(1967) 10 BOM CK 0019

Bombay High Court

Case No: O.C.J. Award No. 6 of 1963

Deviprasad Khandelwal		APPELLANT
	Vs	
Union of India		RESPONDENT

Date of Decision: Oct. 14, 1967

Acts Referred:

- Arbitration Act, 1940 - Section 33, 5
- Constitution of India, 1950 - Article 14, 19(1), 19(1)(f), 290, 299
- Contract Act, 1872 - Section 23
- General Clauses Act, 1897 - Section 21
- Government of India Act, 1935 - Section 175(3)

Citation: (1968) MhLj 635

Hon'ble Judges: J.L. Nain, J

Bench: Single Bench

Advocate: S.D. Parekh and F.S. Nariman, for the Appellant; P.M. Mukhi, for the Respondent

Judgement

J.L. Nain, J.

This is a petition under sections 33 and 5 of the Arbitration Act, 1940, challenging the existence and, in the alternative, the validity of an arbitration agreement and, in case the existence and validity of the said arbitration agreement are established, to have the effect thereof determined, and for leave of the Court to revoke the authority of the arbitrator appointed under the said arbitration agreement.

2. The facts leading to this petition briefly stated are that on or about August 4, 1958, the Regional Director (Food), Western Region, Bombay, Government of India, Ministry of Food, issued a tender notice on behalf of the President of India, inviting tenders for purchase of approximately 244 tons of used iron hoops (scrap released from gunny bales) lying in the Government of India godowns at Thana Street, Bombay-9, on the terms and conditions of sale set out in Appendix "A" to the tender

notice. The goods were described in Appendix ''C to the said tender notice. On August 18, 1958, the petitioners submitted x tender offering to purchase the said goods at the rate of Rs. 607 per ton, The tender was accompanied by a letter of that date addressed to the President c f India through the said Regional Director (Food). The said letter stated that the petitioners had thoroughly read and understood the terms and conditions contained in the tender and the Appendices thereto and agreed to abide by them. The petitioners enclosed a cheque for Rs. 15,000 as earnest money along with the said tender in terms of clause 6 of the tender notice. It appears that on the same day, namely, August 18, 1958, the petitioners addressed a letter to the Iron and Steel Controller at Calcutta, stating that the Regional Director (Food), Bombay, had invited tenders for about 244 tons of used iron hoops (released from gunny bales) and that the petitioners understood that the controlled maximum price chargeable for the said goods was Rs. 335 per ton. They requested the Iron and Steel Controller to confirm if the petitioners'' contention was right and whether the Regional Director (Food), could charge price higher than the controlled price. The reference to controlled price appears to have been to the price fixed on August 3, 1957, by Scrap Price Circular No. 5 of 1957, issued by the office of the Iron and Steel Controller. From the said letter of August 18, 1958, addressed to the Iron and Steel Controller and from the subsequent correspondence and events, it appears that while in the tender the petitioners offered to buy the said scrap at the price of Rs. 607 per ton, they had mental reservations about the price, and hoped to get the price reduced to this controlled price fixed under clause 27 (1) of the Iron and Steel Control Order, 1956, whatever that price was at the relevant time, and there is no dispute about the fact that the said price was much less than Rs. 607 per ton. This price of Rs. 607 per ton was the highest offer pursuant to the tender notice. However, as the price of Rs. 607 per ton was in excess of the controlled price fixed under clause 27 (1), the Regional Director (Food), Bombay, approached the Iron and Steel Controller with a request to fix special price for the said 244 tons of iron hoops described in Appendix ''C'' to the tender notice under clause 27 (2), and by an order dated September 4, 1953, addressed by the Iron and Steel Controller to the Regional Director (Food), Bombay, the Iron and Steel Controller fixed the special selling price of the said good8 by the Government of India at Rs. 607 per ton, purporting to be in exercise of the powers vested in the Iron and Steel Controller under sub-clause (2) of clause 27 of the Iron and Steel Control Order, 1956. Thereafter by his letter of September 25, 1958, addressed to the petitioners, the Regional Director (Food), Bombay, stated that the petitioners'' tender dated August 18, 1958, wherein the petitioners had offered to purchase the stock of approximately 244 tons of iron hoops lying at the Government of India godowns, Thana Street, Bombay-9, at Rs. 607 per ton, had been accepted by the Government subject to the terms and conditions of the tender. In the second para, of the said letter, the Regional Director (Food), Bombay, stated that a special selling price of Rs. 607 per ton for the said lot of iron hoops had been fixed by the Iron and Steel Controller in his letter dated September 4, 1958. In the subsequent paragraphs of the said letter the Regional

