

SUPREME COURT OF INDIA

Bharat Sanchar Nigam Ltd.

Vs.

Motorola India Pvt. Ltd.

Civil Appeal No.5645 OF 2008 arising out of SLP(C) No. 3459 of 2007

(Tarun Chatterjee and Lokeshwar Singh Panta)

15/09//2008

JUDGMENT

TARUN CHATTERJEE, J.

1. Leave granted.

2. This appeal is directed against the judgment and final order dated 26th of October, 2006 of the High Court of Kerala at Ernakulam in AR No 18 of 2006 whereby, the High Court had allowed the prayer for appointment of the arbitrator at the instance of the respondents and directed the parties to submit their disputes to arbitration.

3. The pivotal questions that need to be decided in this appeal are:

i) Whether the levy of liquidated damages under clause 16.2 of the tender document is an "excepted matter" in terms of clause 20.1 of the said document so that the same cannot be referred to arbitration or looked into by the arbitrator.

ii) Whether clause 62 of the special conditions of the tender document will prevail over clause 16.2 of the general conditions of the contract.

4. The relevant facts, which would assist us in appreciating the controversy involved are narrated in a nutshell, which are as follows:

The appellant had issued a notice inviting tender dated 4th of January, 2001, calling upon the eligible bidders for turn key project on planning, engineering, supply, installation and commissioning of Indian Mobile Personal Communications System in the telecom circles of Kerala, Karnataka, Tamil Nadu and Andhra Pradesh. The respondent submitted its bid in response to the notice inviting tender and after the technical, commercial and financial bid evaluation, the respondent was awarded the tender and an Advance Purchase Order (APO) dated 5th of September, 2001 for phase I and Phase II was issued to it by the appellant. The purchase order provided, inter alia, the terms for payment and the schedule for delivery of the goods. It also provided for liquidated damages in the event of failure on the part of the respondent to meet with the delivery schedule. Clause 16.2 of the general conditions of the tender document provided for liquidated damages to the extent of 0.5% of the value of the delayed quantity of the goods and services for each week of delay or the part thereof for a period of upto 10 weeks and thereafter charge 0.7% of the value of delayed quantity or part thereof, for a period of upto 10 weeks thereafter. It is the case of the appellants that the respondent had failed to complete phase I and phase II of the project within the schedule as provided in the tender document, and therefore, liquidated damages were imposed by the Tamil Nadu Circle of the appellant on 21st of May, 2004 under clause 16.2 of the tender document, quantification of which was beyond the purview of the arbitration agreement. There was an exchange of correspondence between the Tamil Nadu Circle of the appellant alleging the delay in the purchase of goods and the respondents denying any such delay and objecting to the levy of liquidated damages. On 24th of March, 2006, the respondent invoked the arbitration clause by sending a letter through its counsel to the appellants to which they did not concede and justified the imposition of liquidated damages. The respondent filed an arbitration application before the High Court of Kerala at Ernakulam for the appointment of arbitrator under section 11 of the Arbitration and Conciliation Act, 1996 in respect of the liquidated damages assessed by the appellant. In the counter affidavit filed in the High Court, the appellant alleged that the liquidated damages assessed and quantified by the appellant under clause 16.2 of the tender document was an excepted matter as per clause 20.1 of the said document and, therefore, not arbitrable. The High Court, as noted herein earlier, by the impugned judgment allowed the arbitration request of the respondents holding that the imposition of liquidated damages by the appellant was not an "excepted matter" and therefore, subject to arbitration. It is this judgment of the High Court, which is impugned in this appeal, in respect of which leave has already been granted.

5. Before proceeding further, we deem it appropriate to note the relevant clauses of the tender document and the purchase order, which would assist us in determining whether the matters alleged are an excepted matter. Clause 16.2 reads as under:-

"16.2. Should the tenderer fail to deliver the goods and services on turn key basis within the period prescribed, the purchaser shall be entitled to recover 0.5% of the value of the delayed quantity of the goods & services, for each week of delay or part thereof, for a period upto 10 weeks and thereafter at the rate of 0.7% of the value of the delayed quantity of the goods and services for each week of delay or part thereof for another 10 weeks of delay. In the present case of turn key solution of supply, installation and commissioning, where the delayed portion of the delivery and provisioning of services materially hampers effective user of the systems, Liquidated Damages charged shall be levied as above on the total value of the concerned package of the purchase order. Quantum of liquidated damages assessed and levied by the purchaser shall be final and not challengeable by the supplier."

