

DELHI HIGH COURT

Air Foam Industries

Vs.

Union of India (Delhi)

I. As. 119 and 846 of 1972 in Suit No. 158 of 1971.
(Avadh Behari, J.)

15.11.1972

ORDER

Avadh Behari, J.

1. This is an application under Section 41 and Schedule II of the Arbitration Act read with Order 39, Rule 2 and Section 151 of the Civil Procedure Code.

2. The brief facts are as follows:-

The petitioner entered into a contract with the respondent Union of India. The contract is contained in the Acceptance of Tender dated July 16, 1968. The Acceptance of Tender is subject to the conditions of contract laid down in Form No. DGS and D 1968 revised up to 1966. These are standard terms. These terms are generally annexed to the contract which is entered into by the purchaser, Union of India with the seller or supplier of goods. One of the terms, Clause 24 of this contract deals with the settlement of disputes by arbitration.

3. On April 24, 1971, the petitioner made a petition under Section 20 of the Indian Arbitration Act calling upon the Court to file the arbitration agreement as contained in clause 24 of the general conditions of the contract. In this petition it was alleged that the Acceptance of Tender contains an arbitration clause and that disputes and differences have arisen between the parties. It was said that for the settlement of disputes and differences the matter may be referred to the arbitrator. The Union of India was not willing to refer the matter. Consequently the application was made. This application was accepted by the Court and the arbitration agreement was ordered to be filed. It is an admitted position that the matter is now before the arbitrator. In this arbitration matter the petitioner has made a claim for Rs. 2,35,800/- against the Union

of India on account of breach of contract.

4. On March 30, 1971, the Union of India wrote a letter to the petitioner in which it was asserted that the Union of India was entitled to recover a sum of Rs. 2,28,900/- from the petitioner on account of general damages in terms of clause 14 of the general conditions of contract. The respondent called upon the petitioner to pay this sum failing which the respondent threatened to recover the amount from the pending bills of the petitioner without any further reference to him.

5. On January 17, 1972 the petitioner made an application under Section 41 read with Second Schedule of the Arbitration Act praying that status quo be maintained and the respondent may be restrained from effecting recoveries by withholding payment of the bills of the petitioner. This prayer was again repeated in another application IA 846 of 1972, which was filed on May 18, 1972. The prayer in this application is the same as was made in the earlier application.

6. This matter came up before my brother Chawla, J. on May 19, 1972, and an interim order was made on the aforesaid date restraining the respondent from making recovery in pursuance of the letter dated March 31, 1971. This matter has now been placed before me for making the order dated May 19, 1972 absolute.

7. The Union of India has strenuously opposed this application. Mrs. Shamlu Pappu appearing for the Union of India has raised a number of contentions. Firstly it is submitted that power is vested in the respondent Union of India to make recovery by reason of clause 18 of the conditions of contract and since this is a valid clause it is binding on the parties and the Union of India is perfectly justified in making recoveries under this clause. It has further been submitted that the petitioner has not challenged the validity of this clause and as he entered into the contract with the Union of India with his eyes open it does not now lie in the mouth of the petitioner to say that he is not bound by clause 18. The second submission is that in any case the action of the Union of India in making recoveries from the other pending bills of the petitioner is not a dispute or difference falling within Clause 24 in this case. It is contended that the Court has no power to make an interim order under the second Schedule of the Arbitration Act as this matter is not a dispute or difference arising between the parties under the present contract. It is submitted that this is an independent matter and since it is not the subject-matter of the arbitration clause in this case the Court has no power to make an interim order under Section 41 of the Arbitration Act.

