

# ALLAHABAD HIGH COURT

Union of India

Vs.

Firm Vishydhha Ghee Vyopar Mandal

F.A.F.O. No. 91 of 1950.

(Sankar Saran and Bind Basni Prasad, JJ.)

22.11.1950

## JUDGMENT

### **Bind Basni Prasad, J.**

1. This is an appeal from an order dated 20-2-1950, passed by the learned civil Judge of Agra refusing to stay proceedings of a suit on the defendant's application under Section 34, Arbitration Act of 1940. The relevant facts are as follows :

2. The plaintiff is a firm registered under the Partnership Act carrying on the business of purchasing and selling ghee. In November 1948, the Government of India invited tenders for the supply of ghee to the armed forces and the plaintiff submitted one. Its tender to supply 2,600 tons of ghee at a total cost of about Rs. 1,31,80,000 was accepted. In February 1949 the Central Government increased the quantity to 3,250 tons at a total cost of about Rs. 1,64,00,000. The acceptance of the plaintiffs tender was contained in a letter with which its enclosures is printed at pp. 29 to 45 of the paper book supplied to us by respondent's counsel. Detailed terms and conditions of the contract are contained therein. The plaintiff accepted these terms and conditions by the letter printed at p. 46 of the paper book. It is important to note here that the terms and conditions of the contract communicated by the Central Government, though addressed to the plaintiff firm, were accepted by one of the partners only Ved Prakash Gupta, who styled himself as the authorized representative for the plaintiff firm. One of the terms of the contract related to arbitration and it was contained in Appen. II (printed at p. 42 of the paper book) of the Central Government's letter accepting the tender. It runs as follows :

"In the event of any question or dispute arising under the conditions mentioned in the Tender or the Schedule or appendices annexed thereto or in General conditions of the contract (Supply Department. Form W.S.B. 133) except as to any matter the decision of which is specially provided for by these conditions, the same shall be referred to the sole

arbitration of the Secretary, Government of India, Ministry of Food or his nominee within a year from the date of completion of contract. The award of the arbitrator so appointed shall be final and binding on the said parties.

2. This clause does not apply to any matters the decision of which is specially provided for by any conditions applicable to this contract and it shall not be open to either party to refer any such questions or disputes to arbitration unless a specific reference to arbitration is jointly signed by the contractor and the purchaser.

3. The provisions of the Arbitration Act, 1940, and of the rules there under and any statutory modification thereof shall be deemed to apply to and be incorporated in this contract.

4. Upon every and any reference as aforesaid the assessment of the costs incidental to the reference and award respectively shall be in the discretion of the sole arbitrator.

5. Work under the contract shall if reasonably possible continue during the arbitration proceedings, and no payment due to or payable by the purchaser shall be withheld on account of such proceedings.

6. The venue of the arbitration proceedings will be the premises of the Food Ministry, New Delhi, or such other place as the sole arbitrator may decide."

3. The plaintiff alleges that it "carried out all the terms of the contract on his part and supplied the entire quantity of ghee according to the contract without any complaint or defeat or rejection and the quality of ghee supplied by him was uniformly found to be according to the prescribed standard after severe tests of analysis by the defendant's officers."

The defendant viz. the Central Government made payment of all the bills except two. The plaintiff therefore brought a suit for the recovery of Rs. 4,90,423-6-0 the particulars of which as given in the plaint are as follows :

	Rs.	As.	Ps.
1. Bill dated 10-5-1949 for the supply of Milk ghee blended duly supplied by inspection note	1,09,592	13	0
Vide para. 7 of the plaint interest @ 6% per annum	2,356	4	0
2. Bill dated 18-5-1949 for the supply of 23 tons 176 lbs. of Milk ghee blended duly supplied by inspection note	1,13,713	4	0
Vide para. 10 of the plaint interest @ 6% per annum ...	2,293	3	6
3. Refund of Security deposit	2,00,000	0	0
Vide para. 18 of the plaint interest @ 6% per annum	3,433	5	6
Damages owing to blocking of the stock of raw ghee at the ghee Heating Centre resulting (vide para. 12 of the plaint)	43,200	0	0

Damages as consequential loss owing to the cancellation of the supply of 62 tons of ghee arising out of the illegal and unlawful cancellation of the 15,250 contract and its frustration @ 5% (vide para. 16 of the plaint)	0	0
Total of paras. 4A and 4B	58,450	0 0
Interest @ 4%.....	584	8 0
	Rs.	
	4,90,423	6 0

4. The defendant before filing the written statement made an application under Section 34, Arbitration Act, and contended that in view of sub-clause (12) of clause 5 and Appen. II of the contract the dispute should be referred to the sole arbitration of the Secretary, Government of India, Ministry of Food or his nominee. It expressed its willingness to do all things necessary to the proper conduct of the arbitration. In para. 5 of the application the Central Government denied that any money was due to the plaintiff. It added that

"the defendant has been informed that the plaintiff has adulterated supplies of ghee made to the defendant. The police investigations in this connexion are in progress."

