
(2018) 02 J&K CK 0031
In the Jammu And Kashmir High Court
Case No : 32 of 2010?MP No 01 of 2016

M/s Shivalik Foods

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 05-02-2018

Acts Referred:

[Jammu and Kashmir Arbitration and Conciliation Act, 1997](#), [Section 33](#), [Section 34](#), [Section 28\(3\)](#), [Section 34\(2\)\(IV\)](#)

Citation : (2018) 02 J&K CK 0031

Hon'ble Judges : Alok Aradhe

Bench : Single Bench

Advocate : P. C. Markanda, Aneeta Harsh, R. S. Jamwal

Final Decision : Disposed Off

Judgement

1. This objection has been filed under Section 34 of the J&K Arbitration and Conciliation Act, 1997 (herein after referred to as the 1997 Act) by

which petitioner has assailed the arbitral awards dated 07.05.2010 as well additional award dated 10.8.2010 passed by the Arbitrator. In order to

appreciate the petitioner's challenge to the impugned awards, few facts need mention, which are stated infra.

2. The petitioner was awarded the contract for supply of frozen meat dressed at Chandigarh for Ladakh sector, including operation Meghdoot for

the period from 09.06.2003 to 31.03.2006. Accordingly a contract was executed on 4.6.2003. The petitioner in pursuance of the contract

furnished security amounts to the tune of Rs. 32,64,000/-, 17,03,000/-and 15,61,000/- on 25.4.2000 and 9.6.2003 respectively. The schedule

for supply of contract was fixed as under:

Year 2003-2004 3,33,400 kgs for 300 days (1111) kg/day

Year 2004-2005 4,00,000 kgs. for 365 days (1096 kg/day

Year 2005-2006 4,00,000 kgs for 365 days (1096 kg/day

3. The details of the supply of frozen meat made by the petitioner as per the demands of the respondents till October, 2003 are as follows:

09.06.2003 14,750 kgs.

July 2003 13,575 kgs

August 2003 13, 525 kgs.

Sept. 2003 12,350 kgs.

Oct. 2003 13,600 kgs.

Total 67,800 kgs.

It is the case of the petitioner that in the month of November 2003, the respondents directed the petitioner to supply frozen meat to the tune

11,072 kilograms per day as against the average supply of 1111 kilograms per day. The petitioner was informed that in case the supply of frozen

meat as directed by the respondents are not made, the frozen meat shall be procured from the local market at the risk and cost of the petitioner.

The petitioner did not supply the frozen meat as per the demand of the respondents, accordingly, vide order dated 4.6.2003 the contract of the

petitioner was rescinded. The dispute arose between the parties, which were referred for adjudication to the sole Arbitrator, namely, respondent

No. 5.

4. The petitioner filed claims before the Arbitrator for an amount of Rs. 3,17,10,310.90, whereas the respondents preferred counter claim to the

tune of Rs. 3,45,19,833.84. The hearing before the Arbitrator concluded on 23.09.2009 and the award was made on 07.05.2010. The Arbitrator

awarded a sum of Rs. 88,412/- in favour of the petitioner and awarded a sum of Rs. 32,64,000/- vide additional award dated 10.08.2010. The

counter claim of the respondents was decreed to the tune of Rs. 1,20,80,340.87 along with cost of Rs. 5,00,000/-. The petitioner received the

copy of the award on 10.05.2012 and filed the application under section 33 of the Act on 24.05.2010. Thereafter, the petitioner filed a rejoinder

with a prayer for granting an oral hearing on 19.07.2010. However, the award was published without affording an opportunity of oral hearing to

the petitioner on 10.08.2010. The petitioner after receipt of the copy of the award has filed the objections. In the aforesaid factual background, the petitioner has approached this Court.

