

(2007) 10 AHC CK 0138

Allahabad High Court

Case No: None

Allahabad Canning
Company (Proprietor
the Oudh Sugar Mills
Ltd.)

APPELLANT

Vs

The Chief Director of
Purchase, Army
Purchase Organization,
Department of Defence,
Min. of Defence

RESPONDENT

Date of Decision: Oct. 12, 2007

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11

Citation: (2008) 1 AWC 21

Hon'ble Judges: H.L. Gokhale, C.J

Bench: Single Bench

Final Decision: Dismissed

Judgement

H.L. Gokhale, C.J.

Heard Mr. Madhur Prasad in support of this petition. Mr. S.K. Mishra appears for the respondent.

2. The petitioner claims to have supplied 53 (MT) of Pineapple lams to the Chief Director of Purchase of Armed Forces on the basis of agreement entered into on 23.12.2005. The supply was supposed to have been made in glass jars. The Armed Forces made the payment for the supply excluding 11 (MT) of this supply. The supply was made to the desired stations at Dehradun and Guwahati on 18.5.2006 but by letter dated 28.7.2006, the petitioners were intimated that the supply as stated above had gone bad within the warranty period. The petitioner should lift the same within 15 days or else the said stock will be destroyed. This is what is specifically stated in paragraph-6 of the petition.

3. Some discussions and correspondence followed between the parties but the fact remains is that the payment was not approved.

4. By their letter dated 11.8.2006 addressed to the petitioners, the Army Purchase Organization of the Defence Ministry called upon the petitioners as follows:

In accordance with the warranty clause of the A/T, you are requested to refund Rs. 5,30,843/- (Rupees Five Lakh thirty thousand eight hundred forty three only) as the cost of the quantity gone bad, to CDA (Hqrs.) "6" Block, New Delhi within 15 days of receipt of the communication. You are also requested to remove the consignments from the Supply Depots (mentioned above) failing with the cost of removal of the said stock shall be additionally recovered from you. The removing cost shall be decided by the above mentioned supply depot, if the stock is not removed by you within 45 days of the receipt of the letter.

5. That very letter stated in para 1 of the footnote that the above amount may please be recovered from the firm's bill, if not deposited by them. Sales Tax and any other charges, if already paid, may also be recovered in addition to the aforesaid amount of Rs. 5,30,843/-.

6. In supplementary affidavit, it has been stated in paragraph - that this amount has since been recovered from Company's other bill. Mr. Madhur Prasad, learned Counsel for the applicants state that this has been so done since the applicants' Company is having a continuous relationship with the Army Purchase Organisation.

7. Therefore, this petition is filed for appointment of an Arbitrator u/s 11(6) of the Arbitration and Conciliation Act and reliance is placed on the Arbitration Clause 23.1(a) of the agreement between the parties, which is as follows:

23. Arbitration

1. Arbitration Clause:

(a) In the event of any question, dispute or difference arising under or out of or in connection with the conditions mentioned in this schedule or in annexure thereto or in general conditions of contract governing contracts placed by the Central Purchase Organisation of the Government of India (now under Department of Supply) Form No. DGS&D-68- (Revised) or touching or concerning the construction meaning or operation or effect thereof/or any matter contained therein or as to the rights, duties or liabilities of the parties hereto respectively or otherwise howsoever in connection with this contract (except as to any matters the decision of which is specially provided for in the conditions mentioned in the schedule or in annexures thereto or in General Conditions of contract as aforesaid), the same shall be referred to the sole arbitration of any person appointed by the Secretary of the Government of India, Ministry of Department of Government of India administratively dealing with the contract at the time of such appointments or if there be

no Secretary the administrative head of such Ministry or Department at the time of such appointment. It will be no objection to any such appointment that the person appointed is a Government Servant, that he has 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.

(underlining supplied)

8. Mr. Prasad, learned Counsel for the applicants submits that this clause clearly provides for an arbitration. The applicants have moved in time and although the clause provides for arbitration of any person appointed by the Secretary of the Government of India since the arbitrator is not appointed within 30 days from the date of the service of notice dated 8.11.2006, the respondents have forfeited their right to appoint an arbitrator. Reliance is place on the judgment of the Apex Court in the case of [Union of India \(UOI\) Vs. Bharat Battery Manufacturing Co. \(P\) Ltd.](#). This judgment is in line of earlier judgment rendered in Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr. reported in J.T. 2000 Su SC 226 which lays down that where the arbitrator is not appointed within 30 days from the date of receipt of request, the power to appoint an arbitrator in terms of the arbitration clause ceases.