8. In support of the last submission, reliance has been placed by *Mrs. Pappu on Union of India v. Birla Cotton Spinning and Weaving Mills Ltd.*,¹ In that case the respondent supplied to the appellant Union of India goods of the value of a large amount under a contract entered into by the parties. A part of the money was paid, but as to the balance the Union of India declined to make the payment on the plea that an amount of Rs. 10,625/- was due to the Union of India from the respondent under another contract between the parties. The respondent filed a suit in the Court of the Senior Subordinate Judge, Delhi for the realization of that amount. The appellant under Section 34 of the Arbitration Act asked for stay of suit. The respondent submitted that there was no dispute concerning the contract which was covered by the arbitration clause and which attracted the application under Section 34 of the Arbitration Act. It was held in that case that for the applicability of Section 34 it was necessary that the suit must raise a dispute in respect of the matter agreed to be referred to arbitration and not independent of it and as no dispute was raised by the appellant about its liability to pay the amount claimed by the respondent arising out of the contract and the only dispute which was sought to be raised was in respect of the liability of the respondent under another contract the suit could not be stayed. This was the view of the Subordinate Judge and it was upheld by their Lordships of the Supreme Court. In the course of their judgment it was observed at page 605 :-

"The Union is however not seeking to withhold payment under a claim of right so to do. What the Union contends is that under the contract they are liable to pay the amounts due but they will not pay because they have another claim unrelated to the claim in suit against the company."

9. Reliance has also been placed on *Tarapore and Co. v. Tractors Export, Moscow*,² This was a case in which an irrevocable letter of credit was opened by an Indian firm. The goods were exported by the Russian firm to the Indian buyers. The Indian firm brought a suit in Madras alleging that the machinery supplied was not up to the contract and claimed an injunction in that suit against the Russian firm as well as the Bank restraining them from taking any further steps in pursuance of that letter of credit. The High Court of Madras granted an injunction order. On appeal to the Supreme Court the injunction order was discharged. It was said that an irrevocable letter of credit has a definite implication and except under very exceptional circumstances the Court should not interfere with this mechanism of international trade.

10. Mrs. Pappu has also relied on a judgment of a learned single Judge of this Court in

*Modi Lantern Works v. Union of India.*³ decided on 4-8-1971 (Delhi). In that case the learned single Judge was concerned with clause 14 of the general conditions of contract contained in form DGSandD-1968. That clause was couched in different words than the clause with which am concerned in this case.

11. The clause with which we are concerned in this case is clause 18 which as it now stands reads as under :-

"18. Recovery of sums due. Whenever any claim for the payment of a sum of money arises out of under the contract against the contractor, the purchaser shall be entitled to recover such sum by appropriating in whole or in part, the security, if any, deposited by the contractor, and for the purpose aforesaid, shall be entitled to sell and/or realize securities forming the whole or part of any such security deposit. In the event of the security being insufficient, the balance, and if no security has been taken from the contractor, the entire sum recoverable shall be recovered by appropriating any sum then due or which at any time thereafter may become due to the contractor under the contract or any other contract with the purchaser or the Government or any person contracting through the Secretary, if such sum even be not sufficient to cover the full amount recoverable, the contractor shall on demand pay to the purchaser the balance remaining due.

For the purpose of this clause, where the contractor is a partnership firm, the purchaser shall be entitled to recover such amount by appropriating in whole or in part any sum due to any partner of the firm whether in his individual capacity or otherwise."

12. It is not disputed that the clause which is applicable to the present controversy is clause 18 and it is under this clause that action is purported to be taken. Clause 18 is followed by Clause 24 dealing with arbitration. That clause reads as under:-

"24. 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 an officer in the Ministry of law, appointed to be the arbitrator by the Director General of Supplies and Disposals, 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. In the event of the arbitrator dying, neglecting or refusing to act, or resigning or being unable to act for any reason, or his award being set aside by the Court for any reason, it shall be lawful for the Director General of Supplies and Disposals to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.

It is further a term of this contract that no person other than the person appointed by the Director General of Supplies and Disposals as aforesaid 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.

The arbitrator may from time to time with the consent of all the parties to the contract enlarge the time for making the award.

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, 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. The venue of arbitration shall be the place from which the acceptance note is issued or such other place as the arbitrator 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."