5. Learned senior counsel for the petitioner submitted that the petitioner in the rejoinder filed before the Arbitrator had made a prayer to grant him

an opportunity of hearing, however, the same was denied to the petitioner, which was mandatory. In this connection, reference has been made to

the decision of the Himachal Pradesh High Court in the case of H. P. Housing and Urban Development Authority vs. M/s Kapil Constructions,

AIR 2010 HP 46. It is argued that the award has been passed in violation of express provision contained in clause 7 of the contract dated

04.06.2003 and the arbitral tribunal is bound by terms of the contract and cannot travel beyond the same. It is urged that despite admission by the

respondents before the arbitrator which is evident from the para 18 of the award that SOP 1991 was applicable to the contract in question, the

arbitrator has applied SOP 2004, which came into force with effect from 04.01.2004 i.e. after rescission of the contract on 04.06.2003. It is also

pointed out that the arbitrator has failed to appreciate that purchases of frozen meat were made before 6.1.2004 at the risk and expenses of the

petitioner on the basis of SOP 1991 and subsequent purchases of the frozen meat were made on the basis of SOP 2004 for an amount of Rs.

1,02,09,183.62. It is further argued that a provision cannot apply retrospectively until and unless the same is expressly provided. In this contention,

reference has been made to the cases of C. Gupta v. Glaxo Smithkline Pharmaceuticals Ltd. (2007) 7 SCC 171 and Madisheti Bala Ramul (dead)

by LRs v. Land Acquisition Officer, (2007) 9 SCC 650.

6. It is also submitted that the Arbitrator has failed to take into account the relevant material on record and has considered the material which was

not on record. It is further submitted that the arbitrator has misread the demand notes and could not have fastened the liability on the petitioner in

respect of an amount of Rs. 5,02,810.50. It is also pointed out that the arbitrator totally ignored the fact that the savings of Rs. 7,80,641.22 was

made in risk expenses purchases at the cost of the petitioner, which were not credited to the account of the petitioner. It is also urged that

admission made by the respondents in favour petitioner were ignored by the

arbitrator and the award has been made in excess of the claim. It is also argued that the arbitrator ought to have appreciated that even though the petitioner has been directed not to make any supply beyond 10.6.2005, yet the petitioner was saddled with the liability to make payment of an amount of Rs. 96,417.50. Lastly it is urged that the findings recorded by the arbitrator are perverse which has resulted in passing of an erroneous award. In support of his submissions, learned senior counsel has relied upon the decisions of the Supreme Court in the cases of Associated Engineering Co. v. Govt. of Andhra Pradesh and another (1991) 4 SCC 93, Rajasthan State Mins and Minerals Ltd. vs. Eastern Engg Enterprises and another, (1999) 9 SCC 283, Bharat Coking Coal Ltd. vs. Annapurna Construction (2003) 8 SCC 154, ONGC limited v. Garware Shipping Corporation Ltd. (2007) 13 SCC 434, M. B. Patel and Co. v. Oil and Natural Gas Commission (2008) 13 SCC 251, Delhi Development Authority vs. R. S. Sharma and co. New Delhi, (2008) 13 SCC 80, State of Rajasthan and another vs. Ferro Concrete Construction Private Ltd. , (2009) 12 SCC 1, Oil and natural Gas Corporation Ltd. vs. Western Geco internal Ltd. (2014) 9 SCC 263, Sharma and Associates Contractors Private Ltd. vs. Progressive Constructions Ltd. (2017) 5 SCC 743, Tamikl Nadu Water Supply and Drainage Board vs. Satyanarayana Brothers private limited, (2010) 1 SCC 171 and Mithalal B. Gurjar vs. Union of India and okrs. 2015 (6) Arb. LR 127 (Bombay).

