

(2001) 09 DEL CK 0010

In the Delhi High Court

Case No : OMP. No. 262 of 2001 and I.A. 8277 of 2001

M/s Sachdeva Traders

APPELLANT

Vs

Food Corporation of India and Others

RESPONDENT

Date of Decision : 07-09-2001

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 34
Council of Arbitration Rules — Rule 14

Citation : (2001) 09 DEL CK 0010

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Mr. Sandeep Sharma, for the Appellant;

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—Respondent No. 1 herein, namely, Food Corporation of India (FCI) invited tenders for the sale of Paddy (1994-95 Crop) on as-is-where-is basis. Among others, the petitioner also submitted its tender which was accepted by the respondent No. 1 vide acceptance letter dated 25-6-1996. It was for sale of 1300 MT of common paddy @ Rs. 351.50 per quintal. However, the petitioner firm lifted the quantity of 785 MT of the goods only as against 1300 MT. Respondent No. 1 through its counsel sent notice dated 18.10.99 whereby the petitioner was demanded to lift the balance quantity also failing which respondent No. 1 would invoke arbitration clause as envisaged in the tender. This demand contained in the last para of the said notice is reproduced below as one of the submissions of learned counsel for the petitioner is based on this para:

"You noticee No. 1 and noticee No. 2-5 being partners of noticee No. 1 are, Therefore, called upon to pay the aforesaid amount forthwith along with the interest @ 17.25% P.A. from the date of default till realisation within 7 days failing which, we have got clear instructions from our clients to invoke arbitration clause as envisaged in the tender at your risk, cost and responsibility which you may please take note".

2. The petitioner, however, did not accede the demand contained in the aforesaid notice. In these circumstances, respondent No. 1 requested Indian Council of Arbitration (ICA) to initiate arbitration proceedings as per ICA Rules. Disputes were to be settled by arbitration in accordance with the Rule of arbitration of ICA. This arbitration clause reads as under:

"All disputes or differences whatever arising between the parties out of or relating to the construction, meaning and operation or effect of this agreement or the breach thereof shall be settled by arbitration in accordance with the rules of arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties. The award will be speaking order."

3. ICA appointed Mr. Justice Sushil Kumar Jain, former Judge, Allahabad High Court and Punjab & Haryana High Court, as the sole arbitrator/Arbitral Tribunal who adjudicated upon the claims and counter-claims of the parties and returned his Award dated 29-12-2000. A perusal of the Award shows that it is a detailed reasoned Award running into 26 pages. The Arbitrator in fact framed issues and even evidence was led by the parties by filing affidavits. After closing of the evidence of the parties, arguments were heard and after considering the oral submissions and documentary evidence, learned Arbitrator has recorded his findings issue-wise. As per the impugned Award, petitioner is directed to pay a sum of Rs. 12,23,209/- minus (Rs. 39000/- on account of refund of a part of the security/earnest money, plus Rs. 1,55,552/- being storage charges which have been declined). In this way the net amount awarded is Rs. 10,28,657/- with direction to pay the same within two months along with interest at the rate of 17.25% per annum w.e.f. 18-9-2000, the date when the parties appeared before the learned Arbitrator for the first time. Parties were directed to bear their own costs.

4. The present petition is filed by the petitioner u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter to be called as "the Act") challenging the aforesaid Award. Conscious of the Limited Scope as per Section 34 of the Act to challenge such awards, the learned counsel for the petitioner pressed the following two grounds at the time of arguments:

1. It was submitted that the Arbitrator had no jurisdiction to proceed with the matter inasmuch as the claim preferred by respondent No. 1 was "excepted matter" and, Therefore, the Award was without jurisdiction. Elaborating the submission, learned counsel for the petitioner referred to para-D(ii) of Schedule-I to the tender documents containing "Terms and Conditions" for the sale of sound paddy. It was the submission that as per this clause if tenderer fails and neglects to perform any of his obligation, the FCI could forfeit either whole or any part in its absolute discretion and the decision of Senior Regional Manager (Punjab) FCI, Chandigarh in this respect was to be final and binding on the tenderer. It was further submitted that the petitioner had participated in the arbitration proceedings without prejudice to its contention that Arbitrator had no jurisdiction to deal with the matter and had even filed an application u/s 16 of the Act calling

upon the Arbitrator to rule on his jurisdiction. However, the Arbitral Tribunal did not decide the said application and, Therefore, failed to discharge the obligation cast upon him u/s 16 of the Act. Learned counsel submitted that in case the petitioner had failed to perform its obligation in the contract by not lifting balance of contracted quantity, it was for the Senior Regional Manager (Punjab) FCI, Chandigarh to take decision whose decision was final and, Therefore, it was not open for the FCI to refer the matter to arbitration. This contention of the petitioner is totally fallacious and merits outright rejection.

