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(1983) 08 SC CK 0048

Supreme Court of India

Case No: Civil Appeal No''s. 2853 and 2863 of 1982

Kamaluddin Ansari and Co.		APPELLANT
	Vs	
Union of India (UOI) and Others Shankar Vijay Saw Mills Vs Union of India (UOI) and Another		RESPONDENT

Date of Decision: Aug. 12, 1983

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 151

Citation: AIR 1984 SC 29 : (1983) 2 SCALE 107 : (1983) 4 SCC 417 : (1983) 3 SCR 607

Hon'ble Judges: V. Balakrishna Eradi, J; R. B. Mishra, J; D. A. Desai, J

Bench: Full Bench

Advocate: D.C. Singhania, Raju Ramachandran, Muhul Mudgal and J.P. Gupta, in C.A. No. 2854/82 and S.N. Kacker, in C.A. No. 2863/8, for the Appellant; K.G. Bhagat, Addl. Solicitor General in C.A. No. 2853/82, Girish Chandra, C.V. Subba Rao and R.N. Poddar, in C.A. 2863/82, for the Respondent

Final Decision: Dismissed

Judgement

R.B. Misra, J.

These two connected appeals by special leave are directed against the judgment and order of the Allahabad High Court and Delhi High Court dated 24th January, 1980 and 13th November, 1979 respectively. The first one arises out of proceedings u/s 20 of the Arbitration Act while the other arises out of proceedings u/s 33 of the Arbitration Act.

2. These appeals raise a common question regarding the interpretation of Clause 18 of the general conditions of contract contained in the standard from of contract entered into by the parties and the ambit and scope of Section 41 of the Arbitration Act. The facts giving rise to these appeals follow a common pattern and it would, therefore, be sufficient if we set out the facts relating to Civil Appeal No. 2863 of

1982 to bring out clearly the points which arise for consideration in these appeals.

3. The appellant in this appeal is a registered firm and carries on the business of manufacturing and selling timber. The Directorate General of Supplies and Disposals (for short, DGS&D) functions as a purchase organisation for the Government of India and makes purchases for various departments. In response to an invitation for tender by the DGS&D for the supply of Bijasal logs first class the appellant firm made an offer to supply 1016 cubic metres at a flat rate of Rs. 669 per cubic metre. The DGS&D accepted the tender on 24th of December, 1973. Pursuant to the acceptance of the tender a standard form of contract was drawn up containing various clauses. Two important clauses of that standard from of contract with which we are mainly concerned are Clauses 18 and 24, which read :

18. Recovery of Sums Due : Whenever any claim for the payment of a sum of money arises out of or 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 realise 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....

24. Arbitration : In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or in connections 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 any 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.

4. The appellant, however, tailed to supply the goods. The contract was cancelled on 28th of August, 1974 at the risk and cost of the appellant. The DGS&D claims to have made risk purchases incurring an extra cost of Rs. 92,364. By notice dated 27th Dec, 1974 the DGS&D called upon the appellants to pay that as failing which alternating arrangements would be made to recover the same.

5. It appears that there were some other contracts between the appellant and the respondent where under the appellant has supplied goods and payments were due

to it under pending bills.

6. The appellant firm moved a petition u/s 33 of the Arbitration Act before the court alleging that there was no concluded contract in existence between the parties containing any arbitration clause and prayed inter alia for determining the existence, validity and effect of the alleged arbitration agreement. The stand of the Union of India on the other hand is that there was a concluded contract between the parties and the appellant firm was bound by the acceptance of the tender.

7. As the Union of India threatened to withhold the amount of Rs. 92, 364 from the payments due under the pending bills of other contracts, the appellant firm sought for an injunction. u/s 41 read with Second Schedule of the Arbitration Act, and Order 39, Rules 1 and 2 read with Section 151 of the CPC, restraining the respondents from appropriating, withholding or recovering the amount claimed from its other bills in any manner whatsoever.

8. As there was cleavage of opinion between the Judges of the same High Court on the question whether such an injunction as prayed for could be issued u/s 41 of the Arbitration Act, the learned Single Judge referred the matter to a larger Bench. The learned Single Judge's own view was that such an injunction could be issued u/s 41. The Division Bench on reference, however, held that the Court could grant an injunction restraining the respondent from appropriating,or recovering the amount of damages claimed from appellant's other pending bills, but no order restraining the Union of India from withholding payments of the other pending bills could be issued u/s 41 of the Arbitration Act in as much as it would amount to a direction to pay the amount due under other bills and such a prayer would virtually amount to seeking a relief for decreeing the claim of the appellant in those contracts. The appellant has come up before this Court against this order by special leave, as stated earlier.

