
(1975) ILR Delhi 420 : (1973) RLR 116

Delhi High Court

Case No: Suit Appeal No. 158A of 1971

Airfoam Industries Pvt.
Ltd.

APPELLANT

Vs

Union of India
(Director-General of
Supplies and
Disposals, Parliament
Street, New Delhi)

RESPONDENT

Date of Decision: May 5, 1972

Citation: (1975) ILR Delhi 420 : (1973) RLR 116

Hon'ble Judges: T.P.S Chawla, J

Bench: Single Bench

Advocate: D.C. Singhanian, R.S. Verma, S. Pappu, Soma Sekhran and Bindra Rana, for the Appellant;

Judgement

T.P.S. Chawla, J.

(1) This is an application u/s 20 of the Arbitration Act. It was opposed by the respondent and on 6-8-1971, the following issues were framed :

1. Whether in any arbitration agreement was entered into between the parties ? O.P.P. 2. If issue No. is proved in the affirmative whether the said

agreement should be filed in this court ?

3.WHETHERthe contract between the parties was repudiated by the respondents as alleged by the petitioner and if so what is its effect on any

arbitration agreement that may have been entered into between the parties, the arbitration agreement being one of the clauses in the conditions of

contract ?

4. Relief.

(2) At the hearing, both counsel agreed that the third issue need not be decided because it would not affect the result. No arguments were

addressed to me on this issue and, Therefore, I shall not deal with it. The first and the second issues can be dealt with together as only one question

was canvassed, and that was whether on the fact? of this case an arbitration agreement was subsisting between the parties. That is the only

question which I have to decide.

(3) The facts on which the answer to that question depends were ultimately found not to be disputed. I am, Therefore, relieved of the task of

examining in detail the pleadings and affidavits of the parties ,which were somewhat obscure, and will refer only to the facts relevant for this

purpose. They are taken mostly from a conjoint reading of paragraphs 4, 8 to 12 and 15 to 17 of the petition and the reply. In the course of the

hearing, I allowed the parties to place on record the documents Constituting the contract between them, though they ought really to have been filed

earlier. This, I did, in order to enable the arguments, and this judgment, to proceed on a surer footing. The complexion of the question to be

determined was not altered or sheeted in any manner by the production of these documents.

(4) In February, 1968, the Union of India, the respondent invited tenders for the supply of 70,000 litres of compound foam, producing fire

extinguishing. The petitioner company submitted its tender on the 20th of February, 1968. There was a document attached to this tender which is

described as ""schedule to/ tender"", on the back of which is a printed form comprising questions which the tenderer is required to answer. Question

No. 14 and the answer given by the petitioner to this question are reproduced below.

DO you agree to sole arbitration by an officer in the Ministry of Law to be appointed as arbitrator by the Director General of Supplies and

Disposals or his nominee as provided in clause 24 of the General Conditions of Contract__ form D.G.S&D-68 (Revised) ?

No

(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.)

(5) The petitioner then received an advance Acceptance of Tender dated 5th of July, 1968, which was followed by a formal Acceptance of

Tender dated 16th of July, 1968. The letter was signed by an officer of the respondent for and on behalf of the President of India. It states,

inter alia, that "the Acceptance of Tender and the schedule annexed shall be the sole repository of the transaction." A schedule was appended to

the Acceptance of Tender, which stipulated in clause 7 that the conditions of contract were "as contained in form No. D.G.S&D (Revised)

including clause 24 thereof, as amended to date." Clause 24 is the arbitration clause in that form of contract. The advance Acceptance of Tender

contained the same stipulation.

(6) Thereafter, it appears, the petitioner offered some supplies which were rejected by officers of the respondent and rejection notes were issued.

As the contract had not been performed within the stipulated period, extension of time was asked for by the petitioner and granted by the

respondent. Later, the contract was cancelled by the respondent and the petitioner was informed that the stores would be purchased at the risk

and cost of the petitioner (per annexure "A" to the petition). After a considerable lapse of time, the petitioner received letter dated 30-3-1971

(Annexure "B" to the petition) demanding a sum of Rs. 2,28,900.00 from it.

