

(2008) 04 DEL CK 0211
In the Delhi High Court
Case No : CS (OS) 808A of 2001

National Research Development Corpn.	APPELLANT
Vs	
Industrial Carbon	RESPONDENT

Date of Decision : 10-04-2008

Acts Referred:

Arbitration Act, 1940 — Section 30, 33
Contract Act, 1872 — Section 73, 74
Evidence Act, 1872 — Section 114

Citation : (2008) 04 DEL CK 0211

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : P.N. Bhardwaj and Ashutosh Bhardwaj, for the Appellant; V. Seshagiri, for Defendant No. 14, for the Respondent

Judgement

S. Ravindra Bhat, J.—The plaintiff, in these proceedings, u/s 30/33 of the Arbitration Act, has challenged the award of the sole Arbitrator dated 19.3.2001.

2. The brief facts necessary for deciding this case are that the petitioner (hereafter referred to as "the Corporation") entered into an agreement with the respondent on 30.3.1989 (hereafter called "the contract") for licensing its knowhow for the manufacture of "Silver Impregnated Graphite". In terms of the contract, the licensee, i.e. the respondent was permitted to manufacture the product for ten years. The parties agreed that the respondent would pay a consolidated premium of Rs. 55,000/- at the time of the execution of the license deed and royalty @ 5% ex-factory sale price of the Article. These were payable on the first day of April and on the first day of October. [Clause 5 (ii)].

3. The representations and undertakings of the respondent/licensee included its duty under Clause 6(B)(ii) to promptly disclose and provide to the Corporation, (in documented form to the maximum extent possible), all improvements, developments and modifications in regard to the knowhow and/or process etc. Such improvements, developments etc. were constituted an integral part of the

knowhow and such were to belong to the Corporation. The respondent was also obliged to do the following things, as provided by Clause 6(B) (iii), (iv) and (v).

...(iii) The Licensee shall always keep and maintain at its usual place of business, separate books of accounts relating to the royalties in such form and containing such information and particulars as may be required by the Licensor for all or any of the purposes of this license, including Clause 5 hereof.

(iv) The Licensee shall at all reasonable times, produce the books of accounts so maintained and all other relevant books of accounts, vouchers, documents, receipts and connected papers, if any, to the Licensor, its attorneys or duly authorised agent(s) and will permit the Licensor, its attorneys or duly authorised agent(s) to inspect the same, take copies of extracts therefrom and the Licensor shall give full information as may be required by the Licensor for determination of the amount of royalties payable hereunder as aforesaid.

(v) The Licensee shall, before first day of April and first day of October every year deliver to the Licensor, its attorneys or duly authorised agents, a true and complete statement of the Article manufactured, stored and marketed or used for its own purposes by the Licensee and ex-factory sale price of the Article during the period for which the royalties are payable to the Licensor, as well as a statement of calculations of the estimated royalties. All such statements shall be duly certified by the Auditor of the Licensee and their validity shall be proven and substantiated if so required by the Licensor.

4. The contract further contained an arbitration Clause in terms of which disputes and differences were to be referred to arbitration. It is not in dispute that the Corporation terminated the contract on 7.4.1994 alleging that the respondent had not complied with the terms regarding disclosure of accounts of royalty. In these circumstances, the Corporation invoked the arbitration clause; a sole Arbitrator was appointed and he entered upon reference on 18.7.1994.

5. The Corporation which was the claimant in the proceedings sought for the following reliefs:

(a) direction to the respondent to furnish the true and correct statement of accounts and the statement of its manufacturing activity from the date of start of the production under the license agreement till the respondents continued to utilize and exploit the Knowhow;

(b) An award for a minimum amount of Rs. 6 lakhs on account of royalty allegedly due to the respondent for the period when the latter started commercial production of the licensed product till termination of agreement and further award of damages quantified at Rs. 55,000/- per month for the illegal use of manufactured products "SIG Contacts".

(c) Interest @ 18% per annum of the amount of royalty so determined in the arbitration.

6. The respondent in its defense, inter alia, averred that the technical knowhow provided to it was defective and unviable. It listed the various deficiencies on paragraph 5 of its reply. It also denied any liability of its terms/contract/agreement dated 30.3.1989. On the contrary, they sought for refund of premium amount, i.e. Rs. 55,000/-.

