
(2010) 11 DEL CK 0130
In the Delhi High Court
Case No : F.A.O. 437 of 2003

Ace Printg and Pack Pvt. Ltd.

APPELLANT

Vs

Modern Food Industries (I)

RESPONDENT

Date of Decision : 25-11-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 12(3), 13, 15, 16(2), 34

Citation : (2010) 1 BC 620 : (2011) 121 DRJ 126

Hon'ble Judges : Mool Chand Garg, J

Bench : Single Bench

Advocate : Manoj Swarup and Lalita Kohli, for the Appellant; Raman Kapur and Franceksa Kapur, for the Respondent

Final Decision : Allowed

Judgement

Mool Chand Garg, J.—This appeal arises out of an order dated 16.05.2003 of the Learned ADJ whereby the Learned ADJ had set aside the award dated 18.08.2002 passed by the Arbitrator on the ground that the Arbitrator had failed to limit the award within the scope and jurisdiction of the reference to arbitration. Further by deciding that there was no validly concluded contract between the parties, the Arbitrator had gone beyond the scope of reference.

2. Briefly stated, appellants are the manufacturers of corrugated boxes used for the packaging of goods. The respondent Company M/s Modern Food Industries (India) Ltd. had invited tenders for the supply of corrugated boxes for packing their Nutro Biscuits. Appellant was one of the tenderer and his rates per box being the lowest, he became the successful tenderer. As the requisite formalities for the contract for supply would have taken some time to come into existence, a draft letter of acceptance was given to appellant by the respondent as a token of acceptance of the contract on 3.06.1999. Appellant too considering the fact that the conclusion of formal contract would take some time and supplies be made during the interregnum gave their quotation for the supply of corrugated boxes on 23.03.1999 itself at the same rate.

3. Pursuant to the quotation, the appellants were given a trial purchase order for the supply of 2000 corrugated boxes on 15.04.1999. The supply was to be made in five days. However, respondent by their letter dated 19.04.1999 unilaterally extended the said trial purchase order to 40,000 corrugated boxes instead of 2000 boxes. Subsequently on 26.04.1999 respondent issued another purchase order for the supply of 2,40,000 boxes. The date of issue of the purchase orders were prior to the date of draft letter of acceptance which was issued by the respondent on 3.06.1999. As per the said purchase orders the payment for supply was to be made within 30 days of the supply.

4. As such it is the case of the Appellant that the purchase orders were not a part of the contract/agreement for which the draft letter of Acceptance was sent by the respondent on 3.06.1999 and which was never signed by the appellant, In fact as per Appellant these were mere trial purchase orders.

5. The appellant had also furnished a bank guarantee of Rs 1.85 lacs which according to appellant had no connection with the two purchase orders placed on 15.04.1999 and 26.04.1999 rather it was against the contract which never came into existence as the draft letter of acceptance dated 3.06.1999 sent by the respondent was never signed by the appellant. However, respondent made various deductions from the bills raised by the appellant and also encashed a part of the Bank Guarantee provided by the appellant on the pretext of the alleged extra expense incurred by the respondent on the purchase made from the market amounting to Rs. 2,76,660/- as appellant had not supplied the boxes in full.

6. Aggrieved by the deductions made by the respondent, the appellant on 27.04.2000 requested for the appointment of the Arbitrator under Clause 20 of the tender dated 23.03.1999 wherein the arbitration clause is couched in very wide terms and interalia reads that " all disputes and differences (other than the technical specifications) arising out of, or in any way touching or concerning the said contract shall be referred to the sole arbitrator of the Senior General Manager of the Modern Road Industries(India) Ltd". The learned Arbitrator passed an award dated 18.08.2002 in favour of the appellant against which the respondent filed objections u/s 34 of the Arbitration and Conciliation Act , 1996 before the learned ADJ and the Learned ADJ after hearing the parties vide impugned order dated 16.05.2003 set aside the award of the Arbitrator which is the subject matter of appeal before us.

