
(2022) 12 DEL CK 0201

In the Delhi High Court

Case No : First Appeal From Order (OS) (COMM) No. 266 Of 2019, Civil
Miscellaneous No. 48395 Of 2018

M/S Heranba Industries Ltd.

APPELLANT

Vs

M/S Hindustan Insecticides Ltd.

RESPONDENT

Date of Decision : 14-12-2022

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 37

Citation : (2022) 12 DEL CK 0201

Hon'ble Judges : Vibhu Bakhru, J; Purushaindra Kumar Kaurav, J

Bench : Division Bench

Advocate : Dr. Amit George, Saurabh Bhargavan, Bharat, Rishikesh, Arunav Patnaik

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J

1. The appellant (hereafter 'Heranba') has filed the present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act') impugning an order dated 17.07.2018 (hereafter 'the impugned order') passed by the learned Single Judge, whereby the appellant's application under Section 34 of the A&C Act, seeking to set aside an arbitral award dated 13.01.2010 (hereafter 'the impugned award'), was rejected.

Factual Context

2. On 05.01.2004, M/s Rail India Technical Economic Services Ltd. (hereafter 'RITES'), a Government of India Enterprise, acting on behalf of the Ministry of Health and Family/Welfare, Govt. of India, invited tenders for supply of pesticides. Thereafter, on 09.02.2004, Hindustan Insecticides Ltd. (hereafter 'HIL') asked Heranba to issue a letter of undertaking that it would supply the technical grade pesticides to HIL. This letter was for the purposes of showing RITES that HIL had the capacity to perform the contract, if awarded to it.

3. On 11.02.2004, Heranba and HIL entered into an agreement for a period of five years (hereafter 'the Agreement'). Heranba states that in terms of the Agreement, it agreed to supply technical grade and formulation form of pesticides to HIL, and HIL would act as the sole and exclusive marketing agent for supply of the said products to various State Governments, Central Government and local bodies etc.

4. Subsequently, HIL emerged as the successful bidder and secured the contract for supply of pesticides to the Ministry of Health (hereafter 'the RITES Contract'). However, HIL did not place the orders with Heranba for technical grade pesticides for performing the RITES Contract. Instead, HIL obtained manufactured material from another source, M/s BR Agro Tech. According to Heranba, this was a breach of the Agreement.

5. Thereafter, on 19.05.2005, Heranba invoked the Agreement to refer the disputes to arbitration. By an order dated 29.09.2005, the learned Single Judge referred the disputes to arbitration.

Arbitration

6. Heranba filed its Statement of Claims before the Arbitral Tribunal. It, essentially, raised three claims. Claim no.1 was for the loss of profits and business of 15% due to HIL not carrying out its obligation to purchase the contracted goods as per the Agreement (Rs. 1,30,85,365/-). Claim no.2 was for the loss on investment made towards raw material purchased to manufacture the materials as required and the consequential depreciation, obsolescence and maintenance costs suffered by Heranba (Rs. 1,60,79,000/-). Claim no.3 was for the expenses incurred in relation to the tender bid for another tender jointly bid by the parties in Maharashtra (Rs. 10,000/-).

7. Additionally, Heranba also claimed pendente lite and future interest at the rate of 18% per annum on the amount of Rs. 2,82,14,965/-from 26.05.2004 till the date of realisation.

8. HIL filed a Statement of Defence contesting the aforesaid claims and also filed a counter-claim seeking refund of the security deposit paid by HIL in respect of another tender (tender floated by the Government of Maharashtra) as the same had been refunded to Heranba.

9. The Arbitral Tribunal considered the contentions of the parties and observed that the contract was for marketing arrangement and did not deal with the RITES Contract. Additionally, the Arbitral Tribunal found that the RITES Contract was cancelled as the High Powered Committee constituted by the Punjab and Haryana High Court observed that HIL could not outsource the RITES Contract, which it had done. Thus, the Arbitral Tribunal denied all the claims of Heranba with respect to the contract with RITES. Further, the Arbitral Tribunal allowed the counter-claim filed by HIL and held that it was entitled to the security deposit collected by Heranba. The Arbitral Tribunal found that since the money was

provided as security deposit by HIL for the tender floated by the Government of Maharashtra, the same could not be adjusted towards the claims in terms of the RITES Contract.