9. It appears that a large number of applications u/s 33 of the Arbitration Act had been moved in Delhi High Court in similar matters. In some of the cases injunctions were also issued by the learned Single Judge restraining the respondents from recovering, appropriating or withholding the amount from other bills of the contractOrs. One of these matters Union of India v. Air Foam Industries was taken to this Court, which was decided by the Court along with Union of India (UOI) Vs. Raman Iron Foundry, . In that case the Union of India put forward the extreme claim that by virtue of Clause 18 of General Conditions of Contract it was entitled to recover damages claimed by appropriating any sum which may become due to the contractor under other pending bills from the Union of India. This Court, however, negatived the plea on the ground that the amount of damages claimed by the Union was only a claim and unless there was adjudication of the claim by Court or admission by the contractor the Union of India had no authority to appropriate the amount due under pending bills of the contractor towards the satisfaction of its claim for damages.

10. While construing the scope of Section 41(b) of the Arbitration Act this Court held :

The Court has, therefore, power u/s 41(b) read with Second Schedule to issue interim injunction, but such interim injunction can only be "for the purpose of and in. relation to arbitration proceedings". The arbitration proceedings in the present case were for determination of the mutual claims of the appellant and the respondent arising out of the contract contained in the acceptance of tender dated 16th July, 1968. The question whether any amounts were payable by the appellant to the respondent under other contracts was not the subject matter of the arbitration proceedings. The Court obviously could not, therefore, make an interim order which, though ostensibly in form an order of interim injunction, in substance amounted to a direction to the appellant to pay the amounts due to the respondent under other contracts. Such an interim order would clearly not be for the purpose of or in relation to the arbitration proceedings as required by Section 41(b).

11. Having laid down the above dictum on the interpretation of Section 41 of the Arbitration Act this Court proceeded to analyse the impugned order of injunction in that case. In its opinion the order of injunction did not expressly or by necessary implication carry any direction to the Union of India to pay the amounts due to the respondent under other contracts. It is not only in form but also in substance a negative injunction. It has no positive content. What it does is merely to injunct the appellant from recovering suo moto the damages claimed by it from out of the pending bills of the respoadent. It does not direct that the appellant shall pay such amounts to the respondent. The appellant Union of India can still refuse to pay such amounts if it thinks it has a valid defence and if the appellant does so, the only remedy to the respondent would be to take measures in an appropriate forum for recovery of such amounts, where it would be decided whether the appellant is liable to pay such amounts to the respondent or not. No breach of the order of interim injunction as such would be involved in nonpayment of such amounts by the respondent to the appellant. The only thing which the appellant is interdicted from doing is to make recovery of its claim for damages by appropriating such amounts in satisfaction of the claim. That is clearly within the power of the Court u/s 41(b) because the claim for damages forms the subject matter of the arbitration proceedings and the Court can always say that until such claim is adjudicated upon, the appellant shall be restrained from recovering it by appropriating other amounts due to the respondent. The order of interim injunction made by the learned Judge cannot, therefore, be said to be outside the scope of his power u/s 41(b) read with the Second Schedule.

12. Following this judgment of the Supreme Court the Delhi High Court started modulating its injunctions accordingly and refused to include the word "withholding" in the order of injunction on the ground that the order in those terms really would mean an order to make the payment which was specifically forbidden

in terms of the above judgment of this Court.

13. As some doubt was raised in the Delhi High Court as to the exact scope of the ratio of the Union of India v. Raman Iron Foundry (supra) the matter was referred to a full Bench apparently to reconsider the earlier Division Bench judgments in Marwar Tent Factory Vs. Union of India and Another, and Air Foam Industries Pvt. Ltd. Vs. Union of India, . Mohan Meakin Breweries Limited Vs. Union of India and Others, took the view that though an injunction could be granted in those matters restraining the Union of India from adjusting or recovering any damages claimed by it from other pending bills of the contractor no order of injunction restraining the Union of India from withholding the payments due to the contractor under other pending bills could be issued.

14. Following the Full Bench decision the Division Bench in the present case held that the Court in arbitration proceedings was not competent to issue an injunction restraining the Union of India from withholding the amount due to the appellant-contractor under other pending bills. The only remedy of the appellant is to proceed outside the arbitration proceedings for the payments due under the pending bills, from the respondent. The Court can, however, restrain the Union of India from recovering or appropriating the amount due to the appellant-contractor under pending bills towards the damages claimed by the Union, unless it has been adjudicated upon or admitted by the other side.