7. It was submitted by the appellant that no valid contract envisaged by the tender dated 23.03.1999 came into existence at any point of time as he did not sign the letter of acceptance dated 3.06.1999 in token of acceptance of the contract. Further the purchase orders were anterior to the letter of acceptance dated 3.06.1999 and neither the trial purchase order dated 15.04.1999 for the supply of 40,000 boxes nor the purchase order dated 26.04.1999 for the supply of 2,40,000 boxes prescribed any condition for the recovery of amounts from the supplier/appellant, in the event of respondent having purchased the boxes from

the market owing to the alleged short supply by the appellant. Further Clause 15 of the tender dated 23.03.1999 envisages the successful tenderer, entering into a fixed quantity contract but such a fixed quantity contract was never entered into by the parties and supplies were made pursuant to the purchase orders issued in April 1999 i.e issued anterior to even the draft letter of acceptance dated 03.06.1999, which was never signed, as such no valid contract envisaged. However, the arbitration clause was invoked because of the tender documents on the basis of which bank guarantee was submitted and recoveries were being made by the respondent under the pretext of that contract even though, the contract was never concluded. The respondent also wanted return of the bank guarantee in the absence of the concluded contract and placement of the order under the contract.

8. On the contrary respondent had submitted that the purchase order was never a trial order. Respondent also denied that no quantity contract was ever signed by the appellant, as per the respondent once the contract was awarded and the appellant deposited the security money and started the supply, the contract became final and the appellant has no right to deny the same. The signature of the appellant company was only formality and in case the contract was acted upon, it needs not to be signed. Regarding bank guarantee, respondent contended that it was furnished by the appellant to assure the respondent to implement the contract awarded to them and in the event of failure to comply with the said contract, the respondent had been assured with the bank guarantee amount and as such there was a default on the part of the appellant and therefore the amount of the bank guarantee was liable to be adjusted.

9. Interestingly, while the proceedings were heard by the Arbitrator, Respondent moved an application u/s 12(3)(a), 13 & 15 of the Arbitration and Conciliation Act 1996 on 31.12.2001 against the Arbitrator for staying off his hands from the proceedings. The application was heard on 02.03.2002 and after hearing the arguments from both the parties and also in the light of the ruling of the Supreme Court of India in the case of International Airports Authority of India Vs. K.D. Bali and Anr, , the application was rejected. The same has been accepted by the respondents as they have not filed any appeal against the order of rejection.

10. Before the Arbitrator the appellant had filed the "Summary of Claims" which were countered by the respondent with his counter claims and basing on that the Arbitrator framed the issues which were thereafter dealt by the Arbitrator with a reasoned order. The relevant extract of the order of the Arbitrator is produced underneath:

The following claims of the claimants outlined in their summary of claims dated 02.02.01 were submitted for adjudication.

1. Regarding the recovery of extra expenses incurred in risk & cost purchase of boxes by the unit FIBP from them.

The party has prayed for the reimbursement of the amount of Rs. 2,20,312.96 to them alongwith interest @18% per annum from the date of recovery (debit) and upto the date of release of the above sum to them.

2. Regarding the release of their bank guarantee of Rs 185 lacs executed in favour of unit Fjbp, delhi-35.

Since a bank guarantee was got executed by them without any valid grounds under the said amount, the same may be got released from the bank as an interim relief, as this had no relevance with any pending claims of the respondent under dispute.

3. Regarding unpaid or partially paid bills of the claimants Certain numbers of their bills when were either short paid or their payment was not received by them which totals upto a sum of Rs. 2,76,660.20 may be released together with an interest @18% per annum from the date of part/non-payment till the date of actual payment to them.

4. Regarding cuts from their bills on account of quality deficiency

Repayment of their claims for the cost of corrugate boxes which were reduced/ deducted on account of less weight and other deficiencies, which resulted in a total deduction of Rs. 33,546.50 from their bills, this amount may be released alongwith interest @ 18% per annum from the date of recovery top the date of repayment to them.

