(2000) 07 DEL CK 0097

In the Delhi High Court

Case No : I. A. 9187 of 1994 and S. No. 1770 of 1994

Bharat Wire Rope Manufacturing Co. APPELLANT

Vs

Union of India (DGS and D) RESPONDENT

Date of Decision : 12-07-2000

Acts Referred:
Arbitration Act, 1940 — Section 30

Citation : (2000) 3 ARBLR 152 : (2000) 86 DLT 777 : (2000) 54 DRJ 801

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Mr. D.S. Chauhan, for the Appellant; Mr. A. K. Bhardwaj, for the Respondent

Judgement

Vikramajit Sen, J.—The facts relevant for the disposal of the applications are that on 22.7.1980 a contract was placed on the Petitioner by the Respondents for the supply of two commodities/stores. One was duly supplied. But in respect of the other, that is Tube Copper Nickel Iron Alloy, for the quantity of 3627 kgs, supply was not effected. It is not in dispute that five extensions were granted for effecting supply and that thereafter the Tender was cancelled. In respect of the supply of this commodity a Limited Enquiry Tender was floated. The Petitioner was given notice thereof, and it had again submitted its offer, which was of the same value as previously given, that is at Rs. 98.86 per kg. Two other offers were received for a sum of Rs. 160/- per kg from M/s. Shanti Lal Shah & Co. and Rs. 225/- per kg from M/s. Super Trade Enterprises. It was an essential stipulation of the Limited Enquiry Tender undertaken on Risk Purchase basis that the tenderer should furnish a security, which was to be made available by 30.4.1983. It is the contention of the Petitioner that on 13.4.1983 it had arranged a Bank Guarantee for a sum of Rs. 35,857/-, being the security amount, drawn on the Canara Bank, Bombay and that this Bank Guarantee was filed in the Respondent''s office on 29.4.1983. The case of the Respondent is that the Bank Guarantee was never received by it. On 30.5.1983 after due consideration the Risk Purchase Contract was placed on M/s. Super Trade

Enterprises. Immediately thereafter a Demand Letter dated 2.6.1984 was raised by the Respondent against the Petitioner for a sum of Rs. 4,45,548/-, being the difference between the price quoted by the Petitioner on 22.7.1980 and the said price of Rs. 225/- per kg. quoted by M/s. Super Trade Enterprises in the Risk Purchase Tender. Disputes were raised. As the demand for Reference of these disputes to Arbitration by the Petitioner had not been acted upon by the Respondents, a Petition bearing No. 1658-A/94 u/s 20 of the Arbitration Act was filed in this Court.

2. These Claims were eventually adjudicated upon by Dr. B.N. Mani, the first Arbitrator, who gave and published his Award on 30.9.1986. This Award was challenged by the Petitioner in Suit No. 2261-A/86. It was disposed of by the orders of P.K. Bahri, J. in terms of Judgment dated December 13, 1990. The learned Judge observed that "it is evident that the arbitrator was legally bound to give reasons in support of his conclusions and as the arbitrator has failed to give any reasons, he appears to have committed illegality in giving unreasoned award". The Objections were upheld and the Award was set aside. The matter was again remanded to the Arbitrator "for giving the award again, giving reasons in support of his findings". It will be relevant to mention that the Petitioner''s claim for sum of Rs. 1,23,086.62 had been declined by the Arbitrator and the Counter Claim of the Respondents was allowed, but only for a sum of Rs. 2,23,879/-. It appears that this amount was computed by Dr. B.N. Mani, the first Arbitrator, by taking into contemplation the next higher offer of Rs. 160/- per kg offered by M/s. Shanti Lal Shah & Co. The Respondent''s computation on the basis of the highest offer of M/s. Super Trade Enterprises was not accepted by the Arbitrator. The Respondents had not filed any Objection against this Award. Obviously they had accepted the logic of the Arbitrator that it was not proper or permissible for the Respondent to claim damages on the basis of the highest offer. This is very significant since the second Arbitrator has, in his impugned Award, found fit to do just so, without giving any reasons in support for his decision.