Section 34 of the A&C Act

10. Heranba challenged the impugned award by filing an application under Section 34 of the A&C Act [being OMP 198/2010 captioned M/S Heranba Industries Limited v. M/S Hindustan Insecticides Limited].

11. The learned Single Judge accepted that the technical grade and formulations may be different but did not find that HIL was bound to procure pesticides from Heranba. The court also found that the RITES Contract was not covered under the Agreement. The learned Single Judge found that at the time of execution of the Agreement, the RITES tender was not in contemplation of the parties. The learned Single Judge further observed that the letter dated 09.02.2004 did not "create a 'compulsion'" for HIL to procure the materials from Heranba and it only supported HIL's bid for the RITES tender. The learned Single Judge held that since the RITES Contract was cancelled, claims related to the said contract could not be maintained. Accordingly, the court rejected Heranba's application under section 34 of the A&C Act.

Submissions

12. Dr. Amit George, learned counsel appearing for Heranba, has assailed the impugned award and the impugned order on, essentially, two fronts. First, he submitted that the Arbitral Tribunal had grossly erred in proceeding on the basis that the letter dated 09.02.2004 was not a part of the Agreement entered into on 11.02.2004. He submitted that this was not a matter of contention before the Arbitral Tribunal. He referred to the Statement of Defence filed by HIL and submitted that HIL did not dispute that it had obtained a letter dated 09.02.2004 and had subsequently entered into negotiations for placing the relationship on "firmer ground". The Agreement dated 11.02.2004 was, thus, admittedly an extension of the arrangement negotiated between the parties in respect of the tenders invited by RITES. He contended that the commercial understanding in respect of the tenders invited by RITES was, thus, covered under the Agreement.

13. Second, he submitted that the Arbitral Tribunal had failed to draw a distinction between 'Technical Grade' and 'formulations'. The tender awarded by RITES to HIL had been cancelled pursuant to the report of the High Powered Committee dated 09.07.2004. The High Powered Committee found that HIL had procured the formulations from M/s B.R. Agro Tech on payment of costs including excise duty. HIL had repacked and re-labeled the product at the premises in Bhatinda. This was contrary to the understanding on the basis of which HIL's bid was accepted by RITES. HIL had, while submitting its tender, indicated that it would be procuring Alphacypermethrin/ Deltamethrin (Technical) from Heranba and would be formulating Alphacypermethrin WP/Deltamethrin 2.5% WP at their works at Rasayani. Subsequently, HIL had proposed that it would be

manufacturing Alphacypermethrin 5% at its facility in Bhatinda. The High Powered Committee was of the view that HIL had proceeded contrary to the spirit of the tender conditions since they had not formulated the final product at their works. On the basis of the aforesaid finding, he submitted that the RITES tender was cancelled solely because the High Powered Committee was of the view that the tender conditions required HIL to manufacture the formulations and not to simply procure it from another entity.

14. Dr. George submitted that it was clear from the report of the High Powered Committee that manufacturing the formulations by procuring the raw material from Heranba was in terms of the tender conditions but procuring a manufactured formulation and supplying the same to RITES was not. However, the Arbitral Tribunal had erroneously reasoned that even if Heranba had supplied the pesticides, the RITES Contract could have been cancelled.

15. Lastly, Dr. George submitted that the Arbitral Tribunal had erred in awarding the counter-claim and directing refund of the security deposit in full without taking into account the terms of the Agreement. He submitted that in terms of the Agreement, the costs of the tenders had to be shared in a fixed ratio. However, on a query from the Court, whether refund of security deposit could be considered as cost/expenses for the tender, he conceded that the refund of security deposits could not be considered as costs. He, therefore, did not press the challenge to the impugned award in respect of the counter-claim.

16. He also conceded that in view of the finding of the Arbitral Tribunal that the appellant had not produced any material to substantiate its claim for loss of profits, the same was rightly rejected.