13. On a plain reading of Clause 18 it seems that if a claim for a sum of money arises against the contractor then the purchaser shall be entitled to recover such sum by appropriating in whole or in part the security if any, deposited by the contractor and if the security is found to be insufficient or if no security has been taken from the contractor then the entire sum recoverable shall be recovered by appropriating any sum then due or which at any time thereafter becomes due to the contractor from the purchaser or the Government. If sum so appropriated is not sufficient to cover the full amount recoverable the contractor shall on demand pay to the purchaser the balance remaining due. Now in this case the petitioner has made a claim for Rs, 2,35,900/-

against the Union of India on account of breach of contract. The Union of India has filed a counter-claim on account of general damages for Rs. 2,28,900/-. Both the matters are before the arbitrator. What the Union of India is seeking to do before the decision of the arbitrator is that it claims that it has a right to appropriate the amount due to the petitioner under other pending bills towards its claim, namely, for Rs. 2,28,900/-.

14. In *(M. L. Nagina v. D. D. A. Delhi)* ⁴ decided by me on 11-4-1972, I said that until such time the arbitrator decides the dispute the respondents cannot be allowed to be judges in their own cause. The respondents admit that the matter has been referred to the arbitrator. It is also not disputed by Mrs. Pappu that if the arbitrator orders the Union of India to refund the entire amount or any part of it then they will do so in obedience to the award of the arbitrator, but in the meanwhile they claim that they have a power under clause 18 to withhold the amount. The argument briefly is that if after the award it is found that some amount is due from the contractor then the Union of India will have no means to recover the amount if the contractor happens to be a man of straw. Therefore, it is claimed by the Union of India that clause 18 confers power on the purchaser or the Government to withhold payment. As I read clause 18 it does not lend itself to this interpretation. What is claimed is a power in the nature of attachment before judgment, namely, power to withhold payment. Clause 18 uses the word 'appropriating' and what appears to be the intention of clause 18 is that if any claim arises out of the contract then the Union may appropriate the amount due to it from other sums due to the contractor. Under this clause the Union of India has no power to withhold payment. Appropriating and withholding a sum are two different things. The clause refers to certain consummated or completed acts which cannot be reopened. If the object of clause 18 is to arm the Government or the purchaser with a power to withhold payment then I am constrained to say that the draftsman has signally failed in achieving that object.

15. The important consideration is that this clause (clause 18) is followed by clause 24 of the Arbitration Act. In this case the contractor says that he has not committed breach of the contract. This is precisely the matter for the arbitrator to decide and arbitrator will adjudicate upon the respective claims of the parties. Pending such decision by the arbitrator the Union of India cannot be allowed to be judges in their own cause. It is settled maxim of law that no man can be a judge in his own cause. In Suit No. 99 of 1972 to which I have already referred, I took this view. I am not repentant. For my part I do not wish to modify or in any way to retract what I said.

16. A number of decisions on such interlocutory applications were cited in the course of the arguments by the learned counsel for the petitioner, Judges after Judges of this Court have almost uniformly taken the view that in case of a dispute between the parties, the Court is not powerless to make an order under Section 41 read with Second Schedule of the Arbitration Act to restrain the Government from withholding payment to the contractor of his other pending bills.

17. This is true that the validity of clause 18 has not been challenged in the present proceedings, but what has been urged on behalf of the petitioner is that whether there is a breach of contract and whether the respondent Union of India is entitled to claim general damages and whether the respondent is entitled to recover Rs. 2,28,900/-, are matters which are to be decided by the arbitrator. The Union of India cannot decide the controversy itself because it has agreed to refer the matter to arbitration under clause 24. In my view, clause 18 must be read subject to clause 24.

18. It may here be noticed that clause 18 of the contract is not an excepted clause and is not a matter the decision of which is specially provided for by the special conditions of the contract. There are certain clauses in the contract where the decision of the Inspector or another officer of the Government is made final. Such one clause is clause 14 where under 14 (7) (iii) it is said that the opinion of the Secretary shall be final on the question whether the stores exactly complying with the particulars are not readily procurable. Clause 24 dealing with arbitration saves such excepted clauses. Clause 18 is not an excepted clause. Therefore, any dispute arising between the purchaser and the contractor under clause 18 can be the subject-matter of arbitration and once the matter is before the arbitrator, the Court is not powerless to exercise the powers conferred upon it by the Second Schedule read with Section 41 of the Arbitration Act.

