

**(2005) 04 DEL CK 0025**

**In the Delhi High Court**

**Case No :** CS (OS) No. 2661-A of 1996 and is No. 1 of 1998

Guru Overseas P. Ltd.

APPELLANT

Vs

State Trading Corporation of India Ltd.

RESPONDENT

**Date of Decision :** 04-04-2005

**Acts Referred:**

Arbitration Act, 1940 — Section 30, 33

**Citation :** (2005) 1 ARBLR 556 : (2005) 119 DLT 638 : (2005) 82 DRJ 119

**Hon'ble Judges :** Pradeep Nandrajog, J

**Bench :** Single Bench

**Advocate :** Kunal Sinha, for the Appellant; C.S. Prashar, for the Respondent

## **Judgement**

Pradeep Nandrajog, J.—Having lost the battle before the arbitrator, M/s. Guru Overseas Private Limited, the claimant, has filed objections to the award by and under is No. 1/1998. Objections have been captioned as u/s 33 of the Arbitration Act, 1940, but a perusal thereof would reveal that the objections have been filed u/s 30 of the said Act.

2. On 24th January, 2005, learned counsel for the objector prayed for an adjournment. Taking note of the fact that the matter pertains to the year 1996, I had declined to grant any further time. However, objector was granted two weeks" time to file written submissions with advance copy to the respondent who was permitted to file response thereto within two weeks thereafter. Written submissions were directed to be handed over to the court master. It was recorded that no oral hearing would be granted. Matter was reserved for judgment.

3. Till date counsel for the objector has not filed any written submissions.

4. Somewhere in October, 1990, objector had discussions with STC regarding possibilities of export of leather garments. Discussions fructified, in that, objector was enrolled as an associate with STC. Objector got itself enrolled as an associate of STC and made available to STC details of the infrastructure available

as also a catalogue of its products. Scouting around for a foreign buyer, STC found one, named SPAIR. Foreign buyer was in U.S.S.R. On 27.2.1991, STC entered into a contract with the foreign buyer for supply of finished leather products at a value of Rs. 48,87,596.00. On 7.3.1991, objector and STC entered into an associate agreement. Evidenced by the recitals thereof, object of the agreement was to develop exports of Indian leather garments. On 18.5.1991, another agreement was entered into between the objector and STC. Object of this agreement was to pass on to the objector the obligations of STC under the agreement dated 27.2.1991 entered into between STC and the foreign buyer. Export contract dated 27.2.1991 was made an integral part of the agreement dated 18.5.1991.

5. Objector claims to have manufactured the goods as per specifications of the contract dated 27.2.1991, benefit whereof was assigned to it by STC. Export did not materialize. Objector claims to have made a distress sale and incurred a loss of Rs. 55,74,183.70.

6. Case of the objector was that STC asked it to manufacture the contract goods under the export contract as it was awaiting opening of a letter of credit from a foreign buyer. STC was, thus liable to recompense the objector for the loss sustained as a result of STC not taking delivery of the goods as per agreement dated 18.5.1991 entered into between the objector and STC.

7. Response of STC was that it never called upon the petitioner to manufacture the goods and alternatively, since foreign buyer did not open the letter of credit, STC cannot be held liable for the alleged loss as STC was not a buyer.

8. Dispute between the parties came to be referred to the sole arbitration of Justice Avadh Behari Rohatgi (Retd.).

9. By and under the impugned award dated 4.6.1996, learned arbitrator held in favor of STC and against the petitioner.

10. Pleadings of the parties before the learned arbitrator, as indeed, the objections filed show that the core area of the dispute between the parties was as to what was the jural relationship between the objector and STC.

11. Claim of the objector was that the agreement dated 27.2.1991 between STC and the foreign buyer was a contract for sale of goods; that the agreement dated 18.5.1991 between the objector and STC was also a contract for sale of goods; that STC was not acting as agent of the objector. As per the objector, opening or non-opening of letter of credit of the foreign buyer was irrelevant for the purposes of decision on the dispute between the parties.

12. On a perusal of the agreement dated 18.5.1991 between the objector and STC, learned arbitrator came to a conclusion that the agreement was a case of vicarious performance. Learned arbitrator took note of what constitutes a vicarious performance and referred to Halsbury Laws of England, Indian Contract Act-Pollock & Mulla as also Chitty on Contracts.

13. Learned arbitrator noted the following passages from Chitty on Contracts (27th Edition, Page 987):-

Vicarious performance.

A contracting party can in the case of many contracts enter into an arrangement by which some other person may perform for him, as far as he is concerned, the obligations of the contract, and the other contracting party will be obliged to accept that performance if it is performance in accordance with the terms of the contract. The contracting party will, however, be liable for any breach that may happen, and the other contracting party is not bound or indeed, entitled to sue the substituted person for breach of contract, although there may, of course, be a remedy in tort, e.g. where the substituted person negligently damages or causes the loss of goods entrusted to him. This is technically known as vicarious performance, and it is quite a mistake to regard that as an assignment of the contract: it is not.