Clause 20.1 which is the arbitration clause and provides for excepted matters, i.e., those matters the decision to which is specifically provided in the agreement itself reads as under:-

20.1 In the event of any question, dispute or difference arising under this agreement or in connection there-with (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the CGM, Kerala Telecom Circle, BSNL or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CGM, Kerala Telecom Circle, BSNL or by whatever designation such an officer may be called (hereinafter referred to as the said officer), and if the CGM Kerala Telecom Circle or the said officer is unable or unwilling to act as such, then to the sole arbitration of some other person appointed by the CGM, Kerala Telecom Circle or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act, 1996.

There will be no objection to any such appointment on the ground that the arbitrator is a Government Servant or that he has to deal with the matter to which the agreement relates or that in the course of his duties as a government servant he has expressed his views on all or any of the matters in dispute. The award of the arbitrator shall be final and binding on both the parties to the agreement. In the event of such an arbitrator to whom the matter is originally referred, being transferred

or vacating his office or being unable to act for any reason whatsoever, the CGM, Kerala Telecom Circle, BSNL or the said officer shall appoint another person to act as an arbitrator in accordance with the terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors....."

Clause 15.2 of Section III of the tender document, which deals with the "delays in the supplier's performance" reads as under:

"Delay by the Supplier in the performance of its delivery obligations shall render the Supplier liable to any or all of the following sanctions, forfeiture of its performance security, imposition of liquidated damages, and/or termination of the contract for default".

Clause 62 of Section IV of the tender document which deals with liquidated damages and incentive reads as under:-

"The bidder shall be charged liquidated damages at the rates as defined in the General conditions of contract as contained in Section III for any delay in the turnkey job entrusted to the bidder. However he shall be provided an incentive @ 0.5% of the cost of the network of each service area (Telecom Circle), for each week of early commissioning of the entire network in that service area, subject to a maximum of 3% of the value of the contract of the circle".

6. Since this appeal arises out of an order, which appointed an arbitrator, to decide the dispute referred to by the respondent, we, in this appeal, need to decide that whether in view of the arbitration clause in the tender document provided under clause 20 of the said document, the breach specified in 16.2 is an "excepted matter".

7. Mr. Gopal Subramaniam, Additional Solicitor General of India appearing on behalf of the appellant contended that in view of the decision of this Court in Vishwa Nath Sood vs. UOI [(1989) 1 SCC 657], a conjoint reading of clause 16.2 and clause 20.1 would clearly show that clause 16.2 is covered under the excepted matters as provided in clause 20.1 of the tender document. He further contended that the High Court had erred in holding that the quantification of the liquidated damages was subsequent to the decision of liability of liquidated damages to be payable to the appellant. Therefore, he contended that the respondent had specifically subscribed to each and every clause of the agreement without any objection at the tender stage and accordingly, it was not open to them to claim immunity from the contractual obligations. Thus, the matter in respect of which the respondent sought reference to arbitration was "excepted matter" in terms of clause 16.2 of the tender agreement.

In order to satisfy us in the aforesaid contentions, the learned Additional Solicitor General, Mr. Gopal Subramaniam placed strong reliance in the case of Food Corporation of India Vs. Sreekanth Transport 1999 (4) SCC 491, which has given the following principles relating to "Excepting

matters" as under :-

"1. These appeals by the grant of Special Leave pertains to the effect of the usual 'excepted clause' vis-à-vis the arbitration clause in a Government contract. While it

is true and as has been contended, that the authorization of the arbitrators to arbitrate, flows from the agreement but the High Court in the judgment impugned thought it fit to direct adjudication of 'excepted matters' in the agreement itself by the arbitrators and hence these appeals before this Court.

2. At the outset, it is pertinent to note that in the usual Government contracts, the reference to which would be made immediately hereafter, there is exclusion of some matters from the purview of arbitration and a senior officer of the Department usually is given the authority and power to adjudicate the same. The clause itself records that the decision of the senior officer, being the adjudicator, shall be final and binding between the parties - this is what popularly known as 'excepted matters' in a Government or Governmental agencies' contract.

