
(2010) 07 DEL CK 0408
In the Delhi High Court
Case No : OMP No. 226 of 2002

DDA

APPELLANT

Vs

Jain Rolling Mills

RESPONDENT

Date of Decision : 02-07-2010

Acts Referred:

Arbitration Act, 1940 — Section 33

Arbitration and Conciliation Act, 1996 — Section 34, 34(2), 7(4), 85(2)

Citation : (2010) 07 DEL CK 0408

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Ansuiya Salwan, for the Appellant; Shiv Khorana, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—This petition u/s 34 of the Arbitration Act, 1996 has been preferred with respect to the arbitral award dated 27th March, 2002. The counsels for the parties made their respective submissions on the basis that the arbitration proceedings were governed by the 1996 Act. However, at the time of preparing the judgment, it is found that the arbitration proceedings in the present case had commenced in the year 1985. Under the provisions of Section 85(2)(a) of the 1996 Act, the arbitral proceedings having commenced before the 1996 Act came into force, are to be governed by the Arbitration Act, 1940 as held by the Supreme Court in Milkfood Ltd. Vs. GMC Ice Cream (P) Ltd., . The 1996 Act could have applied only if there had been an agreement to the same effect between the parties. Neither is it stated in the petition u/s 34 of the Act nor was it urged nor do I have been able to find any agreement of the parties as to the application of the 1996 Act. The petition u/s 34 of the 1996 Act is as such found to be misconceived. The procedure under the 1940 Act with respect to the challenge to the arbitration award being entirely different, this petition preferred under the 1996 Act cannot be treated as one under the 1940 Act objecting to the arbitration award. However, the matter having remained pending for the last

nearly 8 years and the counsels having been heard, it is deemed expedient to proceed with the matter as if under the 1996 Act. I may notice that the respondent also in reply to the petition u/s 34 of the Act has contended that the petition does not disclose any of the grounds for setting aside of the award u/s 34 of the Act and has not contended that the petition is misconceived.

2. The petitioner/DDA had invited tenders for supply of 10000 M.T. of steel bars. The order for supply of the said quantity was placed on the respondent on 18th December, 1982. The entire supply of 10000 M.T. was to be made within four months of 20th December, 1982. The supplies were not completed within the said time. The petitioner extended the time for completing supplies, initially upto 30th June, 1983 and subsequently upto 30th September, 1983. The respondent however continued to make supplies. The last supply was made on 9th May, 1984 and the respondent then informed the petitioner that it was unable to make further supply. The petitioner rescinded the contract vide its letter dated 23rd October, 1984 and thereafter made risk purchase of the balance quantities and vide letter dated 26th April, 1985 imposed liquidated damages in the sum of Rs. 23, 17,820/- on the respondent.

3. The petitioner, before the arbitrator, made a claim on the respondent for (i) Rs. 60,93,272.90p towards loss for non supply of balance 3512 M.T. of steel bars and (ii) for liquidated damages of Rs. 23,17,820/- (supra), besides for interest. The respondent also made a counter claim for damages for breach of contract and for refund of security deposit and for illegal deductions from the bills for the supplies made. The arbitrator has dismissed all the claims of the petitioner as well as the counter claim of the respondent for damages. However, the counter claim of the respondent for refund of security deposit of Rs. 1,00,000/- and for illegal deductions of Rs. 15,798/- has been allowed. Interest at the rate of 12% from 12th August, 1987 to the date of the award and further interest at the rate of 12% from 1st July, 2002 to the date of payment has also been awarded on the counter claims allowed. The respondent is not informed to have taken any proceeding for making of the award rule of the court nor filed objections to the award.

4. At the outset, the contention of the counsel for the petitioner of the claim for liquidated damages being not arbitrable is to be considered. The counsel for the petitioner with reference to Clauses 2 and 14 of the agreement had contended that the decision of the Superintending Engineer with respect to imposition of liquidated damages is final and not arbitrable. Reliance in this regard is placed on DDA v. Sudhir Brothers 1995 (2) Arb.LR 306 and Bhagat Construction Company v. DDA 2001 Supp. Arb.LR 375 (Delhi). To meet the objection of the respondent, of the petitioner having claimed the liquidated damages before the arbitrator being not entitled to take the said plea, it is contended that the claim even if made was without jurisdiction and the arbitrator being a creature of contract had no power to deal with the same and the award dismissing the claim of the petitioner for liquidated damages is a nullity. It is contended that notwithstanding

the dismissal of the said claim by the arbitrator, the petitioner will have liberty to recover the liquidated damages awarded from the respondent. By this petition u/s 34 of the Act, a clarification to the said effect is sought.