5. In reply the plaintiff contended that the defendant had not specified in its application the dispute which according to it can be referred to arbitration under the contract. It asserted that the matter cannot be referred to arbitration inter alia for the reason that on a correct interpretation of the arbitration clause the disputes between the parties were of such a nature as did not admit of any reference to arbitration. The plaintiff submitted interrogatories to be answered by the defendant and stated that it was not possible to file a detailed reply to the defendant's application without the answers to those interrogatories. The defendant objected to answer the interrogatories and contended that for the purposes of deciding the application under Section 34, Arbitration Act, it could not be called upon to answer them. It relied upon *Char an Das v. L. Gur Saran Das Kapur<sup>1</sup>*, in which it was held that an application under Section 34, should be decided on the plaint and on the terms of the contract. The learned Civil Judge upheld the defendant's objection in the following words :

"By serving interrogatories on the defendant the plaintiff wants to know the position which the defendant will take in the case. In my opinion the question whether Section 34 applies and whether the suit should be stayed should be decided on the allegation of the plaint and the contract and hence it is not necessary in the present case at this stage that the defendant should be called upon to file replies to the interrogatories served by the plaintiff."

6. On a consideration of the facts before him the learned Civil Judge held that it was not a case in which he should exercise discretion under Section 34 to stay the suit. He summed up the position

in the following words :

"In my opinion this is not a fit case in which the suit should be stayed under Section 34, Arbitration Act and the discretion of the Court in this case should be exercised in refusing the stay. The plaintiff has denied the validity of the Arbitration Agreement and a question of fraud has been raised by the defendant and a portion of the claim is not covered by agreement clause. These factors alone entitle that the application under Section 34, for staying proceedings should be refused. Moreover in the present case the intricate question of law will arise whether a party after having once tested the goods and found them up to the specification required in the contract, and after having accepted the delivery of the goods was entitled to raise the plea of adulteration and having the goods re-tested again. It should be remembered that the goods have already been consumed by the

<sup>1</sup> AIR 1945 All 146: (I.L.R. (1945) ALL. 162)

Armed forces of the defendant and it is not known how much quantity of the goods are still in possession of the defendant. Further the plaintiff's allegation about the defendants blocking the plaintiff's entire stock of raw ghee in the godowns in the Agra Heating Centre shows that the plaintiff is being harassed by the defendant. The plaintiff can have no confidence in any nominee of the Secretary, Ministry of Food, or his nominee as the matters relate to the department of Ministry of Food."

7. Against the above order the Government of India prefers this appeal, presses that the proceedings in the suit should be stayed and it should be referred to arbitration according to the contract. It is necessary first to set out certain features of Section 34, Arbitration Act, which are relevant for the present appeal. The first point to be noted is that a party to the arbitration agreement is not entitled as of right to the stay of proceedings. Whether or not the Court shall exercise the power given to it by the section is entirely one of discretion. This discretion, of course, must be judicially exercised. But where it has been exercised it will not readily be interfered with, even though the tribunal which is asked to review it may feel that, if the decision had rested with them, their own conclusion might have been different: see Russell on Arbitration 14th Edn, p. 81. Where parties have agreed to refer a dispute to arbitration, and one of them, notwithstanding that agreement, commences an action to have the dispute determined by Court, prima facie leaning of the Court is to stay the action and leave the plaintiff to the tribunal to which he has agreed. But where the dispute referred to arbitration involves a question of fraud or where the dispute under consideration involves charges against the character of one of the parties, the Court will usually permit the party against whom such charges are made, if he so desires, to have them investigated in open Court. It is not proper that a party against whom such charges are made should be without a right of appeal on questions of fact. But an express stipulation that questions involving fraud should be submitted to arbitration will be given effect to by the Court.

8. The second point to be noted is whether there is any valid and binding arbitration agreement,

and if so, whether the dispute involved in the present suit falls within the purview of the arbitration clause.