5. Regarding claim of interest on their cash security deposit with unit FJBP

Since they had deposited a part of their security deposit with unit FDJP in cash. They were entitled to payment of interest on the cash amount, which has been admitted by the senior accounts manager of the unit. In his letter dated 2901.2001, to be as Rs. 7050.0. The total interest on their cash deposit may be got released to them alongwith interest @18% per annum from the date it fell due till the date of payment.

2. Respondents counter to the claimant's summary of claims and their counter claims

The respondent unit FIBP submitted their reply to the summary of claims of the claimants alongwith their counter claims which are briefly outlined below:

1. The claimant's prayer for reimbursement of the recovery made towards extra expenses incurred by the respondent company on the risk and cost expenses of corrugated boxes (which claimants failed to supply) is not justified and they are liable to compensate the respondent - unit for all such risk purchases as they had defaulted the contract and indented goods were not supplied

2. The bank guarantee was furnished by the claimants to assure the respondents to implement the contract awarded to them and in the event of failure to comply with the same, the respondents were assured with the bank guarantee amount.

It was felt that the amount of bank guarantee was liable to be adjusted in the payment of excess amounts paid by the respondent company to other suppliers. It is incorrect that the bank guarantee was not liable to be encashed. The arbitrator may direct the petitioner to pay the difference which after adjustment of the bank guarantee, is found to be due and recoverable from them.

3. About the unpaid/partially paid bills, the respondents state that according to their statement of accounts, a cheque of Rs. 1,00,420.00 was given which was alleged to be short of Rs. 12,980.00. This amount was liable to be adjusted against risk and cost purchases. Similarly, the amount of Rs. 2,35,330.20 (as claimed by the claimants) was not due to them. No bill No 171 dated 14.05.1999 had been received by the respondent Company and hence the claim is wrongly made.

4. The amount of Rs. 33,546.50 was deducted by the respondents company as per the contract terms, as the quality received was not in conformity with the technical specifications of the order placed. Since the said deduction is permissible under the contract. It is legal and relief claimed may be denied.

5. About the interest on cash security deposit amount, they have admitted no right to claim the same, as the respondents have still to recover amounts much more than the amount lying in their credit and the same is liable to be adjusted towards the payment found due, later.

Issues framed

1. Whether a fixed quantity contract was in existence between the parties and if so were the respondents justified in recovering the amounts of loss(out of the amount due to the claimants) against the risk and cost purchases made by the FJBP unit?

2. Whether the claimants have any right to unilaterally withdraw from the contract after acceptance of its offer by the unit under the terms of the tender and if they could refuse to supply the goods during the period of contract? If not, what would be the remedy available with the respondents to recover the losses suffered as a result of non - performance by the claimants, under the contract?

3. Whether the respondents could withhold the payment of interest on cash security amount, after it was replaced by a bank guarantee and not if the respondents are liable to pay interest on the amount due to the claimants but retained by them?

4. Whether the respondents had made risk and cost purchases of corrugated boxes at the rate claimed by them after adopting a proper procedure for the same?

5. Whether the claimants are entitled to the relief claimed in their summary of claims and if so at what rate. Similarly whether the respondents are entitled to their counter claims on the ground of excess amount that they had to pay in

procuring supplies from other sources and if so can the same be recovered from the claimant's bank guarantee?

6. Whether any interest is payable to the respondent on the amount of counter claims asked for and if so, at what rate? Is any other relief also due to the respondents in the given circumstances?

Issue No. 1

From the evidence of the DW and that of PW (Shri N.D Drall)- the witness- who dealt with the entire case- but failed to give any reply to the relevant last question and from a perusal of all the "Exhibits" produced by both the sides, as also from an examination of all the arguments. , it is quite clear that the company did not fulfill the Clause 15 of the tender document and did not enter into "a fixed quantity contract" with the successful tenderer , which would have laid down staggered schedule of supplies viz, weekly, fortnightly, monthly, quarterly etc as required by the respondent. Also, respondent made a change in their letter of acceptance of Contract dated 24.05.1999/3.06.1999 by introducing condition No 6 which merely indicated "supply: schedule for "supply of corrugated boxes will be placed separately" This cannot, in any manner be deemed to be the execution of; a fixed quantity contract between the two parties as envisaged in clause No 15 of the tender form. The issue is therefore decided in favour of the claimants.

