
(2009) 05 DEL CK 0494

In the Delhi High Court

Case No : I.A. No. 721 of 1993 and C.S. (OS) No. 1014 of 1991

Modern Food Industries (India) Ltd.

APPELLANT

Vs

Paper Mate Private Limited

RESPONDENT

Date of Decision : 27-05-2009

Acts Referred:

Arbitration Act, 1940 — Section 30

Citation : (2010) 7 RCR(Civil) 2386

Hon'ble Judges : Rekha Sharma, J

Bench : Single Bench

Advocate : Varun Aggarwal, for the Appellant; None, for the Respondent

Judgement

Rekha Sharma, J.—The challenge in this suit is to an arbitration award dated February 20, 1991 rendered by the sole arbitrator, Shri M.K. Jain. The arbitrator entered upon the reference consequent upon disputes having arisen between the petitioner Modern Food Industries (India) Limited and the respondent/objector, namely, M/s. Paper Mate Private Limited in respect of contract No. MF-PUR/1-BP/88-89/Paper Mate dated October 24/25, 1988. It was only the petitioner who filed its "Statement of Claim" and appeared on various dates of hearing before the learned arbitrator. The respondent/objector neither filed any "Statement of Claim" nor counter-claim or appeared before the arbitrator, with the result that an ex-parte award came to be passed against it. By virtue of the award, a sum of Rs. 41,15,602.88 has been awarded in favour of the petitioner and it has also been allowed to adjust a sum of Rs. 9,63,201/- lying with it against the outstanding bills of the respondent. Consequently, after adjusting the said amount, the respondent has been directed to pay a sum of Rs. 31,52,401.88 to the petitioner along with interest @ 21% per annum.

2. The respondent has assailed the award on three counts. Firstly, on the ground that no concluded contract had come into existence between the parties and hence no reference to the arbitrator could be made by invoking the arbitration clause which was one of the terms of the so-called contract. Alternatively, it was

argued that the matter be remanded to the arbitrator for fresh adjudication including the question, whether there existed a valid and binding contract between the parties. The award was also faulted on the ground that it is non-speaking whereas in terms of the alleged arbitration agreement, the arbitrator was required to give reasons in case the amount awarded against the claims of the parties was more than Rs. 50,000/-. Thirdly, it was argued that non-performance on the part of the respondent on the basis of which the amount as aforesaid has been awarded in favour of the petitioner, is not supported by any evidence.

3. It needs to be noticed here that the objections as aforementioned had once earlier come up for consideration before another learned Judge of this Court who by an order dated January 11, 2007 held that the award was non-speaking and consequently, remitted back the same to the arbitrator for passing a speaking award. The said order was passed in the absence of the petitioner, as none had appeared on its behalf on the date the matter was heard and decided. However, before the order could take effect, the petitioner filed a review application, stating therein that the award contained reasons and that the finding that it was a non-speaking award was liable to be set-aside. The review came up before the same learned Judge who by order dated July 04, 2008 allowed the application and directed the matter to be heard afresh. While disposing of the review application, the learned Judge had observed as under:

In the present case, as already pointed out above, counsel for the petitioner was not present when the matter was heard and there was no assistance on behalf of the petitioner. There is another important aspect of the matter which needs to be highlighted. The award is in three pages. The original award, as tagged in the file, is not properly arranged. After page one is the third page, which is signed by the arbitrator and second page is placed at the end. Therefore, at the time when the matter was argued, I had seen the first two pages only, namely the first and third page of the award. Had second page been also seen at that stage, it would have provided arguable point as to whether the award in question is a speaking award or not. Therefore, when entire award was not read and only the first and last pages were seen, order passed on that basis would amount to error apparent on the face of the record as entire material which is relevant was not taken into account. Therefore, without going into the question at this stage as to whether the award in question is a reasoned award or not, I am of the opinion that the matter needs to be heard afresh after hearing the arguments of both the parties.

4. It was in the above background that the matter was heard afresh, on the question, whether the award is speaking or non-speaking and also on other grounds raised by the respondent. However, before I deal with the objections, it is necessary to set-out a few relevant facts as borne out from the "Statement of Claim" filed by the petitioner before the arbitrator.

5. The petitioner invited tenders for the supply of 750 MT + 20% of Bleached TD Loaded Paper, in response to which the respondent offered its rates vide letter

dated June 07, 1988 along with copy of the tender documents subject to certain terms and conditions as mentioned in its letter. The petitioner accepted the offer of the respondent and communicated its acceptance by issuing to the respondent a telegram dated October 12, 1988 followed by a detailed letter dated October 13, 1988.