3. 'Excepted matters' obviously, as the parties agreed, do not require any further adjudication since the agreement itself provides a named adjudicator - concurrence to the same obviously is presumed by reason of the unequivocal acceptance of the terms of the contract by the parties and this is where the courts have found our lacking in its jurisdiction to entertain an application for reference to arbitration as regards the disputes arising therefrom and it has been the consistent view that in the event the claims arising within the ambit of excepted matters, question of assumption of jurisdiction of any arbitrator either with or without the intervention of the court would not arise; the parties themselves have decided to have the same adjudicated by a particular officer in regard to these matters; what are these exceptions however are questions of fact and usually mentioned in the contract documents and forms part of the agreement as such there is no ambiguity in the matter of adjudication of these specialized matters and termed in the agreement as the excepted matters....."

Keeping the aforesaid principles in mind, let us proceed further.

We may keep on record that the appellants alleged that respondents had not completed phase I and phase II of the project within the schedule as provided in the tender document whereupon the appellants had to impose liquidated damages and invoke clause 16.2 of the tender document. But the respondents refuted these allegations. The contention of the respondent in this case was that the delay, if any, was caused due to the appellant's delay in supplying necessary inputs to the respondent. So the respondent contends that it had performed its part of the contract in time and the blame for delay lies on the appellant. Thus it is to be noted that there is a dispute between the parties on the question whether any breach was committed in this case.

8. The appellant had contended before the High Court of Kerala that the levy of the liquidated damages on the respondent was a matter outside the purview of the scope of arbitration proceedings as it "squarely falls within the exception provided under Clause 20 of Section III, being the matters for which mode of decision is provided under the Agreement itself."

The respondent on the other hand contended that the claim of the petitioner that the dispute pertaining to levy of liquidated damages falls outside the arbitration agreement being an excepted matter is fallacious.

The High Court held that there was no reason why the arbitration request on behalf of the respondent should not be allowed. It held that clause 16.2 is not an excepted matter under clause 20 of the tender document.

9. Having heard the learned counsel for the parties and after examining the judgment of the High Court and the other materials on record, we are of the view that this appeal must be dismissed. Clause 20 is the arbitration clause and provides that any question, dispute or difference arising under this agreement or in connection therewith would be referred to arbitration. To this, an exception is also provided which lays down that the matters, the decision to which is specifically provided under this agreement, would not be referred to arbitration. From a bare reading of clause 16.2 of Section III of the tender document, it is clear that if the tenderer fails to deliver the goods and services on turnkey basis within the period prescribed, the purchaser shall be entitled to recover liquidated damages and the quantum of the liquidated damages assessed and levied by the purchaser shall be final and not challengeable by the supplier.

10. We are in full agreement with the findings of the High Court that there was a dispute as to whether the respondent had at all acted in breach of any terms and conditions of the tender document.

The question to be decided in this case is whether the liability of the respondent to pay Liquidated Damages and the entitlement of the appellant, to collect the same from the respondent is an excepted matter for the purpose of clause 20.1 of the General Conditions of contract. The High Court has pointed out correctly that the authority of the purchaser (BSNL) to quantify the Liquidated Damages payable by the supplier Motorola arises once it is found that the supplier is liable to pay the damages claimed. The decision contemplated under clause 16.2 of the agreement is the decision regarding the quantification of the Liquidated Damages and not any decision regarding the fixing of the liability of the supplier. It is necessary as a condition precedent to find that there has been a delay on the part of the supplier in discharging his obligation for delivery under the agreement.

It is clear from the reading of clause 15.2 that the supplier is to be held liable for payment of liquidated damages to the purchaser under the said clause and not under clause 16.2. The High Court in this regard correctly observed that it was not stated anywhere in clause 15 that the question as to whether the supplier had caused any delay in the matter of delivery will be decided either by the appellant/BSNL or by anybody who has been authorized on the terms of the agreement. Reading clause 15 and 16 together, it is apparent that clause 16.2 will come into operation only after a finding is entered in terms of clause 15 that the supplier is liable for payment of liquidated damages on account of delay on his part in the matter of making delivery. Therefore, clause 16.2 is attracted only after the supplier's liability is fixed under clause 15.2. It has been correctly pointed out by the High Court that the question of holding a person liable for Liquidated Damages and the question of quantifying the amount to be paid by way of Liquidated Damages are entirely different. Fixing of liability is primary, while the quantification, which is provided for under clause 16.2, is secondary to it.