Director (Food), Bombay, has outlined a procedure for the performance of the contract. The said procedure is the subject-matter of controversy, and the petitioners contend that these are fresh terms not already contained in the terms and conditions of the tender and, therefore, the said letter contains a counter offer which the petitioners have at no time unconditionally accepted and, therefore, there is no concluded contract. This letter was replied to by the petitioners by their letter of September 30, 1958 in which they stated that they understood from para. 2 of the letter of the Regional Director (Food), Bombay, that the disposal of the materials in question fell under the Iron and Steel Control Order, 1956, and the price was governed by "Schedule V". They requested the Regional Director (Food), Bombay, to furnish to them copies of correspondence exchanged with the Iron and Steel Controller in connection with the price fixation. They further stated that as regards the price, in view of the fact that the price was controlled) the controlled price applicable according to the Iron and Steel Control Order, 1956, would be applicable. In one of the paragraphs of the said letter, they said, "We, however, accept the order". The contention of the respondents is that the letter of the Regional Director (Food), Bombay, dated September 25, 1958, in its first paragraph contained an unconditional acceptance of the tender. The second paragraph sets out the controlled price specially fixed by the Iron and Steel Controller for the said goods and the subsequent paragraphs outline a procedure for performance of the contract which was in accordance with the contract. In the alternative, their contention is that even if it be held that the third and the subsequent paragraphs of the said letter contained new terry as and, therefore, the letter of September 25,1958, contained a counter offer, the petitioners'' letter of September 30,1958, contained an unconditional acceptance of the counter offer and the contract was, in any event, concluded. However, these are matters in controversy. I shall deal with them later. It appears that thereafter the petitioners failed to pay the sum of Rs. 1,33,108 demanded in the letter dated September 25,1958, by the Regional Director (Food), Bombay, within one week of the acceptance of the tender. The Government forfeited the earnest money of the petitioners and proceeded to resell the goods and, ultimately, on October 31, 19G0, they sold the said goods through Government auctioneers at the rate of Rs 360 per ton and realised a sum of Rs. 87,840. The respondents then claimed from the petitioners as and by way of damages a sum of Rs. 99,064, being the difference between the contract price of Rs. 1,48,108 and the market price prevalent on the date of the breach, namely, Rs. 49,044. Alternatively, the respondents claimed from the petitioners a sum of Rs. 60,268 being the difference between the contract price of Rs. 1.48,108 and the actual re-sale price of Rs. 87,840. As the petitioners failed to pay the amount of damages, the respondents appointed one V. Ramswami Iyer as the sole arbitrator to decide the disputes between the petitioners and the respondents, pursuant to clause 12 of the terms and conditions of sale which contained the arbitration agreement. Before the arbitrator the petitioners appear to have taken the contention that there was no concluded contract. On December 12, 1962, the said arbitrator gave a direction that

as the petitioners challenged the existence and validity of the arbitration agreement, they were directed to apply to the Court u/s 33 of the Arbitration Act, 1940, within a month. Accordingly, on January 18, 1963 the petitioners filed this petition.