In order to appreciate this contention let us first examine as to whether disputes referred to Arbitral Tribunal fall within the category of "Excepted Matter". The answer is emphatic "NO". No doubt the clauses referred to by the petitioner show that in case of breach of contract by the tenderer, the FCI can forfeit the whole or part of the earnest money and decision of the Senior Regional Manager in this respect is to be final. However, it is nowhere provided that such a matter would be "excepted matter". There is no provision in the arbitration clause which makes such matters as "excepted matters" or which bars the reference of disputes in respect of those matters where the decision of the Senior Regional Manager is final. Moreover the decision of the Senior Regional Manager is to be only with respect to the forfeiture of the security deposit. Clause further shows that in case the amount of security deposit is not sufficient to recover the full amount, tenderer shall pay to FCI on demand balance due. If tenderer does not pay the amount demanded, then what is the course of action left for FCI? Because in the instant case the amount demanded by the FCI was much more the security/earnest money. Obviously to recover this amount, FCI has to initiate some legal proceedings. Once there is an arbitration agreement between the parties, the only course open for the FCI is to resort to the arbitration. Arbitration clause has already been reproduced above. It states in no uncertain terms that all disputes and differences have to be settled by the arbitration in accordance with rules of arbitration of ICA. It nowhere excludes those matters about which the decision of Senior Regional Manager is final. In the absence of such an exclusion clause in the arbitration agreement, it cannot be said that the dispute in question fall in the category of "Excepted Matter". Irresistible conclusion is that dispute raised by the FCI was of a nature which securely falls within the scope and ambit of the arbitration clause and, Therefore, was to be decided by the Arbitrator and he had the jurisdiction to deal with the same. Arbitration was to be conducted in accordance with rules and arbitration of the ICA and the learned Arbitrator having appointed by the ICA had jurisdiction to adjudicate upon and decide the dispute.

In view of the aforesaid conclusion, the argument of learned counsel for the petitioner that the Arbitral Tribunal was under obligation to decide the application u/s 16 and not having done so, impugned Award suffers from infirmity also loses its force. Even otherwise, there is no merit in it. No doubt under new Act, 1996, unlike the old Arbitration Act, 1940, the Arbitrator is now clothed with power to decide upon his jurisdiction and, Therefore, any party raising objection to his

jurisdiction can move an application before him and call upon him to decide that issue. Therefore, normally when such an issue is raised before the Arbitrator, the Arbitrator should decide the same. However, it would not follow that in case Arbitrator has not decided this issue, the arbitration Award itself would be rendered invalid. It would be only when it is found that the award is without jurisdiction. Even if the arbitrator over-rules the objection regarding his jurisdiction, the aggrieved party can challenge it in the court by filing petition u/s 34 of the Act. Therefore, ultimately it would be for the Court to take final view in the matter in such proceedings. Thus although the learned arbitrator was expected to decide this issue, even when the Arbitrator did not decide this issue it was open to the petitioner to raise this issue before the Court and upon raising such an issue, the Court could examine the validity of such contention of the petitioner. The petitioner has in fact done so. Its a different matter that after examining the issue it is found that the learned Arbitrator was within his jurisdiction to decide the dispute referred to him. Thus there is no substance in the argument of the petitioner that Award should be declared invalid merely because the Arbitral Tribunal did not decide this issue. If such a contention of the petitioner is accepted the follow-up of that would be to remit the case back to the Arbitrator asking him to decide upon the jurisdiction.

2. Other contention of the petitioner was that it was a unilateral reference made by the respondent-FCI to the ICA which was not permissible in view of the judgment of Supreme Court in the case of Jupiter Chit Fund Co. Vs Shiv Narain 2000 RLR (SC) 88 . This contention of the petitioner is to be noted to be rejected.

In the instant case before approaching ICA, the respondent through counsel had in fact given notice to the petitioner calling upon the petitioner to lift the balance material or pay the amount in question with clear intention to invoke the arbitration in case petitioner fails to do so. The relevant portion of the notice is already reproduced. Thereafter arbitration was invoked by submitting claim to the ICA. This invocation was as per the rules of the arbitration of ICA. Rule 14 of these rules clearly prescribes that any party wishing to commence arbitration proceedings shall submit to the Registrar a written request for arbitration which shall include or be accompanied by:

- (a) the names and full addresses of the parties to the dispute.
- (b) statement of the claim and facts supporting the claim, points at issue and relief or remedies sought with other details of the claimant's case.
- (c) original or duly certified copies of the arbitration agreement, any contract or agreement out of or in connection with which the dispute has arisen and such other documents and information relevant or relied upon.
- (d) Registration fee of Rs. 1000/-.

5. The respondent No. 1 precisely adopted the aforesaid procedure as contained in Rule 14 by submitting its statement of claim along with other relevant papers

as mentioned in Rule 14. ICA thereafter followed the procedure as contained in Rules 17 onward. Therefore, it cannot be said that there was a unilateral reference in the instant case and the judgment quoted by the petitioner obviously has no application to this case.

6. No other point was pressed. As I do not find any merit in the aforesaid two grounds, for the reasons stated above, this petition and I.A. 8277/2001 are hereby dismissed.