(7) The respondent does not dispute that on the facts which I have just stated, a contract did result between the parties, in paragraph 4 of the

respondent's reply to the petition, it was stated "that the advance Acceptance of Tender concluded the contract." That conclusion is otherwise

inevitable from the fact that goods were offered and rejected, that time for performance of the contract was extended, that the contract was

subsequently sought to be cancelled and that a counterclaim was formulated by the respondent on the basis of certain terms in the contract. The

case of the respondent was that though a contract had resulted, it did not contain clause 24, the arbitration clause in the Form D.G.S&D-68

(Revised), because, in response to question No. 14 in the schedule to the tender, the petitioner had negatived the inclusion of that clause ; and the

subsequent introduction of that clause in the Acceptance of Tender was of no avail.

(8) The crucial question is when were the parties *ad idem*. Once that is known, the terms of the contract between the parties are ascertainable.

Counsel for the petitioner referred to *Nihal Chand v. Amer Nath*, AIR 1926 Lah 645, *Jugal Kishore Gulab Singh v. Puras Lal and Sons*. AIR

1930 Lah 325, *Rao Girdhari Lal v. Societe Belge de Banque* AIR 1938 Lah 341, *Moolji Jaitha and Co. Vs. Seth Kirodimal*, and para 118 on

page 69 in volume 8 of Halsbury's Laws of England (Simonds edition) to illustrate the application of the legal concepts of "offer" and "acceptance,

and the principle that an acceptance must be absolute and unqualified. The relevant principles have received statutory statement in Sections 2 and 7

of the Indian Contract Act, 1872, and are too well known to require restatement. Applying those principles, the conclusion I would reach is that

the tender was the offer and proposed a contract on terms which were not to include the arbitration clause. The Acceptance of Tender, though it

purported to be an acceptance, was in law, not an acceptance because it included that clause in violation of the offer. The purported acceptance,

Therefore, rejected the offer and itself constituted an offer or a counter-offer to contract. on terms which would include the arbitration clause. At

this stage. it was open to the petitioner to reject the offer contained in the purported acceptance. It did not do so. On the contrary, it proceeded to

offer goods and otherwise conduct itself on the footing that a contract had come into existence. The respondent acted likewise. It extended time,

rejected the goods offered and then purported to cancel the contract and make a counter claim based on its terms. In these circumstances, the

parties were, in my opinion, ad idem when having received the purported acceptance of tender, which was in reality a counter-offer, the petitioner

by its conduct accepted it. That offer contained the arbitration clause, and so, in consequence, did the contract resulting from its acceptance." In

the case reported as Union of India (UOI) Vs. Himco (India) Private Ltd., , the same conclusion was reached on nearly identical facts. The only

difference, if it be a difference, is that in response to a query similar to question No. 14. the answer given by the tenderer was that ""there should be

an unattached arbitrator."" The court held, that by its subsequent conduct the tendering company accepted the counteroffer constituted by the

purported Acceptance of Tender, and the arbitration clause in the form of contract referred to therein was applicable. It was also held that the

arbitration agreement thus brought about, fulfilled the requirements of Section 2(a) of the Arbitration Act, 1940 and Article 299 of the

Constitution. That case, it seems to me, is on all fours with the present one. A similar conclusion was also reached by P. N. Khanna, J. in suit No.

319 of 1971-M/s. Escorts Ltd. v. Union of India, decided on 14th of December. 1971 .

(9) But, counsel for the respondent urged th,at this was not the true view of the transaction. As a preliminary to the main argument on behalf of the

respondent it was emphasised that an arbitration agreement forming one of the terms of a contract must be treated as distinct and separate from the

other terms and Shiva Jute Baling Limited Vs. Hindley and Company Limited, was referred to for this purpose. With the object of maintaining this

distinction in the course of the argument, the remainder of the contract, apart from the arbitration clause, was referred to as the "contract of

supply". It was then said that the invitation to tender was an "invitation" in the legal sense as regard the "contract of supply", but an "offer", in the

legal sense, as regards the arbitration clause. The tender was an "offer" so far as the "contract of supply was concerned, but the answer to

question No. 14 in the schedule to the tender would, if in the affirmative, constitute an "acceptance" of the arbitration clause and bring an

arbitration agreement into existence forthwith, no matter whether the tender as regards other matters was accepted or not. Conversely, if the

answer was negative, as in this case, the "offer" of an arbitration clause stood finally rejected and that matter ended there, incapable of revival.

