

CALCUTTA HIGH COURT

Union of India

Vs.

Himco (India) Private Ltd

A.F.O.O. No. 183 of 1961

(R.S. Bachawat and C.N. Laik, JJ.)

13.08.1962

JUDGMENT

R.S. Bachawat, J.

1. This is an appeal by the Union of India from an order passed under Section 20 of the Indian Arbitration Act. The Union of India invited tenders for the supply of certain goods. The invitation contained inter alia the following query :

"Do you agree to sole arbitration by Director General of Supplies and Disposals or his nominee as provided in Clause 21 of the General Conditions of Contract Form W. S. B. 133 ?

(Your acceptance or non-acceptance of this clause will not influence the decision of the tender. It should, however, be noted that an omission to answer the above question will be deemed, as an acceptance of the clause)."

2. Defendants M/s. Himco (India) Private Ltd. submitted their tender dated October 3, 1956 wherein they stated at the foot of the query mentioned above as follows :-

"We feel there should be an unattached arbitrator".

The Union of India accepted the tender by A/T No. Cal./PR-II (3)/16359-G/448 dated November 30, 1956. The acceptance stated inter alia that the conditions of the contract would be as contained in Form No. W. S. B. 133 as amended up to date. Clause 21 of the said Form contained the following arbitration clause :

"In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or in connection with this contract, (except as to any matters the decision of which is specially provided for by these or the special conditions), the same shall be referred to the sole arbitration of the Director General of Supplies and Disposals or of some other person appointed by him. It will be no objection that the

arbitrator is a Government servant, that he had to deal with the matters to which the contract relates or that in the course of his duties as a Government servant he has expressed views on all or any of the matters in dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract.

It is a term of this contract –

- (a) if the arbitrator be the Director General of Supplies and Disposals -
 - (i) in the event of his being transferred or vacating his office by resignation or otherwise, it shall be lawful for his successor-in-office either to proceed with the reference himself, or to appoint another person as arbitrator; or
 - (ii) in the event of his becoming unable to act for any reason, it shall be lawful for the Director General of Supplies and Disposals to appoint another person as arbitrator; or
- (b) if the arbitrator be a person appointed by the Director General of Supplies and Disposals - in the event of his dying, neglecting or refusing to act, or resigning or being unable to act for any reason, it shall be lawful for the Director General of Supplies and Disposals either to proceed with the reference himself or to appoint another person as arbitrator in place of the outgoing arbitrator.

It is further a term of this contract that no person other than the Director General of Supplies and Disposals or the person appointed by him should act as arbitrator and that, if for any reason that is not possible, the matter is not to be referred to arbitration at all.

Upon every and any such reference, the assessment of the costs incidental to the reference and award respectively shall be in the discretion of the arbitrator. Subject as aforesaid, the Arbitration Act, 1940 and the rules there under and any statutory modifications thereof for the time being in force shall be deemed to apply to the arbitration proceedings under this clause. Work under the contract shall, it reasonably possible, continue during the arbitration proceedings and no payment due to or payable by the Purchasers shall be withheld on account of such proceedings. The venue of arbitration shall be the place from which the acceptance note is issued or such other place as the Purchaser at his discretion may determine. In this clause the expression "the Director General of Supplies and Disposals" means the Director General of Supplies and Disposals for the time being and includes, if there be no Director General of Supplies and Disposals the officer who is for the time being the administrative head of the Supplies organization, whether in addition to other functions or otherwise".

