

(2007) 07 DEL CK 0218
In the Delhi High Court
Case No : OMP No. 53 of 2006

Modern Food Industries (India) Ltd.

APPELLANT

Vs

International Engineers and Project Consultants Limited
(IEPCL) (Intercorp. Division)

RESPONDENT

Date of Decision : 26-07-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Drugs and Cosmetics Rules, 1945 — Rule 124B

Citation : (2007) 07 DEL CK 0218

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : R.P. Mittal, for the Appellant; G.P. Srivastava, Party-in-person, for the Respondent

Final Decision : Dismissed

Judgement

Shiv Narayan Dhingra, J.—By this petition u/s 34 of the Arbitration and Conciliation Act, 1996, the petitioner has challenged the validity of the award dated 15th October, 1999, passed by the learned Arbitrator whereby he awarded a sum of Rs. 5,00, 817.89 to the respondent with interest at the rate of 18% per annum.

2. Brief facts relevant for the purpose of deciding this petition are that the petitioner had invited public tenders from reputed parties for supply of 20 metric tones of "Vitamin pre mix" (? 20%). The rates of the respondent were found to be lowest being 148/- per kg for Delhi and Rs. 149.95 per kg for other destinations in India. The petitioner though accepted the tender of respondent but placed an order for 5 metric tones (? 20%) "Vitamins premix" only on the respondent and placed an order of 15 metric tones on Elpe Labs, Bangalore the previous supplier, after negotiating rates with the previous supplier although previous supplier was not the successful bidder and its rates were higher. However on representation of the respondent the contract of the respondent was

revised and he was given a contract for supply of 10 metric tones (? 20%).

3. The respondent under the contract offered a lot of 2300 kg of "Vitamins premix" to the petitioner for inspection before making dispatches. The inspection of the lot was done on 4.3.1991 and samples were taken as per the terms of the contract randomly and the sample was sent to Sri Ram Institute of Industrial Research (SIIR) for testing. A test report was received from the SIIR giving the analysis of the samples. It certified that the sample was of standard quality. However, the lot was rejected by the petitioner on the ground that the sample did not meet the quantitative specifications of vitamin premix although it was of a standard quality.

4. The respondent raised a dispute making allegations of malafide on the part of the petitioner. The contract contained an arbitration clause. The respondent invoked the arbitrator clause and requested the chairman of the petitioner either to arbitrate in the matter himself or to nominate an arbitrator in terms of the contract. On failure on the part of the chairman of the petitioner either to arbitrate himself or to appoint an arbitrator, the respondent filed a suit in the Court being Civil Suit No. 1507 of 1991 for appointment of an arbitrator. The arbitrator was appointed and the dispute raised by respondent was referred to the arbitrator. The respondent preferred a claim of Rs. 15.78 lacs + interest @ 24% per annum. The petitioner also preferred a counter claim of Rs. 1,95,143/- against the respondent. The petitioner had also forfeited the security amount of Rs. 78,000/- of the respondent.? Adjusting that security amount, the balance claim made by the petitioner was of Rs. 1,17,143.00.

5. The arbitrator settled the procedure to be followed during the arbitral proceedings after discussion with the parties and gave full opportunity to the parties to lead evidence. The Arbitrator came to conclusion that the test report of SIIR showed that the sample sent by the petitioner to the SIIR was of standard quality, as per the standard prescribed by Drugs and Cosmetics Act. The petitioner had rejected the sample on the ground that it showed deficiency in the contents of Vitamin A, Vitamin B, Niacin and Exsiccated Ferrous sulphate. The Arbitrator observed that since the test result showed that the sample was of standard quality, the petitioner was not right in rejecting the samples on the ground of deficiency. The sample met the standard as laid down under Drugs and Cosmetics Act. The Arbitrator also relied upon technical opinion of Sr. G.M. Mr. P. Krishan Kumar of petitioner given to Dr. M.M. Krishna that the ingredients of Vitamin premix are formulations for particular applications in the bread and there was no universal standard formulation of Vitamin Premix for the purpose of addition in the bread. The Arbitrator referred to the standards prescribed in Pharmacopoeias Drugs Act and rules and also referred to technical journals to determine the issue and came to conclusion that in all preparation of such substances containing ingredients and vitamins premix, the minimum level of permissible standard were laid down under the Famco. The safest indicator in case of such items were available only under the Drugs and Cosmetics Act,