3. When the petition came up for hearing, my learned brother K. K. Desai J. thought that there was a conflict between the decision of the Bombay High Court in Vallabh Pitti v. Narsingdas (1) and the decision of the Supreme Court in Khardah Co. Ltd. v. Raymon & Co. (2), and he referred the matter to a Division Bench of this Court for resolving the said conflict. On February 13 1967 a Division Bench of this Court consisting of Patel and Thakker JJ. held that notwithstanding the contentions of the respondents taken in para. 17 of the affidavit dated March 29, 1963, of Mr. C. L. Rathi in reply to the petition to the effect that the arbitrator alone was competent to decide the question of existence and validity of the arbitration agreement, a Judge of this Court sitting alone was competent to decide the question of existence and validity of the arbitration agreement. The petition was sent back to be disposed of by a single Judge of this Court in accordance with law. The matter then came up for hearing before Mr. Justice Thakker on July 18, 1967, when the petitioners sought and were granted leave to amend the petition by addition of a plea than. the contract containing the arbitration agreement was not made in accordance with Article 299 of the Constitution of India, inasmuch as the said contract was neither expressed to be made by the President of India, nor was made in the name of the President of India and was, therefore, null, void and unenforceable in law. After the said amendment was allowed and carried out, the matter again appeared before me, and during the hearing of the petition, the petitioner-; applied for a further amendment of the petition to the effect that, in the alternative to their contention that there was no concluded contract or that the said contract was illegal and void, they should be granted leave to revoke the authority of the arbitrator appointed under clause 12 of the contract contained in the terms and conditions of sale. I allowed the said amendment for reasons set out in my order of September 27,1967. The matter then proceeded to hearing. . (1) 1963 Mh. L J 84l = (1902) 65 Bom. L R 29 (2) Khardah Company Ltd. Vs. Raymon and Co. (India) Private Ltd.,

4. The contentions raised by the petitioners are fully set out in the petition and briefly summarised are that there was no concluded contract in fact between the petitioner* and the respondents. In the alternative, the petitioners contend that the Regional Director (Food), Bombay, was not a person directed or authorised by the President of India to enter into contracts of the nature of Exh. B (collectively) to the petition, and that, in any case, the said contract was not expressed to be made by the President of India or in his name, and, therefore, the contract contravened the provisions of Article 299 of the Constitution of India and was, therefore, null, void and unenforceable. The petitioners have also challenged the legality and validity of the contract containing the arbitration agreement on the ground that the sale of iron hoops was at a price in excess of the price for such goods notified under clause

27 (1) of the Iron and Steel Control Order, 1956. The petitioners have further challenged the validity of the order of the Iron and Steel Controller dated September 4, 1958, fixing the special selling price of the Government for these goods at Rs. 607 per ton on the grounds: (a) that such fixation cannot be made, except by a notification published in the Gazette of India, (b) that such fixation cannot be made without the approval of the Central Government, (c) that the order of September 4, 1958, does not, as required by the proviso to sub-clause (2) of clause 27, direct that the maximum prices fixed under sub-clause (1) or (2) shall not apply to the stock in question, (d) that the said order purports to fix the price at which the said goods are permitted to be sold, and not the maximum price, and clause 27 authorised only fixation of maximum price, (e) that the said order of September 4,1958, contravenes the provisions of Article 14 of the Constitution of India as it denies to the petitioners equality before the law, and (f) that the order of September 4, 1958, contravenes the provisions of Article 19 (1) (f) and (g) of the Constitution of India, as it takes away the petitioners'' right to dispose of property or the right to carry on trade or business. With regard to the contravention of Article 19 (1) (f), the contention of the petitioners is that as the petitioners would, under the contract in question, acquire the said scrap at the price of Rs. 607 per ton, which was a special selling price of the Government, they would be compelled under the Scrap Price Circular to sell the same goods at the price of Rs. 335 per ton and thus be put to loss, and this in effect took away their right to dispose of property.

5. The petitioners also contend that the contract of sale is illegal on the further ground that under the contract they were required to pay the price of Rs. 1,48,108 for the entire lot of goods described in Appendix ''C'' to the tender notice, that the contract nowhere stated that if on actual weighment the goods were found to be less than 244 tons, any part of the price would be refunded to them, and that the letter of September 25, 1958 required them to pay the said sum and on receipt of the said amount a delivery order for a quantity not exceeding 244 tons would be issued to them. Their contention is that they were required to pay the price not for 244 tons but, even if the goods were found to weigh less, and as such the price being charged to them was even in excess of the price of Rs. 607 per ton. Their contention is that under sub-clause (4) of clause 27 of the Iron and Steel Control Order, no person shall sell or offer to sell or otherwise dispose of, and no person shall acquire any scrap at prices in excess of those notified or fixed by the Controller under this clause, Breach of this provision is made an offence under the provisions of the Essential Commodities Act, 1955. The object of the contract of sale was, therefore, forbidden by law or would defeat the provisions of law and was, therefore, unlawful, and the control of sale was, therefore, void u/s 23 of the Indian Contract Act. The petitioners further contend that the challenge to the evidence and validity of the contract containing the arbitration agreement was outside the scope of the arbitration agreement contained in clause 12 of the terms and conditions of sale, and the arbitrator had, therefore, no jurisdiction to decide such questions and,