3. Disputes arose under the contract and on April 13, 1960 the defendants served a notice of their claim under Section 80 of the Code of Civil Procedure , 1908 upon the Union of India. In course of the subsequent correspondence the Union of India asserted that the disputes should be referred to arbitration in accordance with the aforesaid arbitration agreement whereas the defendant's asserted that the disputes should be referred to the arbitration of an unattached arbitrator. On or about December 1, 1960 the Union of India applied to this Court on its Original Side for filing of the aforesaid arbitration agreement and for other appropriate orders under Section 20 of the Indian Arbitration Act, 1940. The defendants contested the application contending inter alia that (1) there was no valid arbitration agreement and (2) that the Court had no jurisdiction to try the

suit. P.C. Mallick, J. negated both these contentions. His Lordship, however, held that the parties entered into an arbitration agreement upon the terms contained in clause 21 of Form No. W. S. B. 133 with the modification that the name of the arbitrator was left undetermined or alternatively with the modification that the arbitrator should be an unattached person to be appointed by the Director General of Supplies and Disposals; and that consequently the Court had the power to appoint an arbitrator. Accordingly the learned Judge appointed Shri B.K. Choudhury, Barrister-at-Law as the arbitrator and directed that the arbitration agreement be filed and that the disputes be referred to the arbitration of Sri B.K. Choudhury. Aggrieved by this order the Union of India has preferred this appeal. The defendants filed a cross-objection. Before us Dr. Das formally abandoned the cross-objection. On behalf of the defendants Dr. Das now accepts as final the findings of the Court below that there was a concluded contract with an arbitration clause and that the Court has jurisdiction to try the suit. The Union of India has pressed its appeal.

4. We are satisfied that there was a concluded arbitration agreement between the parties in terms of clause 21 of Form No. W. S. B. 133. With respect we cannot agree with the learned Judge's finding that the parties entered into a modified arbitration agreement. By their tender the defendants made a suggestion that there should be an unattached arbitrator. The Union of India did not accept this suggestion and by its acceptance of tender plainly stated that terms of the contract and of arbitration agreement would be as contained in Form No. W. S. B. 133 as amended up to date. The acceptance of tender not being an unqualified acceptance of the offer of the defendants amounted to a counter-offer by the Union of India. By their subsequent conduct the defendants accepted this counter-offer. They acted upon the footing that there was a concluded contract upon the terms contained in the acceptance of tender, dated November 30, 1956 and on that footing supplied goods to the Union of India. The defendant's letter, dated the 13th April, 1960 refers to the supplies as having been made under the acceptance of tender, dated November 30, 1956. It is common case before us that there was a concluded contract together with a concluded arbitration agreement. The defendants seek to enforce claims against the Union of India under this concluded contract; whereas the Union of India seeks to enforce the arbitration agreement contained in it. The terms of this concluded bargain are recorded in the acceptance of tender which on its face stated that the contract was on the terms specified in it and in the schedule annexed thereto and that those documents would be the sole repository of the transaction. In these circumstances we are bound to hold that the parties entered into an arbitration agreement in terms of clause 21 of Form No. W. S. B. 133 and not into a modified arbitration agreement as suggested by the defendants.

5. The arbitration agreement between the parties satisfied that test of a written agreement as required by Section 2(a) of the Indian Arbitration Act, 1940. The consensus of both parties to the terms embodied in acceptance of tender in writing has been established. It is not necessary that this writing should be signed by both parties. In *Jugal Kishore v. Goolbai Hormusji*¹, at p. 815, Venkatarama Ayyar, J. observed .

"But it is settled law that to constitute an arbitration agreement in writing it is not necessary that it should be signed by the parties and that it is sufficient if the terms are reduced to writing and the agreement of the parties thereto is established."

6. The arbitration agreement also sufficiently complies with the provisions of Article 299 of the

Constitution. The formal document embodying the arbitration agreement was

¹ AIR 1955 SC 812

expressed to be made by the President and was executed in proper form and by the appropriate authority and is now the sole repository of the bargain between the parties. The document satisfied the conditions of Article 299 of the Constitution, though it came into existence before the contract was concluded. On this point we respectfully agree with the judgment of P.C. Mallick. J. In *Damodar Shah v. Union of India*²,

7. The learned Judge should have, therefore, directed the filing of the arbitration agreement as contained in clause 21 of Form No. W. S. B. 133 and as set out in the petition. Instead of doing so he has directed the filing of a modified arbitration agreement. In substance he has refused to direct the filing of the arbitration agreement set out in, the petition and has directed the filing of somewhat different arbitration agreement.