5. The counsel for the respondent has contended that upon the petitioner itself making a claim for liquidated damages before the arbitrator, the respondent had raised an objection as to the arbitrability thereof and had also filed an application u/s 33 of the 1940 Act being OMP No. 20/1987 in this Court in this regard. The petitioner however opposed the said objection and this Court also directed the arbitrator to decide the said claim of the petitioner. The respondent challenged the order of this Court before the Supreme Court but without any success. The respondent thus contends that the petitioner having earlier made the claim, treating it to be arbitrable and having opposed the plea of the respondent of the same being not arbitrable is now not entitled to turn turtle when the award on the said claim has gone against the petitioner. Reliance is placed on *Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another*, to contend that if a question is specifically referred to the arbitrator it means that the party is desirous to have the decision on the specific question from the arbitrator rather than from the Court and the Court will not interfere with the award of the arbitrator. Reliance in this regard is also placed on *Union of India v. Avtar Singh* 2000 (1) Arb.L.R.700 (SC) where a similar objection was dismissed having been taken at a belated stage.

6. The counsel for the petitioner has rejoined by contending that in *Tarapore and Company* (supra) the reference was of a legal issue and thus the said judgment cannot apply where, as aforesaid, the claim was not arbitrable. Similarly it is contended that in *Avtar Singh* (supra) also the objections to the award even on non-arbitrable matter were found to be not sustainable and the reason of the objection being belated was stated in that context.

7. The judgments, both in *Bhagat Construction Company* and in *M/s Sudhir Brothers* (supra) setting aside the award with respect to a non- arbitrable claim were under the 1940 Act. The petitioner has preferred these objections under the 1996 Act and the matter has to be looked thereunder. u/s 7(4)(c) of the 1996 Act there is deemed to be an arbitration agreement between the parties if it is contained in an exchange of statements of claim and defence in which the existence of the arbitration agreement is alleged by one party and not denied by the other. In the present case the petitioner insisted that its claim for liquidated damages was arbitrable, inspite of objection by the respondent. The petitioner so succeeded till the Supreme Court. Having claimed in its statement of claim and in previous legal proceedings that its claims for liquidated damages are arbitrable, the petitioner cannot now be heard to state that it is not arbitrable. Thus, notwithstanding the said claim being not arbitrable, owing to the petitioner in its claim petition before the arbitrator and in the previous legal proceedings having averred the same to be arbitrable and for the reason of the said stand of the petitioner having been accepted right till the Apex Court and which under the

1996 Act constitutes an arbitration agreement, the judgments in Bhagat Construction Company and M/s Sudhir Brothers do not apply.

8. That brings me to the objections of the petitioner u/s 34 of the 1996 Act to the award in so far as dismissing its claims against the respondent and allowing the claim of the respondent for refund of security deposit etc. with interest. The petitioner claimed Rs. 60,93,272.90p on account of loss suffered due to non supply by the respondent of full quantity of ordered steel. The award notices that even though the entire supplies were to be completed within four months and the respondent was slow since the beginning in making the supplies, the petitioner wrote no letters to the respondent to expedite the supplies. The award also -

i. accepts the version of the respondent of the petitioner having asked the respondent to slow down the supplies.

ii. holds that the petitioner did not need the entire quantity in four months and that is why did not issue notice to the respondent to expedite the supplies even though the supplies were very slow.

iii. finds that the petitioner on its own extended the time for completing the supplies.

iv. finds that the petitioner delayed the payments beyond 7 days provided in the agreement and withheld the amounts from the passed bills in breach of contract.

v. finds that the petitioner forced the respondent to provide an additional Bank Guarantee which was not provided for in the agreement and in an attempt to cover up its delays in payment.

9. Thus it was held that the petitioner was in breach of contract and the respondent was justified in stopping the supplies specially as prices of steel had been rising and the supplies beyond the stipulated date were made by the respondent as a gesture of goodwill. The arbitrator also held that owing to the conduct of the petitioner time for supplies had ceased to be of the essence of contract and the petitioner had no authority under the terms of the contract to issue the letter dated 3rd August, 1984 asking the respondent to make the balance supplies within 7 days.

10. The counsel for the petitioner has contended that the decision of the arbitrator that time had ceased to be of the essence of the agreement is contrary to the judgment of the Apex Court in State of Maharashtra and Another Vs. Digambar Balwant Kulkarni, and the award dismissing the said claim is thus liable to be set aside and the claim allowed.

11. Per contra the counsel for the respondent cites

i. Mahabir Prashad Rungta Vs. Durga Datt, laying down that upon breach of an important condition of the agreement, the other party can rescind the contract and sue for damages.

ii. Kunja Behari Banerjee v. New India Assurance Co. Ltd. 2009 (1) RAJ 328 (SC) wherein with respect to objections to an award under the 1996 Act it was held that where the award was supported by sufficient reasons and documents the same should not be interfered with.

iii. State of Orissa and Another Vs. Kalinga Construction Co. (P) Ltd., .

iv. G.D. Rathi Steels Pvt. Ltd. Vs. Delhi Development Authority, .

v. Sujanmal v. Radhdey Shyam Agarwal AIR 1976 Raj. 98.

vi. Puri Construction Pvt. Ltd. Vs. Union of India (UOI), .

vii. Hindustan Tea Co. Vs. K. Sashikant Co. and Another, . All on the scope of interference in the award and to demonstrate that the view taken by the arbitrator is a possible view.