Issue No. 2

It is no doubt true that if the two parties had entered into a concluded contract, the claimants had no right to unilaterally withdraw from it under the terms of the tender-agreement and in case they refused to supply the goods during the contract period, the risk and cost purchases- Clause 10- would have come into play. However, the claimants have totally denied that a concluded contract had come into existence in this case, on the following grounds:

1. The original tender , duly signed on each page by the claimants and submitted by them, to the FJBP unit Delhi on 23.03.1999 which was asked for as an additional document by them from the G of the FJBP Unit Delhi, during the proceedings, has not been made available to them. The document alongwith its 3 Annexures were submitted by them and the same was opened by the tender committee and later on examined, alongwith the tenders of other parties by the unit purchase committee and their quoted rates were found to be the lowest and hence the same was accepted vide acceptance letter dated 24.05.1999/3.06.1999, but the original documents(except Annexure 3- schedule of rates) were not produced before the arbitrator who had allowed their production by the GM of the FJBP Unit produced before the Arbitrator, who had allowed their production by the GM of the FJBP Unit. The Arbitrator had then ruled that due to the non-production of the same and other 3 papers asked for, an adverse inference would be drawn by him. In the absence of those original documents, no reliance can be placed on the various clauses of tender sought to

be enforced by the Unit including clause No. 16 - "damages for breach of contract.

2. The acceptance letter was issued, in duplication, and the FJBP Unit had stipulated that this duplicate copy of the Acceptance letter dated 24.05.2009/03.06.1999 had to be returned duly signed by the Claimants to them, in token of acceptance of the contract. They did not do so and the unit also failed to produce any such duplicate letter signed by them and PW-II Shri Drall, has claimed that even if such a duplicate copy signed by the successful tenderer is not received, they assume that the contract stood concluded. This is a layman's contention and legally unacceptable as it is proved that they did not sign duplicate copy of the Acceptance Letter & returned it to the Unit, hence the contract was not concluded.

3. The offer was said to be counter-offer from the FJBP Unit, in which new conditions/additional terms were introduced which were not acceptable to them. The new conditions/additions were stated to be as under, by the DW-Shri Sameer, in his deposition and also in their arguments:

a. In place of Clause No. 15 of the original tender (Guarantee for supply of specified quantity of material) a new item No. 6 of the acceptance-letter came into existence "about apply".

b. The original of acceptance asking for signing of a duplicate copy thereof by the Claimants in token of acceptance of the contract, was never mentioned in the original tender but was included in the Acceptance Letter (CW-20).

c. The letter of acceptance dated 24-05-99/03-06-99, if acceptable to them, would have come into existence and become operative from 03-06-99 only but this was changed by making the contract operative from a retrospective dated 01-04-99, which was not acceptable to the claimants.

In the light of the conditional-offer made by the FJBP Unit (which was not accepted by the successful Tenderer) the contract never got concluded as a valid contract between the two parties. In fact they never received any order or p. order for supplies from the respondent unit on the basis of this contract. As such they were fully entitled and had every right not to fulfill the contract and also to refuse supplying the goods ordered on or after 03-06-99, the date of acceptance of contract by the respondent Unit. In this case reliance is placed on the Supreme Court's judgment in Haridwar Singh Vs. Bagun Sumbrui and Others, .

