

(2012) 09 DEL CK 0138
In the Delhi High Court
Case No : O.M.P. 279 of 2005

Gujarat Heavy Chemicals Ltd.

APPELLANT

Vs

Diwan Mundhra Bros Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 24-09-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16(2), 34, 34(2)(b)(ii)

Citation : (2012) 9 AD 185

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : T.K. Ganju, with Mr. V. Seshagiri, Mr. N. Menon and Mr. Aditya Ganju, for the Appellant; N. Shoba with Mr. Sri Ram J. Thalapathy and Mr. V. Adhimoolam, for the Respondent

Judgement

Justice S. Muralidhar

1. Gujarat Heavy Chemicals Ltd. ("GHCL") has, in this petition u/s 34 of the Arbitration and Conciliation Act, 1996 ("Act") challenged an Award dated 30th March 2005 passed by the learned sole Arbitrator (Respondent No. 2) in the disputes between the GHCL and the Respondent Diwan Mundhra Bros. Pvt. Ltd. ("DMBPL") (Respondent No. 1) arising out of a Distributor Agreement dated 1st April 1994 ("Agreement") whereby DMBPL was appointed as a dealer of the GHCL for effecting sale of soda ash. Article 2.6 (F) of the said Agreement stated that "the Dealer shall be responsible for effecting sales of the Products to the customers and realization of the sale proceed thereof". Article 2.6 (R) of the Agreement reads as under:

R. The Dealer shall be allowed to procure bulk orders from any manufacturer/ direct user/business organization in its territory for sale of products specified in Annexure "A" on the basis of direct supply to be made from the Plant of GHCL to the said Purchaser if accepted by GHCL. The Dealer shall be paid commission as notified by GHCL from time to time for such sale with a condition that Dealer shall be responsible for recovery of sale-proceeds & "C" forms or any other

documents from the Purchaser and in case of any amount remaining unpaid in respect of such deals, it shall be recovered by GHCL from the Dealer and the Dealer agrees to make good the loss if any suffered by GHCL.

2. Disputes arose between the parties as regards the payment of commission by GHCL to DMBPL for the sale of soda ash. According to DMBPL, from the year 1995 onwards GHCL neglected to pay the full commission, bonus and other incentives. It appears that on 14th July 1997 in respect of commission due on a consignment sale of soda ash to Sylvania & Laxman Ltd. ("Sylvania"), a Memorandum of Understanding ("MoU") was entered into between GHCL and DMBPL to the effect that commission would be payable to DMBPL only after the winding up case, i.e., Company Petition No. 18 of 1998 against Sylvania was finally decided by this Court.

3. GHCL terminated the Agreement by a letter dated 24th October 2001 in accordance with Article 7.1 of the Agreement. The case of GHCL was that DMBPL failed in its obligations under the Agreement on all fronts, including sales promotion and timely realization of sale proceeds from the purchase orders. Subsequently however, the Agreement was renewed up to 31st March 2002 with DMBPL assuring GHCL of good performance.

4. On 28th January 2002, DMBPL sent a notice to GHCL invoking the arbitration clause and raising its claims. Following this, the parties jointly agreed to refer the disputes to the learned Arbitrator which was accepted by him by a letter dated 19th April 2002.

5. In its statement of claims before the learned Arbitrator, DMBPL did not explain how its claims under various heads were within time. Claim No. 1-A was for a sum of Rs. 67,278.62 for commission payable on account of consignment sales for the period 1995-96. Claim No. 3-A was on account of unpaid/short paid commission in the sum of Rs. 4,04,000.21 together with interest from 1st April 1997 till the date of payment. Claim No. 3-B was for a sum of Rs. 4,24,614 on account of amount payable towards interest on delayed payments again together with interest from 1st June 1997 till the date of payment. Claim No. 4-A was for interest on the delayed payment of bonus incentive and Claim No. 4-B was on account of bonus incentives for the period 1997-98. Claim No. 5-A was for balance amount towards commission for the sales in the period 1998-99 together with interest. Claim No. 5-B was towards interest on the delayed payments. All the above claims, therefore, pertained to a period more than three years prior to the date of the invocation of the arbitration clause by DMBPL, i.e., 28th January 2002.