in any case, the challenge raised difficult questions of law which should be settled by a Court rather than be referred to a lay arbitrator and the Court should, therefore, not give effect to the arbitration agreement. The petitioners further contend that, in any eve at, because of these difficult questions of law, they should be granted leave to revoke the authority of the arbitrator appointed under clause 12 of the terms and conditions of sale. The respondents have filed an affidavit dated March 29, 1963, of Mr. C. L. Rathi, Deputy Director of Food, Bombay, in reply to the petition which sets out the contentions of the respondents in reply to the contentions of the petitioners and denies the tenability and validity of the said contentions.

6. Arising from the aforesaid contentions, the following issues were framed:

(1) Whether the petitioners should be granted leave to revoke the authority of the arbitrator appointed in pursuance of the arbitration clause (set out in para. 5 of the petition) as alleged in para. 8 of the petition !

(2) Whether the arbitration agreement being clause 12 mentioned in para. 5 of the petition does not apply to all the disputes and differences between the parties as alleged in para. 8 of the petition ?

(3) Whether there is no concluded contract between the parties and therefore no valid arbitration agreement as alleged in para, 9 of the petition ?

(4) Whether the contract and therefore the arbitration agreement is unenforceable by reason of being in contravention of Article 299 of the Constitution as alleged in para. 9 (dd) of the petition 1

(5) Whether the order dated September 4th 1958-Exh. "C" to the petition is illegal, void and without jurisdiction and therefore the contract and the arbitration agreement are also illegal and void as alleged in para. 10 of the petition ?

(6) Whether the contract and arbitration agreement are illegal as alleged in para. 12 of the petition ?

(7) To what relief or relief''s the petitioners are entitled ?

(8) Generally ?

* * * *

7. In my opinion, the first paragraph of the letter of September 25,1958., from the Deputy Director (Food), Bombay, to the petitioners contains an unconditional acceptance of the petitioners'' tender on the terms and conditions of the tender. This results in a concluded contract and I hold that there is a concluded contract between the petitioners and the respondents.

8. The contract is for sale of a quantity of iron hoops weighing 244 tons "approximately". The dictionary meaning of the word "approximately" in "nearly" or "nearly correct". It is a matter of common knowledge that it is not possible to sell

quantities of iron and steel, whether prime material or scrap,, correct to the last ounce. Iron and Steel as well as scrap is always in big pieces and the weight can always be approximate, and not exact. According to the respondents, the; held a lot of approximately 244 tons of iron hoops in their godowns at Thana Street, Bombay-9, and this is what they contracted to sell. It could be, that on actual weighment the goods may weigh, slightly more or slightly less, because the word "approximately" does not permit of large variations in weight and, therefore, when the respondents stated that on payment of the price of 244 tons they would give a delivery order for a quantity not exceeding 244 tons, this was because a quantity not exceeding 244 tons had been paid for and they would not be liable to deliver goods in excess of 244 tons. But this contention still leaves unsettled the question of the excess in weight over 244 tons or shortage in weight however small the excess or shortfall may be. The contention of the petitioners that they would be entitled to the entire lot of goods, whether in excess or short, is correct. The fact is that, in my opinion, the contract concluded by the tender of the petitioners and the first paragraph of the letter of September 25, 1958, is silent on two points: (a) as to what would happen if after the petitioners had paid the price of 244 tons within seven days of the acceptance of the tender, and the goods were weighed thereafter, and were found to weigh in excess of 244 tons, however slight that excess may be, and (b) what would happen if the goods were found to be short, however short the shortfall may be. It is a matter of common experience that no perfect contract can be made, because the parties to it may not at the stage of making it, envisage or provide for all the contingencies that may arise. Several times the parties to a contract may either through forget-fullness or through bad drafting fail to incorporate into the contract terms which, had they adverted to the situation, they would certainly have inserted to complete the contract. In such cases, in order to give efficacy to the contract, the Court will imply into a contract terms which the parties have not themselves expressly inserted. It is true that it is not the function of the Court to make contracts for the parties, but only to interpret contracts already made. Nevertheless, in certain circumstances, the Court will imply terms. In this case the contract provides for price calculated per ton. It further provides that after the acceptance the buyer is to make a deposit of the price for a quantity which is stated to be approximately 244 tons and the goods are thereafter to be weighed, and that the seller will, in the first instance, give delivery order for a quantity not exceeding 244 tons to the buyer because the payment is to be made in advance. It may reasonably be expected that in such a case if on actual weighment the goods are found to be less than 244 tons, the excess price paid would the refunded. It is also reasonable to expect that if the goods are found to be more, the seller will call upon the buyer to pay the balance of the price and to take delivery of the excess goods. I think these terms should be implied into this contract. Such terms are neither contrary to, nor inconsistent with, the express terms of the contract contained in the terms and conditions of sale. Anson on the principles of the English Law of Contract, 22nd Edn., states as follows (p. 129):

