
(2012) 03 DEL CK 0078
In the Delhi High Court
Case No : FAO (OS) 686 of 2006

M/s Continental Chemicals Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 15-03-2012

Acts Referred:

Arbitration Act, 1940 — Section 16, 30, 33
Evidence Act, 1872 — Section 1

Citation : (2012) 2 ARBLR 120

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : Rajiv Bansal, Mr. Deepak Vijay and Ms. Neeru Sharma, for the Appellant;

Final Decision : Dismissed

Judgement

Rajiv Shakdher, J.—This appeal is directed against the judgment dated 12.07.2006 passed by a Single Judge of this court in CS(OS) 2698/94 and IA No. 1584/1995. By virtue of the impugned judgment, the learned Single Judge has dismissed the objections of the appellant to the award dated 02.12.1993.

2. The disputes which arose between the appellant and the respondent (hereinafter collectively referred to as the parties) were, for the first time, referred to an arbitrator by the respondent, on 01.10.1991. The reference was made to one Sh. C. Achuthan, who had issued directions with regard to the filing of the statement of the claim. Mr C. Achutan, however, resigned, and thereafter, reference was made to one, Mr Mahesh Prakash vide communication dated 06.02.1992, who declined to accept the reference.

2.1 Finally, the reference was made to Sh. Ram Bahadur, Additional Legal Advisor, M/o Law vide letter dated 17.12.1992, who delivered the impugned award.

3. In this process, nearly 20 years have passed since disputes arose between the

parties. This leaves us with the sense of disquiet as to whether, arbitration is an effective alternate dispute resolution mechanism available to the parties.

4. Reverting to the case, in our view it would perhaps be necessary to note, in the first instance, the background facts, to the extent necessary, in which, disputes erupted as between the parties.

4.1 The respondent had invited tenders for supply of toilet soaps. The quantity indicated in the Notice Inviting Tender (in short NIT) was 13,50,000/- cakes of 100 grams each. The NIT, was floated on 02.05.1989. The bids were opened on 25.05.1989. The respondent, vide communication dated 31.05.1989, accepted the bid of the appellant for supply of 7,50,000 cakes of toilet soap, each weighing 100 gms., at the rate of Rs 2.54 (hereinafter collectively referred to as stores). Undisputedly, the supplies had to be made by the respondent on or before 30.09.1989. The appellant reiterated his consent to the communication dated 31.05.1989, vide a return communication dated 28.06.1989. As stipulated, in the contract, a bank guarantee was also executed by the appellant.

4.2 It appears that the respondent offered to make supplies at the very fag end of the stipulated period, that is, 22.09.1989 which, resulted in, extension of the delivery period to 15.12.1989, as the respondent could not have carried out inspection in the short period initially available to it.

4.3 To cut a long story short, the dispatches were made to the designated authority under the respondent. Undisputedly, the authority designated to accept the supplies, was the Commandant, COD, Chhekoi, (hereinafter referred to as Commandant), as these were supplies evidently for army personnel.

4.4 It is important to mention, at this stage, that the supplies were made by the appellant in five (5) consignments. The first two (2) consignments, reached the consignee on 01.12.1989, while the remaining consignments were delivered on 12.12.1989. In so far as the first two (2) consignments were concerned, they were rejected by the Commandant vide telegram dated 30.12.1989, which was followed by a letter dated 10.01.1990. There is no dispute that the respondent received both the telegram as well as the aforementioned letter conveying rejection of the said consignments. Importantly, the respondent in no uncertain terms while rejecting the consignments requested the appellant to lift the rejected stores and replace the same.

4.5 The fate of the remaining consignments being three (3) in number was no different as they were rejected vide telegram dated 06.02.1990. By this communication as well the respondent requested the appellant to lift the sub-standard stores and replace them as well. The grounds for rejection in both communications were almost identical; these being broadly as follows: fragrance did not conform with pilot samples; no lather found; packing cases are weak and would not withstand transit hazards; the stores were not as sample; and lastly on visual check, quality of the toilet soaps was found to be sub-standard.

4.6 It, however, appears that, the respondent somehow ended up releasing 95% of the contract value amounting to Rs 18,09,500/-, apart from having borne freight charges amounting to Rs 10,165/-.