3. As Dr. B.N. Mani was no longer in Government service and he had resigned as the Arbitrator, even when the matter was heard by P.K. Bahri, J., the Respondents were directed to nominate a new Arbitrator. The disputes were thereupon referred to the Sole Arbitration of Shri Ram Bahadur, who has given and published his Award dated 7.9.1992. It is this Award that has been assailed in the present Objections, being I.A. No. 9187/94.

4. It is contended before me by Shri D.S. Chauhan, learned counsel for the Petitioner, that the basic foundation of the Award had been laid by Dr. Mani, the first Arbitrator. Since the amount of claim exceeded Rupees one lakh, it was incumbent and mandatory that the Award should disclose reasons and it was only on this ground that Justice P.K. Bahri had remanded the matter for adjudication afresh. It was his contention that all that was expected of the second Arbitrator, namely, Shri Ram Bahadur, post the Judgment of Justice P.K.

Bahri, was that reasons for the Awarded amount should be given. This contention is misconceived and untenable. Firstly it was clear to all concerned, that on the date when this judgment was delivered Dr. Mani was not available. This being the position it would be absurd to construe the judgment as merely remanding the matter back for giving reasons. Quite obviously, these reasons could only have been given by Dr. Mani himself, and no other person. The Relevant portions of the judgment of Justice P.K. Bahri have already been extracted above. On a proper reading it is clear that the disputes were referred back for adjudication, before a person to be nominated by the Respondents, with the explicit direction that reasons be disclosed. It is, Therefore, palpably evident that even on remand a fresh adjudication was expected. The contention, Therefore, that the Arbitrator has travelled beyond the order of Remand or Reference is illogical and unfounded, and is rejected.

5. The next contention of Mr. D.S. Chauhan, learned counsel for the Petitioner is that the Arbitrator has misconducted himself and the proceedings, thereby rendering the impugned Award susceptible and vulnerable to being set aside. Attention was drawn to the finding of the Arbitrator on Issue No. 2, that is, whether the Petitioner had deposited the security amount before 30.4.1983. He had vehemently argued that the Arbitrator has misconducted himself inasmuch as he relied on only a portion of the testimony of Shri Ram Kumar, L.D.C. and ignored the portions which are in favor of the Petitioner. In response to an interjection by learned counsel for he Respondent that the scope and sweep of Objections u/s 30 of the Arbitrator Act do not empower the Court to sit in appeal, he had submitted that the bias and misconduct of the Arbitrator was evident from the piecemeal appreciation of evidence and from the failure to call for production of documents which are germane to the issue. This testimony was not recorded before Shri Ram Bahadur whose Award has been assailed but before his predecessor, namely, Dr. B.N. Mani. In the course of proceedings held on 2.5.1986 the following order was recorded:

"The Union of India produced the attendance register of Section A-13 for the year 1983 where the signature of the witness Shri Ram Kumar happens. No other signatures of Shri Ram Kumar were produced. By looking into the initials of Shri Ram Kumar are there in a formal manner, whereas the signature on the receipt in question, are of a very casual nature. Therefore no fruitful comparison appears to be possible.

The Contractor is directed to produce the original or authenticated copies of the relevant records in respect of the Bank Guarantee obtained by them, within 3 weeks i.e. by 26.5.1986. If necessary, the bank documents may be examined or proved at the documents may be examined or proved at the place and time to be intimated afterwards".

6. The submission of the learned counsel for the Petitioner is that Dr. B.N. Mani, the first Arbitrator, was duty bound to order the production of further specimen signatures/initials of Shri Ram Kumar, L.D.C in the Receipt Section of the

respondent so that a meaningful and complete comparison of those could be made in reference to the Receipt dated 29.4.1983 relied upon by the Petitioner. I find substance in this contention. Reading the order dated 2.5.1986 it is clear that the Arbitrator could not arrive at the conclusion that initials stated by the Petitioner to be that of Shri Ram Kumar were not in fact of this person. There was atleast some doubt in the mind of the Arbitrator which had not been dispelled by either of the party.

