The Union of India

Vs

M/S. D. N. Revri and Co. and Others

Civil Appeal No. 135 of 1972

(P.N. Bhagwati, Syed M. Fazal Ali JJ)

02.09.1976

JUDGMENT

BHAGWATI, J. -

1. This appeal, by special leave, is directed against a judgement of the High Court of Delhi setting aside an award made by an arbitrator on the ground that he was not a validly appointed arbitrator and hence had no jurisdiction to arbitrate and make an award. The facts giving rise to the appeal are few and may be briefly stated as follows.

2. The respondents - a partnership firm - entered into a contract with the appellant for the supply of 30,000 tons of East German sugar at the rate and on the terms and conditions set out in a letter dated July 3, 1954 addressed by the Secretary to the Government of India, in the Ministry of Food and Agriculture to the respondents. The Ministry of Food and Agriculture was concerned with the subject-matter of this contract and hence clause (9) provided that superintendence and inspection of quality, weight and packing of sugar shall be made by a reputable superintending agency to be approved by the Government of India, in the Ministry of Food and Agriculture and clause (10) stipulated for delivery to be made to "authorities or parties nominated by the Ministry of Food and Agriculture". There was provision for arbitration made in clause (17) and that clause also referred to the Ministry of Food and Agriculture. It was in the following terms :

> ARBITRATION : All questions, disputes or differences whatsoever which may at any time arise between the parties to the agreement touching the agreement or the subject-matter thereof, arising out of or in relation thereto and whether as to construction or otherwise shall be referred to a single arbitrator for decision. Such a single arbitrator shall be nominated by the Secretary to the Government of India in the Ministry of Food and Agriculture in his absolute discretion and the decision of such arbitrator shall be final and binding upon the parties. The reference to the arbitrator shall be governed by the provisions of the Indian Arbitration Act, 1940 as amended from time to time and the rules made thereunder.

It appears that disputes arose between the appellant and the respondents in regard to the fulfillment of this contract. The appellant made a claim for payment of Rs. 3,29,107-8-0 against the respondents by a letter dated August 11, 1956 and threatened to recover it from the security furnished by the respondents through their bankers. The respondents disputed the claim of the appellant and by their letter dated August 23, 1956 pointed out that it was not competent to the appellant to recover the amount of the demand from the bankers of the respondents without first establishing its claim by arbitration or suit. The respondents intimated to the appellant that they

were prepared to go to arbitration and suggested that it would be better still, if a special case for the opinion of the court were stated under Section 90 of the Code of Civil Procedure. The respondents also claimed to recover from the appellant under the contract diverse amounts aggregating to Rs. 6,05,689. There was no response to this letter from the appellant and no steps were taken by the appellant to have the disputes referred to an arbitrator nominated by the Secretary in the Ministry of Food and Agriculture as provided in clause (17) of the contract. In the meantime, as a result of an order made by the President under clause (3) of Article 77 of the Constitution, the Ministry of Food and Agriculture was bifurcated into two separate ministries, one of Food and the other of Agriculture, with effect from October 19, 1956 and sugar, the subject-matter of the contract, came to be allotted to the Ministry of Food. The respondents, by their letter dated November 9, 1956, pointed out to the Secretary, Ministry of Food that by reason of this bifurcation, and Ministry of Food and agriculture has ceased to exit and there was no Secretary in the Ministry of Food and Agriculture has ceased to exist and there was no Secretary in the Ministry of Food and Agriculture and the arbitration agreement contained in clause (17) of the contract had, therefore, become a dead letter and was no longer enforceable and once again called upon the appellant to agree in stating a special case for the opinion of the court failing which the respondents would have to file a suit against the appellant. This letter also did not evoke any response from the appellant and the disputes remained unresolved.

3. On February 13/14, 1956 the appellant addressed a letter to the respondents stating that since the Ministry of Food and Agriculture was bifurcated into Ministry of Food and Ministry of Agriculture, it was necessary to amend clause (17) of the contract so as to provide for arbitration by the Secretary to the Ministry, Government of India administratively dealing with the subject of contract at the time of reference to arbitration, or if there is no Secretary, the administrative head of such Ministry at the time of such reference