The doctrine is, therefore, of narrow application, and the requirements are stringent:

Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common ''Oh, of course!

Anson further goes on to say that this doctrine of implied terms has frequently been applied where the circumstances demanded and particularly where the contract would fail completely, unless such terms were implied, or where, in effect, it gives substance to the whole transaction. Halsbury''s Laws of England, 3rd Edn., Vol. 8, at p. 121, in para. 212, also lays down:

212. Implication of terms. In construing a contract, a term or condition not expressly stated may, under certain circumstances, be implied by the Court, if it is clear from the nature of the transaction or from something actually found in the document that the contracting parties must have intended such A term or condition to be a part of the agreement between them. Such an implication must in all cases In founded on the presumed intention of the parties and upon reason, and will only be made when it is necessary in order to give the transaction that efficacy that both parties must have intended it to have, and to prevent such a failure of consideration as could not have been within the contemplation of the parties. In every case the question whether an implication ought or ought not to be made will depend on the particular facts; consequently it is neither possible nor desirable to lay down any hard and fast rules on the subject and it must be remembered that the construction of one contract will afford but little guidance for the construction of another unless the facts and surrounding circumstances are practically identical.

I must say that an implied term must always be based on the presumed intention of the parties and upon reason. In my opinion, the implied terms suggested by me are reasonable. The contract is for a particular lot of goods and for approximate, and not exact, quantity and at a price calculated by weighment. It is reasonable to suppose that the parties intended that in case of excess the same would be paid for and then taken delivery of later, and in case of shortfall, the excess of price paid in advance would be refunded. I have no hesitation in so holding [Missing para].

9. Having dealt with the question of the existence of the contract, I come to the question of its validity. The petitioners have contended that the contract Exh. B (Colly.) to the petition, which contains the arbitration agreement, is unenforceable by reason of being in contravention of Article 299 of the Constitution of India. [Missing para]

10. In this ease, the contract is contained in correspondence Exh. B (Colly) to the petition. The first letter is dated August 4, 1958, and is addressed to the petitioners.

