AGARWAL ENGINEERING CO.

v.

TECHNOIMPEX HUNGARIAN MACHINE INDUSTRIES

July 18, 1977

[V. R. KRISHNA IYER, R. S. SARKARIA AND JASWANT SINGH, JJ.]

Arbitration Act—Parties entered into two separate contracts on different dates for sale of machinery and appointing the appellant as sole selling agent of the machinery—Both contracts contained arbitration clauses—Whether arbitration clause in later contract supersedes the arbitration clause in earlier contract.

As a result of negotiations between the appellant, an Indian engineering concern and the respondent, a Hungarian State Undertaking carrying on export-import trade, the parties had drawn up on April 2, 1970 (Annexure A) a broad arrangement between them. The first four clauses of Annexure A related to the appellant being chosen to represent the respondent in the sale of their goods exclusively in certain specified States in India and the second part deals with the purchase of two specific items, namely, Counterblow Hammer Type EK 25 and EK 13A machines. On the same date two formal contracts (Annexures B1 and B2) were entered into between the parties. Clause 8 of Annexures B1 and B2 states that all questions, disputes, etc. relating to the contract, shall be referred to the arbitration of Bharat Chamber of Commerce. By an agreement dated April 6, 1970 (Annexure C) the appellant was appointed as sales-representative of the respondent. Clause 14 of this agreement contained an arbitration clause. But the two arbitration clauses differed on the composition of the arbitrators as well as the substantive and processual laws to be applied.

The appellant alleged that there was a breach of contract in that the machines supplied by the respondent did not accord with the bargain.

Disputes having arisen between the parties as to which of the two arbitration clauses of the agreements was applicable, the High Court held that the arbitration clause in an Annexure C was the one binding on the parties.

Allowing the appeal,

HELD : (1) The arbitration clause that governs the sales of the two items of machinery in these proceedings is cl. 8 of Annexure B1 and B2. Annexures B1 and B2 are self-contained and constitute a separate contract-set and they exclusively relate to the terms of purchase of EK 25 and EK 13A. Annexure C is futuristic and relates to sales 'agency' and later purchase. [174 D]

(2) The reference by the High Court to the principle that the last deed must govern the relationship between the parties superseding the earlier ones, when there is inconsistency between the two has no room for play here. [175 D—E]

(3) Clause 1 of Annexure A grants a right of exclusive representation to the appellant "to act as its sole agent" in certain specified territories. Clause 2 states that "the detailed text of the agreement will be air-mailed until the 7th April, 1970". Clause 5 deals with the appellant agreeing immediately to place an order for machines. Two machines had been agreed to be sold and to give effect to this agreement referred to in cl. 5 to 8 of Annexure A, two orders, each independent, namely, Annexure B1 and B2, were executed on April 2. 1970. The terms and conditions of these two sales were printed on the back of the order, the first of which stated "this order shall be the sole repository of the transaction....". If the exclusive repository of the terms of the transaction was Annexures B1 and B2, purchase of the machinery EK 25 and EK 13A was covered by this complete deed and there was no justification for travelling beyond it to ascertain the intention of the parties. [172 A-B; H]

(4) The totality of the terms concerning the sale of the two machines had been documented in Annexure B1 and B2, such a concluded contract could cease to be operative ordinarily only by performance or novation or in any other manner known to the law of contract. [173 C]

In the instant case, cl. 8 of Annexures B1 and B2 is valid, unless Annexure C extinguished Annexures B1 and B2. [173 D]

(5) The whole of cl. 1 of Annexure C devotes itself to the appointment of the appellant as sole buyers from the respondent. The terms "hereby" and "hereinafter" mentioned in that clause postulated that while the minutes (Annexure A) projected the proposal for appointing the appellant as exclusive agents it was only under Annexure C, the actual scheme was to come into force on acceptance, and not from any anterior date. Moreover, absence of "special introduction discount" in Annexure C in contrast to such a provision in Annexures B1 and B2 only showed that Annexure C did not deal with the two sales covered by Annexures B1 and B2. [173 F]

Clause 12 of Annexure C stated that "this agreement is valid from after the 7th April, 1970". The two machines in dispute were agreed to be purchased on April 2, 1970 under Annexures B1 and B2 but Annexure C became operative only in regard to transactions from after April 7, 1970. These terms cannot be given retroactive effect since cl. 13 expressly states that "this agreement enters into force *when* both parties have signed it." [174 A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1413 of 1976.