15. The first question that falls for consideration in this appeal is about the exact scope and ambit of Section 41 of the Arbitration Act It will be appropriate at this stage to read Section 41 in order to appreciate the contention raised on behalf of the appellant :

41. Procedure and powers of Court : Subject to the provisions of this Act and of rules made thereunder-

(a) the provisions of the CPC, 1908 shall apply to all proceedings before the Court, and to all appeals, under this Act, and

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceeding, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court:

provided that nothing in Clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.

In view of Clause (b) of Section 41 the Court has been given power of passing orders in respect of any of the matters set out in second Schedule for the purpose of and in relation to any proceedings before the Court. The Second Schedule of the Arbitration Act inter alia includes interim injunction' and the 'appointment of

receiver'. But the Court has got the power to pass an order of injunction only 'for the purpose of and in relation to arbitration proceedings' before the Court.

16. The proceedings before the Court in the instant case was an application u/s 33 of the Arbitration Act. Section 33 of the Arbitration Act in so far as material for the case, provides :

33. Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits.

17. The appellant in the instant case took the stand that there was no concluded contract between the parties including arbitration. Therefore, the order of injunction passed in the instant case could not be for the purpose of and in relation to arbitration proceedings. Faced with this difficulty Shri S. N. Kacker, learned Counsel for the appellant, fell back upon Clause (a) of Section 41 to contend that Clause (a) makes the CPC applicable to all proceedings before the Court and to all appeals under the Act and, therefore, the appellant was entitled to invoke Order 39 of the Code to get an injunction order even if the conditions of Clause (b) of Section 41 were not satisfied. We are afraid this contention cannot be accepted.

18. Clause (a) of Section 41 makes only the procedural rules of the CPC applicable to the proceedings in. Court under the Arbitration Act. This clause does not authorise the Court to pass an order of injunction. The power is conferred by Clause (b) of Section 41. The source of power, therefore, cannot be traced to Clause (a). If the contention of Shri Kacker is accepted, the appeals would lie under Sections 96, 100 or 104 of the C.P.C. but the Arbitration Act itself provides for appeal u/s 39. Besides, if Clause (a) of Section 41 gave wide powers to pass an order of injunction, Clause (b) of Section 41 would become otiose.

19. The learned Counsel for the appellant, however, contends that the arbitration proceedings relate to the claim for damages by the Union of India. Any act of the Union of India which purports to enforce the said claim for damages, before it has been duly adjudicated upon in arbitration proceedings is an act which relates to such arbitration proceedings.

20. On the own case of the appellant that there was no concluded contract between the parties containing an arbitration clause it will be difficult to say that the application for injunction moved by the appellant was for the purpose of and in relation to arbitration proceedings. This apart, the amount due under the pending bills to the appellant was not the subject matter of the present proceedings and, therefore, the injunction order restraining the respondents from withholding the amount due to the appellant under the pending bills in respect of other contracts could not be said to be for the purpose of and in relation to the present arbitration proceedings. In this view of the matter it was not open to the Court to pass the

interim injunction restraining the respondents from withholding the amount due to the appellant under pending bills in respect of other contracts.

21. The learned Counsel Shri Kacker, however, strongly relied on the following observations of the Court in Union of India v. Raman Iron Foundry (supra) :

But here the order of interim injunction made by the learned Judge does not, expressly or by necessary implication, carry any direction to the appellant to pay the amounts due to the respondent under other contracts. It is not only in form but also in substance a negative in junction. It has no positive content. What it does is merely to injunct the appellant from recovering, suo moto, the damages claimed by it from out of other amounts due to the respondent. It does not direct that the appellant shall pay such amounts to the respondents. The appellant can still refuse to pay such amounts if it thinks it has a valid defence and if the appellant does so, the only remedy open to the respondent would be to take measures in an appropriate forum for recovery of such amounts where it would be decided whether the appellant is liable to pay such amounts to the respondent or not. No breach of the order of interim injunction as such would be involved in non-payment of such amounts by the appellant to the respondent. The only thing which the appellant is interdicted from doing is to make recovery of its claim for damages by appropriating such amounts in satisfaction of the claim. That is clearly within the power of the Court u/s 41(b) because the claim for damages forms the subject matter of the arbitration proceedings and the Court can always say that until such claim is adjudicated upon, the appellant shall be restrained from recovering it by appropriating other amounts due to the respondent. The order of interim injunction made by the learned judge cannot, therefore, be said to be outside the scope of his power u/s 41(b) read with the Second Schedule.
With profound respect we find that the aforesaid observation is incongrous with the proposition of law laid down by this Court just before this observation. We find it difficult to agree with the observation of the Court that the impugned order in form and substance being the negative the respondent could refuse to pay such amounts if it thinks it has a valid defence, and if it chooses to do so there would be no breach of the injunction order.

