

**Shri Shankar Vijay Saw Mill Vs. Union of India**

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**Court :** Delhi

**Decided On :** Nov-13-1979

**Reported in :** 17(1980)DLT179

**Judge :** Rajindar Sachar and; S.B. Wad, JJ.

**Acts :** [Arbitration Act, 1940](#) - Sections 32

**Appeal No. :** Interim Application Appeal No. 630 of 1976

**Appellant :** Shri Shankar Vijay Saw Mill

**Respondent :** Union of India

**Judgement :**

**R. Sachar, J.**

(1) The matter relates to the type of injunctions which can be issued by this court in arbitration proceedings arising out of contracts entered into between the D. G. S. & D., Govt. of India and the Contractors. Doubt has been cast on s

(2) The petitioner is a registered firm and carries on the business of manufacturing and selling timber. The Director General of Supplies and Disposal (D. G. S. & D.) functions as a purchase organisation for the Government of India and makes purchases for the various departments. In response to an invitation to tender by D. G. S. & D. for the supply of Bijasal logsst Class, the petitioner made an offer to

supply 1016 cubic metres at a flat rate of Rs. 669.00 per cubic metre. The D. G. S. & D. issued an acceptance of tender No. TWI-6/107/61/721/26-10-65/PAOP dated 24.12.1973. The said acceptance of tender contained an arbitration clause. It appears that later on disputes arose between the petitioner and the D. G. S. & D. The case of the petitioner being that there was no concluded contract while the case of the Union of India is that there was a concluded contract and the petitioner was, bound by the acceptance of tender. The petitioner did not supply the goods and the contract was cancelled on 28.8.1974 at the risk and cost of the petitioner. The D.G.S.&D; claims to have made risk purchases and to have incurred an extra cost of Rs. 92,364.00 . Thereafter the petitioner was informed by the D G.S. & D by its letter of 24.12.1974 that an extra cost of Rs. 92,364.00 has been incurred on repurchase and asking him to pay this amount and also telling him that if this is not paid alternative arrangements will be made to recover the same. It appears that there were some other contracts also between the petitioner and the respondent. It is the petitioner's case that some payments are due to the petitioner from those contracts (bills for the work performed by him). The petitioner moved this court under Section 32 & 33 of the Arbitration Act claiming that there was no concluded contract in existence between the parties containing any arbitration clause. The petitioner also sought an injunction alleging that the respondents were threatening to deduct the amount of Rs 92,354.00 from the payment due on bills of other contracts. The Union of India has however, countered the allegation and maintains that there is a concluded contract and that it is entitled to recover the amount on account of risk purchase on behalf of the petitioners. It is however, denied that the respondents were trying to recover the amount of Rs. 92,364.00 by deducting or appropriating it from the payments alleged to be due to the petitioner under other contracts. The main matter has still to be decided and we are not concerned in this reference with that and need not be detained by that.

(3) The question before us has arisen out of application for injunction namely is 630/76 filed by it in which it is prayed that the respondents be restrained from enforcing the said recovery by adjusting/withholding or deducting from its other bills in any manner whatsoever. The Union of India did not oppose the issuance of injunction restraining the recovery by way of 'adjustment' or by way of 'Deduction'. It however, opposed, and that is the stand even before us, the grant of an

injunction against the 'withholding' of the amount from other bills of the petitioners. The argument is that the injunction against 'withholding' of the amount from other bills of the petitioner in fact amounts to a direction to pay the said bills which is outside the power to issue interim injunction, in the application under sections 32 and 33 of the Arbitration Act.