7. The Arbitrator framed as many as thirteen issues on the basis of the pleadings and materials made available at that stage on 2.12.2000. He returned findings and rejected the claims of the Corporation for royalty and damages. He held that the respondent was not entitled to claim the return of Rs. 55,000/- as premium, in the impugned award dated 19.3.2001.

8. In the present objections to the award by the Corporation, the findings concerning issues No. 8, 9 and 10, i.e. entitlement of the claimant to royalty, damages and interest have been questioned.

9. It is averred and contended on behalf of the claimant that the Arbitrator committed a misconduct in the eyes of law, in not considering the materials available on the record and returning findings against the respondent. Learned Counsel for the Corporation relied heavily upon the contract, particularly, Clause 5(ii) and 6(B) to submit that the respondent having entered into the contract and even exploited the knowhow, was under a duty, as long as the arrangements subsisted between the parties, to comply with its terms. These included the duty to furnish accounts on periodic basis as stipulated in the Contract and also to pay the royalty agreed by the parties. Learned Counsel relied upon Exhibit C-13 dated 16.12.1991 to submit that the respondent's allegation about economic unviability or unfeasibility were without any basis. The said document is Exhibit C-9 dated 3.4.1989. The certificate was executed on behalf of the respondent and it states that the respondent was fully satisfied about the information supplied concerning the knowhow which was the subject matter of the contract. The petitioners also rely upon other documents such as Exhibit C-13, a letter dated 6.2.1991 written by the petitioner to the National Physical Laboratory with a copy to the respondent saying that its help and guidance for the demonstration of the production process was requested. Learned Counsel further relied Exhibit C-17, whereby the respondent informed that the product manufactured by it were tested and approved by the Ministry of Railways, Central Government. The respondent also enclosed copies of the letters written by the Railways as Exhibit C-18 and C-19. Learned Counsel next relied upon Exhibit C-21 to Exhibit C-29 and submitted that all these were reminders and letters written to the respondents demanding from them the payment of royalty and furnishing of accounts.

10. It was contended that the Arbitrator completely ignored these documents and did not advert to the very first claim made by the Corporation, i.e. a direction to disclose the accounts, as an aid to calculating the damages and amounts payable to the former. He relied upon Exhibit C-33A, which was a letter written by Research Designs and Standards Organisation (RDSO) of Railways,

stating that according to their records, the respondent's product had been inspected and supplied. Similar letters for a previous period were furnished and produced being Exhibit C/33C, C/33D and C/33E. The petitioners also rely upon a report made by one Mr. Chander Mohan, Deputy Manager, about his visit to RDSO, Lucknow, and the details of his observations.

11. Learned Counsel submitted that the award discloses manifest error in law since the Arbitrator ignored relevant materials on the one hand, and on the other, refused to award any amount against the respondent. The Arbitrator had reasoned that the onus for proving quantum of damages claimed was on the Corporation which had not produced any independent evidence apart from the record and depositions of its officers. The Arbitrator had commented that if the respondents were to be held liable, some thing more than a mere report of its officials was necessary, either in the form of evidence relating to other contracts for the same product and the profits arising from it or the primary evidence of the officials from the Railways itself. The Arbitrator noted that the entire record of the Railways were seen by the claimant's witness. On a consideration of all these circumstances, the Arbitrator concluded that the claim for royalty, damages was not proved and he did not award any amount in that regard.

12. Learned Counsel relied upon the findings of the Arbitrator on Issue No. 12. The Arbitrator observed as follows:

Moreover the respondent has also committed breach of license agreement Ex.A-1/1 inasmuch as he has neither submitted six monthly returns nor sent any account to the petitioner nor paid any royalty, Therefore, the respondent is not entitled to return of Rs. 55,000/- paid as premium at the time of execution of license agreement dated 30.3.1989. This issue is, Therefore, decided against the respondent.