6. In its reply to the statement of claims, GHCL pointed out that "many of the claims, at the face of it, are barred by limitation". In response to Claim No. 1-A, GHCL contended that the said claim was "illegal, untenable, barred by time and should therefore be rejected". GHCL further pointed out that in a letter written by DMBPL on 4th October 2000 various claims had been raised but there was no

claim for commission for the period 1995-96. In its rejoinder before the learned Arbitrator, DMBPL contended that "having regard to the nature of transactions between the Claimant and the Respondent the question of limitation does not arise. Further limitation is a matter of fact and law and, therefore, cannot be taken as a preliminary objection to the claims made by the Claimant".

7. In the affidavit of evidence by Mr. Shankar Mundhra on behalf of DMBPL, reference was made in para 33, to several the credit notes marked as Ex. P.81 to Ex. P.96. In the said affidavit after referring to the aforementioned documents, it was stated as under:

Further these documents in addition to the documents Ex. P.57 and Ex. P.58 would establish beyond doubt that our remuneration in the form of commission, bonus incentives etc. etc. were actually paid by the Respondent Company long after the transaction entitling us for the remuneration was completed. Therefore, I beg to state that the accounts between the Respondent and our Company were running accounts and were never squared up till the date of illegal termination.

8. In the affidavit of evidence of Mr. P.S. Jassal, Vice-President (legal), GHCL, it was stated in para 8 as under:

It may be stated that since the Claimant has not submitted the documents pertaining to the transactions on the basis of which the Claimant is purporting to make the alleged claims in these proceedings, the learned Arbitrator should dismiss the entire claim filed by the Claimant. There was no running account between the parties and the entries in the books of account were made taking each transaction as an independent transaction. The documents annexed with the Claim Petition are wholly irrelevant and without any basis.

9. One of the issues required to be addressed by the learned Arbitrator was whether the aforementioned claims of DMBPL, which pertained to a period at least three years prior to the invocation of the arbitration clause by DMBPL, were barred by limitation. The learned Arbitrator, while allowing Claim No. 1-A of DMBPL in the sum of Rs. 67,278.62 together with interest at 8% per annum from 1st April 1996 till the date of payment, gave the following reasoning for holding the claim to be within time:

The plea of the Respondent-Company that the claim is barred by limitation, cannot also be accepted, since the parties were involved in a series of transactions over the years and even though the claim would be raised on the basis of the actual sales, which would be reflected at a running account was being maintained for the purpose. The claimant-Company has placed exhaustive documentary evidence on record in the form of vouchers, invoices, accounts statements etc. to indicate the manner, in which the dealings between the parties were taking place. The transactions between the parties and the settlement of accounts between them clearly led to the conclusion that it was a running account and, thus, the plea on behalf of the Respondent-Company regarding limitation needs to be negative.

10. It was submitted by Mr. T.K. Ganju, learned Senior counsel appearing for GHCL that the finding of the learned Arbitrator that there was a running account between the parties was not based on any evidence placed on record. Relying on the decisions of the Supreme Court in *The Hindustan Forest Company Vs. Lal Chand and Others*, and *Chandradhar Goswami and Others Vs. The Gauhati Bank Ltd.*, he submitted that not only was DMBPL required to raise a specific plea to the effect that there was a running account between the parties but also place documents on record to prove such plea. Neither in the statement of claim nor in the rejoinder was there any such plea taken. Referring to Article 1 of the Schedule to the Limitation Act, 1963 ("LA"), Mr. Ganju pointed out that even where there was a running account between the parties, limitation would begin to run from the close of the year in which "the last item admitted or proved is entered in the account". Even by this yardstick, the claims would be barred by limitation. He submitted that Article 26 did not apply to the facts on hand. Even under Article 137 the period of limitation would expire three years from the date on which the claim fell due. The claim pertained to payment of commission for the year 1995-96 onwards and payments were being made periodically by GHCL to DMBPL. There was no contemporaneous protest by DMBPL about short payment of commission. Even in the letter dated 4th October 2000 addressed to GHCL there was no reference made by DMBPL to any non-payment of commission for the years 1995-96 onwards. Mr. Ganju referred to the decision in *Municipal Corporation of Delhi Vs. Sukumar Chandra Jain*, and *Indian Acrylics Ltd. v. E.I. Du Pont De Nemours* 2012 VII AD (Del) 101 to urge that the allowing of time barred claims was opposed to the public policy of India and, therefore, the impugned Award was liable to be set aside u/s 34(2)(b)(ii) of the Act.