8. Dr. Das contended that no appeal lies from the impugned order. We are unable to accept this contention. An appeal lies under Section 39(iv) of the Indian Arbitration Act from an order under Section 20 of the Act filing or refusing to file the arbitration agreement. The Union of India is entitled to an order directing the filing of the arbitration agreement set out in the petition. In so far as the learned Judge refused to direct the filing of that arbitration agreement and in so far as he directed the filing of a different agreement the Union of India is entitled to prefer this appeal under Section 39(iv) of the Indian Arbitration Act.

9. It is true that no appeal lies from the order of the learned Judge in so far as he directed reference of the disputes to an arbitrator appointed by him, see *Dhanrajamal Gobindram v. Shumji Kalidas and Co*³, at p. 1294. But this order of reference to the arbitrator appointed by him is dependent upon the order refusing to file the arbitration agreement set out in the petition and directing the filing of a different arbitration agreement. As soon as the latter order is set aside the order of reference to the arbitrator appointed by the Court must fall to the ground and must be declared to be inoperative.

10. Sub-Section (4). of Section 20 requires the Court to make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court. In the instant case the arbitration agreement provides for reference to the sole arbitration of the Director General of Supplies and Disposals or of some other person appointed by him. The agreement states that the expression "the Director General of Supplies and Disposals" means the Director General of Supplies and Disposals for the time being and includes, if there be no Director General of Supplies and Disposals, the officer who is for the time being the administrative head of the Supplies organizations, whether in addition to other functions or otherwise. It is not the case of either party that there is no Director General of Supplies and Disposals within the meaning of the arbitration agreement. We must, therefore, decide this case on the footing that there is a Director General of Supplies and Disposals who can act as an arbitrator under the agreement. Now under the arbitration agreement the Director General of Supplies and Disposals is not bound to act as an arbitrator and in his place the person appointed by him may act as the arbitrator. The Director General of Supplies and Disposals has not yet signified his willingness to act as arbitrator, nor has he appointed any other person to act in his place. The question is

²AIR 1959 Cal 526

whether it can be said in the circumstances that an arbitrator has been appointed by the parties by this arbitration agreement. The learned Judge has observed that there is no agreed arbitrator in the circumstances, unless the Director General of Supplies and Disposals has expressed his willingness to act as arbitrator or has appointed somebody else to act as such. We cannot agree with this observation. It should be borne in mind that the learned Judge found that the parties entered into a modified arbitration agreement by which they had not appointed an arbitrator and the question whether they have appointed an arbitrator by the arbitration agreement contained in clause 21 of Form No. W. S. B. 133 did not strictly arise for his decision.

11. Now the arbitration agreement contained in clause 21 of Form No. W. S. B. 133 provides that in the event of any dispute in connection with the contract, "the same shall be referred to the sole arbitration of the Director General of Supplies and Disposals or of some other person appointed by him". In our opinion the word "or" in this expression is substitutional and it adds a secondary alternative after a primary one. The expression on true construction in the context of the arbitration agreement read as a whole means that in the event of any dispute "the same shall be referred to the sole arbitration of the Director General of Supplies and Disposals and failing him, to some other person appointed by him". The Director General of Supplies and Disposals has not yet refused to act etc. as arbitrator and the question of appointment of a substitutional arbitrator has not yet arisen.