4.7 On account of the rejection of goods by the Commandant, hectic correspondence ensued between the parties. The appellant made a grievance qua the action of the respondent in rejecting the stores in issue vide letters dated 16.01.1990 and 27.01.1990. As a matter of fact, the appellant sought joint inspection of the goods vide letter dated 16.01.1990 followed by yet another letter dated 27.02.1990. Between these two dates i.e., 16.01.1990 and 27.02.1990, a letter dated 16.02.1990 was shot off by the Section Officer of the respondent to the Quality Assurance Officer to hold a joint inspection. A copy of this letter was sent to the appellant. Therefore, the second letter of the appellant for joint inspection dated 27.02.1990 was sequel to the respondent's letter of 16.02.1990. Interestingly, the request for joint inspection was not mentioned in the appellant's letter dated 27.01.1990 though a review was sought of the respondent's decision to reject the stores.

4.8 It appears that in response to letters dated 16.01.1990, 27.01.1990, and another letter dated 05.02.1990, the Commandant dispatched a communication dated 15.02.1990 to the appellant. Since much stress was laid during the course of argument, on this letter of the Commandant, as well as, on the internal communication of even date, i.e., 15.02.1990 exchanged between the Section Officer and the Quality Assurance officer of the respondent; we propose to deal with the effect, if any, of these documents in the latter part of our judgment. For the sake of convenience, Commandant's letter dated 15.02.1990 is extracted hereinafter:

M/s Continental Chemicals Ltd.,

1202, Akashdeep,

26, Barakhamba Road,

New Delhi - 110 001

A/T No. OC-2/101/0012/20.3.96/173/RP/COAD/268 DT 2212-88 NAD/A/T NO. OC-2 / 101 / 0023 / 20.4.89 /H2 /COAD/292 DATED 31-5-89 FOR SUPPLY OF SOAP TOILET.

Dear Sirs,

1. Reference your letters no. CCL:89-90: 16791 dated 27 Jan 90, CCL: 89-90: 16843 dated 16 Jan 90 and CCL:89-90: 16838 dated 5 Feb 90.

2. In this connection, it is hereby intimated that check samples have been drawn by the inspecting authority from the lot of consignments supplied against I/NOTE No. MW/DLH/1352/25/1 DT. 16.11.89. On receipt of test report action will be taken accordingly.

Yours faithfully,

Sd/-

(AJIT ISSAR)

MAJOR

O I/C P L C

For Commandant

(emphasis is ours)

4.9 We may note in the typed version of the aforementioned letter another inspection note being I/Note No. MW/DLH/1352/12/3 dt. 31.5.89 has been incorrectly added.

4.10 As indicated above, on the very same date i.e., 15.02.1990 a communication was exchanged between the Quality Assurance officer and the Commandant. The sum and substance of this letter was that the quality assurance department seemed to convey to the Commandant that the stores were accepted after due testing and inspection and, as per the specifications stipulated. The rejection of the entire consignment based on a pilot sample was not in accordance with the terms of the contract since, there was no provision for a pilot sample nor, was an approved pilot sample sent to the Commandant, for comparison, with the bulk consignment. In so far as, the objection of the Commandant vis-?-vis the packing was concerned, the quality assurance department was of the view that the packing case was of the quality in technical terms "pack-B", which was capable of withstanding normal hazards of transit. It was further conveyed by the quality assurance department, that in case there was a damage to the packing during transit the appellant had intimated its willingness to replace the same at the site where the goods had been delivered.

5. It is in this background that the disputes were referred to the learned arbitrator. The learned arbitrator dealt with both the claims of the respondent towards refund of price paid on rejected goods, interest and cost of arbitration, as also, the counter claims of the appellant qua payment of the balance 5% of the total agreed consideration against supplies made, return of security deposit, interest, damages and cost of arbitration. The arbitrator made and published his award as indicated above, on 02.12.1993. By virtue of this award, the learned arbitrator rejected all claims of the appellant except that which pertained to the amount paid by it as security to the respondent. In so far as the respondent was concerned it allowed its claim for return of 95% of the price paid with interest at the rate of 18% from the date of filing of the claim till the publication of the award. In so far as the costs was concerned the arbitrator allowed it, to the extent it is justifiable. The realization of the claims by the respondent was, however made, subject to the adjustment of the security amount ordered to be repaid to the respondent.