In the very opening paragraph, it states that "On behalf of the President of India, the Regional Director of Food, Western Region, Bombay, invites tenders ... ". The said tender notice is signed by the Deputy Director (Food), Bombay. The petitioners filled in the tender and submitted the same to the Regional Director (Food), Bombay, with a covering letter dated August 18, 195S. The said letter is addressed by the petitioners to the President of India. This letter contains the offer to buy the said scrap The Deputy Director (Food), Bombay, accepted the said offer by his letter dated September 25, 1958. The said letter is signed by the Deputy Director (Food), Bombay, "for and on behalf of the President of India". Article 290 of the Constitution of India nowhere requires that a contract made on behalf of the Union of India should be contained in any formal document. It is enough if the contract is contained in correspondence. All that the Article requires is that the contract shall be expressed to be made by the President of India and shall be executed on behalf of the President by a duly authorised person. It has been held by the Supreme Court in the case of Union of India v. Rallia Ram AIR 1963 S C 1886, that section 175 (3) of the Government of India Act, 1935, did not require that formal contracts should be drawn up and executed and that the contract on behalf of the Dominion of India may be contained in the correspondence, and that a tender for purchase of goods in pursuance of an invitation issued by or on behalf of the Governor-General of India and acceptance in writing which is expressed to be made in the name of the Governor-General and is executed on his behalf by a person authorised in that behalf would conform to the requirements of section 175 (3). In this case, the contract is contained in correspondence Exh. B (Colly.) to the petition. The tender and letter of acceptance of the respondents are expressed to have been issued and written respectively on behalf of the President of India and the letter of the petitioners containing the offer is addressed to the President of India. In my opinion, the provisions of Article 299 of the Constitution of India have been sufficiently complied with and there is no substance in the contention that the contract in his case contravenes the provisions of Article 299 of the Constitution of India.

11. The next contention of the petitioners is that the power of fixation of special prices is subject to the condition precedent that in the order the Controller must "direct that the maximum prices fixed under sub-clause (1) or (2) shall not apply to any specified stocks of scrap". It is contended that the order dated September 4, 1958 contains no such direction and is, therefore, illegal. A reference to the order of September 4, 1958 indicates that what the Iron and Steel Controller purports to fix is "special selling price for 244 tons of scrap iron hoops". I think the fixing of a "special selling price" by implication contains a direction that the general selling price contained in the Scrap Price Circular No. 5 of 1957 shall not apply to the stocks specified in the order of September 4, 1958. Such direction appears to me to be implicit in the said order and, in my opinion, the fact that the order does not explicitly contain such direction makes no difference to the validity of the said order.

12. It is then contended that under the proviso to sub-clause (2) of clause 27 of the Iron and Steel Control Order, 1956, the Controller has power to fix a maximum price, and not a price at which a specified stock may be sold. Now, sub-clause (1) of clause 27 refers to fixation of "prices" by notification, and not to fixation of "maximum prices". In spite of this, the Scrap Price Circular No. 5 of 1957 refers to "maximum prices", being fixed. Sub-clause (2) also refers to fixation of price, and not to fixation of maximum price. The proviso to sub-clause (2) refers even to the "prices" fixed under sub-clause (1) as "maximum prices", for it states "provided that the controller may direct that the maximum price fixed under sub-clause (1) or (2) shall not apply to any specified stock of scrap". This assumes that "prices" fixed under sub-clauses (1) and (2) are "maximum prices". Sub-clause (4) of clause 27 refers to all prices notified or fixed under clause 27 as "prices". This indicates that in the entire clause 27 of the Iron and Steel Control Order, 1956, the words "prices" and "maximum prices" are used synonymously and have the same meaning. The order of September i, 1958 is, therefore, not illegal even on this ground.

13. It is then contended that the special selling price fixed under the proviso to sub-clause (2) of clause 27 of the Iron and Steel Control Order, 1956, should be for a specified stock of scrap, and should not be the special selling price of a railway or Government Department or Corporation, In other words, the price should be attached to specified goods and not to a specified seller. It is contended that the effect of fixation of a special price for a sale by a railway, Government Department or Corporation would be that the buyer from the Railway or Government Department or Corporation who buys the material at Rs 607 per ton will have to sell the same material at a loss at the lower price fixed by the Scrap Price Circular No. 5 of 1957. The special selling price should, therefore, attach to the specified stocks of scrap, and not to a particular Government seller. This contention loses sight of the fact that under the proviso, the special selling price has to be fixed for a specified stock of scrap held by Railways or Government Departments and Corporations. The proviso clearly indicates that a special selling price has to be fixed for a stock held by a Government Department or Corporation, and not by any other person. The moment such goods pass to a buyer, they cease to be held by a Railway or Government Department or Corporation. It may be that the effect of such interpretation would be that the buyer from a Government Department or Corporation would have to sell at a loss. But this need not be so, for it is open to such buyer to approach the Iron and Steel Controller to classify the scrap bought by him under sub-clause (2) of clause 27 and to fix for such scrap such price as he considers appropriate. Such price so fixed may even provide for a margin of profit. In any event, whether sub-clause (2) of clause 27 is or is not available to the buyer from a Government Department or Corporation and whether the Iron and Steel Controller obliges such buyer or not, it must be borne in mind that in cases like the present one, the buyer has offered to buy the goods from the Government Department or Corporation with open eyes at a price much higher than the general

