
(2002) 09 DEL CK 0251

In the Delhi High Court

Case No : I.A. No. 9244 of 1993 and Suit No. 2762 of 1991

Bharat Battery Mfg. Co. P. Ltd.

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 20-09-2002

Acts Referred:

Arbitration Act, 1940 — Section 30, 33

Citation : (2003) 1 ARBLR 296 : (2002) 101 DLT 459 : (2003) 66 DRJ 717

Hon'ble Judges : C.K. Mahajan, J

Bench : Single Bench

Advocate : Rajesh Benati, for the Appellant; Nemo, for the Respondent

Judgement

C.K. Mahajan, J.—In response to the invitation to tender No. PE-3/AM-7/RC-0983/MT/Batteries/defense/83-84/77 of the respondent the petitioner submitted their quotation bearing reference No. G-1/984/84 dated 5th March, 1984. In the said tender the petitioner inter alias provided as under :

"Prices offered for dry and uncharged batteries F.O.R. station of dispatch i.e. F.O.R. Baliganj/Sealdah/Howrah. If we are to dispatch any consignment of batteries from Shalimar Railway Station which is 20 kms. from our factory, then we shall charge Rs. 5/- extra for each battery."

2. Pursuant to a meeting held between the petitioner and the respondent on 10th May, 1984 the respondent informed the petitioner vide letter dated 23rd June, 1984 that the indenter of the consinee was from the defense department. In the circumstances any store dispatch by rail would be under M/C note which was supplied to the petitioner either by the inspectorate or consinee. The respondent called upon the petitioner to intimate F.O.R. destination prices with M/C note. In response thereto the petitioner vide letter dated 3rd July, 1984 bearing reference No. G-1 72474/84 dated 3rd July, 1984 quoted prices F.O.R. railway station of consinee against M/C note to be issued by the inspectorate/consinee. The tender including the letter dated 3rd July, 1984 was accepted by

the respondent vide their rate contract bearing reference No. PE-4/AM-7/RC-0983/MT Batteries/defense/84-85/77/E-3/Bharat/015/COAC dated 29th September, 1984. Clauses 4 and 5 of the Schedule "B" attached to the aforesaid rate contract provided as under :

"Clause 4 : Terms of Delivery : F.O.R. destination Clause 5 : dispatch Instructions :

(a) The stores shall be dispatched by goods/passengers train on freight paid basis.

(b) Military Credit Notes/Civil Credit Notes. If provided, necessary Military Credit Notes have to be used, the contractor should apply for the same sufficiently in advance to ensure dispatch of stores by the due dates giving the approximate rate and number of packages to be dispatched."

3. The rate contract was received by the petitioner on 10th October, 1984 and the petitioner vide letter dated 24th October, 1984 pointed out that Clause 5(a) of Schedule "B" was not in conformity with the letter dated 3rd July, 1984 and a request was made for deletion of the said clause and to incorporate the dispatch instructions as provided in para 2 of the letter dated 3rd July, 1984. The respondent vide their amendment letter dated 16th January, 1985, Clauses 4 and 5 to Schedule "B" to the rate contract were substituted by the following clause :

"F.O.R. destination -- railway station against -- M/C note to be issued by Inspecting Officer/consignee."

4. Thus it is clear that the respondents were under an obligation to issue M/C notes and the prices quoted by the petitioner were not to pay any amount against M/C notes to be issued by the respondents. The respondents after making and completing the supply by the petitioner issued letter dated 28th July, 1987 stating that the terms of delivery is F.O.R. destination with M/C notes and the concessional rate of freight up to destination is to be borne by the petitioner.

5. Disputes and differences arose between the parties. This Court directed the respondents in Suit No. 1704A/87 for appointment of an Arbitrator. The Director-General of Supplies and Disposal appointed Shri C. Achuthan, Addl. Legal Advisor to the Government of India as Sole Arbitrator for adjudication upon the disputes. The Arbitrator gave his award on 24th June, 1991.

