

M/S. R. N. Ganekar and Co.

Vs

M/S. Hindustan Wires Ltd.

Civil Appeal No. 335 (N) of 1972

(D. G. Palekar, V. R. Krishna Iyer, R. S. Sarkaria JJ)

29.11.1973

JUDGMENT

PALEKAR, J. –

1. This appeal by special leave arises of an order dated June 28, 1971 passed by the learned 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 appellants required about 400 metric tons of the said wire for meeting the order. The representative who are from Calcutta are manufactures of such wires. The respondents, who are from Calcutta are manufactures 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 be 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 agree upon, wrote a letter to the respondents on May 7, 1969 as per Annexure B. This so far as it is relevant is as follows :

"In constitution of the discussion we hereby confirm that :-

We agree to purchase and you have agreed to sell over the nest 18/24 months tons of 4 mm and/or 5 mm dia p. c. wire on the following terms and condition :-

It is not necessary to extract all the terms and conditions here except the one regard to price. It is as follows :

"The above quantity to be supplied at the firm price of Rs. 2,450 (Rupees two thousand four hundred fifty only) per Mt. FOR Faridabad inclusive of CST. 'C' from 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 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 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 poles would be held up. So the appellants requested the respondents to arrange for delivery at once of at least one wagon load of 5mm 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 May 7, 1969 and also to the letter dated May 13, 1969 and stated "kindly note that manufacture of 5 mm of wires has already been undertaken and we expect to despatch the same within two weeks". Along with the letter Annexure 'F' the respondents sent to the appellants copy of what is known as the "works order" also dated May 16, 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 dispatched immediately and for the rest it was stated that dispatch instruction would be issued from time to time. The rate at which the supply was to be made was also mentioned a "Rs. 2,450 inclusive of SCT at 3 per cent. 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 or 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 provisions 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 May 16, 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 June 17, 1969 and the other despatched on June 21, 1969.

6. Further deliveries, however were not made in time as disputes arose regarding the price. By their letter dated September 4, 1969 the respondents demanded a rise in price from Rs. 2,450 per M.T. to Rs. 2,680 per M.T. The by their letter dated November 31, 1969 the respondents asked for further

enhanced price of Rs. 2,750. By the letter dated January 9, 1970 they demanded a still further increase of Rs. 75 per 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 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 February 18, 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 March 10, 1970. Notice was issued to the respondents to file their reply on April 8, 1970. But the respondents took extensions of time till May 19, 1970. On May 20, 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 by the appellants but subject to variation as notified to the appellants by letter dated May 16, 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 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 were 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 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 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."

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 arbitrator 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 question relating to the arbitration agreement only. As pointed out by this court in *Shiva Jute Baling Limited v. Hindley and Company Ltd.*, it may either arise out of an agreement which contains nothing else besides the arbitration, at it may arise out of term contained in a 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 to 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 the 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 of the contract. In fact on May 16, 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 '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 'G' 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 or secondary raw materials and/or increase of duties levies, excise, taxes or fresh levies effected by the Central State government or custom excise, taxes or fresh levies effected by the Central or State Government 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 appellants 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 latter. Thus there is a controversy about it is not necessary for us to enter into the controversy. It was there was a concluded contract for the supply.

Even later, some more tons or steel wire were delivered in of this original contract although the appellants were required as pay 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 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 wires were subject to price variation...."

"As and when we have informed you regarding the increase in price on account of abovesaid condition you have not accepted the increase and every time you raised objection 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 you confirmation for partial quantity although under no circumstances, in the absence of confirmation regarding increase in he price...."

"Even the last confirmation which you gave vide letter No. DLW/553/69 dated 22-11-1969 was only for 2 wagon and naturally we have taken it as granted that 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 in spite 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 taking 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 steel wire. The letter charges the appellants that they had accepted the price variation clause and still for some reason to 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 May 7, 1969, but put forward the plea that the original price of Rs. 2,450 fixed between the parties as the firm price was subject to the price variation clause mentioned in Annexure 'G' 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 complete contract for the sale and delivery of 400 metric tons of steel wire, but whereas the appellants said that the price per tons was Rs, 2,450 the respondents countered that the 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 the High Court shows at every step that 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 17, 1969 written by the respondent to your petitioner, telegram dated May 10, 1969 written to the respondent letter dated May 13, 1969 and copy of works order dated May 16, 1969 written by our petitioner to the respondent and accepted by an 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 appellant 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 May 7, 1969 was to rule the contract or was subject to variation as stated in Annexure 'G' dated May 16, 1969 alleged to have been written by the respondents. The appellants shall get their costs from the respondents.

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