Reasons and Conclusion

17. At the outset, it is noted that the claims made by Heranba were premised on the basis of breach of the Agreement on the part of HIL, resulting in losses and incurring damages. According to Heranba, HIL had breached the Agreement by procuring the manufactured product from another entity, M/s B.R. Agro Tech. Heranba claimed that it was entitled to be compensated for the loss of profit that it would have earned if HIL had performed the contract. According to Heranba, it would be entitled to 85% of the total value of the RITES Contract and would have earned a 15% profit on the said amount. It, accordingly, quantified its claim for loss of profit at Rs. 1,30,85,365/- (Claim no.1).

18. The Arbitral Tribunal rejected the said claim, inter alia, on the ground that Heranba had not produced any documentary evidence to substantiate that it would earn 15% profit as claimed. This Court finds no infirmity with the said view. Dr. George has also fairly conceded that the said claim would not be sustainable for want of documentary evidence. He had, essentially, confined his submissions to Claim no.2 (being the amount of Rs. 1,60,79,500/-) claimed towards purchase of raw material and machinery. Heranba claimed that it had, in anticipation to provide the necessary supplies for performance of the RITES

Contract, purchased raw material and certain machinery and was therefore, entitled to be compensated for the same.

19. It is apparent from the above that Heranba's entire claim is founded on the basis that HIL had breached the Agreement by not procuring the material from Heranba for executing the RITES Contract.

20. The impugned award indicates that on 08.05.2007, the Arbitral Tribunal had framed several issues. The first two issues read as under:

"(1) Whether the Rites Tender dated 05.01.2004 is within the purview of the agreement; which is the subject matter of the claim? Whether the Tribunal has jurisdiction to arbitrate the claim? OPC

(2) If the answer to issue No.1 be in the affirmative, whether the Respondent acted in breach of the said agreement dated 11.02.2004 by not placing the order on the Claimant for the material in question in formulated form? OPC"

21. The principal question to be determined by the Arbitral Tribunal was, therefore, whether the tender issued by RITES on 05.01.2004 and the subsequent contract entered into between HIL and RITES (the RITES Contract) was a subject matter of the Agreement.

22. The Arbitral Tribunal did not specifically deal with each of the issues separately. The Arbitral Tribunal was of the view that the subsequent events – cancellation of the RITES Contract as well as the Agreement – had a bearing on the disputes. Accordingly, the Arbitral Tribunal addressed the question as to the implications of the cancellation of the said two contracts. The Arbitral Tribunal found that the tender conditions applicable to the bids invited by RITES required eligible bidders to be the manufacturers of the product. Thus, a mere trader was not eligible to participate in the said bidding.

23. Although HIL had participated in the tender on the strength of the letter dated 09.02.2004 furnished by Heranba, it had directly procured the formulated product from M/s B.R. Agro Tech. Certain petitions challenging the award of the RITES Contract to HIL were filed before the Punjab and Haryana High Court and the Court appointed a High Powered Committee to examine various questions relating to the RITES Contract. The High Powered Committee found that HIL had breached the tender conditions in the letter and the spirit of the contract as it had not manufactured the formulations and pursuant to its report, the RITES Contract was cancelled. The Arbitral Tribunal held that Heranba was in full knowledge of the tender conditions that the tenderer was required to be a manufacturer but had entered into a contract to supply formulation grade pesticides, which would be packed and inspected at HIL's factory and supplied to RITES. The Arbitral Tribunal described the arrangement as "the same dubious plan like M/s B.R. Agro-Tech to grab the benefits of the RITES Contract". The Arbitral Tribunal held that if HIL had indented pesticides from Heranba, the RITES Contract would have been cancelled.

24. The findings of the Arbitral Tribunal are ex facie erroneous. The Arbitral Tribunal did not make any distinction between 'technical grade' and 'formulations'. According to Heranba, it agreed to supply technical grade, which is the raw material used for manufacturing the formulations and not the final product. The High Powered Committee had faulted HIL for entering into an arrangement of procuring formulated products from M/s B.R. Agro Tech and not formulating it at its works.

25. It is relevant to refer to the following passage from the Report of the High Powered Committee:

"The High Powered Committee members, however, noted that M/s HIL procured formulation from M/s B.R. Agrotech on payment of cost including excise duty, packed it at their Bhatinda premises. Labelled it and effected inspection at their Bhatinda premises itself. As per the terms of their tender the HIL had indicated that they would be procuring Alphacypermethrin/ Deltamethrin (Technical) from M/s Hernaba and would be formulating Alphacypermethrin WP/ Deltamethrin 2.5% WP at their works at Rasayani. Subsequently, proposed to manufacturing Alphacypermethrin 5% at Bhatinda works, when accordingly allowed in the contract.