5.1 The appellant being aggrieved filed its objections u/s 16, 30 & 33 of the Arbitration Act, 1940 (hereinafter referred to as the said Act). The respondent on the other hand, had moved for making the award a rule of the court. As indicated above, objections preferred by the appellant were dismissed by the learned Single Judge, by the impugned judgment. The learned Single Judge has sustained the award with interest at the rate of 12% p.a. from the date of decree till the date of realization.

5.2 Aggrieved by the same, the present appeal is preferred. Before us, Mr Bansal, who appear for the appellant, has confined his submissions to the following aspects:

(i) Firstly, that there was a failure on the part of both the arbitrator as well as the learned Single Judge in ignoring two vital documents of even date, i.e, 15.02.1990. As noticed above, the first document is a letter issued by the Commandant to the appellant stating that the inspecting authority had drawn samples against a specified inspection note number MW/DLH/1352/25/1 dated 16.11.1989, and that, on receipt of the test report action would be taken. The second document, is an internal communication dated 15.02.1990, (to which also we have made a reference hereinabove), exchanged between the Quality Assurance Officer of the respondent and the Commandant. By this document, the Quality Assurance Officer seeks to convey that the rejection by the Commandant was not in order qua consignment accepted vide inspection note no. MW/DLH/1352/25/1 dated 16.11.1989.

(ii) Secondly, the failure on the part of the respondent to consider the request for joint inspection conveyed vide letters dated 16.02.1990 and 27.02.1990.

(iii) The last and the third submission was that, the respondent having consumed, what it claimed were sub-standard goods, could not have sought refund of the price paid by it to the appellant. For this purpose, the learned counsel sought to rely upon paragraph 20 of the objections preferred before the learned single judge and the response of the respondent to the same.

6. It may also be pertinent to note that, on perusal of the record we found written submissions filed on behalf of the appellant, in which, an additional ground appears to have been taken, which is that, the telegram dated 31.12.1989, which was followed by a letter dated 10.01.1990, rejected only the first two (2) consignments comprising of 2,40,000/- soap cakes. According to the appellant, these are the only communications which find a mention in the award. The "letter" dated 06.02.1990, finds no mention in the impugned award". In the written submission, the appellant goes on to state that in the list of documents filed before the learned arbitrator by the respondent, there is no reference to the said letter. In other words, it is contended that there was no material before the learned Arbitrator to sustain the respondent's rejection of all five (5) consignments comprising of 750000 soap cakes.

6.1 Before we proceed further, we may only indicate that Mr. Bansal during the

course of oral arguments made no submissions with regard to this aspect of the matter. The issue was not pressed before us. As a matter of fact we find no discussion on this aspect of the matter even before the learned Single Judge. Nevertheless, we have ourselves looked at the record and find that there is on record a telegram dated 06.02.1990 (and not a letter dated 06.02.1990), to which we have made reference hereinabove, which specifically communicates rejection by the respondent of the remaining three (3) consignments, which were not, the subject matter of the earlier communication 30.12.1989 and 10.01.1990. It is perhaps for this reason this objection was not pressed both before us as well as before the learned Single Judge.

7. Before we deal with other submissions of Mr. Bansal, it may be relevant to record the following undisputed aspects of the matter which have emerged from the record.

7.1 The contract was executed by the appellant by dispatching the stores in issue in five (5) consignments. The details with respect to the Railway Receipt numbers, the date of Rs., the inspection note number, and the date and quantity of the each of these consignments are set out herein below for easy reference:

R.R. No.

Date

Inspection Note No. & date

Quantity

1. C-184685

18.11.89

MW/DLH/1352/25/1 DT. 16.11.89

1,20,000 cakes

2. C-184686

18.11.89

- do -

1,20,000 cakes

3. C-184687

18.11.89

MW/DLH/1352/25/2 DT. 16.11.89

1,70,000 cakes

4. C-184688

18.11.89

- do -

1,70,000 cakes

5. C-184689

19.11.89

MW/DLH/1352/25/3 DT. 16.11.89

1,70,000 cakes

7.2 It is not in dispute, and we have heard Mr. Bansal say nothing to the contrary, that vide communication dated 30.12.1989, followed by a letter dated 10.01.1990 the first two (2) consignments were rejected. Though, as indicated above, in the written submissions there is an issue with regard to rejection of the remaining three (3) consignments, though as observed above, Mr. Bansal did not raise any issue with regard to the same. In any event, as indicated above, vide telegram dated 06.02.1990 the remaining three (3) consignments were also rejected.