There is no provision in the agreement, apparent on the face of it, relating to a decision made by any specified authority on the issue of levy of Liquidated Damages, as is contemplated under clause 20.1 of the agreement which is excepted from the purview of arbitration. No decision coming within the scope of excepted matters under clause 20.1 is envisaged by any portion of the agreement regarding the liability of the supplier to liquidated damages.

Quantification of liquidated damages may be an excepted matter as argued by the appellant, under clause 16.2, but for the levy of liquidated damages, there has to be a delay in the first place. In the present case, there is a clear dispute as to the fact that whether there was any delay on the part of the respondent. For this reason, it cannot be accepted that the appointment of the arbitrator by the High Court was unwarranted in this case. Even if the quantification was excepted as argued by the appellant under clause 16.2, this will only have effect when the dispute as to the delay is ascertained.

Clause 16.2 cannot be treated as an excepted matter because of the fact that it does not provide for any adjudicatory process for decision on a question, dispute or difference, which is the condition precedent to lead to the stage of quantification of damages.

The above stated position can be ascertained through the judgment of this Court in the case of State of Karnataka vs. Shree Rameshwara Rice Mills, (1987) 2 SCC 160. This Court in the said case, made a clear distinction between adjudicating upon an issue relating to a breach of condition of contract and the right to assess damages arising from a breach of condition. It was held that the right conferred to assess damages arising from a breach of condition does not include a right to adjudicate upon a dispute relating to the very breach of conditions and that the power to assess damages is a subsidiary and consequential power and not the primary power.

11. Clause 20.1 regarding excepted matters reads "In the event of any question, dispute or difference arising under this agreement or in connection there-with (except as to the matters, the decision to which is specifically provided under this agreement)...". Therefore it is clear from this provision, matters which will not fall within the arbitration clause are questions, disputes or differences, the decision to which is specifically provided under the agreement. Clause 16.2 is not a clause where in any decision making power is specifically provided for with regard to any question, dispute or difference between the parties relating to the existence of breach or the very lack of liability for damages, i.e. the levy of Liquidated Damages.

12. The learned senior counsel for the appellant relied on the decisions of this court in Vishwanath Sood vs. UOI [(1989) 1 SCC 657], and General Manager, Northern Railway vs. Sarvesh Chopra [(2002) 4 SCC 45]. These cases, we are afraid, will not be of any help to the appellants being distinguishable on facts and having different contractual clauses. We may note that clause 16.2 cannot be treated as an excepted matter. This is because admittedly, it does not, provide for any adjudicatory process for decision on a question, dispute or difference, which is the condition precedent to lead to the stage of quantification of damages nor is it a no claim or no liability clause.

In Vishwanath Sood's case (supra), it was held by this court that a particular claim of the government was excluded because the Superintendent Engineer acted as the revisional authority to decide disputes between the two parties by an adjudicatory process, there being a complete machinery for settlement of the disputes in the relevant clause and most importantly, the Superintendent Engineer had the discretion on consideration of the facts and circumstances including mitigating facts, held no damages was payable. Again in the case of Sarvesh Chopra, this court had held that the claims covered by the no claims clause, i.e., where the contractor had given up the right to make a claim for breach on the part of the government was not arbitrable in terms of the arbitration clause contained therein and clause 63 of the general conditions of the contract which provided for exclusion because no claim clause was excepted as such claims were simply not entertainable. In view of the discussions made hereinabove, we hold that the disputes raised by the respondents are arbitrable and not excepted from scope of arbitration.

13. We feel that there are certain other issues that are to be discussed while disposing of this appeal. The respondent contended in its written submission filed before this court on 14th May, 2007 that the quantum of damages calculated by the appellant in respect of clause 16.2 of the tender document, simply cannot have the effect of rendering all the above disputes as not being arbitrable. We find that there is considerable merit in this argument. The true essence of any arbitration agreement is to arbitrate the matters in a cordial way in respect of issues where there is a dispute between the parties. To construe such limited words in clause 16.2 as being so all encompassing

would destroy the very foundation of the bargain between the parties. The appellant in the present case is acting in an unfair way by seeking to exclude, from arbitration, what it has agreed to arbitrate in the first place.