9. Mr. Mishra, learned Counsel appearing for the respondents, on the other hand points out that the arbitration clause specifically makes an exception and he states as far as the matter the decision of which is specially provided for in the conditions mentioned in the schedule or in annexures thereto or in General Conditions of contract are concerned, they are specifically excluded from reference to arbitration. He has drawn our attention to the Standard Warranty Clause specifically mentioned in the scheduled to the agreement and particularly Sub-clause 3 thereof which becomes part of this agreement. This clause provides as follows:

The declaration by the Chief Director of Purchase or any Officer acting on his behalf communicated to the contractor in writing that a particular consignment has been condemned will be taken by the contractor as the conclusive evidence of the proper condemnation of that consignment provided that such comment is issued by the the Chief Director of Purchase within 45 day of the expiry of the warranty period. Nothing herein contained shall prejudice any other right of the purchaser in that behalf under this contract or otherwise.

10. Mr. Mishra therefore submits that arbitration was clearly not available as a remedy to the applicants in the instant case.

11. As far as this question of initial scrutiny as to whether he claim comes within the purview of the arbitration clause at all came up for consideration before the Apex Court in SBP & Co. v. Patel Engineering Ltd. and Anr. reported in (2005) 8 SCC 618. In paragraph 37, the Apex Court has observed as follows:

37. It is fundamental to our procedural jurisprudent, that the right of no person shall be affected without he being heard. This necessarily imposes an obligation on the Chief Justice to issue notice to the opposite party when he is moved u/s 11 of the Act. The notice to the opposite party cannot be considered to be merely an intimation to that party of the filing of the arbitration application and the passing of an administrative order appointing an arbitrator or an Arbitral Tribunal. It is really the giving of an opportunity of being heard. There have been cases where claims for appointment of an arbitrator based on an arbitration agreement are made ten or twenty years after the period of the contract has come to an end. There have been cases where the appointment of an arbitrator has been sought, after the parties had sealed the accounts and the party concerned had certified that he had no further claims against the other contracting party. In other words, there have been occasions when dead claims are sought to be resurrected. There have been cases where assertions are made of the existence of arbitration agreements when, in fact, such existence is strongly disputed by the other side who appear on issuance of notice. Controversies are also raised as to whether the claim that is sought to be put on aid comes within the purview of the arbitration clause concerned at all. The Chief Justice has necessarily to apply his mind to these aspects before coming to a conclusion one way or the other and before proceeding to appoint an arbitrator or declining to appoint an arbitrator. Obviously, this is an adjudicatory process. An opportunity of hearing to both parties is a must. Even in administrative functions if rights are affected, rules of natural justice step in. The principles settled by *Ridge v. Baldwin* (1963) 2 All ER 66 are well known. Therefore, to the extent [Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd.](#), states that no notice need be issued to the opposite party to give him an opportunity of being heard before appointing an arbitrator, with respect, the same has to be held to be not sustainable.

(underlining supplied)

12. In the facts of the present case it is clear that an exception had been made in the arbitration clause itself for the products which were of perishable nature and concerning which there could be special conditions.

13. In the present case, in the Standard Warranty Clause annexed to the agreement, it was provided that the Chief Director of Purchase or any Officer acting on his behalf will have the authority to make a declaration in writing that a particular consignment had been condemned. The contractor was required to take such declaration as conclusive evidence of the proper condemnation of that consignment provided that such comment is issued within 45 days of the expiry of the warranty period.

14. In the present case, admittedly within 45 days of the supply, the contractor was informed that pineapple jam supplied in glass jars had gone bad and that he should take them back.

15. Mr. Madhur Prasad, learned Counsel appearing for the applicants submits that this Standard Warranty Clause would apply for the products which were packed in tins and in cases/crates and corrugated or Fibre Crates Boxes and that it will not apply to the contents packed in glass jars.

16. We have noted the submissions. In the instant case, it is very clear that the relevant Standard Warranty Clause was annexed to the agreement between the parties. In the circumstances, it is not permissible for the applicants to say that the clause will not be available only because the jam was supplied through jars and not in tins. The Standard Warranty Clause was a part of the agreement. Inasmuch as it was a part of the agreement, it was binding on the applicants. The applicants had accepted that if the Chief Director of Purchase condemns the consignment in 45 days that will be a conclusive evidence. In the Arbitration Clause also, it was specifically provided that where special conditions are laid down in the schedule or in annexures, those conditions will govern the question of arbitrability of the dispute. Inasmuch as, this exception was specifically include in the arbitration clause itself, it cannot be said that the dispute could be referred for arbitration.

17. In the circumstances, the objection raised by the respondents is accepted. The prayer for appointment of an arbitrator is rejected.