The respondent Unit has adduced the plea that by their conduct, the claimants had accepted the contract by supplying goods even after 03-06-99 and they were justified in applying the clause No. 16 of the contract (Risk and cost purchases). It has been found by the undersigned that much before the issue of the acceptance letter by FJBP Unit, two separate purchase orders dated 15-04-99(titled "trial order") & 26-04-99 had been issued by the Unit for supplies of 20,000 & 2,40,000 Nos. of Corrugated Boxes to the claimant party and no

reference to any quotation/offer had been given by the FJBP, in these purchase orders. Actually at this time the tenders were still under examination in the FJBP Unit and the validity of the offers had been got extended by application dated 08-06-02. In his evidence (Cross-examination), the DW (Shri Sameer) has clearly stated that in their invoices/Bills in respect of supplies made by them in response to the two purchase orders dated 15-04-99 & 26-04-99, there was no mention of any contract/tender and therefore, these Pos were arrangements independent of the tender/contract and supplies were made by them as per market practices/conventions. The copies of the invoices are "Exhibits" CW-21 to CW-23 - all the three dated between 07-09- 99 and 31-12-99. The PW-1 (Shri Rajinder Pal) has confirmed the above in his deposition before the undersigned.

In the light of the circumstances stated above, it appears that no contract had come into existence as a result of the issue of letter of acceptance dated 24-05-99/03-06-99 (CW-20), and therefore, the claimants had the right not to comply with the "terms and conditions of the period from 03-06-1999 onwards. As a result the different clauses of the tender agreement (including clause No. 16) were not available as a remedy to the respondents to recover the loss suffered by them as a result of non-performance of the invalid contract by the claimants. In this regard, reliance has been placed on the judgment of S.K. Mahajan, J of Delhi High Court in the case of M/s Brawn Laboratories Ltd. v. Fittydent International GMBH and Anr. 85 (2000) 204, Delhi Law Times. The issue is, therefore, decided in favour of the claimants and against the respondents

Issue No. 3- Withholding the amount of interest on cash Security Deposit amount particularly after it was replaced by a Bank Guarantee executed by the Claimants.

As per the terms of the model tender form and as accepted by the Senior Accounts Manager of the FJBP Unit in his letter No. MFIL/FJBP/C.B. Boxes/2000-01/2691 dated 2901-01, Rs. 7050.00 were lying in the credit of Claimants towards interest on this cash Security Amount. The respondents have, in their arguments, claimed that because of the breach of the contract-terms by the Claimants, this payment of interest is liable to be disallowed to them. Since the contract itself has not been found to be a valid contract, so the breach of its terms cannot be a legal ground for disallowing the payment of the interest amount to the claimants .The issue is, therefore, decided in favour of the claimants.

Issue No. 4-If risk and cost purchase of Corrugated Boxes by the FJBP Unit at the rates claimed by them were made after adopting a proper procedure for the same?

The Respondents have stated in their arguments that they are a large joint sector company and have their set-procedures for making purchases and "risk & cost purchases" in case of failure of the contractor to supply the goods ordered by them in proper time and they had adopted these procedures in this case also. However, it is noticed that there has been a wide range of variations in the rates

at which the risk and cost purchases were made (CW-10 refers in this regard). The excess payments per piece vary between 0.59 paise and Rs. 2.10 paise per pc.

However, the company has neither indicated the then market price of these Corrugated Boxes, which were prevalent in Delhi nor they have adduced any evidence in support of the correctness of procedure/method parties in response thereto, as per the Supreme Court judgments in Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas and Another, and Jawahar Lal Burman Vs. Union of India (UOI), . In the light of these rulings of the Apex Court and other similar judgments, the undersigned does not feel inclined to accept the arguments of the respondent Unit and, therefore, the issue is decided against them.

Issue No. 5 - Are claimants entitled to relief claimed in their Statement of Claims and whether the respondents are entitled to their Counter-Claim of recovery of excess amount incurred by them in procuring supplies from other sources?

In view of the detailed discussion under Issue No. 2 & 4 above, that the contract accepted vide letter dated 24-05-99/03-06-99 was not a valid and concluded contract, the Claimants would be justified in getting the relief claimed for reimbursement of the amounts recovered from their bills with regard to the extra expenses incurred in the risk and cost purchases. Similarly, the Respondents do not appear to be entitled to their counter-claim on account of the excess amount that they had to pay in procuring supplies from other sources. The issues is, therefore, decided against the Respondents and in favour of the Claimants.