12. I have in Bhagwati Contractors Vs. Union of India (UOI) and Another observed as under with respect to the scope of interference in an award under the 1996 Act and which observations are found apposite to the present controversy also:

7. Arbitration is intended to be a faster and less expensive alternative to the courts. If this is one's motivation and expectation, then the finality of the arbitral award is very important. The remedy provided in Section 34 against an award is in no sense an appeal. The legislative intent in Section 34 was to make the result of the annulment procedure prescribed therein potentially different from that in an appeal. In appeal, the decision under review not only may be confirmed, but may also be modified. In annulment, on the other hand the decision under review only may be invalidated in whole or in part or be left to stand if the plea for annulment is rejected. Annulment operates to negate a decision, in whole or in part, thereby depriving the portion negated of legal force and returning the parties, as to that portion, to their original litigating positions. Annulment can void, while appeal can modify. Section 34 is found to provide for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision. A remedy of appeal focuses upon both legitimacy of the process of decision and the substantive correctness of the decision. Annulment, in the case of arbitration focuses not on the correctness of decision but rather more narrowly considers whether, regardless of errors in application of law or determination of facts, the decision resulted from a legitimate process.

8. In the case of arbitration, the parties through their agreement create an entirely different situation because regardless of how complex or simple a dispute resolution mechanism they create, they almost always agree that the resultant award will be final and binding upon them. In other words, regardless of whether there are errors of application of law or ascertainment of fact, the parties agree that the award will be regarded as substantively correct. Yet, although the content of the award is thus final, parties may still challenge the

legitimacy of the decision-making process leading to the award. In essence, parties are always free to argue that they are not bound by a given "award" because what was labeled an award is the result of an illegitimate process of decision.

9. This is the core of the notion of annulment in arbitration. In a sense, annulment is all that doctrinally survives the parties' agreement to regard the award as final and binding. Given the agreement of the parties, annulment requires a challenge to the legitimacy of the process of decision, rather than the substantive correctness of the award.

10. Joseph Raz in his paper "The Politics of the Rule of Law" has opined that the function of the rule of law is to facilitate the integration of a particular piece of legislation with the underlying doctrines of the legal system; the authority of the courts to harness legislation to legal doctrine arises neither from their superior wisdom nor from any superior law of which they are the custodians; it arises out of the need to bring legislation in line with doctrine. The courts ensure coherence of purpose of law, ensuring that its different parts do not fight each other. The learned author has further observed that a law which is incoherent in purpose serves none of its inconsistent purposes very well. Purposes conflict if due to contingencies of life serving one will in some cases retard the other. The second basis for the authority of the courts to integrate legislation with doctrine is the need to mix the fruits of long established traditions with the urgencies of short term exigencies. In ensuring the coherence of law, the courts are expected to ensure the effectiveness of the democratic rule. In giving weight to the preservation of long established doctrines i.e., the traditions, they protect the long term interest of the people from being swamped by the short term. I have taken the liberty to quote from the aforesaid paper since the courts are being repeatedly called upon to adjudicate on the various provisions of the re-enacted arbitration law. From the various pronouncements in the last about 12 years since re-enactment, it appears that the danger of interpreting the new Act in a manner doing away with the whole object/purpose of re-enactment is imminent. The courts continue to be inundated till date, in spite of repeal of the old Act 12 years ago, with cases thereunder also, particularly of challenge to the arbitral award. Provisions of the old and the new Act relating to inference with the arbitral award are vastly different. However, when the courts in the same day are wrestling with a matter concerning arbitral award under the old Act and with that under the new Act, the chances of culling out the huge difference between the two are minimal. It is not to be forgotten that the courts deal with and rule on disputes where monies and properties of real persons are at stake. The courts do not decide in abstract. Thus, when in one case the courts interfere with the award for the reason of the same not rendering to the litigant what the courts would have granted to him, the courts find it difficult in the very next case, though under the new Act to apply different parameters.