7. In K.P. Poulose Vs. State of Kerala and Another, , the Award was set aside on the grounds of the Arbitrator''s failure to call for necessary documents. These documents, i.e. the Receipt for the deposit of the Bank Guarantee as security was essential and central to the determination of the disputes before the Arbitrator. Their significance cannot be over emphasised. If the security had been furnished the Respondent would have been hard put not to accept the fresh offer of the Petitioner, and Therefore, there would have been no scope for any claim for damages for Risk Purchase. Learned counsel has also relied on Union of India Vs. Mehta Teja Singh and Co., in which a Division Bench of this Court had set aside an Award because the Arbitrator had not called for the production of a Report which was germane to the dispute before him. Learned counsel has also relied on M/s. Bombay Ammonia Pvt. Ltd. Vs. Union of India AIR 1987 Del 148, in which the learned Judge had, after reviewing the precedents on the issue, observed as under:

"In the instant case, the arbitrator had directed the respondent Union of India to produce the documents sought to be produced by the petitioner but he did not pursue the matter further. The documents sought to be produced by the petitioner before the arbitrator are not available on the record of the proceedings of the arbitrator. In other words it means that the arbitrator failed to do his duty and his failure or negligence has resulted in substantial miscarriage of justice to the petitioner. On this ground, alone the award is liable to be set aside."

8. If in fact the Petitioner had furnished the Bank Guarantee on 29.4.1983 then its fresh offer for supply of the commodity at the rate of Rs. 98.86 per kg. could not have been ignored by the Respondent. If the Respondent was wrong in awarding the contract at over twice the rate to M/s. Super Trade Enterprises, by ignoring the offer of the Petitioner, as well as the next higher offer of Ms. Shanti Lal Shah & Co., the Petitioner could not be made liable for the alleged damages sustained in the Risk Purchase. A reading of the Arbitrator''s Order dated 2.5.1986 further dis-closes that the Arbitrator appears to have been dissatisfied and also ambivalent on the genuineness of the initials of Shri Ram Kumar. It was for this reason that he had moved on further and sought clarification not merely on the date when the Bank Guarantee was supposedly filed by the Petitioner in the office of the respondent but as to when the Bank Guarantee had been obtained by them. In other words being unable to accept or reject the Petitioner''s assertion qua submission of the Bank Guarantee, the obvious thought had arisen in his mind that if the Bank Guarantee had in fact been

obtained there would be little cause for not filing it with the Respondent. It needs clarification that since the second Arbitrator has drawn fully upon the proceeding before Dr. Mani, these considerations are relevant. The reasons of Mr. Ram Bahadur, by extrapolation, have to be those of Dr. Mani.

9. Learned counsel for the Respondent had contended that the delay had probably been as a consequence of the Petitioner''s failure to make arrangements for the supply of the commodity in question. This point had not been raised in any of the earlier proceedings. It is a dangerous argument inasmuch it gives credence to the case that although the Bank Guarantee had been arranged a fortnight prior to 29.4.1983, it was filed only when arrangements for the commodity had been made. It is thus, a double edged dagger. It not only belies the Respondents case that the Bank Guarantee was not filed but also appears to sustain the submission that the commodity had in fact been arranged and that, Therefore, the Petitioner was entitled to claim damages since the contract was not placed on him.

10. As discussed above the the proceedings before the previous Arbitrator Dr. B.N. Mani are being looked into despite the fact that the Award has been set aside for the reason that Mr. Ram Bahadur had relied on the evidence recorded before the earlier Arbitrator Dr. B.N. Mani, he was fully aware of the controversy that had arisen and which was sought to be dispelled by the two adversaries. No evidence was recorded in the second adjudication. The omission of earlier Arbitrator Dr. B.N. Mani for not insisting on production of documents to prove or disprove the initials of the receiving Clerk must necessarily have arisen in the mind of the second Arbitrator also. This is especially so since the witness had unequivocally stated that the stamp on the Receipt dated 29.4.1983 was undoubtedly that of the Respondent. He had gone to the extent of deposing that whenever he left his seat, this stamp was invariably locked by him. Had the previous Arbitrator, Therefore, duly taken into consideration the contention of both the adversaries, and then leaned towards the correctness and authenticity of one, the Objections against his Award may not have been sustained by P.K. Bahri, J. This Court does not sit in appeal and will not substitute its own appreciation of evidence for that of the Arbitrator. However, since the previous Arbitrator has totally ignored the availability of other documents, as well as having ignored the Petitioner''s case, and the second Arbitrator has adopted his reasoning or failed to state reasons for coming to the same conclusion, he can be faulted for legal misconduct.