Thereafter, even if the tender as to the "contract of supply" were accepted, the arbitration clause could not form part of it. The reference to clause

24 in the Acceptance of Tender was sought to be explained away as otiose. It was clearly necessary for the respondent's case, so propounded, to

preserve this Acceptance as an absolute and unqualified "acceptance" of the tender as regards the "contract of supply". To overcome the obvious

discrepancy between the two, it was urged, that there was no "substantial variation" between the "offer" and Acceptance, and hence the

Acceptance was effective as an "acceptance" in law of the offer contained in the tender relative to the "contract of supply". For this proposition

reliance was placed on *Jawahar Lal Burman Vs. Union of India (UOI)*, . That, in brief, as I understood it, was the argument on behalf of the

respondent.

(10) In my opinion, there are too many objections to the view of the transaction suggested by counsel for the respondent and it is in difficulty at

every stage of the reasoning, which is strained to the point collapse. The pivot of the argument is the words in parenthesis to be found under

question No. 14 in the schedule to the tender. According to counsel for the respondent the words ""acceptance"" and ""non-acceptance"" occurring

there, indicated and were intended to indicate that the answer to the question would, if in the affirmative, result in the immediate formation of an

arbitration agreement in terms of clause 24. To support this theory, it was necessary to find a preexisting offer, and so counsel urged that the

invitation to tender contained the offer of an arbitration clause, which on acceptance became an arbitration agreement. On the other hand, if the

tenderer answered the question in the negative, the offer was rejected and the arbitration clause was thereafter out of view.

(11) I do not read the words ""acceptance"" and ""non-acceptance"" in that way. The note in which they occur is intended to soothe any fears the

tenderer may have that the chances of his tender being accepted may be jeopardised if he answers one way or another, and also to ensure that an

answer is given to the question. Possibly, the purpose may additionally have been to forestall, a conceivable plea that the inclusion of the arbitration

clause was due to undue influence exercised by the respondent in its position of dominance. In that note the word ""acceptance"" is not used in the

contractual sense, but in the sense of "willing to agree". The question asks ""Do you agree ,"" and the answer intimates the willingness to agree or

otherwise. The words in parenthesis must be read in the context of the question. Surely, if it was intended to constitute the answer to the question

an acceptance in the contractual sense, the obvious way of saying that was ""An affirmative answer to this question will bring into existence an

arbitration agreement between the parties"" or some similar formula of words. It seems to me that the initial premise on which the case of the

respondent proceeds is unsound.

EVEN if the premise be accepted, the difficulties which follow arc. to my mind, insuperable. The invitation to tender must now be regarded as a

duality-being an invitation in all respects except the arbitration clause, regarding which it must be treated as , offer. The same duality has to be

carried into the tender, which counsel for the respondent agreed was the offer in regard all matters except the arbitration clause; but, for this clause

it was required to be viewed as the acceptance. This makes the process of negotiation bizarre. Why parties should want to negotiate in this curious

way was not elucidated. Another surprising result of this view of the transaction is that .arbitration agreements will have been concluded between

the respondent and any tenderer who chose to answer question No. 14 in the affirmative, in spite of the fact that his tender as regards the "contract

of supply" was rejected. Now, such a result might be comprehensible if the respondent desired not to negotiate with any tenderer until and unless

he had first accepted the arbitration clause as a preliminary to further negotiations. But, this is the one possibility which question No. 14 and the

words in parenthesis clearly exclude. because the tenderer is given the option to accept or reject the arbitration clause and is also told that his

answer will not influence the decision on the tender.