Schedule V Rule 124B in respect of Vitamins. He, Therefore, turned down the objections of the petitioner that since there? was variations in the quantity of the vitamins despite the vitamins premix being of standard quality, the same was validly rejected by the petitioner. The petitioner contention was that the vitamin premix being procured by the petitioner was not to conform to Drugs and Cosmetics Act Schedule but was to conform to the contractual specifications as laid down in the contract. The Arbitrator observed that materially the quality/strength/contents were within the limits of tolerance prescribed in law or public policy on the subject and ingredients were fit for human consumption and the report showed that the vitamin premix was of standard quality. The Arbitrator, Therefore, gave award against the petitioner regarding rejection of the lot of 2300 kg of vitamin premix and awarded the claim of the respondent in respect of cost of this lot. However, the Arbitrator rejected the other claim of the respondent regarding the cost of second lot being in pipeline and the alleged loss which the respondent suffered because of the cancellation of the contract. Thus, the arbitrator gave an award in favor of the respondent in respect of cost of rejected lot.

6. The Arbitrator also came to conclusion that the petitioner wrongly invoked the bank guarantee despite there being stay given by the Court against invocation of the bank guarantee. The period of the bank guarantee had already lapsed during the pendency of the arbitration proceedings. The Court had issued the interim injunction against the invocation of the bank guarantee during the pendency of the arbitration proceedings. The petitioner misrepresented to the bank and got the bank guarantee invoked and thus forfeited the security amount. The Arbitrator awarded the security amount and the costs of the rejected lot to the respondent. The arbitrator also upheld a part of the counter claim of the petitioner regarding risk purchase. The arbitrator allowed the claims of risk purchase in respect of remaining quantity of the part of the order which was procured by the petitioner during the currency of the contract.? The claim in respect of quantity which was procured after the contract period, was disallowed. The Arbitrator thus allowed the counter claim of Rs. 91,695.12 of the petitioner. After adjusting the counter claim the Arbitrator gave an award in favor of the respondent for a sum of Rs. 5,00,817.89.

7. It is contended by the petitioner that the award of the Arbitrator was contrary to the contract and, Therefore, was liable to be set aside. The Arbitrator was not supposed to re-write the contractor to see if the vitamin premix was in accordance with the standards as mentioned in the Drugs and Cosmetics Act but the Arbitrator was only required to consider whether the vitamin premix rejected by the petitioner met the standards laid down in the contract entered into between the parties or not. Since there was no dispute that the SIIR?s report showed that the sample did not met the contractual requirements, the petitioner was within its right to reject the samples and the Arbitrator misconduct himself by traveling beyond the contract. It is also submitted that the Arbitrator gave a contradictory award. On the one hand, the Arbitrator held that the respondent

stood discharge from its obligation once the petitioner had rescinded the contract and on the other hand the Arbitrator awarded the claim of the petitioner in respect of the risk purchase. Thus, the award was liable to be set aside. The petitioner relied upon *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, wherein the Supreme Court held that if the award was contrary to substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal and could be interfered u/s 34 of the Arbitration and Conciliation Act. However, such submissions or the productive should be patently affecting the rights of the parties. The petitioner also relied upon *West Bengal State Warehousing Corporation and Another Vs. Sushil Kumar Kayan and Others*, wherein the Supreme Court held as under:

11. We do not find any merit in this submission. Clauses (e), (f) and (g) of paragraph 44 have to be read together. What has been held by this Court is that the award made by an Arbitrator can be set aside if the Arbitrator acts beyond jurisdiction, and, to find out whether the Arbitrator has traveled beyond jurisdiction, it would be necessary to consider the agreement between the parties containing arbitration clause and if the Arbitrator acts beyond that arbitration clause then it would be deemed that he has acted beyond jurisdiction. In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether claimant can raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit to the parties to raise a point before the arbitrator and if there is a specific bar in the contract to the raising of the point then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction. Neither of the conditions mentioned in Clause (f) and (g) referred to above stand satisfied to hold that the arbitrator had acted in excess of his jurisdiction. This Court on the agreement arrived at between the parties referred three points by way of disputes to be resolved between the parties and the arbitrator has limited his adjudication on the points of reference made to him. Counsel for the appellant could not point out as to in what way or manner the Arbitrator had acted in excess of his jurisdiction on the matters referred to him. According to us the Arbitrator has confined his award within the framework of the reference made to him and did not exceed the jurisdiction conferred upon him.