Appeal by Special Leave from the Judgment and Order dated 3-2-1976 of the Calcutta High Court in Award Matter No. 109 of 1975.

V. M. Tarkunde, B. M. Bagaria and *D. P. Mukherjee* for the Appellant.

Sachin Choudhary and *D. N. Gupta* for the Respondent.

The Judgment of the Court was delivered by

KRISHNA IYER, J. Commercial causes, we may observe prolegomenary fashion, should, as far as possible, be adjusted by non-litigative mechanism of dispute-resolution, since forensic processes, dilatory and contentious, hamper the flow of trade and harm both sides, whoever wins or loses the lis. That is why arbitration is often prudently resorted to when controversies erupt in the course of business dealings But when basic differences spring up as to which is the arbitration clause that governs, in a plurality of contracts or several steps in evolving a final contract but containing divergent arbitral provisions, the Court comes into the picture, willy nilly. Even so, having regard to the larger interests of justice, an exercise in pre-trial settlement, constistent with judicial non-alignment, is desiderable, and so we had suggested to counsel, at an earlier hearing, to bring the parties together on the limited question of the arbitral locus and law, but, notwithstanding genuine offorts by counsel, and perhaps due to substantial factors waighing with the parties, the effort proved fruitless. A legal adjudication may be flawless but heartless but a negotiated settlement will be satisfying, even if it departs from strict law. The respondent's counsel stated that his client—a foreign State Trading Organization—was rather keen—and this may well be true—on getting the law declared by this Court for future guidance and so we proceed to narrate the litigative story and

cut the legal knot for the benefit of both sides. Since the subject matter relates to the sensitive area of foreign trade we still hope the dispute, even after our pronouncement, will be dissolved and goodwill and business dealings revived between the parties to their mutual benefit.

The dramatis personae or legal actors in this action are an engineering firm in India (the appellant) and a Hungarian State undertaking doing export-import trade with other countries in machinery (the respondent) and the contest relates to the competancy of the appellant to refer a dispute regarding purchase of two Hungarian Counterblows (machinery). The Indian went to Budapest to try and buy Hungarian machinery and the negotiations fructified as the minutes of April 2, 1970, drawn up of the broad arrangement between the parties, disclose. Having been followed up by formal deeds, these minutes mark the beginning of and serve as setting to but not in themselves constitutive of complete contracts. A significant dichotomy which characterises these minutes cannot be missed, though resisted by counsel for the respondent. The first part relates to the appellant, being exclusively chosen to represent the respondent in the sales of their manufactures in certain specified States in India. The second part is devoted to purchase of two specific items of machinery plus provision for a third to be concretised later. This duality analysis may be driven home by reading the text of the minutes here :

MINUTES

Drawn in Budapest on the 2nd April, 1970, Present ....

1. Technoimpex grants the right of exclusive representation to the Agarwal Engineering Company to act as its sole agent in the territories of West Bengal, Bihar and Orissa. It will be decided at a later date whether the representation agreement will be extended to the State of Assam.

2. The detailed text of the agreement will be air-mailed until the 7th April, 1970.

3. A letter in duplicate addressed to STC with the request to issue a stock and tale licence in a value of 2 Million Rupees will be sent to the Hungarian Trade Commissioner in Calcutta who hands over it to M/s. Agarwal Engineering Co., after signing the Agency agreement.

