

LARSEN AND TOUBRO LTD.

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v.

FERTILIZER AND CHEMICALS TRAVANCORE LTD.

NOVEMBER 12, 2007

[DR. ARIJIT PASAYAT AND LOKESHWAR
SINGH PANTA, JJ.]

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Arbitration—Contract entered between Appellant and Respondent—Contained two different set of conditions viz. ‘Standard Conditions’ and ‘Special Conditions’—Dispute between Appellant and Respondent—Arbitration proceedings sought to be initiated—Disagreement between parties over the governing provisions—Held: Arbitration proceedings to be governed by the ‘Standard Conditions’ and not ‘Special Conditions’ as contended by Appellant—‘Special Conditions’ themselves showed that the ‘Standard Conditions’ contained provisions for arbitration.

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Appellant and Respondent had entered into a contract vide a purchase order. The purchase order contained two different set of terms and conditions viz. ‘Standard Conditions’ and ‘Special Conditions’.

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Disputes having arisen between the parties, Appellant invoked the ‘Special Conditions’ and suggested three names to Respondent for appointment of an independent sole arbitrator. Respondent took the stand that in view of Article 26 of the ‘Standard Conditions’, only the Managing Director of Respondent could be appointed as a named arbitrator and accordingly declined to appoint a sole independent arbitrator.

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In appeals to this Court it was contended by the Appellants that the Managing Director of Respondent cannot be treated as an independent arbitrator and arbitration proceedings between the parties was to be governed by the ‘Special Conditions’ and not the ‘Standard Conditions’.

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A Dismissing the appeals, the Court

HELD: 1.1. The stand of the Appellant that the special conditions of the work order superseded the standard terms and conditions, is not correct. The apprehension that named arbitrator may not act fairly is without any foundation.

B [Paras 8 and 11] [1090-E; 1092-C]

1.2. The special conditions themselves show that articles 25 and 26 of the Standard terms and conditions contained provisions for arbitration. [Para 12] [1092-F]

C 1.3. By Article 16 of the special terms and conditions of purchase there was an amendment to Article 25 of the Standard terms and conditions. Similar was the amendment to Article 26 of the Standard terms and Conditions for erection and commissioning in Article 16 of the Special Conditions of work attached to the work order. The amendments incorporated by the Special conditions only provide that the provisions of the relevant Arbitration Act and the rules made thereunder and any statutory modifications thereof for the time being in force will be applicable and the venue of arbitration and language of the proceedings.

E [Paras 11 and 12] [1092-C, D, E, F, G]

Secretary to Government, Transport Deptt., Madras v. Munuswamy Mudliar and Anr., [1988] Suppl. SCC 651, referred to.

F CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5159 of 2007.

From the final Judgment and Order dated 18.12.1999 of the High Court of Kerala at Ernakulam in A.R. No. 29 of 1999.

WITH

G C.A. No. 5160 of 2007

V.A. Mohta, Nilkanta Nayak, Shweta Bharti, Aditi Mohan, Neelam and Niranjana Singh for the Appellant.

H C.N. Sree Kumar for the Respondent.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted.

2. Challenge in these appeals is to the order passed by the learned Single Judge of the Kerala High Court disposing of arbitration request filed before him.

3. Background facts in a nutshell are as follows:-

Appellant and the respondent entered into a contract vide purchase order no.3020/02-2701/016/1018 dated 7.1.1995. Alleging that in breach of the terms and conditions of the purchase order certain amounts were withheld, the appellant invoked the arbitration agreement purportedly in terms of new Article 26 of the Special Conditions and suggested three names for appointment of an independent sole arbitrator and called upon the respondent to name one out of the three names. The respondent took the stand that it is only the Managing Director of the respondent who can be appointed as a named arbitrator as per Article 26 of the Standard Conditions and refused to appoint a sole independent arbitrator. The High Court of Kerala was moved seeking appointment of an arbitrator by Arbitration Request 29/99. Learned Single Judge declined the arbitration request on the ground that terms and conditions of the purchase order provides for arbitration by the Chairman and Managing Director of the respondent. A writ petition was filed under Article 226 of the Constitution of India, 1950 (in short the 'Constitution'). During pendency of the said writ petition this Court in CA Nos. 3777, 4168 and 4169 of 2003 held that the order passed under Section 11 of the Arbitration and Conciliation Act, 1996 (in short the 'Act') is a judicial order and writ petition challenging the said order under Article 226 of the Constitution is not maintainable. Therefore, this appeal has been filed.

