
56 CWN 763

Calcutta High Court

Case No: Suit No. 2316 of 1951

In Re: Arbitration
between C.M. Karanji
and Co. (India)

APPELLANT

Vs

RESPONDENT

Date of Decision: Aug. 14, 1951

Acts Referred:

- Arbitration Act, 1940 - Section 20, 34

Citation: 56 CWN 763

Hon'ble Judges: S.R. Das Gupta, J

Bench: Single Bench

Advocate: D.K. De, for the Appellant; S. Roy Choudhury, for the Respondent

Final Decision: Dismissed

Judgement

S.R. Das Gupta, J.

This is an application under sec. 34 and sec. 20 of the Indian Arbitration Act for stay of proceedings in suit No. 2316 of 1951 [Indo-China Trading Co., Ltd. v. C.M. Karanji & Co. (India)] and for an order that the agreement, dated 16th August, 1950, be filed in this Court and a tribunal of arbitration be appointed by this Court and for costs. The petitioner's case before me is as follows : By a contract in writing dated 16th August, 1950, the petitioner agreed to sell and the respondent agreed to buy 500 bundles of Chinese cassia of 78-80 pounds each at Rs. 44 per bundle. The said agreement contained an arbitration clause which is clause 7 of the terms and conditions thereof. The said arbitration clause reads as follows :

No claim shall be entertained by sellers unless made within 7 days from the date of delivery of the goods. In the event of any dispute arising if these cannot be settled amicably, either party shall have the right to call for arbitration on the matter in dispute under the rules of the local Chamber of Commerce, the party found to be at fault to be

responsible for the costs of such arbitration.

2. The only other clauses of the terms and conditions of the said contract material for the present purpose are clauses 2 and 6 which run as follows :

Clause 2.--Buyers undertake to take delivery of the goods at the price and on terms agreed upon and to effect payment for same in the manner set out on reverse and they further solemnly assure undisputed payment of every bill before maturity. In the most unlikely event of any dispute, the same shall be settled as per cl. 7 but on no account shall any bill be dishonoured.

Clause 6.--In the event of any goods being short-shipped or short-landed, no responsibility attaches to sellers. In the event of goods having been shipped before the required time of shipment, buyers shall be entitled to a corresponding extension of payment. In the event of late shipment, no responsibility attaches to sellers if such delay is due to causes beyond their control or to act of God or through existence of any war, whether Great Britain is a belligerent or not. In all other cases of late shipment, subject to clause 4, buyers would be entitled to cancel the late portion of the order, but in that case no compensation for alleged loss of profits or otherwise shall be due to them.

3. Under the said contract the respondent was to open immediately full letter of credit for the said goods in favour of Messrs. P. B. Dhabher & Co. of Hongkong or pay cost of the said goods at Hongkong through its agents, if the letter of credit could not be arranged, and the shipment would be made by the petitioner in September, 1950. By mutual agreement, the time of shipment of the said goods was extended from time to time until the petitioner by a letter, dated 1st December, 1950, refused to grant further extensions beyond 5th December, 1950. On 4th December, 1950, the respondent through its brokers informed the petitioner that the respondent was unable to perform its part of the said contract and asked the petitioner to have the said goods sold at Hongkong on its account. The petitioner thereupon proceeded to sell the said goods at Hongkong and the same were sold on 4th December, 1950, at Hongkong at Rs. 39 per bundle C. I. F. Calcutta. The petitioner claimed from the respondent a sum of Rs. 3,651-12-3, being the loss incurred in respect of the said transaction and the charges incurred in respect of the said goods for storage, insurance, transport, etc. As the respondent did not pay the amount claimed by the petitioner, the petitioner applied to the tribunal of arbitration, Bengal Chamber of Commerce, for arbitration upon the matter in dispute between the parties, but the respondent refused to submit to the arbitration of the said tribunal. On May 28, 1951, the respondent instituted a suit in this Court, being suit No. 2316 of 1950, against the petitioner for the recovery of Rs. 6,750 as alleged damages for alleged breach of the said contract, dated 16th August, 1950, and thereupon the petitioner on the 11th July, 1951, took out notice of motion for the present application.

4. The case of the respondent is as follows. The period of delivery was from time to time extended by agreement and or by mutual consent. By its letter dated December 1, 1950

(while the said contract was subsisting) the petitioner asked for the permission of the respondent to sell the said goods at Hongkong on account of the respondent, in case the respondent did not desire the same to be shipped. In reply to the said letter the respondent by its letter of the same date only enquired from the petitioner the prevailing market price of the said goods at Hongkong. It is not true that by the said letter, dated 1st Dec, 1950, the petitioner refused to grant further extension beyond the 5th December, 1950, or that the respondent ever informed the petitioner through the brokers of its inability to perform the contract Or asked the petitioner to have the goods sold at Hongkong on account of the respondent, as alleged in the petition. The said goods were unconditionally appropriated to the said contract and the property in the said goods had passed to the respondent. By a letter, dated December 23, 1950, the respondent (while the said contract was subsisting) duly tendered the price of the said goods to the petitioner and asked for delivery but the petitioner wrongfully Sold the said goods without the consent or notice to the respondent, and as a result of the said breach, the respondent suffered damages which he assessed at Rs. 6,750. The suit, being Suit No. 2316 of 1950, has been filed in this Court for the recovery of the said sum from the petitioner. These are the respective contentions of the parties before me.

