Gangaram Ratanlal Vs Simplex Mills Co. Ltd.

Court: Bombay High Court

Date of Decision: April 21, 1981

Acts Referred: Arbitration Act, 1940 â€" Section 2, 33
Civil Procedure Code, 1908 (CPC) â€" Section 9
Evidence Act, 1872 â€" Section 115

Citation: AIR 1982 Bom 72 : (1981) 83 BOMLR 307 : (1989) 177 ITR 176

Hon'ble Judges: Lentin, J

Bench: Single Bench

Advocate: V.V. Tulzapurkar, for the Appellant; D.H. Mehta, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. This in an utterly mala fide petition for setting aside an award.

2. New Textiles Ltd. Were the sole selling agent of the respondent. By certain contracts entered into between the petitioner and the respondent''s

selling agent, the petitioner agreed to purchase certain quantities of yarn of the total value of Rs. 2,40,761,77 subject to the terms and conditions

contained in the respondent''s printed contract form clause 21 in the respondent''s printed form provided for reference of disputes to arbitration in

the following words.-

All disputes and questions and whatsoever which shall arise between the parties hereto out of or in connection with this agreement or as to the

construction or application thereof or the respective rights and obligations of the parties hereunder or as to any clause or thing herein contained or

any account or valuation to be made hereunder or as to any other matter in any way relating to these presents shall be referred to arbitration in

accordance with rules of the Mill owners Association , Bombay, for the time being in force regulating arbitration with respect to piece goods.

However , no such arbitration clause was specifically incorporated in the contracts between the petitioner and the respondent ''s selling agent.

Disputes having arisen between the parties by reason of the petitioner''s failure to pay the balance amount of Rs. 2,11,022.63, the respondent

invoked the arbitration clause contained in its printed contract form and referred the disputes to the Mill owners Association , which in turn called

upon the petitioner to appoint its arbitrator. The petitioner failed to do so , with the result that under the rules of the Association the disputes stood

referred to the respondents arbitrator as sole arbitrator . At the hearing before the arbitrator on 21st Nov 1979 the respondent appeared through

its authorised representative ; the petitioner also appeared through its authorised representative , namely, its partner one BaghwanDas . The

minutes of the arbitrator of that day revealed that BaghwanDas admitted that the petitioners liability to the respondent in the amount of Rs.

2,11,022.63, and also stated before the arbitrator that the petitioner was not in a position to pay this amount and required time to make payment .

Thereupon, the meeting was adjourned by the arbitrator to enable the petitioner to approach the respondent for this purpose. The arbitrators

minutes of the next meeting fixed on 21st Feb., 1980 revealed that the petitioners partner Baghwandas did not appear, having informed the

arbitrator earlier that "" he was preoccupied elsewhere"" . At the third and final meeting held on 14th Mar., 1980 , the petitioner again appeared

before the arbitrator thro '' its partner Baghwandas . At this meeting Baghwandas informed the arbitrator that no useful purpose would be served

by the petitioner taking up the matter with the respondent and that the arbitrator should proceed with the reference . The minutes further reveal that

after hearing both the parties , the arbitrator concluded the hearing and both parties were informed that the award would be made in due course .

For the purpose of this petition , the correctness of the minutes of the meetings before the arbitrator was not disputed by Mr. Tulzapurkar, the

learned counsel appearing on behalf of the petitioner. Here it may also be stated that it is not even the petitioner case that Baghwandas was not the

petitioners authorised representative or had no authority to represent the petitioner before the arbitrator. Thereafter on 19th Mar., 1980 , the

arbitrator made his award against the petitioner in the sum of Rs. 2,11,022.63 . It is now to set aside this award that the petitioner has filed the

present petition.