13. Learned Counsel for the respondent argued that the award cannot be set aside as disclosing illegality or palpable irregularity. It was contended that the Arbitrator acted within his rights in accepting the licensees' justification to the claim that the knowhow and the technology provided to it were unviable and obsolete. He relied upon Exhibit C-32, a letter dated 21.9.1994 whereby the respondent alleged that the technology was of no use and nevertheless offered as a without prejudice measure, to pay 2% royalty for the concerned period when commercial production had been resorted to, i.e. for 1992-1994 to end all disputes. Learned Counsel relied upon Exhibit C-11 and C-13 to contend that though the contract was executed on 30.3.1989, the plant was not even commissioned for more than three years. Exhibit C-11, a letter dated 12.2.1990, by the respondent to the Corporation stated that production had not yet started and that it was in the process of establishing manufacturing facility required for it. Exhibit C-13 was a letter dated 6.2.1991 by the Corporation, disclosing that the respondent had requested help and guidance for demonstration of the production process so that the final production could be commenced immediately, that was 6.2.1991. In these circumstances, it was contended that

the production itself had commenced much later in 1992 and the respondent experienced considerable problems on account of obsolete technology and there was no question of paying royalty or damages.

14. Learned Counsel for the respondent justified the findings in relation to issue No. 8 to 10 and submitted that since the Corporation had made a claim for royalty and damages, the burden of proving its loss was squarely on it. Learned Counsel contended that the Arbitrator's approach was sound inasmuch as he proceeded on the assumption that even if the respondent was ex-parte and un-represented, the onus of proving its case as claimant lays squarely upon Corporation. The latter, however, did not produce adequate material to justify any findings of breach of contract or any other material in support of its claims for damages.

15. Learned Counsel submitted that mere reliance upon a report Exhibit C-33, was insufficient and the Arbitrator correctly surmised that such material being hearsay evidence was insufficient to warrant any finding or award for damages for specific amounts. Counsel furthermore contended that the estimated loss of Rs. 50,000/- per month and Rs. 6 lakhs as damages was fanciful and there was no evidence in support of such claim. It was urged that the Arbitrator had, in the award, indicated the possible method by which the claimant could have proved its case either by adducing material profits in relation to other contracts involving the same technology or by producing the purchasers of the products allegedly sold by the respondent. It could do neither and, Therefore, the Arbitrator correctly surmised that no award for any sums of money could be made.

16. A reading of the contract, particularly Clause 5(2), would show an obligation was cast on the respondent to pay royalty. The said condition is as follows:

5. Payment Obligation

In consideration of the license hereby granted the Licensee shall pay to the Licensor:

i) Premium of a consolidated sum of Rs. 55,000/- (Rupees Fifty Five Thousand only) on or before the execution of these presents.

ii) Royalty @ 5%, on the ex-factory sale price from the time being of the ARTICLE, on the first day of April and on the first day of October every year regularly and punctually and in any event not later than the first day of May and first day of November immediately following, in every such year. Provided that the liability of the Licensee to pay royalty under and in terms of this Sub-clause (ii) shall accrue upon the commencement of the manufacture of the Article for commercial purposes at the PLANT including for any usage of the Article by the Licensee and shall continue for a minimum period of 10 years from such commencement.

17. The materials on record, apart from the said agreement in support of the claimant's case were Exhibit C-9, a Certificate about the supply of all information

and the expression of satisfaction by the respondent. The claimant also produced other documents such as Exhibit C-10, Exhibit C-21 to 29 etc. to show that the respondent did not pay any royalty for any period and did not furnish any accounts. In addition, the claimant had furnished other material such as Ex. C-17, whereby the respondent had acknowledged that bulk production, pursuant to the contract would commence. This was a letter dated 14.11.1991. Materials such as Exhibit C-18 to 20 and Exhibit C-33A, 33B, 33C, 33D and 33E, to an extent establish that the respondent was in fact using the technology. The award, however, does not advert to these materials. On issue No. 11 itself, the Arbitrator concluded that there was no evidence that the goods produced by the respondent were flawed or defective because the technological knowhow was obsolete and they were so rejected by the buyers. He also held that the respondent did not produce any witness. That issue was Therefore, decided against the respondent. Likewise in relation to issue No. 12, there was a categorical finding that monthly returns had not been furnished to Corporation nor was any account sent to by the respondent. On the face of these findings, the Arbitrator could not, in the opinion of the Court, have rejected the entire claim. In fact, the very first claim was for a direction to the respondents to disclose their accounts. The claims (a) and (b) reads as follows:

(a) That the respondent - firm be directed to furnish the true and correct statement of accounts and the statement of its manufacturing activity from the time of start of its production under the licensed agreement till the respondents continuing, utilizing and exploiting the Knowhow;

(b) An award for a minimum amount of Rs. 6 lakhs on account of royalty allegedly due to the respondent for the period when latter started commercial production of the licensed product till termination of agreement and further award of damages quantified at Rs. 55,000/- per month for the illegal use of manufactured products "SIG Contacts".

