FOOD CORPORATION OF INDIA

v.

SREEKANTH TRANSPORT

MAY 14, 1999

[V.N. KHARE AND UMESH C. BANERJEE, JJ.]

Arbitration Act 1940: Section 20—Excepted clause—Government contract—Positive abandonment of the right of adjudication of the excepted matter through its officer by dominus litus—Reference of the subject matter of excepted clause to arbitrator—Held : in normal circumstances. Excepted clause is not dealt with—But in view of express abandonment of right such a course is correct.

The respondent filed a suit under section 20 of the Arbitration Act. The Trial Court referred the three principal claims of the suit for arbitration but refused to refer the fourth claim, as the subject matter of the same was covered under clause 12 [excepted matter] of the agreement. During pendency of the appeal in High Court against the trial court's order, the appellant initiated civil proceeding by filing a suit in respect of the subject matter of the fourth claim of the respondent's suit. The respondent objected to it on the ground that since dominus litus has taken recourse to adjudicatory process of civil court rather than getting the matter decided by its own Senior Regional Manager, the issue covering the appellant's suit which has direct nexus with the three issues of the respondent's suit, also be referred to arbitrator. High Court referred all the issues in dispute in respondent's suit, to the arbitrator holding that the suit of appellant had intrinsic connection with the fourth claim of the respondent's suit. Hence this appeal.

Dismissing the appeal, this Court

HELD : 1.1. In normal circumstances the issue as regards the excepted matters is not dealt with by this court. By reason of the factual situation in the matter, the High Court was not left with any option but to direct such a course of action more so by reason of an express abandonment of right. In the normal course of events if the particular clause was not available in the contract between the parties, the disputes in its entirety by reason of the scope and purview of the Arbitrator clause, could have been referred to arbitration. But if it is by reason of the factum of incorporation of clause

12 and the subsequent abandonment thereof by reason of a decision to have the claim covered under clause 12 to be adjudicated by a forum different from that of the Senior Regional Manager, this Court concurs with the High Court that the fourth dispute being the subject matter of a civil suit initiated by Food Corporation of India also be referred to arbitration. [706-F-H]

1.2. Also there appears to be a positive relinquishment or abandonment of a right so far as the adjudication of the excepted matters are concerned by the appellant Corporation since the Corporation itself wanted to have it adjudicated by a Civil Court. [704-H; 705-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. (s) 1582-83 of 1994.

From the Judgment and Order dated 4.10.93 of the Madras High Court in O.S. Nos. 39-40 of 1990.

Y. Prabhakar Rao for the Appellant.

Shambhu Prasad Singh, M/s Arputham and Aruna & Co., for the Respondent.

The Judgment of the Court was delivered by

BANERJEE, J. These appeals by the grant of Special Leave pertains to the effect of the usual 'excepted clause' *vis-a-vis* the arbitration clause in a Government contract. While it is true and as has been contended, that the authorisation of the arbitrators to arbitrate, flows from the agreement but the High Court in the judgment impugned thought it fit to direct adjudication of 'excepted matters' in the agreement itself by the arbitrators and hence these appeals before this Court.

At the outset, it is pertinent to note that in the usual Governmental contracts, the reference to which would be made immediately hereafter, there is exclusion of some matters from the purview of arbitration and a senior officer of the Department usually is given the authority and power to adjudicate the same. The clause itself records that the decision of the senior officer, being the adjudicator, shall be final and binding between the parties - this is what popularly known as 'excepted matters' in a Government or Governmental agencies' contract.

'Excepted matters' obviously, as the parties agreed, do not require any

further adjudication since the agreement itself provides a named adjudicator - concurrence to the same obviously is presumed by reason of the unequivocal acceptance of the terms of the contract by the parties and this is where the courts have found out lacking in its jurisdiction to entertain an application for reference to arbitration as regards the disputes arising therefrom and it has been the consistent view that in the event the claims arising within the ambit of excepted matters, question of assumption of jurisdiction of any arbitrator either with or without the intervention of the court would not arise; The parties themselves have decided to have the same adjudicated by a particular officer in regard to these matters: what are these exceptions however are questions of fact and usually mentioned in the contract documents and forms part of the agreement as such there is no ambiguity in the matter of adjudication of these specialised matters and termed in the agreement as the excepted matters.