8. The respondent on the other hand, has argued that this Court cannot sit in appeal over the award of the arbitrator. The Arbitrator has considered all aspects of the dispute and has taken into account the evidence produced by the parties including the SIIR's report and came to conclusion that the rejection of the lot of 2300 kg of vitamin premix was unwarranted. The lot was rejected despite the report that the premix was of standard quality. Therefore, this Court cannot re-appreciate the entire evidence and sit in appeal over the award and pass another judgment. The respondent relied upon *Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd.*, ; 2005 (1) Arb L R 247 *Rajesh Khanna v. Government of India* to press his contentions.

9. A perusal of award would show that the Arbitrator considered the entire evidence produced by the parties and the report of the experts etc. before arriving at a conclusion that the rejection of the "Vitamin Premix" by the petitioner was unjustified. The lot of 2300 kg offered by the respondent met the scientific standards and was of a standard quality as per the Test report. There is no doubt that there was slight difference in the quantities prescribed under the contract and the actual quantities per one kg of the bread premix. However, the difference is so slight and minor that it can safely be said that the difference was negligible. The SIIR report itself shows that the premix was of standard quality.

10. I consider that once the Arbitrator has given its findings after considering the entire evidence, the opinion of the expert and the standard laid down under the Pharmacopoeias, this Court cannot sit in appeal and gave another opinion in respect of the bread premix and come to a different conclusion whether the rejection was justified or not. There was no misconduct on the part of the Arbitrator. The Arbitrator had taken into account the evidence of both sides and the arguments of both sides and arrived at a conclusion. The interpretation of the contract was within the ambit and scope of the Arbitration Clause. It was the jurisdiction of the Arbitrator to arrive at a conclusion whether the rejection of the material was justified in view of the contract or not. It is to be noted that the respondent was discriminated from the very beginning and the respondent had made complaints against non-awarding of the contract to the respondent despite lowest tender. Though in terms of the tender, the entire contract of 20 metric tones should have been awarded to the respondent but the respondent was awarded only a contract of 5 metric tones and the respondent made representations to the higher authorities of the petitioner against the officials handling the contract. On this representation, the contract quantity was increased from 5 metric tones to 10 metric tones. Still the respondent was not given the contract of entire quantity and negotiations were done with the previous supplier who reduced his rates from the earlier quoted rates and half of the quantity was ordered to him. The Arbitrator had taken note of all these facts and the circumstances which prevailed with the petitioner to reject the material. I find no reason to interfere with the award of the Arbitrator nor I find that there was any misconduct on the part of the Arbitrator.

11. The plea that the Arbitrator gave a contradictory award since on the one hand he held that the respondent was discharged of his liability under the contract and on the other hand awarded counter claim of the petitioner for risk purchase must fail. A perusal of the award would show what Arbitrator mean was that the respondent was discharged of his liability of supplying 2300 kg of the bread premix since the same had been wrongly rejected. However, the Arbitrator considered that counter claim for the rest of the quantity of the contract for risk purchase was tenable and the Arbitrator allowed the claim in respect of the quantity purchased during the contract period. I find this argument of the inherent contradictions in the award is not tenable.

12. The petitioner has also raised objections against the award of 18% interest. Considering the present regime of rate of interest, 18% interest over the awarded amount from the date of award till realization is on the higher side. I consider that 10% interest per annum would be a reasonable rate of interest. In *Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd.*, Supreme Court had considered the question of power of Arbitrator to award interest and observed as under:

So far as interest for pre-reference period is concerned, in view of the conflicting decisions of this Court, the matter was referred to a larger Bench in *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa, Vs. N.C. Budharaj (Dead) by Lrs. etc. etc.*, . The Court, by majority, held that an arbitrator has power to grant interest for pre-reference period provided there is no prohibition in the arbitration agreement excluding his jurisdiction to grant interest. The forum or arbitration is created by the consent of parties is a substitute for conventional civil court. It is, Therefore, of unavoidable necessity that the parties be deemed to have agreed by implication that the arbitrator would have power to award interest in the same way and same manner as a Court.

13. In view of my foregoing discussion, I find no force in this petition u/s 34 of the Arbitration and Conciliation Act, challenging the validity of the award. The petition is hereby dismissed with modification in the award on account of interest rate alone. The respondent shall be entitled to only 10% interest on the awarded amount from the date of award till its realization. I am supported in this view by judgment of Supreme Court in *Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Another*, .