9. Examining the case in the light of the above principles we find, firstly, that the defendant alleges fraud on the part of the plaintiff. The procedure prescribed by the contract was that the plaintiff shall despatch raw ghee to the Officer-in-Charge, Ghee Heating Centre. The raw ghee shall lie at the risk and responsibility of the plaintiff in the godown at the Centre. The plaintiff was to provide and maintain at its own cost a Ghee Heating Centre at Agra, a fully equipped laboratory and necessary chemicals and staff for the analysis of ghee with the main intention that the plaintiff may be able to verify for himself that the ghee indented by him from various markets was of the required purity. The ghee was then to be blended and strained. Three samples of 1/2 pound each were to be taken from settling tanks by the Officer-in-Charge of the Military Laboratory of the department of the Ghee Heating Centre or by the Officer deputed by him. These samples were to be supplied free by the plaintiff and were to be labeled and sealed by the defendant's officer in the presence of the plaintiff or its authorized agents. Out of the three samples one was to be retained by the Inspecting Officer, the other to be handed over to the Officer-in-Charge Ghee Heating Centre and the third to be made over to the plaintiff. If the sample on analysis by the defendant's officer was found to conform to the standard, the stock of ghee represented by the sample would be accepted. Such ghee as was found acceptable would be taken over from the plaintiff by the defendant after weighment and was to be stored by the Officer-in-Charge of the Ghee Heating Centre in godowns other than those reserved for raw ghee as the property of the Government and the plaintiff was to have no access to the accepted ghee godowns. The payment of the plaintiffs bills was to be made on the basis of the Inspection Notes of the Officer-in-Charge Ghee Heating, Centre Agra, for the quantity of the ghee accepted. It is undisputed that the ghee for which the plaintiff claims the price had been accepted by, and delivered to, the defendant according to the above procedure. It appears, however, from para. 5 of the defendant's application under Section 34 that its case is that the ghee which had been inspected by its officers, passed by them and taken possession of, was adulterated. The implication of this allegation is clear. The suggestion is that the defendant's officers were bribed by the plaintiff and they passed adulterated ghee as up to the standard, according to the contract. It is for these reasons that the defendant entrusted the matter to the police which in the course of investigation blocked a portion of the plaintiffs stock of ghee. The defendant imputes a criminal act on the part of the plaintiff. From para. 14 of the plaint it is evident that the defendant wants the accepted ghee to be re-tested. It is true that the defendant has not, in so many words, alleged fraud on the part of the plaintiff in its application under Section 34, but it is clear that its case is one of fraudulent conduct on the part of the plaintiff and its own officers. There can be no occasion for the re-testing of the accepted ghee which has become the defendant's property unless the defendant's case is that, in the test by its officers a fraud had been committed by the plaintiff in conspiracy with its own officers. Learned counsel for the defendant did not disclose before us the defence story. He did not, however, deny that the plaintiff was guilty of fraud along with its own officers. The case involves charges of personal character and in view of the

principles enunciated at pp. 84 and 85 of Russell's Book of Arbitration, 14th Edn., we are of the opinion that the learned Civil Judge was not wrong in exercising his discretion against the stay of the proceedings.

10. Apart from the above consideration we find that the arbitration clause in the contract does not bind the plaintiff firm. Sub-clause (2) of Section 19, Partnership Act, 1932, provides inter alia:

"In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to-

(a) submit a dispute relating to the business of the firm to arbitration."

It has been already pointed out above that the terms and conditions of the contract were accepted only by one of the partners of the firm, Ved Prakash Gupta. Although he styled himself as the authorized agent of the plaintiff firm, no proof of such authority is forthcoming. Mr. Walter Dutt on behalf of the defendant placed before us a pamphlet known as "Conditions of Contract Governing Department of Supply Contracts" published in 1942. Clause 21 of those terms provides for arbitration. As the preface of this pamphlet shows, it was issued to indicate the terms and conditions on which the Supply Department would make purchases. Learned counsel contends that the arbitration clause was a usage or custom of contracts with the Central Government and so Clause 19 (2) (a), Partnership Act is inapplicable. We do not agree with this. If a party makes large purchases of various kinds of commodities and has for its own convenience laid down certain conditions which it would enforce if anyone enters into a contract with it, then those conditions cannot be said to be any "usage or custom of trade". A practice can be regarded as usage or custom of trade when it is followed and acted upon not by only one party but by all or at least a vast majority of those engaged in that trade. Moreover, what is the particular "trade" in the present case? Certainly entering into contract by Government by itself cannot be regarded as a trade when such contracts may relate to a large variety of articles. Lastly, this condition of Arbitration was laid down by the Government of India only about seven years before the institution of the suit. Even if the matter be regarded as one relating to a "trade" the practice cannot ripen into a custom or usage in a period of seven years. We hold that there is no "usage or custom" as alleged by the defendant. This being the position, the arbitration clause in the agreement cannot bind the plaintiff firm.