As noticed above, the High Court, however, has in fact, referred matters which are in terms of the agreement within the excepted matters to the arbitrator along with the other arbitrable disputes. It would be convenient to note the Arbitration clause at this juncture.

> "All disputes and differences arising out of in any way touching or concerning this agreement whatsoever (except as to any matter the decision of which is expressly provided for in the contract) shall be referred to the sole arbitration of a person appointed by the Managing Director of the FCI. It will be no objection to any such appointment that the person appointed is or was an employee of the Corporation that he had to deal with the matters to which the contract relates and that in the course of his duties as such employee of the corporation he had expressed views on all or any of the matters in dispute of difference. The Board of such Arbitration shall be final and binding on the parties of this contract. It is a term of this contract that in the event of such arbitration to whom the matter is originally referred being transferred or vacating his office or being unable to act for reasons the Manager/Managing Director of the FCI at the time of such transfer, vacation of office or inability to act shall appoint another person as arbitrator. Such persons shall be entitled to proceed with reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by the Managing Director as aforesaid shall act as Arbitrator and if for any reasons that it is not possible the matter is not be

A referred to Arbitration at all.

It is term of a contract that the party invoking arbitration under this clause shall specify the disputes and/or difference to be referred to arbitration together with the amount claimed in respect of each such dispute/difference, at the time of making a request to the Managing B Director for appointment of an arbitrator.

Provided further that any demand for arbitration in respect of any claims of the contractors under the contract shall be in writing and are made within one year of the date of termination of completion (or expiry of the period) of the contractor from the date of termination of C the contract, if it is terminated earlier and where such demand is not made within that period, the claims, of the contractors shall be discharged and released of all liabilities under the contract in respect of these claims. It is further provided that the Arbitrator may, from time to time, with the consent of the parties enlarge the time for D making and publishing the award.

In all cases where the claim in dispute is Rs, 25,000 and above the arbitrator shall record the reasons for his award.

Subject as aforesaid the Arbitration Act, 1940 shall apply to the Arbitration proceedings under this clause. The costs of and in E connection with Arbitration shall be in the discretion of the arbitrator who may make a suitable provision for the same in his award".

Turning now on to the contextual facts, it appears that by reason of certain disputes between the parties the Respondent herein instituted a suit under Section 20 of the Arbitration Act for the purposes of filing the F Arbitration Agreement in Court being CSNo. 304 of 1982. Incidentally, be it noted that in the plaint filed in the suit the Respondent herein has included four several claims of which the fourth claim pertains to the excepted matters in terms of clause XII of the agreement. The claims as lodged in the plaint are as below:

G (a) "Whether the Plaintiff's are liable to pay demurrage or whether the defendants are liable to pay the demurrage accrued due to the omissions and commissions of the officials of the defendants and to the abnormal conditions prevailing at the Railway goods sheds?

H (b) Whether the plaintiffs are liable to pay costs of the water obtained

from outside by the defendants? A

(c) Whether the defendants are entitled to recover amounts allegedly due in respect of the contract with Express Clearing Agency or any other contract from the plaintiff from out of the amounts due in this present contract?

B

(d) Whether the defendants are not liable to pay to the plaintiffs a sum of Rs.70,000 in respect of the transport of Rice from Madras to Ronigunta from June to August 1979?"

It is this inclusion of Claim (d) which stands objected by the Appellant herein and the learned Trial Judge by reason of the same being covered under C clause 12 of the agreement declined to include the same. Since the issue pertains to such an exclusion it is convenient also to note Clause 12 of the agreement, Clause 12 reads as below:

> "The decisions of the Senior Regional Manager regarding such failure of the contractors and their liability for the losses etc. suffered by the D Corporation shall be final and binding on the contractors."