Issue No. 6 - If interest is payable to the Respondents on the amount of counter-claim asked for and if so, at what rate? In view of the findings arrived at under issues No. 2, 3 and 5 above, the respondents do not appear to be entitled to receive any interest on the amount of their counter-claim itself has not been found to be acceptable. The issue is, therefore, decided against the Respondents.

11. The Learned ADJ had set aside the award on the ground that while deciding that there was no validly concluded contract between the parties, the Arbitrator had gone beyond the scope of reference and even though there was an allegation of bias the Arbitrator still continued with the proceedings and allowed the claim of the appellant. The relevant observation is produced as under:

As a matter of fact, the reference to the Arbitrator made on 30.08.2000 left no scope for the Arbitrator to decide as to whether there has been a concluded contract or not for the very simple reason that the same was not an issue at any stage. It would be pertinent to state that till 02.03.2001, the Arbitrator was himself inclined to the view that a contract did exist.

There was also an allegation of bias against the Arbitrator. The basis of the Arbitrator allowing the claim under item "I" is that there was no validly concluded contract. The arbitrator having gone beyond the scope of the reference, the petitioner is at liberty to challenge the award on that count. The letter dated

24.05.1999/3.06.1999 amounted to the contract having been concluded . the Arbitrator is , therefore , proved to have gone beyond the scope of reference by holding that no validly concluded contract came into existence.

12. However, in this regard, it is pertinent to mention that even though if it is assumed for the sake of argument that the Arbitrator had no jurisdiction to decide as to the existence or not of the concluded fixed quantity contract, yet the objection or challenge to the jurisdiction of the Arbitrator or composition of the arbitral Tribunal must be taken u/s 16(2) of the Act before the arbitral tribunal not later than the submission of the statement of defence. If a party chooses not to object, there will be a deemed waiver u/s 4 of the Act and the party shall be said to have intentionally relinquished its known right to object. This has been held by the Apex Court in the case of Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others, . Similarly the award cannot be challenged on the ground of beyond the scope of reference as both the parties had acquiesced in the "reference". This view was held by the Apex Court in the case of Ram Nath International Construction Pvt. Ltd v. State of U.P AIR 1998 SC 367.

13. In the present case also the reply cum statement of defence of the respondent was filed on 16.02.2001 while objection to the jurisdiction of the Arbitrator was filed on 31.12.2001 at the time when the witness of the respondent was being cross- examined and after the issues were framed. In fact, the respondent themselves appointed the arbitrator and when the notice of reference was issued by the Arbitrator and the parties were called upon to appear, then also respondent did not raise any objection and all along took part in the proceedings without any challenge to the jurisdiction of the Arbitrator. Hence the same could not be taken or raised at a later stage. The Ld. ADJ while setting aside the award had not gone into this aspect.

14. Also, a look at the clauses of the agreement specially Clause 15 clearly shows that the respondent did not fulfill the Clause 15 of the tender document and did not enter into "a fixed quantity contr" with the successful tenderer , which would have laid down staggered schedule of supplies viz. weekly, fortnightly, monthly, quarterly etc. Further, respondent made a change in their letter of acceptance of Contract dated 24.05.1999/3.06.1999 by introducing condition No 6 which merely indicated "supply: schedule for "supply of corrugated boxes will be placed separately" This cannot, in any manner be deemed to be the execution of; a fixed quantity contract? between the two parties as envisaged in clause No 15 of the tender form. More so, appellant had never given any acceptance to the letter of Acceptance of contract dated 24.05.1999/03.06.1999 and respondent had also not led any evidence to prove the same.

15. In view of the aforesaid, the appeal filed by the appellant is allowed, the order passed by the learned ADJ allowing the objections of the respondents is set aside. The award given by the sole Arbitrator is made as the rule of the Court.

16. The appeal stands disposed of with no order as to costs.

17. TCR, if any, be sent back forthwith along with a copy of the order to the learned ADJ for information.