14. The appellant contended that it has the unilateral right to determine the Liquidated damages under clause 16.2 and that the quantum of Liquidated Damages decided by the appellant, even if it is exorbitant, would be final and cannot be challenged. We find the contention of the respondent that if the said contention of the appellant is supported, it would mean that a party would be held liable to damages of whatever amount the other party demands without recourse to a remedy, to be relevant and should be given due importance. Such a contention by the appellant would be in violation of Section 28 and Section 74 of the Indian Contract Act.

15. The learned counsel of the appellants had submitted before this court that it was the appellant, which had the right to appoint the arbitrator. This submission cannot be accepted. The respondent had invoked the arbitration clause on the ground that there was no delay on its part by sending a letter to this effect to the appellants on 24th of March, 2006. On 25th April, 2006, the appellants/BSNL replied stating that they had rightly recovered the Liquidated Damages and that the recovery of the damages was not arbitrable. The appointing authority in this matter, i.e., CGM Kerala, did not respond to the notice requiring the appointment of arbitrator and failed to act within the time prescribed under the Arbitration and Conciliation Act 1996. Since the appointing authority appointed no arbitrator, the respondent/Motorola, on 25th of May, 2006, filed a petition under Section 11 of the said Act before the High Court at Kerala. In the case of Datar Switchgear vs. Data Finance Lt. [(2000) 8 SCC 151], which was affirmed in Punj Llyod Ltd. vs. Petronet MHB Ltd. [(2006) 2 SCC 638], it was held that once a minimum of 30 days is expired and a petition is filed to the court, the appointing authority loses the right to make the appointment. Therefore, the appellant/BSNL has now lost its right to appoint any arbitrator for settling the disputes under the agreement.

16. Further, CGM Kerala Circle has already taken a decision as is evident from his letter dated 25th of April, 2006, that the appellant was right in imposing the liquidated damages and therefore, the question of such a person becoming an arbitrator does not arise as it would not satisfy the test of impartiality and independence as required under Section 12 of the Arbitration and Conciliation Act, 1996. Moreover it would also defeat the notions laid down under the principles of natural justice wherein it has been recognized that a party cannot be a judge in his own cause. The judgment of this Court in State of Karnataka vs. Shree Rameshwara Rice Mills, (1987) 2 SCC 160, is significant in this matter. The Court had stated:

".....Even assuming that the terms of Clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, adjudication by the officer regarding the breach of the contract can not be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interest of justice and equity

require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract".

17. The provision under clause 16.2 that quantification of the Liquidated Damages shall be final and cannot be challenged by the supplier Motorola is clearly in restraint of legal proceedings under section 28 of the Indian Contracts Act. So the provision to this effect has to be held bad.

18. Pursuant to section 4 of the Arbitration and Conciliation Act, 1996, a party who knows that a requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives their right to object. The High Court had appointed an arbitrator in response to the petition filed by the appellant. At this point, the matter was closed unless further objections were to be raised. If further objections were to be made after this order, they should have been made prior to the first arbitration hearing. But the appellant had not raised any such objections. The appellant therefore had clearly failed to meet the stated requirement to object to arbitration without delay. As such their right to object is deemed to be waived.

19. Finally we are of the opinion that the contention of the Respondent that Clause 62 referring to special clauses has an overriding effect on Clause 16.2, cannot be accepted. There is in fact no conflict between clause 62 and 16.2. Clause 62 has two parts in it. One part referring to the Liquidated damages and the other part refers to incentives in case the respondent/Motorolla performs its part of the contract within time. The part dealing with Liquidated Damages under clause 62 in fact refers it back to clause 16.2 dealing with the quantification of Liquidated Damages. So it is apparent that there is no dispute between clause 62 and clause 16.2.

20. For the reasons aforesaid, we are of the view that the High Court was justified in passing the impugned judgment and there is no infirmity in the impugned order for which we can interfere with the order of the High Court. The appeal is therefore dismissed. There will be no order as to costs.