4. Detailed proforma invoices in six copies will be sent with the agreement and catalogues at least six copies.

5. It has been agreed that Technoimpex supplies and the Agarwal Engineering Company immediately places the order for the following machies :

One counterblow Hammer Type EK-Gross C & F Price	Rs. 1,000.000
One counterblow Hammer Type EK-13A	Rs. 522.596
Other machines in a value of	Rs. 300.000

A 6. Technoimpex grants a special introduction discount of 10% in the free Hungarian border prices i.e. on

EK—25	Rs.	915.550
EK—13A	Rs.	466.200

and of 5% in the free Hungarian border prices of the other machine
B as per price list handed over to the Agarwal Engineering Company.

7. Payment conditions of counterblow hammer type EK-25 would be : 25" through irrevocable L/C to be opened 30 days before the date of despatch.

75% in 3 years in 6 equal instalments for which 6% interest will be charged extra

C EK 13A counterblow hammer will be paid 25% through irrevocable L/C to be opened 30 days before the date of despatch.

75% 12 months credit to be paid in two equal instalments for which 6% interest will be charged extra.

Other machine types will be supplied at 6 months credit and 6%
D interest will be charged p.a.

The guarantee of a first class bank should be sent with the order to cover the credits granted. The credit is reckoned from the date of B/L.

In case of cash payment no interest will be charged.

8. The machines mentioned in these minutes can be sold only in the territories enumerated under S.I. by M/s. Agarwal.

E *Delivery terms* :

Counterblow Hammer Type EK-25 16th October 1970.
Counterblow Hammer Type EK-13A 15th October 1970.

Budapest, 2nd April 1970

On Behalf of Agarwal Co. On behalf of Technoimpex."

F The first four clauses focus on the 'exclusive representation' rights while the last four specificate the agreed terms for purchase of two items of machinery, such as the price, 'introduction discount', conditions of payment and the like. The former speak of what is proposed to be done, to be set down in an agreement to be despatched on or before April 6, 1970. The latter, now and here, spell out the essential contents of two contracts of purchase of two Counterblows Hammer Type-
G one EK-25 and the other EK-13A. In keeping with this legal 'dialysis' we find on the same date, i.e., April 2, 1970, two formal contracts relating to the sale of the 'Counterblows'. These run virtually on the same lines and set out the terms of the two sales, one of the common terms whereof engrafts an arbitration clause (clause 8) which reads :

"8. All matters, questions, disputes, differences and/or
H claims arising out of and/or concerning and/or in connection with and/or in consequence of or relating to the contract whether or not the obligations of either or both parties under this contract be subsisting at the time of such dispute and

whether or not this contract has been terminated or purported to be terminated or completed shall be subject to the jurisdiction of Calcutta High Court only and shall be referred to the jurisdiction of Calcutta High Court only and shall be referred to the arbitration of the Bharat Chamber of Commerce under the rules of its Tribunal of Arbitration for the time being in force and according to such rules the arbitration shall be conducted."

We have stated at the outset that the Minutes (Annexure A) envisioned the appointment of the appellant firm as sales representatives of the respondent exporters and this project is given concrete form in the shape of an agreement dated April 6, 1970 (Annexure C, p. 86). It is not in dispute that this, by acceptance, ripened into a contract with detailed terms and conditions one of which is an arbitration clause (cl. 14). It is substantially different from the earlier one. We may set it out without comment since it is patent and uncontested that the two arbitral provisions diverge on the fori of decision, the composition of the arbitrators as well as the substantive and processual laws to be applied. Briefly, the bone of contention between the parties is the bare question of *which of the two* incompatible arbitration projects governs the dispute about the sale of the two machines mentioned in Annexures B1 and B2. For, these were forwarded by sea, one to Calcutta and the other to Bombay, but according to the appellants the goods delivered did not accord with the bargain and the contract had been breached by the sellers.

This controversy erupted in two proceedings, one at the instance of the appellant under s. 41 of the Arbitration Act and the other, instituted by the respondent, under s. 33 of that Act. The former failed and the latter succeeded and from this adverse order the appellant has arrived, under special leave, to challenge its correctness.