4. In support of the appeals, learned counsel for the appellant submitted that the provision contained in Article 26 of the Standard Conditions is not the actual provision for arbitration. The same is contained in the special terms and conditions attached to the purchase order and the work order respectively. The purchase order and the work order contained special conditions, standard terms and conditions. By Article 16 of the Special terms and Conditions of the purchase, there is

- A amendment to the article 25 of the standard conditions. There is similar amendment to article 26 of the standard terms so far as it related to commissioning. The provisions contained in the standard conditions in both the cases, it was submitted by learned counsel for the appellant, is not actual provision for arbitration. The general condition stated that all
- B disputes and differences are required to be referred to the Chairman and Managing Director of the respondent-company for his decision and it will be binding on the parties. It was further contended that the provisions contained in the special conditions by themselves do not have any provision for arbitration. It does not have any clause that disputes and
- C difference shall be settled by arbitration. In both the cases, the special conditions specifically state that it is by way of amendment of general condition only and not in supersession of that provision. The Chairman and the Managing Director of the respondent-company cannot be treated as independent person to be appointed as arbitrator. This was essentially the stand which did not find acceptance. It is submitted by learned counsel
- D for the appellant that certain changes were suggested by the respondent.

5. Learned counsel for the respondent on the other hand submitted that the High Court view is unexceptionable.

- E 6. At this juncture it would be necessary to take note of the few conditions :

Clause 16 of the Work Order reads as follows:-

"16. Work Order Conditions:

- F The order shall be governed by the above conditions as well as by the conditions stipulated in Attachment I, II and III of this Work Order, except the following:

- G The order shall be governed by the present special conditions of work (W.O. Attachment III) as well as by the conditions stipulated in Attachment I, and II of this Work Order, except the following:

Spec. No.3020/CS/04: Standard Terms and Conditions of Erection & Commissioning.

- H Art. 4.0.0 Taxes, Duties and Levies (comment)

Taxes shall be as per Article 4.0.0. However, at present conditions; tax on this Work Order is not applicable. A

Art. 13.0.0 Termination (comment)

FACT can terminate the Work Order without giving any reason provided that reasonable cost for termination and actual out-of-pocket expenses will be reimbursed. B

Art. 15.0.0 Changes (Amendment)

FACT shall issue amendment orders which provide for changes in the scope of work required by FACT under the Work Order, and for equitable adjustment in the price and delivery/completion time, if any, hereunder. C

Art. 21.0.0 Tests on Completion & Taking Over (New Article Added).

Art. 21.5.0 (New Article) D

The Primary Reformer Package under the scope of this Work Order shall be deemed to be taken over by FACT immediately after satisfactory pre-commissioning is over within 10 days of Contractor's notice to Owner for commencement of commissioning after pre-commissioning, whichever is earlier. In case taking over is delayed due to no fault of Contractor, after the notice given by Contractor in this regard about the Completion, the entire Primary Reformer Package is deemed to be taken over by FACT. E

Art. 24.0.0 Indemnification F

Secondary liability such as indemnification for loss caused by stoppage of plant of like will be excluded from Contractor's liabilities under the Work Order.

Art. 26.0.0 Applicable Law and Settlement of Disputes (amendment) G

The provisions of the Indian Arbitration Act, 1940 and the rules there under, any statutory, modifications there for the time being in force will be applied. H

A The venue for the arbitration shall be Cochin, and the language of the proceedings shall be the English language.

During the arbitration proceedings, both parties shall continue to discharge their obligations under the Work Order.”

B 7. There was addition and not substitution of condition. Without amendment there was arbitration clause and if there was no amendment the only substitution, then that there was no arbitration clause. In the arbitration request in the statement of facts it has been clearly stated that article 26 of the standard terms and conditions of purchase form part of the work order. The same read as follows:

C “Article 26: Work Order shall be subject to and shall in all respects be governed by Indian law. Any dispute or difference connected with or arising out of WORK ORDER which cannot be settled by mutual agreement of the parties shall be referred to the Chairman & Managing Director of FACT, and his decision will be binding on the parties. Any legal proceeding relating to this WORK ORDER shall be limited to Courts of law under the jurisdiction of the Kerala High Court at Ernakulam District, Kerala State, India.”