11. Learned counsel for the defendant has argued that by accepting the contract and supplying ghee to the defendant according to it, the plaintiff ratified the arbitration clause. There is nothing on the record to show that the plaintiff ratified the arbitration clause. It accepted the contract for the supply of the stipulated ghee, at the stipulated price, according to the stipulated procedure. But no materials have been placed before us to show that it accepted the terms relating to arbitration. It is possible for a party to accept some terms of the contract and not to accept the others. We doubt whether by ratification a thing which as prohibited by law can be validated.

12. Lastly, assuming that the arbitration clause binds the plaintiff, the question still remains whether the present dispute falls within its purview. The arbitration clause has been set out above in extenso. The first point to be noted in this connection is that it is only a question or dispute arising under the conditions mentioned in the tender or the schedule and appendices annexed thereto or under the general conditions of the contract (Supply Department form W. S. B. 133) except as to any matter the decision of which is specially provided by these conditions which can be referred to arbitration. There is no provision in the contract for the re-testing of ghee by the defendant. Hence the demand of the defendant to re-test the ghee which has become its property according to the contract is not one which arises from any conditions of the contract. Para. 19 of form No. W. S. B. 133 contained in the pamphlet placed before us by learned counsel for the defendant provides :

"Any bribe, commission, gift or advantage given, promised or offered by or on behalf of the Contractor or his partner, agent or servant or any one on his or their behalf to any officer, servant, representative or agent of the purchaser or Government or any person on his or their behalf in relation to the obtaining or to the execution of this or any other contract with the purchaser or Government or placed through Government agency, for showing or forbearing to show favor or disfavor to any person in relation to this or any other contract as aforesaid shall subject the Contractor to the cancellation of this and all or any other contracts as aforesaid and also to payment of any loss or damage resulting from any such cancellation to the like extent as is provided in case of cancellation under clauses 11 and 13 hereof and to recover from the contractor the amount or value of any such gift, consideration or commission.

Any dispute or difference of opinion arising in respect of either the interpretation, effect or application of this condition or of the amount recoverable hereunder from the contractor shall be decided by the Secretary, Department of Supply, and his decision shall be final." If the defendant is withholding the payment of the two bills and forfeiting security money because of any corrupt practice as referred to in para. 19 quoted above, then any dispute relating to this matter is to be dealt with according to the special procedure provided in para. 19. The arbitration clause would not apply to it according to paras. 1 and 2 of Appen. ii of the agreement which have been quoted in extenso at the beginning of the judgment, because the matter is one the decision of which has been specifically provided for in the deed of contract.

13. The damages of Rs. 43,200 which the plaintiff claims on account of the blocking of stocks of raw ghee at the Heating Centre by the police is also one which does not fall within the purview of the contract between the parties. No doubt the claim for the price of the ghee, for the refund of the security deposited and for damages for the cancellation of the supply of 62 tons of ghee evidently fall within the purview of the prima facie clause of the contract, but on a close scrutiny of the nature of the dispute between the parties it becomes clear that it is beyond the purview of the clause as the defendant is withholding the price and forfeiting the security money because the plaintiff does not agree to re-testing (re-testing being not provided in the contract) and the

defendant thinks that the plaintiff in conspiracy with its (defendant's) own officers has adulterated the ghee.

14. The fact that the Secretary to the Government of India, Ministry of Food, or his nominee, is to be the arbitrator and that the case involves a question of law of some intricacy can be no ground for refusing the stay. If a party with open eyes agrees to the arbitration of a particular officer, it is not open to him subsequently to object to the reference of the case to him on the ground that he is a subordinate" of his adversary. In this connection I may refer also to *Central Government of India v. Chhotelal Chhanganlal*<sup>2</sup>, The question of law involved in the present case is not such as cannot be expected to be decided properly by an officer of the calibre who is contemplated by the contract to act as an arbitrator.

15. To sum up, the position is that so far as arbitration clause in the contract is concerned, it does not bind the plaintiff in view of Section 19 (2) (a), Partnership Act, 1932. Even if the clause binds the plaintiff, the nature of dispute involved is one which does not fall within its purview. Even if the dispute falls within the purview of the arbitration clause, it is not proper to refer it to arbitration as the dispute involves charges against the character of one of the parties. It is desirable that the matter should be investigated in open Court and the party against whom such charges are made should have a right of appeal on questions of fact.

16. For the reasons given above we uphold the order of the learned civil Judge and dismiss the appeal with costs.

Appeal dismissed.

<sup>2</sup> AIR 1949 Bom 359: (51 Bom. 615)