of the contract by the contractor and in respect of all other matters arising out of this contract and not specifically mentioned herein." Interpreting the said clauses, the Court opined thus:-

> "In the present case, reading clauses 23 and 24 together, it is quite clear that in respect of questions arising from or relating to any claim or right, matter or thing in any way connected with the contract, while the decision of the Executive Engineer is made final and binding in respect of certain types of claims or questions, the decision of the Managing Director is made final and binding in respect of the remaining claims. Both the Executive Engineer as well as the Managing Director are expected to determine the question or claim on the basis of their own investigations and material. Neither of the clauses contemplates a full-fledged arbitration covered by the Arbitration Act."

17. In Bihar State Mineral Development Corporation and another v. Encon Builders (I) (P) Ltd.[15],while dealing with the arbitration clause of an arbitration agreement under the Act the Court stated thus:

"(1) There must be a present or a future difference in connection with some contemplated affair.

(2) There must be the intention of the parties to settle such difference by a private tribunal.

(3) The parties must agree in writing to be bound by the decision of such tribunal.

(4) The parties must be ad idem".

In the said case, it has also been opined that the Act does not prescribe any form of an arbitration agreement. The term 'arbitration' is not required to be specifically mentioned in the agreement but what is required is to gather the intention of the parties as to whether they have agreed for resolution of the disputes through arbitration.

18. In Dina Nath (supra), the clause in the agreement read as follows: -

> "4. Any dispute arising between the department and the contractor/society shall be referred to the Superintending Engineer, Anandpur Sahib, Hydel (Construction) Circle No. 1, Chandigarh for orders and his decision will be final and acceptable/binding on both parties." The two-Judge Bench, basically relying on Tipper Chand (supra) which has approved the view of Jammu and Kashmir High Court in Dewan Chand (supra), treated the aforesaid clause as providing for arbitration because it categorically mentioned the word "dispute" which would be referred to the Superintending Engineer and further that his decision would be final and acceptable to/binding on both the parties.

19. In Jagdish Chander (supra), the Court, after referring to the earlier decisions, culled out certain principles with regard to the term "arbitration agreement". The said principles basically emphasize on certain core aspects, namely, (i) that though there is no specific form of an arbitration agreement, yet the intention of the parties which can be gathered from the terms of the agreement should disclose a determination and obligation to go to arbitration; (ii) non-use of the words "arbitration" and "arbitral tribunal" or "arbitrator" would not detract from a clause being interpreted as an arbitration agreement if the attributes or elements of arbitration agreement are established, i.e., (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them; and (iii) where there is specific exclusion of any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it would not be an arbitration agreement. In this context, the two-Judge Bench has given some examples and we think it apt to reproduce the same: - "For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement."

20. In State of Orissa and others v. Bhagyadhar Dash[16], the Court, while discussing about the non-requirement of a particular form for constituting an arbitration agreement and ascertainment of the intention for reference to arbitration, as has been stated in Rukmanibai Gupta (supra), observed thus: -

"16. While we respectfully agree with the principle stated above, we have our doubts as to whether the clause considered in Rukmanibai Gupta case would be an arbitration agreement if the principles mentioned in the said decision and the tests mentioned in the subsequent decision of a larger Bench in Damodar Das are applied. Be that as it may. In fact, the larger Bench in Damodar Das clearly held that the decision in Rukmanibai Gupta was decided on the special wording of the clause considered therein: (Damodar Das case, SCC p. 224, para 11) "11. ... The ratio in Rukmanibai Gupta v. Collector

does not assist the respondent. From the language therein this Court inferred, by implication, existence of a dispute or difference for arbitration."

21. Keeping in mind the principles laid down by this Court in the aforesaid authorities relating to under what circumstances a clause in an agreement can be construed as an arbitration agreement, it is presently apposite to refer to clause 48 of the agreement. The said clause reads as follows: -

"48.0 Settlement of disputes:

1. Any dispute(s) or difference(s) arising out of or in connection with the Contract shall, to the extent possible, be settled amicable between the parties.

2. If any dispute or difference of any kind whatsoever shall arise between the owner and the Contractor, arising out of the Contract for the Performance of the Works whether during the progress of the Works or after its completion or whether before or after the termination, abandonment or breach of the contract, it shall, in the first place, be referred to and settled by the Engineer, who, within a period of thirty (30) days after being requested by either party to do so, shall give written notice of his decision to the owner and the contractor.

3. Save as hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the parties until the completion of the works and shall forthwith be given effect to by the contractor who shall proceed with the works with all the due diligence.

4. During settlement of disputes and Court proceedings, both parties shall be obliged to carry out their respective obligations under the contract."