6. Objections against the award were filed by the petitioner inter alias that the Arbitrator acted contrary to the terms and conditions of the contract; the petitioner was not liable to pay any freight as the amended clause provided only for F.O.R. destination railway station against M/C notes to be issued by the Inspecting Officer. The petitioner further prayed that the award may be set aside and an independent Arbitrator may be appointed for adjudication of disputes and differences.

7. Respondent filed reply to the objections and denied all allegations made

therein. It is stated that the Arbitrator has given a perfectly valid and legal award except for the fact that he has overlooked the counter claim of the respondent. It is prayed that the award may be remitted to the Arbitrator for reconsideration of the remaining claim of the respondent.

8. On the pleadings of the parties, the following issues were framed on 5th September, 1995 :

"(1) Whether the award dated 24.6.1991 rendered by respondent No. 2 is liable to be set aside in view of the objections raised by respondent No. 1?

(2) What order?"

9. Parties are directed to file affidavit by way of evidence which were filed by them.

10. The matter was called out for hearing. Neither respondents nor Counsel are present. I have heard Counsel for the petitioner.

11. The petitioner raised the following claims before the Arbitrator :

(a) To declare that Union of India is not entitled to recover any amount against M/C note issued by the respondent.

(b) Release of Rs.77,710/-, being balance 2% price in favor of the claimant.

(c) Release of Rs. 4,37,265.60, being the amount illegally and wrongful withheld towards liquidated damages.

(d) Interest @24% p.a. on withheld payment.

Issue Nos. 1 and 2 :

12. The Arbitrator allowed claim No. (c) releasing a sum of Rs. 4,37,265.60 in favor of the petitioner. Claims (a) and (b) were decided against the petitioner.

13. Counsel contends that there is an error apparent on the face of the award insofar as the Arbitrator has disallowed claim Nos. (a) and (b). He seeks setting aside of the award to this extent. It is contended that the Arbitrator went wrong in disallowing the claim of Rs. 77,710/- being the balance 2% payment. The admitted case of the parties is that the entire goods were supplied. It is settled law that 98% payment is released at the time of dispatch and balance 2% payment was to be released after issuance of Inspection Notes. The petitioner in para 10 of the statement of claim was clearly pointed out that Rs. 77,710/- was the 2% balance payment in respect of Inspection Note No. 374598/18/22 dated 6th January, 1987, respect of supply of 400 numbers against S.O. No. RC/19 dated 12th July, 1987.

14. In para 11 of the counter affidavit the respondent had clearly admitted that they had sought confirmation from the Controller of Accounts and the same was awaited. The Arbitrator rejected the claim on the ground that the claimant had

not proved lodging of such a claim. It is admitted case of the parties that the claim was lodged and the matter was under consideration of the Controller of Accounts, Calcutta. In these circumstances the Arbitrator was wrong in rejecting the claim of the petitioner. To that extent the Award of the Arbitrator is liable to be set aside.

15. The award of the Arbitrator for a sum of Rs. 5,29,794/- in favor of the respondent on account of freight charges has been assailed by the petitioner on the ground that the petitioner in their quotation dated 5th March, 1984 provided as under :

"Prices offered for dry and uncharged batteries F.O.R. station of dispatch i.e. F.O.R. Baliganj/Sealdah/Howrah. If we are to dispatch any consignment of batteries from Shalimar Railway Station which is 20 kms. from our factory, then we shall charge Rs. 5/- extra for each battery."