(12) The difficulties do not end there. Accepting for a moment. the respondent's view of the transaction so far, there still remains an obvious

discrepancy between the Acceptance of Tender as the acceptance and the tender as the offer in respect of the "contract of supply", because the

former introduces the arbitration clause which the latter excluded. To surmount this difficulty, it was contended that the variation was not

"substantial" and did not prevent the acceptance being absolute and unqualified as required by section 7 of the Indian Contract Act. For this

proposition support was claimed from *Jawahar Lal Burman Vs. Union of India (UOI)*, . In that case, it was argued, that the letter of Acceptance

was not an absolute and unqualified acceptance because it required the deposit of a security as a condition precedent whereas the terms of the

tender made it a condition subsequent. On a construction of the letter as whole, the court took the view that despite some seeming internal

contradictions, it was an absolute and unqualified acceptance. That was the decision on the facts, arrived at on an interpretation of the letter.

Whether the divergence between the terms of an offer and an acceptance is of a kind as to prevent the acceptance from being absolute and

unqualified must always depend on the facts.

(13) In *Alexander Brogden and Others v. The Directors of the Metropolitan Railway Company (1877) 2 A.C. 666* the House of Lords held that

the insertion of the name of an arbitrator in the draft of a contract was a matter requiring the approval and assent of the other party. A fortiori, the

introduction of an arbitration clause must require the assent of the other party and is, Therefore, a substantial matter. Counsel for the respondent

also relied on Bijoy Ballav Kundu and Another Vs. Tapeti Ranjan Kundu, . There, it was held, that a clause in a Deed of Settlement requiring that

disputes between the trustees be referred to arbitration was not binding as an arbitration agreement between the trustees inter se. The basis of the

decision was that there was no offer and acceptance of the agreement between the trustees, and hence it could not be regarded as a contract

between them. I do not see how that case is relevant or assists in deciding the present one. In so far as it emphasises that the proposal of an

arbitration agreement needs to be accepted, it is in line with Brogden's case, and goes against the respondent. In my opinion, the acceptance of

tender in this case was not absolute and unqualified as it introduced the arbitration clause contrary to the offer.

(14) There is an unreported judgment dated 11-8-1966 of a single Judge of the Punjab High Court (Circuit Bench, Delhi) in F.A.O. No. 70-D of

1964 entitled Union of India v. M/s. Aluminium Corporation of India Ltd. In which the decision does seem to support the respondent. In that case,

a similar question arose on an application u/s 34 of the Arbitration Act, 1940 and it was held that the arbitration clause was not a part of the

contract. None of the authorities to which I have referred appear to have been cited in that case. With respect, I am unable to agree with that

decision.

(15) One other submission made when the respondent's case was opened, remains to be noticed. On the basis of certain observations in Union of

India (UOI) Vs. Chaman Lal Loona, and Shiva Jute Baling Limited Vs. Hindley and Company Limited, it was urged, that on an application u/s 20

of the Arbitration Act the only question the court can decide is whether an arbitration agreement exists or not, and the court is not concerned with

and ought not to inquire into the formation of the contract of which it may be a term. It is, of course, true that the ultimate question to be decided in

proceedings such as this is whether there is a subsisting arbitration agreement between the parties or not. But, when the arbitration agreement is

one of the terms of a larger contract, those very cases as well as *Jawahar Lal Burman Vs. Union of India (UOI)*, establish that the court can inquire

into the wider question so as to arrive at a conclusion on the narrower due, when the two are intermingled. How else a conclusion can be reached

in a case like the present one, is difficult to see. Nor was any other way of approaching the matter suggested by counsel for the respondent.

(16) For the reasons which I have given, in my judgment, the contract which was concluded between the parties, did contain an arbitration

agreement in terms of clause 24 of the form D.G.S.&D.-68 (Revised). The arbitration agreement will, Therefore, be filed, and the disputes which

have arisen between the parties and are within the scope of the arbitration agreement will be referred to an arbitrator to be appointed, in

accordance with that clause, within two months from today. The petition is allowed, but in the circumstances. I think there should be no order as to

costs.