The High Powered Committee members were of the view that M/s Hindustan gone against the spirit of their tender conditions as they have not formulating final product at their works."

26. It is apparent from the above that the Arbitral Tribunal's conclusion that the RITES Contract would have been cancelled even if HIL had procured technical grade pesticides from Heranba, is ex facie erroneous.

27. Having stated the above, we are unable to accept that the error committed by the Arbitral Tribunal in returning the aforesaid findings have any material bearing in the final outcome of Herenba's claim.

28. As noted above, Heranba had founded its claim on the basis of breach of the Agreement, which in turn was premised on the assertion that the RITES Contract was covered under the Agreement. In this regard, the Arbitral Tribunal noted that RITES was not a party to the Agreement; the RITES Contract was also not mentioned in the Agreement; and there was nothing in the Agreement to indicate that any benefits arising from the RITES Contract were required to be shared with any third party (including Heranba).

29. The Arbitral Tribunal also observed that in terms of the Agreement, Heranba had agreed to appoint HIL as its sole exclusive marketing agent for supply of Synthetic Pyrethroids for public health purposes to various institutions/State Government/Central Government/Local Bodies. The Agreement did not create any corresponding obligations on HIL to indent pesticides for all contracts entered into by it with third parties.

30. It is clear from a meaningful reading of the findings of the Arbitral Tribunal

that it did not accept that the RITES Contract was covered under the Agreement.

31. Dr. George referred to Clause 3(h) and (j) of the Agreement to contest the aforesaid conclusion. Clause 1 and 3(h), (i) & (j) of the Agreement are set out below:

“(1) Heranba agrees to appoint HIL as sole & exclusive marketing agents throughout India except in the States of Uttar Pradesh and Uttaranchal for supplied of the above Synthetic Pyrethroids as mentioned above for use in public health purposes in various institutions/State Government’s/Central Government/ Local Bodies, etc.

xxxx xxxx xxxx

3) The material will be supplied to HIL on the following terms and conditions:

h) That Agreement can be amended in content or validity period extension as per mutual consent

i) That HIL shall participate all tenders for the supply of agreed insecticides and shall submit the required by security in the form of Demand Draft/bank Guarantee/IC under the following conditions:-

(j) In the case of unsuccessful tenders the financial cost involved for the bid security calculated at CC rate applicable to HIL from time to time shall be borne at the ratio 3:1 by M/s Heranba Industries & HIL, respectively.”

32. The opening sentence of Clause 3 of the Agreement indicates that that various sub-clauses set out the conditions on which Heranba had agreed to supply material to HIL. Clause (i) provided that HIL would participate in all tenders and submit the bid securities from its own sources. Clearly, the said Clause did not create an obligation on HIL to procure raw materials for all its contracts with third parties, secured by an open tendering process.

33. In terms of Clause 3(j), the parties had agreed to share the financial costs in case of unsuccessful tenders. It is obvious that Clause 3(j) would apply only in cases where HIL had agreed to procure supplies from Heranba. It is difficult to accept that the Agreement precluded HIL from bidding for contracts on its own behalf or otherwise obligated HIL to procure material solely from Heranba.

34. In the aforesaid view, we do not find any infirmity with the conclusion of the Arbitral Tribunal that there was no corresponding duty on HIL to procure materials from Heranba. In any view of the matter, the decision of the Arbitral Tribunal in regard to construction of a contract is final and binding on the parties. The same is not amenable to a review under Section 34 of the A&C Act unless the court comes to the conclusion that the interpretation of the contract is ex facie erroneous; a view that no reasonable person could possibly accept; and one that vitiates the award on the ground of patent illegality.

35. There is no dispute that HIL had secured a letter dated 09.02.2004 from

Heranba confirming that Heranba would supply the technical grade pesticides for formulating the insecticides for which tenders had been invited by RITES. HIL had then submitted the said letter to RITES to establish its credentials for performing the RITES Contract, if awarded. There is no indication in the said letter that it has formed a part of a larger understanding between the parties. The parties had thereafter entered into the Agreement recording the terms of their agreement (the Agreement). However, there is no mention in the said terms that the same also covered the tender floated by RITES on 05.01.2004 (which was prior to the Agreement).