7.3 Undoubtedly, under the terms of the contract, the appellant had been conferred with such a right under clause 19 of the purchase order, which is also referred to as acceptance of tender (in short AT). The said conditions reads as follows:

CONDITIONS OF ACCEPTANCE: If on examination of any sample from any portion of supply that material is found to be not fully conforming to the respective specn./particulars quoted the whole supply may be rejected.

7.4 A bare perusal of the aforementioned clause (i.e., clause 19), would show, that the respondent could extract samples from supplies made by the appellant, and if, the sample did not conform to the specifications and particulars, the entire supply could be rejected. It is nobody's case that the Commandant was not the recipient of the goods, and in terms of the purchase order, he did not have the right to reject the consignment.

7.5 The evidence, with regard to whether or not the respondent had exercised the said right, conferred under the contract, appropriately has been appreciated by the learned arbitrator whereupon, he has come to a conclusion that the rejection of the stores was both valid and legal for the following reasons:

1. Rejection of stores by consignee is valid and legal on the following grounds:-

(A) Clause 19(h) of the A/T filed by U.O.I. at page 25 is part of the contract consented by both parties.

(B) Telegram dated 30.12.89 of which photocopy is filed by UOI is within 60 days as per the terms of clause 19(h) of A/T.

(C) As per letter dated 4.1.91 filed by contractor at p 18, para 9, the stores were received by the consignee on 18.12.89. Hence rejection is within time and under authority of the terms of the contract.

(D) Consignee has rightly exercised the right under clause 19(i) of the A/T.

(E) Joint inspection is not done, hence also rejection stands.

(F) Rejection has never been withdrawn or modified.

7.6 It is trite to say that appreciation of evidence is exclusively within the domain of the arbitrator. Mr. Basil's submission that the arbitrator overlooked the aforementioned two letters dated 15.02.1990 is untenable, in our view, for the following reasons: firstly, there is nothing to demonstrate on a perusal of the award that arguments were advanced based on the said documents. Secondly, in so far as the first letter is concerned it speaks of some kind of assurance of action being taken on test report being received qua check samples having been drawn from the first consignment out of the four consignments. Mr. Bansal did not take his argument further to demonstrate that it was argued before the arbitrator that either no test report was generated, or if generated was not placed on record. Though what cannot be disputed based on the record placed before us that the second lot of three (3) consignments was also rejected, albeit on 06.02.1990.

7.7 The second communication of even date, i.e., 15.02.1990, is an internal communication, once again, referring to the very same consignment, i.e., the first consignment out of the total of five (5) consignments. In this communication, there appears to be an apparent divergence of view inter se the two departments of the respondent. This document by itself, cannot have us come to a conclusion that, the view expressed by an officer of the quality assurance department vide communication dated 15.02.1990 qua the first consignment was the last word on the issue. The ultimate decision of the institution, that is, the respondent was to stick by its decision of rejecting the consignments. This decision, as noted by the arbitrator was not countermanded.

7.8 This aspect attains importance as the arbitrator in his award categorically says that not only has he examined the pleadings and the documents, but also perused the purchase file brought before him on his directions. The arbitrator, in our view, is the master of the proceedings conducted before him. Unless one were to come to the conclusion that the decision arrived at by the arbitrator is perverse, in the sense that, no reasonable or a prudent man could come to the given conclusion, based on the same material which was placed before the arbitrator. The arbitrator, in a manner of speaking, is a private judge chosen by parties under an agreement arrived at between them. Therefore, we are not able to persuade ourselves to come to a conclusion based on the aforementioned documents, that rejection of the consignments in issue, by the respondent, was uncalled for; even if, we were to accept for the sake of argument, that the said documents had been ignored by the arbitrator.

7.9 The other submission of Mr. Bansal that joint inspection though offered was not carried out is, in our view, once again, an aspect on which the arbitrator has returned a finding that joint inspection as matter of fact was not conducted. The respondent, undoubtedly, under the contract was not obliged to conduct a joint inspection. It had though, as noticed above, the right to draw samples from a given consignment, and if, the sample drawn was found not to conform to the specifications or given particulars, it could reject the whole supply. This right was exercised by the respondent. The mere fact that, based on a request of the appellant, a Section Officer, who is perhaps at the lowest rung of the decision making process suggests a joint inspection - a suggestion which was not given effect to, cannot in our view impact the conclusion arrived at by the Arbitrator.

