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**(1991) 08 DEL CK 0010**

**In the Delhi High Court**

**Case No :** First Appeal No's. 176, 177, 182 and 225 of 1989

Chittor Co-Operative Sugar Ltd.

APPELLANT

Vs

State Trading Corporation of India Ltd.

RESPONDENT

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**Date of Decision :** 21-08-1991

**Acts Referred:**

**Citation :** (1991) 45 DLT 223

**Hon'ble Judges :** G.C. Mittal, C.J; Sat Pal, J

**Bench :** Division Bench

**Advocate :** S.B. Ghosh, Kum Kum Sen, R.K.P. Shankar Das and M.G. Ramachandran, for the Appellant;

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## **Judgement**

Sat Pal, J.

(1) These appeals are directed against the order dated 9/03/1989 passed by a learned Single Judge of this Court dismissing the applications of the appellants filed u/s 34 of the Arbitration Act in their respective suits. Since the point of law raised in all these appeals is common, these appeals are being decided by this common judgment.

(2) The facts pertaining to one of the appeals viz Fao (OS) 176/89 briefly stated are that the State Trading Corporation (hereinafter referred to as STC) which is the respondent in all these appeals, entered into an agreement on 26/02/1982 with the appellant whereby it agreed to purchase from the appellant 1850 M.T. of D-30 grade white crystal sugar of 1981-82 crushing season to be exported by STC. Admittedly the appellant supplied 1406 M.T. of said sugar. Before the contract could be completed, the Government of India imposed an embargo on the export of sugar from India. According to the respondent it was not under any obligation to lift the balance quantity of sugar in view of clause 10(d) of the agreement between the parties which reads as under :-

"THIS contract is at all times subject to Government of India's permission to STC to export sugar out of India. If at any time, the Government of India disallow,

defer, postpone or cancel any export commitment and/or reduce the quantity of sugar to be exported bySTC, Stc shall have the right, at its discretion, to cancel this contract and/or defer, postpone or reduce the quantity of sugar to be exported under this contract without incurring any liability to the factory, on any account whatsoever. Similarly, if for any reason whatsoever including any default on the part of the foreign buyer(s) of Stc, is not able to export sugar, Stc without incurring any liability to the factory shall be entitled to cancel the quantities yet to be exported by the Factory."

(3) Thereafter Indian Sugar Mills Association, New Delhi and National Federation Co-operative Sugar Factories Limited, New Delhi, which were defendants No. 2 and 3 in the suit as representatives of the appellant and other sugar manufacturer approached the Stc and asked it to lift the balance quantity of sugar. It was represented on behalf of the appellant and other sugar manufacturers who are appellants in other appeals that if the balance quantity of sugar was not lifted, the manufacturers will sell the sugar at the risk and cost of STC. According to Stc in order to avoid hardship to the appellate and other sugar manufacturers, it entered into an independent agreement with Indian Sugar Mills Association and National Federation of Co-operative Sugar Factories Limited wherein it was agreed that sugar manufacturers may dispose of the balance unlifted quantity of free sale sugar of D-30 grade in the open market and Stc would pay to the sugar manufacturers the difference between the actual sale price and the contract price. This decision was conveyed by STC to the above mentioned Association vide their letters dated 10/02/1983 and 22/04/1983. It was further agreed that the manufacturers including the appellant after disposal of the said sugar would prefer a claim on Stc for the payment of difference in price. The Stc had agreed to pay provisionally 90% of the difference in the price upon the submission of the claim and balance 10% was to be paid after due verification of the invoices and the other documents in respect of the sale of the said sugar.

(4) The case of Stc in the main suit was that the appellant had submitted a claim of Rs. 33,57,338.00 alleged to be the difference in price of the unlifted quantity of 444 M.T. of sugar and the appellant was paid by Stc a sum of Rs. 2,88,357.48 representing 90% of the amount claimed by the appellant. On the examination of the documents it was, however, found that the appellant had in fact sold 269.2 M.T. of E-30 grade of sugar instead of D-30 grade, and was Therefore, not entitled to claim any amount in respect thereof. After giving the appellant credit in respect of D-30 grade sugar, Stc filed the suit for refund of Rs. 1,47,016.74 plus interest of Rs. 72,561.25 at the rate of 18% per annum calculated up to 10/08/1986.

(5) Mr. Ghosh, the learned Counsel for the appellant submitted that the learned Single Judge erred in holding that the arrangement entered into between the parties by virtue of letters dated 10/02/1983 and 22/04/1983 was a fresh agreement and wholly independent of the original agreement dated 26/02/1982.

The learned Counsel further submitted that the arrangement regarding the sale of sugar in free market and payment of differential price between the parties was a transaction intrinsically arising out of and forming part of the agreement dated 26/02/1982 and therefore, the arbitration clause in the said agreement applied to the dispute between the parties.

(6) In support of his submission the learned Counsel referred to a Supreme Court judgment in *Ruby General Insurance Co. Ltd. Vs. Pearey Lal Kumar and Another*, . In this case the Hon''ble Supreme Court while approving the judgment in the case of *Heyman v. Darwins Ltd*, 1982 (1)AER 337 held that an arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. It was held in this case that the test for determining the question whether the point in dispute fell to be decided by the arbitrator is whether recourse to the contract by which the parties are bound is necessary for the purposes of determining the matter in dispute between them. If such recourse to the contract is necessary then the matter must come within an arbitrator''s jurisdiction.

(7) In the present case the point in issue is whether for the decision of the dispute in question, recourse to the contract dated 26/02/1982 is necessary. It will be seen from clause 10(d) of the aforesaid agreement which has been reproduced hereinabove that there was no provision for the sale of sugar in the local market in case the Government of India disallows Stc to export sugar and/or ask Stc to defer, postpone or cancel any export commitment. In fact in terms of the said clause 10(d), in case the Government of India disallows Stc to export sugar, Stc shall have the right at its discretion, to cancel the contract and/or defer, postpone or reduce the quantity of sugar to be exported under this contract without incurring any liability to the factory, on any account whatsoever. It was only with a view to avoid hardship to the sugar manufacturers that Stc entered into an agreement with the Association representing the sugar manufacturers wherein it was agreed that the sugar manufacturers may dispose of the balance unlifted quantity of free sale sugar of D-30 grade in the open market and -STC would pay to the sugar manufacturers the difference between the actual sale price and the contract price. The letters dated 10/02/1983 and 22/04/1983, Therefore, constituted a fresh agreement wholly independent of the agreement dated 26/02/1982, and, Therefore, the fresh agreement was not covered by the arbitration clause. In this connection it will be relevant to refer to a Supreme Court judgment reported as *The Union of India Vs. Kishorilal Gupta and Bros.*, . In this case the Hon''ble Supreme Court held that if the parties substituted a new contract for the contract which they have abrogated, the arbitration clause in the abrogated contract cannot be invoked for the determination of questions under the new agreement.

(8) In view of the above discussion, we find no merit in the appeals and the same are accordingly dismissed but in the circumstances of the case, the parties shall

bear their own costs.