7. On the other hand, learned Central Government Standing Counsel submitted that the petitioner was required to supply the frozen meat and the quantity of the same to be supplied per day was not mentioned in the agreement. It is submitted that in view of the clause 7 of the contract, SOP 204 was rightly applied by the Arbitrator and the arithmetical error can be corrected by the arbitrator in favour of the petitioner and the same cannot be a ground for setting aside the award. It is also submitted that the award has been passed in terms of the contract and this Court in the instant proceeding cannot appreciate the evidence, even if another view is possible and cannot exercise appellate jurisdiction, as the arbitrator is the sole judge of the quality and quantity of the evidence. In support of his submissions, learned Central Government Standing Counsel relied upon the decisions of the Supreme Court in the cases of MC Darmott international vs.

Burn Standard Co. Ltd. 2006 (11) SCC 181, Rashtriya Ispat

Nigam Ltd. vs. Dewan Chand Ram Saran, 2012 (5) SCC 306, M/s Sudershan Trading Co. Vs. Govt. of Kerala, AIR 1989 SC 890, P. R. Shah

v. B. H. H. Securities, 2012 (1) SCC 594, State of Rajasthan vs. Nav Bharat Construction Co., 2010 (2) SCC 182, State of Rajasthan vs. Puri

construction co. Ltd. 1994 (6) SCC 485 and J.G. Engineers pvt. Ltd. vs. Union of India and anr. 2011 (5) SCC 758.

8. I have considered the submissions made on both side and have perused the record. In Kwaliti MFT Point Corpn. Vs. Central Ware Housing

Corporation, (2009) 5 SCC 142, it has been held that scope of interference with an award passed by Arbitral Tribunal is limited and the court

does not sit in appeal over the finding and decision of the Arbitrator. It has further been held that in proceeding under section 34, the Court cannot

re-appreciate the evidence or examine the sufficiency or otherwise of the evidence. Similar view has been taken by the Supreme Court in the case

of Sneh Deep St (P) Ltd. vs. Maharashtra Small Scale industries Development Corporation Ltd. (2010) SCC 34. In Associate Builders vs. DDA,

(2015) 3 SCC 49, it has been inter alia held that an arbitral award can be challenged in a proceeding under section 34 of the Act inter alia on the

grounds, namely, (i) when the award is contrary to fundamental policy of Indian law. (ii) where the award has been passed in violation of principles

of natural justice (iii) where the award has been passed in violation of wednesbury, reasonableness (iv) Where the award suffers from patent

illegality or has been passed in contravention of the provisions of the Act and in contravention of the terms and conditions of the contract. It has

further been held that Court while deciding an objection under section 34 of the Act does not sit as a court of appeal and interference with findings

recorded by the Arbitrator are arbitrary, capacious or perverse or where the illegality committed by the arbitrator goes to the root of the matter.

9. In view of pleadings of the parties and the submissions made by the parties, following substantial issues emerge for consideration:

1) Whether the arbitrator while passing the award has travelled beyond the express terms and conditions of the contract?

2) Whether the arbitrator has passed the award in contravention of section 28 (3) of the Act?

3) Whether the findings recorded by the arbitrator are perverse and arbitrary?

4) Whether arbitrator was required to afford an opportunity of hearing to the parties while deciding the application under section 33 of the Act?

10. I shall proceed to deal with the aforesaid issues ad-seriatim.

Issue No. 1

Admittedly the contract between the parties was executed on 09.06.2003 and the same was rescinded on 4.06.2003, whereas SOP 2004 came

into force on 04.01.2004. Clause 7 (b) of the agreement is reproduced below for the facility of reference:

(b) My/our failing, declining neglecting or delaying to comply with any demand or requisition or otherwise not executing the same in accordance

with the terms of contract, the officer operating the contract or his successor in officer shall be at liberty without prejudice to any other remedy the

Government may have on account of any claim for compensation against loss and inconvenience caused by such breach or non-performance of the

contract to purchase or procure or to arrange from Govt. stocks or otherwise, at my/our expense, such supplies/services as may have been

rejected or that I/we may have failed, declined deflected or delayed to supply, or such authorized substitutes there of as are specified in the

schedule hereto and are approved, by the officer operating the contract or his successor in office and any excess so incurred over the contract

price (together with all incidental charges and expenses incurred in purchasing , procuring or arranging for such supplies/services or their authorized

substitutes and in case where issues in replacement are made from Government stocks or supplies, the cost or value or such stocks or supplies

(together will all incidental charges or expenses), shall be recoverable from me/ us on demand.