The High Court has set out the details of the two proceedings but the crux of the matter turns on one material issue. Did the second contract (Annexure C) supersede the earlier contract (Annexures B1 and B2) so that by novatio the first contract, and together with it the arbitration clause, perished and could not be availed of by the appellant? If annexures B1 and B2 as well as annexure C, related to independent subject matters and could co-exist without the latter superseding the earlier, the appellant would succeed in the appeal. On the contrary, if Annexure C took in its wings the contract relating to the sale of the two items of machinery, the minutes (Annexure A) being the basis, the documents annexures B1 and B2 being steps towards the culmination of the contract which found expression in Annexure C—as argued by Shri Sachin Choudhry on behalf of the respondent then, maybe the terms for the purpose of reference to arbitration would have to be sought in Annexure C and not in the earlier 'contracts'. Shri Sachin Choudhary's position also is that no case of novation arises because there has been no contract arrived at under Annexure B1 and B2, the real and the only contract being Annexure C.

A study of the relevant clauses, taking a conspectus of the triple stages, may take us to a sound solution of the legal problem. The minutes, Annexure A have been scanned by us earlier. Even so, an

A insightful scrutiny may be helpful in unlocking the problem confronting us. Annexure was drawn up in Budapest where both the parties were present. Clause (1) grants a right of exclusive representation to the appellant by the respondent 'to act as its sole agent in the territories of West Bengal, Bihar and Orissa'. The very next clause states that 'the detailed text of the agreement will be air-mailed until the 7th April B 1970.' Clauses 3 & 4 are mainly in furtherance of the 'agency agreement'. What is important to notice is that the agreement to be concluded as per clause 2 relates to 'the right of exclusive representation'.

Then we start off with clause 5 onwards. This fasciculus of clauses is devoted to the *immediate* purchase of Counterblow Hammer Type (EK 25 and EK-13A) machines. Contextually and discerningly read, clause 5 deals with the appellant agreeing immediately to place an order C for three machines two of which we have just referred and the third was not to be bought right away but only later, although its price was indicated in clause 5. Since the parties were beginning a business relationship which was expected to be enduring, the respondent granted a 'special introduction discount' of 10% on EK-25 and EK-13A and 5% on the other machine which was the third item in clause 5.

D Clause 7 speaks of the payment conditions and gives details. Clause 8 puts a condition on the area in which the machines purchased as per clause 5 are to be sold. The terms of delivery, especially the time of delivery, are also set out in cause 8 of the minutes. It follows that the contention of Shri Sachin Choudhry that Annexure C is one integral document and to dichotomise it as Shri Tarkunde, counsel for the respondent did, is to do injury to the consensus of the parties is unacceptE able. Actually there was to be a principal to principal relationship established between the parties and, to start with, there was to be an immediate purchase of two or three items, forthwith, the terms whereof were generally set down. It is apparent that two machines had been agreed to be sold and to give effect to this agreement referred to in clauses 5 to 8 of Annexure A, two orders, each independent, *viz.*, Annexures B1 and B2, were executed between the parties on the same F date, *viz.*, April 2, 1970. The seller and the buyer had already settled the terms of the sale and so it was thought they could and did execute specific contracts in regard to the two machines. The terms and conditions of these two sales were identical and were printed on the back of the 'order/indent'. Moreover, almost every detail of the manner of despatch, the manner packing, the pre-payment of freight, the time for despatch and the manner of drawing up the invoice and many other G particulars, including 'full literature, drawings, instructions covering the supply and insurance policy covering comprehensive risks' was written into Annexures B1 and B2. It was also indicated that part delivery would not be accepted and that the destination was 'Calcutta/ Indian port'.

