APPELLATE CIVIL

Before Bhandari, C.J., and Falshaw, J.

THE UNION OF INDIA,—*Appellant*

versus

MESSRS ALOPI PARSHAD AND SONS, LTD.—*Respondent*

Letters Patent Appeal No. 31 of 1953

1953

Dec. 16th

Arbitration agreement—Dispute arising out of—Claim by the contractor based on the failure of the Government to revise and increase the rates—Provision made in the contract for such revision and increase—Supplies made in anticipation of increase in rates—Rates not revised—Claim for compensation on the basis of fair revision of rates—Whether dispute arising out of the contract.

The contractor was an agent for the Government for purchase and supply of ghee for which he was paid commission on certain rates. When the war started new rates on sliding scale were fixed but after a year the contractor pressed for revision of and increase in the rates. The Government, however, did not revise the rates. The contractor went on making supplies alleging that he had been assured by various officers that the rates would be increased. After the termination of the contract the disputes between the parties were referred to arbitration. One of the claims was based on the ground that from 1942 onwards he was pressing for an increase in the rates fixed by the sliding scale, and went on supplying ghee under the contract as a result of assurances from various officers that the rates would be revised in due course. He claimed that if the rates had been fairly revised, he would have been entitled to receive an extra sum of Rs. 6,91,600-4-0. The umpire held that this claim did not arise out of the contract between the parties and was beyond the jurisdiction of the arbitrators and the umpire.

Held, that in these circumstances there can be no doubt that if during the pendency of the contract the contractor had made a specific claim with a time limit for an increase in the rates under the terms of the supplementary contract, and the Government had refused within the time fixed to increase the rates as claimed, there would have arisen a dispute between the parties out of the contract which could have been referred to arbitration even while the contract was being carried out. In such circumstances it is impossible to say that a similar claim made retrospectively after the termination of the contract is not a dispute arising out of the contract. If a dispute

arises out of a contract during its pendency, the same dispute cannot but be said to arise out of the contract when accounts come to be settled after the termination of the contract.

Heyman and another v. *Darwins Limited* (1), relied on.

Appeal under clause 10 of the Letters Patent from the judgment of Hon'ble Mr. Justice Khosla, dated the 6th May 1953, in F.A.O. 68 of 1952, The Union of India through the Ministry of Food, Government of India, New Delhi, versus Messrs. Alopi Parshad and Sons, Ltd., Kashmere Gate, Delhi, praying that the judgment of Hon'ble Judge be reversed and the order of the learned Sub-Judge, 1st Class, Delhi, dated the 6th March 1952, be set aside and the award of the umpire restored with costs throughout.

M. C. SETALVAD, Attorney-General, and BISHAMBER DYAL, for Appellant.

A. N. GROVER and D.K. KAPUR, for Respondent.

JUDGMENT

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FALSHAW, J. This is a Letters Patent Appeal by the Government of India against the order of Khosla, J., dismissing the Government's appeal against the order of a Sub-Judge at Delhi setting aside the award of an umpire in arbitration proceedings and directing the parties to proceed again to arbitration.

The facts of this case are as follows. On the 3rd of May 1937, the respondent firm, Messrs. Alopi Parshad and Sons, Limited, of Delhi, entered into a contract with the Governor-General for India in Council for becoming the purchasing agents on behalf of the Government for the supply of ghee for the Army. Under the terms of the contract the Government was to reimburse the contractor in full for the actual costs incurred by him in purchasing, packing and transporting ghee, and three rates were fixed at which the contractor was to be paid on other accounts which are described in detail in the contract. Briefly stated they may be said to be one rupee, one anna per one hundred pounds of ghee as financing and overhead (mandi) charges under clause 13(a), annas fourteen, pies

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six per one hundred pounds of ghee for establishment expenses and contingencies under clause 14(a), and rupee one per one hundred pounds of ghee as commission or remnueration.

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It appears that at the time when this contract was entered into in peace time, when only the ordinary standing Army was in existence, the rates were fixed with a view to giving the contractor a fair return for his labour and investment on a comparatively small quantity of ghee purchased, but by the time the war had been in progress for more than two years the requirements of the Army in all respects including ghee had enormously increased, and on the 20th of June 1942, the parties entered into a supplementary contract by which the rate to be paid of one rupee one anna per one hundred pounds of ghee for financing and overhead (mandi) charges was left unchanged, but a sliding scale was introduced as regards the rates to be paid on account of establishment and contingencies and commission or remuneration. Under the former head the old rate of annas fourteen pies six per hundred pounds was retained only for the first five thousand tons and then the rate was to become annas eight per hundred pounds for the second five thousand tons and four annas per hundred pounds for any quantity exceeding ten thousand tons Similarly as regards commission or remuneration the old rate of one rupee per hundred pounds was retained for the first five thousand tons and thereafter the rate became eight annas for the second five thousand tons and four annas for anything over ten thousand tons. The supplementary contract after setting out these revised rates proceeds—

> "It has also been agreed that payment on the sliding scales shall be made on all purchases effected by the Agents from the 11th of September 1940, on which date the first purchase of ghi for the 1940-41 ghi heating season was effected by the Agents. The aforesaid sliding scale shall

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be in force for the duration of the agreement unless a further revision is mutually agreed upon between the parties at any time during its currency.