22. It is true that the order of injunction in that case was in negative form. But if an order injuncted a party from withholding the amount due to the other side under pending bills in other contracts, the order necessarily means that the amount must be paid. If the amount is withheld there will be a defiance of the injunction order and that party could be hauled up for infringing the injunction order. It will be a contradiction in terms to say that a party is injuncted from withholding the amount and yet it can withhold the amount as of right. In any case if the injunction order is one which a party was not bound to comply with, the Court would be loath and reluctant to pass such an ineffective injunction order. The court never passes an order for the fun of passing it. It is passed only for the purpose of being carried out.

Once this Court came to the conclusion that the Court has power u/s 41(b) read with Second Schedule to issue interim injunction but such interim injunction can only be for the purpose of and in relation to arbitration proceedings and further that the question whether any amounts were payable by the appellant to the respondent under other contracts, was not the subject matter of the arbitration proceedings and, therefore, the Court obviously could not make any interim order which, though ostensibly in form an order of interim injunction, in substance amount to a direction to the appellant to pay the amounts due to the respondent under other contracts, and such an order would clearly be not for the purpose of and in relation to the arbitration proceedings; the subsequent observation of the Court that the order of injunction if being negative in form and substance, there was no direction to the respondent to pay the amount due to the appellant under pending bills of other contracts, is manifestly inconsistent with the proposition of law laid down by this Court in the same case.

23. This leads us to the question of interpretation of Clause 18 of the standard contract. Clause 18 has been quoted in extenso in the earlier part of the judgment.

24. The argument by Shri K. G. Bhagat, Addl. Solicitor General on behalf of the Union of India is that what is required for attracting the applicability of Clause 18 is a mere claim for payment of a sum of money arising out of or under the contract against the contractor and it is not necessary that a sum of money must be actually due and payable from the contractor to the purchaser. According to him, if the purchaser has a claim for payment of a sum of money against the contractor, he would be entitled to exercise the right given under Clause 18, even though such a claim may not be for a sum due and payable but may be for damages and it may be disputed by the contractor and may not have been adjudicated upon in a Court of law or by arbitration. Shri Bhagat further submits that if the claim of the purchaser is not well founded and the appropriation made by the Union of India is unjustified, the contractor can always institute a suit or start arbitration proceedings for recovering the sums due to him which have been wrongly appropriated by the purchaser and in such suit or arbitration proceedings, the court or the arbitrator, as the case may be, would examine the validity of the claim against which appropriation has been made by the purchaser and if the claim is found to be unsustainable, set at naught the appropriation and pass a decree or award for the sums due to the contractor. But the court cannot and should not restrain the Union of India from exercising its right of appropriation merely because the claim against which appropriation is sought to be made by the purchaser is disputed by the contractor and is pending adjudication before a court of law or arbitrator.

25. Shri Kacker on the other hand contends that though the words used in the opening part of Clause 18 are "any claim for the payment of a sum of money", which are general words of apparently wide amplitude sufficient to cover even a claim for damages arising out of the contract, a proper construction of the clause read as a

whole clearly suggests that these words are intended to refer only to a claim for a sum due and payable and do not take in a claim for damages which is disputed by the contractor. It is only when a claim for damages is adjudicated upon by a civil court or an arbitrator and the breach of the contract is established and the amount of damages ascertained and decreed that a debt due and payable comes into existence ; till then it is nothing more than a mere right to sue for damages, and it does not fall within the words of Clause 18. Moreover, Clause 18 merely provides a mode of recovery and it can have no application where a claim, even though it be for a sum due and payable, is disputed by the contractor and has to be established in a court of law or by arbitration. Clause 18 applies only where a claim is either admitted, or in case of dispute, substantiated by resort to the judicial process. Therefore, when a purchaser has a claim for damages which is disputed by the contractor, the purchaser is not entitled under Clause 18 to recover the amount of its claim for damages by appropriating other sums due to the contractor until the claim for damages is adjudicated upon and culminates in a decree. The respondent had consequently no right under Clause 18 to appropriate sums due to the appellant under other contracts in satisfaction of its claim for damages against the appellant, when the claim for damages was pending adjudication.