6. Initially, by letter dated October 18, 1988 an order was placed for the supply of 180 MT of Bleached TD Loaded Paper, with a request to the respondent to provide a schedule of production so as to enable the petitioner to depute its inspection team for inspecting the paper before its despatch. This was followed by a registered letter dated October 24/25, 1988 which contained the detailed terms and conditions, on which the supply was to be made, such as, price, specifications, period of contract, security deposit, mode of despatch, delivery period, inspection, insurance, damages for breach of contract, payment and it was also stipulated therein that in case of disputes and differences arising out of or in any way concerning the said contract, the same were to be resolved through arbitration. On October 25/27, 1988 petitioner placed upon the respondent a further order for the supply of balance quantity of 570 MT and also indicated therein the tentative schedule by which supplies were required to be made. As against the orders so placed, the only supply that the respondent made was to the tune of 167.6 MT and that too, as per the inspection team, did not meet the specifications, yet keeping in view the urgency it was accepted. Thereafter, no supply at all was made.

7. The respondent had also not furnished security as per the terms of acceptance of tender and, therefore, the amount of Rs. 9,63,201/- which it was entitled to receive against the supply was withheld. As the respondent failed to supply the balance quantity, the petitioner made risk purchase from other available sources and kept the respondent informed about the same from time to time. The details of the risk purchase were furnished in the Statement of Claim and as a result thereof, a total sum of Rs. 31,52,401.88 was claimed from the respondent.

8. The respondent, as noticed above, neither filed its Statement of Claim nor any counter to the claim raised by the petitioner. The arbitrator on his part after entering upon the reference sent a communication dated November 23/26, 1990 to both the petitioner and the respondent calling upon them to submit their claims latest by December 15, 1990. In response to the same, the petitioner filed its claim while the respondent vide letter dated December 14, 1990 wrote to the arbitrator that there was no lawful, binding arbitration agreement in writing between the parties and as such, he had no jurisdiction to act in the matter. The respondent also stated in the letter that it was seeking legal opinion from its Advocate and accordingly asked the arbitrator to stay the matter for three weeks to enable it to obtain the requisite opinion and to act further in the matter. The arbitrator responding to the said letter informed the respondent by a registered letter dated January 02, 1991 that in view of its letter dated December 14, 1990, the Statement of Claim be filed latest by January 11, 1991. On January 15, 1991

the arbitrator again wrote to the respondent and called upon it to file its claim by January 21, 1991 or else he further wrote that he would be compelled to proceed ex-parte. In response to the letter of January 15, 1991 the respondent wrote to the arbitrator on January 21, 1991 and therein again reiterated that there was no lawful, valid or binding agreement in existence between the parties and he accordingly had no jurisdiction to act as an arbitrator. The respondent thus requested the arbitrator to keep the matter as closed under intimation to it and further requested that no adverse order be passed against it without first writing to it and giving a personal hearing. The arbitrator notwithstanding the letter dated January 21, 1991 from the respondent asking him to treat the matter as closed yet again sent a communication to the respondent dated January 22, 1991 informing it that the arbitration proceeding would be held on February 06, 1991 at 2.30 p.m. and also gave final opportunity to it to submit its claim by January 31, 1991. The respondent remained adamant and on January 31, 1991 again wrote to the arbitrator repeating its stand that he had no jurisdiction in the matter.

9. It was in the backdrop of the aforesaid recalcitrant attitude of the respondent in not participating in the arbitration proceedings inspite of several letters addressed to it by the arbitrator that an ex-parte award came to be passed against it. It will be relevant to notice here that not only the respondent chose not to appear before the arbitrator but even before this Court its? conduct was no better. The matter was taken up by this Court on January 28, 2009. On that day, Senior counsels for both the parties were present and they were heard in the matter. However, none appeared on behalf of the objector/respondent when the case was again taken up on February 19, 2009 for further hearing leaving me with no option but to proceed in the matter in absence of the counsel for the respondent.

10. The main thrust of the submission of the learned Senior counsel Shri A.S. Chandhiok as advanced on January 28, 2009 was that the award is liable to be set-aside on the short ground that it is non-speaking and hence, contrary to the express arbitration agreement contained in clause 14 of the purchase order dated October 24/25, 1988 which required the arbitrator to give a reasoned award in case the awarded amount exceeded Rs. 50,000/-.

11. There is no doubt that clause 14 on which reliance has been placed by the respondent required the arbitrator to give a reasoned award if the awarded amount exceeded Rs. 50,000/-, but insofar as the present award is concerned, I do not think it can be said to be a non-speaking award. The award runs into three pages. It contains facts in detail leading to the dispute between the parties and also sufficiently indicates the mind of the arbitrator in arriving at his conclusions. The relevant portion of the award which reflects the reasoning of the arbitrator runs as under:

Respondent however, did not supply any further quantity of paper presumably on the ground that the claimant was not regular in making payments. Even though

claimant informed the respondent about their inability in releasing the payments on time due to tight financial position, the respondent did not supply any more quantity. The respondent also did not deposit security amount. Since the production of the claimant was suffering due to non-supply of base paper, claimant was forced to buy the paper from other sources at higher rates. The claimant kept informed the respondent about the purchase of paper being made from other sources from time to time and as a result had to incur an extra expenditure of Rs. 41,15,602.88P. Due to failure on the part of the respondent, the claimant did not release the balance payment of Rs. 9,63,201/- in respect of the outstanding bills of the respondent.