(4) N this court large number of applications under sections 32 & 33 of the Arbitration Act have been moved in matters similar to this. In most of the cases injunctions were being issued by the learned single judges restraining the respondents from 'deducting' 'appropriating' or 'withholding' the amounts from other bills of the contractor. One such matter was taken to the Supreme Court and is reported in (1974 Supreme Court 1265) Union of India v. Air Foam Industries. The Union of India put forward the extreme claim that by virtue of clause 18 in the General Conditions of Contract it was entitled to recover by appropriating any sum on account of damages which may become due to the Contractor, from other bills by deducting the corresponding amount from those other contracts. This plea was negated by Supreme Court which held that as this sum was only claim and that there was no adjudication on it the Union of India had no right or authority to appropriate the amount of other pending bills of the contractors in or towards the satisfaction of its claim for damages against it and that therefore injunction issued restraining the Union of India from doing so was justified. One of the points strongly argued before the Supreme Court was that the order of injunction in fact amounted to directing the Union of India to pay the amounts of pending bills of the Contractor in respect of other contracts and as the payment of amounts of such pending bills did not form the subject matter of reference which was pending before the arbitrator there was no jurisdiction under section 41 of Arbitration Act read with second Schedule to make such an order. Dealing with the argument the court emphasised that the power of the court under section 41(b) read with second schedule is to issue interim injunction but such interim injunction can only be 'for the performance of an in relation to arbitration proceedings'. Now in the present case the arbitration proceedings are with respect to the acceptance of tender dated 24.12 1973. The interim injunction therefore that can be issued by this court can only relate to the amounts of damages which form the subject matter of arbitration proceedings in the present case. It cannot relate to the amounts

allegedly due to the petitioner with respect to some other bills, for the simple reason that those other contracts do not form the subject matter of the present arbitration proceedings. That is why when the respondents are restrained from making recovery of its claim for damages by 'appropriating' such amounts from other bills of the contractor no objection can be raised by Union of India; the petitioner, however, cannot go further and claim an interim injunction be issued with regard to the other contracts which are not the subject matter of arbitration proceedings, but that is what precisely will be the consequence if an interim injunction was issued directing the respondent not to 'withhold' the payment of the contractor. Bhagwati, J. who spoke for the court was very clear when he said :

'THE arbitration proceedings in the present case were for determination of the mutual claims of the appellant and the respondent arising out of the contract contained in the acceptance of Tender dated 16th July, 1968. The question whether any amounts were payable by the appellant to the respondent under other contracts was not the subject-matter of the arbitration proceedings. The court obviously could not, therefore, make an interim order which, though ostensibly in form an order of interim injunction, in substance amounted to a direction to the appellant to pay the amounts due to the respondent under other contracts. Such an interim order would clearly not be for the purpose of or in relation to the arbitration proceedings as required by Section 41(b). But here the order of interim injunction made by the learned Judge does not, expressly or by necessary implication, carry any direction to the appellant to pay the amounts due to the respondent under other contracts. It is not only in form but also in substance a negative injunction. It has no positive content. What it does is merely to injunct the appellant from recovering, suo motu, the damages claimed by it from out of other amounts due to the respondent. The appellant can still refuse to pay such amounts if it thinks it has a valid defense and if the appellant does so, the only remedy open to the respondent would be to take measures in an appropriate forum for recovery of such amounts where it would be decided whether the appellant is liable to pay such amounts to the respondent or not. No breach of the order of interim injunction as such would be involved in non-payment of such amounts by the appellant to the respondent.

(5) Following this Judgment of the Supreme Court this court started modulating its injunctions accordingly and therefore in the order of injunction refused to include the word 'withholding' because it took the view that order in this term really meant an order to make the payment which was specifically forbidden in terms of the above said Judgment of the Supreme Court. As some doubt was raised as to the exact scope of the ratio of Air Foam Case (supra) the matter was referred to full bench, to apparently reconsider two earlier Division Bench Judgments in : AIR1975 Delhi27 M/s Marwar Tent Factory v. Union of India & another, and 1974 Dlt 120. The Full Bench is reported in : AIR1975 Delhi248 Mohan Meakin Breweries Ltd. v. Union of India & Others. It has generally been understood in this court that Mohan Meakins case (supra) has finally decided that though an injunction can be given in these matters restraining the Union of India from 'adjusting' or 'recovering' any damage claimed by it from other pending bills of the contractor, no injunction against 'withholding' of payment from other bills is competent in law. The learned Judge has observed that the decision in Mohan Meakins case (supra) does not deal with the question of withholding nor any relief of this kind was sought. With respect to the learned Judge that does not seem to be borne out by a reference to the Judgment because there was a specific prayer (para 30 of the Judgment) that the amounts due to the petitioner under the pending bills which had been withhold by the Union of India in pursuance of the impugned letter be directed to be refunded to the petitioner. It was this prayer which was specifically rejected in para 31 and 32 of the Judgment when the court observed :-

'FURTHER, while the adjustment or recovery of the claim of the respondents for damages was without any right or power conferred by the contract and, therefore, do hors the contract, the refusal of the respondents to pay the amounts due under the other pending bills was not do hors the contract relating to the said pending bills. The supply of the goods by the petitioner and the payment of the price by the respondents were mutual obligations arising under the said contracts relating to the pending bills. The withholding or refusal by the respondents to pay the price was thus a failure to perform an obligation arising under the said contracts and was not do hors those contracts.'