Subject as aforesaid the principal agreement shall have full force and effect."

There does not seem to be any doubt that very soon after this the contractor began pressing again for a further increase in the contractual rates as from the beginning of the 1942-43 ghi season, but no agreement was ever reached on this point, and on the 17th of May 1945, the Government informed the contractor in a letter that the contract would be terminated nine months from that date in accordance with the provisions of clause 1 of the original contract. Thereafter, towards the end of 1945, the parties actually appointed arbitrators to settle their differences, but this arbitration was not proceeded with and instead, on the 16th of May 1946, the contractor actually agreed to supply a quantity of ghee during the year 1946, to the extent of five thousand tons by the 31st of October, when the agreement was to terminate.

The contractor still persisted in his claims relating to the war period, and consequently the disputes between the parties were referred to arbitration under clause 20 of the original contract. The contractor appointed Mr. R. N. Nigam, Advocate, as his arbitrator and the Government appointed R. B. Rangi Lal, retired District and Sessions Judge, as its arbitrator. Before proceeding any further with the arbitration the arbitrators, as if disagreement between them was already anticipated at that stage, appointed Mr. Achhru Ram as umpire. A considerable body of oral and documentary evidence was produced before the arbitrators, who in due course pronounced their disagreement, and, without writing any orders or tentative awards embodying their own conclusions passed the case on to the umpire, who in due course submitted his award, the setting aside of which on the objections of the contractor is the subject of the present appeal.

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Before relating what exactly happened in the proceedings before the umpire, it is necessary, in order to understand the nature of the objections of his award, to set out exactly what was the nature of the contractor's claim and the position adopted on behalf of the Government. The contractor first of all attacked the supplementary agreement, dated the 20th of June 1942, referred to above, on the grounds, (1) that it was without consideration, and (2) that the officer who executed this agreement on behalf of the Governor-General was not authorised to do so. The contractor, therefore, claimed that this agreement was void and that he was entitled to be paid for the total quantities of ghee supplied after the 11th of September 1940, at the uniform rates specified in the original contract. The way in which the quantities supplied by the contractor had multiplied enormously as a result of the war can be seen from the fact that his claim as regards the difference between the original rate and the rates introduced in the sliding scale in the supplementary contract amounts to Rs. 23,08,372-8-0. This claim is set out in detail in Schedule A attached to the contractor's statement of claim placed before the arbitrators. As an alternative he put forward the claim which is detailed in Schedule B. This was based on the ground that from 1942 onwards he was pressing for an increase in the rates fixed by the sliding scale, and went on supplying ghee under the contract as a result of assurances from various officers that the rates would be revised in due course. He claims that if the rates had been fairly revised, he would have been entitled to receive an extra sum of Rs. 6,91,600-4-0.

The third claim, which is detailed in Schedule C, is for Rs. 14,47,204-6-3. This is claimed on account of an increase in the financing and overhead (mandi) charges, which remained fixed throughout at one rupee one anna per hundred pounds of ghee, and was not varied by the supplementary contract. This claim was based on the allegation of vastly increased costs, and it was in fact alleged that the claim was for out-of-pocket expenses actually incurred.

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Finally, a fourth claim was made as detailed in Schedule D for Rs. 2,41,235 on account of damages for the alleged wrongful cancellation of the contract. All these claims were resisted by the Government, which actually put in a counter claim for Rs. 1,09,824-3-0, the details of which were given in a schedule attached to the written statement. On these pleadings the arbitrators had framed 15 issues. It is to be noted that nowhere was any objection taken that any of the contractor's claims were outside the scope of the arbitration and no issue was framed on this point. When the case came before the umpire on the 13th of August 1950, he fixed the 16th and the 17th of September as the dates on which it was to be heard, but apparently he was not in Delhi on those dates, and the proceedings before him really began on the 23rd of September. There does not seem to be any doubt from the record of the proceedings that Mr. Achhru Ram had, as the result of his study of the case, come at least to a tentative conclusion that the real point in issue was the validity of the contractor's claim to Rs. 23,00,000(Schedule A) on the ground that the supplementary contract was void, and that the other two major items claimed (Schedules B and C) were outside the scope of the contract, and therefore outside the jurisdiction of the arbitrators and himself to decide, since these claims were not matters in dispute arising out of the agreement within the meaning of the words in clause 20 of the original contract. On the 23rd of September he accordingly proceeded to put a series of questions to the counsel for the contractor regarding the legal grounds on which these two sums were being claimed, and, by what must be described as a searching cross-examination, succeeded in obtaining an admission that the claims were really based on the principles of *quantum meruit* and section 222 of the Contract Act and were not strictly based on the terms of the contract itself. The learned counsel was in fact finally induced to say that the claim of Rs. 14,00,000 (Schedule C) would be a relief granted independently of the agreement, and that, being under section 222 of the Contract Act, it would be outside the scope of the present