3. The only ground of challenge to which the petitioners learned counsel Mr. Tulzapurkar confined himself in inviting me to set aside the award ,

was that the arbitrator had no jurisdiction to make the award as there was no arbitration agreement between the parties . To the contrary was

urged by Mr. Mehta , the learned counsel appearing on behalf of the respondent. Mr. Mehta further urged that by appearing unconditionally before

the arbitrator and admitting its liability before the arbitrator, the petitioner had acquiesced to the jurisdiction of the arbitrator and hence is now

estopped from challenging his jurisdiction .

4. I shall first deal with Mr. Mehta''s intention and get it out of the way . An arbitration agreement must be one as defined in S. 2(a) of the

arbitration Act and hence must be in writing . If that sign quo-non is absent , the result would be that the initial lack of jurisdiction on the part of the

arbitrator cannot be cured by oral acquiescence on the part of the party and any admission of liability by such party before the arbitrator can avail

the other side nothing as it is made before an authority , who , for want of an arbitration agreement as defined in S. 2(A) , initially has no

jurisdiction to act as arbitrator and is therefore incompetent to make an award . Lack of jurisdiction goes to the root of the matter; it is not merely

an irregularity which can be cured by oral acquiescence . In Kishindas Pursumal v. Menghraj Khaildas AIR 1925 Sind 144, it was held appearing

without protest before an arbitrator devoid of jurisdiction, did not amount to waiver of the right to question the arbitrator''s jurisdiction. In Khardah

Co. V. Raymon & Co., it was held by the Supreme Court that a party applying under S. 33 of the Arbitration Act is not estopped by its conduct

in appearing before the arbitrators and in taking part in the proceedings before them , from questioning the validity of the award; what confers

jurisdiction on the arbitrator to hear and decide a dispute is an arbitration agreement as defined in S. 2(a) and where there is no such agreement

there is an initial want of jurisdiction which cannot be cured by acquiescence. In the light thereof , if in the present matter the arbitrator had no

jurisdiction as urged by Mr. Tulzapurkar, oral acquiescence by the petitioner can avail the respondent nothing . If on the other hand I hold against

the petitioner on the aspect of jurisdiction , the question of the petitioner''s acquiescence does not arise.

5. This therefore brings me to the only ground of challenge urged by Mr. Tulzapurkar, viz that the arbitrator had no jurisdiction for want of an

arbitration agreement between the parties. Mr. Tulzapurkar urged that the arbitration clause appearing in the respondent''s printed from was not

directly germane to the transaction or purchase covered by the contracts of the respondent''s selling agent and hence could be incorporated in the

latter, not be general words, not only by clear and specific words to that effect, and that the same not having been done, the arbitrator had no

jurisdiction to enter upon the reference and the award is a nullity. Mr. Tulzapurkar elaborated that the only terms directly germane to the purchase

of the goods by the petitioner were those pertaining to price, payment, carriage and so forth and that the arbitration clause had nothing to do with

the same and hence could not be incorporated in the contracts of the respondent''s selling agent by general words. To the contrary was urged by

Mr. Mehta on behalf of the respondent.

6. In support of their rival contentions, both learned counsel relied on the general clause in the contracts between the respondents''s selling agent

and the petitioner, which reads as under:

We (viz. The petitioner) hereby agree to purchase from you within mentioned goods subject to the terms and conditions on the Company''s (viz.

The respondent''s Printed Form.

It is not in dispute that the respondent''s printed form contained the arbitration clause. It is not even the petitioner''s case that the petitioner was not

aware of that arbitration clause. Indisputably the arbitration clause has not been specifically set out in the contracts of the general clause indented

above, the arbitration clause in the respondents printed form was incorporated in the contracts of the respondent''s selling agent.

7. In support of his contentions. Mr. Tuizapurkar relied on the decision of the Calcutta High Court in The Abu Road Electricity and Industries Co.

