

(1989) 03 DEL CK 0040

In the Delhi High Court

Case No : Letter Patent Appeal No. 3989 of 1985 and Suit No. 889-A of 1985

Ceekay Grease and Chemicals (P) Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 29-03-1989

Acts Referred:

Citation : (1989) 1 ARBLR 415 : (1989) 39 DLT 116

Hon'ble Judges : C.L. Choudhary, J

Bench : Single Bench

Advocate : S.K. Khurana, R.K. Anand, S.P. Sharma and Amit Khemka, for the Appellant;

Judgement

C.L. Chaodhry, J.

(1) The petitioner was awarded the contract for the supply of grease to Union of India. Certain disputes arose between the parties out of the execution of the contract. The Director General, Supplies and Disposal, New Delhi appointed an Arbitrator and referred the disputes and differences between the parties for adjudication. The learned Arbitrator entered upon the reference and made and published his award on 26.11 1984. The operative portion of the award reads as under :-

"I dismiss the claim of the contractor for Rs. 1,33,496.50 (Rupees one lakh thirty three thousand four hundred ninety six and paise fifty only), as increase in Excise Duty and for Rs. 16,274,00 (Rupees Sixteen thousand two hundred seventy four only) as price increase. I also direct Union of India to pay the contractor, the amount of security deposit and balance price, withheld, in this case. All other claims of the parties are hereby dismissed. The parties shall bear their respective costs of the proceedings before me."

(2) The Arbitrator filed the award as well as arbitration proceedings in court. Notice of filing of the award was given to the parties. Union of India has accepted the award. However, the petitioner has assailed the award by filing objections

under Sections 16, 30 & 33 of the Arbitration Act the award has been challenged on the following grounds :-

(3) That the petitioner is doing the business of manufacture and sale of various kinds of grease. In order to manufacture the grease the petitioner had to purchase base oil from the public corporation. The petitioner was required to pay Excise Duty for these purchases and use the base oil with other ingredients to manufacture the grease. The Excise Duty was leviable on the manufacture of grease during the relevant period and the petitioner had to receive credit on the Excise Duty paid on the base oil. This procedure is known as "set off" under the Excise Rules. By this way the petitioner was to pay Excise Duty as levied minus Excise duty already paid on the base oil. On receipt of enquiry from the respondent the petitioner made his quotation on the basis of the Central Excise Rules and Therefore, the same was part of the offer as made by the petitioner. On these terms a running contract dated 31.1.1977 came into being, for supply of various types of grease by the petitioner. One of the clauses of the contract reads as under :-

"THE prices quoted are firm subject to variation as stated in Schedule "C". The price accepted are inclusive of excise duty at the prevailing rate and any statutory variation in this respect upward or downward will be to the purchaser's account."

The other relevant clause reads as under :-

"THE prices are firm and subject to the condition that any increase/decrease in the price of finished product as announced by the Ministry of Petroleum New Delhi will be to Government Account. Statutory increase in the rate of excise duty or sales tax shall be payable "

The petitioner by letter dated 25.2.1978 was directed to intimate as to how much Excise duty the petitioner had paid from 16.12.1977. On 30/03/1978, Excise duty was withdrawn from the grease but no reduction or withdrawal in excise duty was given to the base-oil. The petitioner on 15.4.1978 wrote to the respondent that the Excise duty was still payable on the base-oil and Therefore, under the principle of "Set off" they had paid the Excise duty and withdrawal of Excise Duty on grease was meaningless and insignificant. Under these premises a claim was laid for a sum of Rs. 1,33,496.53 on account of Excise duty paid on base oil. It was further claimed that the respondents also failed to pay a sum of Rs 36,830.00 towards balance 2% and security deposit of Rs. 34,157.00. Interest was also claimed at the rate of 19% per annum. It is stated that there is an error apparent on the face of the award. There was never a claim by the petitioner for increased excise duty as observed by the Arbitrator. The rejection of the claim by the Arbitrator towards increase in Excise Duty was contrary to the records of the case and pleadings of the parties. The Arbitrator did not look into the evidence and the pleadings of the parties. The learned arbitrator ignored the statutory rules under the Excise Act. The Arbitrator committed misconduct by not following

the law laid down in a number of judgments on this point. On these allegations it is prayed that the award be set aside.