The action against the petitioner, if any, could be taken under SOP 1991 only as SOP 2004 had come into force after rescission of the contract of

the petitioner.

The arbitrator while passing the impugned has applied SOP 2004, which came into force on 04.01.2004 i.e. after rescission of the contract on

04.06.2003, therefore, SOP 2004 by no stretch of imagination could have been applicable to the contract, which was rescinded on 04.06.2003.

Besides that, it is pertinent to mention that respondents had admitted before the

Arbitrator that SOP 1991 was applicable to the contract in

question and not SOP 2004 which is evident from paragraph 18 of the award which read as under:

18. After the arguments commenced, the claimant filed two applications on 09.03.2009, one asking the respondents to clarify whether SOP of

1991 was applicable to the contract and by another application the claimant wanted a direction to the respondents to place on record SOP of

1991.

However, after Mr. Chowdhary, the learned counsel appearing for the respondents stated at the bar that only SOP of 1991 was applicable to the

contract and produced its copy also both these applications were disposed off vide order dated 29.03.2009 as not pressed."

However, the arbitrator has failed to take into account the aforesaid admission made on behalf of respondents and has proceeded to decide the

dispute between the parties on the assumption that the SOP 2004 is applicable to the contract in question. Thus, it is evident that the arbitrator has

passed the award in contravention of express terms of the contract and while deciding the dispute has travelled beyond the terms and conditions of

the contract, which is not permissible in law. Accordingly, the aforesaid issue is answered.

Issue No. 2

Section 28 (3) of the Act reads as under:

Rules applicable to substance of dispute.....(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and

shall take into account the usage of the trade applicable to the transaction.

Thus, it is evident that the arbitrator has to take into account the terms of the contract. For the reasons already assigned by this Court while

answering issue No. 1, it is held that the arbitrator has passed award in contravention of section 28 (3) of the Act in as much as the arbitrator has

travelled beyond the terms of the contract, while passing the impugned award. The aforesaid issue is accordingly answered in the affirmative.

Issue No. 3

While dealing with the aforesaid issue, it necessary to take note of the following facts which emerge from the record.

(i) The arbitrator failed to take note of the fact that there is vast difference in the method prescribed for making risk purchases in the SOP 1991

and SOP 2004. Under SOP 1991, 55% frozen meat, 25% fowl frozen 10% fish and 10% eggs were to be procured on risk purchase basis,

whereas in the SOP 2004 prescribed only one item namely, frozen meat on risk purchase basis. Despite, admitted position with regard to

applicability of SOP 1991, the Arbitrator while passing the award applied SOP 2004.

(ii) The sine qua non for invoking risk and purchase clause was that a demand had to be made on the petitioner and in case the petitioner had failed

to meet the demand, the respondents could have proceeded under the risk and expense purchase clause. In the instant case the petitioner had

specifically pleaded in reply that the purchases of frozen meat have been made at the risk and cost of the petitioner without any demand being

made from the petitioner. From appendix A-X annexed with the counter claim filed by the respondents, it is apparent, that at least on 97

occasions, no demand was made on the petitioner and purchases were made at its risk and costs. However, an excess amount of 52,13,590.30

was debited to the amount of the petitioner by the arbitrator. The arbitrator while passing the award, misread the demand notes, inasmuch as,

demand for supply was placed by the respondents on some other agency namely, M/s Sahil Poultry whereas risk expense purchase clause in

respect aforesaid supply was invoked against the petitioner.