The terms and conditions printed overleaf again ran into further details. But what is most significant in the very first condition which states : '*This order shall be the sole repository of the transaction* and H the terms and conditions mentioned *herein* shall not apply' (emphasis added). Thus the nidus of the terms and conditions governing the contract regarding the purchase of the two mechines was Annexures

B1 and B2. If the exclusive repository of the terms of the transaction was Annexure B1 (and B2), we could sensibly infer that the purchase of the machinery EK-25 and EK-13A was covered by this complete deed and there was no justification for travelling beyond it to ascertain the intention of the parties connected with the bargain relating to the sale of the two machines. *Prima facie,* therefore, the parties were bound to abide by the arbitration clauses, contained in condition 8 of Annexure B-1 and B-2. Indeed, clause 9 made the supplier responsible for 'all consequences by virtue of fines etc.' arising from wrong shipment of goods and it was also clearly stated that the prices mentioned in this order were firm and that they would not be altered even after any gold price variation unless otherwise specifically mentioned therein. In one sense, therefore, the totality of the terms concerning the sale of the two machines had been documented in Annxeures B-1 and B-2. Such a concluded contract could cease to be operative ordinarily only by performance or novation or in any other manner known to the law of contract. In the present case the dispute was regarding whether there had been proper performance, and this dispute was sought to be referred to the Bharat Chamber of Commerce as envisaged in clause 8 of Annexures B1 and B2. Such a proceeding would be valid, unless, as was contended by Shri Sachin Chaudhri, Annexure C extinguished Annexures B1 and B2 so that a substitution or *novatio* took place. Of course, it is fair to state that Shri Sachin Chaudhry drew our attention to certain details and minor differences between Annexure B series and Annexure C, which, in our view, are but frills and do not affect the core contention.

We may, in this view, have to examine the provisions in Annexure C and their effect upon Annexures B1 and B2. The competing clauses—rather, the rival versions—from their relevance to the question posed above, may be looked into at this stage. Clause (i) is significantly self-evident : "Sellers hereby appoint buyers as sole buyers of their machine tools of all kinds,. . . on the terms and conditions hereinafter mentioned and the buyers *hereby* accept such appointment on such terms and conditions". The whole clause clearly devotes itself to the appointment of the appellant as 'sole buyers' from the respondent. The emphasis on 'hereby' and 'hereinafter mentioned' postulated that while the minutes Annexure A projected the proposal for appointing the appellants as exclusive agents it was only under Annexure C, dated April 6, 1970, the actual scheme was to come into force on acceptance, and not from any anterior date. Clauses (2) and (3) do not relate to the 'sales representatives' part of the contract. Clause (4) continues the same idea and spells out the terms of the sale. It is noteworthy that there is no 'special introduction discount' provided for in Annexure C in contrast to such a provision in Annexures B1 and B2. The likely inference is not that the said discount is withdrawn but that Annexure C does not deal with those two sales (covered by Annexures B1 and B2).

Likewise, the terms of payment mentioned in clause 5 are such as are 'to be arranged from time to time' while Annexures B1 and B2 specify the terms of payment so far as the two machines covered by them were concerned. The subsequent clauses (6) to (11) deal with

A kindred matters of sales agency. Clause 12, captioned 'duration of agreement' states that 'this agreement is valid *from after the 7th of April* 1970 *till* 31st December, 1970....' The two machines with which we are concerned in this appeal were agreed to be purchased, as it were, on April 2, 1970, under Annexures B1 and B2 but Annexure C became operative only in regard to transactions from after April 7, 1970. Indeed, these terms cannot be given retroactive effect B since clause 13 expressly states that 'this agreement enters into force *when* both parties have signed it'.

Clauses 15, 16 and 17 are also not germane to the purchase of the two machines but, in the background we have traced, clause 14 has to be decoded. That clause, as already mentioned, is a new arbitration clause, substantially different from the one contained in C Annexures B1 and B2. The question is : Can the arbitration provision in clause 14 have retroactive effect to bind sales effected on April 2, 1970 especially when such a contention runs in the teeth of clause 13 which directs that Annexure C shall enter into force only when both parties have signed it, which event obviously took place only on or after April 6, 1970.

