
(2005) 02 DEL CK 0099

In the Delhi High Court

Case No : I.A. 4867/97 in CS (OS) 2488 of 1996

Katikeya (India) Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 14-02-2005

Acts Referred:

Citation : (2005) 80 DRJ 681

Hon'ble Judges : Pradeep Nandrajog, J

Bench : Single Bench

Advocate : Sunil Mittal and Sanjeev Kumar, for the Appellant; Dalip Singh and Rajinder Nischal, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—Disputes and differences between M/s. Katikeya (India) Private Limited, the objector, and Union of India were referred to the sole arbitrator, Sh. Ram Bahadur, Additional Legal Adviser to the Government of India for adjudication. Claim of the company was rejected and counter claim of Union of India was accepted. Objector challenges the award.

2. Mr. Sunil Mittal, learned counsel for the objector, inter alia, urged:-

"(i) That the award suffers from a non-application of mind inasmuch as the learned Arbitrator has recorded that there was no "force majeure clause" in the contract between the parties, a finding which was contrary to the record, being documents U-7 and U-8.

(ii) The award suffers from an error apparent on the face of the record for the reason that material documents have been ignored, being U-7 and U-8.

(iii) The award cannot be said to be a reasoned award.

(iv) Risk purchase was not established and there was no evidence on record on basis of which counter-claim of Union of India could be allowed."

3. To appreciate the objections raised to the award, backdrop facts may be noted. Union of India had floated a tender inviting offers for supply of antacid gel. Objector made an offer to supply antacid gel of the desired quality and quantity. Offer was accepted by Union of India on 25.9.1991. Objector was to supply antacid gel, being 62,500 bottles @ Rs. 11.75 per unit i.e. at a value of Rs. 7,34,375/- for the entire quantity. The date of delivery was 30.9.1991 or earlier.

4. Objector could not effect the supply on or before the stipulated date. Union of India cancelled the contract and sought to recover damages as per clause of the contract which entitled Union of India to go in for risk purchase within 6 months of breach of the contract.

5. This led to a dispute which was referred to arbitration.

6. Case of the objector was that contract contained a clause of "force majeure" and since there was a strike in its factory, said clause stood attracted and Therefore, no penalty could be levied upon the objector. Objector laid a claim of Rs. 7,57,750/-, being the amount withheld from other bills. Objector claimed interest @ 12% per annum.

7. Case of Union of India was that there was no "force majeure clause" in the contract and in any case, nothing happened which could justify the applicability of "force majeure", if at all contract had one. Union of India laid a counter claim in a sum of Rs. 7,57,250/-.

8. Learned Arbitrator held against the objector and did not award any sum in favor of Union of India for the reason it was held that Union of India had recovered the sum of Rs. 7,57,250/-, being the risk purchase loss from other bills of the objector.

9. A perusal of the award would reveal that the learned Arbitrator has referred to and decided the entire gamut of the disputes in relation to claim No. 1 of the objector. Relevant part of the award, reads as under:-

"It is disallowed on the following grounds:

1. I have perused the Advance A/T placed on the record with application dated 16.11.95, in this there is no "Force Majeure Clause". I have also perused the original A/T from beginning to end, in this also there is no Force Majeure clause governing the contract. Hence question of frustration of the contract on this account does not arise. In reply to para 4 of the counter, the respondents have simply denied it but have not quoted any condition or clause number to substantiate their point of frustration.

2. Supplies ought to have been completed by 20.9.91 as per terms of A/T (16 weeks from issuance of Formal A/T). Admittedly no information regarding strike was given before 26.9.91. D.P was 31.9.91 or earlier. No inspection call was given before 21.9.96. Strike period is only from 5.9.91 to 13.9.91 as per

Annexure 9, the claimants could supply from 14.9.91 to 30.9.91. Hence I am of the firm view that by any stretch of imagination doctrine of frustration is not applicable to the facts and circumstances of the case.