The Factual backdrop further depict that after the order of the Learned Trial Judge the matters were taken up to the appellate court wherein on an application for stay the respondent herein has obtained an order of stay. Incidentally, during the pendency of Section 20 matter, there was also an E application under Section 34 for stay of the suit - the application under Section 34 however was dismissed though the suit under Section 20 was not ordered in its entirety as has been pleaded and prayed before the Court. Be that as it may when the matter came up before the appellate court, the appellate court passed an interlocutory order of injunction directing stay of F the operation of the order. It is only thereafter however, as the factual backdrop argued before this Court that the Food Corporation of India thought it fit to institute a suit for recovery of loss damage and expenses suffered and incurred by the Appellant herein in paying the demurrage, wharfage and expenses for forfeiture of wagon on account of the negligence, lapse and unworkmanlike performance of the Respondent herein in performing their duties and G obligations under the contract. In paragraph 11 of the plaint, the Plaintiff prayed before the Court the following:

> "(a) directing the defendants jointly and severally to pay the plaintiff the sum of Rs.1,89,775.00 (Rupees One lakh eighty nine thousand seven hundred and seventy five only) together with interest at H

A 18 per cent per annum on the said sum from the date of plaint till date of realisation;

(b) directing the defendants to pay the costs of the suit; and

(c) pass such further or other relief as this Hon'ble Court may deem fit and proper and render justice.

B

Significantly enough in paragraph 8 of the Plaint, the appellant Food Corporation of India being the Plaintiff therein stated as below:

"8. The Senior Regional Manager, Food Corporation of India, Tamil Nadu Region, as the Head of the Offices of the Corporation in
C the State of Tamil Nadu and as party to the tender contract is entitled to and competent to file the suit for the recovery of the sum due to the Corporation, as set out in this Plaint. The District Manager, Madras District of the Food Corporation of India is also a Principal Officer of the Corporation and has been not only closely associated with the contract and the work covered thereon but also is the authority who
D has been effecting payments, supervising and controlling the actual execution of the work by the defendant contractor. The District Manager and his men have been duly authorised for the said purpose and has been authorised to institute the proceedings and sign and execute the pleadings and the Vakalath for and on behalf of the Senior
E Regional Manager, Food Corporation of India. This is the position under the provisions of Clause III of the Contract also.

But what about the rights preserved under clause 12, we searched in vain, in that regard: The plaint is delightfully silent on that score excepting the averment as contained in paragraph 8 as noticed above. The Food
F Corporation therefore, as a matter of fact desired an adjudication of their claim to the extent of Rs.1,89,775 together with interest at the rate of 18 per cent per annum from the Civil Court rather than relying on to the adjudicatory process available in the contract itself through their own Senior Regional Manager. The agreement as noticed above expressly provide that the
G adjudication shall be effected by the Senior Regional Manager and by no other authority and the decision, it has been recorded in the agreement, of the Senior Regional Manager, would be final and binding on the parties. There is therefore, a positive act on the part of the Food Corporation of India not to put any reliance on to that particular clause of the agreement. There is, as a matter of fact, thus on the state of facts, as above, appears to be a positive
H relinquishment or abandonment of a right so far as the adjudication of the

excepted matters are concerned by the Appellant Corporation since the Corporation itself wanted to have it adjudicated by a Civil Court.