5. Mr. Roy Chowdhury appearing on behalf of the respondent contended in the first place that the arbitration clause is vague and uncertain and therefore void. Secondly, he urged that difficult questions of law are involved in this matter and it is just and proper that the same should be decided by this Court and not, by the arbitrators. Lastly, Mr. Roy Chowdhury's contention is that the subject matter of the suit is not covered by the arbitration clause. The suit was really a suit for damages for non-delivery but the arbitration clause, according to him, relates only to disputes after delivery and every dispute is not included in the said arbitration clause.

6. The arbitration clause, in my opinion, is vague and uncertain. As I have already indicated, the said arbitration clause provides that in the event of any dispute arising, if this cannot be settled amicably, either party shall have the right to call for arbitration on the matter in dispute under the rules of the local Chamber of Commerce. The arbitration clause does not indicate which local Chamber of Commerce is to arbitrate in such dispute. As Mr. Roy Chowdhury pointed out to me, there are number of local Chambers of Commerce, e.g. Marwari Chamber of Commerce, Muslim Chamber of Commerce, Bengal Chamber of Commerce, Indian Chamber of Commerce, and it is by no means clear which of these bodies is to arbitrate in such disputes between the parties. The petitioner before me has referred the dispute to the arbitration of the Bengal Chamber of Commerce. The respondent in its affidavit in reply has disputed that the arbitration clause provided that the dispute should be referred to the arbitration of the Bengal Chamber of Commerce. If then it is not dear as to which particular body was meant to arbitrate in the event of disputes arising between the parties, it is impossible to say that the parties were ad idem with regard to the person or body of persons which is to arbitrate in their dispute. In this connection it would be helpful to refer to the observations of Viscount Maugham in

the case of G. Scammel and Nephew, Limited. V. H. C. and J. G Ouston [(1941) A. C. 251]. His Lordship observed as follows :

In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that unless this can be done it would be impossible to hold that the contracting parties had the same intention; in other words, the consensus ad idem would be a matter of mere conjecture.

7. It is no doubt true that His Lordship proceeded to observe that in commercial contracts more latitude should be given in interpreting the terms of the contract and if the court is satisfied that it is a binding contract, to imply terms and in particular the terms as to the method of carrying out the contract. But there is a limit to the application of that doctrine. If, as in this case, it is impossible to ascertain which particular body or which particular person was meant to arbitrate in the dispute between the parties, it would be impossible to import a particular term in the said contract and thereby determine for the parties a body or tribunal of arbitrators. As I have already indicated, the petitioner contended that the Bengal Chamber of Commerce is the local Chamber of Commerce but the contention of the respondent is otherwise.

8. In support of his contention Mr. Roy Chowdhury relied on the decision in Ganpatrai Gupta v. Moddy Brothers Ltd. (85 C. L. J. 136). In that case there were two arbitration clauses, one a printed clause and another type-written clause. In the printed clause it was provided that all disputes regarding the contract are to be settled by two arbitrators, one nominated by buyers and one by sellers respectively, in accordance with the Indian Arbitration Act. The type-written clause provided that all disputes whatsoever arising on or out of this contract shall be referred to arbitration under the rule of the Tribunal of Arbitration, Bengal Chamber of Commerce or Indian Chamber of Commerce for the time being, for decision and such decision shall be accepted as final and binding on the parties to the contract. S. B. Sinha, J., in the course of his judgment observed as follows:--

Arbitration agreement should be strictly construed. Clear language should be introduced into any contract to which is to have the effect of ousting the jurisdiction of the Courts and compelling the parties to have recourse to arbitration for decision of disputes. Having regard to the language used in the contract, I am not satisfied that the language had the effect of carrying out the intention of the parties to exclude the jurisdiction of the ordinary court of law. It is at least doubtful whether the terms of the arbitration agreement are so clear and unambiguous, that it is possible to say that the parties intended to have their disputes decided by a domestic forum to the exclusion of the jurisdiction of the ordinary courts of law.

9. These observations, to my mind, apply with equal force to the case which is now before me. It is impossible to say as to what the parties meant and which person or body of persons the parties wanted to arbitrate in the matter of their disputes. That being so, I am clearly of the opinion that the arbitration clause is vague and uncertain and is not,

therefore, a valid and legal arbitration clause.