11. In reply to the above contentions, it is submitted by Ms. Shoba Nagarajan, learned counsel appearing for DMBPL, that there was exhaustive documentary evidence placed on record to prove that there was a running account between the parties. According to her, there were various credit notes which were drawn up during the aforementioned period which were paid for much later by the GHCL, and which fact was not denied by GHCL. She contended that the balance of the running account was carried forward from year-to-year. She referred to some answers given by GHCL witness in his cross-examination which according to her was an admission of the above fact. She stated that inasmuch as the accounts between the parties were admittedly never settled, an inference had to be drawn that there was a running account. Although she did not dispute that in the impugned Award there was no detailed discussion of the evidence, she submitted that the fact that the learned Arbitrator adverted to "exhaustive documentary evidence on record in the form of vouchers, invoices, account statements etc." should be taken to be a sufficient indication that the said evidence was looked into by the learned Arbitrator for arriving at the conclusion that there was a running account between the parties. She also relied upon the decision in *A.M. Shaik Ali v. D S & A Co. Employees Stores* 1991 (2) (HC) A.P.L.J. 192.

12. At the outset, it requires to be noted that Claim Nos. 1-A, 3-A, 3-B, 4-A, 4-B, 5-A and 5-B all relate to the period at least three years prior to the date of the invocation of the arbitration clause by DMBPL on 28th January 2002. With the GHCL having categorically taken a plea in its reply to the statement of claims that many of the claims of DMBPL were time barred, it was incumbent on DMBPL as Claimant to establish how the claims were within time. It is also not in dispute that neither in the statement of claims nor in the rejoinder filed before the learned Arbitrator did DMBPL plead that there was a running account between the parties. This plea was taken for the first time in para 33 of the affidavit of Mr. Mundhra filed by way of evidence before the learned Arbitrator. Even the said affidavit did not enclose the accounts maintained by DMBPL regarding the transactions with GHCL. It only referred to a series of credit notes (Ex. P.81 to Ex. P.96 and Ex. P.57 - P.58).

13. For the purposes of making good the plea that there was a running account between the parties, it was incumbent on DMBPL to have pleaded such fact in the first place. The importance of this requirement has been emphasized in the two decisions of the Supreme Court relied upon by learned Senior counsel for the GHCL. In *Hindustan Forest Company v. Lal Chand*, the Supreme Court discussed Article 115 of the Jammu and Kashmir Limitation Act which was in Pari Material with Article 85 of the Limitation Act, 1908 and which in its essential features was no different from Article 1 of the Schedule to the LA, except as regards the actual period of limitation. Even in that case, the question was whether the suit of the Plaintiff based purportedly on a running account was within limitation. The Supreme Court held that the decision of the Calcutta High Court in *Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah* (1930) ILR 58 Cal 649, laid down the correct test for determining whether there was "a mutual, open and current account where there have been reciprocal demands between the parties". It required examination whether the payments made "were in discharge of the obligation created in the buyer by the deliveries made to it to pay the price of the goods delivered and did not create any obligation on the sellers in favour of the buyer". In para 13 of the decision in *Hindustan Forest Company v. Lal Chand*, the Supreme Court categorically held that the applicability of Article 115 depended on special facts which were not pleaded in the plaint. It was observed that in the pleadings "there is no hint there that the account was mutual. We feel sure that if the attention of the learned Judges of the High Court had been drawn to this aspect of the matter, they would not have permitted any question as to Article 115 being raised, and the parties would have saved considerable costs thereby".

14. The issue was revisited by the Supreme Court in *Chandradhar Goswami v. Gauhati Bank Ltd.* The entries in the accounts produced were examined for determining the question whether there was an "open, mutual and current account" for the purposes of limitation.