8. We may, profitably, once again, remind ourselves that this is an aspect, which is also, within the jurisdictional periphery of the learned arbitrator, who appears to have looked at this aspect as well and come to a definitive conclusion that it cannot effect the right of the respondent to reject the consignments; albeit for good reason. The fact remains that it was not as if the respondent was averse to the appellant making the supplies. The only caveat was that it should remove the damaged stores and replace the same with those conformed the specifications stipulated under the contract. This aspect was made clear by the respondent vide its communication dated 30.12.1989, 10.01.1990 and 06.02.1990.

8.1 The correct position of law is enunciated by the Supreme Court in the observations made in *Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another*, . The relevant extracts are culled out herein below :-

4. In this case, there was no violation of any principles of natural justice. It is not a case where the arbitrator has refused cogent and material factors to be taken into consideration. The award cannot be said to be vitiated by non-reception of material or no consideration of the relevant aspects of the matter. Appraisal of evidence by the arbitrator is ordinarily never a matter which the court questions and considers. The parties have selected their own forum and the deciding forum must be conceded the power of appraisal of the evidence. In the instant case, there was no evidence of violation of any principle of natural justice. The arbitrator in our opinion is the sole judge of the quality as well as quantity of evidence and it will not be for this Court to take upon itself the task of being a judge of the evidence before the arbitrator. It may be possible that on the same evidence the court might have arrived at a different conclusion than the one arrived at by the arbitrator but that by itself is no ground in our view for setting aside the award of an arbitrator.

5. It is familiar learning but requires emphasis that Section 1 of the Evidence Act, 1872 in its rigour is not intended to apply to proceedings before an arbitrator. P.B. Mukharji, J. as the learned Chief Justice then was, expressed the above view in *Haji Ebrahim Kassam Cochinwalla v. Northern India Oil Industries Ltd* and we are of the opinion that this represents the correct statement of law on this aspect. Lord Goddard, C.J. in *Mediterranean & Eastern Export Co. Ltd. v.*

Fortress Fabrics Ltd. observed at pages 188-89 of the report as follows:

A man in the trade who is selected for his experience would be likely to know, and, indeed, would be expected to know, the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. In this case, according to the affidavit of the sellers, they did take the point before the arbitrator that the Southern African market has "slumped". Whether the buyers contested that statement does not appear, but an experienced arbitrator would know, or have the means of knowing, whether that was so or not and to what extent, and I see no reason why in principle he should be required to have evidence on this point any more than on any other question relating to a particular trade. It must be taken, I think, that in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the courts looked with jealousy on the jurisdiction of arbitrators. The modern tendency is, in my opinion, more especially in commercial arbitrations, to endeavour to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the courts should be slow indeed to set aside his award.

6. This in our opinion is an appropriate attitude.

7. In this case the reasons given by the arbitrator are cogent and based on materials on record. In Stroud's Judicial Dictionary, Fourth Edn., page 2258 states that it would be unreasonable to expect an exact definition of the word "reasonable". Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy. But mankind must be satisfied with the reasonableness within reach; and in cases not covered by authority, the verdict of a jury or the decision of a judge sitting as a jury usually determines what is "reasonable" in each particular case. The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. See the observations, in *Re a Solicitor*.

9. This brings us to the last aspect of the matter, which was that, the respondent having consumed the goods, it could not seek refund of the price paid. For this purpose, as indicated above, Mr. Bansal relied upon the following averments made in paragraph 20 of the objections filed before the learned Single Judge "...Subsequently even the goods had been consumed and no goods of respondent were available and therefore no rejection had remained after property is used.

9.1 We are not impressed with this submission of Mr. Bansal for more than one reason. Firstly, the respondent has categorically denied the averments. Secondly, we find that there is no reference to this submission either in the award or in the impugned judgment of the learned Single Judge. The ground was obviously not

pressed before the Single Judge. The submission made before us for the first time is clearly an afterthought. Lastly, this submission of Mr. Bansal, made at the second stage of scrutiny of the award, appears to be incongruous, for the reason that, all along the respondent had been calling upon the appellant to remove the rejected stores; thus making it quite clear that it was not interested in consuming the said stores.

10. Therefore, for the aforementioned reasons, we find there is no merit in the appeal, and hence, it deserves to be dismissed. It is ordered accordingly. The costs shall follow the result, which are quantified at Rs 25000/-.