18. As far as the question of damages and/or other amounts allegedly payable by the respondents were concerned, the Arbitrator proceeded on the footing that the onus was on the petitioner to adduce evidence in addition to the letters produced by it.

19. Counsel for the petitioner had relied upon Section 114(g) of the Evidence Act and contended that the Corporation had produced the best evidence available to it and that Arbitrator committed an error in law drawing deficiencies, inference, in the circumstances of the case. He had, in that background, relied upon the decision reported as Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, and I. Armugam Vs. Channagiri N. Govindaraj Shetty, . In those decisions, the Court had held that if a party in possession of best evidence which would throw light on the issue in controversy withholds it, the Court ought to draw adverse inference against him notwithstanding that onus of proof does not lie on him.

20. In this case, the Arbitrator framed issues and after considering the materials

undeniably returned the following findings:

1. The respondent did not pay any royalty.
2. The respondent did not furnish any accounts to the Corporation.
3. The respondent was unable to prove that the technology and knowhow, furnished to it pursuant to the contract was either unviable or defective.

21. In case a party alleges breach of contract by the other claims, specific amounts, as compensation of damages, the general principles applicable would be Section 73 of the Contract Act or if the parties stipulate the payment of an agreed pre-determined amount, in accordance with Section 74. Such amounts should be a genuine pre-estimates of the loss. In the present case, there is no stipulation which can be characterised as a genuine pre-estimate of damages or as liquidated damages. In the absence of such an agreed stipulation, the burden of proving the extent of profits or amounts that could be reasonably derived by the respondent was upon the plaintiff. It is one thing to contend that the best evidence in the form of books of accounts were available with the respondent for securing an order that such books of accounts should be disclosed. However, it is entirely another to say that the withholding of such books of accounts itself should lead to an adverse evidence that damages automatically had to be avoided. The Court is of the opinion that such an automatic inference is not permissible and unsupported by any principle of law. The Corporation being a claimant was no doubt under duty to prove what could have been the reasonable profits as well as the period for which such profits would have been derived by the respondents in support of its claims for damages and reasonable royalty. In this regard, the Arbitrator has, in the opinion of the Court, correctly analyzed the evidence on the record. He considered the report Exhibit C-33 as well as the deposition and other letters and concluded that they are insufficient for a finding of the damages to the tune of Rs. 55,000/- per month or for any other amount such as Rs. 6 lakhs.

22. It is a trite law that a party or plaintiff who approaches the Court is under a duty to prove damages and the extent suffered. In the absence of positive evidence, the claimant could not, on the issues of damages, rely on the withholding of books of accounts. Therefore, the finding of damages and royalty cannot be interfered with. In this context, it would be well remind one self that Court's jurisdiction u/s 30/33 is supervisory and not appellate. It can interfere with the award, if satisfied upon the materials on record that the inferences drawn on the findings rendered as such can be characterised as manifest errors of law or those which could have been rendered in the circumstances of the case. There is no material available on the record. All the relevant discussions in this regard concerning damages, in the opinion of the Court, cannot be interfered with. It is certainly not a manifest error of law.

23. The Court is of the opinion that even while the finding on damages or the adequacy of proof in that regard cannot be interfered with, the award has

rendered inconsistent findings and also not addressed the issue of claim No. 1. After having rendered clear findings concerning the respondent's breach of the contract failure to pay royalty, and failure to disclose accounts, the Arbitrator could not have completely overlooked claim No. 1. In the circumstances, even while sustaining the other findings, this Court is of the opinion that the award requires to be interfered with on that limited aspect.

24. In the light of the above discussions, the award should be partly set aside. The Arbitrator has to render fresh findings on claim (a) and consequent directions in claim (b) concerning royalty, and interest.

25. In view of the above discussion, the claim in the suit has partly succeed. Accordingly the award is partly set aside. The Arbitrator is hereby directed to consider the materials on record and render specific findings on claim No. 1 and based on the same after the hearing of the learned Counsel for the parties, render specific findings on the other claims. Subject to these directions, findings on Issue No. 8 and 9 are left undisturbed. The Registry shall ensure that the arbitration records are sent back.

26. The parties shall be present before the Arbitrator on 28th April, 2008 for further proceedings/directions.

The suit is partly decreed in the above terms.

Order dusty.