14. Learned arbitrator read the contract between the parties as under:-

The instant case is a case of vicarious performance. What happened is this. STC entered into a contract with the foreign buyer for sale of goods on 27.2.1991. STC is the seller and the Russian party is the buyer. STC thereafter entered into a contract with Guru Overseas, the claimant, on 18.5.1991. This is a contract between the STC, the main contractor, and Guru Overseas the sub-contractor. The contractor can delegate the performance of his contractual obligations to a third party, such as Guru Overseas in this case. Sub-contracting is a species of delegation of contractual responsibilities. To the foreign buyer it matters little whether that delegation is administered through a sub-contract or the contract is performed by the main contracting party itself, namely, STC.

15. Learned arbitrator took note of the fact that most modern states have set up channel sing agencies which are carrying on business in the public sector for the government. Much of the work they take can only be executed by means of sub-contract. It matters little to the foreign party for whom the work is to be done, whether it is done by the immediate party to the contract or by someone else. Learned arbitrator noted that as regards the foreign buyer, jural relationship of a buyer or a seller was between the foreign buyer and the canalizing agency.

16. Analyzing the contract dated 27.2.1991 between the foreign buyer and STC and the contract dated 18.5.1991 between the objector and STC, learned arbitrator has returned a finding as under:-

The indemnity clause and clauses 5 and 12 (ii) cover up and shield STC from any claim by Guru Overseas. Though STC remains liable to the foreign buyer notwithstanding the sub-contract entered into between STC and Guru Overseas, the sub-contract gives complete protection to STC from any claim that may be raised by Guru Overseas against STC.

17. On the issue of opening of a letter of credit and consequence of one not

being opened, learned arbitrator has held as under:-

As the foreign buyer did not open the L/C the whole transaction fell through. In other word the opening of the L/C was a condition precedent for the shipment of the goods. The contract provided that payment to the supplier shall be made by STC on receiving the L/C from the foreign buyer. So STC has not to pay from their pocket the price of goods manufactured or for that matter damages if the foreign buyer does not open the L/C.

18. On the issue of representation by STC to the claimant to manufacture the goods, as claimed by the objector, learned arbitrator in para 44 of the award has held that claimant has failed to prove that STC had given verbal instructions to the objector to manufacture goods.

19. Learned arbitrator, analyzing the contract dated 27.2.1991 has held that between the opening of the letter of credit and actual shipment, there was a sufficient time gap and intention was that on opening of letter of credit, goods could be manufactured and shipped. In other words, opening of the letter of credit was held to be a condition precedent for goods to be exported and as a consequence thereof, finding as noted above has been returned by the learned arbitrator in para 43 of the award.

20. Though, I had no benefit of assistance from the side of the objector for the reason that even after 9 years of present proceedings having remained pending in this court, when I took up the matter for the first time, adjournment was sought, which was declined. Unfortunately, written submissions required to be filed have not been filed by the objector. I have considered the written objections. They centre around on the same issues which were raised before the learned arbitrator. Case of the objector is that agreement dated 27.2.1991 between the foreign buyer and STC was a contract for sale of goods and agreement dated 18.5.1991 between the objector and STC was also an independent contract for sale of goods.

21. Rest of the objections would have a meaning only if the principal objection filed by the objector is sustained.

22. Objections must fail for two reasons.

23. Firstly, as observed by the learned Author in Chitty on Contracts (27th Edition, P.987):-

Whether or not in any given contract performance can properly be carried out by the employment of a subcontractor must depend on the proper inference to be drawn from the contract itself, the subject-matter of it, and other material surrounding circumstance.

24. As held by Their Lordships of the Supreme Court in the decision reported as Steel Authority of India Limited Vs. J.C. Budharaja, Government and Mining Contractor, , interpretation of a particular condition in an agreement would be

within the jurisdiction of the arbitrator.

25. As observed in Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another, , an arbitrator is a tribunal selected by the parties to decide their disputes according to law.

26. Learned arbitrator, in the instant case, has analyzed the agreement dated 27.2.1991 and the agreement dated 18.5.1991. Learned arbitrator has taken note of the law pertaining to vicarious performance and has rightly analyzed and applied the law, being, in a case of vicarious performance the original contracting party remains liable on the contract. There is nothing to prevent a person contracting on such terms that he is entitled either to perform the contract himself or to secure performance by making a new contract with a third party as agent of the other contracting party. If such a new contract is in fact made, the original contracting party may be subjected to no further liability on the contract.

27. It would not be within the domain of this court to re-enter the contract. What the objections seek is to require this court to re-enter the contract between the parties.

28. Secondly, learned arbitrator has recorded a finding of fact that STC never represented to the objector to manufacture the goods. Learned arbitrator has held that as per STC till foreign buyer opened a letter of credit pursuant to contract dated 27.2.1991, no enforceable contract came into existence. Significance of this finding qua the claim of the objector would be that till STC gave the go ahead signal to the objector to manufacture the goods, objector could not unilaterally process/manufacture the goods and insist that STC should take delivery under pains of damages for breach of contract.

29. Objector may have been over-enthusiastic or may have acted by design. That would be irrelevant and should not prejudice the court. Issues have to be decided as per law. Law being that the arbitrator is the authority chosen by the parties to interpret the contract between them. Learned arbitrator has precisely done the same.

30. I find no merit in the objections.

31. is No. 1/1998 is accordingly dismissed.

32. However, in the facts and circumstances there shall be no order as to costs.

33. Award dated 4.6.1996 published by Justice Avadh Behari Rohatgi (Retd.) is made a rule of the court.