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reference. Arguments were heard on the 24th of September, but only apparently until 11.40 a.m., and it would seem that the arguments were allowed entirely confined to the question of jurisdiction. The counsel representing the Government was not called upon to argue at all. At 4.50 p.m. on the same day a letter addressed to the umpire was received from the learned counsel for the contractor in which he complained that he had not been allowed an adequate opportunity to present his client's case and requested for a further hearing at which some of the merits of the case might be gone into. On this Mr. Achhru Ram recorded the following order:—

> "Received by special messenger at 4.50 p.m. I had told Mr. Chari at the time he concluded his arguments at about 11.40 a.m. that I was just then going to dictate the award. I had also told Mr. Chari in the presence of his client, what my decision was. I had completed dictating the award by 1 p.m.
>
> I am astonished to read in the above note of Mr. Chari that he was not permitted to do full justice to his client's case. He was given the fullest latitude to argue his case. During the course of arguments or after concluding them, he or his client never complained that he had not had his full say.
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> As regards the application mentioned by Mr. Chari in paragraph 1 of the letter, I told him yesterday that I would make an order for the production of those documents, which were intended to prove that the claimants could claim by way of compensation sums not payable to them under the terms of the agreement on the ground of the respondent being estopped from denying its liability therefor, if I, after hearing him on the subject, felt satisfied that the claim for compensation was within the scope of

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the reference. Mr. Chari expressed his full agreement with the view expressed by me that it would not be necessary at all to call for those documents if I held that the aforesaid claim was outside the scope of the reference. It was agreed that he could argue this point assuming that all the facts which he wanted to prove by means of those documents did in fact exist.

It is true that I told Mr. Chari that before hearing him on the merits, I wished to hear him on the question of the arbitrators' and consequently my own, jurisdiction to deal with the claim to compensation because, I felt, that unless he could satisfy me on that subject, it would be wholly unnecessary, and a sheer waste of time, to hear him on the merits of that claim. Mr. Chari himself seemed fully to share my view. No occasion for the respondent's counsel to object to Mr. Chari arguing on the merits arose. It was for me to regulate the procedure at the hearing and not for the respondent's counsel.

The prayer contained in the note is frivolous and seems to have been made as an afterthought, possibly with some indirect motive. I, accordingly, reject the same."

The award itself is dated the 27th of September 1950, and even before it was filed in Court the contractor had put in an application for setting it aside. By the award the umpire rejected the contractor's claim *in toto* and left the parties to bear their own costs in the arbitration proceedings. He rejected the claim in Schedule A on the ground that the supplementary contract was not void on the grounds pleaded by the contractor, and he held that the claims in Schedules B and C were not disputes arising out of the contract and so were outside the scope of the arbitrator's and umpire's jurisdiction.

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The discussion on this point occupies the major portion of the award. The fourth claim (Schedule D) was disallowed as it is stated in the award that it had been given up by the contractor.

The objections to the filing of the award raised by the contractor were briefly that the umpire was guilty of judicial misconduct in not allowing the contractor's counsel to present his case properly or to adduce certain evidence which he had applied to produce, and that he had wrongfully held that he had no jurisdiction to decide the claims in Schedules B and C. The learned Subordinate Judge set aside the award and directed fresh arbitration proceedings on the findings that the umpire was guilty of judicial misconduct in unduly curtailing the presentation of the contractor's case, and that he had wrongly omitted to decide the claims in Schedule B and Schedule D. The umpire was, however, held rightly to have declined to consider the claim in Schedule C. The Government appealed, but its appeal was dismissed by Khosla, J., who practically agreed with the findings of the learned Subordinate Judge.

