B. Manik Peter (Dead) by LRs.

Vs

Union of India and Others

Civil Appeals Nos. 1929-30 of 1966

(J. M. Shelat, G. K. Mitter JJ)

02.03.1970

JUDGMENT

MITTER, J. -

1. The appellants in these appeals are the legal representatives of one B. Manik Peter who had obtained an award against the Union of India of Rs. 37,874-12-2 besides interest and costs made on December 5, 1956. The award-holder had preferred an application under Section 14(2) of the Arbitration Act (hereinafter to be referred to as the 'Act') calling upon the arbitrator (the umpire) to file his award coupled with a prayer for the passing of a decree in terms of the award. The Union of India not only resisted that application but preferred an application under Sections 30 and 16 of the Act for setting aside the award, and, in the alternative, remitting the award back to an umpire to be appointed by the Madras High Court for reconsideration. The learned single Judge of the Madras High Court who heard the two petitions together allowed the award-holder's application and dismissed that of the Union of India. A Division Bench of the same High Court hearing appeals preferred from the said order set aside the award. By the present appeals the appellants ask for restoration of the order of the single Judge.

2. The facts necessary for the disposal of the appeals lie in a small compass. B. M. Peter, deceased, had entered into four contracts with the Union of India for the supply of coir fibre according to certain specification. The contacts were in the usual form of calling of invitations to tender and acceptance thereof. The goods were to be put on rail at Cochin for transport to Kanpur. There was provision for inspection of the goods by a representative of the Union of India at Cochin before the goods were put on rail. The coir fibre was to be delivered in new, clean and dry condition in bales of 112 lbs. each. The baling was to be carried out in 5 wooden or bamboo batons each at least 3' in length and secured in containers. The bales were to be rectangular in shape and approximately 3 1/2' x 1 3/4' in dimension. The net weight of coir fibre in any bale was not to be less than 112 lbs. Clauses 11 and 12 of the invitation to tender and instructions with schedule in each case provided as follows :

> "11. The permissible moisture content of 15% caters for the extreme humid conditions of atmosphere prevailing in the coir producing districts. The moisture content of coir fibre in any consignment should not on any account exceed 15%. And if the coir is packed as stipulated in the relevant specification there is not much chance of the fibre inside the bale losing the natural moisture and the consignees consequently receiving shore supply on this score. It is only when the bale is opened and fibre exposed that loss in weight due to driage takes place.

12. Payment will be made on the basis of net weight actually received and accepted by the consignee."

The acceptance to the tender shows that the place of delivery and the term as to delivery was F.O.R. Cochin Harbour Terminus of Badagara. Clause 19 of the acceptance to tender contained certain special instruction as given below :

"19. Special instructions : (1) Contractors are responsible .... (2) Suppliers will be responsible for any shortage at the destination and payment will be made on the basis of net weight actually received and accepted by the consignee. (3) 90 per cent. payment will be made on the proof of despatch of stores supported by copies Nos. 2 and 5 of inspection note duly received by consignee. (4) Book Examination clause (attached)."

The supplier put the goods on rail in December 1950 and January 1951. As and when the goods reached Kanpur they were taken delivery of by the military authorities. 90 per cent. of the value of the goods was paid for in terms of the contract with a retention of 10%. According to the supplier the total amount of retention came to Rs. 37,820-1-6. The goods were not weighed immediately on reaching their destination. The evidence disclosed in this case showed that they were weighed on diverse dates between 4 and 15 days after their arrival at Kanpur. Several letters were addressed in February 1951 by the military authorities at Kanpur to the Officer in Charge G.S.I.D., Madras with copies to the supplier showing that each bale on weighment showed a certain deficiency in weight as compared to the figures thereof given in the railway receipt. The supplier wrote back to say that each bale of goods had been examined and weighed and the weight of each bale had been noted at the time of inspection prior to the enrailment thereof. He could give no explanation of the reported shortage but proceeded to say that the shortage, if any, might have been brought about by the escape of moisture content of fibre (within permissible limits as per governing specification) owing to the climatic changes of the place from the obtaining at Cochin and as such he should not be held responsible for the same. Evidently this did not satisfy the Union of India and after a good deal of correspondence the supplier asked for arbitration in terms of Clause 21 of the conditions of contract of contract V.S.B. 133. Thereafter the parties proceeded to appoint an arbitrator each and the arbitrators called for statements of claim and written statement thereto and settled several issues of which it is necessary to note only the following :

(2) What is the correct weight of stores cosigned to Kanpur from Cochin Harbour Terminus ?