Ltd. Vs. Industrial Gases Ltd., Not so mush for what was decided therein but for the purpose of the principles enumerated therein. It is

unnecessary to dilate at any length on that decision of the Calcutta High Court, because apart from the fact, that the facts in that case are different

from those in the present matter, the Calcutta High Court ultimately came to the finding that (at p. 488)-

..... strictly the question of incorporation in not a relevant matter for consideration in respect of the controversy is issue between the parties in this

proceeding.

Mr. Tulzapurkar however concentrated on certain observations reproduced in that judgment from certain English decisions. This concentration is

misplaced, for those observations, based on the peculiar facts of those cases, can possibly be of no assistance in the present petitioner. Those

observations are to the effect that, (a) incorporation by general words of an arbitration clause in the Bill of Lading would be wholly unintelligible

and inconsistent with the terms of the earlier contract, viz, the charter party, and that in the facts of those causes, the nature of the arbitration clause

in the charter party was such that it could not be imported into a contract relating to a different subject matter (b) if the arbitration clause was

imported bodily into the Bill of Landing, it would deal with no disputes arising under the Bill of Lading and would he vague, uncertain and

insufficient to oust the jurisdiction of the Courts; (c) if the arbitration clause in the original contract (viz, the charter party) was written into the

subsequent contract (viz. The Bill of Lading), it had to be intelligible and consistent with the terms of the subsequent contract: (d) disputes

pertaining to the conditions of the charter party did not pertain to disputes arising under the Bill of Lading inasmuch as the arbitration clause

governed disputes between the parties to and out of the conditions of the charter party and not to dispute''s arising out of the Bill of Lading: and (e)

if the dispute was exclusively under the Bill of Lading and not under the charter party, the arbitration clause would not apply. It was therefore in the

context of the facts and circumstances of those cases that it was held that the arbitration clause in the charter party was not directly germane to the

subject-matter of the Bill of Landing and hence such a clause could not be incorporated in the Bill of Lading merely by general words. Thus, the

sum and substances of those observations is that on the facts of hose cases the arbitration clause in the character party not being directly germane

to the subject-matter of the Bill of Lading, the arbitration clause could not be incorporated by general words in the Bill of Lading but only by words

which were appropriate and explicit, leaving no scope for generalisation, speculation or uncertainty. The principles called out by the Calcutta High

Court from the observations in the English decisions and other cases (including Dwarkadas and Co. Vs. Daluram Goganmull, referred to hereafter

at length in this judgment) are that (I) a clause in an earlier contract and he imported into a subsequent contract if the language is appropriate,

unambiguous and clear, (ii) such clause in the earlier contract can be written in bodily into the later contract if there is no inconsistency of vagueness

or uncertainity, (iii) a clause in the earlier contract which is germane to the subject matter of the later contract may be incorporated therein by

general words though some degree of manipulation may be involved; and (iv) in respect of a clause in the earlier agreement which is not directly

germane to the subject-matter of the later agreement. It is not permissible to construe general words as incorporating such clause therein when the

clause in terms does not relate in transactions of such later contract, such a clause can only be incorporated in the later contract by clear words

either in the earlier or subsequent contract.

8.Applying the very principles enumerated by the Calcutta High Court to the facts of the present matter it is difficult to appreciate why the

arbitration clause appearing in the respondent''s printed form. Is not directly germane to the subject matter of the contracts between the petitioner

and the respondent''s selling agent. The arbitration clause in the terms and conditions in the respondent''s printed form. Would certainly be one of

the terms and conditions on which the petitioner agreed to purchase the goods under the contracts of the respondent''s selling agent. There is not

inconsistency, vagueness or uncertainty, as is manifest from the general clause in the contracts of the respondent''s selling agent, which in terms

refers to the terms and conditions contained in the respondent''s printed form, the arbitration clause being one of them On the contrary, far from

being of assistance to the petitioner, the principles enumerated by the Calcutta High Court go against the petitioner, as is also borne out by the

cases hereafter.