15. As far as the present case is concerned, the mere statement in para 33 of the affidavit of Mr. Mundhra that there was a running account is hardly sufficient

to prove the point. The mere production of credit notes (Ex. P.81 to P.96) was also not sufficient. Also, the mere fact that there was no dispute that payments under the credit notes were made later than the dates of the credit notes did not per se establish that there was a running account. For there to be a running account, there obviously had to be a periodic reconciliation of accounts. At the least, the certified accounts had to be produced to prove the relevant entries as regards the payments in respect of credit notes. No such accounts were produced in the instant case before the learned Arbitrator. The statement by Mr. Mundhra in his affidavit that there was a running account between the parties was, therefore, not proved. There was no basis on which the learned Arbitrator could have rendered a finding to that effect. It must also be recalled that GHCL witness Mr. Jassal had categorically denied that there was any running account between the parties.

16. An earnest attempt was made by Ms. Nagarajan, learned counsel for DMBPL, to contend that there was a carry forward of the outstanding balance in the accounts from year to year. Apart from the fact that there is no such plea taken even in the affidavit of Mr. Mundhra, such fact if at all had to be proved by producing the accounts. It was not a matter of mere averment by one party. Moreover, there was no discussion whatsoever of any of the documents referred to in para 33 of the affidavit of Mr. Mundhra on behalf of DMBPL, or to the affidavit of Mr. Jassal of GHCL or their respective cross-examination. Certainly the learned Arbitrator did not hold that there was any "carry forward" of the balance at the end of a period and that, therefore, there was a running account.

17. The resultant position is that there was no evidence placed on record before the learned Arbitrator so as to enable him to conclude that there was a running account between the parties. The finding to that effect in the impugned Award was based on no evidence at all. The impugned Award is, therefore, unsustainable in law.

18. With DMBPL failing to establish that its Claim Nos. 1-A, 3-A, 3-B, 4-A, 4-B, 5-A and 5-B were within time, those claims ought to have been rejected by the learned Arbitrator as being barred by limitation. As already explained by this Court in *Municipal Corporation of Delhi v. Sukumar Chandra Jain and Indian Acrylics Ltd. v. E.I. Du Pont De Nemours*, the allowing of time barred claims would render an Award to that extent patently illegal and opposed to the public policy of India since the law of limitation is very much part of the public policy of India. Consequently, the impugned Award in respect of Claim Nos. 1-A, 3-A, 3-B, 4-A, 4-B, 5-A and 5-B is unsustainable in law and is set aside.

19. Claim No. 6-A was for a sum of Rs. 8,31,132.25 towards balance commission payable on the sales. The plea was based on a tabular statement (Annexure P-11). The learned Arbitrator returned the following finding in that regard:

A perusal of the document, Annexure P-11, would reveal that it is not a case of non-payment of commission, as suggested by the Respondent-Company. In fact,

less commission was paid. The commission payable was @ Rs. 150/- per M.T., whereas the commission was paid in most cases @ Rs. 75/- per M.T. The complete details of the bill numbers, quantity sold and the dates on which the sales were made, have been duly reflected in Annexure P-11. The Respondent-Company was not able to show that the tabulation was wrong, but the only submission made was that the commission was reduced or not paid at all due to the default of the claimant themselves. If it was the case of the Respondent-Company that no commission was payable, then it is not understandable as to why commission at lesser rates was paid. Moreover, the Respondent-Company has failed to furnish the details regarding their plea of receipt of payment beyond 180 days. The letter dated 21.03.2001, cannot be pressed into service for non-payment of commission, since it is the case of the Respondent-Company themselves, as is evident from Annexure P-11 that the commission, in fact, was paid to the claimant-Company, but at lesser rates. There is no reason to doubt the transactions, indicated in Annexure P-11, since the bill particulars with their respective dates and the quantities have been clearly mentioned and the Respondent-Company has not denied the transactions. Accordingly, I am of the firm view that the claimant-Company is entitled to the sum of Rs. 8,31,132.25 as balance commission along with interest @ 8% per annum from 01.04.2000 till the date of payment.

20. The examination of Annexure P-11 shows that it was a document prepared by DMBPL itself. Although it was contended that this document was not denied, the correct position is that there was an admission/denial of documents undertaken in the course of the arbitral proceedings. On the body of Annexure P-11 counsel for GHCL made the following endorsement: "Ex. P-11 (p.36-60) denied"

21. The credit notes (Ex. P.84 to Ex. P.101) show that there is no indication therein that the commission agreed to be paid by GHCL to DMBPL was Rs. 150 per metric tonne ("PMT"). It is only in the debit notes prepared by DMBPL itself that there was a reference to the commission being Rs. 150 PMT. Then again in a letter dated 21st March 2001 (Annexure R4) to the reply on behalf of GHCL to the statement of claim, DMBPL inter alia stated as under:

We are enclosing detail of pending commission towards various invoices remained either unpaid or less paid while issuing credit note. The total amount due comes to Rs. 36,245/-. Here we would like to add that in Mohan Meakin no commission has been paid against the detail enclosed which itself comes to Rs. 20,402/-. This commission remained unpaid in view of company policy of 180 days beyond which if payment comes no commission is payable.