(6) It is not, therefore, correct to say that the full bench had not dealt with the matter in controversy before the full bench. As a matter of fact the full bench had relied upon the observation of the Supreme Court in Air Foam case (supra) and applied the ratio of that case.

(7) The learned judge has also referred to the original application made in the case of M/s Air Foam Industries (supra) in this court, and seems to suggest that though in this case ultimately the order that was passed was for restraining the Union of India from appropriating the amounts of other pending bills towards satisfaction of its claim for damages, this injunction also covered the prohibition against 'withholding' because the prayer for 'withholding' was also mentioned in the application. We do not think that is a correct way of reading the Judgment of the court because injunction issued by the learned single Judge 1973 Del 253 as well as by the Supreme Court was only for restraining the respondent from recovery the amount. No help can, therefore, be sought from the Mohan Meakin's case (supra) to say that the injunction had been issued against withholding of the amount from other pending bills. As a matter of fact this was not how a division bench of this court modified to order in C M. 458 (w)/74 in C.W. 329/74 when subsequently in CM. 1293/74 filled by the Union of India for clarification of the injunction, the court in view of the above Supreme Court decision modified its earlier order of March 27, 1974 and directed that the word 'withholding' in the order passed earlier be deleted. A distinction sought to be made by the learned Judge is that the full bench decision in M/s Mohan Meakin Breweries (supra) case and in the division bench Judgment in Ageel Ahmad's case were in writ proceedings while he was dealing with the matter in suits, is in our opinion of no consequence considering that the decisions were given on interpretation of Air Foams case (supra) and though the injunction against the 'withholding' of the amount from other bills by the Union of India was prayed for but was specifically rejected. The learned Judge has referred to para 8 of the Mohan Meakin's case (supra) and opined that the Supreme Court has held that there was no right of lien under clause 18 and therefore it amounts to that the payment cannot be withheld. With respect we may point out that the discussion in para 8 was on the meaning to be assigned to clause 18 and in that context it was said that clause 18 only gives an additional mode of recovery and the purchaser can only exercise a right where claim for that

sum is presently due and payable and it cannot be exercised by appropriating the other sums due to the contractor when the same had not been adjudicated. There is nothing, therefore in the Supreme Court Judgment which goes against the interpretation given by the Full Bench and Division Bench of this court.

(8) The learned Judge has given two illustrations apparently to show the anomalous situation if the contention of the Union of India was to be accepted. One is, that if a suit is filed by the contractor for recovery of the amount due on other bills and on his death his legal representatives are not brought on record within the stipulated period with the result, that the suit abated and later on the arbitrator found the claim of Union of India to be baseless, will it mean that the Union of India will retain the amount which had been withheld because the suit has abated. Frankly we are somewhat unable to appreciate the relevance of the illustration and Mr. Singhanian the learned counsel for the petitioner was also not able to enlighten us on this point. In the illustration the suit abates because no legal representatives are impleading that would be the case in every legal proceedings where the necessary party is not impleaded in time and suit has abated. On the other hand if the local representatives were impleaded the suit will proceed and if the Union of India's claim is held to be baseless the legal representatives will be able to recover the amount. So where is the anomalous situation We are unable to find any and Mr. Singhanian was also not able to help us in this matter at all.

(9) Another so called anomalous situation put forward by the learned judge is that if the claim of the Union of India to withhold the amount is disallowed it was not clear whether any interest on the withheld amount would be paid for that period, the learned Judge therefore concluded that the contractor would be deprived of the principal and also the interest on the withheld amount which may lead to strangulation of business. We find no such difficulty. We would normally assume that if the Union of India was to withhold the payment of amount without any justification and later on an action is brought by the contractor he will not only have his suit decreed for that amount but will also be entitled to interest on the amount withheld for that period. By a curious incidence a matter (FAO (OS) 12/79 decided on 19.10.1979) came up before us in which the plaintiff has filed a suit claiming not