D The analysis of Annexures A to C which we have made, leads only to one conclusion, viz., that Annexures B1 and B2 are self-contained and constitute a separate contract-set, and that they exclusively relate to the terms of purchase of EK 25 and EK 13A. Annexure C is futuristic and relates to sales 'agency' and later purchases. The arbitration clause that governs the sales of the two items of machinery in these proceedings is clause B in Annexures B1 and B2. This E necessarily means that the dispute between the parties may be completely arbitrated by the Arbitration Tribunal of Bharat Chamber of Commerce.

The High Court has taken a contrary view, ignoring the effect of Annexures B1 and B2 and over-emphasising, indeed misreading, the minutes of April 2, 1970 and the deed of April 6, 1970. These F two formal contracts (B1 and B2) have been dismissed not by argument but by assertion :

> "In my view, the placing of the order by the Standard Printed indent/order form of the Respondent with the petitioner for the supply of the said two machines can only be in pursuance of the said Parent agency agreement which G was arrived at between the Parties in the meeting dated the 2nd of April, 1970 and the details were of which was formally recorded in the document dated the 6th of April, 1976. The party never intended that the said order/indent placed by the respondent with the petitioner would be an independent and separate agreement as now sought to be contended by Mr. Bhabre on behalf of the Respondent." H

How the learned Judge reaches the conclusion that the arbitration clause in B1 and B2 is inoperative beats our comprehension.

"Further, from the minutes of the meeting dated the 2nd of April, 1970, and the document dated the 6th of April, 1970, it is made quite clear that the parties intended to have transaction only on the basis of the forms which were fully set out in the document dated the 6th of April, 1970. Therefore, the arbitration clause in the said document dated the 6th April, 1970, is the one which is operative and binding between the parties and the arbitration clause in the Standard Printed Indent/Order form of the Respondent has no effect as the said order was formally placed in pursuance to the agency agreement arrived at between the Parties as recorded in the minutes of the meeting dated the 2nd of April, 1970."

Once we grasp the scenario of events and execution of documents and give full effect and intelligible coordination to the various documents it becomes clear that there is no sequitur in the High Court's reasoning. Nor are we able to persuade ourselves, as the High Court has done, that there may be ambiguity as to the interpretation of the series of documents and the terms of the contract concerned.

We agree that all the machinery purchased by the appellant or to be purchased by him from the respondent, except the two items covered by Annexures B1 and B2 are governed by Annexure C. The reference by the High Court to the principle that the last deed must govern the relationship between the parties superseding the earlier ones, when there is inconsistency between the two, assuming it to be right, has no room for play here. Subsequent documents, such as the protocol of November 14, 1970, February 26, 1971 and the like, do not vary the jural relationship, *vis a vis* the sale of the two items of machinery we are concerned with. We are unable to agree with Shri Sachin Choudhry that the said protocol shows that Ex.C was taken to be the sole matrix of the contractual terms regarding the purchase of EK. 25 and EK. 13A. Neither the conduct of the parties nor the chain of correspondence deflects us from the conclusion already reached.

In this view, the inference is inevitable that arbitral clause in B1 and B2 bind the parties, so far as the disputed machines are concerned.

Shri Sachin Chaudhri stated at the bar that in regard to one of the items, some sort of settlement has been reached, although Shri Tarkunde does not agree. We merely mention this and leave it at that.

We must further state that Shri Tarkunde did assure the Court that irrespective of the result of the appeal, the appellant was agreeable to the arbitral reference going before any Tribunal of Arbitration of any Chamber of Commerce in India. We hold the party to that assurance.

In conclusion we allow the appeal, but, in the circumstances, direct the parties to bear their respective costs. We further direct that if the respondent intimates the appellant in writing on or before

A August 15, 1977 that he chooses any particular tribunal of Arbitration, set up by any Chamber of Commerce in Bombay or Calcutta, the reference of the dispute will go to that body. If, however, no such intimation is made, the Tribunal of Arbitration of the Bharat Chamber of Commerce will have jurisdiction and will continue the proceedings. The arbitrators will decide, according to clause 8 in Annexures B1 and B2, the rights and liabilities of the parties. The parties will bear their
B respective costs throughout.

P.B.R. *Appeal allowed*