(4) The Union of India is contesting the claim of the petitioner. In the reply it is stated that the award is non-speaking award. The Arbitrator has made the award after taking into account all the facts and circumstances of the case. There is no mistake apparent on the face of the award. the award is understandable and unambiguous. The Excise Duty on finished product applicable before 16.12.1977 was 20% ad valorem whereas the same was reduced from 20% ad valorem to Rs. 1,200.00 per M.T. with effect from 16.12.1977 and thereafter wef. 30.3.1978 the Excise Duty was completely withdrawn As per clause (6) of the Rgc the prizes accepted were inclusive of excise duty and at the prevailing rate and statutory variation in that respect upward or downward were to be on the purchaser's account. As such the firm was not entitled to any increase. Thus there was no error apparent on the face of the award The arbitrator had adjudicated the actual disputes between the parties. There is no misconduct on the part of the Arbitrator.

(5) On the pleadings of the parties the following issues were framed :-

1. Whether the impugned award dated 26/11/1984, made by Mrs. R. Laxman is liable to be set aside/remitted on any of the grounds mentioned in the objection petition ? (2) Relief.

Parties were given liberty to lead evidence by way of affidavits.

(6) I have heard the learned counsel for the parties and have gone through the record. My findings on the issues are as under :- Issue No. 1:

(7) The case of the petitioner is that the Arbitrator has not properly appreciated the claim made on behalf of the petitioner. The claim laid before the Arbitrator on behalf of the petitioner was not in respect of the increase in excise duty. The claim was that on 30/03/1978 the Excise duty was withdrawn from the grease but no reduction or withdrawal was given on the base oil. The withdrawal of excise duty on grease was meaningless and insignificant because in over all prevailing duty there was no change and subsequently on 17/05/1978 claimant again made it clear that the excise duty on base-oil was still payable. The amount of Rs. 1,33,496.57 was claimed on account of the excise duty paid on the base oil. The learned arbitrator has not appreciated the scope of the claim of the petitioner, and it is a clear case of non-application of mind. The Arbitrator has not considered the claim of the petitioner in respect of the excise duty paid on the base oil i.e. the dispute which was referred to the Arbitrator remains undecided. In this connection reliance is placed on The Fertilizer Corporation of India Ltd. Vs. Bharat Painters, wherein it was held that an award which is the product of non-application of the mind of the Arbitrator cannot be permitted to be sustained in law, since this would come within the expression "otherwise invalid" used in Section 30 of the Arbitration Act. Non-application of mind to the materials on record suggests absence of fair play and indicates that the

arbitrator did not function in a manner befitting his role)"

(8) On the other hand the contention of the respondent is that the award is non-speaking one and there is no error apparent on the face of the award. The Arbitrator has decided the disputes referred to him and it is not a case of non-application of mind.

(9) I have considered the relevant contentions of the parties and have gone through the record. The Arbitrator dismissed the claim of the petitioner for Rs. 1,33,496.50 as increase in excise duty. In fact the petitioner had not claimed any amount on account of increase in the excise duty. The case of the petitioner was that though the excise duty on grease was withdrawn w.e.f.30.3.1978 yet there was an element of excise duty paid on the base-oil which is one of the ingredients for manufacture of grease as such they were entitled to the excise duty paid on the base-oil. The Arbitrator, it appears, has not appreciated the scope of the reference and scope of the claim of the contractor as laid before the Arbitrator. It is a clear case of non-application of mind and there is an error apparent on the face of the award. I agree with the law laid down in Fertilizer Corporation's case (Supra), which laid down that "an award which is the product of non-application of mind of the Arbitrator cannot be permitted to sustain in law." The Arbitrator has not decided the real question at issue which was "whether the claim of the petitioner for payment of excise duty on base-oil was justified or not."

(10) In the result the (objection petition succeeds) and the award of the Arbitrator dated 26.11.1984 is set aside, the matter is remitted to the Arbitrator for re-consideration in terms of the observations made above. Of course the Arbitration will decide the matter afresh after hearing the parties. This petition is disposed of leaving the parties to bear their own costs.