only the amount withheld but also the interest for the period for wrong withholding. This would answer the query as to what has to happen in case where there is unjustifiable withholding. So no difficulty would arise if the court awards interest if it holds that the withholding was without any justification. The learned Judge also seems to imply that the observations in Air Foam case (supra) that the Union of India can still refuse to make payment is' dependent on it having a valid defense unconnected with the matter in dispute. This seems to suggest as if the reason why Union of India was withholding the payment of other bills has to be justified in the present proceedings. Now this goes squarely against the Supreme Court Judgment that injunction can only be for the purpose of and in relation to arbitration proceedings. Just as in the present arbitration proceedings the disputes are with respect to acceptance of tender dated 24.12.1973, the injunction that may be issued must necessarily relate to and form part of the arbitration proceedings with respect to this tender. No injunction can issue with regard to the matters which are unconnected with that tender. The payment of otherwise due from other bills of other contracts are obviously matters unconnected with the present arbitration proceedings. So if the payment on those contracts are withheld no injunction can issue with regard to those and all that the contractor can do, in the words of Supreme Court is to take recourse in appropriate forum, where it will be decided whether what the Union of India though a valid defense has any basis. The contractor cannot call upon the Union of India to justify its action and prove its defense in those proceedings. The defense, valid or otherwise will be determined and has to be shown in other proceedings. The. claimed power to issue injunction to restrain the Union of India from withholding the payment of amount from other pending bills is outside the power of the court when deciding the arbitration proceedings.

(10) The learned Judge has assumed that withholding is a step in aid of recovery and as recovery is prohibited 'withholding' is also prohibited. But the facts are otherwise. The Union of India has communicated to the petitioner, that if Rs. 92,364.00 on account of damages is not paid, it will proceed to take legal action. This is not an action for recovery. Whether in law the Union of India will be able to justify its action is withholding if the contractor was to proceed against them in a court of law in a separate matter. The court is not determining all possible disputes

between the contractor and the Union of India. It is concerned only with the acceptance of Tender of 24.12 73 wherein the contractor claims that there is no arbitration agreement while the Union of India claims to the contrary. The petitioner can only demand that this sum of Rs. 92,364.00 be not appropriated from the other pending bills of the petitioner. He cannot go further and say that not only must the Union of India not appropriate but that it should be restrained from withholding the payment of other bills, it in effect is seeking a direction to pay the amount. We must look at the matter in a practical way. If the Union of India is restrained from withholding the payment of amount of Rs. 92,364.00 from other contracts the only and inevitable effect of it is that it must make full payment of those other pending bills, a course amounting to a direction to make payment which is impermissible in terms of Judgment of Air Foam Industries (supra). But if this prohibition against withholding is not to be understood to be a direction to pay then it is an utterly useless and ineffective injunction and it is well settled that the Court does not issue an ineffective and useless injunction asking for an injunction against withholding payment really amounts to asking for decreasing the claim in those unconnected contracts. It does not matter, whether that defense will be accepted if the contractor was to file a suit for the recovery of amount due on those other bills; that eventuality is not to be examined in the present arbitration proceedings. We do not find any hardship or injustice in such an interpretation also, because assuming that the government withholds the payment of other bills of the contractor it is open to the latter to seek his remedy in proper forum, but he cannot convert the payment proceedings into execution proceedings for amounts allegedly due on other bills. The view of the learned Judge that an injunction can issue restraining the Union of India from withholding the amount due from other bills is virtually seeking to exercise the power to decree a money suit without having to file a suit and without even adjudication having taken place. To appreciate it is in greater light let us assume that there was no dispute between the Union of India and the contractor as in the present case and there were no arbitration proceedings pending in the court. In such a situation if an account of 5 completed contracts some amount was claimed to be due from the Union of India by the contractor and if the same was not being paid it cannot be disputed that the only remedy which the contractor will have will be to file a suit for recovery of the