36. Dr. George had earnestly contended that in view of the averments made in the Statement of Defence filed by HIL, there was no dispute that the RITES Contract was covered under the Agreement and therefore, the Arbitral Tribunal could not have decided otherwise.

37. The relevant averments made in the Statement of Defence are set out below:

"c. Keeping in view the vast expertise in the field, a large number of private business houses are in touch with the respondent either with a view to procure/supply various materials and/or entering into some sort of Memorandum of understanding and/or agreement etc. The claimant had approached respondent with an offer for supply of technical grade Deltamethrin/Alphamethrin in respect of the RITES Tender published on 5.1.2004 for supply of synthetic pyrethroids for anti-malaria spray by National Anti-Malaria programme of the Ministry of Health, Govt. of India, New Delhi. The respondent purchased the tender documents and initiated action to submit the bid security by way of Bank Guarantee. The internal proposal was put up on 05.02.2004 through the Company's Finance Department for obtaining the Bank Guarantee as per the required format. This was approved by the CMD on 10.2.2004 and the company submitted the tender to M/s. RITES after collecting and incorporating various details as required for submission of the tender. With a view to assure the tenderer regarding the supply of Deltamethrin/ Alphamethrin (technical grade), the respondent obtained a letter dated 9.2.2004 from the claimant, undertaking to supply the said material in technical form. Subsequently, the parties opened-negotiations to enter into an agreement to put its relationship on a firmer ground. It was with this view that the agreement dated 11.2.2004 was entered into between the parties. The agreement does not refer to RITES Tender.

d. Transactions prior to that date, including 'The RITES tender' were never intended to be covered by the Agreement. Any reference to Agreement dated 11.2.2004 in the context of the RITES tender is, therefore, wholly incorrect. Respondent submitted the RITES tender all by itself. No consultation or consent was necessary, nor held, with the claimant in respect of price to be quoted for formulated material. However, when the claimant was approached to negotiate price for Alphamethrin/ Deltamethrin Technical, they refused to quote a price."

38. It is clear from the above that there is no merit in the contention that HIL

had admitted that the RITES Contract was covered under the Agreement. HIL had clearly stated that it had submitted the tender to RITES without any consultation with Heranba in respect of the price to be quoted for the formulated material. HIL had admitted that it had obtained a letter dated 09.02.2004 from Heranba, whereby it had agreed to supply the technical grade pesticides. According to HIL, the parties had, subsequently, entered into negotiations to put their relationship on firmer ground. This did not include any past transaction.

39. In view of the Arbitral Tribunal's decision that the RITES Contract was not covered under the Agreement, the claims raised by Heranba – which, as noted above, were based on breach of the Agreement – could not be allowed.

40. The learned Single Judge rightly held that the Agreement between the parties did not envisage that HIL will source the products from Heranba only. Paragraph nos. 11 and 12 of the order passed by the learned Single Judge are relevant and read as under:

"11. The distinction between the 'Technical grade' and the final product obtained from B.R. Agrotech may be correct. However, the agreement between the Petitioner and the Respondent did not envisage that the Respondent will ONLY source the products from the Petitioner. The exclusivity did not apply to the Respondent. It applied only to the Petitioner, that the Petitioner would exclusively market its products through the Respondent. There was no obligation on behalf of the Respondent only from the Petitioner. Moreover, the RITES tender was not in contemplation at the time of execution of the Agreement dated 11th February, 2004.

12. The letter dated 9th February, 2004 may have supported the Respondent's bid with RITES. But the said letter does not create a 'compulsion' for the Respondent to source the products from the Petitioner and neither is the said letter to be treated as a 'promise'. It is at best representation of the commercial capability to supply if the Respondent chooses to place the order on the Petitioner. The said letter is not a part of the arrangement envisaged in the Agreement dated 11th February 2004. Since the RITES contract itself has been cancelled, no claims in respect thereof could have been maintained. For these reasons, no fault can be found in the Arbitrator's reasoning."

41. We find no error in the said conclusion. The appeal is unmerited and is, accordingly, dismissed. The pending application is also disposed of.