(iii) The respondents had made certain purchases at the rate lower than the rates quoted by the petitioner. Even in reply to petition, at page 17, the

respondents have not denied the fact that certain purchases were made at lower prices. However, credit of an amount of Rs. 7,80,641.22 was not

given to the petitioner and the aforesaid aspect was totally ignored by the Arbitrator.

(iv) In paragraph 4 of the written submissions filed by the respondents before the arbitrator, the respondents have admitted that an amount of Rs.

60,307/- was due to the petitioner on account of loss of weight in the chilling room. However, the arbitrator did not take note of the aforesaid fact.

(v) The arbitrator ought to have appreciated that the respondents had claimed Rs. 86,750/- by way of costs in para 14 of the counter claim.

However, while passing award the arbitrator as awarded a sum of Rs. 5,00,000/- in favour of the respondents. Thus in view of the section 34(2)

(iv) of the Act, the award of the arbitrator in so far as it pertains to grant of cost is liable to be set aside as it contains decision on matters beyond

the scope of submission to arbitration. In other words, the arbitrator has acted in excess of powers. It has been observed that if the arbitral tribunal

exceeds its power while passing an award, the same may furnish a good ground for setting aside the award (See Russel on Arbitration Twenty

third Edition page 484)

(vi) As per the stock register, filed by the respondents before the arbitrator in support of their counter claim, total supply was shown to be

6,20,254 kilograms. However, the arbitrator failed to appreciate that out of the aforesaid quantity 1,31,521 kilograms were supplied by the

petitioner, therefore, aforesaid quantity should have been deducted from the debit made to the account of the petitioner.

(vii) Vide communication dated 10.6.2005, the petitioner was directed not to make any supplies beyond 10.6.2005, as the demands stood

satisfied. However, the respondents debited an amount of Rs. 96,417.50 towards risk and expenses purchases for the balance month June, 2005

to the account of the petitioner, which could not have been done.

Thus, from the above narration of the facts, it is axiomatic that the findings recorded by the arbitrator are contrary to the record as well as

admission made by the respondents, therefore, the same cannot but be termed as perverse and arbitrary. Accordingly, the aforesaid issue is also

answered in the affirmative.

Issue No. 4.

The petitioner had made a request to the arbitrator in application under section 33 of the Act for an oral hearing. The aforesaid prayer was

reiterated in the rejoinder filed before the arbitrator. However, the arbitrator without affording an opportunity of hearing to the petitioner, made an

additional award dated 10.8.2010. According to the petitioner, the award passed by the arbitrator dated 07.05.2010 contained certain factual

errors, therefore, the petitioner had sought the oral hearing. The principles of natural justice are regarded as an important procedural safeguard

against undue exercise of power by an authority. It is well settled legal

proposition that if the principles of natural justice are not excluded either expressly or by necessary implication in a statutory provision, the same have to be read in the provision (See *State of Uttar Pradesh vs. Vijay Kumar Tripathi*, AIR 1995 SC 1130 and *Mangilal vs. State of MP*, (2004) 2 SCC 447).

In the instant case it noteworthy that section 33 of the Act does not exclude principles of natural justice, therefore, the arbitrator was under a legal obligation to hear the parties on the merit of the application before deciding the same. Thus, the Arbitrator, before deciding the application under section 33 of the Act ought to have given opportunity of hearing to the petitioner. Accordingly, the aforesaid issue is also answered in the affirmative.

11. In view of the preceding analysis, the impugned awards dated 07.05.2010 and dated 10.8.2010 are quashed and set aside. In view of the decision of the Supreme Court in the case of Central Government Standing Counsel Mr. Justice Y. P. Nagrotra, a retired judge of this Court is appointed as an Arbitrator to adjudicate the dispute between the parties. The matter is remitted to the arbitrator for decision afresh in accordance with law. The Arbitrator shall be entitled to settle his fees and expenses, which shall be borne in equal proportion by the parties. The arbitrator is requested to make his award expeditiously preferably within a period of six months from the date of entering upon the reference.

12. Accordingly, the petition is disposed of.