12. The arbitration agreement names the Director General of Supplies and Disposals as the primary arbitrator. This joint nomination sufficiently appoints him as the arbitrator. The fact that he has not yet agreed to act as arbitrator does not establish that he is not the arbitrator appointed by the parties. If and in case he subsequently refuses to accept the office, the consequence will be that the appointed arbitrator has refused to act. In *Mirza Satirk Hussain v. Mt. Kaniz Zohra Begam*⁴ the arbitration agreement provided for reference to two named arbitrators. One of the named arbitrators refused to act. The question arose whether the Court had power to appoint another arbitrator under Section 510 of the Code of Civil Procedure, 1882, which provided that

"if the arbitrator, or, where there are more arbitrators than one, any of the arbitrators * * * dies, or refuses or neglects or becomes incapable to act * * * the Court may in its discretion * * * appoint a new arbitrator * * * or make an order superseding the arbitration and in such case shall proceed with the suit".

The Privy Council held that the named arbitrator was an arbitrator appointed by the parties and as the appointed arbitrator had refused to act the Court had power to appoint a new arbitrator in his place. Lord Shaw observed at page 1009.

"What had happened in the present case was that after the arbitrator had been appointed he refused to accept office as such, or to act * * * It appears to their Lordships that, when an arbitrator is nominated by parties, his refusal to act is signified as clearly by his refusal to accept nomination as by any other course he could pursue. His refusal to act necessarily follows, for he has not performed the first action of all, namely, to take up the office by signifying his assent to his appointment".

⁴15 Cal WN 1005 (PC)

13. Similarly in this case the Director General of Supplies and Disposals is the appointed arbitrator. The fact that he has not yet indicated his willingness to act as arbitrator, shows only that he has not yet assumed the office of the arbitrator by signifying his assent to the appointment.

14. The arbitration agreement contains adequate and exhaustive machinery for appointment of arbitrators including substitutional appointments in case the appointed arbitrator refuses to act etc. The fact that the appointed arbitrator has not yet signified his willingness to act as arbitrator does not debar the Court from making an order of reference of the dispute to him. If he subsequently refuses to act as the arbitrator the procedure, laid down in the arbitration agreement will prevail and will have to be followed : see the observation in paragraph 26 read with paragraphs 6, 7 and 23 in the judgment of the Supreme Court in AIR 1961 Supreme Court 1285 at pages 1293-94 read with pages 1288-89 and 1292. It may be noted that both parties pray before us that the arbitration agreement should be, enforced and that the disputes should be referred to arbitration.

15. The learned Judge should, therefore, have directed the filing of the arbitration agreement set out in the petition and also should have made an order of reference to the Director General of Supplies and Disposals.

16. We notice that the standard form of an order of reference under Sections 20(4) and 23(1) of the Indian Arbitration Act, 1940 prescribed by the Rules framed by this High Court under that Act requires the arbitrator to make and submit his award within a time to be fixed by the Court. Rule 18 of the aforesaid Rules provides that the form set out in the schedule thereto shall be used for the purposes therein mentioned with such variation as the circumstances of each case may require. In case of an order of reference in a pending suit under Section 23(1), the Court is under a duty to specify in the order of reference such time as the Court thinks reasonable for the making of the award. But in case of an order of reference under Section 20(4) where no suit is pending, the Court is not bound to specify in the order of reference the time for the making of the award. In this case it is not desirable that the Court should fix this time by the order of reference. As we do not fix this time, the consequence will be that paragraph 3 of schedule I of the Indian Arbitration Act, 1940 will apply and the appointed arbitrator will have to make his award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to arbitration agreement or within such extended time as the Court may allow.

17. We pass the following order :

The appeal be and is hereby allowed. The judgment and order passed by the Court below is set aside. We direct that the arbitration agreement set out in paragraph 2 of the petition of the appellant be filed as of records herein. We also direct that all matters in difference between the parties herein mentioned in the said petition including the question of the costs of the reference are referred to the Director General of Supplies and Disposals in accordance with the aforesaid arbitration agreement. Each party will pay its own costs of and incidental to the suit and of this appeal.

18. The Cross-objection be and is hereby dismissed. There will be no separate order as to the costs of the Cross-objection.

Laik, J.

19. J agree.
Appeal allowed.