16. It is the contention of the petitioner that from a reading of Clause 5(a) of Schedule B it is clear that there was no liability on the part of the petitioner to pay any freight whatsoever. Moreover the respondents were under an obligation to issue M/C note and the prices quoted by the petitioner included freight and were not to pay any amount against M/C notes to be issued by the respondents. There was also no clause in the contract or any other letter which provided for payment of any amount for the M/C notes which were to be issued by the Union of India. The petitioner made and complete the entire supplies to the respondents after the issuance of the amendment letter dated 16th January, 1985. By way of letter dated 28th July, 1987 the respondents sought recovery of the amount debited to the defense department as freight charges against the contract. The petitioner was asked to reimburse the amount of freight involved under the M/C note which was to be borne by the petitioner. The respondents in their counter affidavit contend that this was in violation of the terms of the contract. It is contended that in light of the judgment reported in 2002 (2) Arb. L.R.1, subsequent amendment/variation of terms of contract could not be made.

17. I have perused the award. Heard Counsel for the petitioner. I do not find any infirmity in the reasoning arrived at by the Arbitrator in rejecting the claim of the petitioner and in holding that the respondents were entitled to recovery of a sum of Rs. 5,29,794/- against the M/C notes issued. The contract is silent with regard to payment of any amount for the M/C notes. The price quoted by the petitioner itself was F.O.R. destination railway station though against concessional tariff rate available for the supplies meant for defense installations by use of M/C note clearly understood and customarily to be paid by the suppliers. This is the standardised and mercantile custom accepted all over the world. F.O.R. destination is a term of common usage and it is an accepted practice for the seller to bear the freight charges of the stores up to the destination i.e. the consignee's unit. If there was to be any variation in this established practice it would have been provided for in the contract. There is no term in the contract creating an exception or variation in the contract. The reference to M/C note in

the clause does not in any way alter the situation. It was for the benefit of the petitioner to have availed of the concessional freight rate to its advantage and to procure railway wagons on a priority basis. The onus of payment of freight charges would not shift from the petitioner to the respondent on account of the issue of these M /C notes. There is no evidence on record to suggest otherwise.

18. The Award can only be set aside if it fails within the ambit of Section 30 of the Arbitration Act. The Courts do not exercise appellate jurisdiction over the verdict of an Arbitrator and as such cannot go into the merits of the case nor can the Courts reappraise and re-examine the evidence led before the Arbitrator. The Courts also cannot look into the insufficiency of the evidence led before the Arbitrator. It is not for the Courts to see the reasonableness of the reasons given by the Arbitrator or sufficiency of the reasons. However, what reasons are required, it depends upon the facts of each case.

19. In *The Hindustan Construction Co. Ltd. Vs. Governor of Orissa and others*, it has been held by the Supreme Court as under :

"It is well known that the Court while considering the question whether the award should be set aside, does not examine that question as an Appellate Court. While exercising the said power, the Court cannot reappraise all the materials on the record for the purpose of recording a finding whether in the facts and circumstances of a particular case the award in question could have been made. Such award can be set aside on any of the grounds specified in Section 30 of the Act. According to us, no ground has been made out on behalf of respondents to set aside the award holding it to be invalid,"

20. Similar view was taken in *Union of India (UOI) Vs. A.L. Rallia Ram, ; State of Orissa and Another Vs. Kalinga Construction Co. (P) Ltd., ; Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another, Indian Oil Corporation Ltd. Vs. Indian Carbon Ltd., ; Puri Construction Pvt. Ltd. Vs. Union of India (UOI), Food Corporation of India Vs. Joginderpal Mohinderpal*,

21. There is no infirmity in the finding of the Arbitrator rejecting the claim of the petitioner and holding that the respondents were entitled to recovery of a sum of Rs. 5,29,794/- against the M/C notes.

22. The Award is, accordingly, made Rule of the Court in respect of claim (c). Decree be drawn in terms thereof.

23. For the reasons aforesaid, the award is set aside to the extent the claim of Rs. 77,710/- was disallowed by the Arbitrator. To this extent the matter is remanded back to the Arbitrator for fresh consideration. In case the Arbitrator has retired, the D.G.S. and D. is directed to appoint a fresh Arbitrator, within four weeks from the receipt of the order, to adjudicate the claim of Rs. 77,710/-.

The objections are disposed of in the above terms.