Learned Advocate appearing in support of these appeals very strongly contended that as a matter of fact, the Corporation has had no other alternative but to initiate a civil suit by reason of the order of injunction and in any event it has been contended that initiation of a civil suit in the Civil Court does not and cannot be identified to be acceptance of the Arbitration Agreement in the matter - whether it does or it does not amount to acceptation of Arbitration or not, we are not expressing any opinion in that regard but the fact remains that in fact, there was an abandonment of a right of adjudication by one of the Corporation's officer so far as the wharfage claim is concerned and it is on this perspective that the Appellate Bench of the High Court was pleased to direct that all the issues in dispute in suit No.C.S. 304 of 1982 shall be referred to L.R. Kohli, Arbitrator. The High Court as a matter of fact came to a conclusion that the dispute in Civil Suit No.368 of 1986 has intrinsic connection with the fourth claim of the Respondent herein in Suit No.304 of 1982. The Appellate Bench observed:

> "Since three of the four times of the disputes between the parties in C.S.No.304 of 1982 have been referred to arbitration, it is indeed improper to exclude one item in respect of damage connected with the other matter which is before the Arbitrator for Court's adjudication. There can be in a situation like this conflict in the pronouncements all connected facts and the Arbitrator may take one view and the court another depending upon evidence brought before the court and the Arbitrator respectively by the parties. There can be no finality to the adjudication in this behalf until all proceedings in the Court independent of the proceedings under the Arbitration act are concluded. In such a situation just and proper order, in our opinion, is that the dispute in C.S.No.368 of 1986 which is nothing but a subject connected with CS No.304 of 1986 shall be included in the reference to the Arbitrator and is accordingly referred to the same Arbitrator before whom the reference is pending adjudication."

The facts of the matter in issue is thus singularly singular since the Corporation being a party dominant feels it expedient to institute a civil suit without taking recourse to the provisions of the agreement for adjudication of its claims. The other party namely the contractor has already filed a suit in terms of Section 20 and the suit has been disposed of by an order of

A reference by the Court in terms of provisions of Section 20 in so far as three principal disputes are concerned. The other claim concerning wharfage stands negated by the learned Trial Judge and in our view very rightly by reason of clause 12 of the agreement - here comes thereafter a situation which is rather significant and as noted above singularly singular: the Food Corporation itself gives a go by to its right of adjudication through the Senior Regional Manager as regards the wharfage claim and initiates proceeding in the Civil Court. It is this initiation which has been objected to by the contractor on the plea that since the civil courts' adjudicatory process has been taken recourse to by the dominant litus, the court ought to direct to sub-serve the ends of justice in a manner so that the issue covering the Corporation's suit be also referred to arbitration since that has direct nexus with the other three issues as already been directed to be referred to arbitration. The learned advocate for the contractor strongly contended that in the event the same is not ordered, as has been directed by the High Court then and in that event two sets of evidence would be required covering the identical field and as such the Appellate Bench thought it fit to refer the disputes in Corporation's suit as well to arbitration so to minimise expenses and to observe and follow the requirement of justice in the matter of expeditious disposal of the entire matter in dispute between the parties

In the normal circumstances, course of events as they are, this court would not have dealt with the matters as is being presently dealt with but as has been pointed out by the High Court itself that the matters have been dealt with upon consideration of the cause of justice and to sub-serve the need of justice, we also do deem it fit and proper that by reason of the factual situation in the matter, the High Court was not left with any option but to direct such a course of action more so by reason of an express 'abandonment of right' as noticed above. In the normal course of events if this particular clause 12 was not available in the contract between the parties the disputes in its entirety by reason of the scope and purview of the Arbitration Clause, could have been referred to arbitration and there would not have been any necessity for delving into a matter in the manner as we have, herein before, but it is by reason of the factum of incorporation of clause 12 and the subsequent abandonment thereof by reason of a decision to have the claim covered under clause 12 to be adjudicated by a forum different from that of the Senior Regional Manager, we also have no option left but to record our concurrence with the finding of the High Court that the fourth dispute being the subject matter of a civil suit initiated by the Food Corporation of India be also referred to arbitration. Be it noted that this order is passed in the

peculiar facts and circumstances of the facts in issue and the issue as regards the excepted matters have not been delved into in detail excepting however as above. A

In that view of the matter, we do deem it fit to record our concurrence with the findings of the High Court more so in the peculiar facts and circumstances centering round these Appeals. The appeals therefore, fail and are dismissed. No order as to cost. B

K.K.T. Appeals dismissed.