19. As stated above, recovery is sought to be made from the other pending bills. Mrs. Pappu says that the amount due to the petitioner under other pending bills is not the subject-matter of dispute in this case. I am unable to agree with this contention. Section 41 (b) of the Arbitration Act gives power to the court to make orders in respect of the matters set out in the Second Schedule "for the purpose of and in relation to, arbitration proceedings." The arbitration proceedings with regard to this contract are pending. With regard to this very contract a counter-claim has been made which is sought to be realized before the decision of the arbitrator from the other pending bills of the contractor. In my view this is certainly a matter in which the Court has power under Section 41 (b) because it falls within the words "for the purpose, and in relation to. Arbitration proceedings." In my opinion the observations made in the decision of

the Supreme Court in (1964) 2 SCR 599 (supra) do not support the contention of Mrs. Pappu.

20. The case of M/s. Tarapore and Co., AIR 1970 Supreme Court 891 (supra) was decision of entirely different hue for it related to the mechanism of international trade. The principles relating to letters of credit are well established in the field of international trade and those principles have been authoritatively restated by the Supreme Court in that decision. In my opinion this case is of no assistance to the counsel for the Union of India.

21. In (*M/s. Malam Bros. v. Union of India*,⁵ decided on 26-2-1972 (Delhi), by B. C. Misra, J.) Clause 18 came up for decision for there the contractor wanted an order in identical terms. The learned Judge was of the view that under clause 18 no lien of the Government is created on the admitted dues of the party for payment of the disputed or doubtful claims of the Government. The learned Judge was further of the view that if the construction sought to be placed on this clause by the respondent is to be accepted as correct then it must be said that clause 18 is not happily worded to bring out that intention clearly. I am in respectful agreement with the view taken in that decision.

22. A striking example of the way in which this clause is used by the Government in its favor is afforded by Suit No. 33-A of 1972 which was also heard and decided by me with this case. In that case the contractor delivered all the goods to the Union of India and he was paid the price thereof and nothing remained to be done by the parties under that contract. After more than four years of the completion of the contract the Union of India wrote to the contractor on December 23, 1971, that the rates of articles supplied by the petitioner during 1967 and 1968 have been revised and in view of the revised rates the Union of India has become entitled to refund of the amount from the contractor which had been paid in excess of the revised rates. The Union of India did not quantify the claim and did not tell the contractor as to what amount had become due to it by reason of the revision of rates. The Union asked its pay and Accounts Officer not to make payments to the contractor of his other pending bills and to ensure that the amount when quantified is recovered from the contractor. This is strange way. Surely the parties at the time of the making of the contract could not have contemplated such an arbitrary and unbridled use of this clause by one of the parties to it.

23. Lastly Mrs. Pappu laid much stress on the "sanctity of the contract" and urged that

it is the duty of the court to uphold the clause. I am not prepared to accept this argument. If the contract is sanctimonious it does not mean that the action of the court under the Second Schedule read with Section 41 of the Arbitration Act is profane and a Civil Court is powerless in the face of this clause and is unable to make any order even when it finds that the action of one of the parties to the contract is wholly arbitrary and unjustified. The "powers of court" set out in the Second Schedule are conferred on a Civil Court in order to do what is just and reasonable in the circumstances and it can make ancillary orders to that end. This does not mean that the courts no longer insist on the binding force of contracts deliberately made. It only means that they will not allow the words, in which they happen to be phrased, to become tyrannical masters. In situation such as this it is the function of the court to see that what is just and right is done to the parties until the arbitrator gives his award.

24. In the result I accept the applications IAs 119 of 1972 and 846 of 1972 and restrain the Union of India from effecting recovery of the amounts claimed to be due from the other pending bills of the petitioner. The Union of India will pay costs of this petition which I assess to be Rs. 200/-. (Only one set of costs in all the three cases - IAs 119 of 1972 and 846 of 1972 in Suit No. 158-A of 1971, I. A. 118 of 1972 in Suit No. 33-A of 1972 and I. A. 748 of 1972 in O. M. (P) 63 of 1972).

Application allowed.

Cases Referred.

1. (1964) 2 SCR 599.
2. AIR 1970 Supreme Court 891.
3. Suit No 131 of 1971
4. Suit No. 99 of 1972 (Delhi),
5. Suit No. 244 of 1970,