said amount. The withholding may be carricious, without any justification and without any basis but even then no civil court could give any other remedy excepting in a suit brought for recovery of the said amount. It is not suggested that any injunction could be issued or could be asked by the contractor with regard to that amount. The normal civil remedies of suit for recovery of amount due from a party will have to be followed by the contractor. If that be the case in which a contractor like the petitioner will be placed if there was no dispute with regard to any contract we do not see any logic or justification to hold as the learned Judge seems to suggest that merely because a dispute has arisen in regard to one contract it permits the contractor to ask for injunction not to withhold the payment of amounts in regard to contracts not the subject matter of the present proceedings. We do not see how and by what justification the rights of the petitioner can become enlarged if there is a dispute with regard to one contract which is subject matter in arbitration proceedings then they would be if there was no dispute with regard to any contract at all. This illustration will show the infirmity in the reasoning of the learned judge in holding that even an injunction with regard to the withholding of payment of amount can be granted. It may well be asked as to why then an injunction with regard to deduction and appropriation are permitted the onus and responsibility will be thrown on the contractor to file action to recover that amount and as clause 18 does not permit it, injunction is issued to prevent with regard to the withholding of the amount from other contracts it does not prevent the contractor from suing the Union of India for the recovery of that amount and if no valid defense is proved, it will have to bear the consequences. For example as in the present case if the amount of Rs. 92,364!- was allowed to be deducted or appropriated by the Union of India, the latter could rest on its oars thus forging and compel the contractor to file a suit for the recovery of the amount, and need not take the initiation in recovering this amount. But now because Union of India cannot appropriate or deduct and at the most withheld the amount (for which justification will have to be given when the suit is filed against it by the contractor with regard to the other bills) it has nevertheless to be alert and initiate proceedings if it wishes to recover the damages of Rs. 92,364.00 , otherwise it may run the risk of the amount being barred by time because of limitation. There is thus a vital difference between the injunction which does not include direction

against withholding of the payment from the other bills. The contract of the injunction given in *Bharat Straw Board v. Union of India* (IA 1793/75 in Suit No. 175/75 decided on 19.3.1976) case brings out the anomaly of holding that though an injunction may be issued against the Union of India restraining it from withholding the payment of the amount due on other bills of the contractor, yet it will not amount to an order to make payment. A reference to the order that was passed by the learned Judge himself in that case, shows that after directing the issue of injunction restraining the Union of India from withholding the payment from other bills he hastened to make it clear that this restraint order does not authorise the petitioner to recover the amount of the other bills if they are withheld on the ground unconnected with the present case. If the learned Judge himself concedes that the injunction not to withhold the payment is not to be construed as permitting the petitioner to demand the payment of that amount the purpose of issuing such an injunction is hard to appreciate. If such an injunction was issued and the petitioner was to demand payment and the same was not to be paid by the Union of India it may be construed as violating the injunction order. The only way the Union of India could avoid disobeying the injunction order would be to make payment because otherwise it would be accused of withholding payment against which the injunction was issued. Thus though in word and pharasesiology the injunction may say that it is not a direction to make payment the inevitable consequence of such an injunction would be to compel the Union of India to make payment of other bills which are not the subject matter of the arbitration proceedings end for which purpose no injunction can be issued in terms of decision of Supreme Court in *Air Foam Case* (supra). Thus the court will be doing in an indirect manner what it is prohibited to do in a direct manner Such exercise of power would amount to not only decreasing the suit but even executing the decree. Such startling results are the direct consequence of issuing injunction restraining the Union of India from withholding of payment of amounts on other bills which are not the subject matter of present arbitration proceedings.

(11) We would, thereforee, with respect hold and answer the reference by saying that the law has been correctly laid down in the full bench case of *M/s Mohan Breweries* (supra) and *Ageel Ahmad's case* and does not require reconsideration. We would also hold that the view of the learned single Judge in *Southern Alloy*

Foundries and Bharat Straw Boards cases and in the present referring order does not lay down correct law.

(12) In our view this court in arbitration proceedings is not competent to issue an injunction restraining the Union of India from withholding the amount claimed to be due from the bills of other contracts of the petitioner. For the payment said to be due from other bills the petitioner must seek his remedy outside those arbitration proceedings. Any injunction order issued by this court therefore must necessarily restrict itself to an order restraining the Union of India from recovering or appropriating the amount claimed on account of damages unless it has been adjudicated upon. No injunction can be issued restraining the Union of India from withholding the payment of any amount with regard to the bills of other contracts and any such order of injunction would be without jurisdiction. The reference having been answered as above the matter will now go back to the learned single Judge who will deal with the matter in accordance with law and in the light of opinion given by us here.

(13) There are a number of connected matters wherein the point is the same. It is unnecessary to deal with the others because it was conceded by counsel for the parties that the decision and the opinion expressed in this Judgment will govern those cases which will also be now sent back to the learned Single Judge to be decided in accordance with the opinion expressed.

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