(3) What is the correct weight as ascertained at Kanpur for the various consignments ?

(4) Is the price payable on the basis of the net weight actually received and accepted by the consignee at Kanpur ?

Unfortunately the arbitrators could not agree and the matter was referred to an umpire. According to him the only point in dispute was about the effect of the clause in the contract, namely, whether payment would be made on the basis of the net weight actually received and accepted by the consignee. He noted that it was not the case of the Government that the goods had not been packed according to the specification or that any defect had been noticed at destination. Further the supplier did not admit that the weights reported by consignee were the correct weight of the goods when they

reached Kanpur and taken delivery of. According to him :

> "It was admitted that the reported shortage in weight was due to driage of the moisture contents of the fibre."

3. Before the umpire only one witness was examined on behalf of the Union to produce certain files or papers. These documents were admitted in evidence but the umpire held that they did not disclose that "the goods were weighed before they were taken delivery of from the railway or immediately thereafter". The reasoning of the umpire was as follows :

> "The moisture content permissible is as high as 15 per cent. The loss in weight discovered at the time the weights are taken does not in any one of the consignments with which we are concerned exceed 7 per cent. In the dry climate of Kanpur the moisture will evaporate much sooner than elsewhere and the loss in weight might have occurred after the goods reached Kanpur and they were taken delivery of by the consignee. In any event the evidence adduced by the Government on whom the burden of proof lies regarding the loss of weight does not enable me to record of finding that there was shortage in the weights actually received and accepted by the consignee."

4. On the above basis of the umpire found that the Government was not justified in withholding the payment of Rs. 37,874-12-2.

5. The learned single Judge held that it was for the Union of India to prove the extent of shortage if any, and such shortage must be related to the point of time when the goods were received. The learned Judge also noted that the evidence before the umpire showed that after receipt of the goods the bales were unpacked and kept lying for long periods of time before actual weighment was made and in numerous cases as many as 10 to 15 days elapsed between the date of receipt and the date of weighment. There was no evidence that any bale had split open during transit nor was there any moisture test of any portion of the goods. He rejected the contention put forward on behalf of the Union that the weight recorded by the consignee was conclusive and binding upon the contractor and accordingly on the basis that the burden of proof of shortage was upon the defendant he held the award to be unassailable and passed a decree in terms thereof.

6. Before the Division Bench hearing the appeals it was contended on behalf of the Government : (a) that the umpire as well as the arbitrators had gone beyond their jurisdiction on the question as to whether the shortage was or was not due to the delay on the part of the department; and (b) the umpire and the learned Judge had both misinterpreted Clause 19 of the acceptance to tender.

7. The Division Bench accepted both the contentions. On the first point it observed that neither before the commencement of the arbitration proceedings nor in the statement of case filed by the supplier had any point been taken about the alleged delay on the part of the Government in weighing the goods after receipt thereof, or any plea raised that the shortage was due to such delay. The Judge held that the second issue noted above did not involve the question as to whether the shortage at the destination was on account of the delay in weighment of the goods and proceeded to observe :

> "As a matter of fact we find agreement at the Bar that there was no dispute as to the correct weight of the goods as reported by the department."

8. The Bench then went on to hold that as the controversy as to the delay in weighment being the cause of shortage had not been raised in the pleadings or before arbitration and no precise issue on that matter had been settled the question was beyond the scope of reference to arbitration. Accordingly it held that the umpire had misdirected himself as to the scope of his jurisdiction.

9. On the question as to the burden of proof of shortage the Bench relied on another Bench decision of the Court to hold that the onus would in such circumstances be on the contractor to show that the loss was due to delay on the part of the Government. Clause 19(2) of the acceptance to tender was said to bear the same interpretation. Following the reasoning in the judgment of the Division Bench relied upon the Court came to the conclusion that as the umpire had misdirected himself as to the interpretation of the contract there was an error apparent on the face of the record which amounted to legal misconduct. In the result the award was set aside on both the grounds urged before the Division Bench.