selling price fixed by the Scrap Price Circular No. 5 of 1957. The petitioners were not compelled to fill in a tender for these goods and have done so with full knowledge of the situation and their legal obligations. They have even in their letter to the Iron and Steel Controller of August 18, 1958 pointed out this position to him. If they filled in the tender with a mental reservation that they would be able to bring down the price to the general controlled price and have not succeeded in doing so, they have to bear the loss arising from their own act. There is no substance in the contention that the price must be attached to a specified stock without reference to who holds such stock or that it must attach to all subsequent sales of the said specified stock. This does not appear to me to be the intention of the proviso to Sub-clause (2). [Missing para]

14. The next contention of the petitioners in challenging the legality and validity of the order of September 4, 1958 is that as sub-clause (1) of clause 27 of the Iron and Steel Control Order, 1956, provides two conditions requisite for fixation of prices by the Iron and Steel Controller, namely, (a) approval of the Central Government and (b) publication by notification in the Gazette of India, and these conditions not having been satisfied in making the order of September 4, 1958, the said order is illegal and invalid. Now, a reading of clause 2'''' indicates that prices may be fixed by the Iron and Steel Controller in two ways. One of the ways which is prescribed by sub-clause (I) is that the fixation must be with approval of the Central Government, and secondly, the fixation must be published by a notification in the Gazette of India. Sub-clause (2) of clause 27 does not require either the approval of the Central Government or publication in the Gazette of India of the prices fixed thereunder. The prices fixed under sub-clause (1) being general prices, it is reasonable to expect that public should be given notice thereof by publication in the Gazette of the Government of India. Price3 fixed under sub-clause (2) are only either in respect of particular class of scrap or in respect of specified stock held by a railway or Government Department or Corporation, and no notice to the public appears to be necessary. In any case, sub clause (2) does not provide either for the approval of the Central Government or for publication in the Gazette of India. It is also significant to note that sub-section (4) of clause 27 contemplates two modes of fixation of prices, namely, prices notified and prices fixed-obviously otherwise than by notification. Sub-clause (4) states that no person shall sell or offer to sell or otherwise dispose of, and no person shall acquire, any scrap at prices in excess of those notified or fixed by the Controller under this clause. It is obvious that two modes of fixation are contemplated; one, by notification under sub-clause (1) and the other without a notification under sub-clause (2), and its proviso. It is further contended that prices under sub-clause (1) of clause 27 having been fixed with the approval of the Central Government and by publication in Government Gazette any amendment, variation or rescission of such price must also be with the approval of the Central Government and by publication in the Gazette of India. It is contended that the order of September 4, 1958 amends or varies or rescinds in any case with regard to

a specified stock the prices fixed under sub-clause (1) of clause 27. Reliance has been placed on section 21 of the General Clauses Act which provides as under:

21. Where, by any Central Act or Regulation, a power to issue notifications, orders, rules or bye-laws is conferred then that power includes a power exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued.

In my opinion, section 21 of the General Clauses Act has no application. What section 21 contemplates is such addition, amendment, variation or rescission of a notification such as Scrap Price Circular No 5 of 1957 which brings about a textual addition to or amendment, or variation in or rescission of such notification. It applies only if the said notification is thereafter to be read with and subject to such addition, variation, amendment and rescission. In this case, the order of September 4, 1958, merely excepts from the operation of the said notification a specified stock pursuant to power conferred on the Iron and Steel Controller under clause 27 of the Order. The Scrap Price Circular No. 5 of 1957 is not so amended, varied or rescinded that after the order of September 4, 195S, it is to be read subject to the amendment, variation or rescission. The Scrap Price Circular No. 5 of 1957 continues even after September 4, 1958, to be and to read the same as before. Section 21 of the General Clauses Act has, therefore, no application.