3. 30.9.91 is the date of breach in this matter and R.P.A/T was placed on 20.3.92 well within six months from the date of breach. Hence R.P is in order.

4. There is no deviation between original A/T and R/P A/T.

5. 100% supply has been made by the RP A/T holder contractor. Proof is at page 17 in the documents filed by U.O.I.

6. 100% payment has been made to the R.P. A/T holder contractor. Proof is at page 18 in the documents filed by U.O.I/respondents."

10. A perusal of the afore-noted extract of the award would reveal that the learned Arbitrator has considered the evidence in the context of the last date for delivery, claim under strike period, contract condition which required risk purchase to be effected within 6 months of breach of contract and proof of risk purchase.

11. The reasoning may be brief, but it cannot be said that there is no reasoning in the award. The learned Arbitrator has duly noted that last date for effecting supplies was 30.9.1991. Risk purchase order was placed on 20.3.1992. It has further been noted that there was no deviation in the tender specifications of the tender pursuant whereof objector had submitted an offer and the tender whereunder risk purchase was effected. It has further been noted that 100% supply had been effected by the successful tenderer at the stage of risk purchase and payment was released.

12. Learned Arbitrator has also noted that no intimation of strike in the factory of the objector was notified to the department prior to 26.9.1991 and that the strike period was only from 5.9.1991 to 13.9.1991.

13. I do not find that the award is without reasons. I do not find non-application of mind. I do not find that any material documents has been ignored.

14. Documents U-7 and U-8 relied upon by learned counsel for the objector is the letter of offer dated 8.4.1991. In para 9 of the said letter, it is recorded as under:-

"9. Delivery: Where can supply within 12 to 16 from the date of the reply of formal acceptance of tender subject to `force majeure clause".

15. Pleadings of the objector before the Arbitrator was as under:-

"1. The contractors tender was accepted vide A/T dated 29.5.1991 (Annexure-B) for supply of antacid gel valued at Rs. 7,34,375/- and governed by clause 24 -, being arbitration clause at Annexure C and was governed by "force majeure".

16. The pleadings were vague and that appears to be the reason why the learned

Arbitrator went about searching for the "force majeure clause" in the contract, and on finding none, so recorded in the award.

17. Be that as it may, issue becomes irrelevant for the reason, learned Arbitrator went into the issue on merits and noted that period of strike proved was only from 5.9.1991 and 13.9.1991. The learned Arbitrator has held in light of the aforesaid that by no stretch of imagination force Majeure could be applied on the facts and circumstances.

18. A force Majeure" condition relieves a party of the obligation under a contract to comply with the time fixed under the contract for performance of the obligation. The finding of the learned Arbitrator is that the period of strike being from 5.9.1991 to 13.9.1991 was too insignificant. On facts, "force Majeure" condition being not established, existence or otherwise of a "force Majeure clause" in the contract becomes irrelevant.

19. That the period of strike was limited is a finding of fact and cannot be gone into by this Court. I may, further note that the period of strike is to be noted in the documents filed by the objector being C-22, a letter dated 18.10.1991 addressed by the Chief Conciliation Officer, officer of the Labour Commissioner, Haryana.

20. On the issue of risk purchase, learned counsel for the objector did not dispute that as per contract, risk purchase could be effected within 6 months of date of breach. Annexure R-1 in the record of the Arbitrator establishes that on 20.3.1992, offer of M/s Alpine Industries Ltd was accepted for supply of 6250 bottles of antacid gel at a unit price of Rs. 23.40. Total contract price being Rs. 14,62,500/-. Document U-23 establishes supply being effected by Alpine Industries. Document U-24, being letter dated 1.12.1992 addressed by Alpine Industries to Union of India establishes receipt of full payment.

21. For the reasons noted above, objections are not sustainable. I.A is dismissed.

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Award dated 11.9.1996 is made a Rule of the Court. As per the award since Union of India has already effected recovery for risk purchase, no amount has to be recovered by Union of India.

Decree be drawn. No costs.