10. In our view the Division Bench went wrong on both the points. As regards the ambit of the jurisdiction of the umpire it is enough to say that the arbitration clause was very widely worded and embraced sandy dispute "arising under the contract". It would be difficult to conceive of any dispute relating to the shortage of the goods which would not be covered by such a clause. It is true that in the statement of claim before the arbitrator no point had been made by the supplier about the delay in the weighment of the goods after they had reached Kanpur. The statement of claim is not quite explicit on this point but the supplier's definite case was that he had no liability for shortage after the goods were entrusted by him to the carrier at Cochin Harbour and that there was no reason or justification for withholding of the sum of Rs. 37,820-1-6. In its written statement the Union's case was that the supplier was only entitled to claim on the basis of the net weight actually received and accepted by the consignees of the articles in question. Evidently by this plea the Union of India sought to contend that the weight of the goods as recorded by it no matter how long after they reached Kanpur was the weight to be taken into account. The award of the umpire shows very clearly that the only point in dispute between the parties was about the effect of the clause in the contracts relating to payments on the basis of the net weight actually received and accepted by the consignee. According to the supplier, he had no knowledge when making the claim about exact time of weighment and it was only as a result of the evidence of defendant's witness No. 1 that it was discovered that the Union of India did not get the goods weighed immediately before or after taking delivery thereof at Kanpur but that the goods were allowed to lie about for a number of days before the actual weighment took place. In our view Clause 19(2) could not be interpreted to mean that the weight of the goods whenever recorded by the Union was to be treated as the weight to be paid for. Clearly it was the duty of the Union of India to act bona fide and reasonably and check the weight of the goods at the time of taking delivery or soon there-after with reasonable despatch. The umpire therefore was not unjustified in accepting the plea of the supplier that the dry climate of Kanpur must have been responsible for the loss in weight of the coir fibre which admittedly is hygroscopic by nature and which gives out moisture in a dry climate.

11. The clause in the contract about the permissibility of 15% moisture in the goods bore no relation to the discovery of shortage of weight of 7 per cent. as a result of weighment. The said clause in the contract only means that goods which contained more than 15% of moisture, to be assessed in the manner laid down in the contract, could be rejected by the Union of India but if the Union chose to accept goods which contained moisture exceeding that limit it could only claim for a reduction of price on the breach of warranty. We are not, however, concerned with that question here. Clause 12 of the invitation to tender can only mean that payment has to made for the goods according to the weight on receipt thereof. It was not open to the consignee to record the weight of the goods as and

when it thought proper and to hold the supplier bound by such record. In our opinion, the arbitrator could not be blamed for having come to the conclusion that goods like coir fibre which were apt to lose weight in dry climate had probably done so in the case before him.

12. With regard to the burden of proof the judgment of the Division Bench is also wrong. The checking of the goods and the recording of the weight thereof being obligations of the consignee and within its special knowledge it was for the consignee to lead evidence as to when they were received and what was the actual weight received. We find ourselves unable to accept the view of the Division Bench that the burden of proof of shortage lay on the consignor. The goods being sent F.O.R. Cochin Harbour the consignor had nothing to do with regard to the taking delivery thereof at Kanpur which was the obligation of the consignees. It was for the consignee to adduce evidence about the weight in terms of Clause 12 and rely on the shortage, if any, disclosed by weighment at the proper time. The unexplained and unreasonable delay in the weighment of the goods by the Union of India at Kanpur negatives its claim for shortage as disclosed by the difference in the weights of the goods as recorded in the Railway invoices and those recorded in the ordinance depots at Kanpur.

13. Again in our opinion there was no question of any error apparent on the face of the record as found by the High Court. The learned Solicitor-General appearing for the Union of India relied on the reasoning of the umpire as quoted by us and argued that the juxtaposition of the two sentences therein relating to the permissible limit of moisture content of 15% and the shortage in weight of 7% demonstrated that the umpire had taken the view that shortage up to 15% was permissible under the contract and as such had committed an error apparent on the face of the record. This argument cannot be accepted. The umpire as already noted had given his verdict that it was for the Union of India to establish by evidence the actual weight of the goods immediately or soon after the goods had reached Kanpur and the long delay in inspecting and allowing the goods to remain unpacked for days before weighment probably accounted for the diminution in weight. According to us, there was no flaw in the reasoning of the umpire. He certainly did not commit an error of law much less one on the face of record. He was competent to decide both questions of fact and of law. He does not appear to have committed any error in interpreting the contracts in this case. The question of setting aside the award on this ground therefore did not arise. In our view, the umpire did not misdirect himself the interpretation of the contract.

14. In the result, the appeals are allowed and the judgment and order of the learned single Judge restored. The appellant will be entitled to costs throughout.

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