D 8. The stand of the learned counsel for the appellant that the special conditions of the work order superseded the standard terms and conditions, is not correct. The mere fact that the arbitrator was named does not render the arbitration proceedings invalid.

E 9. In *Secretary to Government, Transport Dept., Madras v. Munuswamy Mudliar and Anr.*, [1988] Supl. SCC 651 it was noted as follow:

F “7. Pursuant to this the Superintending Engineer of that Circle, at the relevant time, was previously appointed as arbitrator. There was succession to that office by another incumbent and the succeeding Superintending Engineer wanted to continue the arbitration proceedings but before that an application was made under Section 5 of the Arbitration Act, 1940 (hereinafter called ‘the Act’) for removal of the arbitrator, before the learned Judge of the City Civil Court, Madras.”

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10. Again in paras 11 to 13 it was noted as follows:

“11. This is a case of removal of a named arbitrator under Section 5 of the Act which gives jurisdiction to the court to revoke the authority of the arbitrator. When the parties entered into the contract, the parties knew the terms of the contract including arbitration clause. The parties knew the scheme and the fact that the Chief Engineer is superior and the Superintending Engineer is subordinate to the Chief Engineer of the particular Circle. In spite of that the parties agreed and entered into arbitration and indeed submitted to the jurisdiction of the Superintending Engineer at that time to begin with, who, however, could not complete the arbitration because he was transferred and succeeded by a successor. In those circumstances on the facts stated no bias can reasonably be apprehended and made a ground for removal of a named arbitrator. In our opinion this cannot be, at all, a good or valid legal ground. Unless there is allegation against the named arbitrator either against his honesty or capacity or *mala fide* or interest in the subject matter or reasonable apprehension of the bias, a named and agreed arbitrator cannot and should not be removed in exercise of a discretion vested in the Court under Section 5 of the Act.

12. Reasonable apprehension of bias in the mind of a reasonable man can be a ground for removal of the arbitrator. A predisposition to decide for or against one party, without proper regard to the true merits of the dispute is bias. There must be reasonable apprehension of that predisposition. The reasonable apprehension must be based on cogent materials. See the observations of Mustill and Boyd, *Commercial Arbitration*, 1982 edn., page 214. Halsbury's *Laws of England*, 4th edn., Volume 2, para 551, page 282 describe that the test for bias is whether a reasonable intelligent man, fully apprised of all the circumstances, would feel a serious apprehension of bias.

13. This Court in *International Authority of India v. K. D. Bali*, [1988] 2 SCC 360 held that there must be reasonable evidence to satisfy that there was a real likelihood of bias. Vague suspicions of whimsical, capricious and unreasonable people should not be made the standard to regulate normal human conduct. In this

A country in numerous contracts with the government, clauses
requiring the Superintending Engineer or some official of the
Government to be the arbitrator are there. It cannot be said that
the Superintending Engineer, as such cannot be entrusted with the
work of arbitration and that an apprehension, simpliciter in the
mind of the contractor without any tangible ground, would be a
justification for removal. No other ground for the alleged
apprehension was indicated in the pleadings before the learned
Judge or the decision of the learned Judge. There was, in our
opinion, no ground for removal of the arbitrator. Mere imagination
of a ground cannot be an excuse for apprehending bias in the mind
of the chosen arbitrator.”

11. The apprehension that named arbitrator may not act fairly is
without any foundation. The High Court has rightly held that by article
16 of the special terms and conditions of purchase there was an
amendment to article 25 which reads as follows:-

“The provisions of the Indian Arbitration Act, 1940, and the rules
thereunder, any statutory modifications thereof of the time being
in force will be applied. The venue of the arbitration shall be
Cochin, and the language of the proceedings shall be the English
Language. During the arbitration proceedings, both parties shall
continue to discharge their obligations under the Purchase Order.”

12. Similar was the amendment to Article 26 of the Standard terms
and Conditions for erection and commissioning in Article 16 of the Special
Conditions of work attached to the work order. The special conditions
themselves show that articles 25 and 26 contained provisions for
arbitration. The amendments incorporated by the Special conditions only
provide that the provisions of the relevant Arbitration Act and the rules
made thereunder and any statutory modifications thereof for the time being
in force will be applicable and the venue of arbitration and language of
the proceedings.

13. The appeals are sans merit, deserve dismissal, which we direct.

B.B.B.

Appeals dismissed.