9. What happens where. A sells goods to B by a contract containing an arbitration clause and thereafter B enters into a contract with C to sell the

same goods to A on the same terms and conditions as in the contract between A and B7 Can it be said that the arbitration clause in the earlier

contract was incorporated in the later contract or not? In AIR 1931 289 (Privy Council) the Privy Council answered the question in the affirmative.

The facts in that case were that on 25th Apr., 1918 a written agreement was entered into between the appellants and certain other persons

whereby the latter were to act as Dubashes (Dubashes an interpreter Ed) to the appellants. The agreement contained an arbitration clause. Under

that agreement several contracts were made between the appellants and the dubashes including 4 contracts in Aug., 1918, each containing the

words-

Conditions as per agreement with you (i.e. the appellants) dated 25th Apr., 1918 Observing that each of the 4 contracts-

.....by direct reference to the agreement of Apr., 23 1918, embodied the arbitration clause .....

it was held by the Privy Council that the combined effect of the agreement of 25th Apr., 1918 and the 4 contracts a provision for arbitration in

terms of the arbitration clause contained in the agreement of 25th April. 1918. In (Haji) Vali Mohomed Ayoob Vs. Shamdeo Gopiram, In respect

of a contract of sale, the entry in the sowda book of the vendors signed by the purchasers, recited that the vendors had purchased the goods from

a certain importing firm and that all the terms in the present transaction were to be according to the contract between the vendors and the importing

firm. It was held by the Division Bench if the Calcutta High Court that the terms of the contract between the vendors and the importing firm. So far

as they could and did apply, were made applicable by the above to the present transaction and accordingly an arbitration clause to be found in the

first contract must be taken to have been imported into the second contract. The decision in Haji Vali Mahomed''s case was approved by the Pull

Bench of the Calcutta High Court in Dwarkadas v. Daluram. AIR (95) Cal 10 . In that case, a entered into a contract with B for sale of certain

cloth. It was an express term in the contract that it was subject to all the terms and conditions of contract to A by C (viz., the importers of the

cloth). The arbitration clause in the contract between A and C referred to arbitration of disputes which arose ""in respect of the goods or in

reference to any of the conditions thereof"" It was held that the arbitration clause in the earlier contract between a and c was in fact framed in the

widest terms and if the clause were to be written in the subsequent contract between A and B, it would be wholly intelligible and consistent with the

terms of the subsequent contract and would on the face it apply to all disputed under the subsequent contracts, that being so, the arbitration clause

found in the contract between A and C was imported into the subsequent contract between A and B. It was observed by the Full Bench of the

Calcutta High Court that the terms of a document can be incorporated by reference when they are not inconsistent with the express terms of the

incorporating document and are not repugnant to the transaction which that document represents. It was further observed that the general rule of

construction is that a document should be construed according to the plain meaning of the words used; but if the literal construction leads to

absurdity, repugnancy or incosistencu, then the general rule should be modified to avoid such a result and the incorporation of such a clause is

excluded in the case of inapplicable or insensible conditions. It was further observed that an arbitration clause in one contract can be imported into

a subsequent contract provided that when so imported, it is not inconsistent with the terms of the subsequent contract.

10. These decisions were brought by me to the pointed attention of Mr. Tulzapurkar. With his habitual discretion, be had no comment to offer and

no doubt rightly so. These decisions including the decision of Full Bench of the Calcutta High Court in Dalurm''s case AIR 1922 Cal 10 which has

also been referred to in The Abu Road Electricity and Industries Co. Ltd. Vs. Industrial Gases Ltd., are a complete answer to the petitioner''s

challenge to the award and put the same beyond the pale of controversy. To uphold Mr. Tulzapurkar''s contentions to the contrary, would be to

do violence to the plain reading of the general clause, contrary to all can our of construction.

11. In the result, the petition must stand dismissed with costs. The facts are gross and the challenge to the to the award without a vestige of

tenability. If I do not meet the petitioner in compensatory costs. It is a temptation I resist with some difficulty.

12. Petition dismissed.