11. Arbitration under the 1940 Act could not achieve the savings in time and

money for which it is renowned and had merely become a first step in lengthy litigation. It was to get over the said malady that the law was sought to be overhauled. While under the old Act, the award was unenforceable till made rule of the court and for which it had to pass various tests as laid down therein and general power/authority was vested in the court to modify the award, all this was removed in the new Act. The new Act not only made the award executable as a decree after the time for preferring objection with respect thereto had expired and without requiring it to be necessarily made rule of the court but also did away with condonation of delay in filing the said objections. The reason/purpose being expediency. The grounds on which the objections could be filed are also such which if made out, the only consequence thereof could be setting aside of the award. It is for this reason that under new Act there is no power to the court to modify the award or to remit the award etc. as under the old Act. A perusal of the various grounds enunciated in Section 34 will show that the same are procedural in nature i.e., concerning legitimacy of the process of decision. While doing so, the ground of the award being in conflict with Public Policy of India was also incorporated. However the juxtaposition of Section 34(2)(ii) shows that the reference to Public Policy was also in relation to fraud or corruption in the making of the award. The new Act was being understood so till the Supreme Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., held that the phrase Public Policy of India is required to be given wider meaning and if the award on the face of it is patently in violation of statutory provisions, it cannot be said to be in public interest and such award/judgment/decision is likely to adversely affect the administration of justice. In para 37 of the judgment it was held that award could be set aside if it is contrary to fundamental policy of Indian Law or the interest of India or justice or morality or if it is patently illegal. A rider was however put that illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that the award is against the public policy. Yet another test laid down is of the award being so unfair and unreasonable that it shakes the conscience of the court.

12. The courts have thereafter been inundated with challenges to the award. The objections to the award are drafted like appeals to the courts; grounds are urged to show each and every finding of the arbitrator to be either contrary to the record or to the law and thus pleaded to be against the Public Policy of India. As aforesaid, the courts are vested with a difficult task of simultaneously dealing with such objections under two diverse provisions and which has led to the courts in some instances dealing with awards under the new Act on the parameters under the old Act.

13. The result is that the goal of re-enactment has been missed.

14. The re-enactment was not only to achieve savings in time and prevent arbitration from merely becoming the first step in lengthy litigation but also in consensus with the international treaties and commitments of this country thereto. Since the enactment of the 1940 Act, the international barriers had

disappeared and the volume of international trade had grown phenomenally. The new Act was modeled on the model law of international commercial arbitration of the United Nations Commission on International Trade. It was enacted to make it more responsive to contemporary requirements. The process of economic liberalization had brought huge foreign investment in India. Such foreign investment was hesitant, owing to there being no effective mode of settlement of domestic and international disputes. It was with such lofty ideals and with a view to attract foreign investment that the re-enactment was done. If the courts are to, notwithstanding such re-enactment, deal with the arbitration matters as under the old Act it would be a breach of the commitment made under the treaties on international trade.

13. The petitioner in the present case has not urged any ground with respect to the decision making process of the arbitrator. The findings of the arbitrator of time for supply having ceased to be of the essence, of reciprocal breach on the part of the petitioner and of the petitioner itself having no requirement for the goods within the stipulated time and having itself asked the respondent to slow down the supplies are findings of facts and the parties having agreed to make the award of the arbitrator final, the petitioner cannot be now permitted to raise such grounds. The objections of the petitioner/DDA for setting aside of the award and dismissing its claims for Rs. 60,93,272.90p are thus dismissed. The counsel for the petitioner besides the preliminary objection with respect to the award on its claim No. 2 for liquidated damages of Rs. 23,17,820/- has not made any other objection. In any case the award dismissing the claim for liquidated damages is for the same reasons on which the claim No. 1 of the petitioner/DDA was dismissed. Accordingly, the objections to the award dismissing claim No. 2 for liquidated damages are also dismissed.

14. No argument has been raised with respect to the objection in so far as allowing the counter claim of the respondent for refund of security deposit of Rs. 1 lac and of Rs. 15,798/- on account of excess recovery for the testing charges. The counsel for the petitioner has however objected to the award of interest at 12% per annum.

15. In so far as objection to the rate of interest is concerned, it is felt that award of any interest till the date of the award is not justified. It is the petitioner/DDA which had first lodged its claims against the respondent. The respondent by challenging the arbitrability of all the claims of the petitioner by preferring a petition u/s 33 of the Arbitration Act, 1940 in this Court held up the arbitration. The respondent pursued its said objection till the Supreme Court. Thus, the delay caused in the arbitration was squarely attributable to the respondent. The respondent made its counter claims in the arbitration award belatedly and it appears only by way of counter blast to meet the claims of the petitioner. It cannot also be said that the claims of the petitioner/DDA, though have been disallowed were frivolous or mala fide. The petitioner was bona fide pursuing its claims and ought not to be burdened with interest till the date of the award.

However, there is no justification for the petitioner not paying the awarded amount in terms of the award. Accordingly while maintaining the interest at 12% per annum as awarded by the arbitrator, I modify the award by holding the respondent not entitled to any interest pendente lite and holding the respondent entitled to interest at 12% per annum only from 1st July, 2002. With the aforesaid modification the petition is dismissed. No order as to cost.