26. This Court in Union v. Raman Iron Foundry (supra) while construing Clause 18 of the standard contract observed :

It is true that the words "any claim for the payment of a sum of money" occurring in the opening part of Clause 18 are words of great amplitude, wide enough to cover even a claim for damages, but it is a well settled rule of interpretation applicable alike to instruments as to statutes that the meaning of ordinary words is to be found not so much in strict etymological propriety of language nor even in popular use as in the subject or occasion on which they are used and the object which is intended to be attained. The context and collocation of a particular expression may show that it was not intended to be used in the sense which it ordinarily bears. Language is at best an imperfect medium of expression and a variety of meanings may often lie in a word or expression. The exact colour and shape of the meaning of any word or expression should not be ascertained by reading it in isolation, but it should be read structurally and in its context, for its meaning may vary with its contextual setting. We must, therefore, read the words 'any claim for the payment of a sum of money' occurring in the opening part of Clause 18 not in isolation but in the context of the whole clause, for the intention pf the parties is to be gathered not from one part of the clause or the other but from the clause taken as a whole. It is in the light of this principle of interpretation that we must determine whether the words 'any claim for the payment of a sum of money' refer only to a claim for a sum due and payable which is admitted or in case of disputes, established in court of a law or by arbitration or they also include a claim for damages which is disputed by the contractor.

27. The headings prefixed to a section or a group of sections in some modern statutes are regarded as preambles to those sections. They cannot control the plain words of the statutes but they may explain ambiguous words. The view is now well settled that the headings or titles prefixed to a section or a group of sections can be referred to in determining the meaning of doubtful expressions. It is true that the court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words. The law is clear that those headings cannot be used to give a different effect to clear words in the section where there cannot be any doubt as to the ordinary meaning of the words. The golden rule is that when the words of a statute are clear, plain and unambiguous, that is, they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of the consequences. The duty of a Judge is to expound and not to legislate, is a fundamental rule. If we apply the same principle to the interpretation of Clause 18 of the standard form of contract, it would be clear that the clause unequivocally contemplates a claim for the payment and it is open to the Union of India to appropriate any amount due to the contractor under other pending bills. It does not contemplate the amount due and, therefore, the heading of this clause which talks of only 'Recovery of sum due' will not control Clause 18. The clause in our opinion gives wide powers to the Union of India to recover the amount claimed by appropriating any sum then due or which at any time thereafter may become due to the contractor under other contracts.

28. Clause 18 of the standard form of contract earlier was slightly differently worded and it read 'whenever under this contract any sum of money is recoverable from and payable by the contractor'. But this formula was deliberately and advisedly altered when the present standard form was introduced and instead the words 'whenever any claim for payment of a sum of money arises' were substituted and this change in phraseology indicated that in order to attract the applicability of the present Clause 18, it was not necessary that there should be a sum of money due and payable by the contractor to the purchaser, but it was enough if there was a mere claim on the part of the purchaser for payment of a sum of money by the contractor irrespective of the fact whether such sum of money was presently due and payable or not. This Court, however, did not attach importance to this aspect of the matter by observing :

We do not think it is legitimate to construe Clause 18 of the contract between the parties by reference to a corresponding clause which prevailed in an earlier standard form of contract. This is not a statute enacted by the legislature where it can be said that if the legislature has departed from the language used by it in an earlier enactment, it would be a fair presumption to make that the alteration in the language was deliberate and it was intended to convey a different meaning. It is a clause in a contract which we are construing and there any reference to a similar or dissimilar clause in another contract would be irrelevant.

29. The Court itself while interpreting Clause 18 of the contract has observed :

It is true that the words "any claim for the payment of a sum of money" occurring in the opening part of Clause 18 are words of great amplitude, wide enough to cover even a claim for damages, but it is well settled rule of interpretation applicable alike to instruments as to statutes....

But while dealing with another aspect of Clause 18 observed to the contrary that it should not be construed as a statute. It may, however, be pointed out that even after the change in the language of Clause 18 of the standard agreement the Union of India cannot be injuncted from with holding the amount under other bills of the contractor. But it can certainly be injuncted from recovering or appropriating it to the damages claimed.

30. Shri D. C. Singhania appearing along with Shri Kackar substantially reiterated the same argument in his written note.

31. We are clearly of the view that an injunction order restraining respondents from withholding the amount due under other pending bills to the contractor virtually amounts to a direction to pay the amount to the contractor-appellant. Such an order was clearly beyond the purview of Clause (b) of Section 41 of the Arbitration Act. The Union of India has no objection to the grant of an injunction restraining it from recovering or appropriating the amount lying with it in respect of other claims of the contractor towards its claim for damages. But certainly Clause 18 of the standard contract confers ample power upon the Union of India to withhold the amount and no injunction order could be passed restraining the Union of India from withholding the amount.

32. We find no error in the impugned order passed by the Allahabad or the Delhi High Courts in the two cases. The appeals, therefore, must fail and they are accordingly dismissed. In the circumstances of the case, however, we direct that the parties should bear their own costs.