The first question to be determined in this appeal is whether the umpire was correct in his view that the claim detailed in Schedule B was not a dispute arising out of the agreement between the parties. It will be remembered that in the original contract between the parties certain flat rates were fixed for financing and overhead (mandi) charges, establishment expenses and contingencies, and buyer's commission, and that the two latter rates were made subject to a sliding scale by the supplementary contract in 1942, which also contained provision for the further revision of these rates by mutual agreement. There can be no doubt that soon after the supplementary contract was entered into in 1942, the contractor began pressing for a revision of the rates, and although there must have been negotiations between the parties in this matter, no agreement was reached during the pendency of the contract. In these circumstances I do not think there can be any doubt that if during the pendency of the contract the contractor had

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made a specific claim with a time limit for an increase in the rates under the terms of the supplementary contract, and the Government had refused within the time fixed to increase the rates as claimed, there would have arisen a dispute between the parties out of the contract which could have been referred to arbitration even while the contract was being carried out. In such circumstances it seems to me impossible to say that a similar claim made retrospectively after the termination of the contract is not a dispute arising out of the contract. If a dispute arises out of a contract during its pendency, the same dispute cannot, in my opinion, but be said to arise out of the contract when accounts come to be settled after the termination of the contract.

It seems to me that the matter can be put even more simply. The contract itself provides for variation in the sliding scales, and the contractor has been both during the pendency of the contract and subsequently in the arbitration proceedings claiming an increase in the rates fixed in the sliding scales. In spite of the fact that the contract only provided for such a variation by mutual agreement, it seems to me to be quite impossible to say that a claim for an increase in the rates is not a claim based on the contract, and that a dispute relating to such claim is not a dispute arising out of the contract.

Such being my view, it seems hardly necessary to discuss at length the various cases which have been cited before us, it being in my opinion sufficient to state that the English Courts have tended to place a wide rather than a narrow interpretation of such phrases as "arising out of the contract" or "arising under the contract". In *Heyman and another* v. *Darwins, Limited* (1), the House of Lords has held that when an arbitration clause in a contract provides without any qualification that any difference or dispute which may arise "in respect of" or "with regard to" or "under the contract" shall be referred to arbitration, and the parties are at one in asserting that they entered

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into a binding contract, the clause will apply even if the dispute involves an assertion by one party that circumstances have arisen, whether before or after the contract has been partly performed, which have the effect of discharging one or both parties from all subsequent liability under the contract, such as repudiation of the contract by one party accepted by the other, or frustration of the contract, the dispute falls within the terms of the arbitration clause and the action ought to be stayed. The question of the liability of the parties to a contract which is frustrated is clearly a matter outside the scope of the terms of the contract, and if an arbitrator can decide matters of this kind, I fail to see how it could possibly be said that the claim for an increase in certain rates, for the revision of which the contract itself contains a provision, is outside the jurisdiction of an arbitrator appointed to decided disputes arising out of the contract.

The learned counsel for the contractor has attempted to attack the finding of the learned Subordinate Judge that the claim contained in Schedule C for an increase in the financing and overhead (mandi) charges was correctly ruled out by the umpire. It will be recalled that the rate under this heading was not varied or subjected to a sliding scale even in the second contract, and no provision for its revision occurs in the contract. This amount was claimed even now under section 222 of the Contract Act, which embodies the principle that any agent is entitled to be reimbursed by his principal for expenses actually and legitimately incurred by him on behalf of the principal. Since, however, the whole of the matters in dispute are being referred afresh to arbitration, I should prefer not to express any opinion on this matter, and would rather leave the new arbitrators to consider the question, with the hope that even if they consider that this claim of the contractor does not strictly arise out of the contract, they will express some opinion about its merits.

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In the closing stages of the argument the suggestion was made on behalf of the Government, although this matter had not even been raised in the appeal before the learned Single Judge, or in the grounds of appeal before us, that even if we held that the claim under Schedule B was a dispute arising out of the contract and so was wrongly excluded by the umpire from consideration on the merits, we should adopt the course, not of setting aside the award as a whole and initiating fresh arbitration proceedings, but merely of remitting the award for a decision by the umpire on the merits of this particular claim. On this aspect of the case, however, I cannot help sharing the view of the learned Subordinate Judge and the learned Single Judge of this Court that the umpire did not altogether allow the learned counsel for the contractor a fair opportunity to present his case. Although according to the umpire the dictation of the award was completed on the day on which he heard arguments for an hour or two, he might well have acceded to the request of the learned counsel received by him later in the day for a further opportunity to present his case, since the award itself shows that it was not signed until the 27th of September, and the fact that he was in my opinion clearly wrong on one of the main points on which he was positive that his view was correct and which he took up *suo motu* without any plea from the side of the Government disinclines me to send the case back to him. This suggestion of the learned counsel for the Government was strongly opposed on behalf of the respondent, and in my opinion there is sufficient justification for it not to be accepted. The result is that I would dismiss the appeal with costs. Counsel's fee Rs. 250.

Bhandari, C.J.

BHANDARI, C. J.—I agree.