and proposed an amendment to that effect for the acceptance of the respondents. The respondents, by their letter in reply dated February 26, 1957 declined to accept the proposal for amendment of clause (17) of the contract and once again reinterated that the arbitration agreement contained in that clause was "dead and unenforceable". However, within a short time thereafter, another order was issued by the President under clause (3) of Article 77 of the Constitution integrating the Ministry of Food and the Ministry of Agriculture into one single Ministry of Food and Agriculture with effect from April 23, 1957. This new Ministry of Food and Agriculture had two departments, one of Food and the other of Agriculture, and there was a Secretary in charge of each department. It seems that the appellant requested the Secretary, Department of Food in the Ministry of Food and Agriculture nominee an arbitrator for adjudicating upon the disputes which had arisen between the appellant and the respondents in terms of clause (17) of the contract and the Secretary, Department of Food in the Ministry of Food and Agriculture, by a letter dated February 27, 1958, nominated Shri A. V. Vishwanath Shastri, Advocate, to act as sole arbitrator to adjudicate upon such disputes. On the same day, the respondents served a notice on the appellant under Section 80 of the Code of Civil Procedure demanding payment of the amounts due to the respondents and stating that in case the appellant failed to meet these demands, the respondents would have to file a suit against the appellant. Though respondents gave this notice under Section 80 of the Code of Civil Procedure, they did not proceed to file a suit, but instead filed their statement of claim before the arbitrator and in the statement they claimed payment of an aggregate sum of Rs. 7,89,858 from the appellant and also prayed for a declaration that the contract stood "final and properly performed" by the respondents. The appellant filed its reply disputing the claim of the respondents. The appellant also filed a statement making its own claim for Rs. 3,29,107-8-0 against the respondents. It was stated in paragraph 18 of the statement of claim of the appellant

that under clause (17) of the contract the Secretary, Food and Agriculture Ministry of the Government in his discretion has the right to nominate a sole Arbitrator and refer the dispute to the Arbitrator and that has been duly done on February 27, 1958, and the parties have been duly notified under Secretary of the Government letter No. SIMP-3 (40) dated February 27, 1958.

The respondents filed their written statement denying the claim of the appellant and in paragraph 18 of this written statement they averred "that para 18 of the Statement of Claim of the Government of India is not objected to". The proceedings in connection with the claim of the respondents and the counter claim of the appellant were carried on before the arbitrator and the respondents participated in the arbitration proceedings without objection or protest against the jurisdiction of the arbitrator. The arbitrator ultimately made an award against the respondents.

4. The appellant made an application before the Sub-Judge, Delhi to pass a decree in terms of the award. The respondents resisted the application of the appellant and sought to set aside the award mainly on two grounds. One ground was that Daljeet Singh, a partner of the respondents, had no power to bind the other partners by an arbitration agreement and hence clause (17) of the contract was not binding on the respondents, and the other was that the arbitrator was not validly appointed and he had, therefore, no jurisdiction to enter upon the reference and adjudicate upon the disputes between the parties. Both these grounds were rejected by the learned Sub-Judge and the award was made a rule of the court. The respondents thereupon preferred an appeal to the High Court. The same two grounds were also urged in the appeal. Out of them, the first ground relating to lack of authority in Daljeet Singh to bind the respondents by clause (17) of the contract was negatived by the High Court and it was held that clause (17) being an integral part of the contract, the authority of Daljeet Singh to enter into the contract on behalf of the respondents extended also to clause (17) of the contract and in any event, the conduct of all the partners showed that Daljeet Singh had authority on behalf of the other partners to enter into the arbitration agreement contained in clause (17) of the contract. The second ground however, found favour with the High Court which held that in view of the bifurcation of the Ministry of Food and Agriculture into two separate ministries, one of Food and the other of Agriculture, by the Presidential Order, which came into effect from October 19, 1956, the arbitration agreement in clause (17) of the contract became dead and unenforceable and nothing that happened thereafter could revive it and in any event, even after reintegration of the Ministry of Food and Agriculture into one single Ministry of Food and Agriculture, the arbitration agreement could not be given effect to since there were then two Secretaries in the Ministry of Food and Agriculture and clause (17) of the contract did not indicate as to which Secretary was to exercise the power of nominating the arbitrator, with the result that the arbitration agreement suffered from the fault of vagueness and uncertainty. The High Court accordingly allowed the appeal and set aside the award made by the arbitrator. Hence the present appeal by the appellant with special leave obtained from this Court.

5. The only question debated before us in this appeal was as to whether the appointment of the arbitrator by the Secretary, Department of Food in the Ministry of Food and Agriculture was a valid appointment. Obviously, if the appointment was invalid, the arbitrator would have no jurisdiction to arbitrate upon the disputes between the parties and the award would be invalid. But, an alternative argument was also advanced on behalf of the appellant to sustain the award and it was that the respondents not having raised any objection to the appointment of the arbitrator and participated in the arbitration proceedings without any demur or protest, it was not open to them, after the award was made, to challenge it on the ground of invalidity of appointment of the arbitrator. The respondents, having taken the chance of obtaining the award in their favour, could not denounce the award when it went against them. We will first examine whether the appointment of the arbitrator

was valid, for, if it was, the second question, which raises the issue of waiver, would not arise.