22. Enclosed with the above letter was a statement which showed the commission payable even according to GHCL, was either Rs. 100 PMT or Rs. 75 PMT. Consequently it is not understood as to how the learned Arbitrator came to the conclusion that the GHCL had agreed to pay DMBPL commission at Rs. 150 PMT. Again this finding is not based on the evidence on record. In fact, there is

no discussion on any of the above documents by the learned Arbitrator to justify his conclusion. A reference is made by Ms. Nagarajan to the letter dated 22nd May 1997 written by DMBPL to GHCL (Ex. P.7) enclosing various credit notes against which payment was due and which stated that DMBPL would be charging interest for the delayed payment. The endorsement during admission/denial as far as this document is concerned reads as under:

Ex. P-7

Pages 28-30

Receipt admitted.

Contents denied.

23. Reliance therefore cannot be placed on the above document to urge that it had been agreed between the parties that interest would be paid by GHCL for the delayed payment on the credit notes. There is no other document which goes to show that there was any admission by GHCL that it would pay interest on delayed payments. Consequently, the impugned Award as regards Claim No. 6-A and the corresponding interest claims, i.e., Claim Nos. 6-B, 6-C, 7-A and 8-A is unsustainable in law and requires to be set aside. The Award in respect of Claim No. 10 as regards refund of security deposit in the sum of Rs. 5 lakhs with interest at 8% p.a. from 1st April 2002 till the date of payment has not been seriously contested by the GHCL and therefore the impugned Award in respect thereof is not interfered with. However, the award of interest on the interest component under Claim No. 11 cannot be sustained in law in the absence of any express agreement between the parties in that regard.

24. As regards the Award in respect of the counter-claims of the GHCL, this Court is not inclined to interfere with the same, since even the said counter-claims have not been shown to be within limitation. As regards the return of "C" Forms, this Court holds that the view taken by the learned Arbitrator does not call for interference. As observed in the impugned Award in respect of the counter-claims, it would be open to GHCL to seek other appropriate remedies as may be available to it in accordance with law.

25. One more submission of Mr. Ganju, learned Senior counsel for GHCL, was that the learned Arbitrator ought not to have entertained the claims of DMBPL at all once the Agreement on the basis of which DMBPL was making its claims was held not to be the agreement between the parties. A perusal of the impugned Award shows that while GHCL was contending that the only Agreement between the parties was the one dated 1st April 1994, DMBPL was contending that there were certain modifications made to the said Agreement which had been suggested by DMBPL in its letter dated 15th September 1994. The learned Arbitrator referred to the correspondence between the parties and concluded as under:

..... The claimant-Company was, therefore, not justified in stating that the

Agreement dated 01.04.1994, was not the real Agreement, since the same Agreement with modifications of 15.09.94 letter was the actual contract between the parties.

26. Accordingly, the plea of the GHCL in its application before the learned Arbitrator u/s 16(2) of the Act challenging the jurisdiction of the learned Arbitrator was rightly rejected. The modifications suggested by DMBPL in the arbitration agreement did not affect the arbitration clause which was independent of the agreement itself. Therefore, whether it is the agreement dated 1st April 1994 relied upon by the GHCL or its modified form as relied upon by DMBPL, the arbitration clause remained the same. Consequently, the decision of the learned Arbitrator rejecting the GHCL application u/s 16(2) of the Act cannot be faulted. The result of the above discussion is that the impugned Award to the extent that it rejects the application of GHCL u/s 16(2) of the Act and to the extent it allows Claim No. 10 and rejects the counter-claims of the GHCL, is upheld. The Award to the extent it allows the remaining claims of DMBPL is hereby set aside. The petition is disposed of in the above terms, but in the circumstances, with no order as to costs.