22. On a careful reading of the said clause, it is demonstrable that it provides for the parties to amicably settle any disputes or differences arising in connection with the contract. This is the first part. The second part, as is perceptible, is that when disputes or differences of any kind arise between the parties to the contract relating to the performance of the works during progress of the works or after its completion or before or after the termination, abandonment or breach of the contract, it is to be referred to and settled by the engineer, who, on being requested by either party, shall give notice of his decision within thirty days to the owner and the contractor. There is also a stipulation that his decision in respect of every matter so referred to shall be final and binding upon the parties until the completion of works and is required to be given effect to by the contractor who shall proceed with the works with due diligence. To understand the intention of the parties, this part of the clause is important. On a studied scrutiny of this postulate, it is graphically clear that it does not provide any procedure which would remotely indicate that the concerned engineer is required to act judicially as an adjudicator by following the principles of natural justice or to consider the submissions of both the parties. That apart, the decision of the engineer is only binding until the completion of the works. It only casts a burden on the contractor who is required to proceed with the works with due diligence. Besides the aforesaid, during the settlement of disputes and the court proceedings, both the parties are obliged to carry out the necessary obligation under the contract. The said clause, as we understand, has been engrafted to avoid delay and stoppage of work and for

the purpose of smooth carrying on of the works. It is interesting to note that the burden is on the contractor to carry out the works with due diligence after getting the decision from the engineer until the completion of the works. Thus, the emphasis is on the performance of the contract. The language employed in the clause does not spell out the intention of the parties to get the disputes adjudicated through arbitration. It does not really provide for resolution of disputes.

23. Quite apart from the above, clause 4.1 of the agreement is worthy to be noted. It is as follows: -

"4.1 It is specifically agreed by and between the parties that all the differences or disputes arising out of the Agreement or touching the subject matter of the Agreement, shall be decided by a competent Court at Bangalore."

24. Mr. Vishwanathan, learned senior counsel for the appellants, laying immense emphasis on the same, has submitted that the said clause not only provides the territorial jurisdiction by stating a competent court at Bangalore but, in essence and in effect, it stipulates that all the differences or disputes arising out of the agreement touching the subject-matter of the agreement shall be decided by a competent court at Bangalore. Mr. Dave, learned senior counsel for the respondents, would submit that it only clothes the competent court at Bangalore the territorial jurisdiction and cannot be interpreted beyond the same. The submission of Mr. Dave, if properly appreciated, would convey that in case an award is passed by the arbitrator, all other proceedings under any of the provisions of the Act has to be instituted at the competent court at Bangalore. This construction, in our opinion, cannot be placed on the said clause. It really means that the disputes and differences are left to be adjudicated by the competent civil court. Thus, clause 48, as we have analysed, read in conjunction with clause 4.1, clearly establishes that there is no arbitration clause in the agreement. The clauses which were interpreted to be arbitration clauses, as has been held in Ram Lal (supra) and Dewan Chand (supra) which have been approved in Tipper Chand (supra), are differently couched. As far as Rukmanibai Gupta (supra) is concerned, as has been opined in Damodar Das (supra) and also in Bhagyadhar Dash (supra), it has to rest on its own facts. Clause in Dina Nath (supra) is differently couched, and clause 48, which we are dealing with, has no similarity with it. In fact, clause 48, even if it is stretched, cannot be regarded as an arbitration clause. The elements and attributes to constitute an arbitration clause, as has been stated in Jagdish Chander (supra), are absent. Therefore, the irresistible conclusion is that the High Court has fallen into grave error by considering the said clause as providing for arbitration.

25. Consequently, the appeals are allowed and the judgments and orders passed by the High Court are set aside. However, regard being had to the facts and circumstances of the case, there shall be no order as to costs.

.....J.

[Anil R.

Dave] .....J.

[Dipak Misra] New Delhi;

April 07, 2014.

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[1] (1999) 2 SCC 594
[2] (2000) 4 SCC 272
[3] (2007) 5 SCC 719
[4] (1980) 4 SCC 556
[5] (2007) 5 SCC 28
[6] AIR 1967 SC 166 : 1966 Supp SCR 158
[7] (1980) 2 SCC 341
[8] AIR 1947 Lah 215 : 226 IC 444
[9] AIR 1961 J & K 58

[10] AIR 1966 Punj 436 : 68 Punj LR 522 : ILR (1966) 2 Punj 428 [11] AIR 1996 SC 942 [12] (1998) 3 SCC 573 [13] (1993) 3 SCCC 137 [14] AIR 1999 SC 899 [15] (2003) 7 SCC 418 [16] (2011) 7 SCC 406