6. Now, clause (17) of the contract provided that all disputes arising out of the contract shall be resolved by arbitration. It embodied an arbitration agreement between the parties. It also laid down the machinery for appointment of the arbitrator. It provided that the arbitrator shall be nominated by the Secretary in the Ministry of Food and Agriculture in his absolute discretion. There was undoubtedly a Ministry of Food and Agriculture in his absolute discretion. There was undoubtedly a Ministry of Food and Agriculture at the time when the contract was made and there was one and only one Secretary in that Ministry, so that at the date of the contract there could no question as to who was the person authorised to nominate the arbitrator. The same position continued to obtain also at the time when disputes arose between the parties. But before an arbitrator could be nominated by the Secretary in the Ministry of Food and Agriculture to adjudicate upon these disputes, the Ministry of Food and Agriculture was bifurcated into two separate ministries and it ceased to exist as Ministry of Food and Agriculture. Then obviously there was no individual who filled the description of "Secretary in the Ministry of Food and Agriculture" and consequently the machinery for appointment of the arbitrator became unworkable. If the matter had rested there, a question could well have arisen whether, despite the breakdown of the machinery for nomination of an arbitrator, the arbitration agreement of clause (17) could still be enforced by the court by appointing an arbitrator in a proceeding under Section 20 of the Arbitration Act. But the position again changed and the Ministry of Food and Agriculture came in to being as a result of intergration of the Ministry of Food and the Ministry of Agriculture, with this change, namely that the new Ministry of Food and Agriculture had two departments, one of Food and the other of Agriculture and there was a Secretary in charge of each department. There were thus, after integration, two Secretaries in the Ministry of Food and Agriculture and the argument of the respondents was - and that argument found favour with the High Court - that this event rendered the arbitration agreement vague and uncertain, inasmuch as it did not specify which of the two Secretaries was to nominate the arbitrator "in his absolute discretion". Though this argument appears attractive at first sight, a little scrutiny will reveal that it is unsound. It is based on a highly technical and doctrinaire approach and is opposed to plain common sense.

7. It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation. More, at the time when the arbitrator came to be nominated and the reference was made, there was a Ministry of Food and Agriculture and there was a Secretary in that ministry, but the only difficulty, according to the High Court, was that there was, instead of one, two Secretaries and it could not be predicated as to which Secretary was intended to exercise the power of nominating an arbitrator. We do not think this difficulty is at all real. Let us consider, for a moment, why in clause (17) the power to nominate an arbitrator was conferred on the Secretary in the Ministry of Food and Agriculture and not on a Secretary in any other ministry. The reason obviously was that at the date of the contract the Secretary in the Ministry of Food and Agriculture was the officer dealing with the subject-matter of the contract. If this object and reason of the provision of clause (17) is kept in mind, it will become immediately clear that the "Secretary in the Ministry of Food and Agriculture" authorised to nominate an arbitrator was the Secretary in charge of the Department of Food who was concerned with the subject-matter of the contract. The secretary in charge of the Department of Food filled the description "Secretary in the Ministry of Food and Agriculture" given in clause (17). The

respondents relied strongly on the use of the definite article 'the' before the words "Secretary in the Ministry of Food and Agriculture" and urged that what the parties to the contract had in mind was not a Secretary in the Ministry of Food and Agriculture, but the Secretary in the Ministry of Food and Agriculture and that clearly postulated one definite Secretary in the Ministry of Food and Agriculture and not one of two secretaries in that ministry. This is, in our opinion, a hypertechnical argument which seeks to make a fortress out of the dictionary and ignores the plain intendment of the contract. We fail to see why the Secretary in the Ministry of Food and Agriculture in charge of the Department of Food could not be described as the Secretary. He would be the Secretary in the Ministry of Food and Agriculture concerned with the subject-matter of the contract and clearly and indubitably he would be the person intended by the parties to exercise the power of nominating the arbitrator. The parties to the contract obviously could not be expected to use the words "a Secretary in the Ministry of Food and Agriculture", because their intendment was not that any Secretary in the Ministry of Food and Agriculture should be entitled to exercise the power of nominating an arbitrator, but it should only be the Secretary in the Ministry of Food and Agriculture concerned with the subject matter of the concerned with the subject-matter of the contract. That is why the use of the definite article 'the'. It is also significant to note that when the Secretary in charge of the Department of Food in the Ministry of Food and Agriculture nominated the arbitrator, the respondents did not raise any objection to the appointment of the arbitrator and participated in the arbitration proceedings without any protest. The respondents knew at that time that there were two Secretaries in the Ministry of Food and Agriculture and the appointment of the arbitrator was made by the Secretary in charge of the Department of Food and yet they acquiesced in the appointment of the arbitrator and took part in the proceedings. This circumstance is also clearly indicative of the intendment of the parties that the Secretary in the Ministry of Food and Agriculture concerned with the subject-matter of the contract should be the person entitled to nominate the arbitrator. Or else the respondents would have objected to the appointment of the arbitrator and declined to participate in the arbitration proceedings or at any rate, participated under protest. We are, therefore, of the view that the arbitrator was validly nominated by the Secretary in charge of the Department of Food in the Ministry of Food and Agriculture.

8. This view renders it unnecessary for us to consider whether by participating in the proceedings before the arbitrator without objection or protest and taking the chance of obtaining an award in their favour, the respondents could be said to have waived the defect in the appointment of the arbitrator.

9. We accordingly allow the appeal, set aside the order of the High Court and while dismissing the application for setting aside the award, pass a decree in terms of the award. Having regard to the peculiar facts and circumstances of the case, we make no order as to costs throughout.

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