11. The Award as well as the proceedings are liable to be set aside also for the reason that the Arbitrator has proceeded in an inconsistent manner. The order dated 2.5.1986 had directed the Petitioner to furnish proof when the Bank Guarantee had been arranged by the Petitioner but this stream of enquiry was thereafter totally abandoned. Having read the impugned Award the learned Arbitrator has not considered this issue at all. In the circumstances of the case, specially since Risk Order procedure had been set into motion, the Arbitrator

ought to have recorded reasons why he thought it irrelevant that the Petitioner having obtained a Bank Guarantee would not have filed it with the Respondents. These contentious issues had already been raised and the second Arbitrator has failed to address or meet then. The impugned award cannot be read to contain reasons.

12. It requires reiteration that the Arbitrator was bound to give a reasoned Award. Even if he was dealing with the matter in the first instance, some Explanation was called for to substantiate why in his view it was open to the Respondent to place an order on M/s. Super Trade Enterprises although their quoted price was Rs. 225/- per kg, and the order had not been placed placed on M/s. Shanti Lal Shah & Co. which quoted the price at Rs.160/- per kg. This Explanation was especially called for, keeping in perspective the fact that his predecessor Arbitrator, Dr. B.N. Mani, on whose proceedings the second Arbitrator has almost wholly relied, had in terms found that the Respondents were not entitled to claim Risk Purchase at the differential between the rate quoted by the Petitioner i.e. Rs. 98.86 and that of M/s. Super Trade Enterprises at Rs.225/- per kg when there was a lower offer of Rs.160/- per kg.

13. On a perusal of the impugned Award and that of Dr. Mani which was set aside by the Court, the reasons given by Shri Ram Bahadur for awarding the much larger sum of Rs. 4,45,548/- are equally scanty, laconic and superficial. It does not meet the requirements of being a reasoned Award. On these grounds also the Award is liable to be set aside.

14. Learned counsel for the Petitioner had submitted that there had been a material deviation in the terms of the initial tender placed on the Petitioner and the Risk Purchase Tender which was subsequently participated in. He has relied on an unreported judgment of H. C. Goel, J. pronounced on October 15, 1985 in Suit No.923-A/82 entitled Union of India Vs. M/s. Nanco Rubber &am; Plastics Ltd. & Anr. It was contended by him that whereas the Petitioner was contractually bound to indemnify against any damage due to breach of warranty, this onerous condition did not exist in the second case since pre delivery inspection was envisaged in the contract placed on M/s. Super Trade Enterprises. I do not intend to go into this issue, not only because the Award is liable to be set aside for the reasons mentioned above but also because the alleged relaxation in the terms of the contract would have the effect of depressing prices. The Arbitrator has considered this argument and has duly recorded that in his view no substantial difference in the original Risk Purchase Tender has been brought.

15. It remains to be considered how the Petitioner''s claim for damages is to be decided. In these proceedings the dispute does not pertain to the cancellation of the previous Tender, after five extensions having been granted to the Petitioner. In my view it was not an essential term of the Risk Purchase Tender that in order to submit its bid the Tenderer should already have been in possession of the commodities in question. If this is kept in mind then the Petitioner cannot claim

damages for the Respondent''s failure to place an order on it. The position would be different if the claim was in respect of the cancellation of a contract. The Petitioner has not put forward a claim for loss of legitimate expectations. Accordingly, the Petitioner''s claim has been correctly rejected by the Arbitrator. In these circumstances I.A. 9187/94 is allowed. The Award dated 7.9.1992 given by Shri Ram Bahadur, Sole Arbitrator is set aside. In the circumstances of the case there shall be no order as to costs.