Now, I, the said arbitrator having considered the above position of the matter in dispute and after having perused the documents filed before me by the claimant make the award as under:

I award a sum of Rs. 41,15,602.88P in favour of the claimant-company and against the respondent-company, since under the contractual obligations the respondent was required to supply the paper which the respondent failed.

I also give the permission to the claimant-company to adjust the amount of Rs. 9,63,201/- lying with them against the outstanding bills of the respondent. After adjusting the amount, the respondent should pay the balance amount of Rs. 31,52,401.88 P to the claimant along with interest @ 21% per annum.

12. As already noticed above, the arbitrator gave sufficient opportunities to the respondent to come forward and join the proceedings. The respondent instead of participating in the proceedings entered into correspondence with the arbitrator who even though was not obliged to respond to the same did so and gave opportunity after opportunity to the respondent to file its "Statement of Claim". If the respondent felt that the arbitrator had no jurisdiction to adjudicate upon the disputes it ought to have taken recourse to legal proceedings as were available to it rather than boycotting the arbitration proceedings and choosing to challenge the award only after it was rendered against it. The arbitrator had only one side of the story before him in the form of "statement of claim" of the petitioner and the evidence produced in support thereof. What better could he have done in the absence of a counter version from the respondent than to have accepted the claim of the petitioner which is supported by reasons.

13. It has been time and again held by various judicial pronouncements that the courts will not go into the sufficiency of the reasons given by the arbitrator and it will not sit in appeal over the award and review the reasons. One may in this regard refer to the judgment of the Supreme Court in Gujarat Water Supply and Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd. and Another, , wherein it has been held as under:

Even in a case where the arbitrator has to state reasons, the sufficiency of the reasons depends upon the facts and circumstances of the case. The Court, however, does not sit in appeal over the award and review the reasons. The

Court can set aside the award only if it is apparent from the award that there is no evidence to support the conclusion or if the award is based upon any legal proposition which is erroneous.

14. Reference may also be made to the judgment of the Supreme Court in *Bank of Baroda Vs. B.J. Bhambani and Another*, wherein it has been held that it is not necessary that speaking award should give detailed reasoned judgment. It has been further held that it is sufficient if the arbitrator makes clear his mind in the award for reaching to a particular conclusion.

15. Again in *Indian Oil Corporation Ltd. Vs. Indian Carbon Ltd.*, , the Apex Court has held as under:

It is one thing to say that reasons should be stated and another thing to state that a detailed judgment be given in support of an award. Even if it be held that it is obligatory to state the reasons, it is not obligatory to give a detailed judgment. Arbitration procedure should be quick and that quickness of the decision can always be ensured by insisting that short intelligible indications of the grounds should be available to find out the mind of the arbitrator for his action.

16. In view of what has been noticed above, I hold that the arbitrator has clearly indicated his mind in passing the award and this Court cannot sit in appeal over his judgment. The respondent has itself to blame for what has befallen upon it.

17. As regards the objection of the respondent that there was no concluded contract between the parties and hence the disputes could not have been referred to arbitration, all I need to say is that the parties had entered into a contract with eyes wide open for the supply of paper by the respondent to the petitioner as per purchase orders dated October 25/27, 1988. It is not disputed by the respondent that it had made supply of 180 Metric Tonnes of paper to the petitioner. If, as contended by the respondent, there was no concluded contract between the parties, why then did it make supply of 180 Metric Tonnes of paper? The fact that the respondent had acted upon the purchase order belies its plea that there was no concluded contract between the parties.

18. I also do not find any merit in the objection that the non-performance on the part of the respondent is not supported by any evidence. Nothing was shown to me as to how the finding in regard to the above is not supported by evidence. As already noticed above, the arbitrator had before him the Statement of Claim of the petitioner which contained details of the risk purchase made by it supported by evidence. How then can it be said that the award is not supported by evidence? In any case, an award u/s 30 of the Arbitration Act, 1940 is liable to be challenged only if there is an error apparent on the face of the award and that error is discernable from the award itself otherwise Courts would be loath to interfere in the award. There is nothing in the award to indicate that it is based on no evidence. I find no error discernable on the face of the award. However, there is one aspect of the award which, in my view, needs to be modified and

that is with regard to the grant of interest. The arbitrator has granted interest @ 21% per annum which I find to be excessive. Accordingly, I reduce the rate of interest from 21% per annum to 9% per annum.

19. For the foregoing reasons, the objections are dismissed and consequently, the award dated February 20, 1991 is made a rule of the Court with the variation that it shall not carry interest @21% per annum but @9% per annum. Decree in terms of the award be drawn up.

20. The main suit as well as the I.A. stand disposed of.