10. Mr. De appearing on behalf of the petitioner referred me to two decisions of this Court. One is a decision of the Full Bench of this Court in the case of [Dwarkanadas and Co. Vs. Daluram Goganmull](#), and the other is a decision of S. R. Das, J. in the case of *Governor-General-in-Council v. Associate; Live Stock Farm (India) Ltd.* (52 C.W.N. 288). In the first case it was contended on behalf of the appellant for the first time before the Full Bench that the contract referring the disputes to arbitration as contained in clause 17 of the terms thereof was void for uncertainty and it was urged that if a contract is uncertain, the purpose of which could never be enforced, then it must be held that the arbitration clause is void for uncertainty. As this contention was raised for the first time before the Full Bench and was not raised in the trial court, their Lordships did not allow that contention to be raised. Harries, C. J., in the course of his Lordship's judgment observed as follows:--

Mr. Bachawat has contended that on the principle of these cases it might well have been established that this arbitration clause, though on the face of it vague and uncertain, bears in the commercial world some definite and certain meaning. I am unable to say whether that contention is well-founded but it does appear to me that the matter should have been raised before Sinha, J., or at the latest, the point should have been taken in the memorandum of appeal. A point cannot now be taken without the leave of the court and we do not think that we should allow the appellants to raise this new point at this very late stage. The respondents have had no opportunity of dealing with it and they, as I have said, might, had the point been raised, have been able to establish to the satisfaction of the Court below that this was a common form of arbitration clause amongst the commercial community in Calcutta and had in that community a definite and certain meaning. That being so, I hold that the Court should not allow this point to be raised.

11. Thus this contention as to whether the contract in question in that case was void for uncertainty was not gone into by their Lordships. I fail to see how this case can be of any assistance to the petitioner. But in this connection I ought to state that no attempt has been made before me in this case to establish that the form in which the arbitration clause has been put is the common form of arbitration clause amongst commercial community in Calcutta, and had in that community a definite and certain meaning.

12. In the other case decided by Das, J., the arbitration clause provided that disputes or differences arising out of the contract should be referred to the arbitration of the officer sanctioning the contract and it was held by His Lordship that stay of the suit cannot be resisted on the ground that the officer left India as the arbitration clause does not show that any vacancy in the office of the arbitrator cannot be filled up by the Court. The question before Das, J., was not whether the arbitration clause as it originally stood was void for uncertainty or whether there could be no arbitration at all of the officer sanctioning the contract on that ground, but the question which was raised and which His Lordship decided was that where the officer concerned had left India the vacancy which has been

created by his so leaving can be filled up by the Court and that was an entirely different question from the question which is now before me. In the circumstances, I cannot see how that case as well is of any assistance to the petitioner. I have, therefore, come to the conclusion that the arbitration clause in this particular case is void for uncertainty and is invalid on the ground of uncertainty and cannot be given effect to.

13. With regard to the second contention of Mr. Roy Chowdhury, namely, that difficult questions of law are involved in this matter and therefore this Court should not stay the proceedings in the said suit which has already been filed. I am unable to accept the same. It is now well-established that the arbitrators are judges both of law and of facts. The subject-matter of the dispute between the parties involves not only questions of law but also questions of fact and I do not see any reason why the arbitration proceedings should not be carried into effect.

14. With regard to his last contention. Mr. Roy Chowdhury urged that it is not any and every dispute between the parties relating to the contract which can be decided by the arbitrators but the only dispute which can be decided by the arbitrator is a dispute arising after delivery. In my opinion, that contention of Mr. Roy Chowdhury is sound. In any event, it is not clear at all from the arbitration clause as to what disputes between the parties were meant to be referred to the arbitrator. Clause 7 of the terms and conditions of the contract. Which is the arbitration clause, starts with the words : "No claim shall be entertained by sellers unless made within Seven days from the date of delivery of the goods". Then the said clause provides that in the event of any disputes arising, if these cannot be settled, either party shall have the right to call for arbitration. Thus the provision in the said clause, namely, that no claim shall be entertained by the sellers unless made within seven days after delivery, suggests that the disputes referred to in the said clause which are to be arbitrated upon are disputes which have nothing to do with the question relating to the non-delivery of the goods. A reference to clause 6 of the terms and conditions would help us in ascertaining the nature of the disputes to be decided by the arbitrator, e.g., claims relating to short shipment or short landing or late shipment and things of that kind. But the respondent's claim as made in the plaint is for damages for non-delivery. In any event, it is not clear as to what disputes were meant to be referred to arbitration under clause 7 of the said contract and unless it is clear from the arbitration clause itself, in my opinion, the said clause cannot be given effect to. In the premises I have come to the conclusion that the stay asked for should be refused. That being so, no question of filing the arbitration agreement and appointing an arbitrator arises. In any event the application for filing the arbitration agreement and appointing an arbitrator is not in order and should on that ground also be refused. The application is, therefore, dismissed with costs.